EMPLOYMENT TRIBUNALS

Claimant:	Mr. M Blenkinsop
Respondent:	Asda Stores Limited
Heard at:	Newcastle (by CVP)
On:	12 and 13 November 2024
Before:	Employment Judge Loy (sitting alone)

Representation

Claimant:	In person
Respondent:	Mr Alexander Rozycki, counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the claimant was not unfairly dismissed. The claim therefore fails.

REASONS

Background

1. By a claim form presented on 14 September 2023 the claimant made a claim of unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 (ERA).

2. The claim form as originally presented contained a claim for disability discrimination. That claim was struck out at a preliminary hearing on 8 July 2024. The claimant's applications to amend his claim were denied at that same hearing.

3. In its response form the respondent denied all liability.

Claims and issues

4. The sole claim for the tribunal's determination at this hearing was the claim for unfair dismissal contrary to sections 94 and 98 ERA.

The list of issues

5. A draft list of issues was prepared for this final hearing.

6. In the interests of clarity, the tribunal has slightly re-presented that draft list of issues (without changing its substance) as follows:

Issue 1

What was the reason or principal reason for dismissal?

The respondent says the reason was capability (long term absence) or some other substantial reason.

Capability

Issue 2

If the reason was capability, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant?

The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. The Tribunal will usually decide, in particular, whether:

i. the respondent genuinely believed the claimant was no longer capable of performing his duties;

ii. the respondent adequately consulted the claimant;

iii. the respondent carried out a reasonable investigation, including finding out about the up-to-date medical position;

iv. the respondent could reasonably be expected to wait longer before dismissing the claimant; and

v. the decision to dismiss was within the range of reasonable responses.

Issue 3

Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

Did the respondent or the claimant unreasonably fail to comply with it?

If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?

Some other substantial reason

Issue 4

If the reason was a substantial reason capable of justifying dismissal, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant?

The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

Evidence

7. The tribunal was provided with an agreed bundle of documents of 664 pages to which one additional document (an email of 3 June 2024 from the claimant to the respondent's solicitors) was added during the course of the hearing.

8. The respondent called two witnesses:

   8.1. Mr Robert Cecere, who produced a written witness statement of 61 paragraphs over 13 pages. That statement was accepted into evidence. At the time relevant to these proceedings. Mr Cecere was the General Store Manager at the respondent's Thornaby Superstore. Mr Harrison was cross-examined by the claimant.

   8.2. Mr Shaun Parker, who produced a written witness statement of 29 paragraphs over 6 pages. That statement was accepted into evidence. At the time relevant to these proceedings, Mr Parker was the General Store Manager at the respondent's Boldon Store. The claimant was given the opportunity to cross-examine Parker.

9. The claimant gave evidence on his own behalf. The claimant produced a written witness statement of 5 paragraphs over 1 page. The claimant was cross-examined by Mr Rozycki.

The tribunal's approach to the evidence

10. 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.

11. 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.

12. 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.

13. 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.

The witnesses

14. The tribunal found Mr Cecere to be a truthful and reliable witness. His evidence was also consistent with the written documentation the tribunal had to consider.

15. The tribunal also fully accepted Mr Parker's evidence in his statement which was also consistent with the written documentation. The claimant chose not to cross-examine Mr Parker so to that extent his evidence was not tested as might normally be expected. However, that was a decision the claimant took:

    15.1. with the benefit of having the tribunal process explained to him;

    15.2. after time was given to him to prepare any questions he might wish to put to the respondent's witnesses; and

    15.3. after the importance of putting his own case to the respondent's witnesses had been explained to him.

16. The tribunal had some difficulty with the claimant's evidence.

17. The claimant plainly believed passionately about certain points that were of great importance to him. In particular, the claimant genuinely believed with considerable conviction that he had been badly treated by the respondent's management at the time of and in the aftermath to a road traffic incident on 10 November 2020 when the claimant (to put it neutrally) became involved in a collision with a third party member of the public.

18. It was a feature of both the management and litigation phases of this dispute, that the claimant's position became entrenched. On many occasions the claimant declined to engage with the respondent's many attempts to support and manage his attendance unless the respondent was prepared to enter into a discussion with him about:

    18.1. the violence he said he had suffered at the hands of the third party driver on 10 November 2020;

18.2. providing him with an apology;

18.3. the sole responsibility he said the respondent bore for his anxiety and depression that he said had caused his continuous absence from 10 November 2020 until the date the decision was taken by Mr Cecere to dismiss him on 7 September 2023;

18.4. compensating him for his losses resulting from what he saw as the respondent's actions; and

18.5. having access to management at the respondent that was in a sufficiently senior position to have decision-making authority to have this discussion with him.

19. The result of this entrenchment was that the claimant came to see everything through the lens of his grievances about the road traffic incident of November 2020. In the tribunal's assessment this had the effect of distorting his view of certain of the key events and of the respondent's management's motivation for them. As a consequence, although the tribunal found the claimant a mostly credible witness, it did not always consider his evidence reliable. Where that was the case, the tribunal has set that out in its factual findings and explained why it preferred the evidence of Mr Cecere.

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

Findings of fact

21. Except where it is made clear below, the following factual matters were not in dispute.

22. The respondent is a well-known large retailer.

23. The claimant was directly employed by the respondent from 21 September 2018 as a Home Shopping Delivery Driver operating from the respondent's Washington Store. The claimant entered into a written contract of employment (pages 80-88).

24. The claimant was continuously absent from work from 10 November 2020 until his dismissal which took effect on 6 October 2023.

25. The fit notes submitted by the claimant identified anxiety and depression as the medical basis for the authorised absence. The claimant attributed his medical condition to management of the traffic incident. The tribunal was not provided with any oral or written evidence establishing that attribution beyond the claimant's own assertions and his repeated responses in cross examination reasserting his position.

26. The respondent's position was that, long before the decision to dismiss was taken, its management of the traffic incident and its aftermath had reached

finality. The traffic incident says the respondent is not to the point when it comes to the reason for and fairness of the claimant's dismissal.

2020

The traffic incident of 10 November 2020

27. On 10 November 2020, the claimant was involved in a road incident ('the traffic incident') with a third party car driver while driving the respondent's delivery van during the course of his employment.

28. The claimant strongly contested

    28.1. the apportionment of responsibility for the traffic incident; and

    28.2. the appropriateness of the respondent's management of its aftermath.

29. The claimant's disagreement with the respondent on these issues dominated the claimant's employment from the date of the incident on 10 November 2020 until the respondent's decision of 7 September 2023 to terminate the claimant's employment on notice with effect from 6 October 2023.

30. The claimant commenced a period of sickness absence on 10 December 2020 2020. The claimant did not return to work from that absence before his dismissal with effect from 6 October 2023. That was a continuous period of over 33 months. The claimant's absence was ultimately covered by consecutive fit notes during this period. The reason for absence was stated (or should have been stated) on the fit notes as anxiety and depression.

31. On 11 November 2020, the claimant was suspended from work on account of his involvement in the traffic incident and a concern that he may have been partially at fault for it.

32. On 2 December 2020, the respondent's investigation into the traffic incident concluded. The claimant was asked to attend a disciplinary hearing in the light of that investigation.

2021

33. On 1 July 2021, the claimant raised a first grievance regarding the traffic incident (page 180). Part of that grievance related to Mr Steve Mckenna (General Store Manager, Washington Store) who had by then become involved in the claimant's management.

34. On 6 July 2021, Danielle Nicholls (Customer Trading Manager, Boldon Store) considered the claimant's first grievance. The claimant was invited to attend a meeting on 16 July 2021 to receive the outcome of his grievance. The claimant declined to attend.

35. By a letter of 16 July 2021 (page 181-182), the claimant was informed Ms Nicholls that the outcome of his first grievance was that she was recommending that the

claimant and Mr Mckenna take part in a mediation process and that the disciplinary process should continue once the claimant was fit to participate in it. The claimant appealed against that first grievance outcome.

36. On 12 August 2021, the claimant's appeal against the outcome of his first grievance was considered by Ian Kirkup (People Business Partner). By a letter of the same date (pages 661-664), Mr Kirkup informed the claimant that he was upholding the decision of Ms Nicholls. The claimant was also told that:

'The hearing is now closed, and can I remind you that you have no further right of appeal under our company procedures and this decision is final.'

37. On 24 August 2021, a disciplinary hearing was conducted by Catherine Herkes (Operations Manager, Washington Store) in the claimant's absence to consider his involvement in the traffic incident. The claimant was given a final written warning effective for a period of 12 months (pages 185-187).

38. On 13 September 2021, Alex Smith (Store Manager, Spennymoor Store) considered the claimant's appeal against the disciplinary decision of Ms Herkes of 24 August 2021 to issue a final written warning.

39. By a letter of 27 September 2021 (pages 185-187), Alex Smith informed the claimant that his disciplinary appeal was successful to the extent that the final warning was to be revoked and the lesser sanction of a written warning effective for 6 months was to be substituted in its place.

40. On 12 November 2021, in response to the claimant's indication that he might resign his employment, Vicky Harrison (People Business Partner) responds that she will accept the claimant's resignation if that is what he wants, but that the claimant can also return to his existing job which remains available to him or to any available suitable alternative employment.

41. In an email of 19 November 2021 (page 203), Vicky Harrison offers the claimant the opportunity to bring grievances against Toni Parkinson (the claimant's manager at the time of the traffic incident) and Nick Jackson in connection with the claimant's on-going dissatisfaction with the management of the traffic incident. Ms Harrison describes this as *'the only way for us to move forward'*. Ms Harrison says that she intends to appoint a suitable investigation manager for this purpose.

42. In an email of 22 November 2022 (page 201-202), Vicky Harrison tells the claimant:

'As said previously we will not be offering you any form of compensation.'

43. The claimant gave Vicky Harrison's suggestion of a further grievance short shrift. In an email also on 19 November 2021, the claimant says:

'After raising grievances previously it has also been made clear that the Gentleman's club of Asda will stick together in doing favours for each

other…nothing is independent if the person is paid by Asda. Do not bother with another grievance as it will be biased.'

44. On 24 November 2021, Vicky Harrison confirms by email (page 200) that the claimant has declined the opportunity she gave him to bring further grievances and attempts to reassure the claimant that the respondent will support him to return to work.

45. On 26 November 2021, Vicky Harrison answers the claimant's written questions about the traffic incident *'for the final time'* (pages 210-211).

2022

46. On 8 February 2022, the claimant attended an Occupational Health appointment. The OH adviser's comments in the feedback report (pages 229-231) include the following.

'It is my opinion, based on this and previous records, that [the claimant] has developed coping strategies to manage negative thoughts and feelings, but appears stuck in his belief that an apology and explanation is what he needs to move forward. This is a management issue not an OH health advice issue.

…

There appear to be workplace stressors or difficulties at work and we strongly recommend that a conversation takes place with the employee to understand the impact of this.'

47. On 17 February 2022, the claimant attended a welfare meeting (page 232).

48. On 4 March 2022, the claimant raised a second grievance concerning his managers' response to the traffic incident (pages 658-9).

49. On 7 April 2022, the claimant's second grievance, which raised concerns about health and safety connected to the traffic incident, was considered by Steve White, General Store Manager. The claimant's grievance was upheld in part to the extent that Mr White agreed that in future the respondent should call the police in appropriate circumstances rather than leaving it to the third party involved to do so. The outcome was communicated to the claimant by Mr White in a letter of 4 May 2022 (pages 661-664).

50. On 30 May 2022, the claimant attended a wellbeing meeting with Laura Mustard (Online Training Manager) (page 235).

51. On 27 June 2022, the claimant attended a wellbeing meeting (page 239) with Laura Mustard at which he says that he is not interested in any vacancies and wishes to be dismissed by the respondent. The respondent continues to send details of available vacancies to the claimant.

52. In an internal email between Laura Mustard and Vicky Harrison of 29 June 2022 (page 240), which is referred to in Mr Cecere's witness statement at paragraph 14, Laura Mustard says the following regarding alternative vacancies.

'I have already shared these with Michael… He is not interested at all in any of the vacancies in store or the shifts from the depo.

His words were just sack me I want you to sack me.'

53. On 5 July 2022 (page 242), the claimant is invited to a wellbeing meeting to discuss how the respondent can support his absence. The meeting was scheduled for 18 July 2022 and then rearranged to 29 July 2022 (page 249). The claimant did not attend,

54. The wellbeing meeting was further rearranged for 9 August 2022 (page 251) and then for 9 September 2022 (page256). The claimant did not attend

55. On 20 October 2022 (page 263), the claimant tells respondent that he will not attend a wellbeing meeting until his own GP says that he is fit.

56. On 22 November 2022, the claimant attended an Occupational Health assessment (pages 277-279). The report confirmed that the claimant remained unfit to attend work and advised that a further wellbeing review meeting should be held with the claimant on the expiry of his current fit note (which was to end on 15 December 2022).

57. There was then a period between 15 December 2022 and 30 June 2023 when the claimant did not provide a fit note and was absent from work without leave.

58. On 19 December 2022, the claimant again failed to attend a wellbeing meeting that had been scheduled for him.

2023

59. On 21 February 2023, Claire Beason-Welsh (Store Manager, Durham) became involved to help move things forward.

60. The claimant was invited to but did not attend wellbeing meetings on the following dates: 7 March (page 297/299); 21 March 2023 (page 298); 24 April 2023 (page 320-321); and 3 May 2021 (page 331).

61. Ms Beason-Welsh invited the claimant to investigation meetings to establish why he was absent without leave on 22 May 2023 (pages 335-336) and 9 June 2023 (pages 341-357). The claimant did not attend either meeting.

62. On 9 June 2023, upon reviewing the situation as a whole, Ms Beason-Welsh decided to convene a disciplinary hearing to consider the claimant's absence without leave since 15 December 2022 (pages 359-366). Mr Cecere became involved at this stage. Mr Cecere was the General Store Manager for the

Thornaby store. The Thornaby store is in the same region as the claimant's store at Washington but operates and is manged independently. Mr Cecere had no prior involvement in the matter.

63. On 27 June 2023, Mr Cecere invited the claimant to a disciplinary hearing. The letter of invitation included the investigation documents (page 372).

64. On 30 June 2023, the claimant emailed a fit note to Mr Cecere. The fit note was dated 12 June 2023. It covered the period from 16 December 2022 and until 23 May 2024, a total period of some 75 weeks. The reason given for the claimant's absence on this fit note was bereavement (pages 370 and 373-374). It was common ground that the reason should have been identified as anxiety and depression.

65. In the light of this development, Mr Cecere decided not to proceed with the disciplinary hearing. Instead, Mr Cecere reverted to managing the claimant's absence under the respondent's Health and Wellbeing Policy (pages 96-115). That policy applies to employees who are on long term absence. Long term is defined in the policy as a period lasting four weeks or longer. The policy sets out a 3-stage process. By the time of Mr Cecere's involvement, the claimant was already at stage 3 which applies (amongst other situations) to a continuous absence of 6 months.

66. On 20 July 2023, the claimant told Mr Cecere that that he (the claimant)

'[was] unfit for work because Asda managers will not engage in dialogue regarding me being financially and medically disadvantaged…' (page 382).

67. The claimant maintained the position he had adopted throughout the period since November 2020. He was not prepared to attend a wellbeing meeting (which was designed to discuss how to support his absence and consider ways in which he might be able to return to work) unless the respondent would first agree to discuss ways of compensating him for the *'financial and medical harm'* that the claimant said had been caused by the traffic incident of 10 November 2020.

68. On 2 August 2023, Mr Cecere reiterated the management position on the traffic incident. He explained that since the applicable management processes had been exhausted, he would not be engaging in any further discussion on those issues (page 385-386).

69. On 9 August 2023, Mr Cecere repeated that position again to the claimant (page 388-389).

70. In the same communication on 9 August 2023, the claimant was invited to attend a wellbeing meeting on 18 August 2023. The claimant did not attend.

71. On 18 August 2023, in the light of the claimant's failure to attend, Mr Cecere wrote once more to the claimant rearranging the wellbeing meeting for 21 August 2023 (pages 391-392). The claimant did not attend.

72. By a letter from Mr Cecere to the claimant on 29 August 2023 (page 407), the claimant was invited to attend a capability meeting on 7 September 2023. The capability meeting was convened to consider the claimant's absence and his ability to fulfil his contractual duties. The claimant was expressly told in that letter (page 409) that the purpose of the meeting will be to

'…make a decision about your continued employment which may result unfortunately in your employment with Asda being ended.'

73. The claimant attended the meeting on 7 September 2023.

74. The fit note that Mr Cecere had in front of him at the meeting on 7 September 2023 had an end date of 23 May 2024. There was a conflict of evidence on whether the claimant pointed out at that meeting that the end date was incorrect. It was common ground that the claimant said that the reason for his absence was not 'bereavement' (as indicated on the fit note itself) and that the reason for his continued absence remained 'depression'.

75. However, the claimant also said in evidence that he pointed out to Mr Cecere that his fit note contained a second error. It should have been for a further month from the date of issue not until 23 May 2024. The tribunal prefers the evidence of Mr Cecere to that of the claimant on this point. The tribunal finds that the claimant did not correct Mr Cecere at the meeting of 7 September 2023 about the end date of the fit note.

76. Mr Cecere's account is consistent with the written document evidencing what was said at the meeting (pages 409 – 420) which makes no mention of the end date being incorrect. The written documents do record that the reason for the claimant's absence is incorrect on the fit note and it is difficult to see why, having recorded that error, the notes would not also have reflected any mention by the claimant that the end date was also inaccurate.

77. Also, the claimant's position at the meeting of 7 September 2023 remained as it did throughout: he was not willing to return to work until the respondent apologised for not phoning the police about the incident and was prepared to discuss his losses arising out of the traffic incident that had taken place over 30 months previously. It is difficult to see why the claimant would attach any particular importance to the end date of his fit note in circumstances where on his own case at the meeting it was irrelevant to his intention to return to work.

78. Mr Cecere therefore took his decision to terminate the claimant's employment in the belief that the claimant's fit note expired on 23 May 2024. In any event, the claimant had already been absent from work for some 33 months by that stage without the claimant being able to give any indication that he would be prepared to return to work even if he had been fit to do so unless his preconditions were first met.

79. Mr Cecere noted that:

79.1. The claimant had been absent for work for essentially the same reason

for some 33 months;

79.2. The claimant remained on the same dosage of medication (50mg of Sertraline) as he had done since the outset of his absence;

79.3. The claimant had refused to engage with the respondent's Occupational Health service provider;

79.4. It was the claimant's position that he did not see himself returning to work until Acas became involved in discussions with him and the respondent about the traffic incident and its impact on him; and

79.5. The respondent had reached a position of managerial finality on the traffic incident which was that the claimant had exhausted the grievance process.

80. By a letter dated 7 September 2023 (pages 424-425), Mr Cecere informed the claimant of his decision to dismiss him on 4 weeks' notice with effect from 6 October 2023. The claimant's pay was reinstated during the notice period which was treated as authorised absence. The claimant was reminded of his right to appeal.

81. The claimant said in cross-examination that he believed that the decision to dismiss him had been taken not by Mr Cecere but by someone in a more senior position, perhaps at the respondent's head office. The tribunal was fully satisfied that it was indeed Mr Cecere who took the decision that he said he had to dismiss the claimant.

82. There was no evidence at all to suggest that Mr Cecere was under any sort of instruction or control form superior management. There was simply an unevidenced assertion to that effect by the claimant. Given the length of the claimant's absence and the preconditions he set before he would agree to discuss a return to work, the tribunal felt no need or reason to look beyond the ostensible decision-maker for the identity of the person who took the decision to dismiss the claimant. In the tribunal's assessment it was Mr Cecere and no one else who took that decision.

83. That Mr Cecere took internal advice about how best to proceed given the claimant's somewhat uncooperative behaviour was entirely unremarkable to the tribunal. The claimant's suspicions about that advice, while a clear source of annoyance to the claimant, were not justified. It is commonplace for line managers to take HR and legal advice on issues they are required to deal with and which may have legal implications.

84. On 11 September 2023, the claimant informed the respondent that he wanted to appeal against his dismissal (pages 428-429).

85. Mr Shaun Parker (General Store Manager, Boldon store) was appointed to hear the claimant's appeal. The claimant's appeal hearing was convened by Mr Parker to take place on 4 October 2023.

86. On 4 October 2023, the claimant failed to attend his appeal hearing. The appeal hearing was rescheduled for 10 October 2023 (page 438). The claimant was expressly told that,

'If you don't attend this meeting and don't give a satisfactory reason, it would be assumed you no longer wish your appeal to be heard and the original decision will remain the same.'

87. The claimant was also given the opportunity of attending by Zoom or to put in written submissions as alternatives to attending the appeal hearing in person.

88. On 5 October 2023, the claimant replied by email. He did not respond to the offer to hold the hearing by Zoom and said only that he was *'in Yorkshire'* and that the date and location of the meeting were inconvenient. The claimant did not offer any alternative dates and provided no written representations.

89. On 10 October 2023, the claimant again failed to attend his appeal hearing. Mr Parker wrote to the respondent on the same day saying that in these circumstances the respondent had assumed that the claimant did not wish to pursue his appeal.

90. This was in accordance with the respondent's Appeal Policy (pages 136-146) which state,

'If a colleague doesn't attend a meeting without giving appropriate notice/having a good reason for non-attendance the appeal can be withdrawn and the matter closed. At Asda's discretion an alternative date can be agreed and arranged. If the colleague agrees to attend the second meeting the matter maty be considered closed, and the colleague will be informed in writing.

91. On 10 October 2023, Mr Parker confirmed to the claimant (page 456-458) that the original decision to dismiss him remained in place.

The relevant law

Unfair dismissal

92. Pursuant to section 94 ERA, an employee has the right not to be unfairly dismissed.

93. Section 98 (so far as is relevant) provides:

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

(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 … of the employee for performing work of the kind which he was employed by the employer to do,

…

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality,

…

(4) 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.

94. It is for the respondent to establish one of a limited number of potentially fair reasons for dismissal. If there is more than reason it is for the employer to establish that the principal reason is one of those limited number of potentially fair reasons.

95. These potentially fair reasons include

95.1. in section 98(2) (a) ERA a reason related to capability of the employee for performing work of the kind which he was employed by the employer to do; and

95.2. in section 98(1) (b) ERA some other substantial reason of a kind such as to justify the dismissal of an employee holding the position that the employee held.

96. In **Abernethy v Mott Hay and Anderson** [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this:

> *'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.'*

97. Where the employer establishes a potentially fair reason for dismissal, the tribunal will go on to consider, on a neutral burden of proof, whether the dismissal was fair or unfair having regard to the reason shown by the employer. This depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee. This is to be determined in accordance with equity and the substantial merits of the case.

98. The tribunal will go on to consider whether dismissal fell within the band of reasonable responses: **Iceland Frozen Foods v Jones** [1982] IRLR 439.

99. It is not for the tribunal to re-try the facts that were considered by the employer or to substitute its decision for that of the employer: **Foley v Post Office, Midland Bank v Madden** [2000] IRLR 827.

100. The band of reasonable responses test applies to the process of dismissal and to the investigation that took place: **Sainsbury's Supermarket Ltd v Hitt** [2003] 2023, as applied in long term absence cases to the process of the employer looking into and obtaining any medical information that it needs to inform its decision to dismiss: **Pinnington v Swansea City and County Council & Anor** EAT 0561/03.

101. In long term absence cases, the employer's process will normally include:

101.1. carrying out an investigation into the circumstances of the employee's absence;

101.2. taking steps to establish the up-to-date medical position;

101.3. consulting with the affected employee to obtain his/her input into the decision-making process; and

101.4. establishing the likelihood of the employee returning to work in the foreseeable future.

102. The band of reasonable response test applies to each of these aspects to the process and it is not for the tribunal to substitute its own view of what it may consider to be an alternative reasonable approach to that adopted by the employer.

103. If it is established that the employer is responsible for the heath impairment that is causative of the absence that led to dismissal, this may be a factor affecting reasonableness. However it is not determinative of whether the dismissal is fair or unfair: **Royal Bank of Scotland v McAdie** 2008 ICR 1087, CA; **Edwards v Governors of Hanson School** 2001 IRLR 733, EAT; **Frewin v Consignia plc** EAT 0981/02; and **Iwuchukwu v City Hospitals Sunderland NHS Foundation** Trust 2019 IRLR 1022, CA.

104. When considering fairness of procedures, the tribunal considers the overall process including any appeal against dismissal: **Taylor v OCS Group Ltd** [2006] ICR 1602.

Analysis and conclusions

105. The tribunal has come to the following conclusions.

Issue 1

106. The burden is on the respondent to show that it dismissed the claimant for a potentially fair reason.

107. The tribunal accepted that the respondent dismissed the claimant for a reason related to the claimant's capability to perform the work that he was employed to do as a Home Delivery Driver.

108. The tribunal accepted Mr Cecere's evidence that he took into account:

108.1. the claimant's overall period of absence of 33 months;

108.2. the absence of any medical information identifying a date the claimant might return to work; and

108.3. the absence of any indication from the claimant himself that there was a prospect of him returning to work.

109. The tribunal accepted that it was on this factual basis that Mr Cecere decided to dismiss the claimant.

110. The tribunal rejects the claimant's contention that Mr Cecere was not the decision-maker or that a more senior manager was directing Mr Cecere to make a decision disadvantageous to the claimant. The tribunal heard no direct or indirect evidence to support this argument. The tribunal found Mr Cecere to be a truthful witness. Mr Cecere had plainly done a lot of work to familiarise himself with the claimant's situation and he took professional advice where he felt he needed to do so.

111. Mr Cecere was also having to carry out his managerial duties in the face of a distinct lack of cooperation and intransigence from the claimant. The tribunal was satisfied that it was Mr Cecere (and Mr Cecere alone) who took the decision to dismiss the claimant and that he took that decision for the reasons set out in his

witness statement as repeated at paragraph 108 above. Those reasons are also consistent with the contemporaneous written documents, including the letter of dismissal of 7 September 2023 sent by Mr Cecere to the claimant (pages 424-425).

112. It is also very difficult to reconcile any allegation of bias towards the claimant on the part of Mr Cecere with the way in which this dismissal was dealt with by Mr Cerce. Looked at objectively, considerable restraint was shown by a number of managers including Mr Cecere towards the claimant who was plainly not easy to manage as the agreed facts alone demonstrate. It was also Mr Cecere who decided not to continue with the disciplinary process against the claimant when the claimant belatedly produced a fit note in June 2023 having not produced one since his previous fit note had expired in mid-December 2022.

113. Looking beyond Mr Cecere, the claimant had fought and won (at least in part) a grievance and had made and won (at least in part) a disciplinary appeal against a final written warning. The tribunal did not sense in any way that the respondent had acted with any sort of bad faith towards the claimant, not least because the respondent made a number of decisions that were advantageous to the claimant's interests.

114. What Mr Cecere was looking for on 7 September 2023 was some positive evidence of a return to work date in the foreseeable future. There was no such return date even on the claimant's own account. To that extent, the tribunal did not understand Mr Cecere's evidence to be that the end date of the current fit note was particularly to the point. The evidence before Mr Cecere was that there was no end in sight to the claimant's absence regardless of the end date of the most recent fit note.

115. It was common ground that Mr Cecere was told by the claimant at the meeting on 7 September 2023 that his preconditions would still apply to his return in any event. That was despite the claimant having been told in Mr Cecere's letter of 29 August 2023 (page 407) arranging the meeting on 7 September 2023 that his continued employment was to be considered at the meeting on 7 September 2023 and that his employment might be terminated.

116. Applying the test in **Abernethy**, the tribunal accepted the evidence of Mr Cecere that the principal facts and matters that operated on his mind when dismissing the claimant related to his belief that there was no reasonable prospect of the claimant returning to work in the foreseeable future with the effect that he was unable to perform the work he was employed by the respondent to do.

117. In coming to this conclusion, the tribunal has not forgotten about the claimant's position that it was the respondent who was responsible for the health condition that lead to his absence. Nor has the tribunal forgotten about the claimant's strongly held view that the respondent should have agreed to his preconditions and demands for a meeting with senior management; to receive an apology; and to discuss with senior management what the claimant described in cross-examination as 'his losses'. Rather, the task of the tribunal is to establish the respondent's reason for dismissing the claimant.

118. This is not a claim for constructive dismissal. It is a case of express dismissal when it is for the respondent to show that it had a potentially fair reason to dismiss the claimant. It appeared to the tribunal that the claimant was confusing his reason for being annoyed at the respondent for the respondent's reason for dismissing him. They are not the same thing.

119. The tribunal therefore concludes that the reason the claimant was dismissed was for a potentially fair reason, namely a reason related to the claimant's capability as set out in section 98(2) (a) ERA.

Issue 2

120. Applying a burden of proof that is neutral between the parties, the second issue is whether the claimant's dismissal for the potentially fair reason relied upon was in the circumstances of the case (including the size and administrative resources of the respondent) fair or unfair. That will depend on whether in the circumstances the respondent acted reasonably or unreasonably in treating the reason relied upon as sufficient to dismiss the claimant. That is to is to be determined in accordance with equity and the substantial merits of the case.

121. The tribunal has concluded that the respondent did act within the band of reasonable responses open to it on the following key points. Those key points were either (i) points raised with the tribunal by the claimant himself; or were (ii) points considered by the tribunal as being part and parcel of everyday fairness in most cases of dismissal for long term sickness absence, recognising that the claimant was a litigant in person who may not have had the knowledge or expertise to raise those points for himself.

122. Those key points are:

    122.1. The respondent reached its decision after carrying out a reasonable investigation into the claimant's medical condition.

    122.2. The respondent's reasonably consulted with the claimant before it took the decision to dismiss him.

    122.3. The respondent's steps to inform itself of the claimant's up-to-date health position were reasonable, both generally and in the light of the claimant's own intransigence in setting preconditions to any meeting or discussion the claimant might be prepared to have with the respondent.

    122.4. It was reasonable for the respondent not to acquiesce to those preconditions before dismissing the claimant.

    122.5. The respondent took a reasonable approach to identifying and drawing to the claimant's attention vacancies for alternative employment that might avoid the client's dismissal.

122.6. The respondent's decision to treat the issues relating to the road incident of 10 November 2020 together the management of its aftermath as closed was a reasonable one. The respondent's decision to manage the claimant's ill health absence as a separate issue was a decision that fell within the band of reasonable approaches that were open to it to take. It is not for this tribunal to substitute its own view of what some other alternative reasonable approach to the management of those two issues might have looked like.

122.7. Mr Cecere was fully aware of the history of the claimant's employment, especially the difficulties in the relationship that had emerged since the road incident.

122.8. It was reasonable option open to a reasonable employer to dismiss the claimant despite his continued assertions that the respondent was to blame for the health condition that caused him to be absent from work.

122.9. The respondent had not acted with unreasonable haste. The respondent had given the claimant every reasonable opportunity to get back to work either driving for the respondent or working in some other capacity. Mr Cecere was entitled to take into account that it was the claimant, not the respondent, who frustrated all of the respondent's attempts to get him back to work by laying down preconditions that he had been told many times would not be met.

123. Looking at the matter in the light of the appeal, it was not unreasonable of Mr Parker to confirm the original decision to dismiss in the light of the claimant's failure on two occasions to attend his own appeal hearing. Mr Parker had offered a hearing by Zoom to overcome logistical problems and had offered to receive written representations. The claimant took neither opportunity. Mr Parker's decision was both reasonable and it was also one that was open to him to take under the respondent's Appeals Policy.

124. The tribunal has had regard to the size and resources of the respondent in reaching its decision on the issue of reasonableness. The respondent put a very significant amount of time and resource into managing this matter and acted reasonably in trying to find ways to retain the claimant in its employment. It appointed numerous independent managers from other stores in the same region in an effort to maintain independence. It waited a considerable period of time before terminating the claimant's employment. It followed its own policies carefully and showed considerable restraint.

125. The tribunal was satisfied that the decision to dismiss was reasonable notwithstanding the resources available to the respondent.

Issues 3 and 4

126. In the light of the tribunal's findings on Issues 1 and 2, it is unnecessary for the tribunal to come to a conclusion on either Issue 3 or Issue 4.

127. The tribunal concludes that the claimant was fairly dismissed by the respondent and the complaint of unfair dismissal is accordingly not upheld.

Employment Judge Loy
12 August 2025

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