EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4100377/16

Held in Glasgow on 14 February 2017

Employment Judge: Laura Doherty

Mr John Thomson	**Claimant** **Represented by:** **Ms V O`Connor - Solicitor**
M G Construction Ltd	**Respondent** **Represented by:** **Mr Craig Milloy - Director**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant was unfairly dismissed and the respondents are ordered to pay the claimant a monetary award of **£10,212.50.**

REASONS

1. The claimant presented a complaint on 3 March 2016 under a number of jurisdictions, including unfair dismissal and payment of a redundancy payment. All claims are resisted.

2. At the commencement of the Hearing Ms O`Connor for the claimant confirmed that the claim is proceeding only as one of unfair dismissal.

3. Mr Milloy, appearing for the respondents, raised the legitimacy of this position on the basis that the claimant had indicated in his ET1 that he wished to claim compensation for loss of earnings, and a redundancy payment, but had not presented a monetary claim in respect of unfair dismissal. Mr Milloy indicated that he had only received the claimant's updated schedule of loss (page 32 in the joint bundle) the evening before the Hearing, and it was only this which indicated to him that he was facing a claim of unfair dismissal. He submitted this claim should not be allowed.

4. The Tribunal was satisfied that the ET1 gave notice of a claim of unfair dismissal. The box indicating the claimant intimated a claim of unfair dismissal was ticked at point 8.1 of the ET1, and in box 8.2 the claimant stated that he considered himself to have been unfairly dismissed by the respondents. On that basis the Tribunal was satisfied that there was a claim of unfair dismissal before it, and the fact that the schedule of loss had been intimated shortly before the commencement of the Hearing was not a basis on which to strike the claim out.

5. Mr Milloy confirmed that he was not seeking adjournment of the proceedings to allow him time to investigate any matter raised by the revised schedule of loss (which is for less than the claim intimated in the ET1), and that he was able to proceed with his defence of the claim at this Hearing.

6. On the basis that the complaint of unfair dismissal was intimated in the ET1, and there was nothing in the revised schedule of loss which required the respondents to undertake any further investigations, the Tribunal was satisfied that it was consistent with the overriding objective that the Hearing proceed.

7. Mr Milloy gave evidence for the respondents, and the claimant gave evidence on his own behalf. A joint bundle of documents was produced.

Findings in Fact

8. From the evidence and information before the Tribunal it made the following findings in fact.

9. The respondents are a specialist construction company undertaking piling work. They have around 16 employees, 5 of whom deal with administrative matters; the remainder work on operations. Mr Molloy is a Director of the company.

10. The claimant, whose date of birth is 31 May 1961 was employed as Piling Operative/Foreman. The claimant commenced employment with the respondents on 5 January 2000. He had worked with the respondents previously, but had been dismissed and was then reemployed. The claimant's salary from his employment was £570 gross per week, which is £445 net per week.

11. The claimant's contract of employment is produced at document 10 in the joint bundle. Clause 5.1 of the contract under the heading "Additional Grounds for Dismissal" states: "*If an employee as a result of illness or accident, becomes incapacitated for the job which he was employed, he may have his employment terminated subject to the discretion of the Company Directors.*"

12. In order to carry out his job as a Piling Operative it is mandatory, that the claimant has certain CPCS certifications (referred to as "*cards)"*. In order to obtain the required certification the claimant requires to pass a site test, and also requires to pass a written multiple choice test. Certification is for a fixed term. When an employee's certification is due to expire the respondents put in place arrangements to enable the employee to sit the requisite tests in order to obtain the necessary certification.

13. In the claimant`s case, in order to carry out his job with the respondents he required a card for the following:-

    (1) Health and safety;

    (2) Telehandler;

    (3) Slinger Signaler;

    (4) Excavator;

    (5) Piling Rig

14. The claimant's cards or certifications were due to expire. On 2 September 2014 the respondents wrote to the claimant advising that his CPCS card was due for renewal, and advising him that he required to sit a theory test for teach of the categories referred to above. He was asked to confirm if he felt confident to sit these tests or if he needed more time for revision.

15. The respondents arranged for him to sit the tests to renew these certificates on 6 October 2014. The claimant failed each of these tests.

16. The respondents booked a second set of tests for the claimant to sit on 1 December 2014. On this occasion the claimant passed the health and safety test, but failed the remainder of the tests.

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17. A site test was carried out with the claimant on 18 December 2014 which he failed. The NVQ Assessor confirmed this to the respondents in an email of 9 February 2015 (page 14.3).

18. The respondents arranged for the claimant to re-sit his assessments at the end of March 2015, but this was cancelled, as the claimant was absent from work on that date.

19. The respondents understood that they would be in breach of their health and safety obligations, and that they would be breaking the law if they allowed the claimant to work as a Piling Operative without the required certification.

20. On 7 April 2015 the claimant attended the Forth Valley Royal Hospital in Larbert, because of a problem with his leg. The claimant continues to suffer a problem with his leg and is still receiving medical treatment for his condition.

21. The claimant had been unable to work with the respondents from 7 April 2015. He supplied statements of fitness for work from his doctor, from that date until the date when his employment was terminated. The conditions noted on the fitness for work certificates included "*leg pain,* and '*vascular investigations*".

22. The claimant was in receipt of statutory sick pay for a period of 28 weeks. On 7 October 2015 Ms Murray, the respondents` Accounts Manager, wrote to the claimant advising him that his entitlement to SSP was coming to an end.

23. On 24 November 2016 Mr Milloy wrote to the claimant terminating his employment. The letter stated:-

> "*It is with regret that MG Construction Ltd require to formally terminate your employment as from the date of this letter.*
>
> *We are unable to see a point whereby you will be fit to return.*
>
> *You are due holiday pay and this shall be calculated and paid forthwith.*

Tom and myself thank you for your long service and we hope your position improves and that your health returns, however, please understand we have no real alternative but to take this action."

24. Mr Milloy believed that Ms Murray had been in touch with the claimant on occasions during his ill health absence to enquire about his welfare.

25. At the point when the decision was taken to dismiss the claimant, Mr Milloy understood the claimant to be suffering from leg pain and to be unfit for work, and that certificates of fitness for work had been supplied indicating he remained unfit for work.

26. Mr Milloy discussed the claimant`s situation with his fellow Director, Tom, (referred to in the letter). They took the view that they were entitled to invoke Clause 5.1 of the claimant`s contract of employment as he was not fit to attend work, and there was no indication as to when he might be ft to attend work.

27. Mr Milloy also took into account the fact that the claimant had failed the tests which he needed to pass to obtain the requisite cards. He considered that the claimant`s inability to pass these tests was likely to be linked to his condition, as the claimant was an experienced Piling Operative and otherwise should have been able to pass the tests. It was uncommon for the respondent's employees not to pass the requisite tests.

28. In taking the decision to dismiss the claimant Mr Milloy took into account the ongoing difficulties which the claimant`s absence caused for the business. They could not recruit a replacement Piling Operative to replace the claimant, while the claimant remained in employment, and this had the potential to impact adversely on the business.

29. Furthermore Mr Milloy considered that there was a very significant heath and safety risk in allowing the claimant back on site to carry out the job of Piling Operative and that he as Director of the company he would ultimately

be responsible if anything went wrong, and that this was an unacceptable risk.

30 The respondents had on previous occasions referred to the claimant for medical investigations. In 2008 the respondents referred the claimant for medical examination via BUPA because of concerns about the claimant having an alcohol problem. In 2013, the respondents referred the claimant for medical examination because of the problem with his leg.

31. After the claimant received the letter terminating his employment, he contacted his trade union UCATT who sent a letter appealing the decision to dismiss him. This letter was sent on 8 December 2015. Ms Murray of the respondents attempted to call the claimant on 16 and 17 December 2015 and left messages for him, but the claimant did not get in touch with her.

32. After termination of his employment, the claimant has remained unfit for work, and has not obtained alternative employment.

Note on Evidence

33. While there were no significant conflicts in evidence on matters which were material to the Tribunal`s decision, there were some conflicts in evidence.

34. In the main, the Tribunal found Mr Milloy to be a credible and reliable witness, although on occasion he was unable to recall the dates when particular events occurred. The Tribunal was satisfied that there was nothing adverse to be taken from this, and that it was simply consistent with the passage of time.

35. Ms O`Connor, in her submission, made much of the fact that the letter of dismissal referred to the claimant`s ill-health, but the ET3 form refers to the claimant not having the requisite certification. The Tribunal did not consider

this to be an issue of credibility, and it accepted Mr Milloy`s explanation that in the ET3 he expanded upon the reasons for having dismissed the claimant. He accepted that the reason given for dismissal was that the respondents were unable to see a point when the claimant was fit to return to work.

36. The Tribunal accepted Mr Milloy`s evidence that the expiry of statutory sick pay was not a decisive factor in the decision but drew the respondents attention to the situation. In reaching this conclusion, the Tribunal takes into account that there was a gap of around a month between the expiry of the statutory sick pay and the decision being taken to dismiss the claimant.

38. The Tribunal was also satisfied that Mr Milloy took into account the claimant had failed to obtain the requisite certification. There was no challenge to the respondents position that the claimant required to have this certification to do the job that he was employed to do.

39. In relation to the claimant`s evidence, there were certain points which the Tribunal did not find the claimant to be credible or reliable, albeit the conflicts in evidence were not necessarily material to the Tribunal`s decision The Tribunal did not form the impression that the claimant set out to deliberately mislead it, however, there were certain points on which his evidence was inconsistent with the documentary evidence produced. For example, the claimant insisted that he had passed two of the certificates but the documentary supported that he had only passed one, on the second attempt.

40. The claimant denied that a site test had taken place, however there was an email from the examiner confirming that this had taken place. The claimant initially denied that he had sat the touch screen test on two occasions and that a third occasion had been organised by the respondents, however he subsequently he gave evidence inconsistent with that, accepting that a third

set of tests had been organised. This position was in any event supported by the documents produced.

Respondents` Submissions

41. Mr Milloy for the respondents firstly submitted that the issue from the claimant`s perspective appeared to be the apparent difference between the letter dismissing him, and the contents of the ET3. This centered round the basis for dismissal. The letter of dismissal clearly stated that the respondents relied on the claimant`s inability to continue to work. The respondents were invoking clause 5.1 of the claimant`s contract of employment, and it was immaterial that there was no specific reference to that Clause in the letter. Additional information was provided in the ET3 response, and that was the claimant failing the tests, and his ability to work on a piling rig generally because the claimant was incapable of passing the test or being a credible operator.

42. This was not an unreasonable position for the respondents to take. It also went to the capability of the employee, and demonstrated that the claimant was so severely impaired that he could not continue with his contract and the respondents had no option but to let him go. Mr Milloy submitted the respondents were entitled to rely on this reason, in the event the claimant challenged the first reason for dismissal. Given the whole circumstances, it was untenable for the claimant to continue working with the respondents.

43. Mr Milloy submitted this was not unfair dismissal. He did not consider the process had been unfair. A letter of appeal had been sent, of which the claimant had no knowledge. The respondents had tried to contact him, in response to that, but had been unable to do so. When the letter of dismissal was sent, the respondents were deliberately ‘soft’. They did not state the claimant was “fired”. There was no loss to the claimant, as at this point he was not receiving any payments from MGM. Mr Milloy submitted that what the respondents had done was not a material breach of the claimant`s

rights. The claimant could have phoned the respondents at any time, but did not do so.

44. Mr Milloy submitted that the respondents acted in compliance with the duty of care which they had, and the claimant could not have continued to work on a piling rig.

Claimant`s Submissions

45. Ms O'Connor produced written submissions, which she supplemented with some oral submissions. She submitted that the claimant`s position was that he was unfairly dismissed as the respondents had not followed a fair procedure in dismissing the claimant as required by the ACAS Code and Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("*TULCRA*"). Ms O`Connor submitted that the Tribunal should make a 25% uplift on any award made.

46. Ms O'Connor relied on the discrepancies in the reasons for dismissing the claimant between the letter of dismissal and the ET3. The ET3 response highlighted a different reason for dismissal to that given to the claimant. The letter of dismissal stated that the claimant was unfit to work and the respondents had no option but to terminate his employment.

47. The claimant had appealed the decision to dismiss, following upon which there was no response from the respondents.

48. Ms O'Connor submitted that the respondents had not adopted a fair and consistent procedure in dismissing the claimant and in fact there was no procedure adopted at all. The respondents did not investigate the matter and they did not invite the claimant to come in and speak to them to give him more information on why he was being dismissed or to give him the opportunity to advise when/if he would be fit for work.

49. The respondents did not invite the claimant to a disciplinary meeting.

50. Ms O'Connor referred to Clause 5 of the contract of employment (additional grounds for dismissal, Section 5.1).

51. If the respondents followed a fair procedure by investigating the matter they would have invited the claimant to a disciplinary hearing and it was submitted they would have been in a better position to determine whether the claimant was incapacitated for the job on which he was employed as a result of his illness. Failure to follow a fair disciplinary procedure means the respondents are unable to rely on Clause 5, and in any event, the respondents were unable to contract out of their employment law obligations. No right of appeal was given.

52. Ms O'Connor referred to the test of reasonableness set out by Lord Denning in the case of ***British Leyland –v- Swift [1981] IRLR 91 CA*** and she submitted that the decision to dismiss the claimant fell outwith the band of reasonable responses. The respondents stated that there was no real alternative but to dismiss but the claimant did not accept that this was the case. There were other options open to MG Construction in dealing with the situation. Had a fair procedure been followed it would have established that dismissal was not the only available option. The respondents could have invited the claimant to a meeting to discuss how they could accommodate him it the workplace. For example, they could have put on light duties or found him an alternative position within the company which he would have been able to carry out. It was the claimant`s position that the respondents were looking for a reason to dismiss the claimant. In relation to the ACAS Code, Ms O`Connor drew the Tribunal`s attention to paragraphs 5 to 31 of that Code as to how disciplinary matters should be dealt with. She accepted that in the event disciplinary procedure was not appropriate, then the ACAS Code would not apply.

Reasons

53. Section **94** of the Employment Rights Act 1996 ("the ERA") provides for the right of an employee not to be unfairly dismissed by his employer.

54. Section **98(1)** provides the following:-

> "(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 reasons) 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 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 an employee,*
>
> *(c) is that the employee was redundant, or*
>
> *(d) or is that the employee could not continue to work in the position which he held without contravention (either on his part or on the part 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 or physical or mental quality and

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

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer`s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

55. In terms of Section **98(1)** it is for the employer to establish the reason for dismissal.

56. In the event the employer establishes there was a potentially fair reason for dismissal, the Tribunal then has to go on to consider the fairness of the dismissal under Section **98(4).**

57. The Tribunal firstly considered whether the respondents had established a potentially fair reason for dismissal. The reason for dismissal is said by the respondents to fall within Section **98(2)(a),** and **(d).**

58. The reason for dismissal has been described as a set of facts known to the employer, or it may be beliefs held by him which caused him to dismiss the employee. The hurdle for the respondents at this stage is not a high one.

59. A good deal was made of this case of the apparent difference between the reason given to the claimant of the letter dismissing him, and the details contained in the ET3.

60. The Tribunal considered the evidence in order to determine the reason, or principal reason for dismissal, at the point when that claimant was dismissed. On the basis of the evidence given by Mr Milloy, the Tribunal was satisfied that the respondents dismissed the claimant because he had been on long term sickness absence, the respondents concluded they could not ascertain when he would be fit to return to work, and the claimant had been unable to pass the examines in order to obtain the requisite cards in order to carry out the job which he was employed to do.

61. The Tribunal is supported its conclusion as to the reason for dismissal, in that at the point when the decision was taken to dismiss the clamant he had as a matter of fact been on long term sickness absence, and the respondents had no information which suggested they were in a position to ascertain when he might be fit to return to work.

62. Secondly, although it is not mentioned in the letter of dismissal as a matter of fact, the claimant had failed to obtain the requisite certifications. This was a matter which impacted on the claimant's ability to do his job, and therefore it was believable that this formed part of the respondent's reasons for dismissing the claimant, even if this was not stated in terms in the letter.

63. The Tribunal was unable to conclude that the reason for dismissal fell within Section **98(2)(d),** as there was no evidence which allowed it to conclude what enactment would have been contravened, beyond Mr Milloy`s reference in evidence to general health and safety law.

64. The Tribunal was however satisfied that the respondents had made out the reason for dismissal. That was that the claimant's capability, both on the grounds of his long term ill-health, and the lack of the certifications which he required to carry out his job. Capability is a potentially fair reason for dismissal in terms of Section **98(2) (a)** of the ERA.

65. The Tribunal was therefore satisfied that the respondents had established a potentially fair reason for dismissal, and went on to consider whether dismissal was fair or unfair, with reference to the test set out at Section **98(4)** of the ERA. The Tribunal reminded itself that considering this test the burden of proof is neutral, and the Tribunal should apply an objective test of reasonableness in considering the fairness of the dismissal.

66. This is not a conduct dismissal, and therefore the respondents would not reasonably be expected to apply a disciplinary procedure prior to dismissing on the grounds of long term ill-health or failure to obtain the requisite certifications. This is not a dismissal to which the ACAS code applies.

67. There was however an absence of any kind of procedure in this case prior to dismissal, and in considering the fairness of the dismissal under Section **98(4)** of ERA, the Tribunal considered what the respondents did at the point when they took the decision to dismiss the claimant.

68. Mr Milloy candidly accepted that the respondents did not engage in any kind of consultation with the claimant or adopt any procedure prior to dismissing him. The Tribunal accepted that Mr Milloy, as he said in evidence, believed that Ms Murray had been in touch with the claimant to enquire about his welfare generally and that the claimant was in touch with other colleagues,

but at the point Mr Milloy he took the decision to dismiss, he had no information about the claimant`s medical condition beyond that contained in the fitness notes which certified him as unfit to attend work.

69. Mr Milloy took into account that the claimant had been certified as unfit for work from April to November, and that he was in receipt of fitness notes which stated the claimant remained unfit for work at the point when the decision to dismiss the claimant was taken. Mr Milloy also took into account the impact which the claimant`s continued absence had on the business and the fact that his entitlement to statutory sick pay had expired. These were all factors which the respondents were reasonably entitled to take into account in considering whether the claimant should be dismissed on the grounds of ill health capability.

70. However the Tribunal considered, whether the respondents acted reasonably in proceeding on the basis of these factors, without any consultation with the claimant, or without carrying out any investigation as to the claimant's medical condition. Applying the objective test of a reasonable employer, even taking into the relatively small size and administrative resources of the respondents undertaking, the decision to dismiss the claimant on the basis of the information available, without any consultation with the claimant, or a medical advisor, in order to make enquiry as to when the claimant might be in a position to return to work, was one which fell outwith the band of reasonable responses. An employer acting reasonably would not take the decision to dismiss on the grounds of ill health capability in the absence of such enquiry.

71. In relation to the second limb of the reason to dismiss, the Tribunal considered whether the respondents acted reasonably in taking the decision to dismiss the claimant for lack of capability, on the basis that he had not passed the necessary exams, and obtained the requisite cards, in the absence of any consultation with him. The respondents had arranged for the claimant to undertake the exams again in March (albeit he did not sit

these because he was off ill). It was therefore was possible for the claimant to retaking the exams, and applying an objective test of reasonableness, it was unreasonable for the respondents to dismiss the claimant without any consultation with him in order to consider if he could retake the exams or not, or if there were any alternatives to dismissal.

72. It may well have been that if the respondents consulted with the claimant, or carried out medical investigations, that these investigations would have proved fruitless, and the end result would have been the same. However, an employer who dismisses for a potential fair reason will not be able to avoid a finding of unfair dismissal by virtue of the conclusion that the failure to follow a fair procedure made no difference to the outcome of the dismissal process. In such cases, the Tribunal is entitled when assessing the compensatory award payable in respect of an unfair dismissal, to consider whether a reduction should be made on the grounds that the lack of a fair procedure made no practical difference to the decision to dismiss, but the dismissal is still unfair.

73. For these reasons, applying the test under Section **98(4)** to the facts in this case, the Tribunal found the dismissal to be unfair.

Remedy

74. The remedy sought is compensation only. In terms of Section **118** of ERA where a Tribunal makes an award of compensation for unfair dismissal the award shall consist of

(a) a basic award

(b) a compensatory award.

75. The basic award is calculated in accordance with Sections **119, 122** and **126** of ERA, and is assessed by reference to the claimant`s age and length of service, his gross weekly earnings.

76. The claimant was employed from 5 January 2000 to 24 November 2015, which is a period of 15 full years.

77. In terms of Section **119(2)** of ERA the claimant is entitled to 1.5 week's pay for each year for which he was not over the age of 41, and one week's pay for each year of employment in which he was not below the age of 22. The claimant is therefore entitled to 21.5 weeks pay at the statutory cap of £475, which bring out a total of **£10,212.50.**

78. The Tribunal then went on to consider whether there should be a compensatory award in terms of Section **123** of ERA. Section **123(1)** provides:-

> "*Subject to the provisions of this section and Sections 124, 124A and 126A the amount o the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*."

79. In assessing the compensatory award the Tribunal considers the loss from the date of dismissal to the date of the Hearing, and then if appropriate future loss if the claimant is likely to continue to suffer loss of earnings after the date of the Hearing.

80. In this case no claim for loss of earnings is made. The Tribunal was in any event satisfied that the claimant has been unable to work because of ill-health from the date of his dismissal, and continues to be unable to do so, and therefore it is not appropriate to make any award for loss of earnings.

81. The claimant claims loss of statutory rights of £300. The Tribunal was satisfied however that had a fair procedure been followed, the likelihood is that the claimant would have been dismissed. The claimant's evidence before the Tribunal was that he has continued to remain unfit for work The Tribunal was satisfied therefore it was likely, had the respondents adopted a fair procedure, that the claimant would have been dismissed, and therefore the Tribunal should make no award in respect of this head of claim.

82. Had the claimant sought to recover a compensatory award, the Tribunal would have applied the principals to be derived from ***Polkey –v- AE Dayton Services Ltd*** and considered whether if a fair procedure had been followed, dismissal would likely to have been the result in any event. Given the evidence about the claimant's continued ill-health, the Tribunal would have made such a reduction to the compensatory award, had it been required to address this. The principals to be derived from ***Polkey*** however do not apply to the Tribunal`s assessment of the basic award. The total monetary award in this case is therefore **£10,212.50**

Employment Judge: Laura Doherty
Date of Judgment: 23 February 2017
Entered in register: 27 February 2017
and copied to parties