Case No: 6035421/2025

EMPLOYMENT TRIBUNALS

Claimant: **Mr. Jake Young**

Respondent: **SGN Contracting Limited**

Heard at: Bristol (via CVP) **On:** 29 – 30 June 2026

Before: Employment Judge Gray-Jones

Representation
Claimant: Mrs. Charlton-Young, Claimant's mother

Respondent: Mr. G Probert, counsel

JUDGMENT

1. The claim for unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. In a claim form presented on 25 September 2025 the Claimant a complaint of unfair dismissal against the Respondent.

2. The Claimant was employed by the Respondent as a First Call Operative from 01 November 2018 until his dismissal with effect from 30 July 2025. The reason for dismissal was persistent high absence levels.

The Hearing

3. The hearing was conducted by CVP. The Claimant appeared as a litigant in person and was represented by his mother, Mrs Chalton-Young. The Respondent was represented by Mr Geraint Probert of Counsel. There was a bundle of documents plus a further supplemental bundle. The Respondent called three witnesses: Mr Dekland Gosden, Engineering

Manager, who dismissed the Claimant; Mr Gavin Brown, Regional Manager, who heard the Claimant's appeal against dismissal; and Ms Maria Donoghue, People Partner, who provided HR support for Mr Brown at the appeal hearing. The Claimant gave evidence. There were witness statements from all witnesses and all witnesses gave their evidence under oath and were cross-examined.

4. Judgment was reserved. The Tribunal apologises to the parties for the delay in providing the judgment and reasons which arose from pressure of work.

The Issues

5. The only claim being pursued by the Claimant was unfair dismissal. He was not asserting that he was disabled at any time relevant to the claim. It was agreed that the issues in the case were as follows:

    1. The Clamant (C) is bringing a claim for unfair dismissal against the Respondent (R): ss. 94, 98 Employment Rights Act 1996 (ERA).

    2. C was employed by R from 01 November 2018 until 30 July 2025. R admits that it dismissed C.

    3. Was the reason for dismissal a potentially fair reason: s.98 Employment Rights Act 1996 ("ERA")?

        3.1 R asserts that the reason related to capability (s.98(2)(a) ERA);

        3.2 C does not accept that capability was the reason for dismissal but rather asserts that it was for other reasons, including conduct (s.98(2)(b)).

    4. If so, was the dismissal fair or unfair (having regard to the reasons shown by the employer)?

        4.1 (a) depending 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
        4.2 (b) shall be determined in accordance with equity and the substantial merits of the case (s.98(4) ERA).

    5. C asserts the following aspects of unfairness:

        5.1 That R's Excessive Sickness Absence Procedure ("ESAP") is inherently unreasonable and unfair such that an improving absence record remains blighted by historic absences;

        5.2 Dismissal was predetermined and the application of the "ESA Procedure" was no more than a sham;

5.3 Misconduct was at least part of the reason for dismissal and that no managing misconduct process or policy was followed;

5.4 That in R's ESAP there was no specific amount of days absence which would trigger the next stage of the procedure following his Final Written Warning;

5.5 That multiple absences should have been disregarded such as the 31 days sickness absence following the operation (30/05/2024 – 26/06/2024).

5.6 That C's absence for hand, foot and mouth disease ("HFM") (11/11/24 – 22/11/24) should have been disregarded because of NHS advice to stay at home;

5.7 That the fact that R did not disregard the HFM absence from work in the ESAP was discriminatory as C could not work from home like office-based staff;

5.8 That C should have been sent to Occupational Health ("OH") if R was concerned about his sickness record;

5.9 That R failed to complete a return-to-work meeting after every absence, and, in light of this, that R was in breach of its own policy. The lack of any conversations immediately after each absence, coupled with having no other criticism of C's work, meant that the gravity of the situation was by no means obvious;

5.10 That R removed two periods of absence which should not have been included in the sickness record in the Appeal Outcome letter;

5.11 That the decision by R to dismiss without notice was made in error and that a payment of six weeks' pay in lieu of notice was due, as stated in the Appeal Outcome letter. R admitted this happened and that it was an error and has since made a payment to C of the correct PILON. However, R does not accept that it made the dismissal unfair.

5.12 That C's updated full sickness record does not show any "unknown absences" unlike the previous record which was provided prior to the appeal hearing;

5.13 That requested paperwork was not available prior to the appeal hearing.

5.14 That Gavin Brown (Appeal Manager) stated *"It shouldn't get to this, something has gone wrong"* and that *"I acknowledge the points raised around detail, discussions not completed, it needs to be better"* at the Appeal hearing;

5.15 That Gavin Brown acknowledged that, *"The only issue is sickness, at work you do a super job";*

5.16 That during the appeal, C persistently asked how he could improve when being told several times that R did not doubt his sickness absence was genuine, and that this question was never answered;

5.17 That R questioned whether C's absences were genuine, and R was expecting am unrealistic level of attendance moving forward;

5.18 That R would not allow C to return to work on light duties;

5.19 That R failed to consider suitable alternative employment.

6. In the event that the dismissal was unfair because of a procedural failing, would it have been likely that the employer would have fairly dismissed C for this reason or another reason?

6.1 If so, when would this dismissal have likely happened?

6.2 Alternatively, what percentage likelihood would C have been dismissed?7

Remedy

7. Does C wish to be reinstated to their previous employment?

8. Does C wish to be re-engaged to comparable employment or other suitable employment?

9. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if C caused or contributed to dismissal, whether it would be just.

10. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if C caused or contributed to dismissal, whether it would be just.

11. What should the terms of the re-engagement be?

12. If there is a compensatory award how much should it be? The Tribunal will decide:

12.1 What financial loss has the dismissal caused C?

12.2 Has C taken reasonable steps to replace their lost earnings, for example, by looking for another job?

12.3 If not, for what period of loss should C be compensated?

12.4 Is there chance that C would have been fairly dismissed in any event (see para 6 above)?

12.5 It is admitted that the statutory cap of 52 weeks' pay applies.

13. What basic award is payable to C?

Facts

6. The Tribunal made the following findings of fact. Where facts are disputed findings are made on balance of probabilities.

7. The Claimant commenced employment in 2018. He was employed as a First Call Operative. The Respondent provides gas distribution services in the UK and at the time of the Claimant's dismissal was responsible for providing safe and reliable gas supply to approximately six million customers. It is licensed to carry out gas transportation and has obligations under the licence which include providing emergency responses to gas escapes. The relevant regulator is OFGEM. OFGEM regulations require the Respondent to respond within an hour or two to a reported gas escape.

8. The Claimant's role as a First Call Operative involved attending customers who reported gas leaks or other network issues. The Tribunal accepts that it was an important role which was critical for ensuring the safe supply of gas by the Respondent and complying with licensing and regulatory obligations.

9. The Claimant was based in the Respondent's South region and was based at the Respondent's office in Poole. He was one of approximately 30 – 34 FCOs within the region. When a customer reported a gas escape the Respondent had to despatch an FCO within one to two hours, depending on the urgency of the report. FCOs were required to respond to a report outside normal working hours. FCOs would also carry out less urgent tasks including dealing with faulty meters and emergency issues for vulnerable customers. For less urgent matters there was a four-hour response time under OFGEM regulations.

10. The Claimant and other FCOs worked under a standby rota. It was important for the Respondent that the rota was property resourced so that the Respondent could deal with emergency call outs within the required response times. Failure by the Respondent meet its licensing and regulatory obligations in relation to emergency call outs could have very serious consequences for the Respondent. It could lead to reputational damage and significant fines.

11. The rotas drawn up by the Respondent were carefully planned and were based on data compiled over a number of years. The rotas took account of the requirement of the Working Time Directive and Regulations in relation to rest breaks and rest periods. Non-availability of staff due to sickness absence put pressure on other staff who had to cover gaps in the rota and

increased the risk of employee fatigue. When an employee was not available to work on a standby rota by reason of sickness absence the Respondent faced increased costs as it had to pay other staff to cover the absent employee's shifts.

12. To assist with the management of sickness absence the Respondent had a Sickness Absence Policy & Procedure. This was specifically referred to in the Claimant's contract of employment. The section of the Policy which was relevant to the Claimant's dismissal was the Excessive Sickness Absence Procedure ("ESAP") [hearing bundle p.121]. This stated:

    "B.1.1 The following procedure will be applied in cases of excessive levels of (normally) short-term sickness absence. Its primary purpose is to encourage employees to make and maintain an acceptable improvement. Longer term absences (individual absences that have continued for a month or more) should be dealt with in accordance with our Long-Term Sickness Absence Procedure (see Section C below).

13. There was more than one version of the Sickness Absence Procedure in the bundle but the trigger point for absences under the ESAP was the same in all versions, namely 3 or more occasions and/or 8 or more days of absence in a rolling 12-month period, which includes the last period of sickness [pp. 112 and 171].

14. Under the ESAP sickness management was conducted under a 3-stage procedure: an informal stage and then Stage 1, which allowed for management and review of the position, with the employee moving to Stage 2 if there was not an acceptable improvement. Under Stage 2 an employee could be issued with a final written warning in the absence of an acceptable improvement or a deterioration in the sickness record, with dismissal as the final option if this position continued. Sickness management under Stages 1 and 2 was conducted by means of review meetings.

15. The Sickness Management Policy was available at all times to employees on the Respondent's intranet.

16. The Policy was also incorporated into a joint agreement between the Respondent and recognised trade unions, namely the GMB and Unison. The Claimant was a member of the GMB.

17. Prior to the Claimant's dismissal he had been subject to review under the ESAP for several years.

18. The Claimant first moved from Stage 1 to Stage 2 of the ESAP process on 27 March 2020. This was as a result of the Claimant accruing sickness absence of 5 occasions/31 days within a rolling 12-month period. This resulted in a 6-month review period being set.

19. The Claimant was invited to a stage 1 meeting on 11 August 2021, having accrued 13 days' sickness absence over 4 occasions in a 12-month rolling

period. The Claimant was issued with a Formal Written Warning and a 6-month review period was set. The Claimant did not appeal the warning.

20. The Claimant was asked to attend a further Stage 1 meeting on 01 December 2022 following 40 days' absence over 4 occasions in a rolling 12-month period and was placed on a 12-month review [pp.227 – 228]. He did not appeal this decision.

21. On 29 January 2024 Simon Spicer, an Engineering Manager, emailed the Claimant a letter recording that a Stage 1 sickness interview had taken place on 17 January 2024 at the Poole depot to discuss the Claimant's sickness absence record (5 occasions/26.5 days within a rolling 12-month period) and that the outcome was to move to Stage 2 of the ESAP. The Claimant was given the right to appeal this decision.

22. The Claimant responded on 29 January 2024 requesting to appeal the decision. He disputed that the interview had taken place as described in the letter, stating that he had been invited into a meeting on 16 January 2024 without prior warning for an informal chat about his absence. He alleged that a refusal of a request that he be allowed to carry out light duties meant that he had had no alternative but to take sickness absence. He requested information on his sickness dates and pointed out that the letter had issued at a time when he was awaiting the birth of his first child.

23. Simon Spicer responded to the email on 05 March 2024 apologising for the letter being issued to the Claimant before he had commenced paternity leave and attaching sickness reports and E-Timesheets to the email. He said that he had been advised that light duties would not have been an option as it would still have meant carrying relatively heavy items such as tool box, gascoseeker, Gastec etc. He offered some dates for the Claimant and his trade union representative to meet with him.

24. Simon Spicer is no longer employed by the Respondent and was not called to give evidence. The Tribunal accepts the Claimant's evidence that what purported to be the meeting on 16 January 2024 was not arranged in accordance with the sickness absence procedure, in that he was not given proper notice of it or the chance to arrange representation.

25. The Claimant and his trade union representative were invited to a Stage 1 sickness absence meeting with Simon Spicer on 12 April 2024. This was described in the email notifying him of the meeting as a *"formal chat about your sickness record"*. The Tribunal finds that this was effectively a rehearing of the meeting which took place on 16 January 2024.

26. Following the meeting a letter was sent to the Claimant on 22 July 2024 notifying him that his sickness absence record had been reviewed (4 occasions/17 days within a rolling 12-month period) and that as there had not been a satisfactory improvement he would be moving to Stage 2 of the ESAP. The Claimant did not appeal this outcome. The Respondent accepted that the Claimant's sickness record actually showed 15.5 days

absence rather than 17 [p.349], although this was still above the trigger point set in the ESAP.

27. Following Simon Spicer's decision to progress the Claimant to Stage 2, Dekland Gosden invited the Claimant to attend a Stage 2 sickness absence review meeting on 29 August 2024. In contrast with the earlier two meetings conducted by Simon Spicer the Claimant was received formal notification of the meeting in a letter dated 09 August 2024. The Claimant was warned that the outcome of the meeting could include dismissal [p.261]. Dekland Gosland had not had any previous involvement in the Claimant's case and was based at a separate depot to the Claimant.

28. The Claimant attended the meeting on 29 August 2024 with his trade union representative, Richard Chambers. Dekland Gosden was supported by Karen Baldwin from the Respondent's HR department. Written minutes were produced of the meeting [p.262]. These are relatively brief and clearly don't amount to full record of the discussion. However, their accuracy was not challenged. They record that the Claimant's sickness absence record was reviewed with him and he did not raise any dispute in relation to it. Dekland Gosden also produced brief handwritten notes of the meeting [p.189].

29. Following the meeting a letter was issued dated 30 August 2024 which informed the Claimant that at the meeting the level of his sickness absence had been discussed [pp.263 – 264]. The absence levels were 30.5 days on 4 occasions in a rolling 12-month period. These absences were recorded as being due to viral bacterial infection; Covid; common cold; and an operation. The operation accounted for 20 days of absence.

30. Dekland Gosden said in his witness statement that he did not take account of the operation, although this is not recorded in the outcome letter. However, if the operation was discounted the Claimant's absence (11.5 days over 3 occasions) would still exceed the trigger point. The letter is also unclear as to whether the meeting was under Stage 1 or Stage 2, as it refers to the review period following the meeting taking place under Stage 1.

31. The letter stated that the Claimant was being issued with a Final Written Warning as of 29 August 2024 which would remain current for a period of 1 year *"beyond the satisfactory end of any complete formal review period*". The Claimant was informed that a further meeting would be arranged for March 2025 (the letter referred to March 2024, but this was clearly an error), or sooner if his sickness record caused concern.

32. The Claimant was then absent from work from 11 November – 22 November 2024 (9 days), the reason given being virus/bacterial infection – Hand, foot and mouth disease.

33. The Claimant's case was that Hand, Foot and Mouth was a contagious illness and that public health guidance states that individuals should remain away from work. The NHS guidance published online on Hand,

Foot and Mouth disease makes clear that it is not the same as foot and mouth disease which affects farm animals. The guidance does not state that adults need to stay off work or otherwise quarantine if they contract the illness.

34. The Claimant's further period of absence led to a further Stage 2 sickness review meeting being arranged on 07 January 2025. The Claimant was sent a written invitation to the meeting on 02 January 2025, which stated that a potential outcome of the meeting was dismissal [p.272].

35. There was no record of a formal outcome letter being issued after the meeting, and no minutes of the meeting have been produced. Dekland Gosden produced his own handwritten notes. These are very brief and indicate that the Claimant asked how the sickness review process worked and that this was explained to him. It also indicates that the wellbeing section on the Respondent's digital hub was explained to him.

36. The outcome of the meeting was that the Claimant was informed that his sickness absence record would be kept under review and he was given a further 6 months to improve his attendance.

37. The Claimant was on sickness absence from 12 June 2025 until 18 June 2025 (5 days). The reason given was flu.

38. On 10 July 2025 the Claimant was invited to a formal Stage 2 sickness review meeting [pp.275 – 276]. The invitation letter stated that the sickness absence in the previous 12 months was 15 days on 2 occasions (a 10 day absence in November 2024 and the 5 day absence June 2025, although in fact the 10 day figure was an error, as the absence in November 2024 had been for 9 days). The letter stated that a potential outcome of the meeting was dismissal.

39. The meeting took place on 30 July 2025. It was conducted by Dekland Gosden, assisted by Karen Baldwin. The Claimant was accompanied by his trade union representative, Richard O'Toole.

40. In the meeting the Dekland Gosden reviewed the Claimant's sickness absence record. The Claimant stated that he believed that he was making a change, and he stated that he was coming in to work on days when he did not feel well to try to improve his absence record. Dekland Gosden's view was that the Claimant had been under review under ESAP since 2021 and that he would not be able to sustain attendance without a level of sickness absence that would trigger the policy. This was demonstrated by the levels of sickness absence that had occurred since the issue of the final written warning on 29 August 2024. The Claimant's absence level of 14 days on 2 occasions over the review period was over the threshold stated in the policy.

41. Dekland Gosden was aware that a potential outcome of the meeting was to give the Claimant further time to improve his attendance, but his evidence was that he did not believe, given the Claimant's previous history, of

persistent absence for various reasons, that this would change the situation. As such his decision was to terminate the Claimant's employment.

42. He stated that the absence due to medical surgery was removed from the record, but this did not change the overall picture.

43. The outcome of the meeting was confirmed in writing on 30 July 2025 [pp.278 – 279].

44. The Claimant appealed his dismissal. The appeal letter stated that the Respondent's ESAP had not been followed (although was not clear on what provisions of the policy had been breached). It alleged that the hearing had not been fair and unbiased and that the decision was disproportionate. It requested that medical and occupational health evidence be sought and reviewed and also made requests for information on the dismissal process, including *"the trigger points and criteria used by SGN to escalate to dismissal."*

45. The Claimant's appeal was heard by Gavin Brown. He was a senior manager with extensive experience of dealing with dismissals, grievances and appeals. He had no prior knowledge of the Claimant and had had no involvement in the process which had led to the Claimant's dismissal.

46. The appeal meeting took place on 21 August 2025. The Claimant was represented by Charlotte Gardner, a full-time trade union representative. Gavin Brown was assisted by Maria Donoghue. Detailed minutes of the meeting were produced [pp.299 – 308].

47. Prior to the meeting the Claimant and his trade union representative had requested copies of documents relating to the dismissal process, including notes of the dismissal meeting and return to work meetings. These were not provided. Gavin Brown offered the Claimant and Charlotte Gardner the opportunity to have the appeal adjourned in order to see if the documents could be obtained, but after a short adjournment the Claimant confirmed that he wished to proceed with the appeal and not adjourn.

48. The Claimant set out his grounds of appeal in the meeting. He made the point that all of the sickness absence was genuine and Gavin Brown confirmed that it was not being alleged that the Claimant was not unwell when he took sickness absence.

49. The Claimant asked what would be considered an acceptable improvement. The notes record Gavin Brown as stating that he was looking for no sickness absence over 12 months. The Claimant questioned this and Gavin Brown then said that it started at zero but that it was on an individual basis and that there will be certain times when sickness cannot be helped. The triggers point of 3 occasions or 8 days in a rolling 12-month period accommodated the fact that some sickness absence would need to be taken in the 12-month review period.

50. Gavin Brown adjourned the meeting for approximately 20 minutes and then gave his decision was the meeting was reconvened, which was that the appeal was dismissed. He acknowledged that there were gaps in the paperwork and that return-to-work meetings should have been properly recorded but that this did not change the overall numbers. The Claimant had exceeded the trigger points in the ESAP over a lengthy period and Dekland Gosden's conclusion that this unlikely to improve was a reasonable one.

51. A detailed letter recording the appeal outcome and the reasons for it was issued to the Claimant on 03 September 2025 [pp.358 – 361].

The Relevant Law

52. Dismissal for intermittent short-term absences can amount to a dismissal by reason of capability for the purposes of s.98(2)(a) Employment Rights Act 1996. It is for the employer to establish that the potentially fair reason exists. A neutral burden of proof then applies when considering the fairness of the dismissal.

53. The Tribunal must not substitute its own view for the employer's. The question the Tribunal has to address is whether it was reasonable for the employer to dismiss in the circumstances in which the employer found itself: **Linfood Cash and Carry Ltd v Thomson [1989] IRLR 235**. It does not matter that other employers might not have decided to dismiss in the same circumstances: **British Leyland (UK) Ltd v Swift [1981] IRLR 91**.

54. The authorities make clear that in cases of short-term intermittent absence the fairness of the dismissal should not be assessed using the same principles which apply in cases of dismissal for long-term absence. In particular, it is not unfair for an employer to dismiss an employee for short-term intermittent absences without first obtaining a medical report: **Lynock v Cereal Packaging Ltd [1988] ICR 670**. The EAT stated that where there is no single underlying health condition causing the absences then a medical report is unlikely to assist the employer.

55. In **International Sports Co Ltd v Thomson [1980] IRLR 340** the EAT stated that the correct approach in cases of short-term intermittent absence is for the employer to:

    1) review the pattern of absences and the reason for them;
    2) warn the employee of the required improvement in attendance, giving them the chance to make representations; and
    3) consider whether the required improvement in attendance has materialised. If not, dismissal is likely to be reasonable.

56. In **Lynock** the EAT noted that cases of short-term intermittent absence should be treated by employers on an individual basis and that fairness has to be judged by looking at the whole history of the employment. Relevant factors for the employer to take into account may include the nature of the illnesses causing the absences and the likelihood of

recurrence; the length of the absences compared with periods of good health; the employer's need for the particular employee and the impact of the absences on the rest of the workforce; and the extent to which the employee was made aware of the possibility of dismissal.

Conclusions

57. Both parties made oral submissions, and the Respondent produced a skeleton argument. These were of assistance and the Tribunal has considered them when reaching its conclusions.

58. In relation to the reason for dismissal the Tribunal is satisfied that the Respondent has shown that it was by reason of capability. The Tribunal finds that Dekland Gosden dismissed the Claimant because he considered that his sickness absence level was unacceptable and that there was no reasonable prospect of it improving. The Claimant's appeal was dismissed for the same reason.

59. The evidence supporting the Claimant's assertion that the real reason for dismissal was misconduct was a spreadsheet containing negative comments and criticisms of the Claimant. These appear to been recorded by one manager, Dion Thorp. Dekland Gosden's evidence was that he had not seen the spreadsheet at the time the Claimant was dismissed and relied only on the Claimant's absence level when he decided to dismiss. Gavin Brown confirmed that the dismissal was due to sickness absence only.

60. The Tribunal is satisfied that Dion Thorp did not have any involvement in the decision to dismiss the Claimant and not did his comments on the spreadsheet influence the decision.

61. As far as the fairness of the decision is concerned, I will deal with the specific issues relating to fairness raised by the Claimant:

    1) That R's Excessive Sickness Absence Procedure is inherently unreasonable and unfair such that an improving absence record remains blighted by historic absences

62. It could be argued that the ESAP sets a relatively low threshold for triggering management intervention, namely 8 days absence or 3 occasions of absence in a rolling 12-month period. However, the policy has 3 stages and if an employee reaches the trigger point, then the first stage will usually be informal management action.

63. Ultimately, it is for the Respondent to decide on the appropriate trigger points in the policy, taking into account matters such as the requirements and resources of the organisation. The Tribunal accepts the Respondent's evidence, which was not challenged, on the pressures that sickness absence placed on the FCO rota. It cannot be said that the trigger points in the policy are set at a level which cannot reasonably be achieved. The policy itself is agreed with recognised trade unions.

64. The reference to historic absences refers to the fact that the trigger points are assessed using a rolling 12-month period. Therefore, if more than one review meeting takes place in a 12-month period, then a period of absence in that period may be considered at more than one review meeting. I do not consider that this is inherently unfair. The fact that the 12-month period is a rolling period means that an absence will fall out of account in the review period after 12 months. I do not consider that it is reasonable to require the Respondent to disregard a period of absence in a 12 month review period simply because it may have been considered at an earlier review meeting.

    2) Dismissal was predetermined and the application of the "ESA Procedure" was no more than a sham

65. There is no evidence to support this assertion. The Tribunal is satisfied that the decision to dismiss was made by reason of the Claimant's absence level, his persistent breach of the trigger points in the ESAP and Decland Gosden's conclusion that there was no realistic prospect of the absence level improving to a level that was above the threshold in the ESAP in the foreseeable future. The decision was only made after the absences had been reviewed and the Claimant and his trade union representative had been given the opportunity to make representations at the dismissal meeting.

    3) Misconduct was at least part of the reason for dismissal and that no managing misconduct policy or process was followed

66. This issue has been dealt with above. I am satisfied that the Respondent has shown that the reason for dismissal was capability.

    4) That in R's ESAP there was no specific amount of days absence which would trigger the next stage of the procedure following his Final Written Warning

67. The ESAP clearly sets out the trigger points for action to be taken under the procedure. It is correct that there was no specific number of days absence stated in the ESAP which would trigger the next stage of the procedure following a Final Written Warning. However, that does not make the policy itself or the way it was applied in the Claimant's case unfair. The evidence of the Respondent was each case was treated individually with the number of days' absence following a Final Written Warning being one of the factors taken into account.

68. Furthermore, it is not really correct to say that there was no specific number of days' absence which would trigger the next stage of the procedure. The threshold which was consistently applied was the trigger point of 8 days absence of 3 occasions of absence in a rolling 12-month period, and it was clear that the Respondent took into account the fact that

the Claimant had been unable to comply with that threshold during the review period.

5) That multiple absences should have been disregarded such as the 31 days sickness absence following an operation (30/05/24 – 26/06/24)

69. The Respondent did disregard the time accounted for by the operation, but the Claimant's sickness absence record remained above the trigger point even after this absence was discounted.

70. The Respondent also adjusted the absence record at the appeal stage so that the 9.5 days the Claimant was off work with a back sprain was discounted, as it was accepted that the Claimant had requested but been refused light duties. The Claimant's sickness absence record was still above the trigger point after this time was discounted (4 occasions, 17 days).

6) That C's absence for hand foot and mouth disease should have been disregarded because of NHS advice to stay home.

71. It was not unreasonable for the Respondent not to discount the absence due to hand, foot and mouth. The NHS does not advise adults with the condition to quarantine.

7) That the fact that the R did not disregard the HFM absence from work in the ESAP was discriminatory as C could not work from home like office-based staff

72. It was neither unreasonable nor discriminatory not to disregard the absence due to hand, foot and mouth. The Claimant's role meant that he could not work from home, and so an office-based employee who contracted hand, foot and mouth might not have incurred this sickness absence if they were able to work from home. However, this does not amount to unlawful discrimination (at least not in the circumstances of this case, where no complaint under the Equality Act 2010 is being pursued and the actual discrimination alleged was never identified by the Claimant).

8) That C should have been sent to Occupational Health, if R were concerned with his sickness record

73. There was a range of reasons given for the Claimant's absences during the period that he was under either Stage 1 or Stage 2 review under the ESAP, including flu, cold, Covid, sprain, virus/bacterial infection and eye problems. In those circumstances it is not clear what purpose would have been served by an occupational health report and the Claimant did not make clear in the dismissal process or indeed at the Tribunal hearing what an OH report might have shown which would have altered the picture.

9) That R failed to complete a return-to-work meeting after every absence and, in light of this, that the R was in breach of their own

policy. The lack of any conversations immediately after each absence, coupled with having no other criticisms of C's work, meant that the gravity of the situation was by no means obvious

74. It is clearly unsatisfactory that there was a failure to record return-to-work meetings with the Claimant. Paperwork had either gone missing or was never completed in the first place. It was unreasonable for this to happen. However, the question the Tribunal has to address is whether this made the decision to dismiss unfair.

75. The absence of this paperwork was only something that the Claimant and his trade union raised at the appeal stage. It is not clear how the return-to-work meetings, if they did not happen, or were not properly recorded, would have altered the overall picture, and in particular would have improved the Claimant's absence record.

76. The Tribunal does not consider that the failure to record return-to-work meetings meant that the Claimant did not know, or should not have known, about the gravity of the situation. The Claimant was aware from August 2024 at the latest that there was the possibility of dismissal if his absence record did not improve.

77. Accordingly, the Tribunal does not find that the missing return-to-work documentation was such a serious flaw that it made the dismissal unfair.

10) That R removed two periods of absence which should not have been included in the sickness record in the Appeal Outcome letter

78. As noted above, two periods of sickness absence were discounted. It is not clear why it is argued that this was unfair.

11) That the decision by R to dismiss without notice was made in error and that a payment of six weeks' pay in lieu of notice was due, as stated in the Appeal Outcome letter

79. There was an error made in relation to the Claimant's entitlement to notice pay but this was subsequently rectified. It was not something which affects the determination of whether the dismissal was fair.

12) That C's updated full sickness record does not show any "unknown absences" unlike the previous record which was provided prior to the Appeal hearing

80. This appears to relate to the fact that the reason for some absences recorded in the Claimant's payroll record is stated as "unknown". However, this does not affect the fairness of the dismissal. The Tribunal is satisfied that the number of days' absence was correctly calculated. It was not alleged by the Claimant or his trade union representative that the figures on which the decision to dismiss were based were wrong.

13) That requested paperwork was not available prior to the Appeal hearing

81. This relates to the missing return-to-work documentation, which is dealt with above. Furthermore, the Claimant and his representative were asked if they wanted the hearing to be adjourned so that attempts could be made to find the paperwork but they indicated that they wished to proceed. As such the Tribunal does not find that this is something which makes the dismissal unfair.

14) That Gavin Brown stated 'It shouldn't get to this, something has gone wrong' and that 'I acknowledge the points raised around detail, discussions not completed, it needs to be better' at the Appeal hearing

82. The Tribunal finds that the first statement is a comment on the Claimant's lengthy absence record and the second is an acknowledgment that there had been a failure to ensure that return-to-work meetings were properly documented. The Tribunal does not find that either comment was an admission that the dismissal was unfair or indicates that the dismissal process was unfair.

15) That Gavin Brown acknowledged, 'The only issue is sickness, at work you do a super job'

83. The Respondent did not allege that the Claimant's conduct or performance were problematic. The only reason for his dismissal was his absence record. It is not clear why this comment in the appeal meeting shows that the dismissal was unfair.

16) That during the appeal, C persistently asked how he could improve when told several times that R did not doubt his sickness absence was genuine, and that this question was never answered

84. It is not entirely clear what is being alleged. The Respondent did not at any time allege that the sickness absence was not genuine, but this does not mean it was not entitled to dismiss the Claimant because of that absence.

85. I consider that the trigger point in the ESAP was made clear to the Claimant during his employment and that it was clear, or should have been clear to him, that he was breaching the trigger point and had been doing so for a significant period prior to his dismissal. The Respondent was entitled to take this into account when deciding to dismiss. I consider that Gavin Brown explained the position to the Claimant in the appeal meeting, which was that some absence may have been unavoidable but that the trigger point in the ESAP indicated the point at which the sickness absence level would be considered problematic.

17) That R questioned whether C's absences were genuine and R was expecting an unrealistic level of attendance moving forward

86. I don't find that the Respondent questioned whether the absences were genuine. I don't consider that either Dekland Gosden or Gavin Brown were unrealistic in their expectations of attendance going forward. Both applied the trigger point in the ESAP when assessing the level of absence and considered the history of the Claimant's sickness absence when assessing whether there was a reasonable prospect of improvement.

    18) <u>That the Respondent would not allow C to return to work on light duties</u>

87. The Respondent discounted the time that the Claimant was absent from work after his request for light duties was refused at the appeal stage. As such the earlier refusal does not affect the fairness of the dismissal.

    19) <u>That the Respondent failed to consider suitable alternative employment</u>

88. The suggestion that the Respondent should have considered suitable alternative employment was not raised during the Claimant's employment or at the appeal. It is not clear how this would have been a reasonable option and in particular how it would have changed either the sickness absence record or given a reasonable basis for concluding that the Claimant's sickness absence levels would improve. As such the fact that the Respondent did not consider suitable alternative employment does not make the dismissal unfair.

89. Looking at the process overall the Tribunal is satisfied that the Respondent carried out a reasonable dismissal procedure. There was no identified breach of the ESAP.

90. The Tribunal considers that Dekland Gosden had reasonable grounds to conclude that the Claimant's sickness absence record showed that over a very lengthy period prior to the dismissal hearing he had breached the trigger points set out in the ESAP and that it was reasonable for him to conclude that it would not improve within the foreseeable future. In these circumstances the Tribunal is satisfied that dismissal was a reasonable option.

91. It is certainly correct that Dekland Gosden could have set a further review period, and given the Claimant a final chance to improve, and that some employers might have chosen this option. However, this does not mean that it was unreasonable for Dekland Gosden not to choose this option and instead decide to terminate the Claimant's employment.

92. The Tribunal considers that the appeal process was fair and that all of the grounds of appeal put forward by the Claimant were fairly considered.

93. The Claimant suggested that he had not been made fully aware of the Respondent's expectations in relation to attendance and that he had not been made aware of the gravity of the situation. The Tribunal does not

accept this argument. The provisions of the ESAP were clear and were accessible to the Claimant. The Claimant, who was represented throughout the process by his trade union, was, or should have been, fully aware of the possibility of dismissal if his attendance did not improve once he moved from Stage 1 to Stage 2 of the ESAP in August 2024.

94. It is clear that there were some flaws in the process. The meeting on 16 January 2024 was not properly documented and took place without the Claimant being given proper notice of the meeting or the opportunity to arrange representation, but this was ultimately remedied when the meeting was reheard. It would have been better for notes to have been kept of all the meetings and, as already stated, for the return-to-work meetings to have been properly documented. However, these flaws are not sufficient to make the process, when looked at overall, unfair.

95. Accordingly, the Tribunal concludes that the Claimant was fairly dismissed.

Approved by
Employment Judge D Gray-Jones
Date: 6 November 2026

JUDGMENT & REASONS SENT TO THE PARTIES ON
10 November 2026