EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT		**RESPONDENT**
MRS K ALLEN-POWLETT	**V**	**CARDIFF & VALE UNIVERSITY HEALTH BOARD**

HELD AT: CARDIFF ON: 16 & 17 MARCH 2017

EMPLOYMENT JUDGE: MR W BEARD

REPRESENTATION:

FOR THE CLAIMANT - Mr Gil (Counsel)
FOR THE RESPONDENT - Ms Howells (Counsel)

JUDGMENT

1. The claimant's claim that she was unfairly dismissed pursuant to section 98 of the Employment Rights Act 1996 is well founded and this matter will be set down for a remedy hearing.

2. The respondent is ordered to pay to the claimant the sum of £1200.00 pursuant to Rule 76(4) of the Employment Tribunal Rules of Procedure 2013

REASONS

Preliminaries

1. Mr Gil represented the claimant and the respondent was represented by Mr Howells. I was provided with a bundle of documents running to over 350 pages. I heard oral evidence on behalf of the respondent from Mrs Gallent, the claimant's line manager and Mrs Davies who sat on the appeal panel. The respondent also asked me to take account of the witness statements of Judith Harrhy and Richie Haworth, both senior figures in the respondent's human resources department at the time of the claimant's dismissal.

2. The respondent dismissed the claimant on the grounds of capability. The claimant contends that the decision to dismiss fell outside the bands of reasonable responses. The claimant does not contend that there have been any specific procedural failings arising out the respondent's policies.

3. I indicated to the parties at the outset of the hearing I would only take account of documents referred to in witness evidence or submissions.

The Facts

4. The respondent is an NHS Health Board in Wales. The claimant was employed as a band five nurse working in the cardiac intensive care unit. The claimant commenced her employment on 13 May 2013.

5. The cardiac unit deals with pre-operative and post-operative cardiac surgical patients. The patients on that unit are classified either as level three or level two patients. Level three indicating those patients who require the most care and are generally nursed on a one to one basis and for level two patients care is usually provided by two nurses. It was common ground that last minute absences of staff caused problems in maintaining these ratios. It was further common ground that obtaining the services of other staff at short notice was often difficult and sometimes not possible. The parties also agreed that this was a stressful working environment. This meant that where the ratios fell below the usual levels this created potential impacts on patient care and staff stress levels. The respondent gave evidence that staff absences of this nature had led to surgery being cancelled; the claimant was unaware of any incidence where this happened but accepted it was a possibility. Given that the patients are likely to be seriously in need of care on an intensive basis, short notice absence is an important concern to the respondent because of these knock-on effects.

6. The respondent has a sickness absence policy introduced in November 2015 (this is an all Wales policy which the respondent is required to adopt). The parties agree that although some of the events precede November 2015 it is nonetheless the policy was that applied at the time of the claimant's last period of absence leading to the claimant's dismissal. The policy sets out trigger points for meetings to be held with employees, and then describes stages to which the trigger points relate. The policy demonstrates e.g. that after three periods of absence in a six-month period (or four in a twelve-month period) a meeting is triggered. The stage of the process to which that meeting relates depends on what, if any, previous occasions meetings had been triggered. The parties agree that a final stage meeting had been triggered by the claimant's absence in June 2015 and further that a second final stage absence meeting had been triggered by the claimant's absence on 11 December 2015.What is clear from the general tone of the policy is that a capability dismissal on the grounds of sickness absence is not a "punishment" but is to assure the efficiency of service provided. In my judgment, the policy is forward looking in the sense that it asks the decision maker to consider the prospects of an employee providing efficient service going forward. The policy sets out that a decision maker at a final stage absence meeting should consider the following factors in deciding the appropriate outcome.

   6.1. The attendance record of the employee.

   6.2. The content and outcome of previous informal and formal interviews.

   6.3. What opportunity has been given to improve.

   6.4. All medical advice available.

   6.5. Is there a diagnosis of an underlying medical condition.

   6.6. Any adjustments considered or introduced.

   6.7. The likelihood of improvement in the foreseeable future.

6.8. The needs of the service and difficulties created by the absence.

7. The claimant had four instances of absence in the last seven months of 2013. In 2014 she had seven instances of absence (one of which was a long-term absence to allow her to undergo and recover from surgery). In 2015 the claimant was absent on 7 January due to migraine, 25 March due to diarrhoea and 15 June again due to migraine. Occupational Health reports were prepared in respect of the claimant in September 2014, August 2015 and February 2016. The relevant information from those reports was as follows:

7.1. The report prepared in September 2014:

7.1.1. That the claimant had developed migraines in or around 2009.

7.1.2. The episodes of migraine had increased in frequency in the six months from March to September 2014.

7.1.3. That the claimant was aware of trigger factors including lack of sleep, anxiety and poor fluid levels.

7.1.4. That the claimant was suffering personal problems at home which was contributing to the trigger factors.

7.1.5. The report was prepared at the time when the claimant was absent due to having undergone surgery, the advice in respect of the work environment in this report was related to the conditions arising out of that as opposed to the more chronic migraine issue.

7.2. The report prepared in August 2015:

7.2.1. This report concentrates on the issue of migraines. It refers to no specific triggers but indicates the condition is chronic with an occurrence approximately once a month.

7.2.2. The recommendation made is for the claimant to seek help from her GP; specifically, by reviewing the medication prescribed.

7.2.3. The report supports a reduction in the claimant's hours (which was implemented by the respondent) and a split shift pattern (which was not) in order to support an appropriate work/life balance.

7.3. The report prepared in February 2016 sets out as follows about the claimant *"since she was last seen, her migraines have reduced in frequency, and this is probably related to the reduction in hours allowing her a better work/life balance. I hope that this will be continued and as a result her sickness shall fall within the normal acceptable levels."*

8. The claimant's absence on 11 December 2015 occurred in unusual circumstances. The claimant had booked annual leave for that date. The respondent required the claimant to undertake a certain amount of study each year for which study leave was given. The claimant had attempted to attend a course in November 2015 to fulfil this obligation but the course was full. The claimant was offered a place on a course in December which coincided with her pre-booked holidays. The claimant accepted the place and, although it fell within the time of her annual leave, the claimant was required to attend to work on that

study day. It is equally the case that the claimant was not required to work with patients at the unit on that day.

9. The claimant's absence on 11 December 2015 triggered the policy. This was because the claimant had been absent four times in the previous 12 months. Three of those occasions were those that occurred up to June 2015; the fourth was the December absence. The claimant was given an occupational health appointment, and the final report dealt with above was provided to the respondent in February 2016. The claimant was thereafter invited to attend a final stage absence meeting.

10. On the 18 April 2016 the respondent held a final stage capability meeting with the claimant. I have heard no evidence from the decision maker. I have seen the written notes of the decision dismissing the claimant (p. 213) the notes are as follows:

> *"(a) The improvement you have demonstrated however in light of SM policy you have still 4 periods in 12 months in addition to the 10 previous episodes over 2 years.*
>
> *(b) We have taken on board OH advice on shifts supporting you with pattern, roster. However, you have decided to change that support given by choosing to work night duty.*
>
> *(c) Refused redeployment post hip surgery."*

Beyond that information I have little evidence as to how the decision maker approached the question of exercising her discretion with regard to the matters referred to in the policy. In the letter of dismissal there is reference to improvement in attendance not being to the level expected, that there were no underlying medical reasons for absence and that no changes in level of work were required but that the claimant had tried to have her hours increased. Mr Howells asks me to conclude that the matter raised at (b) must be because the decision maker thought the claimant would not be likely to achieve appropriate levels of attendance in future because of the change she made to night work; I consider this to be far too speculative based on that evidence. In my judgment, I can only conclude that the decision maker considered levels of attendance, the absence of an underlying medical condition (which appears at odds with the chronic migraine diagnosis) and that adjustments had been made for the claimant as part of the process of concluding she should dismiss the claimant. What I have no evidence on is which period the decision maker was considering absence over, what account she took that the specific absence in question was in unusual circumstances and caused no difficulties on the ward and what account she took of the likelihood of improvement referred to in the occupational health report.

11. The claimant appealed. At the appeal hearing she produced evidence that she had not previously given at the final stage meeting. That evidence was that she had been subjected to domestic violence and had considerable problems arising from that from 2013 to August 2015 after which her husband was excluded from the family home and subsequently left the country divorcing the claimant whilst overseas. Mrs Davies told me she accepted that evidence as true and took account of it.

12. I was not impressed with Mrs Davies as a witness. I gained the impression that she was justifying the decision to dismiss the claimant before me in ways that she had not considered at the time.

12.1. An example of this was when she was questioned about the decision to dismiss and the suggestion was made that dismissal was automatic following a trigger event. Her first response was to indicate that it was automatic but then to later revise that to indicate that dismissal was only a possible outcome; I would, normally, consider this to be a slip of the tongue. However, in the letter dismissing the claimant's appeal Mrs Davies referred to the claimant having been told that, if she did not make the required improvement after the September 2015 meeting, she would be extremely likely to be dismissed. In the letter, she then goes on to conclude that although improvement had been made by the claimant this improvement had already been taken account of at the September meeting. The obvious conclusion was that as such that improvement could not be taken account of at this meeting.

12.2. I considered that the respondent was approaching his matter on a mechanical basis: concluding that this was the second final stage meeting that had happened and therefore dismissal was not only appropriate but automatic. I was bolstered in this conclusion because after dismissing the appeal it was suggested that the claimant apply for specific forms of "bank work" (a matter to which I shall return), in my judgment if Mrs Davies felt justified in dismissing it is probable that no such offer would have been made.

12.3. In addition to this my opinion of her evidence was affected by the assertion that she made that the claimant's lifestyle appeared chaotic to her: I considered this to be hyperbole. The claimant in the year prior to her dismissal had been absent on two occasions; this was not evidence of a chaotic lifestyle. The claimant obviously had significant difficulties at home in the period where her absences had been most frequent, those were related to her having been a victim of domestic violence. If those circumstances were relied upon by Mrs Davies in concluding that the claimant's lifestyle was chaotic, it undermines her evidence that she accepted the claimant's account of those events as true.

12.4. Finally, in this respect I considered that when Mrs Davies said that her decision was based on a belief that the claimant was not likely to provide consistent levels of attendance in the future she was not relating her conclusions at the time of her decision. She told me that this conclusion was based on the claimant's communication and behaviour. However, at an earlier stage of questioning she referred to issues around the claimant's attendance in other areas. When asked to explain this further she indicated that the latter referred to the claimant continuously changing shifts and seeking special leave. The former, as it turned out, was a clumsy way of saying that the claimant had sought to unilaterally stop the adjustments that had been put in place on shifts. None of this reasoning is explained in the dismissal letter or any other documents. Mrs Davies at first contended that the conclusion was in the letter but that it was not clear from the way in which she had written the document. However, when questioned further Mrs Davies

could not point to any aspect of the letter which she said was meant to deal with the matter but had not done so adequately.

13. Mrs Davies was also inconsistent in her evidence as to the period which was being considered in dismissing the claimant. When first questioned, she said that the period where absences occurred that she considered ran from April 2015 to April 2016. However, as questions progressed, and particularly when it was being put to her that only two absences occurred during that period, she altered her evidence to indicate that the period she was taking account of related to twelve-months back from December 2015. The respondent's witnesses had each accepted that if the twelve-month period which preceded the 18 April 2016 was looked at then the claimant's absenteeism was at a good level. It was only if the twelve-month period up to December 2015 was taken account of, in light of the claimant's previous poor record, that the level of attendance could be considered poor. It appeared to me that Mrs Davies was attempting a form of reverse engineering of her decision. Her change of response was given when she realised that the good absence record in the preceding year from April 2016 would not have justified dismissal. This added to my view that the evidence was retrospective justification rather than the thought process adopted at the time the decision was made.

14. On the basis of those conclusions I consider that the respondent at the appeal hearing gave no proper consideration to the new evidence provided by the claimant as to her personal circumstances. Further I am of the view that Mrs Davies did not consider there was a discretion in respect of whether to dismiss the claimant at this appeal.

15. Since dismissal the claimant had been carrying out general "bank work". That means she is on a list used by the respondent to obtain nurses. The claimant provides her availability to carry out nursing work and the respondent employs her on an ad hoc basis. In the letter setting out the appeal decision Mrs Davies writes that she had discussed the claimant with the director of nursing. This discussion was specifically related to the information about the claimant's personal circumstances which had been revealed at the appeal. The result of that discussion was to suggest to the claimant that some support might be given to her in respect of future opportunities so that the claimant could be assigned to bank work in a specific clinical area. The following words are used *"this would allow you to build up a positive profile of commitment and record of attendance"*. In my judgment, this demonstrates a view on the part of Mrs Davies that the claimant was likely to continue with the improvement in absenteeism in the future. Otherwise what purpose would there be in making special arrangements unless it is implied that the claimant would have the prospect of returning to employment with the respondent because of the "positive profile".

The Law

16. I have to apply Section 98 of the Employment Rights Act 1996 which provides:

> *(1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, the Tribunal shall have regard to—*

> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is ---- a reason falling within subsection (2)".*
>
> *(2) A reason falls within this subsection if it-*
>
> *(a) relates to the capability or qualifications for performing work of the kind which he was employed by the employer to do;*
>
> *----------*
>
> *(4) where the employer has fulfilled the requirements of subsection (1) the determination of the question of 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".*

17. I remind myself that in ***Mitchell v St Joseph's School*** in the Employment Appeal Tribunal, a decision made after the change to a situation where unfair dismissal cases are dealt with generally by an Employment Judge alone His Honour Judge McMullen QC made it clear that the law remains as it was. It is not the subjective view of the Employment Judge that is important, what is important and what is being examined is the employer's reason for dismissal and the objective reasonableness of that decision. It is a review of the employer's decision. That proposition was set out very clearly in ***Turner v East Midlands Trains [2013] IRLR 107***. The Judge in Turner said:

> *"For a good many years it has been a source of distress to unfair dismissal claimants that, with rare exceptions, they cannot recanvass the merits of their case before an employment tribunal. In spite of the requirement in s.98(4)(b) that the fairness of a dismissal is to be determined in accordance with the equity and the substantial merits of the case, a tribunal which was once regarded as an industrial jury is today a forum of review, albeit not bound to the Wednesbury mast".*

18. However, I am also to consider the limits that are set out by Lord Justice Longmore in ***Bowater v Northwest London Hospital NHS Trust [2011] IRLR 331***, he said:

> *"I agree with Stanley Burnton LJ that the dismissal of the appellant for her lewd comment was outside the range of reasonable responses open to a reasonable employer in the circumstances of the case. The EAT decided that the ET had substituted its own judgment for that of the judgment to which the employer had come. But the employer cannot be the final arbiter of its own conduct in dismissing an employee. It is for an ET to make its judgment always bearing in mind that the test is whether dismissal is within the range of reasonable options open to a reasonable employer. The ET made it more than plain that that was the test which they were applying".*

That case in my judgment makes it clear that the decision as to the answer to the question of whether it is an objectively reasonable decision on the part of the employer remains mine to make.

19. This is a capability case. I have been referred to ***Lyncock v Cereal Packaging Limited [1988] IRLR 50*** which indicates that the approach of the employer in a capability case must be based on the specific circumstances in the case and judged on its own facts. However key elements may include, the likelihood of recurrence, length and frequency of absences, the employers need for the work of the particular employee, impact of absence on other employees and that it has been made clear to the employee that the point of no return is approaching.

Analysis

20. In my judgment, the dismissal was unfair. I base this conclusion on three aspects.

    20.1. Firstly, I take the view that the respondent did not properly take account of the list of matters set out in the policy. In particular, that there had been a significant change in levels of attendance.

    20.2. Secondly, in my judgment there was no sufficient account taken of the change in knowledge about the claimant's personal circumstances in assessing whether the claimant was likely to have good attendance in future.

    20.3. Finally, I consider that the decision makers did not consider properly whether dismissal was the appropriate sanction in the light of the claimant's good levels of attendance between September 2015 and April 2016.

21. The claimant had good attendance between June 2015 and April 2016 when the dismissal took place, but poor attendance if the earlier period is considered. I would, generally, be very wary of concluding that a particular level of absence was not sufficient for a reasonable employer to conclude it amounted to a level for which dismissal was an appropriate sanction. However, in this case I am

justified in doing so without substituting my opinion for that of the employer for the following reasons.

21.1. The respondent's policy imports a forward looking approach to the decision to terminate. Whilst it takes account of past absences, obviously, its concern is in respect of the prospect of future absence. It requires account to be taken of both the opportunities given to improve and the *likelihood* of improvement in the future (my emphasis).

21.2. The reaction of Mrs Davies to the claimant's revelations as to her home circumstances and the change that had taken place was to attempt to find a way in which the claimant could work for the respondent in the future by proving commitment and attendance.

21.3. In my judgment that conclusion envisaged giving the claimant a chance returning to permanent employment with the respondent in the future. It is a chance which no reasonable employer would offer in that manner. If a reasonable employer sees improvement and is looking for further improvement from an employee it would usually be done by continuing the employment and not by dismissing the employee. If the respondent considers that the claimant is *likely* to improve and continue with an existing improvement, as must be the case when a specific arrangement in respect of bank work was envisaged, then the policy requires it to consider that likelihood in coming to a decision. It can be seen that setting specific targets for the claimant to abide by in continued employment would achieve the same objective of allowing the claimant to demonstrate a positive profile of commitment and record of attendance.

22. My next concern can be described as the "new evidence" issue.

22.1. At appeal the claimant provided new information. If that information was accepted as true then it should be placed into the balancing exercise in deciding whether to dismiss the claimant. The respondent's witness has told me that she accepted the evidence. Nothing in the documentation demonstrates that the respondent did not accept this to be a true account. On that basis for my purposes it is information that should have been considered in the appeal process.

22.2. That information provided an explanation for the claimant's earlier absenteeism. It was both factually and temporally clearly connected with the times of the claimant's absences. Further, in terms of the improvement in the claimant's attendance there was, again, the possibility (if not probability) that the improvement was related to the changes in question.

22.3. In my judgment Mrs Davies gave no consideration to this new evidence in coming to her conclusions. As I have indicated it appeared to me that she considered that there was a requirement that the dismissal be upheld because this was the second final stage meeting. Given the relevance to the decision to be made ignoring that evidence was not reasonable. This is in addition to fettering her discretion as to the decision to dismiss, which in itself is not reasonable.

23. My final concern is that relating to the consideration given to the sanction given that the claimant had by the time of the decision in April 2016 demonstrated a significant improvement in attendance. I have already indicated that I consider there was a fettering of discretion at the appeal stage. I am not able to see the reasoning for dismissal at the dismissal stage, other than it appears retrospective on the reasons given and there is no indication that the fact the claimant had limited absences in the period from April 2015. I do not say by this that the respondent was not entitled to take into account the claimant's poor history of attendance in previous years, but that I have no evidence that the respondent was looking at the whole picture when the decision to dismiss was made. A reasonable employer would look at that whole picture and, in my judgment, would bring into the balance that the claimant had improved considerably. Further there is no indication that at dismissal stage the respondent took into account the Occupational Health report which indicated that the claimant should have acceptable service in future. Again, this does not preclude the respondent from dismissing the claimant but it is not reasonable not to consider it in the decision-making process.

24. On that basis, I am clear that the claimant's claim of unfair dismissal is well founded. In my judgement, based on the substantial merits and the equity and in all the circumstances the respondent was not reasonable in deciding to dismiss the claimant based on capability. This matter will be set down for a remedy hearing.

_____
Employment Judge Beard

Order sent to Parties on
10 April 2017

_____
For the Tribunal office