



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4104772/2018

Hearing Held at Dundee on 22 and 23 October 2018

Employment Judge: I McFatridge (sitting alone)

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Miss I Bruce

**Claimant
Represented by:
Mr Abram
Friend**

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Ark Housing Association Limited

**Respondents
Represented by:
Mr Quickfall
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The Judgment of the Tribunal is that the Claimant was not unfairly dismissed by the respondents. The claim is dismissed.

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REASONS

1. The claimant submitted a claim to the Tribunal that she had been unfairly dismissed by the respondents. The respondents submitted a response in which they accepted that the claimant had been dismissed but stated that she

had been dismissed by reason of capability and that the dismissal was procedurally and substantively fair. The respondents referred to their sickness absence management policy. At the hearing evidence was led on behalf of the respondents from Ms S Petrie a Support Manager with the respondents, Mrs M Anderson Area Manager of the respondents and Mrs J Farren an HR Business Partner with the respondents. The claimant gave evidence on her own behalf. On the second day of the hearing Ms Petrie was recalled to give evidence in short compass regarding two documents which had been lodged overnight by the respondents. The documents were lodged in relation to evidence which had come out on the first day. The claimant's representative initially indicated he would be recalling the claimant to speak to these documents but at the end of the day he did not recall the claimant. On the basis of the evidence and the productions the following factual matters relevant to the issue before the Tribunal were proved or agreed.

Findings in Fact

2. The respondents are a charitable company operating in the care sector. They carry out work in the east of Scotland and in the Western Isles. They provide care services to individuals who are usually funded by the local authority. The claimant was employed by them as a Care Worker commencing her employment on 23 December 2014.
3. The claimant's duties involved looking after service users generally within their own residence. Some of the service users lived at home and others in various types of accommodation. The claimant's role would involve providing personal care and additional services to these individuals. Precise level of care would be determined on an individual basis. Some of the care provided was known as critical care and would involve getting the claimant up and dressed, cleaning them and providing them with food and or medicine. Other types of care were less critical such as taking them to lunch. Many of the service users were extremely vulnerable. Some were on the autistic spectrum and found it difficult to adapt to new people.

4. The respondents see the management of sickness absence as a key management responsibility. They have policies on this which were lodged (their sickness absence policy was lodged at pages 74-84 and 115-120 and guidance on the policy at pages 84-94. This is available on the respondents' intranet to both managers and employees. One of the respondents' policies relates to short term absence. The respondents' management have concerns about the disruptive effect of short term absences. There are a number of reasons for this. If an individual is absent then that means that the service user with whom they were supposed to work that day is not covered. In order to deal with this, the respondents have various options. The first of these is that they have a bank of relief support workers who are on zero hours' contracts and can be brought in to cover staff absence. There are a limited number of such employees and given they are on zero hours' contracts they may or may not be available to work when they are required. Secondly the respondents can arrange for other members of staff to work additional hours to those which had been planned. This can involve members of staff coming in on their day off or working longer hours than they had contracted to do. The third alternative which is used in many cases is to look at the type of support which a support worker was planned to do and then make arrangements for this work to be covered by other staff on duty. This will usually mean that certain service users will only receive critical care that day when they may have been rostered to receive more than this. It can also involve things like doubling up whereby two service users are dealt with by one support worker when the intention was that each would have their own support worker. It will usually involve some disruption to the service user such as not being able to attend appointments or go to social activities which had been scheduled. It will usually also entail some disruption to other members of staff.
5. The respondents have a robust absence management system which requires to be implemented by all managers. Managers are trained on the system. The key features of the system are set out in the document lodged at page 80. It is a three stage process.

6. The first stage is that if an employee has four absences or 14 days' sick leave within a rolling 12 month period then they will be invited to a stage 1 meeting. Their absences will be reviewed and the usual outcome would be for the employee to be issued with a formal capability warning and placed on a Stage 1 absence management regime for a period of six months.
7. The absence management monitor means that the employee's absences have been managed and they are made aware that if they meet the next trigger then they will be invited to a stage 2 meeting. The trigger for a stage 2 meeting if one is on a stage 1 absence management monitor is two absences or five days' sick leave within the six month period during which one would normally be on a stage 1 absence management monitor. If one moves on to stage 2 the employee is given a formal capability warning and placed on a stage 2 absence management monitor for a period of 12 months. If the employee who is on stage 2 has a further two absences or five days lost in any six month period in the 12 months after the stage 2 warning then they can be invited to a stage 3 meeting. At the stage 3 meeting the absences will be reviewed and a decision will be made either to dismiss or to extend the stage 2 absence management monitor.
8. Managers are given guidance in the procedure as to how to manage absences and in particular to offer support to employees who may be experiencing particular difficulties. In addition they are encouraged to show flexibility and compassion.
9. The claimant's absence record was lodged (page 70). This record was compiled by the respondents' HR department from absence returns made from the management at the Forfar unit. A spreadsheet is completed each month and uploaded to the respondents' HR department. An individual within HR then uploads the information on to a master spreadsheet. If the reason for an absence is not known at the time the absence management return is made then the reason is recorded as 'unknown at time of input'. Otherwise the reason for absence is inserted from a dropdown list. I accepted that on the basis of the evidence one of the claimant's absences; that on 20 January 2017,

was not shown on the list on page 70 and this was due to a simple transcription error.

- 5 10. Having commenced employment on 23 December 2014 the claimant was absent for two days on 8 and 9 January 2015. The description from the dropdown list was 'sickness and diarrhoea'. She was then absent again for one day on 28 February 2015. The reason for this was recorded as 'unauthorised absence'. She was then absent again for two days on 21 and 22 July 2015 with sickness and diarrhoea and absent again on 21 and 10 22 November 2015 with 'ears/oral problems'.
11. At this point the claimant had reached the trigger point for a stage 1 meeting having had four absences within 12 months. She was not however invited to a stage 1 meeting at that stage.
- 15 12. In January 2016 the claimant was involved in an unfortunate incident where one of the service users whom she was assisting died. The claimant had been with him when he collapsed and she and another colleague had given him CPR for around 40 minutes before he received further medical attention. The 20 claimant was extremely upset and distressed as a result of this. She was absent between 22 January and 31 January 2016. Her absence is noted as due to 'personal stress'. The claimant was then absent again on 5 and 6 May 2016 and the reason for this was recorded as 'chest/bronchitis/pneumonia' from the dropdown list.
- 25 13. Following this absence, the claimant was invited to a stage 1 meeting. The letter inviting the claimant to this meeting was lodged (page 36). The claimant was provided with a copy of the respondents' sickness absence management policy and a copy of her absence record to date. At that time the claimant had 30 had the four absences in 2015 totalling seven days and in 2016 she had had 10 absences due to personal stress and a further two due to chest/bronchitis/pneumonia. The meeting was held with the respondents' manager Ms Petrie. Ms Petrie decided that although the claimant had met the trigger in that she had three absences totalling 16 days within the previous

rolling 12 month period she would not put her on to a stage 1 absence management monitor. The reason for this was that Ms Petrie decided to discount the 10 days which the claimant had taken off with stress following the unfortunate death of the service user in January.

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14. The claimant was then absent again from 26 July to 8 August 2016 (14 days). The reason for this was reported as “unknown reason at time of input”. This was because the claimant had not returned to work at the time the absence report was updated. The claimant had the usual return to work meeting on her return and the cause of the absence was known to local management although it never made it on to the spreadsheet maintained by HR. The reason for the absence was that the claimant had a virus. The claimant’s medical records were lodged in part and in redacted form by the claimant and showed that on 27 July the claimant was reviewed by her GP and reported having large glands having previously reported four days of sore throat and aching muscles. Following her return to work the claimant was invited to a further sickness absence management meeting on 12 September 2016. A note of this meeting was produced. It was conducted by Ms Petrie (page 38). The claimant was placed on stage 1 and Ms Petrie explained what this meant in terms of triggers etc. The claimant is recorded as commenting

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“Isla did not feel that this was fair and said it was not her fault that she picks up these bugs/germs.”

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During this meeting the claimant was offered a further copy of the respondents’ absence management policy but declined as she said she had already received it along with her invitation to the meeting.

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15. Following the meeting Ms Petrie confirmed that the claimant was on stage 1 by writing to her on 22 September. This letter was lodged (page 39). The claimant was told that she was on stage 1 and that she had been issued with a first formal warning in respect of her attendance. She was told that this would remain on record for six months. It would therefore end on 12 March 2017 provided the claimant did not hit any further triggers.

16. The claimant was then off for three days between 18 and 20 November 2016 with sickness and diarrhoea. She was also off on 20 January 2017 for one day. This absence was not recorded in the documentation at page 70 but I
5 was satisfied on the basis of the evidence that the claimant had been absent on that date. Following the absence on 20 January the claimant was invited to a further absence management meeting which took place on 24 February 2017. A note of this meeting was lodged. It was signed by Ms Petrie and by the claimant. Within the body of the meeting the claimant acknowledged that
10 she had indeed been absent from 18-20 November and on 20 January. There was a discussion regarding the claimant's health. The note goes on to state

“Isla agreed she understood this, Isla feels it has been a particularly bad year in regards to her health and she keeps picking up bugs. Sharon
15 asked if the blood test results which had been taken showed anything? Isla said no. Sharon suggested vitamin supplements would maybe help boost her immune system and prevent this continuing. Isla said she is eating and feeling better and hoped she will be better now.

Sharon asked if there was anything that she could do to help or support
20 Isla in relation to the absence. Isla said no.”

17. The claimant was now on a stage 2 absence monitor. In terms of the respondents' policies this would last 12 months. If however she hit the trigger of five days lost in any six month period in the 12 months after the stage 2
25 warning then she would potentially require to attend a stage 3 meeting.

18. Following this the claimant was absent again on 31 July to 1 August 2017 for one day, for two days between 5 September 2017 and 6 September 2017 and the reason given for these two absences was unknown reason at time of input
30 and joint/bone injury. The claimant then had a lengthy period of absence from 1 October 2017 to 2 November 2017. The reason for this absence is recorded as 'personal stress'. The claimant advised the respondents that this was due to relationship difficulties she was having at the time. The claimant met with her then line manager Gayna Cameron on 6 November. A note of this meeting

was lodged (page 43A). The claimant was reminded that she was already on stage 2 following previous absences. Her absences were then discussed. The note goes on to state

5 “Isla had been going through a particular personal stressful situation. Isla informed Gayna that she has things sorted out and is feeling better. Isla explained that she was feeling much better and was now glad she had returned to work.

10 Gayna informed Isla that she could use Ark’s counselling service should she wish to use this. Isla refused this.”

19. The counselling service is a free confidential counselling service which is provided by the respondents to their staff. Staff members are given a telephone number which they can call. It is confidential in that in most
15 circumstances the counsellor will not advise the respondents who is taking advantage of the service.

20. The note of meeting goes on to state

20 “Gayna decided not to place Isla on stage 3 of Arks management policy & procedure and her absence would continue to be monitored, Isla’s stage 2 absence would be extended for a further 6 months and any further absence may progress to Stage 3 of the absence procedure. Gayna advised Isla that stage 3 trigger could result in disciplinary action.”

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21. The claimant was then absent again on 23 December 2017 for one day. The reason for this is stated as ‘headache/migraine.’ The claimant was then absent again for seven days from 3 to 9 January 2018. The reason for absence is stated as ‘virus infection’. The claimant had thus again hit the trigger having
30 had two further absences totalling eight days. Following her return to work the claimant was invited to an absence management meeting by her manager. By this time Ms Petrie had reverted to being the claimant’s line manager. The letter inviting the claimant to the meeting dated 25 January 2018 was lodged (page 46).

22. This meeting was scheduled to take place on 31 January but was rearranged at the claimant's request and eventually took place on 8 February. A note of this meeting was lodged (pages 48-49). I considered this to be an accurate record of what took place at the meeting. The claimant's absences were discussed. It was noted that the claimant had attended a meeting with Gayna Cameron on 6 November and that the outcome of the meeting was to extend her being placed on Stage 2 for a further six months. Ms Petrie explained that in the circumstances if the claimant had further absences a stage 3 meeting would be held with the respondents' HR department and Margaret Henderson the Regional Manager. This meeting could lead to the claimant's dismissal. The discussion is then recorded as being

“It was then discussed that as there was no actual pattern in the separate causes for absence although personal stress had led to more than one of the absences that it is more difficult to look at a support function to prevent any further absences.”

Ms Petrie decided the Claimant should be invited to a formal stage 3 meeting at which there was a possibility that she might be dismissed.

23. By letter dated 1 March 2018 the claimant was invited to a formal stage 3 meeting to take place on 9 March. The letter was lodged (pages 50-51). The claimant was advised of her right to be accompanied, she was also again reminded of the confidential employee assistance programme and given the number of this.

24. The claimant duly attended the absence management meeting on 9 March. A note of the meeting was lodged (page 52-53). I consider this to be an accurate record of what took place at the meeting. The meeting was chaired by Mags Anderson the respondents' Area Manager, Jo Farren the respondents' HR Business Partner was in attendance. The claimant was accompanied by LJ a colleague. During the hearing Ms Anderson went through the claimant's absence records. She said, “Looking at your record over the last year Isla, it

doesn't look great." The claimant said, "I know it doesn't." The claimant was asked about the most recent absence. She said she had had the flu and was seriously ill. She then went on to say "there were five of us off with flu at the time. That was December not January for four or five days."

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25. The only occasion in recent years when the respondents' Forfar operation has had a number of staff off at the same time with a virus was December 2016. At that time 10 staff were off with norovirus. The monthly sickness record for December 2016 was lodged on the second day of the hearing (page 135). The claimant was not one of those absent at that time. The claimant was however absent in January 2018 with a virus. At that time only two others were off albeit one or two of the service users had also contracted a virus and as a precaution the managers of the property in which they lived had arranged to spend use of the communal living room. The monthly absence record for January 2018 was lodged (page 136).

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26. Ms Farren told the claimant that this was her opportunity to explain what was going on. The claimant's response was "I have no idea what is going on. I am always under the weather and I get eye and ear infections constantly. I was going through a crappy time of my life but better now that I am at the end of a relationship. I have had blood test to see if there is anything wrong and waiting to find out if anything wrong." The claimant went on to say that she had also had a kidney infection and that things kept dragging her down. She was asked if there was anything else she wanted to add and stated "No I know my sickness isn't great."

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27. The claimant mentioned that she had been off with stress following the death of a service user. She confirmed this was in 2016. Ms Anderson stated

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"Even taking that into consideration and taking off the personal stress, you have still had 12 separate occasions of absence. You have been on a stage and off a stage constantly."

The claimant stated

“Yeah I know it’s not good.”

5 The meeting was adjourned and following the adjournment the claimant was advised that she was being dismissed. Her dismissal was confirmed to her in a letter dated 13 March 2018 which was lodged (pages 54-55). The claimant was paid four weeks’ pay in lieu of notice. She was advised of her right of appeal.

10 28. The claimant initially contacted the respondents to advise that she wished to have an appeal. Mr Abram wrote to the respondents on 14 March 2018 on behalf of the Claimant confirming this. He sought various pieces of information. The respondents wrote to the claimant indicating that if she wished to appeal she required to do this personally. She was advised that the respondents were
15 only prepared to allow her to be accompanied at an appeal hearing by a fellow employee or trade union representative. She was told that if she did intend to appeal she should set out the grounds of her appeal to Mr Phillips the respondents’ Assistant Director no later than 28 March. On 25 March 2018 the claimant and her representative Mr Abram wrote to the respondents. Mr Abram
20 pointed out that the claimant was dyslexic and various documents were requested (pages 59-60). In a second document dated the same date the claimant confirmed that she wished to appeal (pages 61-62).

25 29. On 5 April the respondents wrote to the claimant inviting her to an appeal meeting to take place on 20 April 2018. The claimant was advised of her right to be accompanied. On 9 April Mr Abram and the claimant wrote to the respondents stating

30 “Unfortunately due to anomalies with the disciplinary documentation received, Isla will now need to seek further legal advice prior to an appeal hearing, and seeks to postpone until a later date.

Isla’s lawyer is presently working in the States and will not be returning to the UK until 4th May. An appointment has been requested at their earliest convenience.”

On 19 April 2018 the respondents wrote to the claimant agreeing to postpone the appeal hearing until Tuesday 8 May 2018. The claimant was advised of her right to be accompanied by a work colleague or trade union representative.

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30. On 4 May the claimant telephoned the respondents' office. She advised that her lawyer was not returning until 7 May and she would not be attending the appeal hearing on 8 May. The claimant was twice offered the opportunity to reschedule the meeting for a later date but stated that she did not wish to do this. On 4 May the respondents therefore wrote to the claimant in the following terms (page 68):

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"I refer to the telephone call you made today, Friday 4th May 2018 to our office, whereby you informed Carol Sheridan, HR Assistant that you would not be attending the arranged appeal hearing on Tuesday 8th May 2018 in ARK's Arbroath Office. This meeting was previously arranged for Friday 20th April 2018.

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You were given the opportunity to reschedule this meeting for a second time, however; you declined this offer, therefore, and this now concludes ARK's disciplinary process."

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31. Following her dismissal the claimant was successful in obtaining another job however she gave this up after three months. The reason for this was that she had started suffering panic attacks. She is not currently on benefits and she has returned to live at home. She is looking for other work but is prioritising getting her health back.

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Matters Arising from the Evidence

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32. I had no hesitation in accepting the evidence of the three witnesses for the respondents. They were clearly trying to assist the Tribunal by giving honest evidence and their evidence was in accordance with the contemporary documents. There were a number of matters where they simply could not remember precisely what had happened due to effluxion of time however on

those occasions they were happy to accept that this was the case and did not seek to speculate even where that might have assisted the employer's case. I was less impressed with the evidence of the claimant. She did not appear to be an accurate historian and had difficulty giving precise evidence about anything. Her evidence was that her absence in January 2018 had coincided with a situation where the business was at crisis point due to practically all of the staff being off. She said that the line manager Gayna Cameron had had to come in and do shifts on the floor herself at that time. This evidence had not been foreshadowed in the pleadings and was disputed by the respondents. The respondents overnight obtained further documentation (pages 135-136) which they sought to lodge on the second day of the hearing. The claimant's representative, following discussions with his client did not object to this happening and to Ms Petrie being recalled to speak to it. I accepted Ms Petrie's evidence that the claimant was confusing January 2018 with an incident in December 2016 when 10 employees had been off at the same time with norovirus which had caused considerable difficulties for the service. I considered Ms Petrie's account to be more likely because this was backed up by the documentation which had been lodged. In addition I accepted Ms Petrie's evidence that Gayna Cameron had been on annual leave until around 9 January 2018 and on her return had been working from the Arbroath unit rather than the Forfar unit. It appeared to me that the claimant had confused the two instances.

33. The claimant's representative made various suggestions during his cross examination of the respondents' witnesses and also during examination in chief of the claimant. Basically the suggestion was that the claimant's absences could be put down to the unfortunate incident in January 2016 and that the respondents had somehow been remiss in not referring the claimant to counselling or at least taking Occupational Health advice following this. Generally speaking, apart from agreeing to leading questions put by her representative the claimant did not give any evidence which supported this. During cross examination she accepted that, as shown in the minutes of meetings, she had been asked if any further support could be provided and had said there wasn't anything.

34. The claimant's position, at least as understood by her representative, was that she had no recollection of the meeting of 8 February. I was satisfied that this meeting had taken place on the basis of the evidence of Ms Petrie, the minute
5 of the meeting and the fact that it was referred to in letters sent out at the time to the claimant without the claimant commenting on it. I also accepted that the claimant had been absent on 20 January 2017 since this absence was noted in the minute of the meeting of 24 February which was signed by the claimant.

10 **Issues**

35. The sole issue before the Tribunal was whether or not the claimant had been unfairly dismissed by the respondents. If the claimant succeeded she sought compensation. Simply for the record I note that in her ET1 the claimant ticked
15 the box which states

“If claiming discrimination, a recommendation”

however I agreed with the respondents that there is no claim set out in the form
20 other than a claim of unfair dismissal.

Discussion and Decision

36. I should say at the outset that it was clear to me that both the claimant and her
25 representative were strongly of the view that her dismissal was unfair in the sense that the claimant had not done anything wrong. I should say that I entirely agree with the claimant that she had not done anything wrong and there was absolutely no suggestion during the hearing that the dismissal was as a result of any fault on her part. That is not however the end of the matter
30 since, as will be seen below, the law permits an employer to dismiss an employee in circumstances where through no fault of that employee the employer reasonably concludes that the employee is not capable of doing the job required by reason of ill health.

37. The relevant legislation is set out in part X chapter 1 of the Employment Rights Act 1996. Section 98 states

5 “(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.

10 (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,

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(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 ...”

20 38. I was entirely satisfied on the basis of the evidence that the reason for the claimant’s dismissal was her capability. The respondents concluded that because of the number of short term absences she had for a number of different reasons that her health was such that she was incapable of carrying out the role for which she was employed.

25 39. I was referred by the respondents’ agent to the cases of *International Sports Co Ltd v Thomson [1980] IRLR 340* and *Lynock v Cereal Packaging Ltd [1988] IRLR 510*. Both of these cases go on from the leading case of *Spencer v Paragon Wallpapers Ltd [1976] IRLR 373* and *East Lindsey District Council v Daubney [1977] IRLR 181*. These cases were in relation to long term absence and the *Spencer* case set out the question which was to be asked in those cases which is whether the employer can be expected to wait any longer and if so how much longer. It also sets out the general requirement

for consultation and discussion between the parties. It notes that before taking action there requires to be a discussion of their position between the employer and the employee so that the situation can be weighed up bearing in mind the employer's need for work to be done and the employee's need for time to recover his health. The ***International Sports Company*** case was a case involving numerous short term absences of the type which occurred in this case. In that case the employee had a pattern of poor attendance. He had been through a process of being dismissed and then reinstated by the employers but his reinstatement had come with the warning that an appreciable and sustained improvement in his attendance was required. The claimant was then absent again and was dismissed. It was suggested that the employer ought to have obtained medical evidence before dismissing him. The EAT specifically rejected this noting that, as in the present case, the employers "were concerned with the impact of an unacceptable level of intermittent absences due to unconnected minor ailments." The point was made that in such a situation the employee will usually be fit for work at the time the decision is made to dismiss. The issue for the employer is that if an employee has a high level of intermittent absences caused by unconnected minor ailments this may mean that they are not suitable for the job they hold which requires a higher level of attendance. The issue to be determined by the Tribunal is set out in paragraph 16

.... "the issue before the Tribunal was whether any reasonable employer and not the Tribunal themselves would have treated the respondents' actual persistent absences as a sufficient reason for dismissal in the light of the detailed history that had been proved in evidence including the warnings that she had been given."

This approach was confirmed in the case of Lynock. In paragraph 14 it is noted

"In our judgment there was no requirement to have further medical evidence. Although the applicant was in employment again at the time when he was dismissed this is likely to be the situation where you have these intermittent absences and the fact that there had been those

absences since February 1986 indicated there was no improvement. The approach of an employer in this situation is in our view one to be based on those three words which were used earlier in our judgment sympathy, understanding and compassion. There is no principal that the mere fact that an employee is fit at the time of dismissal makes this dismissal unfair one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact and provided that the approach is right the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision include perhaps some of the following – the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for work done by the particular employee; the impact of the absence of some others who worked with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment and the ultimate decision and of course the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises the point of no return, the moment when the decision was ultimately being made may be approaching.”

40. As can be seen from the above it is not permissible for the Tribunal to substitute its own view for that of the employer. In submissions the claimant's representative made the point that even if one does not discount the stress related absences the claimant's 84 absences over the course of three years still equates to over 90% attendance. Discounting those absences as the respondents bore to do would bring the claimant's attendance up even higher. In my view however I would be falling into error if I accepted this argument in that I would be required to make my own assessment of what is a reasonable period of absence rather than look at the evidence of the employer.

41. It is clear to me that looked at from the point of view of other professions and other employers the claimant's absence record might well be unexceptional. In other types of employment she may not have reached the point where any

absence management process was triggered particularly if the two lengthy periods of absence through stress are considered. That is not however my role. I am required to take into account the factors set out in **Lynock**.

5 42. The first of these was that I entirely accepted the respondents' evidence that
the particular type of work which the claimant was doing is one where
intermittent absences cause a particular difficulty. I accepted that the
respondents were dealing with vulnerable individuals and that intermittent
short-term absences are extremely disruptive and cause particular difficulty for
10 service users. I also accepted that they caused particular difficulties for other
employees who may be required to come in on their days off or "double up".
This is a fact which there is no way of getting around. A level of intermittent
absence which causes no difficulties for certain types of employer will cause
immense difficulties for the employer in the present case.

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43. I note that as a result of this the respondents have an extremely clear
attendance management process which I accepted was available to the
claimant at all times through the process. I accept the claimant is dyslexic
however it is also clear that the triggers were clearly explained to her at the
20 various meetings. I accepted that as a matter of fact the claimant hit the
triggers and that when she hit these triggers meetings were held in order to
discuss the position with her.

44. I do not accept the claimant's position that at these meetings the respondents
25 failed to provide the claimant with additional support. The fact of the matter
appears to be that the claimant in her own words keeps picking up bugs. It
would appear that the claimant has an immune system which causes her to
have regular absences for numerous unrelated ailments. It is unclear what
possible support the respondents could have given the claimant other than the
30 suggestion that she may wish to take multivitamins to boost her immune
system. To revert to the point I made at the beginning of this discussion it is
clearly not the claimant's fault if she has a weak immune system but it may well
be that someone with a weak immune system simply cannot sustain the level

of attendance which the respondents require of someone doing the claimant's role.

5 45. I also note that the respondents have applied their policy with flexibility and a degree of compassion. The claimant was not placed on stage 1 on the first occasion she hit the stage 1 trigger. She was not placed on stage 2 the first time she hit the stage 2 trigger and she was not dismissed the first time she hit the stage three trigger. On each occasion the claimant was given another chance. The situation in March 2018 when the decision to dismiss was made
10 was that the claimant had had unacceptable levels of attendance, at least by the respondents' standards, during the whole of her employment. There was no specific cause identified for this and indeed it appeared that the claimant was simply susceptible to catching various ailments. The claimant herself accepted that this was the case. It appeared to me there was no further
15 support that the respondents could provide. The claimant's agent suggested that the claimant could have been referred to Occupational Health but I agree with the respondents that this was not something which would have been appropriate. The situation here was the same as the situation in the ***International Sports Company*** case. The claimant was not suffering from
20 one ailment but appeared to be susceptible to catching whatever was going.

25 46. The claimant's agent also suggested that in some way all of the claimant's illnesses were due to the stress she suffered in January 2016 in relation to the service user who died. I did not accept that there was any evidence whatsoever on which to base this assertion. If this was the case it would have been up to the claimant to adduce medical evidence to that effect and I would have expected the claimant to have raised this herself during the process. On the occasion when the claimant was specifically referred to the confidential employment assistance programme she stated that she did not want this. At
30 the end of the day the decision I have to make is whether the respondents' decision to dismiss was within the range of reasonable responses open to a reasonable employer. It does appear to me that the decision was a harsh one. On the other hand the respondents are in the business of providing support services to extremely vulnerable individuals and in order to do so have taken

the view that intermittent short term absences are not something which can be readily tolerated because of the effect they have on service users and other staff. At the end of the day I am not prepared to find that their decision to dismiss the claimant in the circumstances of this case was outwith the band of reasonable responses. Some employers may have decided to give the claimant another chance. Equally some employers may have taken a less lenient view of the claimant's lengthy stress related absences and taken action sooner. At the end of the day my view is that dismissal in this case was within the band of reasonable responses and for that reason the dismissal is fair.

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Employment Judge: Ian McFatridge
Date of Judgment: 12 November 2018
Entered in register: 12 November 2018
and copied to parties

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