EMPLOYMENT TRIBUNALS

Claimant:	Mr P Green
Respondent:	Tesco Stores Limited
Heard at:	Newcastle (by CVP)
On:	4 & 5 March 2024
Before:	Employment Judge Loy (sitting alone)

Appearances:

Claimant:	Mrs H Green (spouse and lay representative)
Respondent:	Miss G Corby, counsel

REASONS UNDER RULE 62(3)

JUDGMENT having been sent to the parties on 8 March 2024 and the claimant having made a request for written reasons under rule 62(3) of The Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, the following reasons are provided.

REASONS

Background

1. By a claim form presented on 19 October 2023, the claimant claims unfair dismissal. The claimant was employed by the respondent as a Customer Delivery Driver from 23 February 2020 under his dismissal with effect from 10 June 2023. The respondent is a well-known retail supermarket. The claimant was employed at the respondent's Tesco Extra Stockton store.

2. It is accepted by the claimant that the reason for his dismissal was his absence from work on account of a work-related injury. It is also accepted that this was a potentially fair reason for dismissal, namely a reason related to the capability of the claimant to carry out his work. However, the claimant says his dismissal was both procedurally and substantively unfair and that he has accordingly been unfairly dismissed.

3. The respondent denies unfairly dismissing the claimant.

Evidence

4. The tribunal was provided with an agreed bundle of documents of 260 pages to which the claimant added two additional emails. The claimant also produced a 15 page document which is referred to as the claimant's written submissions. Both sides made oral submissions at the end of the hearing.

5. The claimant gave evidence on his own behalf. He also called his wife, Helen Green. The claimant produced a written witness statement of 55 paragraphs over 17 pages. The claimant's wife produced a written witness statement of 13 paragraphs over 3 pages. The claimant and his wife were both cross-examined by Miss Corby.

6. The respondent called two witnesses:

    - Jessica Wilson, dotcom Manager in the Tesco Extra Stockton store, who produced a written witness statement of 50 paragraphs over 10 pages. Ms Wilson was the claimant's line manager and the principal manager who dealt with the claimant's sickness absence.

    - Jamie Dawson, Lead Manager in the Tesco Extra Stockton store, who produced a written witness statement of 26 paragraphs over 6 pages. Mr Dawson was the manager who took the decision to dismiss the claimant.

The tribunal's approach to the evidence

2. Before moving to the findings of fact, the tribunal sets out a number of points of general approach, some of them commonplace in our work.

3. In this case, as in many others, evidence and submission touched on a wide range of issues. Where the tribunal makes no finding on a point about which it heard, or where the tribunal does make a finding, but not to the depth with which the point was discussed, that is not oversight or omission. It reflects the extent to which the point was truly of assistance to the tribunal.

4. While that observation is made in many cases, it is particularly important in this one, where the claimant felt very strongly about a number of issues, and was inexperienced in the law and procedure of this tribunal.

5. The tribunal's approach also included an understanding of proportionality. In the artificial setting of tribunal litigation, the focus is on how the individual claimant was managed. The tribunal must not lose sight of the fact that at the time that the events in question occurred, nobody may have given these events the importance which the artificiality of the tribunal process requires.

6. All of the tribunal's findings of fact were made on the balance of probability.

Findings of fact

7. On 7 August 2022, the claimant had an accident at work. He suffered a back injury as a result of the shutter door on his delivery van jamming as he was attempting to close it.

8. On 9 August 2022, the claimant commenced a period of sickness absence as a result of his injury for which he did not return before his dismissal on 10 June 2023. The claimant's absence was covered by fit notes throughout the period of his absence.

9. On 29 September 2022, the claimant attended an informal Wellness Absence meeting with Ms Wilson.

10. On 4 October 2022, the claimant had his first Occupational Health assessment. The advice that Ms Wilson received was that there was no return date in the light of the claimant's back injury but there was a suggestion about amended hours and duties as and when the claimant was in a position to return to work. The material part of the occupational health advice was as follows:

    '…in my opinion Paul's fitness for work remains compromised due to his ongoing pain and discomfort. He is unable to lift and carry, bend or twist as this is likely to aggravate his ongoing symptoms….. It is difficult to estimate a return to work date, as this will depend upon Paul's response to treatment and management of his symptoms.

11. The advice goes on to identify a number of adjustments which could potentially be made on the claimant's return to work including: a phased return to work in both hours and duties, risk assessments and buddy support.

12. On 31 October 2022, the claimant had his first formal Long-Term Absence Meeting with Ms Wilson. This was conducted by telephone. The status of the claimant's was that he was awaiting an MRI scan for that to provide better information on his diagnosis and prognosis.

13. On 12 December 2022, the claimant had his second formal Long-Term Absence Meeting with Ms Wilson. The status of the claimant's absence was that he was still awaiting the results of his MRI scan and the claimant estimated he would be unable to return to work for 2-4 months.

14. On 13 January 2023, the claimant had his third formal Long-Term Absence Meeting with Ms Wilson. He had received the results of his MRI scan and had a GP appointment to discuss those results in a week's time.

15. On 30 January 2023, the claimant had his second Occupational Health assessment. The advice that Ms Wilson received was that the claimant might be fit to return to work subject to adjustments such as avoiding heavy lifting and a phased return. The possibility of 'click and collect' as an alternative role was canvassed. The material part of the occupational health advice was as follows:

'From my consultation with Mr Green today, he has made progress but would benefit from physiotherapy input. Mr Green could potentially return to work, but I would suggest that this would need to be a less physically demanding role initially.

…

Mr Green could return to work if there was the option of excluding heavy lifting. I understand that returning to click and collect may be available to him I would certainly facilitate a return.

I would recommend a phased return…

I would suggest that returning to van deliveries is not commenced until the physiotherapist is happy and has provided him with guidance on activities and exercises to avoid any further injury'

16. On 15 March 2023, there was an informal conversation between the claimant and Ms Wilson. Ms Wilson offered the claimant a number of alternatives with a view to assisting the claimant getting back to work. They included click and collect, checkout duties and duties at the petrol station. Essentially, these were all less strenuous roles than dotcom van driver.

17. The claimant rejected these roles because he did not feel he was fit to return to work in any capacity. The claimant was not able to offer a return to work date and informed Ms Wilson that he was in constant pain.

18. On 29 March 2023, the claimant had his fourth formal Long-Term Absence Meeting with Ms Wilson. Ms Wilson wanted this meeting to be in person face-to-face. The claimant was unable to attend the store. The meeting was therefore held in his absence. The claimant was providing the facility of making a written statement so that he could participate in the meeting.

19. On 20 April 2023, Ms Wilson took advice from internal human resources (Colleague Relations) given the extended period of the claimant's absence together with the fact that the claimant had stopped taking physiotherapy because of the pain that he was experiencing.

20. On 17 May 2023, the claimant had his third Occupational Health assessment. The advice that Ms Wilson received was the claimant remained optimistic about a return to work, but it would remain unfit for four weeks. No adjustments were identified which would enable the claimant to return to work sooner or at all. Ms Wilson was also told that it was unlikely that the claimant would be able to perform any roles that would be available for him at Tesco. No precise timescale for return to work as identified. The material part of the occupational health advice is as follows:

'From my consultation with Mr Green today, given the level of ongoing symptoms and limited function declared, he remains unfit for work.

At present Mr Green requires ongoing sickness absence. I do not believe there are any adjustments which could currently be put in place to facilitate a return. This may remain the case until he has had further intervention via the musculoskeletal clinic.

Mr Green is unable to sit for any period of time and is unable to undertake any lifting….. This would appear to exclude roles that will be available to him at Tesco. Given his limitations and pain it is difficult to identify a suitable role that could facilitate a return in the near future…

Given the physically demanding nature of the customer delivery driver position, I do not anticipate a return in the near future and I would be unable to confirm a timescale to do so.

21. On 27 May 2023, the claimant had his fifth and final formal Long-Term Absence Meeting. This meeting was to be with Lead Manager because dismissal was one of the possible outcomes of the meeting. That Lead Manager was Jamie Dawson, Lead Manager in the Tesco Extra Stockton store.

22. This meeting was originally scheduled for 27 May 2023 as an in-person meeting at the store. The claimant was unable to attend an in-person meeting and the meeting was then rearranged for 3 June 2023. This meeting was again rescheduled took place on 10 June 2023 by telephone. The claimant had been provided with a number of options enabling him to participate in the meeting without being physically present including: making written representations, having a trade union representative present in the meeting and a change of meeting venue.

23. The claimant elected to make written representations. Those representations are at [138]. Those representations were:

'Regarding the final formal long-term absence meeting about my absence from work to be held on Saturday, 10 June 2023 at 12:00 PM midday at Tesco Stockton, I am unable to attend this meeting due to not being well and am sending a written statement about my current health to be read meeting in my absence.

As you are aware I suffered on 07/08/2022 whilst at work resulted in a compression fracture of my T11 vertebra. I've been unable to work since this occurred.

I am still suffering from chronic pain in my spine related to this injury and as a result of this is limiting my ability to do basic daily activities without pain and discomfort. I currently find that I can only sit or stand for very short periods of time especially when my pain relief is wearing off between doses.

I do not feel that I am yet ready to return to work in any capacity due to the amount of pain I am in and cannot give you an expected date to return to work at this time as I do not know when or if will become more manageable and allow me to do more activities.

I discussed my recovery and ongoing symptoms and how these affect me with occupational therapy, and you should have also received the report.

Yours sincerely,

Paul Green

24. The meeting went ahead on 10 June 2023. The outcome of the meeting was that Mr Dawson terminated the claimant's employment with immediate effect and paid him three weeks salary in lieu of notice. The material terms of the letter of dismissal are as follows:

'Our most recent occupational health report dated 17/05/2023 outlined that with your ongoing symptoms and limited function declared, you remained unfit for work. There were no adjustments that could be made to facilitate a return to work and this would remain the case until further intervention via musculoskeletal. The report stated no feasible return to work in the near future.

We previously discussed any workplace adjustments or a transfer or alternative role that might enable you to return to work, however Occupational Health Report stated that no adjustments would facilitate a return to work, confirming that we have exhausted all options.

Following our formal meetings, the analysis of your Occupational Health report(s), and the information provided to us in your written statement of the meeting on 10/06/2023, I have come to a very difficult decision to dismiss you on the grounds of your income ability to deliver your role due to ill-health.

Your employment will cease with effect from 10/06/2023. You will be paid for your notice period of three weeks along with any outstanding however if you have exceeded your holiday entitlement, a deduction for this will be made from your final pay in accordance with your contract of employment. This information will be sent to you as soon as possible. Your P45 will be sent to you separately, posted to you along with your last payslip, on Friday, 23 June 2023.

You have the right to appeal against my decision. Please outline the reason why you want to appeal in writing to James Delaney, Store Manager at Tesco Stockton…. within seven working days of receipt of this letter'

25. The claimant did not appeal Mr Dawson's decision to dismiss him.

The relevant law

26. The test of unfair dismissal is set out in section 98 of the Employment Rights Act 1996 ('ERA').

27. Section 98 of the ERA provides:

98 General

(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
You

(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.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do;

…..

(3) Where the employer has fulfilled the requirements of subsection (1), 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."

28. The tribunal considered the judgement of Underhill LJ in O'Brien the Bolton St, Catherine's Academy and the judgement of Phillips J in Spencer v Paragon Wallpapers Ltd 1977 ICR 301, EAT.

29. The essential question in cases of long-term medical absence is whether the employer can be expected to wait longer for the employee to return. In that context, the size and resources of the employer are relevant. The relevant circumstances are often taken to include the nature of the illness, the likely length of the continuing absence and the need of the employer to have done the work which the employee was engaged to do.

30. In the often quoted words of Phillips J in Spencer v Paragon Wallpapers at p307 B-D,

'Every case depends on its own circumstances. The basic question which has to be determined in every case is whether, in all 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'

31. Phillips J went on to say that the relevant circumstances, '*include the nature of the illness, the likely length of the continuing absence, the need of the employees have done the work which the employer was engaged to do.'* [p306G].

32. Whether the ill-health and absence was caused by the employer's actions does not determined fairness (London Fire and civil defence authority v Betty [1994] IRLR 384; Edwards v Governors of Hanson school [2001] IRLR. That does not mean to say that it is irrelevant, but rather it is not in itself determinative of unfairness. The tribunal can have regard in an appropriate case to the question of whether the employer caused the medical absence which led to the dismissal.

33. It is also important to emphasise that the band of responses test applies to capability dismissals just as it does to dismissals for other potentially fair reasons. Accordingly, when assessing the reasonableness of the respondent's management action for the purposes of section 98(4) ERA the tribunal must not substitute its own opinion about whether the employee should have been dismissed, but must recognise that there will often be a range of reasonable responses open to an employer. Unless management action falls outside that range it ought not to be considered unreasonable. It has also been emphasised that this although providing flexibility is not equivalent to a perversity test.

34. The tribunal must also consider the procedure adopted by the employer in the light of section 98 (4) ERA 1996. In the case of Polkey v AE Dayton Services Limited [1987] IRLR 503 HL, where the dismissal is fair due to a procedural reason tribunal was called consider whether an employee would still have been dismissed even if a fair procedure had been followed. The tribunal may reduce the normal amount of compensation by a percentage representing the chance of the employee would still have lost their employment. In an appropriate case, that percentage reduction may be up to 100%.

Conclusions

The reason for dismissal

35. The factual basis upon which the claimant was dismissed was ongoing long-term sickness absence. In particular, the facts and matters that when the mind of Mr Dawson at the point of the dismissal were that the claimant was unable to carry out the terms and conditions of his contract of employment. Accordingly, the claimant was dismissed for potentially fair reason, namely his incapability to carry out the duties under his contract of employment. That falls plainly within the definition of capability under section 98(2)(a) ERA.

36. The claimant was therefore dismissed for a potentially fair reason.

The reasonableness of the decision to dismiss the claimant the reasonableness of the decision to dismiss the claimant

37. The next question for the tribunal is whether or not the respondent acted reasonably in all the circumstances (including the size and administrative resources available to the respondent) in treating the reason for dismissal as a sufficient reason for dismissing the claimant. That is the requirement of in section 98 (4) ERA 1996 and must be determined in accordance with equity and substantial merits of the case.

38. The tribunal must approach the application of section 98(4) within its jurisdiction which prevents it from substituting its own view for that of the respondent. The tribunal must take that approach when looking at both the procedural and substantive issues that arise for its consideration. The question at all stages is whether the management action taken by the employer felt within the band of reasonable responses.

Procedural fairness

39. The respondent has a bespoke employment policy applicable in cases of sickness absence management. That policy is at [1 -35].

40. The policy sets out the process that the respondent considers it appropriate to undertake in cases including long-term sickness absence management. The tribunal was satisfied that this was a long-term absence in accordance with the provisions of the policy set out paragraphs 40 - 49 of the policy's internal numbering.

41. The claimant referred the tribunal to the section of the policy entitled Accidents at Work [25 – 26]. The section is in the following terms:

'All accidents at work must be reported to a Manager immediately and phoned through the Injury Helpline, followed by an investigation, where the investigation is completed within seven days of your return to work.

If, following the investigation, it is found that you are not at fault/made no contribution to the accident then the accident and any absences directly following (and linked to) within reason, should be excluded from the review level and no formal action should be taken. This however doesn't mean we are accepting liability for the accident.'

42. The claimant says that no such investigation took place and that all of his absences were linked to an accident at work which was neither his fault and to which he made no contribution. Those absences should therefore in accordance with the policy be entirely disregarded.

43. The tribunal does not agree with the construction of the wording set out immediately above. First, the claimant did not return to work. Secondly, the wording does not give the claimant or any other employee a total amnesty against any action being taken for any absences however long their duration provided those absences remained connected to accidents at work for which the employee is not to blame.

44. Indeed, the words *'within reason'* cannot simply be ignored. This was a case where ultimately Mr Dawson had to take a decision in circumstances where the claimant had been continuously absent from work for over 10 months and where there was no positive evidence, including from the claimant himself, that there was a date by which he was likely to be able to return. It would be an extraordinary construction of the policy if its effect was that an employee could quite literally never be able to return to work because that absence was originally linked to an accident at work. The tribunal is satisfied that this is not a fair and proper reading of the relevant section.

45. It was common ground that the respondent more than met the minimum number of meetings that are required by its policy. The claimant attended formal Long-Term Absence Meetings on: 31 October 2022, 12 December 2022, 13 January 2023, 29 March 2023 and 10 June 2023. Ms Wilson also kept in informal contact with the claimant from time to time

46. It was also common ground that the claimant was referred on three separate occasions for occupational health assessments on: 4 October 2022, 30 January 2023 and 17 May 2023.

47. Dealing with the claimant's main criticisms.

48. The claimant says that there were inconsistencies in the witness statements.

49. For example, the claimant says that at paragraph 16 of Ms Wilson's statement she says that the occupational health report states that he (the claimant) has not provided a return to work date. The claimant makes the point that it was the occupational health assessor who in fact said that it was difficult to estimate a return to work date as that will depend on how the claimant responds to treatment and management of her symptoms.

50. The claimant may very well be right, but nothing of any substance turns on the point. The claimant seemed to think that he was being disbelieved or criticised by the respondent for his absence. That has coloured his view of events and led to him read too much into minor discrepancies The tribunal did not consider that either Mr Dawson or Ms Wilson disbelieved the claimant or criticised him. Ms Wilson was simply concerned to see what the respondent could do to help the claimant get back to work. The sad reality was that after 10 months not only the respondent, but also its occupational health advisers and the claimant himself were all unable to identify anything that the respondent could do in practical terms to help the claimant back to work.

51. Similarly, the claimant is critical of Ms Wilson's statement about when she says she learnt about the claimant's diagnosis of a fractured lower back. Again, the tribunal was not assisted by this level of detailed debate. There was simply no dispute about the claimant's diagnosis. If Ms Wilson has incorrectly recalled when the claimant first told her about his diagnosis then so be it. The point of substance is that everyone agrees that the respondent was aware of the claimant's diagnosis very substantially in advance of the claimant's dismissal on 10 June 2023.

52. The claimant criticised paragraph 19 of Ms Wilson's statement where she says that at the first formal meeting on 31 October 2023 '*the claimant appeared eager to return to work. He was hopeful that once he knew what was wrong with them, [he] can give an indication of when [he] would be able to come back to work.'* The claimant says that this statement is untrue because the claimant already knew what was wrong with him by this time.

53. The tribunal considers that to be an unfair criticism of Ms Wilson. It was common ground that as at 31 October 2022, the claimant was still awaiting further tests in the form of Dexa bone scans and MRI scans. The tribunal does not read Ms Wilson's words as saying anything more than that the claimant would be in a better position to indicate a potential return to work when the outstanding further investigations that were being undertaken had all been completed. Indeed, it is common ground that the claimant had scans on both 7 and 11 November 2022.

54. The claimant also identified what he thought were important discrepancies between how Ms Wilson portrays matters in her statement and how things actually were at the time. The claimant criticises Ms Wilson for what she says at paragraph 42 of her witness statement about the OH assessment, namely *'their opinion was that there were no adjustments that could be put in place to facilitate me returning to work.'* The claimant points out that what the assessor actually said was *'I do not believe there are any adjustments which could currently be put in place to facilitate a return to work. This may remain the case until he has had further intervention via musculoskeletal clinic.'* The claimant invites the tribunal to conclude that Ms Wilson was editing the OH advice by omitting the word 'currently' in order to mislead.

55. The tribunal does not agree that the omission of the word 'currently' makes any meaningful difference. Plainly the OH advice, like any advice, is only as good as the date upon which it is given. The point of substance was that no adjustments could be identified at that point in time by the OH advisor.

56. The claimant makes a similar point about paragraph 43 of Ms Wilson's statement. The claimant says that when Ms Wilson was seeking advice from Colleague Relations (HR) she was presenting a slanted version of events. In her witness statement, Ms Wilson says that she sought advice from Colleague Relations and was advised that if she believed all possible support for the claimant had been exhausted and if there was no foreseeable return to work then she should refer the claimant to a final formal absence meeting. One of the outcomes of such a referral could be the claimant's dismissal.

57. The claimant says that what the occupational health assessor had said was that given the pain that the claimant was experiencing, it was difficult to identify a role that could facilitate a return to work in the near future.

58. The claimant further says that Ms Wilson informed Colleague Relations with that the claimant was *'unlikely to return to work in the near future or at all and [there was] no possibility of any adjustments to be put into place to enable a return to work, what would you recommend?'* The claimant again accuses Ms Wilson of giving false information to Colleague Relations and that she was deliberately adding words so she could get more categorical advice to assist the claimant's dismissal.

59. Again, the tribunal does not consider that to be a fair criticism of Ms Wilson. Ms Wilson was entitled to explore with Colleague Relations what the next steps should be. There was no evidence of a likely return date for the claimant. Ms Wilson was not constrained by each and every word of the occupational health assessor in seeking advice. The tribunal did not form the impression that either Ms Wilson or Mr Dawson had any interest in bringing about the premature dismissal of the claimant not least because the claimant was a skilled driver for whom the respondent had an ongoing need.

60. The claimant made similar criticisms of Mr Dawson. The claimant says that at paragraph 14 of his witness statement, Mr Dawson misquotes him by saying that in the claimant's written statement at [139] the claimant had said *'he was not ready to return to work'* whereas what the claimant actually says in his written statement is *'he is not yet ready to return to work.'.*

61. The claimant is factually correct. However, it was entirely unclear to the tribunal what substance there was in the omission of the word 'yet'. The tribunal might have seen some substance in this point if the claimant's position had been that he was currently not yet ready to return to work but there was an identifiable point in the future by which he envisaged that he would be able to return to work. However, that was not the claimant's position. The claimant's position was that he could not identify a point in time in the future by which he expected he might be able to return to work. In those circumstances, the word 'yet' adds nothing to the sentence. The tribunal concluded that the claimant's analysis of the omission of these words was a matter of semantics.

62. In the interests of proportionality, the tribunal has not dealt in these written reasons with each and every criticism made by the claimant in his 15 page written representations. However, the tribunal has considered them all and reached the conclusion that there is no proper basis on which to consider evidence of Ms Wilson and Mr Dawson lacked credibility. Indeed, the tribunal reached the opposite conclusion and found both witnesses to be both credible and reliable.

63. The claimant was also critical of the fact that he says he was not given the required period of notice of his final formal Long-Term Absence Meetings. The claimant says that the policy requires that he be given seven days' notice of such meetings. It is correct that the claimant was originally given only three days' notice of this meeting. However, the meeting was postponed twice and eventually took place on 10 June 2023. There was no suggestion that the claimant was prejudiced by the original date being given less than seven days prior to the original date of the meeting. The tribunal did not consider that there was any unfairness to the claimant arising out of this point or any other issue about the timings of meetings. On the contrary, the respondent was both patient and accommodating.

Substantive fairness

64. The tribunal acknowledges that this was the case where the absence arose from injury at work. That is one of the factors to be taken into consideration but it's not a determinative factor of unfairness.

65. There is a common misconception that the employer before it can be considered to have acted reasonably must have some form of definitive evidence that the employee will not be able to render any meaningful service in the future. That is incorrect. An employee is under a contract of employment requiring attendance so as to deliver the services under the contract of employment that the employee is required to do.

66. The claimant candidly accepted in evidence that at the time of his dismissal it was his own position that he was currently unable to discharge the duties under his contract of employment and that he was unable to say if left alone when he might be in a position to do so.

67. By the time of his dismissal:

    67.1. the claimant had been absent for some 43 weeks or so;

    67.2. occupational health were unable to identify any adjustments that might facilitate a return to return to work;

    67.3. occupational health were unable to identify a date in the future by which the claimant may be able to resume his duties;

    67.4. the claimant was unable to identify that either any adjustments that might facilitate his return to work or provide any date upon which he might be able to resume his duties;

    67.5. the respondent had offered the claimant the opportunity to consider alternative duties such as click and collect and checkout; and

    67.6. the claimant's own position was he could not undertake any alternative duties.

68. The claimant was also a skilled worker a position for which the respondent had an ongoing need. The tribunal considered the size and resources of the respondent which are substantial. The tribunal was also considered that the respondent operates in a highly competitive market which is price sensitive and that it had an ongoing need for dotcom drivers. It specifically was not unreasonable for the respondent not to keep the claimant's job open in the hope he might be able to return by utilising overtime which is both expensive and not a long term solution

69. In the circumstances, the tribunal has concluded that the decision to dismiss the claimant was reasonable and fair. There was no identifiable date of return for the claimant. The claimant's absence was over 10 months at the date of dismissal with no positive foreseeable date of return.

70. The tribunal considered the submission that further independent medical advice should have been sought. This is also a question of reasonableness and the tribunal is unable to find that the respondent's failure to go beyond its own occupational health advisers involves any unreasonableness.

71. In these circumstances, the tribunal has concluded that the respondent acted fairly in treating the reason for dismissal as a sufficient reason to dismiss the claimant.

72. The claimant was not unfairly dismissed.

Polkey

73. If the tribunal has fallen into any error in relation to procedural fairness, then the question of causation and what difference any procedural failings might have made to the decision comes into play.

74. The tribunal was satisfied that even if everything that the claimant suggested should have been done have been done (whether reasonable or otherwise) it would have made no difference at all to the respondent's decision to dismiss the claimant. In other words, the claimant would have been dismissed fairly in any event and the tribunal would have reduced any compensation otherwise payable to the claimant by 100%.

Employment Judge Loy

15 July 2024

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