



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr A Khatab

**Respondent:** Abellio London Limited

**Heard at:** London South Croydon

**On:** 6 & 7 November 2019

**Before:** Employment Judge Tsamados (sitting alone)

## Representation

**Claimant:** In person

**Respondent:** Mr Green, Solicitor's Agent

# RESERVED JUDGMENT

The **Judgment** of the Employment Tribunal is as follows:

- 1) The Claimant was not unfairly dismissed. His complaint is ill-founded and is dismissed;
- 2) The Claimant is not entitled to wages/damages for breach of contract. His complaint is ill-founded and is dismissed.

# REASONS

## The claim and background to this hearing

1. By a Claim Form received by the Employment Tribunal following a period of ACAS Early Conciliation from 30 May to 22 June 2018 the Claimant, Mr Khatab, has brought complaints of unfair dismissal and entitlement to outstanding sick pay against his former employer, Abellio London Limited (the Respondent). In its Response received by the Employment Tribunal on 8 August 2018, the Respondent denies both complaints and states that in any

event the complaint in respect of outstanding sick pay was presented outside the requisite time limit in which to bring that complaint (on the basis that it is a complaint in respect of unauthorised deductions from wages).

2. The Employment Tribunal sent a notice of hearing to the parties on 11 July 2018. This set a date for the full hearing of 17 October 2018 and a series of case management orders for preparation of the case for that hearing.
3. However, in view of concerns raised by the Respondent's solicitors as to the lack of particulars relating to the complaint of unfair dismissal and the time issue relating to the sick pay claim and because of their application for a deposit order, the Tribunal wrote to the parties on 24 September 2018 converting the full hearing to an open preliminary hearing.
4. The preliminary hearing took place on 17 October 2018 and was conducted by Employment Judge Andrews. At the hearing EJ Andrews determined the claims and issues and set out a series of revised case management orders intended to prepare the case for a one-day hearing set for 22 May 2019. In addition, I note that at that hearing an interpreter was to be provided to assist the Claimant.
5. There followed correspondence with regard to an application by the Respondent for an unless order in respect of the Claimant's failure to disclose documents and an application by the Claimant for disclosure of a CCTV recording of an accident in which he was involved. In a letter dated 25 February 2019, EJ Bryant rejected both applications, but reiterated that the Claimant must send copies of all documents in his possession or power relating to matters in issue in the proceedings and indicated clearly what this included.
6. On application of the Respondent in an email dated 3 April 2019 the full hearing was postponed and relisted for two days, it being apparent that one day was insufficient time within which to complete matters. The hearing was subsequently set for 6 and 7 November 2019.

### **The issues for this hearing**

7. The issues at this hearing are as set out in the Order of EJ Andrews made at the hearing on 17 October 2018 and are as follows:

“2. Unfair dismissal: the Claimant was dismissed on 17 April 2018 following a period of sick absence. The Claimant says this was unfair as the reason he was off sick was because of stress following the refusal of the Respondent to allow him time off work to be with his sick son who was in hospital in another country. The Respondent says the dismissal was fair substantively and procedurally. The Claimant is not seeking re-employment.

3. Breach of contract: the Claimant says that he was not paid the correct amount of sick pay due to him under his contract of Employment for the period 14 August 2015 to 24 April 2016. He says he should have been paid his full-time rate but he was paid at a part-time rate. He agrees that contractually he

was entitled to 13 weeks for pay and 13 weeks half pay. The issue is the correct rate of pay.

4. The Respondent says that the Claimant requested to go on to part-time pay. The Claimant says he only made that request after his return to work from that period of sick leave.”

8. Whilst the case management orders included leave for the Respondent to file an amended Response, if so advised, on or before 7 November 2018, no amended Response has been filed.

### **Preliminary matters**

9. On reading the file it was apparent to me that whilst an Arabic interpreter was supposed to be booked for this hearing, this had been overlooked inadvertently by the administration. I therefore asked my clerk to make enquiries as to the possibility of an interpreter being provided for today's hearing.
10. Whilst I was awaiting confirmation of the position, my clerk informed me that the Claimant had indicated from the waiting room that he was willing to proceed without an interpreter.
11. I therefore commenced the hearing at 11 am. It seemed apparent to me on speaking to the Claimant, that he had a sufficient grasp of spoken English to proceed. I took into account that he was a bus driver, all of the meetings with his employer were conducted in English and that the correspondence between the parties was written in English. However, I was not oblivious to the differences between conversational and work English and English used in formal court proceedings. Nevertheless, we started the hearing and I expressed gratitude to the Claimant for agreeing to go ahead without an interpreter.
12. I identified the documents that I had been provided with and expressed my concern that the Claimant had not provided a witness statement. The Claimant appeared to have misunderstood and thought this meant a statement for a witness he had intended to call but then decided not to do so rather than one for himself. I told him that the order of EJ Andrews at page 29D of the Respondent's bundle was clear and so I was concerned that he had not prepared a witness statement for himself. In any the event, Mr Green explained that the Respondent's solicitors had sent their witness statements to the Claimant so as not to put him at a disadvantage even though he had not provided one of his own.
13. I took the view and advised the parties that the Claimant's case was as set out in his claim form and the issues identified by EJ Andrews. This could stand as his evidence in chief. The Respondent would give its evidence first and the Claimant would have an opportunity to ask its witnesses questions. His case is essentially as set out at the time of the events in question and as set out in the documents written at the time. This of course would be subject to what he says in answer to questions during the hearing.

14. I went through the issues with the Claimant and explained to him what was involved in both complaints. In essence the Claimant believes his dismissal was unfair because his ill-health (a back condition) was exacerbated by the stress that the Respondent caused him in refusing him four days annual leave to visit his sick son. The Claimant further seeks an underpayment of sick pay for a period of approximately 18 months.
15. The Claimant said that his focus was on the sick pay owing and that he had not suffered any loss of earnings after his dismissal because he had taken a job as a minicab driver. I pointed out that this was contrary to his schedule of loss in which he was seeking his loss of earnings from the date of dismissal until the then date originally set for this hearing in May 2019 (at page 29 of the Respondent's bundle). Given this change of position I did suggest that he might talk to Mr Green during an adjournment to see if there was any possibility of resolving the matter given that his claim was worth substantially less than he had previously indicated.
16. I then adjourned partly to allow this to happen and partly to find out whether there had been any Response to my request for an interpreter. During the adjournment I was made aware that Mr Sorouji, an interpreter, had arrived and we recommenced at 11.50 am. On recommencing the hearing, it was apparent that the Claimant was not prepared to talk to Mr Green. I therefore introduced him to interpreter and ascertained that they understood each other. I went over the issues again through the interpreter, the procedure that the hearing would follow and any adjustments that the Claimant required because of his back condition.
17. During this discussion the Claimant stated that he was dismissed because he was disabled. I explained to him that this was not a claim that he had brought to the Tribunal, that he may well be disabled but the claim that he had brought was about the fairness of his dismissal. He said he was receiving disabled care allowance. I explained to him that this might mean that he is disabled for the purposes of that benefit but the matter before this Tribunal was about his dismissal due to his back condition of which there was no indication that it amounted to a disability for the purposes of the Employment Tribunal either in his claim or in the medical evidence provided.
18. At several points during the course of the hearing, the Claimant produced additional documents. I did explain to him on a number of occasions that any documents that he had which he intended to rely upon or were relevant to the issues determined should have been sent to the Respondent a long time ago so that they were in the bundle of documents before the Tribunal. In the end he produced a total of three documents over the course of the first day, which on hearing representations from Mr Green, I decided to allow the Claimant to rely upon. These form the last three pages of the Respondent's bundle.
19. One of those documents was an email which the Claimant relied upon as supporting evidence that the Respondent had rejected his grievance in relation to the non-payment of sick pay and told him it was too late. It turned out that this was in fact an email from his trade union, Workers for England Union, containing advice that the Respondent's grievance outcome letter dated 25 May 2018 appeared correct and was consistent with what the union

had previously told him, namely that he was out of time to submit a claim regarding the reduction in salary. This email was clearly privileged, but the Claimant had already shown it to Mr Green and still wished to rely upon it, even after the issue of privilege was explained to him, stating that he had nothing to hide. I therefore accepted this in evidence. It is at page 223 of the Respondent's bundle.

### **The evidence**

20. The Respondent provided a bundle of documents which including the three documents provided by the Claimant during the course of the first day of the hearing runs to 223 pages. I will refer to this where necessary as "R1".
21. I heard evidence by way of witness statements and in oral testimony from Mr Mark McGuinness, Mr Martin Moran and Mr Raj Chadha. The Claimant gave evidence through the interpreter by way of the contents of his claim form, by reference to the issues identified by EJ Andrews at the hearing on 17 October 2018 and in oral testimony.

### **My findings**

22. I set out below the findings of fact that I considered relevant and necessary to determine the issues I am required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and we have borne it all in mind.
23. Given that Employment Tribunal judgements are now published online I do not propose to include the full names of anyone other than the Claimant and the Respondent's witnesses. This is because those persons are not present and may not even be aware that matters involving them are being considered and determined. I will therefore abbreviate those persons names but refer to their job titles so that the parties know who is being referred to.
24. The Claimant was employed by the Respondent as a Public Carriage Vehicle ("PCV") driver from 31 October 2011 until his dismissal on 17 April 2018.
25. The Respondent is a bus company operating public transport services across Central, South and West London and the Claimant was one of its bus drivers.
26. The Claimant does not speak English as his first language and had the services of an Arabic interpreter at this hearing which he used intermittently.
27. During the course of the events in question the Claimant attended meetings which were conducted in English and sent and received letters and emails which were written in English. The Respondent did not believe that this posed any difficulties for the Claimant and the Claimant did not raise any concerns in this regard.
28. The Claimant's written particulars of employment are at R1 30-34. The document is signed by the parties and dated 17 October 2011 (by the Respondent) and 31 October 2011 (by the Claimant). At the time of the

events in question the Claimant was working part-time hours of three days per week. Clause 16 of this document sets out the Claimant's entitlement to company sick pay, clause 17 sets out his entitlement to notice of termination of Employment (which reflects the statutory minimum entitlement) and clause 30 sets out the grievance procedure.

29. The Respondent's Sickness Absence Policy is at R1 35 – 43 and the Long-term Sickness Policy is at R1 44 – 58. In essence, sickness absence of more than a certain length of time acts as a trigger point to activate the sickness absence policy and in certain circumstances sick pay is payable for absences at either the statutory sick pay rate or at what is referred to as a "normal anything" rate dependent on the period of service work by the employee.

#### First grievance

30. On 8 December 2017 the Claimant brought a grievance to the Respondent's attention in which he stated that the Respondent had failed to pay him the correct amount of statutory sick pay and salary for two weeks and that this was causing him severe hardship and that his application for four days annual leave had been refused without reasonable explanation. The grievance letter was addressed to the Respondent's Staff Manager, DA and is at R1 143A.
31. A grievance hearing took place on 8 February 2018 and was chaired by Mr Raj Chadha, Operations Manager. The Claimant was represented by SM of the Workers of England Union and notes of the meeting were taken by RM. The notes are at R1 147A-D. At the meeting the Claimant raised his concern as to non-payment of two days of sick pay. It became apparent to Mr Chadha that whilst payment had been delayed due to an error on the Respondent's part, payment had been subsequently made. The Claimant also raised his concerns that he had requested an additional four days annual leave on 4 December 2017 which was refused. He also indicated to Mr Chadha that there was an additional matter that he wanted to add to the grievance. Mr Chadha said he should raise this at the end once the other matters have been dealt with.
32. The circumstances in which the Claimant had requested his annual leave whilst hinted at in the contemporaneous documents were not completely clear. In answer to my questions, the Claimant explained that his son was unwell, and he booked annual leave during December 2017 to travel to Saudi Arabia with his wife and son so that his son could receive treatment. He had requested an additional four days leave, but whilst he was there, he found out when he telephoned the Respondent, that his request had been refused. Consequently, he had to return prematurely, whilst his son was still in hospital and leaving his wife and his brother to look after matters. The Claimant was clearly very upset about these events, in particular the refusal of his leave and having to return prematurely, leaving his wife and son in Saudi Arabia, and he became emotional during this hearing. He said that what happened caused him a lot of stress and that it in turn made his back condition even worse and lengthened the period of time that he was off sick from work.
33. At the grievance hearing, Mr Chadha ascertained the nature of the grievance in broad terms, in which the Claimant identified the basics of his complaint

and mentioned that he was stressed and had a medical condition with his back.

34. Mr Chadha asked what the Claimant wished to achieve from the grievance and the Claimant said he wanted an apology from Mr Moran, the Operations Manager at Battersea depot, from DA, the Staff Manager, and from JT, the HR Officer. Mr Chadha explained that he would speak to these persons first and then the apology would come from him if appropriate. However, the Claimant insisted that he wanted an apology in writing but not from Mr Chadha.
35. The meeting then went on to discuss an additional matter that the Claimant had identified at the beginning of the grievance hearing. He explained to Mr Chadha that he had an accident at work two years previously, that he had applied to work part-time following that accident, that CR, the Staff Manager at that time, had set out the details of his new part-time work hours in a letter dated 2 October 2015, that he told CR that he wanted the hours to be effective on his return to work after his period of sickness absence since the accident, but he was paid company sick pay as if his part-time hours had begun whilst he was still off sick. He specifically claimed that as a result he was incorrectly paid in respect of a period of five months.
36. The Claimant showed Mr Chadha a letter of 2 October 2015 which is at R1 59. This is addressed to whom it may concern and states that the Claimant is working on a part time permanent basis three days a week on late duties and indicates that this commenced on 11 September 2015.
37. To put the matter in context, the Respondent's evidence is that around 11 September 2015 and whilst on sick leave, the Claimant made a request to reduce his working hours from full-time to part-time, that is three days per week (21 hours per week).
38. Following the amendment, the Claimant did not have set hours and was allocated to the "spare rota". The Respondent's position is that the reason why the Claimant wanted to amend his hours was to assist in a claim for state benefits.
39. Following the end of the Claimant's sickness absence in October 2015, he was absent from work on paid leave and on agreed unpaid leave until 10 December 2015. Thereafter the Claimant returned to work on 11 December 2015 on his agreed part-time hours (R1 63).
40. Mr Chadha observed in his evidence that if one accepted the Claimant's interpretation of what was agreed, he was not underpaid for a period of five months.
41. In oral evidence Mr Chadha said that explained to the Claimant that he should put this element of his grievance in writing. Mr Chadha further said in evidence that he had no further dealings with this matter. Whilst the Claimant said in evidence that Mr Chadha refused to hear his grievance, Mr Chadha denied this.

42. Mr Chadha wrote to the Claimant on 20 February 2018 to confirm the outcome of his grievance hearing. His letter is at R1 147E-F.
43. He decided not to uphold the matter of incorrect payments given that this had been resolved prior to the grievance hearing.
44. Mr Chadha considered the Claimant's holiday entitlement and confirmed that as a part-time employee, the Claimant's request for annual leave had been refused on the basis that he had not accrued leave which he had requested. The letter set out what holidays the Claimant had taken during the leave year 2017. This showed that he had in fact been given four days additional leave during that period in any event, taking days granted on the 2 and 3 January 2018.
45. However, Mr Chadha did recognise and understand that the Claimant would have been upset that his request was denied due to the nature of why it was requested. He accepted that the reason should have been explained to the Claimant in more detail at that time. He concluded that the best course of resolution was to facilitate a meeting between the individuals in question and the Claimant. This letter advised the Claimant of his right of appeal against the grievance outcome.
46. It appears that no steps were taken to facilitate such a meeting.
47. The Claimant did not appeal the grievance outcome.

#### Second grievance

48. The Claimant did raise a separate grievance relating to his part-time hours and back pay. This is the second grievance and is at R1 148 dated 26 February 2018.
49. This grievance was dealt with by Mr Moran, Operations Manager. The Claimant's grievance alleged that the Respondent started to pay him as a part-time employee during a period of his sickness absence and continued to do so for approximately seven months. The Claimant's view was that the Respondent should have waited until he returned to work, then subsequently started him as part-time.
50. The Claimant attended a grievance hearing with Mr Moran on 22 March 2018 at which he was represented by JB from the Workers of England Union. The minutes of this meeting are at R1 158-161. The Claimant's position was that he had an accident at work where he fell down the stairs on a company vehicle. At this point he was working full-time. He was unable to confirm the date of his accident or when he returned to work following the accident. He said he was paid part-time hours whilst off sick but could not say when this was. His union representative stated that the issue was more to do with a phased return to work rather than a request to work part-time.
51. After the meeting had concluded, Mr Moran spoke to CR who confirmed that the Claimant requested part-time hours so that he could claim benefits and he wanted a reference letter for this purpose.



52. Mr Moran wrote to the Claimant on 9 April 2019 following his investigation into the grievance. This letter is at R1 166-167.
53. In his letter he identified the following. The Claimant had reported that he had fallen down the stairs of a bus on 14 August 2015. At this point he was working full-time on route 156 late rota. He was certified sick from 18 August 2015 following a period of waiting from 15 August 2015. He remained on sick leave until and inclusive of 28 October 2015. Whilst he was off sick, the Claimant requested to reduce his hours to commence on 11 September 2015. From 30 October 2015, the Claimant was on paid and unpaid leave until 10 December 2015. The Claimant returned to his driving duties from 12 December 2015 on a three-day week for a two-week period. He then reported sick from 27 December 2015. He was off sick until he was dismissed on capability grounds on 24 February 2016. He was subsequently reinstated on 25 April 2016 following his appeal against the decision. He received back pay at the part-time rate.
54. On the basis of this information, Mr Moran determined that the Claimant had been paid sick pay at his part-time rate from 11 September 2015 based on CR's letter dated 2 October 2015. His sick pay ceased on 28 October 2015 upon his return to work. He then took paid and unpaid leave before subsequently returning to his driver duties from 12 December 2015. The Claimant's grievance is that he had been incorrectly paid for a period of seven months as he had returned to work on his part-time hours. Mr Moran determined that the query could only have related to part-time payments made between 11 September and 28 October 2015. His letter explained that to clarify this issue, he spoke with CR who told him that it was the Claimant's request to go part-time during his period of sickness absence for the purpose of claiming benefits. He further explained that he had no reason not to believe what CR had told him and took into account that the Claimant did not question his working week reducing to 3 days per week whilst certified sick, whilst on annual leave, whilst on unpaid leave, and when he was paid back pay following his reinstatement in April 2016. He also expressed his concern that the Claimant raise this matter some two years after the event and was somewhat confused as to why the claimant had not raised it at the time. In closing, he stated that he was not upholding the Claimant's grievance. The letter informed the Claimant of his right of appeal.
55. I note the handwritten memorandum from CR at R1 170 dated 10 April 2018. This states that the Claimant approached him sometime in 2015 requesting a reference letter stating that he chose to do part-time bus driving as a result of an incident he had. In particular, the note records the following:
- “Driver Khatab was given the reference with no liability to Abellio as this was his wish in order to claim benefits (as mentioned to me)”.*
56. Mr Moran said in evidence that he had asked CR for this. The Claimant said in evidence that he had not seen this document until these proceedings.

The first dismissal

57. To put the previous dismissal into some context, the Claimant was dismissed on grounds of medical capability on 24 February 2016. He was subsequently reinstated after successful appeal on 25 April 2016. It would appear that there was some confusion over the information that the Claimant had provided in respect of when he would be fit to return to work. As part of the appeal process, the Respondent arranged for the Claimant to undergo assessment with an occupational health specialist and this confirmed that he was fit to work. The Respondent reinstated the Claimant and he was restored to his part-time hours. The intention was for the Claimant to increase to full-time hours after one month. However, he remained working part-time hours until his second dismissal on 17 April 2018. Although I was not taken to it, the appeal outcome letter is at R1 130-131.

The second dismissal

58. The Claimant was signed off as unfit to work with back pain from 9 January 2018 and did not return to work for the Respondent thereafter. He provided medical fit notes to the Respondent on 5 February 2018 (at R1 147), 5 March 2018 (at R1 151) and 16 April 2018. This final medical fit note was for a period from 16 April to 15 June 2018 (at R1 189). All of these certificates indicated that the cause of absence was back pain and the last of which stated low back pain. No adjustments were recorded.
59. The respondent arranged for the Claimant to undergo assessment with occupational health specialists on 17 January 2018 and 4 April 2018. The first report is dated 19 January 2018 and is at R1 145. This concludes that the Claimant states that he has back pain which had been provoked by feeling stressed out work, he is unable to work because he cannot sit for long enough and he does not think he will be able to return to work for another four weeks. The occupational health adviser could not confirm to what extent the Claimant does or does not have the problems he alleges because the Claimant refused to cooperate with his assessment.
60. The Claimant attended a welfare meeting with DH, the Driving Standards Manager, on 9 March 2018 to discuss his ongoing sickness absence. The minutes of that meeting are at R1 153-155. DH was clear that there was no available return to work date, and there did not appear to be any improvement in the Claimant's condition. For these reasons a further occupational health report was obtained which is at R1 163-164 and a further capability hearing was arranged by letter dated 6 April 2018 (at R1 165). This letter notified the Claimant of the capability hearing to be conducted on 12 April 2018. It requested the Claimant to bring with him any appointments for specialists and any prescribed medication he may be taking. The letter warned him that at the hearing there was a possibility that a decision may be made in regards to his future employment.
61. The Claimant attended a second occupational health assessment on 4 April 2018. The second report is dated 6 April 2018 and is at R1 163-164. In this report the doctor concluded that the Claimant stated that he is suffering from incapacitating back pain which requires regular painkillers, intermittent use of

a crutch, and substantially impairs his day-to-day activities and prevents him from sitting more than 15 or 20 minutes. The doctor further records that the Claimant stated that he had been offered a six month rehabilitation course which it is hoped will be helpful, but he has been told there is no guarantee. The doctor concluded that on the basis of his reported symptoms and lack of progress, he cannot see any prospect of the Claimant returning to work for many months and then only if the rehabilitation classes do prove to be helpful. The doctor also records that the Claimant feels that stress has played a significant part in his perceived symptoms, but an MRI scan has shown some problems with his spine. As the Claimant appeared to have severe pain moving around when the doctor saw him, the doctor concluded that such reported symptoms would be more of a manifestation of physical problems with his back rather than psychological. The report ends by stating that given the very bleak prospect of the Claimant getting back to his job, the doctor fears that the Respondent may have to look at his continuing employability.

62. The capability meeting took place on 12 April 2018. The Claimant attended this meeting with his union representative, JB, and it was conducted by Mr Moran. The minutes of the meeting are at R1 171-177. The medical report dated 6 April 2018 was discussed and the Claimant's ability to return to work. The Claimant indicated that the only alternative work he would be able to undertake was a teaching role.
63. After further investigation, Mr Moran wrote to the Claimant on 17 April 2018 to confirm the outcome of the capability hearing. This letter is at page 190-191. Mr Moran had made enquiries of other depots to see if there was any alternative work available for the Claimant (at R1 178-186). However, there were no alternative vacancies available. In his letter he explained that with regret he had reached the conclusion that the Claimant's employment would end on 17 April 2018 on the grounds of long-term ill-health absence.
64. The letter set out what was discussed at the hearing. The letter stated that the history of the Claimant's back pain commenced in August 2015 after he fell down the stairs of a bus and lasted until 28 October 2015. He was then on leave to 12 December 2015 and returned to driving duties three days a week. This lasted for a period of two weeks before he reported sick again until his dismissal on 24 February 2016. The Claimant returned to work on 25 April 2016 following an appeal in which he was reinstated on the proviso that he would return to work full-time after a one-month phased return. To date the Claimant had not returned full-time. Mr Moran's letter explained that based on the evidence presented at the hearing, the Claimant is not currently fit to return to work. Further, the Claimant had not advised of what alternative work he could do other than he would like to teach. Mr Moran explained that he had enquired of all Abellio sites in London and that no alternative work exists at present. He further confirmed that there are no vacancies within the business other than bus driving. He stated that the latest medical certificate certifies the Claimant as sick until 15 June 2018, there was no reference to a phased return, amended duties, altered hours or workspace adaptations. Mr Moran stated that he had spoken to the occupational health doctor that morning (17 April 2018) and confirmed that the Claimant would not be in a position to work alternative duties and he also made reference to the later

certificate which contained no reference to amended duties. The letter notified the Claimant of his right of appeal.

The appeals against second dismissal and the second grievance outcome

65. By an email dated 18 April 2018 (R1 192), the Claimant appealed against the decision to dismiss him on the following grounds: he was sick because of the stress and pressure caused by the Respondent during his son's illness and treatment; and the Respondent must pay him one month's pay for every year that he had been employed.
66. The Claimant's appeal against both his second grievance and dismissal was conducted by Mr Mark McGuinness, Performance Director. The combined appeal hearing took place on 10 May 2018 and the Claimant was again represented by JB of the Workers of England Union. The minutes of the meeting are at R1 199-211.
67. Following the appeal hearing, Mr McGuinness emailed the claimant on 18 May 2018 seeking confirmation of whether the Claimant was receiving any state benefits when he was off sick from work in 2017 (sic). This is at R1 213. The Claimant's response was that this was not his business (R1 213). Mr McGuinness sent a further email to the Claimant clarifying that he meant to ask about 2015 rather than 2017 and he explained that he believed it was an appropriate question (R1 212). In response the Claimant stated: "Again it's not your business."
68. By letter dated 25 May 2018 Mr McGuinness wrote to the Claimant with the outcome of his appeal against dismissal. This letter is at R1 216-217. Mr McGuinness stated in the letter that the Claimant's position on his health had not changed at their meeting and that he remains unfit with no idea of a date when he would be in a position to return to work. The letter records that there was a discussion of suitable alternative employment to driving and the Claimant stated that he would only consider a role in Allocation. Mr McGuinness confirmed that there were no current vacancies in this or any other administrative roles. He also explained that he looked into whether there were any vacancies at the time of his dismissal and he confirmed that the only substantive role available was for an iBus Controller. The letter also explained the position regarding the Respondent's decision not to allow the Claimant further leave to visit his son as having been dealt with by Mr Chadha in his previous grievance. Having regard to the Claimant's inability to work, the lack of foreseeable return to work date and the unavailability of alternative roles, the Respondent took the decision to terminate the Claimant's employment. The letter explained the Claimant's entitlement to notice of one week for each complete year of service. The letter concluded that the decision to dismiss the Claimant was correct.
69. By letter also dated 25 May 2018, Mr McGuinness wrote to the Claimant with the outcome of his appeal against his second grievance. This letter is at R1 218-219. The letter set out the background to the grievance and the action taken by Mr Moran. The letter also set out the Claimant's position at the appeal hearing. Mr McGuinness explained that it was his belief that following an accident at work the Claimant asked to work part-time. However, he said

that he could see no evidence that this was for a prescribed period of time and the Claimant had not raised this or any changes to payments received that happened as a result as an issue until recently. He therefore concluded as a result that he was of the firm belief that the decision to work part time was the Claimant's choice and that he accepted that there would be associated consequences to his pay and associated entitlements to sick and holiday pay. He therefore concluded that Mr Moran's decision was correct and that the Claimant had provided nothing new by way of evidence during the appeal. As a result he found that the decision not to uphold the Claimant's grievance was correct and that the appeal was unsuccessful.

70. In the Claimant's oral evidence to the Employment Tribunal, the following matters arose.
71. The Claimant was adamant that he had raised the issue of his reduction of hours to part-time during his sick absence and his resultant drop in earnings on many occasions. However, beyond assertion he provided no evidence to support this and the Respondent's witnesses were unaware of any previous occasions beyond the report to Mr Chadha during the first grievance hearing.
72. The Claimant accepted that he had queried his entitlement to unpaid sick pay of a number of days but had not pursued the matter of his reduction of hours and the resultant drop in earnings which was a much greater sum of money. Indeed, it was identified as a reduction from £304 per week to £196 per week and at its highest on the allegations made by the Claimant it was in the sum of £9600. I did form the view that it seemed rather incredible that the Claimant did not pursue this matter much sooner given what was at stake.
73. The Claimant provided a letter on the second day of the hearing which is at R1 221. This is a staff memo form which he has completed in which he has ticked the box which indicates the memo is regarding change of rota and written the words next to it "full time to part time" in the Claimant's handwriting. It is dated 9 September 2015 and the Respondent's date records it was received on the same date. None of the Respondent's witnesses had seen this document before. In itself it appeared to add nothing to this aspect of the Claimant's claim.
74. The Claimant said in oral evidence that it was CR who pushed him to claim benefits rather than it being the other way round as the Respondent alleges, that he had requested the reference letter to facilitate his entitlement to benefits. He also explained that at the time he was only claiming Housing Benefit and could earn more by working full-time than part-time. However, he accepted that if he worked full time, he was less likely to get Housing Benefit or would receive a reduced entitlement, and if he worked part-time, he would receive more Housing Benefit. I also considered his refusal to answer Mr McGuinness's question about his entitlement to benefits in 2015 and the lack of any documentary evidence of this today.
75. The Claimant also said in oral evidence that he had requested the reference letter because he had been advised by his union representative not to trust the Respondent and to get his requested change of hours in writing. I expressed my surprise to the Claimant because if this was the purpose

behind it then the reference letter did not record his request accurately in the terms that he alleges it was made and granted. Further, it gives cause to further question why he did not raise the matter at that time or indeed when he realised that he was getting paid less than he would have expected.

76. With all of the evidence in mind, on balance of probability I find that the Claimant did not ask for his reduction in hours to take effect on his return at some future point to health and to work. It is clear from the documentary evidence at the time and from the surrounding evidence including what has been said by the Claimant in oral evidence that it was to take effect from September 2015. For reasons best known to the Claimant he asked for written confirmation of this from CR and this was provided in the letter dated 2 October 2015. I have to say it does seem more probable than not that the Claimant did request this for benefit purposes. However, that is not to say that there is anything untoward in his so doing.

### Relevant law

77. Section 94(1) of the Employment Rights Act 1996:

*'An employee has the right not to be unfairly dismissed by his employer.'*

78. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

*'(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 or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

*(b) relates to the conduct of the employee,*

*(c) is that the employee was redundant, or*

*(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

*(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, and*

*(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*

*(4) [In any other case 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.'*

## Conclusions

### Unfair dismissal

79. I first have to determine whether the Respondent had a potentially fair reason to dismiss the Claimant within sections 98(2) and (3) of the Employment Rights Act 1996. The Respondent states that this was by reason of capability.
80. It is clear that incapability can stem from sickness, what is necessary is that the sickness or ill-health impacts upon the Claimant's capability to do his job which can arise from resultant lack of attendance at work. The Respondent was applying an absence policy and long-term sickness policy which was triggered by certain periods of absence, allowed for capability meetings and medical examination and gave managers guidance on matters to discuss at capability meetings, as well as to the determination of capability (at R1 35-58 specifically at R1 53).
81. I therefore find that the Respondent has shown that the potentially fair reason for dismissal was capability.
82. I then turned to consider whether the Claimant's dismissal satisfied the test of reasonableness under section 98(4) of the 1996 Act.
83. In cases involving intermittent ill-health absences for either the same or a variety of reasons the test of reasonableness is measured by reference to the following.
84. The employer must have made it clear to the employee what level of attendance was expected. If the employer is dissatisfied with the employee's attendance record it should conduct a fair review of the record and give the employee an opportunity to explain the reason for the various absences (**Rolls-Royce v Walpole** [1980] IRLR 343, EAT). Any warning after the review should make it clear that the employee may be dismissed if there is no improvement. If there is no satisfactory improvement following a warning, dismissal will invariably be fair (**International Sports Co v Thompson** [1980] IRLR 340, EAT).
85. An employer is expected to deal with the matter in a sympathetic, understanding and compassionate manner and ought to take into account the following factors: the length of absences and periods of good health; the likelihood of future absences; the nature of the employee's job and the effect of absences; the consistent application of the employer's absenteeism policy (**Lyncock v Cereal Packaging** [1988] IRLR 510, EAT).
86. If there is an underlying medical condition, the employer should take medical advice and follow the steps appropriate in cases of long-term sickness. This will involve the basic question of whether in all the circumstances the employer could be expected to wait any longer for the employee to return to work and, if so, how much longer (**Spencer v Paragon Wallpapers** [1976] IRLR 373, EAT). In addition, it is reasonable to expect the employer to have found out the true medical position and have consulted with the employee

before making a decision. A medical report on the implications of and the likely length of illness should generally be obtained from the employee's GP or from an occupational health adviser. Once an employer has such a report, a meeting should be arranged to discuss the contents with the employee. In general, an employer must take such steps as are sensible in the circumstances to discuss the matter and to become informed of the true medical position. Unless the medical advice is obviously inaccurate, based on inadequate information or lack of proper examination, employers can reasonably rely on what the doctor says, as long as the employee gets a chance to comment.

87. The employer's decision should be based on the following factors: the nature and likely duration of the illness; the need for the employee to do the job for which he was employed and the difficulty covering his absence; the possibility of varying the employee's duties, although an employer is not expected to create an alternative position that does not already exist or go to great lengths to accommodate the employee. However a large employer may be expected to offer any suitable vacancy which would suit the employee; whether or not contractual sick pay has been exhausted is just one factor either way; the nature and length of the employee service may suggest the employee is the type of person who is likely to return as soon as he can, but length of service would not necessarily be relevant in any other way.
88. There was no evidence to suggest that the Respondent was in breach of its policies in terms of the process followed. The Claimant was invited to meetings, he was advised of the process to be followed, he was allowed a right of accompaniment and he was forewarned of the possibility of dismissal prior to the final capability meeting and he was given and exercised a right of appeal.
89. The Respondent reviewed the Claimant's history of ill-health which went back several years. It had received medical certificates from the Claimant's own GP which simply stated with no indication of any adjustments that he was suffering from back pain. The final certificate was for three months. The Respondent had referred the Claimant on two occasions to its occupational health advisers. Their reports, especially the second one, indicated no date on which the Claimant could return to work on the basis of the Claimant's own presented symptoms and information. Indeed, on the first occasion it appears that the Claimant refused examination and assessment. These reports were discussed with him. The Respondent attempted to enquire into the Claimant's medical condition at both the final capability meeting and on appeal but was unable to advance matters as to the Claimant's possible date of return to work. Whilst the Claimant made reference to the stress that he was put under by the Respondent in his past dealings which made his back condition worse, there was no medical evidence to support this and indeed the occupational health doctor believed in the circumstances that the back injury was a manifestation of a physical injury not a psychological one. The Claimant was asked as to other roles that he could undertake, the Respondent made enquiries, but none were available. There was some discussion as to the availability of iBus Controller roles, but the Claimant by his own admission at this hearing said that he could not undertake such a role because it involved sitting for long periods of time. In any event the



Respondent did not believe the Claimant had the necessary skills to undertake this role.

90. In the circumstances I have reached the conclusion that the Respondent acted reasonably in terms of the procedure followed and the substantive reason for dismissing the Claimant.
91. I therefore find that the Claimant was fairly dismissed, and I dismiss his complaint of unfair dismissal.

Wages

92. In essence the Claimant is seeking his wages for the period of what appear to be 11 September 2015 until his return to work from ill health absence. It is unclear exactly whether he means his return in December 2015 or the end of his employment.
93. Inasmuch as there might be a time limit issue if one were to treat this as an unauthorised deduction from wages claim I did indicate to the Respondent that I was inclined, given the Claimant's lack of representation, to view this as a breach of contract claim for monies owing on termination of employment under the Employment Tribunal's Extension of Jurisdiction comparing England and Wales) Order 1994. This is how EJ Andrews identified this claim.
94. However, given my above findings, I do not accept that there was any agreement between the Claimant and the Respondent that he would go onto part-time hours from a future date of return to work from ill-health absence as he alleges. It is clear that the agreement was for him to reduce his hours to part-time 3 days a week with effect from 11 September 2015 as recorded in the document at R1 59.
95. On this basis the complaint for wages/damages for breach of contract is ill-founded and is dismissed.

Employment Judge Tsamados

Dated 17 February 2020