



# EMPLOYMENT TRIBUNALS

## LONDON CENTRAL

**Claimant:** Mr MILTON MUSAU MUNYIRI

**Respondent:** LONDON NORTH EASTERN RAILWAY LIMITED

**Heard :** By video [CVP]                      **On:** 21 & 22 November 2023

**Before:** Employment Judge Sutton KC

### Appearances

For the claimant: In person

For the respondent: Mr H. Sheehan, counsel

## JUDGMENT

The complaint of unfair dismissal fails and the claim is hereby dismissed.

# REASONS

## Introduction

1. By a claim presented to the Tribunal on 5 June 2023, the Claimant complains of unfair dismissal. The Claimant asserted that his dismissal, on grounds of ill health capability, took place against a background of medical advice that he was fit to undertake a phased return to work. It was asserted that the Respondent deliberately 'swapped' to another health adviser, with the object of obtaining a recommendation that the Claimant was incapable of working in any capacity by a misdiagnosis of his medical condition.
2. The Claimant further asserted that, during periods of sickness absence, he had no welfare checks and that he was required to remind management to book appointments for him in an effort to get back to work. In his claim form, the Claimant denied having a disability.
3. In its Grounds of Resistance, the Respondent admitted that it dismissed the Claimant with effect from 11 April 2023. It contended that the Claimant's dismissal was because of long term sickness absence and that it acted reasonably in reaching the decision to dismiss. If, contrary to its primary case, it was found to have acted in a manner that was procedurally unfair, it contended that compensation should be reduced on the basis that a fair process would still have resulted in dismissal.
4. The parties agreed that the hearing should be conducted by video link. At certain points, the Claimant's video connection was interrupted but not the audio link. The Claimant and the Respondent were content to proceed during these periods of interruption and the Tribunal was satisfied that the Claimant was able to engage fully in the proceedings at all stages.

**Witnesses**

5. The Tribunal heard evidence from the following, each of whom produced a witness statement on which they were questioned by the opposing party and the Tribunal: the Claimant; Suhuyb Patel, Competence Development Manager and former line manager, Adam Davies, Competence Development Manager, line manager and dismissing manager; and Simon Moeller, Regional Station Manager and appeal manager.

**Documents**

6. The Tribunal was supplied with a main and supplemental bundle of documents.

**Case number 2203901/2022**

7. The Claimant pursued, by way of a separate Tribunal claim, complaints of unlawful race discrimination; harassment related to race and victimisation under case number 2203901/2022. These complaints were heard by a Tribunal in March this year and, in each case, were dismissed. That claim was substantially concerned with an altercation which was alleged to have occurred between the Claimant and his manager in December 2020.
8. To the extent that the findings in those proceedings are relevant to the current Claim, it is noted that the Tribunal found that the altercation flowed from an occasion when the Claimant return late from a break and was reluctant to complete a form detailing the reason for his absence. The Tribunal specifically rejected the Claimant's assertion that he had been called a 'terrorist' by his manager. Instead, the Claimant had said that he had been made to feel like a terrorist. But it was found that the Claimant's manager, Mr Weir, had overacted and responded to the situation in a disproportionate manner in the circumstances.

**Findings of Fact**

9. The Respondent is a railway company operating on the East Coast Main Line. It employs around 3,500 employees.
10. The Claimant commenced employment with the Respondent in the role of Station Support Assistant. At the time of his dismissal, the Claimant was based at King's Cross Station. On 17 August 2021, the Claimant commenced a period of sickness absence. Aside from the period between 9 and 31 March 2022, when he was notionally back at work but in fact using up untaken annual leave, the Claimant remained absent from duty until dismissed on 11 April 2023.
11. The Claimant was issued with an employment contract which, at clause 17, set out the sick pay entitlements of staff absent due to sickness or injury, linked to length of service. For an employee with five years' service or more, the 52 week overall sick pay entitlement reduces by half after a period of 26 weeks absence.
12. The Claimant's contract of employment incorporated a policy headed Attendance Improvement Procedure. The policy imposed an obligation on the Respondent to maintain contact and regular communication with employees during extended periods of sickness absence and to engage with the Health and Wellbeing Team, the in house occupational health service, to discuss an employee's medical problems and appropriate follow up action. The Health and Wellbeing Team's functions included providing information on an employee's likely future attendance pattern, prognosis, work limitations and alternative employment options.
13. Long term sickness absence is addressed at section 10 of the Attendance Improvement Procedure. This applies to absences in excess of 4 consecutive weeks, where the employee may not return in the foreseeable future. The policy requires the Respondent to facilitate welfare visits during the period of sickness absence. The frequency of meetings is a matter for mutual agreement. Such meetings should discuss means of achieving an early resumption of work.

14. Between 16 December 2020 and 29 January 2021, the Claimant was absent from work due to work related stress/anxiety: a period of absence of 45 days. The Claimant was again absent for a period of 6 days between 26 and 31 May 2021 due to suspected coronavirus and for a further period of 2 days between 14 and 16 June 2021, due to hay fever and related symptoms.
15. On 17 August 2021, the Claimant commenced a further period of absence, due to work related stress. Attempts were made by his manager, Kieran Weir, to make contact with the Claimant by telephone on that day. His girlfriend answered and said that he would return the call. He did not do so. Attempts were made the following day to make contact with the Claimant using five different numbers that his manager held for him. Two didn't connect, one continued to ring and two voicemails were left.
16. The Claimant did make contact the following day and explained to his manager that he felt unable to attend work due to an investigation that was being undertaken into the workplace altercation referred to above. Further attempts were made to make contact with the Claimant by telephone on 1 and 2 September 2021 without success.
17. An initial referral was made under the Attendance Management procedure. This assessment was performed by Ms Debbie Jones, Occupational Health Advisor, on 27 September 2021. Ms Jones noted that the Claimant had been offered counselling sessions with a provider called Vita Health to assist him in developing some effective coping strategies. It was anticipated that the Claimant would be well enough to attend an investigatory meeting after 2-3 sessions of counselling.
18. The Claimant's period of sickness absence continued, and a further occupational health assessment was conducted by Ms Jones on 26 October 2021. Ms Jones reported that the Claimant was making steady progress but not ready to resume work at that point. The Claimant had stated that he continued to feel stressed, with symptoms of disturbed sleep and impact on mood. It was noted that the Claimant had attended counselling sessions on two occasions. Ms Jones advised

that it was difficult to predict whether the Claimant would be in a position to render effective service in the future.

19. A further occupational health assessment was undertaken by Ms Jones on 6 December 2021. It was reported that the Claimant remained temporarily unfit for work. It was anticipated that he would remain unfit until the end of the year with the aim of achieving a resumption of work in early January 2022. Ms Jones advised that the Claimant was making 'steady progress' in response to the counselling he had received and had achieved 'better insight into controlling emotions'. Ms Jones was proposing to contact Vita Health with a view of obtaining further counselling sessions to support the Claimant once he had resumed work. It was suggested that the Claimant's manager, Mr Patel, should meet with the Claimant for coffee outside the station prior to engaging in a more formal workplace meeting.
20. Ms Jones proposed a phased return to work commencing at 40% of normal hours and rising to full duties after a four week period. A further occupational health review was recommended for early in January 2022.
21. In her report dated 4 January 2022, Ms Jones noted that the Claimant was due to meet with Mr Patel away from the workplace with a view to commencing his phased return to work once his current sick note expired on 12 January 2022. The Claimant was described as feeling 'generally very positive' with good coping strategies in place. Ms Jones advised that the Claimant was now able to resume work when his sick note expired. It was noted that counselling support continued and that the Claimant was in the process of arranging his next session.
22. In line with Ms Jones' recommendation, by email of 14 February 2022, Mr Patel sought to arrange an informal meeting with the Claimant, prior to the envisaged recommencement of work on a phased basis. As explained in his email, the delay in getting this arranged was due to Mr Patel having been on leave during the preceding weeks.

23. No response was received to this email, and Mr Patel wrote to the Claimant the following day urging him to make contact as soon as possible and no later than 18 February 2022. No communication having been received from the Claimant, a further letter was written by Mr Patel on 22 February 2022 stating that, if contact were not made by 25 February 2022, the Respondent would have to consider withholding the Claimant's sick pay. During this period, Mr Patel made repeated efforts to establish contact with the Claimant by telephone.
24. A telephone occupational health review took place on 1 March 2022, following a management referral by Mr Patel. This was again conducted by Ms Jones who reported that the Claimant was describing increased anxiety and insomnia waiting for his return to work meeting. It was recommended that this meeting should take place as soon as possible, with interim contact to offer the Claimant welfare support.
25. Ms Jones noted that Mr Patel had encountered difficulties making contact with the Claimant and explained that she had advised the Claimant to telephone his manager that day. She recorded that the Claimant said he was disadvantaged in not having a company issued telephone, since his own phone broke, and that for this reason he had been unable to check emails or make work calls. It was stated that the Claimant had completed his course of therapy with Vita Health and was fit to attend an initial meeting with management
26. In accordance with Ms Jones' advice, the Claimant telephoned Mr Patel on 1 March 2022. Mr Patel explained in the call that he had been trying to make contact for weeks to arrange an informal meeting, away from the workplace. This was arranged to take place on 8 March 2022.
27. A return-to-work meeting took place on 8 March 2022. At that point, the Claimant's period of sickness absence, having commenced on 17 August 2021, was 203 days. The Claimant explained that he had found the therapy sessions, and time in the gym had assisted his recovery and provided strategies to avoid future occurrences. The Claimant confirmed that he was not on medication and that no future treatment was envisaged at that point in time. He did comment that

what he termed 'outstanding issues', which referred to the earlier workplace altercation, remained to be addressed and that these were the cause of the stress.

28. On 16 March 2022, following a meeting between himself and the Claimant the previous day, Mr Gary Smithson, station manager at Kings Cross, wrote to the Claimant in connection with a grievance he had earlier raised, which Mr Smithson had agreed to look into. This had been followed by an investigation and had resulted in a proposal for mediation to be undertaken between the Claimant and his former manager Mr Weir.
29. Mr Smithson noted in his letter that the Claimant had referred to discrimination in his grievance letter and proposed that this should be the subject of its own investigation, conducted by Ms Mearns, station manager at Edinburgh.
30. On 5 April 2022, a further occupational health assessment was conducted by Ms Jones over the telephone. It was noted that Ms Mearns had made contact with him but that the Claimant did not feel well enough to meet with her. Ms Jones advised that the Claimant was temporarily unfit for work in any capacity, having been signed off by his GP until 27 April 2022 with work related stress.
31. Mr Patel wrote to the Claimant by email on 7 April 2022, noting that the return to work plan which they had agreed at their informal meeting on 8 March 2022 would need to be reviewed and a further welfare meeting would be arranged to discuss how the Claimant could be supported in achieving a return to work.
32. On 28 April 2022, Ms Jones conducted a further telephone occupational health assessment. She confirmed that the Claimant remained temporarily unfit and that he had experienced some self-harm thoughts of which his GP was aware. It was noted that the Claimant had been urgently referred to the primary mental health care team and that an assessment had been booked for 29 April 2022.
33. On 26 May 2022, the Claimant attended an occupational health review in person with Dr Maria Athanasiou. In her report, Dr Athanasiou noted that the



Claimant's symptoms had not been effectively addressed through counselling and that he was still under the care of the NHS counselling service and being seen by his doctor.

34. Dr Athanasiou advised that, from an occupational health viewpoint, if the Claimant's work situation was not resolved, then his mental health was not expected to improve. She considered that the Claimant was fit to attend workplace meetings, although ideally with someone to accompany him. As matters stood, the Claimant was assessed as temporarily unfit to undertake work in any capacity.
35. A further occupational health meeting was conducted by Dr Athanasiou with the Claimant in person on 21 July 2022. The Claimant reported that his line management had changed from Mr Patel to Mr Davies, and he found this to be positive and helpful. He said that he had been in touch with HR to discuss a potential move to another station as a return to Kings Cross would increase the risk of flashbacks. Dr Athanasiou considered that this proposal might provide a route to achieving a return to work. Pending such discussions, the Claimant continued to be assessed as temporarily unfit to undertake work in any capacity.
36. The Claimant attended an assessment at the Nightingale Medical Centre, Peterborough, on 5 August 2022, conducted by Mr Jussab, a psychological wellbeing practitioner. Mr Jussab noted that the Claimant had expressed fleeting suicidal thoughts, but with no plan to act on such thoughts. Although not expressed as a formal diagnosis, Mr Jussab recorded 'reaction to severe stress and adjustment disorders – F43'. The Claimant linked his thoughts to the altercation which had taken place in late 2020.
37. A risk management plan was put in place by Mr Jussab, part of which entailed the prompt seeking of support and help should the Claimant feel the need for it, including GP and out of hours support services. Having discussed various treatment options, the Claimant opted for counselling at that point.

38. On 21 September 2022, Dr Athanasiou saw the Claimant in clinic for a further occupational health assessment. She advised that the Claimant remained temporarily unfit to resume his duties in any capacity. The Claimant explained that he was waiting for an appointment with an NHS counsellor. Dr Athanasiou made a referral to the Respondent's Vita Health counselling service.
39. The Claimant's grievance concerning the altercation had been investigated by with a Stage 1 meeting taking place with the Claimant on 27 May 2022; Stage 2 of the process was conducted by Mr McKinnie, with a meeting taking place with the Claimant on 9 August 2022. The third and final stage of the process was conducted by Mr Alan Riley, Head of Stations at the Respondent. Mr Riley produced a Stage 3 report and relayed his conclusions to the Claimant at two meetings: the first on 27 September 2022 and the second on 27 October 2022.
40. Following the second of these meetings, the Claimant wrote to Mr Riley by email dated 31 October 2022. The Claimant noted in his email to Mr Riley that a mediation between himself and Mr Weir had taken place on 20 October 2022, facilitated by Mr Michael Ross, Senior Customer Relations Manager. The Claimant stated that, although he wouldn't go into details regarding the particulars discussed in the mediation, 'Michael Ross explored resolutions that I would deem fair given the circumstances'.
41. On 3 November 2022, Dr Athanasiou again saw the Claimant in clinic for a review of his progress. She advised that the Claimant remained temporarily unfit for a return to work but that he would be fit to return to work, from the beginning of December, working in a different location and under different management and in a different team. This should be viewed as a temporary solution pending what she referred to as 'the ongoing proceedings.' Dr Athanasiou acknowledged that this might not be operationally feasible.
42. By email of 7 December 2022, Mr Davies wrote to the Claimant to arrange a welfare discussion and also to inquire about the Claimant's engagement with Vita Health, the counselling service, who had written to explain that they had received no response to a recent letter they had written to Claimant. On 8 December 2022,

the Claimant emailed his manager, Adam Davies, rejecting the proposal of a welfare meeting and proposing that it be refixed for January 2023.

43. On 29 December 2022, Dr Athanasiou met with the Claimant in clinic for a further occupational health review. She advised that the Claimant remained temporarily unfit for work in any capacity. She noted that, 'due to a setback in his overall health', the Claimant was temporarily unfit to attend an investigation or disciplinary meeting. She recorded that she had strongly advised the Claimant to seek advice from his GP regarding 'medical treatments that would help him, including medication'. She further observed 'for optimal support, I advise that both sides should be open and honest'.
44. The reference to a 'setback' in Dr Athanasiou's report was made clear to Mr Davies, when he met with the Claimant later the same day. The Claimant explained that he had developed a problem with alcohol and cocaine. Mr Davies undertook to see what support the Respondent could offer for this. The Claimant was also referred to the support available to him via the Vita Health service as well as the Respondent's employee assistance programme.
45. On 11 January 2023, the Claimant attended a welfare meeting with Mr Davies. Ms Demetriou attended as note taker. Mr Davies addressed the recommendation that the Claimant might be relocated to work at another station and sought his views on undertaking a phased return at Peterborough station as a temporary arrangement. The Claimant said that he would be willing to 'give it a go'.
46. The Claimant made further reference to his drugs and alcohol problem and explained that his GP had recommended continued engagement with his therapist. The Claimant said that he also intended to contact the Respondent's Employee Assistance Programme, in line with Mr Davies' suggestion. He said that drugs and alcohol were used to deflect his suicidal thoughts. He said that he did get them now and again and that the problem was still there.
47. Mr Davies explained that the Respondent worked with a number of charities including CALM and Mind. He told the Claimant that these avenues were

available if counselling support was not enough. He encouraged the Claimant to seek support.

48. Looking to future steps, Mr Davies said that he would seek further information from Dr Athanasiou. Depending on her advice, thought could be given to the Claimant's work location for a phased return. It did not need to be at Peterborough station. The Claimant was asked what further support he required. The Claimant said he welcomed routine support calls and Mr Davies agreed to organise a recurring mid-week telephone discussion.
49. By letter of 1 February 2023, Mr Davies wrote to the Claimant inviting him to attend a meeting on 16 February. The purpose of the meeting was to discuss the Claimant's recent medical history and future prognosis. Redeployment to alternative roles would be considered. One possible outcome would be termination of employment. The Claimant was advised of his opportunity to attend with a Trade Union representative or colleague.
50. In advance of the proposed meeting, an occupational health assessment took place on 15 February 2023, conducted by Dr Athanasiou in her clinic. Her advice, following a review of the Claimant's progress, was that he remained temporarily unfit to return to work in any capacity, whether at his current location or any other.
51. She obtained the Claimant's permission to approach his GP to confirm that he was receiving treatment for what she termed his 'newly declared condition'. This related to his disclosure that he was using cocaine and alcohol. Dr Athanasiou advised that the Claimant was temporarily unfit to attend investigation or disciplinary meetings. She recorded that the report would first go to the Claimant to obtain his consent before it was released to his manager.
52. The meeting on 16 February 2023 nevertheless proceeded and was attended by Adam Davies, the Claimant and Helen Mason acting as notetaker. Dr Athanasiou's report following the previous day's review was produced mid-way through the meeting. The Claimant commented that he was unfit to attend a disciplinary or grievance investigation and that this was supported by the occupational health advice.

53. Mr Davies said that he wished to consider the report after the conclusion of the meeting, before reaching a decision. The Claimant said that he regretted that a decision could not be taken that day and that he was prepared for his employment to be terminated and did not wish the Respondent to 'hold back'. He said he had handed in his uniform and was 'prepared and ready to go'.
54. Mr Davies noted Dr Athanasiou's comment in her report from that advice from the Claimant's GP report would be sought. The Claimant responded that it was pointless waiting. He was unfit for work as stated in the report. He followed this by saying that the company had failed to provide him with support when needed. He maintained that Dr Athanasiou had got upset with him when he disclosed his drug and alcohol use. He said he wanted no further contact with her and requested a different doctor. The meeting concluded with Mr Davies stating that he would await the GP report and liaise with Health and Wellbeing before considering next steps.
55. Notwithstanding the proposal to await further medical information, Mr Davies Respondent decided to dismiss the Claimant on 6 weeks' notice, with an effective date of termination of 11 April 2023. Mr Davies' communicated his decision to the Claimant by letter dated 27 February 2023. The following matters were highlighted:-
- (i) although his preference would be to have a full understanding of the medical prognosis prior to reaching a decision regarding the Claimant's future capability, Mr Davies was mindful of the duration of the Claimant's absence from work and the 'changing diagnosis' regarding his health;
  - (ii) the Claimant's recent absence was associated with his declaration of alcohol and drug dependency, against a background of certified sickness absence since April 2022 on grounds of work related stress;
  - (iii) the Claimant's own perception of his fitness to return continued to change and was inconsistent with the medical advice;

- (iv) the Claimant had returned his uniform in late December 2022. This was just days after a discussion had taken place around a phased return to work at Peterborough. On 8 February 2023, the Claimant had informed Mr Davies that he could not envisage a return to work in any capacity;
  - (v) the Claimant had been absent from 17 August 2021 until 8 March 2022 due to work-related stress and thereafter, from 1 April 2022, due to a combination of work-related stress and drug and alcohol use. This period amounted to 537 days absence. The 'return to work' period in March 2022 had been utilised by the Claimant for untaken leave, before his sickness absence recommenced;
  - (vi) against this background, and given the current medical advice available to him, Mr Davies felt unable to conclude that the Claimant would be fit to return to work, whether in his existing or an alternative role at present or in the foreseeable future.
  - (vii) Mr Davies also stated that he felt unconvinced about the Claimant's wish to return to work in any role, location or capacity and that this was a barrier to his recovery and a return to work
56. Mr Davies noted that further medical inquiries were discussed in Dr Athanasiou's latest report. He indicated a willingness to consider any further evidence of changes to the Claimant's health, including any advice that may be produced by his GP. The Claimant was encouraged to liaise with his GP with a view to obtaining a response to the Respondent's request for information.
57. By email dated 1 March 2023, the Claimant submitted an appeal to Mr Simon Moeller. He pointed to the fact that his dismissal hearing had taken place before receipt of the further medical information which Mr Davies said he would await before making a decision. The Claimant asserted that this amounted to breach of contract, unfair dismissal, victimisation and discrimination. The Claimant also contended that alternative options should have been considered before dismissal such as reemployment to Peterborough Station.

58. In advance of the appeal meeting, Mr Moeller wrote to the Claimant on 16 March 2023 regarding insulting and, in certain instances, threatening comments which the Claimant had recently made about Mr Davies, Mr Patel, Dr Athanasiou, Mr Smithson and others. It was explained that such comments could be regarded as a breach of the Respondent's bullying and harassment policy. He was counselled to stop this kind of unacceptable behaviour. In the same email, Mr Moeller said he would benefit from further information about the Claimant's drug and alcohol use.
59. A letter was provided, ahead of the appeal, from an advanced nurse practitioner at the Claimant's GP surgery dated 5 April 2023. This letter confirmed that the Claimant had spoken to the mental health nurse about depression and anxiety over the last two years and had been directed to Aspire for help with his recreational drug and alcohol misuse. It was noted that the Claimant maintained that such use was in moderation. The practice held no records to confirm whether or not he had started rehabilitation support in connection with his drug and alcohol problem.
60. An appeal meeting took place on 28 March 2023. The Claimant was accompanied by Mr Edward Nestfield, an RMT trade union representative. Ms Leona Hampshire attended as note taker.
61. The Claimant's appeal was unsuccessful. The outcome was communicated by Mr Moeller's letter dated 3 April 2023. Mr Moeller noted in his decision that a letter had been provided from a nurse at the Claimant's GP surgery. He also took note of the fact that the Claimant had spoken with a mental health nurse with regard to his depression and had been recommended to contact Aspire regarding his recreational drug use. Mr Moeller concluded that there was no additional information which had been produced to indicate 'any fitness to return to work'.
62. Mr Moeller noted the Claimant's contention that he had been willing to return to work on a phased basis at Peterborough in December 2022. He concluded that

such an arrangement would have conflicted with the occupational health advice, notably that of Dr Athanasiou in her 15 February 2023 report, that the Claimant was unfit to return to work in any capacity.

63. Addressing the Claimant's argument that he would have been able to return to work at a much earlier point, in January 2022, and that this had been impeded by Mr Patel's failure to arrange a meeting, Mr Moeller found that Mr Patel had repeatedly struggled to make contact with him in order to arrange a welfare conversation.
64. Mr Moeller concluded that the Claimant had been appropriately supported throughout his period of sickness absence with welfare calls and occupational health reviews. Reasonable adjustments were actively considered in order to achieve a phased return at an alternative location, but the Claimant was not fit to engage in such initiatives.
65. Ultimately, Mr Moeller stated that, having reviewed all of the evidence including the medical advice in particular, he did not genuinely believe that the Claimant was fit to return to work, either in the Claimant's substantive role or an alternative one.

## **Legal Guidance**

66. Where an employee has been absent from work for some time, the Tribunal should address the central issue of whether the employer can be expected to wait any longer for the employee to return. *Spencer v Paragon Wallpapers Ltd* 1977 ICR 301, EAT. In answering this question, and as part of its overall assessment of the reasonableness of the decision to dismiss, relevant factors for the Tribunal to consider include:-
  - (i) whether other staff are available to carry out the absent employee's work;
  - (ii) the nature of the employee's illness;



- (iii) the likely length of absence;
  - (iv) the cost of continuing to employ the employee;
  - (v) the size of the employing organisation; and
  - (vi) (balanced against those considerations), the unsatisfactory situation of having an employee on very lengthy sick leave.
68. The Tribunal must also address the question of whether the employer has adopted a fair procedure. The Tribunal should have regard to whether there was sufficient and meaningful consultation with the employee; a thorough medical investigation (to establish the nature of the illness or injury and its prognosis), and consideration of other options; in particular, alternative employment within the employer's business.
69. A booklet produced by Acas, 'Managing attendance and employee turnover', states that employees on long-term sick leave should be dismissed 'only as a last resort once all other options have been considered'.

## **Conclusions**

70. The Tribunal was satisfied that the Respondent had discharged the burden of showing that the reason for the Claimant's dismissal was capability arising from long term sickness absence, and that this was a potentially fair reason for the purposes of s.98 of the Employment Rights Act 1996. Its inquiry was essentially focused upon an assessment of the reasonableness of the procedure which preceded the decision to dismiss, as well as the decision itself.
71. As required by the legislation, the Tribunal took account of the size and administrative resources of the employer. The Tribunal did not consider that the requirement to fill the role left vacant by the Claimant during the period of his absence, nor financial pressures associated with his pay entitlements provided of themselves compelling reasons to terminate his employment.
72. On the other hand, the length of the Claimant's absence, leaving aside the very limited return to work in March 2022, was on any view very significant indeed. In

the view of the Tribunal, given this inordinate period off work, the Respondent was reasonably entitled to decide that, absent some realistic and medically supported indication that a return to work could be achieved within the foreseeable future, the employment should be brought to an end. A return to work in this context would necessarily entail consideration of appropriate adjustments, such as a reintroduction into the workplace on a phased basis, potentially at an alternative location.

73. At the point in time when Mr Davies decided to dismiss the Claimant, the medical picture was incomplete. There was an acknowledgement that it would be helpful to seek input from the Claimant's GP practice, in particular in relation to the recently disclosed issue of drug and alcohol misuse. In the view of the Tribunal, it would have been procedurally fairer and more satisfactory for Mr Davies to await that information before finalising his decision whether to dismiss. The opportunity afforded to the Claimant to furnish such information during the notice period was not good practice, neither did it reflect the recommendations or expectation of occupational health.
74. That precipitate feature of the decision-making at the first stage was however rectified on appeal, such that the overall process met, in the Tribunal's view, the requirements of fairness viewed in the round. By the time of the appeal decision, Mr Moeller had the opportunity to review the information supplied by the Claimant's GP practice which, as matters turned out, did really not shed any new light on what was already understood. It is very unlikely that it would have caused Mr Davies to have reached a different view, had he stayed his dismissal decision to wait for it.
75. In the view of the Tribunal, the Respondent adhered substantially to the requirements of its policy on the management of long-term sickness absence and adopted a fair procedure viewed in the round. Although the routine welfare support provided to the Claimant was impeded by his intermittent lack of a telephone, he was also unresponsive on many occasions. The assessments which were conducted by the Respondent's occupational health advisers were conducted regularly and provided clear and informative assessments.

- 76. The Respondent was reasonably entitled to conclude that attempts to bring the Claimant back to work, including in an adjusted role, had run their course. The persistent uncertainty about the Claimant stress-related illness and its prognosis became compounded by the revelation of his drug and alcohol use.
  
- 77. The combined effect of these conditions on the Claimant's ability to resume employment gave rise to a genuine and understandable state of uncertainty as to the prospect of achieving a return to work at any foreseeable point in time. The Claimant's own ambivalence and contradictory messages about his desire to return only added to the uncertainty. The Respondent was reasonably entitled to bring its employment relationship with the Claimant to an end and acted fairly in so doing.
  
- 78. The complaint of unfair dismissal accordingly fails.

Employment Judge Sutton

11 December 2023

Sent to the parties on:

11/12/2023

For the Tribunal Office:

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