THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant	**and**	**Respondent**
Mr D White		**Royal Mail Group Ltd**

Held at London South **On 1 August 2018**

Before: Employment Judge Nash (sitting alone)

Representation

For the Claimant: **Mr Percival, Trade Union Representative**

For the Respondent: **Mr Hartley, Solicitor**

JUDGMENT

The Judgment of the Employment Tribunal is: -

1. The claimant was fairly dismissed.

REASONS

1. The Claimant presented his claim to this tribunal on 14 June 2017. The respondent did not defend the claim. Accordingly, a Rule 21 Judgment was entered against the Respondent on 28 June 2017. At a reconsideration hearing on 7 February 2018 the

Tribunal revoked this Judgment. The claim therefore proceeded to a full merits hearing.

2. At this hearing the Tribunal heard from the Claimant on his own behalf. On behalf of the respondent it heard from Mr Joe Miranda an Independent Case Work Manager who heard the appeal. The Tribunal also had sight of the statement of Ms Nicola Blake, at the material time an Operations Manager, who made the decision to dismiss. In common with its usual practice the Tribunal attached little weight to the evidence of a witness who was not present to give evidence on oath or be cross examined.

3. The Tribunal had sight of an agreed Bundle.

The Claims

4. The only claim was for unfair dismissal under section 98 Employment Rights Act 1996.

The Issues

5. The first issue was the reason for dismissal. The Respondent relied upon some other substantial reason as a potentially fair reason for dismissal. The stated reason was the Claimant's failure to comply with the respondent's attendance policy.

6. The second issue was whether the dismissal was procedurally fair. The Claimant relied on to factors: –

    a. the respondent had failed to follow its own procedure in that the claimant had not received a Stage II warning prior to dismissal; and

    b. in calculating the number of days absences under the attendance policy, the respondent had incorrectly taken into account a number of absences which should have been discounted. However, it was agreed that if all the absences were properly accounted, then the Claimant did not meet the attendance requirements set out the different stages of the Respondent's policy.

7. The Tribunal viewed these points as going to procedural unfairness because the various trigger points in the attendance policy did not automatically lead to a sanction but only permitted the respondent to consider a sanction, such as dismissal.

8. The third issue was sanction, that is whether the decision to dismiss came within a range of responses available to a reasonable employer in the circumstances.

9. Should the Tribunal find that the dismissal was procedurally unfair, the Respondent relied upon Polkey v AE Dayton Services Ltd [1987] UKHL 8, to the effect that it could and would have dismissed fairly had it followed a fair procedure.

10. The Respondent did not contend that Claimant had contributed to his dismissal.

The Facts

The Background

11. The Claimant started work for the Respondent on 11 October 2010 as a postman.

12. The Respondent and its recognised Trade Union, the CWU, have a long-standing agreed attendance policy which permits the respondent to issue sanctions when an employee accrues a set number of absences in set periods. These are as follows: -

    a. A Stage I attendance review is prompted after 4 absences or 14 days absence in a 12-month period.
    b. A Stage II attendance review is prompted after a further 2 absences or 10 days absence in the next 6 months following a Stage I attendance review.
    c. Considering of dismissal is prompted by a further 2 absences or 10 days absence in the next 6 months following Stage II.

13. The attendance policy provides that in normal circumstances absences occasioned either by a disability or by an accident at work are not counted when deciding if an employee has accrued the set number of absences necessary to trigger a stage of the attendance review policy.

14. The Tribunal had sight (starting at page 77) of a list of the Claimant's absences which was not disputed. Put briefly, the Claimant had suffered an elbow injury at work in 2013 which amounted to a disability. His consequent absences would have triggered the absence policy on more than one occasion, had they not been caused by an accident at work.

Events Leading to the Dismissal

15. The Claimant was issued with a Stage I attendance review on 15 April 2016 following absences which were caused by a number of different issues. It was not disputed that this was correctly calculated and that the claimant had accrued the required number of absences to trigger a Stage I.

16. The Claimant then went sick on 21 September 2016 following the onset of back pain at work. He was absent sick for 25 days. He contended that his back pain caused when he was in effect sorting packages at work. There was a dispute as to whether this constituted an accident at work. However, it was not in dispute that this was not recorded in the Respondent's accident recording system, although this was operational at the time. The claimant's case before the tribunal was that he had sought to have the incident recorded in the accident reporting system but was prevented from doing so.

17. Upon his return the claimant attended a return to work interview with his manager Mr Taylor on 15 October 2016. He did not complain at this interview that he had been prevented from recording the incident in the accident reporting system. At the interview, he said he had come to work on the day of the incident, felt a "twinge" when using his shoulder but when he woke up the next morning he could not walk.

18. As a result of this further 25 days sickness absence, the claimant's absence levels were sufficient to trigger Stage II of the attendance policy on 28 October 2016. He was invited to an attendance review by way of a letter which did not refer to either Stage I or Stage II.

19. The attendance review on 28 October 2016 was recorded in several documents including a letter to the claimant. According to these documents, Mr Taylor told him that he had taken 27 days sickness absence in 6 months. (This was the calculation for a Stage II rather than a Stage I attendance review.) According to the documents, Mr Taylor informed the claimant that the next possible stage in the attendance policy was dismissal. However, Mr Taylor's letter to the claimant stated in terms that the claimant was being issued with a Stage I attendance review. The letter referred to the next stage in the attendance policy being a possible "RTU" which was an out of date term for a potential dismissal meeting. The claimant signed receipt of the attendance review.

20. In the 6 months following the second attendance review the Claimant took a further 92 days absence due to his back condition. The respondent considered that this triggered consideration of dismissal. Accordingly, on 13 March 2017 the claimant was invited to a potential dismissal hearing.

<u>The dismissal</u>

21. The dismissal hearing was held on 21 March 2017 by Ms Nicola Blake. The Claimant was represented by his union. The minutes of the hearing were not sent to the Claimant, contrary to the Respondent's practice. Ms Blake who was not present

before the tribunal confirmed the accuracy of the minutes in her statement. However, the Claimant's evidence before the tribunal was that these minutes were inaccurate. In the circumstances, the Tribunal could attach limited weight to Ms Blake's notes. Be that as it may, the minutes did not record the Claimant saying that, following the meeting with Mr Taylor, he was not aware that he was on a Stage II absence review and in fact believed that he was on a Stage I absence review. In addition, the minutes did not record the claimant saying that he was prevented from entering the back incident into the accident reporting system. The minutes also recorded Ms Blake's considering whether the claimant's absences should be discounted under the attendance policy because there were caused by an accident at work

22. Ms Blake dismissed the Claimant by means of a dismissal letter, dated 27 March 2017 on the grounds that he had failed to comply with the attendance policy. According to the dismissal letter, Ms Blake had based her decision, to an extent, on the following allegations: - that the Claimant had shown no sense of remorse for his absence, that he was deliberately counting days in effect, to "game" the attendance policy, and that there was a question as to whether his absences were genuine. It was notable that Mr Miranda who heard the appeal readily accepted that these considerations should have played no part in the decision to dismiss.

23. In the view of the tribunal, the section of the dismissal letter containing these allegations appeared to be generic and did not appear to be consistent with or related to Ms Blake's findings as to the attendance policy set out in the earlier part of the letter. It appeared likely therefore that the sections containing these allegations were, in effect, boilerplate clauses which had been cut and pasted into the letter. This was evidence that Ms Blake had not directed her mind to the claimant's individual circumstances when making the decision to dismiss.

<u>The appeal</u>

24. The claimant appealed against dismissal on 29 March 2017.

25. Prior to the hearing, the claimant was sent the list (at page 77 of the Bundle) of his overall absence record.

26. The appeal hearing was heard by Mr Joe Miranda on 2 May 2017. Mr Miranda proceeded by way of a complete rehearing of the decision to dismiss. The Claimant was represented at the appeal hearing by a full-time union representative. The minutes of the appeal hearing were agreed as accurate if not verbatim.

27. The minutes recorded that the Claimant's case was that he believed that he was on Stage I after the Mr Taylor meeting because this was what he signed following the meeting. He also said that he was not seeking ill health retirement; he wanted his job back.

28. Mr Miranda had sight of the following medical evidence all of which came from Respondent's occupational health Assist programme: -

    a. On several occasions, the Claimant was reviewed by Ms Garvey a physiotherapist. In her earlier reports she stated that the claimant was unlikely to be disabled for the purposes of the Equality Act 2010. However, on 30 January 2017 her view changed, and she stated in terms he was likely to be disabled.

    b. She referred the claimant to Dr Milne, a Consultant Occupational Physician who attended the Claimant over the telephone on 8 February 2017. Dr Milne recorded that an MRI and X-Ray did not show abnormalities of the spine. In his opinion, it was unlikely that the Claimant was disabled.

    c. On 22 February 2017, Ms Garvey confirmed that the Claimant was able to return to work on light duties and stated that he was probably disabled.

    d. On 28 February 2018, the Claimant was assessed by Dr Dar, an Occupational Physician. Her opinion was that the underlying medical condition could account for his attendance pattern, but that only his elbow condition counted as a disability. She stated that the claimant's back symptoms had been problematic but should settle down, although he had limitations in bending and manual handling.

    e. The most recent medical evidence was a letter from Ms Garvey dated 15 March 2017. According to this letter, the claimant was struggling on his return to work schedule because he was not making the progress that had been hoped with developing physical activity. She suggested a referral back to Mr Milne but did not say for what purpose. She also reiterated her opinion that the Claimant was likely to be regarded as a disabled person for the purposes of the Equality Act.

29. Following the appeal hearing Mr Miranda prepared an appeal decision document dated 18 May 2017, which rejected the appeal.

30. Miranda concluded that Mr Taylor had made a typographical error when he described the second attendance review as a Stage I. He noted that Mr Taylor had entered the second warning as a Stage II of the Respondent's internal system. However, Mr Miranda did not ask Mr Taylor what was in his mind when he made this decision. Mr Miranda found that the Claimant knew that he was on a Stage II following his meeting with Mr Taylor, and accordingly had suffered no prejudice from this error.

31. In determining whether the Claimant's absences should be disregarded because they were caused by a disability, Mr Miranda preferred the evidence of the Occupational Health physician and the consultant, rather than the physiotherapist. He therefore concluded that it had been correct not to discount the back-pain absences from the attendance review.

32. He did not deal in his appeal decision document with whether these same absences should have been discounted because they were caused by an absence at work. The claimant raised this at his appeal hearing, although it was not a formal ground of appeal. Before the Tribunal, Mr Miranda said that he did not consider that the back incident constituted an accident at work, primarily because it was not recorded at the time. Accordingly, he concluded that it was correct that the absences had been counted under the attendance policy.

33. In the appeal decision document, Mr Miranda went on to accept in terms that Ms Blake should not have placed any reliance upon doubts as to whether the Claimant's absences were genuine, that he had shown a lack of consideration to customers or his lack of remorse for his sickness absences. Mr Miranda stated that he did not take any of these factors into account because they were impermissible and irrelevant.

34. Finally, in the appeal decision document, Mr Miranda referred to the Claimant's overall absence record when upholding the decision to dismiss. Mr Miranda referred to an "astonishing" 420 days sick absence over 6½ years of employment. This point had not been put the claimant at the appeal hearing.

The Applicable Law

35. The applicable law is found at Section 98 of the Employment Rights Act 1996 as follows: –

> (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,

…

(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) 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.

Submissions

36. Both parties made brief and pertinent oral submissions.

Applying the law to the facts

37. The tribunal firstly considered the reason for dismissal. The Respondent relied on some other substantial reason as a potentially fair reason for dismissal. It is sometimes a nice point in such cases whether the reason for dismissal is ill health (capacity) or some other substantial reason. However, there was no real challenge to the Respondent's characterisation of its reason as "some other substantial reason". In the opinion of the tribunal, the respondent's decision makers approached their task by considering whether the Claimant had accrued the appropriate number of days absences under the attendance policy, rather than the claimant's ongoing health situation.

38. Accordingly, the tribunal found that the reason for dismissal was some other substantial reason - being the Claimant's failure to comply with attendance policy. This was the operational reason in the Respondent's mind at dismissal and appeal.

39. Having found that there was a potentially fair reason for dismissal, the tribunal went on to consider fairness.

40. Had there been no appeal, the respondent might well have been in some difficulties in establishing the fairness of the dismissal. However, it is trite law that a properly constituted appeal - which is a complete rehearing of the decision to dismiss - can

rectify faults in the original decision. Accordingly, the tribunal considered Mr Miranda's decision and only considered Ms Blake's when it considered it relevant.

41. The first issue was whether the dismissal was procedurally fair. The question for a Tribunal when deciding whether a dismissal is procedurally unfair is not whether the Tribunal would have itself applied this particular procedure in this particular way. A tribunal may not substitute its view of what constitutes a fair procedure for that of the respondent. The question is whether the procedure adopted by the employer fell outside a range of procedures available to a reasonable employer in the circumstances.

42. The attendance policy was agreed with the recognised trade union. The claimant did not challenge the fairness of the attendance policy as a whole, but only its application to him in the circumstances.

43. The tribunal firstly considered the issue of the attendance review by Mr Taylor. The tribunal accepted the respondent's contention that there were many clues in this letter which indicated that it was supposed to be a Stage II attendance review; it referred to the stage II calculation rather than the Stage I calculation and referred to dismissal rather than Stage II as the next potential step. However, this did not change the fact that the latter stated in terms that the claimant had been issued with a Stage I attendance review. The claimant was returning from a lengthy sickness absence and there was no dispute that this was a stressful time for him. This was a clear and unnecessary breach of the Respondent's own procedures and the Tribunal viewed this a significant failing.

44. Nevertheless, the question for the Tribunal was whether this failing was sufficient to make the dismissal procedurally unfair. In the circumstances the Tribunal found, narrowly, that this error was not sufficient to render the dismissal procedurally unfair. The main reason for this finding was that the Claimant knew, in effect, that his job was at risk following the meeting with Mr Taylor. He said this in effect at paragraph 12 of his witness statement, and referred to a RTU (a potential dismissal) following the meeting. In addition, the Claimant was represented by his union who were very familiar with the attendance policy. Further, the number of absence days were easily sufficient to trigger Stage II of the attendance review.

45. In view of the tribunal, it is clearly undesirable for the respondent to send letters to employees who are vulnerable and going through the attendance policy, that are anything other than entirely clear about that employee's position and their potential risks going forward. This is a matter that the respondent should consider addressing promptly.

46. The tribunal next considered whether the respondent's calculation of the absence days under the attendance policy stages was procedurally fair.

47. The tribunal firstly considered the claimant's contention that the respondent had failed to follow its own procedure by failing to discount the back-condition absences, because the back condition amounted to a disability. In deciding that the back condition did not amount to disability (and accordingly that it should not be discounted) Mr Miranda preferred the Occupational Health reports from two doctors, -that the Claimant was less likely to be disabled - to reports from a physiotherapist - that the claimant was more likely to be disabled. As Mr Miranda correctly stated, the question of whether someone is a disabled person for the purposes of the Equality Act is not one for a medical practitioner. It is a legal question where medical opinion may be valuable.

48. However, this was not a disability discrimination claim. The question for the tribunal was whether the procedure came within a reasonable range. The tribunal found that, narrowly, the procedure did come within a reasonable range. The medical evidence before the respondent in the circumstances was inconsistent, the tribunal could not find that - by preferring the evidence of two doctors to a physiotherapist - the respondent fell outside a reasonable range of procedures. A finding that the dismissal was procedurally unfair because the respondent did not seek further medical evidence as to whether or not the claimant's absences were caused by a disability would be substituting the view of the tribunal for that of the respondent as to what constituted a fair procedure.

49. The tribunal next considered whether the back-condition absences should have been discounted under the absence policy because they were caused by an accident at work. This point formed a more significant part of both parties' cases before the Tribunal, than the evidence indicated it had done at the material time. For instance, this allegation was not raised by the claimant during the appeal meeting although the agreed minutes indicated that he was very competently represented by his union official. There was little or no reference to this point in Mr Miranda's appeal determination.

50. It was unclear how much of Mr Miranda's justification before the Tribunal was in his mind when he made the decision. Mr Miranda told the Tribunal that he had not accepted that the back injury was an accident at work primarily because (i) the Claimant had kept on working that day, and (ii) the claimant has not reported the incident at the time and there was no evidence that he had been prevented from doing so. Mr Miranda pointed out that there was no reference to the claimant being

prevented from recording the accident during his return to work interview. The first reference to the Claimant being prevented from recording his accident was in the ET1. This allegation was set out in the ET1 and the claimant developed it in very robust terms when he gave oral evidence.

51. In view of the tribunal, the evidence did not indicate that the "accident at work" issue was one that the Claimant felt strongly about at the time of dismissal. Had he done so, it is likely that there would have been more than a passing reference to this at the appeal meeting.

52. Further, it was highly unlikely that if the claimant had felt as strongly about his being prevented from recording the incident as he stated before the tribunal, that this would have not have been raised at the appeal meeting. This is in the context of the Claimant's representative referring to the elbow injury being discounted because it was caused by an accident at work. This showed that the Claimant and his representative were aware that injuries sustained at work were not normally counted as absences and were able to rely on this factor as appropriate.

53. In view of the tribunal, this was an issue that was identified as significant after the fact by the Claimant and justified after the fact by the Respondent. The question for the tribunal was whether Mr Miranda operated a fair procedure by failing to discount the absences because they were caused by an accident at work. When he made his decision, Mr Miranda knew that the claimant did not rely on the accident at work issue as a ground of appeal and he did not know that the claimant was alleging that he had been prevented from recording the accident at the time. In these circumstances, his decision not to discount absences on an accident at work grounds did not take the procedure outside the reasonable range.

54. Accordingly, the tribunal found that the dismissal was procedurally unfair.

55. The tribunal next considered the issue of sanction. The question of the fairness of the sanction is also subject to the reasonable range test. This means that when deciding whether the Respondent's decision to dismiss was fair, the Tribunal may not substitute its view of what it would have done had it been standing, so to speak, in the Respondent's shoes. A tribunal may only decide whether the Respondent's decision to dismiss came within a range of decisions available to a reasonable employer in the circumstances.

56. The Tribunal considered the circumstances at the time of the dismissal and the appeal. The Claimant had returned to work and had not taken any further absences.

However, it was clear both from his statement and from Ms Garvey's report that he was on restricted duties and Ms Garvey records him as struggling with these.

57. The Claimant had a poor overall absence record. The tribunal accepted Mr Miranda's evidence that this was a lesser consideration and not a determinative consideration in his decision. The reason for this was that Mr Miranda put this consideration at the end of his appeal determination and that the claimant had accrued significantly more than the minimum number of absences to trigger the appropriate stages of the attendance policy. The tribunal found that it was not outside the reasonable range of responses to consider a specific failure to comply with the requirements of the absence policy in the context of an employee's overall absence record.

58. The tribunal considered whether the fact that the claimant was not given an opportunity to address his overall absence record at the appeal meeting in terms rendered the dismissal unfair. The tribunal took into account the fact that the claimant had not identified this as a procedural failing.

59. In the opinion of the tribunal if Mr Miranda wished to take the claimant's overall absence record into account he should have put this in terms to the claimant at the appeal meeting. The difficulty for the Claimant was that there was little that could have been said that was not in fact said at the appeal. There was no challenge to the accuracy of his absence record. The issue was not entirely ignored at the meeting. His union representative did raise the fact that some of the previous absences had been occasioned by an injury at work - the elbow injury. Mr Miranda as shown by his answers to the Tribunal was aware of those the earlier absences which have been caused at the accident at work. In the circumstances the tribunal found that while the claimant's overall absence record should have been put to him in terms at the appeal, it was referred to and the failure did not render the decision to dismiss outside the reasonable range.

60. For the avoidance of doubt, if the tribunal has fallen into error in finding that the failure to put the claimant's overall absence record to him at appeal rendered the dismissal procedurally unfair, the tribunal would have found that the respondent would have and could have dismissed fairly in any event. The appellant's absence record was what it was. The tribunal found that the operative reason in Mr Miranda's mind for upholding the dismissal was the claimant's failure to comply with requirements of the attendance policy. The reason for this was that the claimant was well in excess of the minimum number of days absence required to trigger the stages of the attendance policy.

61. The Tribunal then turned to the question of whether the Respondent could have waited longer before dismissing the claimant. Had it, in effect jumped too soon? It was put to the Tribunal that the Claimant was waiting for further treatment, specifically two injections. The case law in such circumstances often asks the question of when from an employer's point of view, "enough is enough". When is the respondent no longer expected to wait any longer? However, the reason relied upon by this respondent is some other substantial reason, rather than incapacity because of ill health. Accordingly, the future prognosis of the Claimant carried less weight than it might have done in a straightforward ill health dismissal.

62. Dr Garvey's reports show that the Claimant was struggling on his return to work. He had to avoid lifting and was on modified duties. At the time of the dismissal and appeal, there was no date as to when the injections might happen. In these circumstances the tribunal did not find that the respondent's failure to wait for a possible improvement in the claimant's medical condition took the decision to dismiss (as upheld on appeal) outside of the reasonable range in a dismissal for some other substantial reason.

63. Accordingly, the tribunal found that the Respondent's decision came, somewhat narrowly, within a reasonable range. The most important reason for this finding was that the claimant had failed to comply, albeit not necessarily through any fault of his own, with the attendance policy which had been agreed with the recognised trade union and which he did not seek to challenge. The employer's dismissal following the proper operation of this agreed attendance policy came within a reasonable range.

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Employment Judge Nash
Date: 7 August 2018