EMPLOYMENT TRIBUNALS

Claimant: **Mr Antony Ramshaw**

Respondent: **Abingdon Flooring Limited**

Heard at: **Cardiff** **On: 22 & 23 August 2024**

Before: **Employment Judge S Jenkins**

Representation:
Claimant: Mr J Rushton (Counsel)
Respondent: Mr J Lewis-Bale (Counsel)

JUDGMENT having been sent to the parties on 27 August 2024, and reasons having been requested by the Respondent, in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Background

1. The hearing was to deal with the Claimant's complaint of unfair dismissal, brought in relation to a dismissal on 16 January 2024, by way of a Claim Form issued on 9 April 2024, following a period of early conciliation with ACAS between 20 February 2024 and 26 March 2024.

2. I heard evidence from three witnesses on behalf of the Respondent; John Thomas, Backing Plant Manager; Stacy Mason, Human Resources Manager; and Mike Collins, Production Director; and I heard evidence from the Claimant on his own behalf.

3. I considered the documents in a hearing bundle spanning 115 pages to which my attention was drawn, and I took into account the parties' representatives' closing submissions.

Issues and Law

4. The first issue for me to address was the reason for dismissal, where the burden would be on the Respondent to establish that it had dismissed the Claimant for a potentially fair reason falling within Section 98(1) or (2) of the Employment Rights Act 1996 ("ERA"). In that regard I noted the guidance of the Court of Appeal in the long established case of ***Abernethy -v- Mott Hay and Anderson*** **[1974] ICR 323**, that the reason for dismissal is the set of facts which led to the decision to dismiss.

5. In this case the reason for dismissal advanced by the Respondent was capability. In full, Section 98(2)(a) ERA refers to the reason relating to "*the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do*". In this case the Respondent's focus was on the capability element rather than the qualifications element, and Section 98(3)(a) ERA notes that capability means the employee's capability "*assessed by reference to skill, aptitude, health or any other physical or mental quality*".

6. The Claimant did not materially dispute that capability was the reason for dismissal in this case.

7. If I was satisfied that capability was the reason for the dismissal, I would then need to consider whether dismissal for that reason was fair in all the circumstances, applying the test set out in Section 98(4) ERA, which states:

   "…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."

8. With regard to the fairness of capability dismissals, the Court of Appeal, in ***Alidair Limited -v- Taylor*** **[1978] ICR 445**, noted that the test has two elements:

   (i) Does the employer honestly believe this employee is incompetent or unsuitable for the job?

   (ii) Are the grounds for that belief reasonable?

9. I would also need to assess whether any procedural deficiencies could be said to have led to an unfair dismissal.

10. If I concluded that the dismissal was unfair, I would then need to go on to consider the appropriate compensation to award. That would involve calculating a basic award pursuant to Section 119 ERA and a compensatory award pursuant to Section 123 ERA.

11. In that regard, Section 123(1) notes that the amount of a compensatory award, "*shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.*"

12. Section 123(4) notes that, in assessing loss under sub-section (1) the common law duty of mitigation applies. In that regard, the Employment Appeal Tribunal in ***Gardiner-Hill -v- Roland Berger Technics Limited*** **[1982] IRLR 498**, directed that the Tribunal should ask three questions:

    (i) What steps were reasonable for the Claimant to have to take in order to mitigate his or her loss?

    (ii) Whether the Claimant did take reasonable steps to mitigate loss?

    (iii) To what extent, if any, the Claimant would actually have mitigated his or her loss if he or she had taken those steps.

13. The focus, when considering mitigation, is on the individual claimant's particular circumstances, and the burden of establishing a failure to mitigate is on the respondent.

14. In addition to assessing mitigation, two possible adjustments to the compensatory award were advanced by the Respondent. One was the "Polkey" principle, i.e. applying the guidance of the House of Lords in ***Polkey -v- A E Dayton Services Limited*** **[1988] ICR 142**, that, if the dismissal was found unfair due to procedural deficiencies, account should nevertheless be taken, in terms of compensation, of whether a fair dismissal would have ensued had a fair procedure been followed.

15. The other was contributory conduct. Section 123(6) ERA notes that, "*where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.*"

16. In that regard, the Court of Appeal in ***Nelson -v- BBC (No. 2)*** **[1979] IRLR 346**, set out three factors which must be present for the compensatory award to be reduced; the Claimant's conduct must be culpable or blameworthy, it must have actually caused or contributed to the dismissal, and the reduction must be just and equitable.

Findings

17. My findings of fact relevant to the issues I had to decide, reached on the balance of probability where there was any dispute, are set out below. In the event there was little material dispute over the events that took place.

18. The Respondent is a manufacturer of carpets and floor coverings. It currently operates principally from a factory on the Pen-y-Fan Industrial Estate in Crumlin, but, up until the Summer of 2023, it also operated a Tiling factory in Blaenau. The Claimant was employed at that factory as a Production Operative, essentially as a "Sewer", and he started work there on 21 October 2017. He was also a Trade Union Shop Steward at that site, but nothing turned on that.

19. In terms of events prior to Summer 2023, no issues regarding the Claimant's conduct or performance had arisen; indeed, he was described by Mr Collins as a popular and well-liked employee. In terms of the Claimant's health, he underwent an operation to fix a detached retina in 2021. Although the Claimant was, and remains, shortsighted, that operation was successful.

20. By early July 2023 however, the Claimant experienced cloudy vision in the same eye, which was then subsequently diagnosed as a cataract.

21. In terms of the Claimant's role, the Blaenau factory, as I have noted, closed in Summer 2023. All employees there were, following a consultation process, offered the options of being made redundant or of transferring to the Pen-y-Fan site. Many employees opted for redundancy, but the Claimant opted to move to Pen-y-Fan, having transport which enabled him to travel the additional distance involved.

22. The Claimant then commenced a new role as an "Operator/Creeler" in the Tufting department on 3 July 2023. The role was subject to the usual statutory four-week trial period, during which the Claimant had the ability to bring his employment to an end and instead receive a statutory redundancy payment.

23. The Claimant's role in the Tufting department involved threading needles. Due to his eye condition, he was unable to do that, and that led to a discussion between the Claimant and Mr Collins.

24. How that discussion arose was one of the few differences between the parties in relation to the facts. The Claimant contended that he approached Mr Collins, noting his difficulties and stating that he would have to take redundancy, and that Mr Collins then indicated to him that he did not need to do that, and that he would find employment for him elsewhere in the factory. The Claimant then indicated that he raised the fact that there was a job on the notice board for a "Sewer/Driver", and that Mr Collins then told him that the job was his but he would have to apply for it.

25. Mr Collins' evidence was that he observed the Claimant struggling with his eyesight, and raised himself the prospect of the Sewer/Driver role.

26. Whilst no material implications arose from the difference of view of the two witnesses, I preferred the Claimant's version of events. Mr Collins, in his evidence, confirmed that he would only visit the shop floor periodically, and I therefore felt, on balance, that it would be less likely that Mr Collins observed the Claimant's difficulties, rather than the Claimant raised them himself.

27. Regardless of how the conversation arose however, the agreed outcome was that the Claimant, following an interview with Mr Thomas, moved to the position of Sewer/Driver in the Backing department.

28. The Claimant was then issued with an amendment to his Terms and Conditions of Employment with effect from 11 July 2023, which he signed on that day, which included a line saying, "PROBATION 3 months".

29. I observed that no such clause was included in the document issued to the Claimant in relation to the Tufting department role, even though all the evidence indicated that that role was materially more different to the role the Claimant had undertaken in Blaenau than was the Sewer/Driver role.

30. Another outcome of the discussion between the Claimant and Mr Collins was that, on Mr Collins' recommendation, the Claimant arranged an optician's appointment. That took place on 7 July 2023, and led to a diagnosis of the cataract. Following that, a consultant's appointment was arranged, with notification of an appointment on 16 October 2023 being issued to the Claimant on 9 September 2023.

31. In the Backing Plant the Claimant worked as one of a team of three on a rotational basis. One employee would drive the boom truck or pole truck, a large forklift truck, to the Stores area to obtain the carpet in 4 or 5 metre widths, which would then be taken through the Backing machine by the other two employees, and the three employees would rotate between the three roles.

32. The roles undertaken by the two operators would be physically demanding ones as they would need to physically manoeuvre the carpet through the machine. Mr Thomas confirmed that the two employees working on the machine would themselves rotate from one side to the other, as the role on one side was more demanding than the other.

33. Occasionally (Mr Thomas himself confirmed that this would be no more than two or three times per day at most), when a thread broke or ran out, re-threading needed to take place. That would be undertaken by one of the operatives on the machine, but, due to his eyesight difficulties, the Claimant was unable to undertake that work. The Claimant was also unable, again due to his eyesight, to drive the truck.

34. As a consequence the Claimant was unable to play a full part in the rotations. Mr Thomas confirmed that there were no particular concerns raised by the other employees about that, and the Claimant in fact commented that he felt that his colleagues preferred doing more of the driving work as that was less physically demanding. Mr Thomas further confirmed that he had no apprehension that the Claimant would not complete his probation once his vision problem had been addressed.

35. With regard to the re-threading, Mr Thomas confirmed that an issue arose from time to time if the other operator was inexperienced, as the person driving would then have to be called upon. However, as I have noted, re-threading did not happen frequently, and Mr Thomas confirmed that the group that the Claimant usually worked in contained two experienced operators. It was only therefore if the issue arose when other operators were covering for those experienced operators that a problem would arise.

36. As I have noted, the Terms and Conditions issued to the Claimant in relation to the Sewer/Driver role indicated that it was subject to a three-month probation period. His Line Manager, David Knapp, undertook a review just prior to the expiry of that three-month period, on 4 October 2023, and in that Mr Knapp noted that the Claimant was doing "*ok*", but that his training had not been able to be progressed due to his eyesight. He noted that when the Claimant's vision was better he would no doubt complete his training. He concluded by noting that the Claimant's probation period would need to be extended.

37. A formal probation review meeting then took place on 9 October 2023, although no evidence of any invitation to that meeting was before me. The meeting took place between the Claimant and Mr Thomas, with an HR representative also present.

38. The notes of the meeting indicate that the Claimant informed Mr Thomas that he had an appointment with the Newport Eye Hospital, and that he would pay for the operation if required. The HR employee asked the Claimant if he had looked into using Westfield Health, which appears to be a company via whom some private health assistance could be arranged, or at least via whom reimbursement of some private medical care could be obtained, and the Claimant said he would claim back what he could.

39. Mr Thomas observed that the Claimant's probation would be extended for another twelve weeks, and would be reviewed every four weeks, and he explained that the Claimant needed to be able to demonstrate a re-thread and his ability to drive the boom truck.

40. The notes record that the Claimant asked what would happen if his eye problem was not addressed, to which Mr Thomas replied that, "*they would cross that bridge when they came to it*", and that the Claimant needed to focus on getting his eyesight corrected.

41. Following that meeting Mr Knapp undertook further probation assessments on 6 November 2023 and 4 December 2023 in which he made the same comments as he had in October.

42. The Claimant indicated in his evidence, which I saw no reason to doubt, that Mr Knapp regularly asked him what progress had been made in relation to arranging the operation, and that he, the Claimant, regularly telephoned to try and find out when the required operation would take place. As I have noted, the Claimant was due to see a consultant on 16 October 2023, and did indeed see a consultant on that date, following which he was placed on a waiting list for the operation.

43. The Claimant also indicated in his evidence, and I again saw no reason to doubt it, that he asked the consultant about paying for the operation privately, but was told that he was already at the top of the waiting list barring emergencies, and that going private would not lead to any earlier treatment. He did not therefore pursue private treatment any further. I noted that the Claimant's evidence on that was consistent with his comment to Mr Thomas on 16 January 2024, recorded in the notes of that meeting, that he had been calling the hospital in December and January, and that he was first on the list with only emergencies in front of him.

44. That meeting on 16 January 2024 was arranged by Ms Mason, by way of a letter to the Claimant on 11 January 2024. In that, she noted that, as the Claimant was no doubt aware, his continued employment in the role of Sewer/Driver was subject to satisfactory completion of his probationary period, but that, despite transferring to the role in July 2023, his probation had been extended on more than one occasion due to his inability to drive

and re-thread due to his poor sight. Ms Mason noted that, despite help, support and guidance during this time the Claimant was still failing to make (I presume she meant "take") positive steps to rectify that issue, and that in order to discuss the matter further she had arranged a probationary review meeting on 16 January at 4.00pm with herself and Mr Thomas. The Claimant was reminded of his statutory right to be accompanied by a Union representative, and was advised that an outcome of the meeting could be the termination of his employment. I noted that that was the first indication that anyone had formally raised with the Claimant that he could potentially be dismissed in these circumstances.

45. The day before the meeting, 15 January 2024, the Claimant had finally been given the date for his operation, which was to be on 6 February 2024, some three weeks away. During the meeting, Ms Mason queried with the Claimant, when he told her about that, as to why he had waited until the "*11th hour*", and why he had not contacted Westfield Health, and the Claimant answered in the ways I have already described at paragraph 43 above.

46. The notes of the meeting also record Mr Thomas stating that he had to be fair to everyone. and had to "*stick by the rules*", and that he had had a number of occasions where individuals had lost their jobs. That appeared to me to be very much the tenor of his evidence before me, which was that only one probation extension was allowed by the Respondent, and that, on two other occasions, he had dismissed employees for failing probation. He confirmed, in his oral evidence, in respect of those however, that neither involved health issues, that one was a completely new starter, and that the other was someone who had applied for a promotion.

47. After an adjournment, Mr Thomas confirmed that he was terminating the Claimant's employment subject to payment in lieu of notice. Mr Thomas confirmed his decision in a letter dated 17 January 2024, in which he noted that the following matters had been taken into consideration when deciding to terminate the Claimant's employment. They were:

    - Failure to address the Claimant's sight issue prior to transferring to Tufting in July 2023
    - Despite the Claimant's admittance to being fully aware that he was unable to see sufficiently, the Company allowed him to transfer to the Backing plant with temporary adjustments
    - Failure to progress a privately funded appointment, despite agreeing to do so.
    - Failure to act despite numerous reminders of probationary reviews and meetings
    - Continued employment was impossible as the Claimant could not fulfil the terms of his employment as a Sewer/Driver.

Mr Thomas also reminded the Claimant of his right to appeal to Mr Collins.

48. The Claimant did then appeal the same day, noting that he wished to appeal the termination of his employment. He noted that, on 16 January 2024,he presented the appointment letter of the operation that was due to happen on 6 February. He stated that he believed he had taken every step possible to make his health improve and to rectify his temporary poor eyesight in order to fulfil his role. He noted that he was thankful to the company for giving him time and accommodating him whilst on the NHS waiting list, but that unfortunately he could not make it go any quicker. He noted that he had spoken to his consultant on more than one occasion about going private, but had been advised not to do so as the waiting time was practically the same. He concluded by saying that as he was close to surgery he believed that it was the wrong decision to let him go over a health issue beyond his control that was being rectified.

49. The appeal meeting with Mr Collins took place on 22 January 2024. The notes of the meeting indicate that Mr Collins was focused on seeing evidence of what the Claimant had done to resolve his health condition which had caused him to fail his probation. The meeting concluded with a direction that the Claimant was to provide evidence of what had happened, and then Mr Collins would make his decision.

50. The Claimant then, on 23 January 2024, forwarded various emails to Mr Collins relating to his medical appointments. One of those emails was an email that had been sent to the Claimant on 18 January 2024, noting that his appointment on 6 February 2024had been cancelled.

51. The Claimant's initial evidence was that he had not seen that email until after the meeting on 22 January 2024, but he then indicated that, whilst he had seen the email on 18 January 2024,he had not fully read it until 23 January 2024. He noted that the start of the email was the same as the emails he had received arranging the appointment, and that he had not scrolled down further on his phone to see what was underneath.

52. My comparison of those emails showed that the format of them was indeed the same. The email the Claimant received on 17 January 2024 confirming his appointment had a blue block at the top stating "*Your appointment*", followed by a section confirming the location, date and time, and then the text noting the appointment. The email the Claimant received on 18 January 2024 cancelling the appointment had identical top sections in blue stating "*Your appointment*", and then a section confirming the location, date and time. It was only below that that the indication of the cancellation could be seen.

53. Mr Collins replied to the Claimant acknowledging the emails that he had sent him, and flagging up the fact that the cancellation appeared to have occurred before the appeal meeting, and that the Claimant had failed to mention it. The Claimant replied, noting that on 21 January 2024, he had opened an email stating that the operation had been cancelled, and had sent it to Mr Collins as soon as he had found it. I presumed from the Claimant's comment about sending it as soon as he had found it that he meant to say 23 January and not 21 January.

54. Mr Collins forwarded the Claimant's reply to Ms Mason, who noted in reply that she thought that there was some "*fraudulent info*" there. i.e. in the Claimant's comments regarding the cancellation.

55. Mr Collins then concluded the appeal by writing to the Claimant on 26 January 2024 with his decision. In that, Mr Collins noted that there had been an identification of shortcomings or areas where the Claimant had been failing, and that the Claimant's supervisor and manager had continued to support the Claimant and had given him time to resolve the issue surrounding his decision, extending his contract by several months, and yet he had been unable to get the issue brought to a timely and satisfactory conclusion.

56. Mr Collins noted therefore, that he would not overturn the decision made to terminate the Claimant's contract, on the basis of the Claimant being "*unable (not unwilling) to successfully complete [his] probation*". He commented that the decision was fair and followed the Respondent's agreed process and rules, agreed in conjunction with the Union.

57. He further noted that moving to another role in another department was not an option, as the Claimant's eyesight would continue to be a stumbling block, and that there was no definite date when the Claimant's eyesight would be at a level that allowed him to do a role with the Respondent, and that, unfortunately, the Respondent could not rely on the Claimant receiving medical support in a timely manner.

58. Mr Collins also noted his disappointment that the Claimant had failed to be open about the cancellation of the operation planned for 6 February 2024, noting that, "*hiding this wasn't a good idea*", but also noting that the Claimant did, later in the week, share the cancellation email that he had received.

59. Mr Collins then went on to say that he would be prepared to allow the Claimant to return via an agency as a Tufting Operator to train once the Claimant's eyesight had been restored, but that again would be subject to successfully completing a probation period.

60. Whilst not directly relevant to the fairness of the Respondent's decision to bring the Claimant's employment to an end overall, I did note the issue that Mr Collins had identified there regarding the information provided about the cancellation of the operation. In my view, whilst the Claimant clearly had received and seen the email cancelling the appointment prior to the appeal meeting, it seemed clear to me that he had not fully appreciated its content. Had there been, to use Ms Mason's words, an element of fraud involved, then it would have been a very stupid thing for the Claimant to have done to have sent the cancellation appointment later, when it clearly showed that it had been sent to him prior to the meeting. Had he intended to defraud, he would no doubt just have sent the appointment letter.

61. The Claimant's employment therefore ended with effect from 16 January 2024, the date of the dismissal decision of Mr Thomas.

62. The Claimant ultimately had the cataract operation on 11 April 2024. Prior to that, he attended his local job centre to search for work, but, after explaining that he was awaiting surgery and was suffering from a cataract, he was told that he should not make any job applications whilst not 100% fit, and should apply for Employment Support Allowance (ESA"). The Claimant was then told that he could not apply for ESA without a Fit Note, and he then obtained Fit Notes on 2 February, 2 March, 2 April and 1 May 2024, in each case for a month at a time.

63. Following the operation on 11 April 2024, the Claimant was told that it would take two weeks for his eye to heal, but was advised that, due to the nature of the role he did, he should not work for six weeks in order not to get dust or debris in his eye. That would have left him effectively fit to undertake work from the latter part of May 2024, his Fit Note expiring on 31 May 2024.

64. The Claimant confirmed however that he had not sought alternative work at that point, as, from 1 June 2024, he had been his mother's full-time carer. He confirmed in his evidence that that had arisen following a request from those treating his mother. He further explained that this was really down to his availability due to being out of work, and that, had he still been in work with the Respondent, he would have stayed, and other family members and/or paid carers would have been engaged to look after his mother.

65. The only other findings relevant for me to note are that, within the bundle, the Respondent included information regarding five vacancies in the local area, as of 5 July 2024, for production operators or machine operators, and that also included in the bundle was a table showing that eight employees made redundant by the Respondent from the Blaenau site in summer 2023 were in alternative employment as at 1 July 2024.

Conclusions

66. Applying my findings of fact and the applicable legal principles to the issues I had to decide, my conclusions were as follows.

67. First, with regard to the reason for dismissal, I was satisfied that capability was indeed the reason, noting the definition of capability in Section 98(3)(a) ERA. I noted that Mr Thomas' dismissal letter referred to the decision arising from the meeting held to discuss the Claimant's failure to reach the expected standards to successfully complete his probation period, and that the Respondent's Grounds of Resistance at paragraph 27 stated that the Claimant failed to demonstrate his ability to perform work of the kind which he was employed to do, and accordingly failed his probation period and was dismissed for capability.

68. With regard to assessing whether dismissal for that reason was fair in all the circumstances I noted the two-stage test suggested by the Court of Appeal in ***Alidair -v- Taylor***, and I was satisfied that the Respondent had honestly believed that the Claimant was incompetent or unsuitable for his job. However, I was not satisfied the Respondent's grounds for that belief were reasonable.

69. I considered that the Respondent had unreasonably focused on, indeed I would go as far as to say had become unreasonably fixated on, the Claimant being in probation in relation to his role. As I have noted, the Respondent did not appear to have included a probation period in the Claimant's initially transferred role at the Pen-y-Fan site, even though all the indications were that that was materially more different to the role the Claimant had undertaken in Blaenau. It was however clearly included in the document issued to the Claimant relating to the Sewer/Driver role. Whilst clearly included however, it did not go beyond that bare statement, and no discussion took place with the Claimant that his job might be on the line were he not to complete the probation period successfully until his invitation to the meeting in January 2024. Indeed, when the Claimant, on 9 October 2023, raised the prospect of what would happen if his eye problem was not addressed, he was told by Mr Thomas that, "*they would cross that bridge when they came to it*". Ultimately, that did not happen.

70. In the event, the Claimant did not complete the probation period successfully, but, as long as the Claimant continued to suffer from his cataract, it was impossible for him to do so. It was common ground between the parties that the Claimant could not drive the boom truck, a regular part of his job, and could not undertake a re-thread, which whilst not a regular occurrence, was a requirement from time to time.

71. Whilst regular review meetings were held with the Claimant during his time in the Backing plant, monthly with Mr Knapp and the formal three-month review with Mr Thomas, those reviews were essentially meaningless, as they simply recorded that the Claimant had not been fully trained, but he could not be fully trained due to his eye condition.

72. In my view, had the Respondent been dealing with a new starter, i.e. someone within the first few months of their employment, its focus on the Claimant's fundamental inability to do the full range of the role could potentially have been justified. However, the Respondent appeared to lose sight of the fact that the Claimant was a fairly long-serving employee, having been employed for some six years, during which no issues regarding his performance had been raised. The Respondent also appeared to lose sight of the fact that it was only the Claimant's ill health that was preventing him from undertaking all of the elements of his role.

73. In that regard, I noted Mr Collins' comment in his witness statement that the Backing Plant role was similar to the one the Claimant had undertaken in the Tiling Plant, Mr Knapp's comment that he had no doubt that the Claimant would complete his training when he had better vision, and Mr Thomas' comment that he had no apprehension that the Claimant would not complete his probation once his vision problem had been addressed.

74. All that was also in a context where the Claimant was at work and, to the extent he was able, was performing well at all times. Mr Thomas confirmed that he had had no material complaints from others about the limitations on the work the Claimant could do, and the only concern advanced about re-threads was in the context of situations where the usual three-person team was not operating.

75. In my view, taking those matters into account, a reasonable employer would have viewed the Claimant's position much more from a medical perspective. In that regard, one of Mr Thomas' comments in his evidence was telling, in that he confirmed that, had the Claimant transferred earlier and already passed his probation before his eyesight difficulty arose, he would have been treated differently by way of a referral to Occupational Health.

76. Had the Claimant not been in work at all due to his eye condition then, as noted by the Court of Session in ***BS -v- Dundee City Council*** **[2014] IRLR 131**, various factors would have needed to have been considered, and to have been balanced, before a dismissal on grounds of ill health would have been considered to have been fair, including; the nature of the illness, the length of the absence, the ability of other staff to cover, and the cost of the impact of the absence on the organisation, all leading to the fundamental

question of whether the employer could reasonably have been expected to wait longer for the employee to return.

77. Whilst this was a capability dismissal rather than an ill health dismissal, in my view, in the circumstances that prevailed, the Respondent should reasonably have had those matters in mind in the Claimant's case. Had it done so, it would have assessed that the issue was of relatively short-term duration. At the point of dismissal in January 2024, it was understood that it would be resolved by the end of March 2024, and, even allowing for the cancellation of the operation, was in fact resolved by the end of May 2024.

78. All that was, as I have noted, in the context of the Claimant being able to work, and being able to undertake a large proportion of his duties, in circumstances where any limitations on his ability to undertake the full range of his work did not appear to materially impact on the Claimant's colleagues or on the Respondent generally.

79. In those circumstances, notwithstanding that the Claimant had not passed his probation, as I have noted, as things stood, it was literally and physically impossible for him to have passed his probation. Had the Respondent acted reasonably, it would, in my view, simply have extended the period until the Claimant was fully fit, continuing to manage the work in the way it had been managed over the previous few months. There seemed then little doubt that, had it done so, the Claimant would have passed his probation, and would still have been in work for the Respondent.

80. My overall conclusion was therefore that the Claimant had been unfairly dismissed.

Remedy

Basic Award

81. A Schedule of Loss produced on behalf of the Claimant was in the bundle, and the Respondent did not challenge the core elements of it regarding the Claimant's gross and net pay, continuous service, and receipt of regular overtime, a weekly shift allowance and a monthly clocking-in bonus. However, elements of the Schedule were incorrect or lacking.

82. In terms of the basic award, all the Claimant's service was over the age of 41 and therefore a multiplier of 1.5 weeks' pay would need to be applied, whereas a multiplier of 1 was used for part of the calculation.

83. It also did not seem to me that the underlying figure of a week's pay for these purposes was correctly assessed. The calculation was done by reference to the number of weeks' pay multiplied by £472.34, which was

noted as the gross weekly basic pay. However, the Schedule then noted that, in fact, on average the Claimant's weekly pay was higher, by reference to overtime, shift allowance and the clocking in bonus.

84. The ERA with regard to a "week's pay" does allow for those matters to be factored in as well, and I considered it would be appropriate to factor those in for these purposes.

85. Adding those elements, together with the pension contribution, which the case of ***Sunderland University -v- Drossou*** **(UKEAT/0341/16)** indicated should also be taken into account for this purpose, led to a weekly pay figure, by my calculation, of £557.74 on a gross basis. That led to the basic award multiplication being 9 x £557.74 leading to a total of £5,019.66.

Compensatory Award

86. With regard to the compensatory award, I noted that the Claimant had been paid in lieu of notice, which covered the period up to 27 February 2024. It would not therefore be appropriate to make any form of order in relation to the compensatory award covering that period as that would involve double payment.

87. The Claimant was then not in work, or indeed seeking work, through to the end of May 2024, and I considered that it was reasonable for him not to seek work at that time, in light of the operation that he was waiting for, and the information he had received from the Benefits Agency with regard to claiming ESA. That involved a period of some 13 weeks.

88. In terms then of the net award, having mentioned what I considered the gross weekly sum to be, I calculated the net weekly sum, taking into account the regular overtime, shift allowance, clocking-in bonus and pension amounts, to be £483.20 per week, so the amount for that 13-week period would be £6,281.60.

89. In terms of losses beyond that point, I noted that the Claimant was not currently looking for work, and instead is acting as his mother's full time carer. I also noted that the Claimant is of the view that he would not be doing that if still employed by the Respondent, and would still be in receipt of income from the Respondent.

90. However, in my view, the Claimant's current decision not to look for alternative employment is a choice, and it would be reasonable to expect him to mitigate his losses by looking for other work. To put that another way, it is not, in my view, reasonable for the Respondent to be expected to compensate the Claimant for his choice, which has led to him not being in receipt of employment income.

91. In my view therefore, from roughly the end of May 2024, the Claimant would have been in a position to look for alternative employment. Taking into account the jobs identified by the Respondent in the bundle, the Claimant's experience, and the positive reports of his performance, assessing the matter as best I could, I considered that had the Claimant started to search for jobs towards the end of May when fully fit, it would be likely that he would have been able to obtain a similarly remunerated alternative position within a further 12 weeks. I therefore limited future loss to that period.

92. That therefore meant that, in addition to the compensatory award covering the period up to the end of May 2024, which I have identified as £6,281.60, there was a further element of the compensatory award for the period of losses from that point up to the date of the hearing of £5,798.40. Adding finally a sum of £300.00 in respect of the loss of statutory rights, as set out in the Schedule of Loss, that led to a total compensatory award of £12,380.00, and a total overall of £17,399.66.

93. I did not consider it appropriate to make any adjustment to the compensatory award as urged by the Respondent. I did not see any indication that the Claimant's employment would have ended had the Respondent acted procedurally differently, I did not, in fact, consider that the Respondent acted insufficiently procedurally, I just considered that it got its substantive decision wrong.

94. Similarly, with regard to contributory conduct, I did not consider, taking into account the Guidance of the Court of Appeal in ***Nelson -v- BBC (No 2)***, that there was any sufficiently blameworthy or culpable conduct on the part of the Claimant which would have justified his dismissal in the circumstances. I did not therefore consider that it would be appropriate to reduce the compensatory award by any amount.

95. For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996, the Grand Total is £17,099.66, the Prescribed Element is £12,080.00, the period of the Prescribed Element is 16 January 2024 to 23 August 2024, and the excess of the Grand Total over the Prescribed Element is £5,019.66.

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Employment Judge S Jenkins
Dated: 24 September 2024

REASONS SENT TO THE PARTIES ON 25 September 2024

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche