EMPLOYMENT TRIBUNALS

Claimant: Mr B Gouldbourne

Respondent: Adient Seating UK Ltd

HELD AT: Liverpool **ON:** 21 September 2017
12 October 2017
(In Chambers)

BEFORE: Employment Judge Rice-Birchall

REPRESENTATION:

Claimant: Mr Pinder, Solicitor
Respondent: Ms Levene, Counsel

JUDGMENT

The judgment of the Tribunal is that the claimant was fairly dismissed by the respondent. His claim of unfair dismissal fails and is dismissed.

REASONS

Claims and Issues

1. An agreed list of issues was presented to the Tribunal which identified the following list of issues.

(i) What was the fair reason for the claimant's dismissal? It was agreed by both parties that the reason for dismissal was the claimant's breach of the respondent's attendance management process. The respondent put forward some other substantial reason as the potentially fair reason but pleaded conduct and./or capability in the alternative.

(ii) Did the respondent act reasonably in treating this as a reason for dismissing the claimant taking into account all of the circumstances.

(iii) Did the respondent follow a fair procedure.

(iv) Was the dismissal within the range of reasonable responses open to the respondent?

Remedy

2. If the claimant's claims were upheld the Tribunal was asked to consider:
   (i) What financial compensation is appropriate in all the circumstances?
   (ii) Should any compensation awarded be reduced by virtue of the principle in *Polkey v A E Dayton Services Limited* 1987 ICR 142 and, if so, what reduction is appropriate?
   (iii) should any compensation awarded be reduced on the grounds that the claimant's actions caused or contributed to his dismissal and if so what reduction is appropriate?
   (iv) has the claimant mitigated his loss?
3. There were no other claims before the Tribunal.

Evidence

4. The Tribunal heard evidence from the claimant himself. On behalf of the respondent, the Tribunal heard evidence from Mr Stewart Cunningham, Production Manager, who was the Dismissing Officer and from Mr Derek Connolly, MP and L Manager, who was the Appeals Officer.
5. The Tribunal had the benefit of a bundle of documents.

Findings of Fact

Background

6. The respondent is a market leader in automotive seating.
7. The claimant was employed by the respondent from 1 December 2011 as a manufacturing team member at the respondent's Halewood plant. The Halewood plant functions 24 hours a day, five days a week and manufactures seat sets for one key customer: Jaguar Land Rover.
8. The respondent is a JIT (Just In Time) supplier. This means it is linked to its clients to enable it to respond in real time to any client changes and/or fluctuations.
9. JIT is an extremely challenging business model. As a result, the respondent's production lines adhere to strict timetables and schedules in order for the respondent to fulfil its expectations and obligations.
10. At the Halewood plant, where the claimant was employed, there are 130 manufacturing team members ("MTM's") per shift. They work across eight different areas of the plant. On each shift, each MTM is allocated a station on the production line. The product of all stations is the end product.
11. If an employee does not attend work for any reason, the respondent does have resource available to it. It has a labour pool; it can use first line managers who are trained in each station of the production line and who can assist if the line is short staffed; or can "run light". Any of these options "bridge a gap" but full attendance is obviously preferable in order to maintain quality and output targets.
12. Halewood plant has demanding targets in terms of its production output and aims to work to a target of 44 jobs per hour.
13. The respondent operates a tough absence management procedure which contains the following policy statement: "It is the company's intention to encourage a culture where non-attendance is seen as having a high cost in terms of disruption to service, additional pressure placed on other team members and increased direct costs".

14. The policy continues: “colleagues…have a responsibility to keep absence to a minimum and ensure they report any medical conditions that arise".
15. The policy specifically states that the following types of absence are included within its scope: “personal sickness and injury, howsoever caused: domestic emergencies (other than where this falls within time off for dependants) and any other absence.
16. The policy also deals with part absences and states that any absence during a shift is termed a "part absence" and that a colleague will be paid only for the hours they have worked in that shift. It states that "part absences where less than 50% of the normal shift has been completed are classed as one day's absence". However, it also states that “all part shifts will continue to be monitored in line with the trigger point process.”
17. The procedure provides that, "in order to ensure consistency", officers will investigate and report on any colleague whose absence record meets or exceeds either ten days or more of absence in a rolling 26 week period or 3 occasions of absence in a rolling 26 week absence". If a colleague's absence record meets or exceeds either of those criteria the absence management procedure is triggered.
18. Although the procedure is known to be a strict procedure, there was no evidence that it had been challenged by the trade union.
19. The stages of the absence management procedure are as follows:- verbal warning; first written warning; final written warning; and dismissal.
20. Once a colleague is given a verbal warning, he or she is notified that a review period of 26 weeks from the date of the last absence will be initiated. If a colleague has a further two periods or ten days of absence during the review period, then stage two of the procedure will be triggered (the first written warning). However if there are no absences during the review period, the colleague will be taken out of the procedure.
21. If a first written warning is given then the colleague will be notified that there will be a review period of 39 weeks from the date of the last absence. During that period the colleague has a further two periods of absence or five days of absence then stage three (a final written warning) will be triggered. Again, if there are no absences during the review period, the colleague will be taken out of the procedure.
22. If a colleague is given a final written warning, the policy provides for a review period of 52 weeks from the date of the last absence. Any further absence during that period will trigger the next stage of the process which is dismissal.
23. If there are no absences during the 52 week period the colleague will be taken out of the procedure. If there is an absence within that 52 week period then the colleague is likely to be dismissed under the procedure. There is a right of appeal.
24. It is important to note that the respondent operates a dependency; compassionate; and emergency leave policy which applies to colleagues who need to take time off for emergencies or to care for dependents when an unexpected emergency situation arises. The claimant had taken leave under this policy on a number of occasions. Any absence taken under this policy did not count as absence under the attendance policy.
25. Mr Cunningham explained that if an absence was for a genuinely unavoidably reason, and there was evidence of that, discretion could be exercised on whether or not to move to the next stage of the process. Mr Connolly confirmed that that was the case.

The Claimant

26. The claimant was first issued with a verbal warning under the respondent's absence management procedure in September 2013.
27. Following further absences this was escalated to a written warning in October 2013.
28. Due to further absences, the claimant was issued with a final written warning in April 2014 which would remain on his file until April 2015. This meant that any further absence from between April 2014 and April 2015 would be likely to result in his dismissal. However the claimant maintained a 100% attendance record during that period and so the final written warning elapsed.
29. On 21 January 2016, the respondent invited the claimant to a stage one absence management disciplinary meeting as a result of the claimant having three occasions (and five days) of absence within a twenty six week period. Following a disciplinary meeting, at which the claimant was represented by his trade union, the claimant was issued with a verbal warning. The reasons given for absence were gastroenteritis and vomiting respectively for the second and third absences. The claimant could not remember why he was absent on the first occasion nor was it marked on his return to work interview notes.
30. The claimant was informed that two further occasions of absence or ten or more days of absence within the following twenty six weeks (the review period) could trigger stage two of the process.
31. An occupational health appointment was made for the claimant and it was recommended that he visit his GP. There was no evidence before the Tribunal that the claimant attended either at this stage.
32. The verbal warning was not appealed.
33. Following further absences on Tuesday 16 February 2016 (for sickness) and Monday 11 April 2016, the claimant was invited to a stage two absence management disciplinary meeting. In respect of the latter absence, the claimant said he had been absent because he woke up late, having thought he had pressed snooze but in fact had switched his phone off.
34. The claimant was given a written warning and informed that two more instances or five days' absence within the 39 week review period could trigger the next stage. Again the outcome was not appealed.
35. The claimant was absent from work on Monday 13 June 2016 (in respect of which absence there is no return to work form), but the reason cited was sickness, and then between 4 to 18 July (totalling nine working days).
36. These two absences triggered the third stage of the absence management process. The claimant explained during the hearing that, in July, he had family issues which had caused him stress.
37. During the disciplinary hearing, the claimant explained that he hadn't been allowed to see his children and consequently "couldn't be bothered with anything".
38. The claimant was issued with a final written warning which he did not appeal. He was warned that, if he had any further absence within the fifty-two week review period, he would be dismissed.
39. The claimant was referred to occupational health for an appointment. The first scheduled appointment was whilst the claimant was off sick (18 July) but a second was scheduled for 1 September 2016. Neither were attended by the claimant. Although he claims he did not receive the letters inviting him to attend those appointments, he knew that he had been referred and did nothing to chase up the appointments.

40. The claimant's attendance did then improve for a period, but he was absent from work again in January 2017.
41. On Friday 27 January 2017, the claimant was working a 2.30 until 10.30 pm shift. The claimant went home just after half way through that shift.
42. The claimant was due to work an early shift (6 am to 2.30 pm) on Monday 30 January 2017 but he did not attend work and he telephoned the respondent to inform them that he would not be in work. He said his absence was caused by a problem with the electricity.
43. The claimant attended a return to work interview when he came back into work on 1 February 2017 (he had booked holiday for Tuesday 31 January 2017). The record of that meeting records unauthorised absence as the reason for absence.
44. As the claimant's absence was during the review period of the final written warning, an investigation meeting took place during which the claimant claimed that the "leccy" (electricity) went off "so [his] phone died as it did not charge".
45. The notes of the investigation meeting refer to the fact that the claimant had been suffering in his personal life, had been given tablets for his anxiety, and that he had been having issues mentally and physically "due to stress/depression". It states: "His partner has left him and taken his two kids which had started the downward spiral, Ben has been to the doctors for help and is organising counselling. Ben states that he asked his FLM to see the nurse two weeks ago but nothing came from it".
46. Following the investigation, the claimant was invited, by letter dated 2 February 2017, to an absence disciplinary hearing scheduled to be heard on 3 February 2017. The letter clearly states that the hearing is to discuss the two days of absence on 27 and 30 January 2017 and explains: "if this period is absence is upheld against you the possible outcome may be that we issue stage four of the attendance management process which results in the termination of your employment".
47. The disciplinary hearing was conducted by Mr Cunningham. Melina Crookall attended as a note taker and the claimant was represented by Brian Morris.
48. The minutes of that meeting indicate that there was first a discussion of the absence on 27 January when the claimant went home half way through his shift. The claimant explained that he "couldn't deal with it - my mate topped himself and never went to the funeral and then split up with my girl. Only saw kids twice over Christmas, my head is chocca and don't know what I'm doing half the time". He also acknowledged that his attendance was bad.
49. With regards to the Monday absence, the claimant confirmed that his absence was actually because he was supposed to have had the children but his partner let him down. When asked why he said he had stayed off because the electricity went off, he said: "my head's gone I'm on tablets off my doctor". The claimant then presented a prescription to the respondent. The claimant admitted that he shouldn't have lied about the reason for his absence.
50. When asked about two occupational health appointments which he failed to attend, the claimant said that he didn't know anything about them. He did however confirm that he had not pursued any further contact with the nurse because he "felt better".
51. Following an adjournment, Mr Cunningham dismissed the claimant (with notice) . Mr Cunningham took into account:
    a. that the Claimant's overall attendance was poor;
    b. that there appeared to be a pattern in which the claimant was often absent from work on Fridays and Mondays;

c. that although some of the issues the claimant was raising pertained to his health, he felt the claimant had responsibility to himself to sort those issues out; and
d. that the claimant's explanation for his most recent absence was inconsistent and the claimant had initially lied about the reason for his absence.

52. The claimant's employment was terminated on notice. The termination of his employment was confirmed by a letter dated 6 February 2017.
53. The claimant appealed against the decision to dismiss him and was invited to attend an appeal hearing on 22 February 2017.
54. At the appeal hearing, the claimant was represented by Mr Alan Johnson. The Appeal Officer was Mr Connolly. Notes were taken by Marc Armstrong from the respondent's HR function.
55. The claimant explained that he felt his dismissal was unfair as he got no help from the respondent despite the fact that OH and his Shift Manager knew that his "head was all over the place" "with [his] kids and things".
56. The claimant confirmed that he missed a couple of OH appointments in August and September but stated that he had never received the letters for them.
57. He explained that, on Friday 27 January, he couldn't stop vomiting and felt sick and that is why he had gone home even though he appreciated what the repercussions would be. He said that, if he had stayed, he would have been dismissed for "vomiting on the seats".
58. With regards to the following Monday, the claimant explained that his "head fell off" and "couldn't deal with anything".
59. The claimant explained that he had seen his doctor and was on anti-depressants and sleeping tablets. He referred to the fact that his mate "topped himself" and that he had "all that with" his kids and his ex-wife. He pleaded for another chance as he was now getting help to deal with his issues.
60. Having reviewed the claimant's absence record, Mr Cunningham noted to the claimant that his absences were "normally Monday or Friday". He also confirmed that there had been seven periods of dependency leave. Mr Connolly then stated "if you are on a final written warning, if you are sick, I would expect you to be vomiting in the canteen and staying". By waiting until one minute past the four hours I question why you couldn't stay until the end of the shift".
61. Mr Connolly confirmed that he was upholding the decision to dismiss the claimant and that there was no further right of appeal under the respondent's disciplinary procedure.

Law

Reason for dismissal

62. The respondent accepts the claimant was dismissed. It is thus for the respondent to show one of the five potentially reasons for dismissal (Section 98 (1) and (2) of the Employment Rights Act 1996 ("the 1996 Act").
63. In this case it is accepted by both parties that the reason for dismissal was the application of the respondent's absence management policy.
64. The task of identifying the real reason for dismissal rests with the Tribunal (notwithstanding that the burden rests on the employer to prove that it was one of the five potentially fair reasons).

65. In this case, the respondent asserts that the reason the claimant was dismissed falls within the category of some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held under Section 98(1) (b) of the 1996 Act (some other substantial reason). That is one of the five potentially fair reasons for dismissal set out in Section 98 of the 1996 Act.
66. This is significant because the Tribunal can only properly consider the question of fairness in the context of the reason found for the dismissal.
67. In *Wilson -v- The Post Office* 2000 EWCA Civ 3036, an employee with a poor attendance record was dismissed for failure to satisfy the employer's attendance policy. A tribunal found that the reason for dismissal was capability but the Court of Appeal held that the reason was the employee's failure to meet the requirements of the policy, which was some other substantial reason.
68. In *Ridge v HM Land Registry* [2014] UKEAT/0485/12, the EAT emphasised that the correct characterisation of the reason for dismissal will depend on what was at the forefront of the employer's mind. If it was the employee's "skill, aptitude, heath or any other physical or mental quality" then the reason for dismissal would be capability. However, where the recurring absences themselves are the reason for the dismissal and an attendance policy has been triggered, the better characterisation may be SOSR.

Fairness

69. If a potentially fair reason is shown by the employer, the Tribunal needs to have regard to Section 98(4) of the 1996 Act which provides that: *"the determination of the question whether dismissal is fair or unfair (having regard to the reasons 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".*

70. The test in section 98(4) test this was further clarified by the Employment Appeal Tribunal in *Iceland Frozen Foods Limited -v- Jones* 1982 IRLR 439:

(i) the starting point should always be the words of Section 98(4) themselves;
(ii) in applying the section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether they (the members of the Employment Tribunal) consider the dismissal to be fair;
(iii) in judging the reasonableness of the employer's conduct an Employment Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer in many, though not all cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another.
(iv) the function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a

reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair, if the dismissal falls outside the band it is unfair".

71. The reason for dismissal is significant in determining fairness, as evidenced by the following passage from *Wilson*: "*We agree that if the ..Tribunal..had correctly based its section 98(4) deliberation upon a sui generis attendance procedure dismissal then the underlying and continuing health of the applicant could not be excluded as a wholly irrelevant factor, but it could not have acquired the prominence appropriate to a "capability" dismissal.*

Remedy

72. If dismissal is found to be unfair but a Tribunal is of the opinion that there is a chance that the claimant would have been dismissed in any event, then a deduction can be made from any compensatory award as a result of the principle in *Polkey -v- A E Dayton Services Limited* 1988 ICR 142.

73. An award of compensation may also be adjusted to take into account contributory fault under Section 122(2) and Section 123 (6) of the 1996 Act.

Conclusions

Reason for Dismissal

74. It is clear from undisputed facts (and agreed by the parties) that the claimant was dismissed as a result of the application of the respondent's attendance management process to the claimant. No other reason has been put forward by the claimant as a potential reason for dismissal.

75. That that is the reason for the claimant's dismissal is clear from the correspondence leading up to and confirming the termination of the claimant's employment as well as from the appeal.

76. The Tribunal is satisfied that the claimant's failure to meet the requirements of the respondent's attendance policy is the reason for the dismissal, and that the appropriate characterisation of the reason for dismissal in this case is "some other substantial reason" .

77. The Tribunal is satisfied that, at the time he took the decision to dismiss, Mr Cunningham genuinely believed the claimant had not met the requirements of the respondent's attendance policy.

78. In all the circumstances of the case, this Tribunal is satisfied that the respondent dismissed the claimant for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held which is a potentially fair reason falling within Section 98(1)(b) of the 1996 Act.

Fairness

The Respondent's policy

79. The claimant accepted that is reasonable for an employer to have a policy and have clear and understandable rules on absence and attendance. However, he argues that it is not reasonable to impose an absence standard which is too severe.

80. In this case, he argues that the respondent's policy falls outside the band of reasonableness as, in particular, during the twelve months in which a colleague is on

a final written warning, there is zero slack and no credit for improved attendance during that period.

81. The Tribunal notes that the respondent's policy is aimed at upholding good attendance. The respondent is entitled to require good attendance in light of its commercial obligations and pressure to perform to tight deadlines. Employees being off sick have a considerably detrimental impact on production. The claimant himself was clearly aware of the pressures of "just in time".

82. The claimant argues that there was no evidence of the real impact of absence, but it was clear to the Tribunal that good attendance would have a significant impact on performance.

83. There was no evidence that the policy itself had been challenged by unions or indeed by other employees, including the claimant himself throughout the process which lead to his dismissal.

84. The Tribunal, whilst accepting that the respondent's is a "tough" policy, does not accept that the policy falls outside the band of policies which could be imposed by a reasonable employer. The policy explains its rationale and makes it clear why it is there and what the consequences of non-compliance are for the employee. It also makes it clear that absence causes great inconvenience. It is the response of a reasonable employer, therefore, to seek to minimise absence to the greatest extent possible.

85. As regards the requirement to have no absence during a twelve month period once an employee is on a final written waring, it is accepted that this is an onerous obligation. However, the claimant himself had managed to satisfy that requirement on a previous occasion. Further, an employee who reaches the final written waring stage if the policy has already had a significant amount of absence. In addition, the policy is very clear.

86. Accordingly, the Tribunal considers that the policy itself falls within the band of reasonable responses open to a reasonable employer.

Process

87. Procedurally, the Respondent acted within the band of responses of a reasonable employer. The claimant had had a verbal warning, a written warning and a final written warning before he was dismissed. He was given the right to be accompanied and had the right of appeal at each stage, albeit that the right was not taken advantage of until the claimant had been dismissed.

88. The claimant knew very clearly at each stage of the process what the consequences would be of further non-attendance.

89. The claimant had the benefit of union representation.

90. The claimant knew, once he had received the final written warning, that dismissal was a possibility, or indeed likely, if he had just one more absence.

91. It is also relevant to point out that the claimant was familiar with the attendance management process and knew what was expected of him having previously been issued with a final written warning under the same process. However on that occasion, the claimant was able to avoid dismissal by not having a single days' absence during the twelve month period during which the final written warning was live.

92. Finally, the claimant was told he could present information at the appeal. The invitation to the appeal requests the claimant, if he had any documents he wished to be considered at the appeal, to provide copies in advance of the meeting.

Dismissal

93. Did dismissal fall within the band of reasonable responses open to a reasonable employer?
94. The Tribunal had considerable sympathy for the Claimant. He had clearly had a difficult time, particularly as regards family matters.
95. However, whilst the cause of the absences is relevant, in this case it does not acquire prominence (see *Wilson* above) because the reason for dismissal is the fact that the claimant has not achieved the required attendance standard.
96. In such circumstances, it is for the claimant to explain his absence to the respondent, rather than for the respondent to focus, for example, on the claimant's health.
97. The claimant complains of a distinct lack of enquiry by the respondent; that dismissal was almost inevitable once a further absence occurred; and that there was simply a cold analysis of the absence. However, the Tribunal did hear evidence from Mr Cunningham in which he explained that, if an absence had been for a genuinely unavoidably reason, and there was evidence of that, there could be some discretion exercised on whether to move to the next stage of the process. Mr Connolly confirmed that that was the case.
98. The claimant argues that his dismissal must be unfair because he was not told that, if he'd had evidence of a genuine illness, he might have avoided dismissal. If he had known that, he says, he could have obtained medical evidence. He says that effectively the respondent shifted the burden to the claimant. But again, the reason for dismissal is significant. Here, the claimant had failed to reach the attendance standard required with a potential consequence being dismissal. It was for the claimant to explain his absence having triggered the next stage of the process, and for the respondent to decide whether, in light of the explanation, it would exercise its discretion not to dismiss in all the circumstances.
99. In this case, notably, the claimant initially did not tell the truth about the reason for his absence.
100. Further, it is reasonable for an employer to act in accordance with its policy and to consider carefully when to exercise its discretion in order to maintain respect for the policy in the workplace.
101. In all the circumstances of the case, including the fact that the claimant initially mislead his employer about the reason for his absence, the Tribunal considers that it is not outside the band of reasonable responses for the employer to have dismissed the claimant and to choose not to exercise its discretion to give the claimant another chance.
102. It is clear to the Tribunal that the respondent carefully considered whether to dismiss as demonstrated by a list of factors taken into account.

The absences which led to dismissal

103. Much was made, by the claimant, of the fact that the claimant was dismissed for his absences on both the Friday and the Monday, when in fact the Friday should have been time LOST. It is notable that this issue was not raised by the claimant during the disciplinary or appeal hearings and has been raised only during the Tribunal proceedings.
104. The letter dismissing the claimant, and the reason given for dismissal was the fact that the claimant had been absent on both 27 and 30 January. Those are the dates confirmed in the letter of termination of employment and in the letter inviting

the claimant to the disciplinary hearing. Further, Mr Cunningham commences the disciplinary hearing by stating that the meeting is "in relation to two days' absence on the Friday and the Monday". The appeal relies on the two dates as the reason for dismissal and so does the respondent's notice of appearance.

105. The claimant argues that, as the claimant was dismissed for both Friday and Monday, and no distinction was made between those two days, it is not now possible to say that it would have made no difference if the respondent had only relied on the Monday, and that the claimant would have been dismissed in any event for his absence on the Monday.

106. The Tribunal disagrees, and believes that what is relevant is the fact of a further absence (whether for one or two days) which triggered the final stage of the process and led to the claimant's dismissal. The claimant was actually absent all day on 30 January, and therefore would still have been dismissed in accordance with the policy for that absence alone. Although the claimant was moved to stage four of the process, which could result in the termination of his employment, with two listed absences on his record as opposed to one, the Tribunal considers that this was irrelevant as the next stage of the process was invoked.

107. If the Tribunal is wrong on this, and this fact renders the dismissal unfair as it meant that, as the claimant submitted, the claimant was dismissed because it appeared that he had had two days' absence rather than one, the Tribunal considers that this would have made no difference to the outcome of the disciplinary proceedings or the appeal as he had still failed to meet the required standard of attendance.

108. The Tribunal concludes that dismissal of the claimant fell within the range of reasonable responses available to the respondent and that, in all the circumstances of the case, the dismissal was fair. The claimant's claim of unfair dismissal fails and is dismissed.

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Employment Judge Rice-Birchall

Date 3 December 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON
8 December 2017

FOR THE TRIBUNAL OFFICE

[JE]