



EMPLOYMENT TRIBUNALS

Claimant: Mr Dale Knights

Respondent: John Lewis plc

Heard at: Watford Employment Tribunal

On: 1, 2 and 15 May 2025

Before: Judge Bartlett, Mr Bury and Dr von Maydell-Koch

RESERVED JUDGMENT

1. The complaint of unfair dismissal is not well-founded and is dismissed. The claimant was not unfairly dismissed.
2. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.
3. The complaint of unfavourable treatment because of something arising in consequence of disability is not well-founded and is dismissed.

REASONS

Background

4. The claimant was employed by the respondent from 26 July 2020 until his dismissal on 8 July 2024. The claimant was initially employed as a supermarket assistant driver and later, due to ill health, his role was changed to Supermarket Assistant.

The Issues

5. A case management hearing took place on 3 February 2025 at which a list of issues was agreed. At the start of the hearing Ms Meredith confirmed that the respondent no longer disputed that the claimant was disabled as a result of heart disease/angina and neither did it dispute knowledge. Otherwise the list of issues remain as per that draft and is as set out below.

Unfair dismissal

4.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was ill health capability.

4.2 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

4.3 Issues relating to compliance with the ACAS Code of Conduct, Polkey and contribution may arise.

Disability

4.4 Was the claimant a disabled person in accordance with the Equality Act 2010 ("EQA") at all relevant times because of the following condition(s):?

4.4.1 Heart disease/angina

4.4.2 Crohn's disease.

4.5 The respondent accepts that at all material times the claimant was disabled within the meaning of the Equality Act 2010 by reason of Crohn's disease and that the respondent had knowledge of the same.

4.6 The claimant confirmed today that he did not rely upon sleep apnoea and mental health.

EQA, section 15: discrimination arising from disability

4.7 Did the following thing arise in consequence of the claimant's disability:

4.7.1 The claimant's sickness absence.

4.8 Did the respondent treat the claimant unfavourably as follows:

4.8.1 Dismissing the claimant?

4.9 Did the respondent dismiss the claimant because of that sickness absence?

4.10 If so, has the respondent shown that dismissing the claimant was a proportionate means of achieving a legitimate aim? The respondent relies on the following as its legitimate aim(s):

(Taken from paragraph 35 of the response)

- 4.10.1 Ensuring operational effectiveness and efficiency of the respondent's business.
- 4.10.2 Ensuring the respondent's ability to meet customer demand.
- 4.10.3 Ensuring a sufficient and reliable workforce.
- 4.10.4 Enabling workforce and resource planning.
- 4.10.5 Enabling a fair allocation of work among the workforce.
- 4.10.6 Encouraging satisfactory attendance among the respondent's workforce.
- 4.10.7 Ensuring appropriate use of the respondent's resources.

Reasonable adjustments: EQA, sections 20 & 21

4.11 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

- 4.11.1 A trigger of 3% sickness absence to be dealt with under the sickness policy.

4.12 Did such a PCP put the claimant at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time, in that: he was more likely to reach that trigger level of attendance?

4.13 If so, did the respondent know or could it reasonably have been expected to know the claimant was likely to be placed at any such disadvantage?

4.14 If so, were there steps that were not taken that could have been taken by the respondent to avoid any such disadvantage? The burden of proof does not lie on the claimant, however it is helpful to know what steps the claimant alleges should have been taken and they are identified as follows:

- 4.14.1 Disregarding disability related absence when applying the sickness policy.

4.15 If so, would it have been reasonable for the respondent to have to take those steps at any relevant time?

4.16 The respondent contends that it made reasonable adjustments, namely:

- 4.16.1 Redeploying the claimant to work as a supermarket assistant.
- 4.16.2 Allowing the claimant to take regular, short breaks as required.
- 4.16.3 Redeploying the claimant away from cold fridges.
- 4.16.4 Agreeing the claimant's request to reduce his hours.

Remedy

4.17 If the claimant succeeds, in whole or part, the Tribunal will be

concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

Law

Unfair Dismissal

6. In *Hammersmith LBC v Keable* UKEAT/2021/2019-00733 the Employment Appeals Tribunal set out a clear explanation about the law on unfair dismissal:

68. The right not to be unfairly dismissed is set out in s.94 of the Employment Rights Act 1996 (ERA 1996). It is currently afforded to employees with two or more years of continuous service with an employer.

69. The fairness of a dismissal is determined in accordance with the principles set out in s.98 of the ERA 1996. An employer bears the burden of establishing that the dismissal is for a potentially fair reason within the meaning of s.98(2) ERA 1996, and then, if that is established, the Tribunal will determine whether that dismissal was fair or unfair, (having regard to the reason shown by the employer). That determination will depend upon “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, shall be determined in accordance with equity and the substantial merits of the case”. The critical question, therefore, is whether, having regard to those matters, the employer acted reasonably or not in treating the particular, potentially fair reason, as a sufficient reason for dismissing a particular employee.

*70. It is implicit within those words that the question the Tribunal must address, is not whether the Tribunal members themselves would have made the decision to dismiss the employee; they must not simply substitute their view for that of the employer (*Morgan v Electrolux Ltd* [1991] IRLR 89 CA; *London Ambulance Service NHS Trust v Small* [2009] IRLR 563, CA). Over the years, Tribunals have been reminded that they must judge the standard of a fair dismissal, not by that which they would, or might have done, but by reference to the options open to a reasonable employer, in other words by an objective standard. A dismissal is only to be held to be unfair if it was outside the range of reasonable responses open to a reasonable employer. This assessment, of whether the decision to dismiss this particular employee in respect of a particular matter or issue, came within the range of reasonable responses open to a reasonable employer lies at the heart of the law relating to unfair dismissal; it is the litmus test by which each stage of the dismissal process and the decision to dismiss is to be judged. *Sainsbury’s Supermarkets v Hitt* [2003] IRLR 23, particularly para. 30.*

7. This case concerns an ill health capability dismissal. *Phillips J* in *Spencer v Paragon Wallpapers Ltd* sets out that, there are a variety of factors to be weighed up in considering whether the decision to dismiss is reasonable under ERA 1996 s 98(4). These include:

- 7.1. the nature of the illness and the job;
 - 7.2. the applicability and clarity of an employer's ill health policy;
 - 7.3. the needs and resources of the employer;
 - 7.4. the effect on other employees;
 - 7.5. the likely duration of the illness;
 - 7.6. how the illness was caused;
 - 7.7. the effect of sick-pay and permanent health insurance schemes;
 - 7.8. alternative employment; and
 - 7.9. length of service.
8. The weight to be given to particular factors will vary from situation to situation.

S15, Equality Act, Discrimination arising from disability

9. S15 of the Equality Act 2010 sets out the following:
- (1) A person (A) discriminates against a disabled person (B) if—*
- (a) A treats B unfavourably because of something arising in consequence of B's disability, and*
- (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.*
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.*

Reasonable Adjustments

10. S20 of the Equality Act sets out the following:
- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.*
- (2) The duty comprises the following three requirements.*
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage...*
11. We were referred to the case of *McAllister v HMRC* [2022] EAT 87 which is decision based on reasonably similar circumstances to those of the claimant. For example, in that case the claimant was dismissed as a result of absences from work arising in consequence of his disability. The EAT found that the tribunal's decision that the dismissal was a proportionate means of achieving an illegitimate aim to ensure staff are capable of demonstrating satisfactory attendance and a good standard of attendance was open to it.

Burden and Standard of Proof in discrimination cases

12. S136 of the Equality Act 2010 sets out the burden of proof which applies to discrimination cases:

“(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

13. In *Igen Ltd v Wong* the Court of Appeal approved the guidance given in *Barton v Investec Securities Ltd* [2003] IRLR 332 concerning the burden of proof in discrimination cases which is that:

“(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as “such facts”.

(2) If the claimant does not prove such facts he or she will fail....

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.”

14.3. In *Madarassy v Nomura International plc* 2007 ICR 867, CA Lord Justice Mummery stated:

“The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”

Findings of Fact

15. The facts in this case were not largely in dispute. We make the findings of fact set out below.

16. The claimant has a number of health conditions including the disabilities

identified above. This resulted in a considerable number of short term unpredictable absences from around November 2022 onwards.

17. However, throughout the claimants employment from 2020 onwards he had suffered from significant ill health which resulted in significant absences. He had originally been employed as a driver as a result of ill health and he had temporarily be reassigned to be a supermarket assistant. However, after several years it was accepted that he could no longer be a driver and he was permanently reassigned as a supermarket assistant.
18. Around January 2024 the respondent underwent an alignment process. This was prompted by the organization becoming unprofitable. Some of the impacts of this were a change in staff requirements in particular as to when staff were required, staff that left were not replaced and pay budgets for individual sites, which had the effect of taking out spare capacity in respect of staff, where introduced. This was relevant to the claimant's situation as it concerned the ability of the respondent to tolerate absence. This was part of the background.
19. In February 2023 Mr Jim Bradley joined the branch at which the claimant worked as a Team Manager. As the claimant had a high rate of absences at this time and frequent absences, Mr Bradley carried out return to work meetings with the claimant. There are records that such meetings had been carried out before Mr Bradley joined by a Mr Knock.
20. The claimant was referred to Occupational Health several times, for these purposes the relevant dates were in September 2023 and January 2024. The September 2023 referral confirmed that the claimant was not fit to return to driving and suggested "*look at reducing the exposure in the chilled area*". The January 2024 OH outcome stated that his absence level was 15.8%, he is prone to flare ups which are unpredictable and it was management decision as to the tolerance of the level of absence.
21. At one of the return to working meetings in May 2024 the claimant's continued high absence levels were discussed and Mr Bradley explained that he would be contacting PPA (an internal HR department of the respondent) to discuss starting a fitness to work procedure. One measure discussed with the claimant was dropping one day of work. The claimant would only agree to drop a weekend shift however the respondent required partners to work weekends and would only agree to him dropping a weekday shift. The respondent made an offer that he could swap the Saturday shift for a Sunday shift but the claimant refused that offer.
22. On 17 June 2024 Mr Bradley called the claimant into a meeting which was an investigation into his absences. Mr Bradley said it was an informal meeting but notes were taken and a separate note taker attended. We consider that this was a formal meeting. It was at this meeting that Mr Bradley asked if there were any other roles that could reduce his absence and the claimant said maybe remote working. Mr Bradley said he could explore that option and the claimant said "if you are rough, you are rough...". This was taken as the claimant not being genuinely interested.

23. On 8 July 2024 Mr Bradley held a meeting with the claimant at which the claimant was dismissed. At this time his absence level was 16.89%.
24. There is no real dispute about the level of the claimant's absence. In January 2024 it was 15.8%, it went down slightly to around 14% and by July 2024 it was 16.89%. We find that these figures are similar and in the same region and during that time they did not change substantially.
25. The respondent adopted a rolling 12 month period in relation to assessing absences. The claimant repeatedly stated that his absence levels were affected by absence for a knee replacement and a heart attack in 2022. We note that the claimant returned to work on 8 December 2022 and this was the last of his absences related to those matters and therefore by 9 December 2023 these two absences did not have any impact on his absence figures thereafter and not at the times we are considering.
26. The respondent had a short-term sickness policy which triggered disciplinary action at a 3% threshold.
27. It had a long-term absence policy which is stated as applying to absences related to an underlying medical condition.
28. We find that the claimant was dealt with under the long-term sickness absence policy. This sets out:
- If some circumstances where your condition continues to significantly impact your ability to fulfil your role, or you haven't been able to return to work, your manager may have no other option but to consider dismissing you due to capability (ill health). This is referred to as the Fitness to Work process.
29. We find that this (the long term sickness absence policy) is what was applied to the claimant.
30. We find that during his employment with the respondent various adjustments were made to the claimant's work:
- 30.1. He been given a new role from a driver and became a Supermarket Assistant;
 - 30.2. he was not required to work in ambient chilled areas but we accept many areas of the store may have been cold, such as tills near the door, operating the cardboard baler near the door, etc.
 - 30.3. His hours were reduced on various occasions.
 - 30.4. He was reminded to take breaks as required.

We find that the relatively persistent level of absences indicated that none of these had a meaningful impact on his absence levels.

31. The respondent concluded that there was no realistic prospect that his absence level would reduce. This is also what was set out in the OH report. We find that this was a reasonable conclusion on the facts: the

claimant's conditions were long term, there was no real prospect of there being a material reduction in his absences and they were likely to remain unpredictable in their nature.

32. We consider part of the claimant's case was that Mr Bradley was out to get him and that factors other than his health were relevant to the decision to dismiss. These were related to comments that there were Facebook pictures of him at a pub when he was off sick and that he worked at his daughter's market stall. We find that though there is some mention of these in the documentation they played no role in the decision to dismiss the claimant. There is substantial evidence of Mr Bradley referring the claimant to OH several times and seeking advice on how to deal with the situation from the respondent's HR and people management departments which were entirely independent from Mr Bradley. The advice from HR makes no mention of these issues and instead focuses on the actual absences. We found that Mr Bradley applied the respondent's policies appropriately without animus to the claimant.
33. The respondent gave the claimant the right of appeal which he exercised. The appeal meeting was held on 22 July 2024 via telephone following an invitation that was sent to him on 11 July 2024. The claimant was accompanied by his daughter, the appeal was heard by Rita Rodrigues who we accept had no prior knowledge or involvement with the claimant or the situation. We find that Ms Rodrigues was independent. Ms Rodrigues interviewed Mr Bradley, reviewed the relevant documentation and ultimately concluded that the absence levels "*were unsustainable and put pressure on the branch operation and your colleagues. I also agree that it was likely, having considered all of the evidence, that you would not be able to achieve and sustain a reasonable level of attendance due to your poor health*". We find that there was sufficient evidence to make that conclusion and that this was a reasonable response. We conclude from the note of the meeting with the claimant that he was given an opportunity to raise all the issues he wanted to in relation to the decision to dismiss. It is recorded that he raised concerns about Mr Bradley not acting fairly towards him, disability related absences being considered and the possibility of further adjustments being made. We find that Ms Rodrigues considered all of those matters.

Unfair dismissal

34. We find the principal reason for dismissal was the claimant's capability to perform his role due to ill health and that this is a potentially fair reason under s98(2)(a) of the ERA. The dismissal letter and the process leading up to the dismissal are all focused on the claimant's absence which are as a result of ill health.
35. However, we must consider if this was a fair response and in particular if the respondent acted within the band of reasonable responses.
36. We have considered the factors identified in *Spencer v Paragon Wallpapers Ltd* and all the circumstances of the case.

37. We have found above that the claimant's illnesses were long term and produced unpredictable absences which created difficulties in finding cover at short notice (on the day). Despite several reasonable adjustments, the claimant's absences remained relatively static and there was no real prospect that they would reduce or the pattern of absence change.
38. We have set out above the respondent's short and long term sickness policies. We find that they were clear and that the long term sickness absence policy was applied to the claimant.
39. We find that the on the day and short notice of the absences created difficulties for the respondent. Often managers had to carry out the claimant's work rather than their own duties and this created problems of when that work could be done.
40. The respondent relied on the claimant's absences having a negative effect on colleagues in that there was a negative affect on moral. Mr Bradley gave evidence that other employees expressed disgruntlement at the claimant's absences and we found that had the ring of truth. We accept that evidence.
41. The respondent also relied on the claim that the claimant's absences adversely affected the customer experience in their store. We consider that this was a reasonable concern to take into account given the nature of the respondent's business. We accept that the absences of a staff member on the shop floor (who carried out a more customer focused role as he could not do shelf stacking due to his disabilities) did have an adverse effect on customer experience.
42. The claimant's disabilities were for causes entirely unconnected with his work for the respondent.
43. The claimant would not have been eligible for permanent health insurance as he did not meet several criteria including age and length of absences.
44. Various reasonable adjustments had already been made and there was no other role to offer him. As set out above he was offered another day off to reduce his hours.
45. In these circumstances, we find that the respondent's decision to dismiss was within the band of reasonable responses.
46. As set out below and for those reasons, we do not consider that the dismissal was tainted by disability discrimination in anyway.
47. We have considered whether the process of the dismissal was fair. We have concluded that a fair process was followed. We had some concerns that the claimant had not been notified in advance of the investigation meeting which took place on 17 June 2024. We do not consider that a mention in a back to work meeting of an investigation at some unspecified date is sufficient. However, we consider that the claimant was properly

notified of the dismissal meeting and any failures were remedied by the appeal process.

48. Therefore, we find that the dismissal was fair in all respects.

49. The claimant's claim for unfair dismissal fails.

EQA, section 15: discrimination arising from disability

50. We find that the claimant's sickness absence was a thing arising in consequence of the claimant's disability. We recognise that some of the absence recorded on the respondent system included minor illness which indicated it was not referable to any of his disabilities. However, the respondent disputed this and in oral evidence said it all related to his disabilities however it was recorded. We accept that almost all of the sickness absence was because of his disabilities.

51. We find that the dismissal of the claimant was something unfavourable and that the dismissal of the claimant was because of that sickness absence.

52. Therefore, we must consider if the respondent has shown that dismissing the claimant was a proportionate means of achieving a legitimate aim.

53. The respondent relied on 7 legitimate aims. These are:

Ensuring operational effectiveness and efficiency of the respondent's business.

Ensuring the respondent's ability to meet customer demand.

Ensuring a sufficient and reliable workforce.

Enabling workforce and resource planning.

Enabling a fair allocation of work among the workforce.

Encouraging satisfactory attendance among the respondent's workforce.

Ensuring appropriate use of the respondent's resources

54. We find that these are all interrelated legitimate aims which are legal and not discriminatory in themselves. The aims were rationally connected to the dismissal and the dismissal was capable of achieving those aims. We have taken the aims collectively as they are interdependent and some seem to overlap very extensively if they are not a duplication. It is well established in case law that Aim 3 - ensuring a sufficient and reliable work force - is a legitimate aim. We consider that aim seven adds little more to aim one.

55. We have made findings of fact above which are repeated here. In particular, we record that we have found that there was an impact on team morale, that there was an impact on management time, that the short notice of the absences created difficulties for workforce and resource planning and allocation of work fairly amongst the workforce. We have made findings above about the impact on customer experience and we consider that those findings are also applicable to meeting customer demands. We consider that to some extent the impact of the claimant's

short term and short notice absences on the legitimate aims is obvious when his role as a customer facing supermarket consistent is taken into account. We accept that the respondent did not have staffing levels that included having an extra member of staff available to cover duties of another staff member that was off sick. We have set this out in relation to our findings about the realignment process that started in January 2024. As a result of not having spare capacity in staffing we find this created difficulties with the respondent's ability to meet customer demand and in having an operationally effective and efficient business which also includes an appropriate use of the respondent's resources. We have set out elsewhere that the short notice of the absences meant that the respondent was not able to plan to cover them and resulted in an unfair allocation of work among the workforce and that managers had to put their duties to one side to cover the claimants work. The aim of having satisfactory attendance ties into all of these aims. We consider that it is artificial to separate them out as they are so interlinked and interdependent.

56. The question we must then consider is whether dismissal was a proportionate means of achieving those aims. We find that the dismissal was a proportionate means of achieving those aims for the following reasons:

- 56.1. The respondent had tried reasonable adjustments and nothing had materially changed the claimant's absence pattern or levels. As set out above his role had been changed, his duties had been changed, his hours were reduced and the options had reasonably been exhausted. Any suggestion about remote working would not have changed the situation as the claimant would still have experienced the same pattern and level of absences;
- 56.2. The respondent had carried out many return to work meetings over a period of years with the claimant;
- 56.3. Mr Bradley had received advice that he could have started the fitness to work process in January 2024 but he waited until June/July 2024 to start the process;
- 56.4. Ultimately his pattern of absences had a negative effect on the business that the business could no longer accommodate;
- 56.5. Reassigning the claimant to yet another role would not have had an impact on his absence given his disabilities and their long term nature;
- 56.6. We recognise the discriminatory conduct on the claimant which is that he lost his job with the respondent and this is an important consideration.

57. We therefore conclude that the aims could not be achieved by less discriminatory means.

Reasonable adjustments: EQA, sections 20 & 21

58. The claimant said that the PCP was "*A trigger of 3% sickness absence to be dealt with under the sickness policy*".

59. We find that the respondent did not apply this policy to the claimant. This

is the short term sickness absence policy and we have found that the respondent applied the long term sickness absence policy. The respondent did not deal with the claimant under a disciplinary process which is what the short term sickness absence policy requires. The respondent dealt with the claimant under a capability process and we have found that he was dismissed for a capability related reason. At the material times the claimant's absences were around 15% which is clearly much greater than the 3% threshold.

60. As we have found that the PCP was not applied to the claimant, we find that the claimant did not suffer any disadvantage.

61. As set out above the respondent did make a number of reasonable adjustments in any event but they did not have a material impact on his absence level and it was reasonable to conclude in all the circumstances that his absences would not reduce due to the long term nature of his disabilities.

Conclusion

62. We find that the Claimant's claims for unfair dismissal, discrimination arising from disability and reasonable adjustments all fail and are dismissed.

Approved by:

Employment Judge Bartlett

16 May 2025

JUDGMENT SENT TO THE PARTIES ON

12/6/2025

FOR THE TRIBUNAL OFFICE

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