EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs E Matongo	**v**	**Tesco Stores Limited**

Heard at: Watford **On:** 20-23 August 2018

Before: Employment Judge R Lewis
Members: Mrs L Thompson
Ms N Duncan

Appearances:

For the Claimant: In person
For the Respondent: Mr S Liberadzki, Barrister

JUDGMENT having been sent to the parties on **17 September 2018** and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. This was the hearing of combined claims presented by the claimant on 6 June 2016 and 23 August 2016. Before this hearing the claims had been the subject of extensive case management. There had been preliminary hearings on 14 September 2016 (Employment Judge Southam); 1 December 2016 (Employment Judge Heal); and 21 March 2017 (Employment Judge Henry).

2. The Order of Employment Judge Henry, which was sent on 6 April 2017, was significant for two major reasons. The first was that it gave a listing for this case (originally 19 to 23 June 2017 and subsequently postponed); and the second was that Judge Henry definitively set out the list of issues to be decided.

3. While we do not need here to deal with the reasons for delay and postponement, we note that their effect was that between receipt of Judge Henry's Order and start of this hearing, more than sixteen months had gone by. The parties had had ample time to reflect, prepare, and if need be, seek further assistance from the Tribunal.

4. Judge Henry set out a structure which limited the issues before us to two

discrete issues. The first was whether the claimant had been unfairly dismissed. The second was whether the claimant had been subjected to direct discrimination on the grounds of sex in the following respect:

> "The claimant was not picked to do office duties over 12 years of service, although her contract states that she would be given occasional office duties and only male colleagues were picked for office duties."

Judge Henry's Order then went on to name five male comparators "and/or hypothetical comparators."

5. There was a bundle of about 400 pages. There were a number of disputes about documents, not all of which we need to resolve. There were omissions from the respondent's contribution to the bundle which were surprising, although in the event not material to the outcome of the case. In particular, it was surprising that the respondent's solicitors had omitted the documents added by the claimant as pages 293A to 293D (added in the course of this hearing) which were plainly material.

6. The parties had exchanged witness statements. The claimant was the major witness on her own behalf. Her husband, Mr. Bernard Matongo, submitted a short statement, on which there were no questions from the respondent or the Tribunal, and which he adopted on oath before being released as a witness.

7. On behalf of the respondent, there were two witnesses. They were Mr. Steve French, now employed by the respondent as Transport Manager, who at the time in question had been Warehouse Shift Manager, and had dismissed the claimant. The second was Mr. Alan Fuller, Depot Manager, who had rejected the claimant's appeal against dismissal.

8. Judge Henry had directed that this hearing deal with liability only. We proceeded on that basis, confirming before we started the hearing that we would at this stage deal also with any issue of contribution and Polkey. The tribunal read the witness statements, and extracts from the bundle, before oral evidence. The claimant's case was heard first, the claimant was cross-examined for about four hours. Mr. French was cross-examined for about one hour, and Mr. Fuller for about thirty minutes. After Mr. Liberadzki's closing submission, the Tribunal took an extended early lunch break, so that the claimant would have sufficient opportunity to finalise her reply. Submissions were concluded at around 2pm on the third day of hearing, and oral judgment was given mid-morning on the fourth day.

General observations

9. We preface our findings with general observations.

10. In this case, as is frequent in the work of the Tribunal, we heard evidence about a wide range of matters, some of it in depth. Where we make no finding about a matter of which we heard; or where we make a finding, but not to the depth to which the parties went in their evidence, our approach does not represent oversight or omission, but reflects the extent to which

the point in question was truly of assistance to the Tribunal.

11. While that approach is commonplace in the work of the Tribunal, it was particularly material in this case for two reasons. The first was that we noted in the claimant a tendency to identify an issue which she thought was important, and to focus on it to an extent which objectively was out of any reasonable proportion to its relevance or probative value. There were three striking instances at least in this case and we refer to them below in the course of these Reasons. They were the holiday form; signature of notes; and historic disputes with Mr. Paul Nixon.

12. The second point, which follows from the one just made, was that the Tribunal is familiar with the difficulties faced by members of the public who represent themselves in the Tribunal. We understand that they are not experienced in law or procedure, that the Tribunal process is artificial, and involves a return to events which maybe painful or difficult to remember and to discuss. We do not expect inexperienced members of the public to master the law and we make every allowance for imperfect understanding of the legal framework. Making all those allowances, we nevertheless noted that the claimant appeared to have prepared inadequately for this hearing. Despite the length of time available to do so, she was far from familiar with the issues, the evidence, or the bundle. She appeared to have given little thought to analysing potential strengths or weaknesses in her case.

13. The claimant on a number of occasions told the Tribunal that she had with her substantial additional documentation which had not been placed in the bundle. We declined to be drawn into dispute about the bundle, when the parties had had over two years to prepare for this hearing. We permitted the addition of the plainly material pages which formed pages 293A to D of the bundle. In the course of her evidence, the claimant referred to drawings allegedly put on her holiday form by Mr. Dorgu (see below). As no such drawing had ever been found, the Tribunal asked the claimant to draw a replica of what Mr. Dorgu had drawn, and that was annexed to her statement. The claimant drew what could be described as an oblong with a thin extension at the top right (the Judge noted a vague similarity to the shape of Cyprus on the map).

Background

14. We set the scene. The claimant, who was born in 1966, began working for the respondent in October 2004. Her employment continued until her dismissal on 7 June 2016. She was employed as a full-time Warehouse Assembler. She was contracted to work five days out of seven, totalling 36.5 hours per week. She worked exclusively on night shifts at Welham Green Distribution Centre. We were told that in the latter part of the claimant's employment, there were about 45 operatives on duty per night shift.

15. The bundle contained indications that the claimant was and was seen as a highly competent employee and a valued colleague. Certainly, we heard no

evidence to the contrary effect.

16. The claimant's terms and conditions (79) included the following under the heading Job Title:

> "Your job title is: Warehouse Assembler – Nights. You will also be expected to carry out any other duties that may be reasonably required of you. Your normal duties are fully flexible and will involve any warehouse work (loading, unloading, picking) along with clerical duties."

17. This case focused heavily on the respondent's attendance management procedure. In particular, it focused on the claimant's attendance in her final two years of employment.

18. The bundle contained, seemingly at random, over 40 pages of time cards, which were barely legible, and not helpful. A single coherent chronology of the last two years of the claimant's attendance would have greatly assisted.

19. The attendance procedure contained a series of steps. The first step was Welcome Back (76G). It provides that after any unplanned absence, the employee is during her first shift back at work to have an informal meeting with a member of management. Although the procedure is to be read in full, it indicates that the purpose is to confirm the employee's fitness to return, welcome her back, address any issues of for example, disability, accident recording or payment, and identify any issue which may go to the second step described below.

20. If an individual is identified as meeting the trigger points to do so, she may be referred to the second step, known as Attendance Review Meeting ("ARM"). This was described as triggered by one of two trigger points:

> "3% and or 3 occasions of unplanned absence in a rolling 26-week period." (76E)

21. The formula for calculating 3% was set out in the procedure (76K) although we found the worked examples (e.g. 146) more accessible. The concept is simple: calculate the contracted hours of the previous 26 weeks (working back from the day of calculation); calculate the number of hours of absence; if the latter amounts to more than 3% of the former, the trigger is met. In that event, the employee is referred to the ARM Procedure.

22. The ARM Procedure involves a three-stage monitoring process, each stage being for six months. The procedure (76C) provides as follows:

> "Persistent Absenteeism – Individuals coming onto the stage monitoring process for a third time in a rolling two-year period will be placed on stage 3 of the process and not stage 1. We will only include stage placements that happen from the date that Supporting Attendance went live in your depot. Once an individual is on stage 3 of the process they are then potentially only one absence away from dismissal." (76C)

23. It follows that at an Attendance Review Meeting, the relevant manager may

place an employee at the appropriate stage of the monitoring process.

24. The final step occurs when an employee on stage 3 fails to meet the standard of attendance which is required. Put more plainly, an employee on stage 3 who then has unplanned absence will be referred to the disciplinary procedure, which, although not in our bundle, was said to have three stages, i.e. a disciplinary/dismissal meeting followed by two stages of appeal.

25. We accept that this procedure had been agreed with the relevant union (USDAW) and was operated with the involvement of USDAW representatives.

26. In evidence, the claimant at one point stated that she was unfamiliar with the procedure. We do not accept that evidence. The procedure had been applied to the claimant many times, and we are confident that she understood what it meant and how it worked in practice. The claimant was at all material times a member of USDAW, and had access to USDAW support.

27. The Tribunal put to Mr. Liberadzki at the end of submissions that the procedure could operate on a "no fault" basis, by which we meant a purely mathematical calculation, which did not include any issue as to whether any absence was genuine or avoidable. Counsel confirmed that that is the respondent's case.

28. Mr. French was asked by the Tribunal whether in a case where the mathematical triggers for dismissal were met, the dismissing officer retained discretion on dismissal, or was obliged in effect to follow a totting up form of procedure which could only lead to dismissal. We accept Mr. French's evidence that the former was the case.

<u>Events from 2014</u>

29. The material events with which we were concerned were taken by the respondent to run from August 2014. They therefore encompassed the major part of the claimant's last two years of employment. We agree that that is the correct approach in principle, and we limit our findings to the preceding period as below.

30. By late August 2014, the claimant was about to complete her tenth year of successful service.

31. We were told that there had been a previous history of disagreements between the claimant and members of management, based on events running back to 2004. These matters were referred to in the claimant's grievance outcome of 31 March 2016 (266) to which reference is made below.

32. Save in one respect, that history was not material to this case, and we make no findings about it. The one finding which we do make, is that the

claimant's sense of grievance about her dealings with a former manager, Mr. Nixon, appeared still live in the three days of hearing before us. We note that in the grievance outcome in March 2016, Ms. Smith wrote that Mr. Nixon ceased to be in the claimant's line management in 2012, and that there had been a major issue between him and the claimant in 2008. The claimant was dismissed in 2016, and the hearing before us was in August 2018. We could see no conceivable relevance to our task of inter personal disputes ten or more years previously.

33. The second background matter to note is that before August 2014 the claimant had a significant history of unplanned absence, and had been referred on many occasions to the ARM Procedure indicated above. A summary headed "Case Outline" was in the bundle at page 78, but was unsupported by the primary evidence of how it had been created, and we treat it with some caution.

34. In late August 2014, the claimant returned to work from an unplanned absence. The Welcome Back meeting meeting began on 22 August, and was adjourned to enable a union representative to attend. It resumed on 30 August. The template ARM Checklist (105) showed an absence level of 5.5%. It recorded that the claimant had then been placed on stage one of the Attendance Procedure. The checklist set out nine previous occasions on which the claimant had been referred to an ARM stage. It also recorded that the August 2014 meetings were the claimant's twentieth ARM meeting through her employment.

35. The next matter of which we heard was an ARM which began on 29 May 2015 and concluded on 4 June 2015. The template (117) showed an absence level of 3.9%. The outcome (120) was that the claimant was placed back on stage 1.

36. The claimant's next unplanned absence was between 30 December 2015 and 18 January 2016, partly certificated for headaches and hypertension (124 and 125). At the Welcome Back meeting on 19 January 2016, her absence level was recorded as 10.6% (127).

37. The claimant was referred to an ARM Meeting which began on 25 January and was adjourned due to the absence of a Trade Union representative. It resumed on 2 February 2016.

38. There was a dispute before us about the meeting on 2 February 2016. We find that the notes of the meeting (139 to 140) were a broadly accurate summary, and, although handwritten, were legible. Those present were the claimant, Mr. Stewart, the Depot Manager, Mr. Ellis, on behalf of USDAW, and Mr. Dorgu, the Team Manager. As Mr. Stewart said at the start of the meeting, it was the claimant's twenty-second ARM.

39. There was some discussion of the claimant's health, and after an adjournment, Mr. Stewart told the claimant that his decision was to place her on stage three "bearing in mind your prior history 3 times on stage 1 in 2 years" (140). That form of words referred to the definition of "Persistent

Absenteeism" which we have set out above. The claimant was later given written confirmation that she was on stage three monitoring until 30 June 2016 (330). We deal below separately with the issue of the integrity of notes.

40. On 19 February the holiday form incident took place. The claimant completed a holiday request form which she gave to Mr. Dorgu. Mr. Dorgu refused the claimant's request, giving as his reason that she had already used up her holiday entitlement. The request was to enable the claimant to attend a religious event which was of considerable importance to her, and we understood that she was later able to swap a shift with a colleague and to attend the event. It is sufficient to say that the reason for the request was of great personal and emotional importance to the claimant.

41. The bundle contained the front of a holiday request form, not in good quality copying throughout, but on which the handwritten words "Refused no hols left" are plainly legible (293A).

42. The claimant alleged that Mr. Dorgu's manner in the conversation about holiday had been abrupt or dismissive. We make no finding about that. Given the importance of the reason for the request, the claimant may well have had expectations that her understanding of the need for absence would be shared.

43. The claimant alleged that Mr. Dorgu had made other marks on the holiday form, in addition to having written the refusal and the reason for it. These other marks became a matter of apparent fixation for the claimant. They were described to us variously as rude or disrespectful doodles or cartoons or drawings. When the claimant was asked to replicate what she had seen, she produced two outline shapes described at paragraph 13 above. On the basis of what the claimant produced, there was no rational objective basis for finding the shapes which Mr. Dorgu allegedly drew to be in any way personalised or offensive.

44. Later, on the overnight shift of 21 to 22 February, the claimant went home early, complaining of a headache. Her unplanned absence from work was for 6.5 hours. She had a Welcome Back meeting on 22 February at which her absence percentage was calculated at 10.6% (144). It was her third unplanned absence within 26 weeks. This took place at a time when, in the words of the procedure, (76C) she was "potentially only one absence away from dismissal."

45. The claimant was referred to her twenty-third ARM Meeting on 25 February. The claimant attended accompanied by Mr. Ellis and Mr. Stewart chaired the meeting. The notes of the meeting are at pages 156 to 160 and a key comment was made early in the meeting:

> "NS: Went home Sunday, on Friday refused holiday." (156)

46. That phrase captured a point which gripped the claimant throughout this hearing as much as it had done at the time. She asserted that her headache on Sunday 21/22 February was the result of her stress and

distress at the refusal of holiday the previous Friday; and a response to Mr. Dorgu having marked the form; and that therefore her absence was explicable and justifiable, having been brought on by a form of mismanagement; and should be discounted from her record by the respondent.

47. We attached weight to Mr. Stewart's summary of the meeting, sent by email the following day, in which he asked for a disciplinary officer to be appointed and wrote the following:

> "In the meeting last night she seemed to have no regard for S&A she basically just hit self-destruct." (162)

48. We understand that phrase to mean that Mr. Stewart perceived the claimant not to have addressed the issues which were in her best interests to address, but to have spoken about the matters with which she was concerned. That at times was also her approach in the Tribunal.

49. On 26 February, the claimant was invited to attend a disciplinary meeting which she was told could have led to her dismissal (163). On 28 February she submitted a grievance in writing (164); and by a letter of 1 March the claimant was told that the disciplinary process was put off until completion of the grievance procedure (172). That was, as Mr. Liberadzki put to the claimant, fair and reasonable management. It gave rise to a line of questions which were to the effect that the grievance had been submitted opportunistically to delay the disciplinary process. That point did not assist us, and we make no finding on it.

50. Meanwhile, between 29 February and 23 March, the claimant had further absences, certificated as due work-related stress (171 and 191).

51. During her sick leave, the claimant attended a grievance meeting with Ms. Smith, who on 31 March, informed the claimant that her grievance had failed and later sent the claimant her conclusions and report in writing (266 to 272).

52. We have noted above Ms. Smith's findings about the historic episodes involving Mr. Nixon. Two other material matters were mentioned in the grievance outcome. The first was "You feel aggrieved that you've never been given the opportunity to work in the office" on which Ms. Smith found as follows:

> "I can find no evidence of you having applied officially or asked to be considered for either a secondment in the office or a permanent position." (268)

53. Item 7 in the claimant's grievance was "Holiday requests were often denied". Ms. Smith wrote (270):

> "All holiday requests from colleagues are taken and the opportunity to approve the request is based on availability of labour to achieve the forecasted volume of work. I have found that all requests for holiday are dealt with on a first come, first serve basis and only denied if there is no other alternative. I find that there is

> no evidence to suggest that holiday requests from you were dealt with any differently than any other colleague."

54. The claimant appealed and in due course Ms. Wilby rejected her appeal by letter dated 11 May (290 to 293). In the grievance appeal outcome, Ms. Wilby recorded that the claimant had raised a concern "about funny drawings or caricatures" on the holiday form. Ms. Wilby wrote there was nothing that she could see on the form that looked offensive, and she sent the claimant a copy of the front page of the form, (293A) as well as notes of her own meeting with the claimant on 4 May 2016 (293B to D).

55. The claimant had told Ms. Wilby that she did not want to continue working at the Welham Green depot. Ms. Wilby suggested and arranged through Mr. Coe for the claimant to undergo a four-week trial period at the Cheshunt store. The email trail suggested that Mr. Coe was prompt to make the appropriate arrangements. After two or three shifts at the Cheshunt store, the claimant reported that the work was painful for her back and legs, and asked to return to Welham Green (285). This was arranged.

56. The position, therefore, by mid-May 2016 was that the claimant had exhausted the grievance procedure and therefore was due to re-enter the disciplinary procedure; that since she had been referred to the disciplinary procedure on 26 February she had had a further lengthy absence; and her request for a trial in a different location and different type of workplace had been allowed, but had not proved successful.

57. By letter dated 23 May the claimant was invited to attend a disciplinary meeting on 31 May (294). Mr. French, who was a Depot Manager in Reading, and had no involvement in any event at Welham Green other than the claimant's disciplinary, was appointed to conduct the disciplinary, and provided with appropriate paperwork about the claimant's history.

58. The claimant on 25 May wrote to Mr. Coe (296), to state that her attendance at the disciplinary meeting on 31 May was conditional. The letter should be read in full, because it captures much of the claimant's mindset at the time, much of which remained unchanged before us (all emphases added):

> "Following your text message, I wrote a letter to Rachel explaining that I wasn't satisfied when she said she had closed the grievance and attaching a falsified holiday form, on 16 May 2016.
>
> I also asked for a legible interview statement by Neil Stewart since I could not read it. As it is, I do not know what Neil said.
>
> These documents are crucial to my defence during the disciplinary hearing.
>
> We cannot separate my grievance from the disciplinary hearing because that forms part of the case which led to the disciplinary hearing.
>
> Once I received these 2 documents - 1) my original holiday form request 2) Neil Stewart's interview – I will be happy to attend the disciplinary meeting be it the Tuesday 31 May as arranged. If more time is needed for some reasons, I have

stretched myself to Friday the 10 June." (296)

59. Ms. Wilby was on holiday, but replied by email to make three short points (298): that the grievance procedure was closed; that the claimant should be advised that the meeting might proceed in her absence; and that she was entitled to copies of documents and not originals. Mr. Stewart wrote to the claimant at that effect on 27 May (300).

60. On 31 May the claimant telephoned Ms. O'Neill at Welham Green to state that she would not attend the disciplinary hearing. Ms. O'Neill replied that the meeting could proceed without her, and the claimant replied to the effect that that was fine (302).

61. Mr. French, no doubt on HR advice, elected not to proceed. He telephoned the claimant. There was some controversy about the telephone call which followed, which lasted no more than a matter of minutes. We find that Mr. French told the claimant that the meeting had been put back a week, to 7 June.

62. We find that the claimant asked for written confirmation, which Mr. French agreed to give. We find that that was confirmation of information already given.

63. In light of the claimant's requests for original documents, Mr. French told her that her personnel file would be brought to the meeting, and it could be consulted during the meeting.

64. Mr. French then wrote to the claimant on 31 May to confirm that the meeting would proceed on 7 June and could proceed in her absence (303).

65. The claimant's evidence to the Tribunal was that she did not receive the letter of 31 May. The respondent's evidence was that it had been sent and that it was confirmation of what the claimant had been told both in the telephone conversation of 31 May, and in the invitation letter to the 31 May meeting.

66. We find that the claimant was aware that there was to be a disciplinary meeting on 7 June. She knew the company's systems and she had been told that she would receive written confirmation. She knew that she had been one absence away from dismissal. She took no initiative to enquire about the position even though she was at work between 31 May and 7 June. She did not attend the disciplinary meeting on 7 June. Mr. French recorded his thought process as if the claimant were present (305 to 309) and by letter of 7 June, wrote to notify the claimant that she was dismissed with effect from that day (310). The reason stated was "incapability as a result of your inability to attend work to an acceptable level." Mr. French set out seven bullet points underlying his decision, of which the first two were persistent poor attendance and the overall attendance record. He referred to the offer of a trial at Cheshunt and finally to the claimant's failure to attend the disciplinary meetings.

67. One of his bullet points was the following:

> "Since being placed on a Stage 3 on 2 February 2016 you have had 2 further occasions of absence. I believe the stress caused from the Stage 2 grievance relating to the holiday form is an isolated event and is not related to previous absences."

68. We take that as indicating that Mr. French attached little weight to the 6½ hour absence allegedly arising from the holiday form incident, which we find was a barely material matter in his decision making.

69. Mr French also wrote that the holiday form had been available at the meeting for the claimant to look at, if she had attended. It was the respondent's case that at some point the original was lost, but that originals were available. It was apparent that the copy which we saw did not include the marks allegedly made by Mr Dorgu.

70. The claimant appealed against her dismissal and the appeal was heard by Mr. Fuller. Mr. Fuller was an experienced manager, who had been at Welham Green only a matter of months. He was therefore not familiar with the claimant's history. The claimant attended the appeal meeting on 10 August. We accept the summary as accurate (341 to 343) and note that the claimant departed quickly from the agenda for the meeting.

71. The notes record the meeting as starting at 9:20am, and at 9:39am the claimant's USDAW representative, Ms. Baiden, asked for an adjournment. The meeting resumed at 9:45. Mr. Fuller's evidence was that during the short adjournment, Ms. Baiden spoke to him privately, and said that she would do her best to get the claimant back on track.

72. We note the discussion of the conversation which the claimant had with Mr. French on 31 May. The claimant repeated "I told him I am not attending the meeting until I get the original holiday form."

73. Mr. Fuller wrote to the claimant on 14 August to dismiss her appeal (344).

74. The claimant's evidence on the allegation of sex discrimination referred to the job title set out at paragraph 16 above and wrote as follows:

> "Despite management knowing that I am a qualified secretary with a First-Class Pitman qualification, I was never picked to work in the office like my male workmates … I have already mentioned names of these workmates earlier ... I never saw anyone asking for such duties. The manager on duty could pick anyone, including agency staff. The same people kept being rotated to work in the office but that did not happen to me for over twelve years … I found that deplorable and discriminatory against me as the only woman in the warehouse."

75. Mr. Fuller's witness statement said:

> "I am not aware that the claimant has ever made a request to undertake office duties."

76. He then dealt with the contractual position. He set out that the general

approach was that warehouse staff were only offered office duties as an adjustment on their return to work after illness. He explained in oral evidence that for planned absences such as holiday, different arrangements were made. In relation to the five comparators identified by Judge Henry, Mr. Fuller's evidence was that one, who had been described as "Mark from Hungary" could not be identified; that Mr. Ellis had been allocated office duties as an adjustment when he had back trouble; and that for three others (Mr. Pooley, Mr. Barnes and Mr. Guiz) (respectively Bands and Guza in Judge Henry's order) he had searched records and found no indication of any of them ever having undertaken office duties. He finally said that he had asked two former long-serving managers at Welham Green, whose service predated his own substantially, and both "confirm they are unaware of any employees undertaking office duties other than the permanent warehouse clerks."

Legal framework and discussion

77. The legal framework for the claim of unfair dismissal can be shortly stated. The first task of the Tribunal is to find what was the reason for dismissal. The factual reason was the claimant's persistent short-term absence, which the respondent pleaded to be some other substantial reason justifying dismissal.

78. In that context, Mr. Liberadzki referred the Tribunal to International Sports Co Ltd v Thomson [1980] IRLR 340, and in particular paragraph 15, dealing with persistent short-term absence:

> "What is required, in our judgment, is, firstly, that there should be a fair review by the employer of the attendance record and the reasons for it; and, secondly, appropriate warnings, after the employee has been given an opportunity to make representation. If then there is no adequate improvement in the attendance record, it is likely that in most cases the employer will be justified in treating the persistent absences as a sufficient reason for dismissing the employee."

79. We were also referred to Wilson v Post Office [2000] IRLR 834, which went to the analysis of persistent short-term absence as some other substantial reason rather than incapability (or indeed misconduct). Those were helpful authorities.

80. Although the claimant submitted that there were other underlying reasons for her dismissal, we reject those submissions. We find that the material reason for her dismissal was persistent short-term absence in breach of the respondent's policy. The policy was a bilateral one, available to the claimant and to her union, and throughout which she had Trade Union representation and support.

81. We must also consider whether the requirements of s.98(4) of the Employment Rights Act have been met. That provides that:

> "The determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) 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 should be determined in accordance with equity and the substantial merits of the case."

82. In closing, Mr. Liberadzki reminded us that we must not substitute our view for that of the employer, and should ask ourselves the question whether a reasonable employer could have made the decision to dismiss.

83. He pointed out that there were agreed triggers for the appropriate policy, and that the requirements of the policy in procedural steps had been met in the claimant's case. As a matter of fairness there were discussions of whether there were underlying reasons for the claimant's sporadic absences, and the claimant was clearly told in writing when she had reached a stage where she was potentially at risk of dismissal. The claimant had had ample opportunity of unpaid time off, in case that assisted her health and personal circumstances, and an opportunity in a retail outlet. He submitted that the claimant's dismissal was reasonable in all the circumstances.

84. We find that the respondent adhered to its own policy; that it gave the claimant every reasonable opportunity to speak on her own behalf, although she may not have used those opportunities well; and that it followed fair and proper process before reaching the decision to dismiss. The claimant was not a constructive advocate on her own behalf. Her refusal to attend the meetings on 31 May and 7 June 2016 was ill judged. She laid down a pre-condition which she had no authority to seek to impose; she refused a reasonable accommodation (availability of the personnel file); and she deprived herself of the opportunity to make points on her own behalf. When she attended the appeal meeting, she appeared not to analyse what were strong points on her own behalf and focused on the points which concerned her. We find that in all the circumstances known to Mr French, and later Mr Fuller, the decision to dismiss was one which was a reasonable employer could reasonably reach.

85. The Tribunal finds that the claimant's dismissal was fair. It is therefore not necessary to make any reduction for contribution or Polkey.

Sex discrimination

86. The claim of sex discrimination fails.

87. The claimant asserted that the language of her terms and conditions gave her a contractual right to undertake office work. We do not agree. We read them as one-sided: they permit the employer to require her to work in the office, but do not entitle her to insist on doing so.

88. The claimant has made a bare assertion that when there was ad hoc need for office staff, other, exclusively male colleagues were "handpicked" to assist in the office and she was never picked, or offered the same opportunity. She has not provided any reliable evidence beyond that assertion.

89. We accept that two of the comparators whom she named could not be probative, one because he could not be identified and one because the reason for the offer, namely light duties for a medical reason, was plainly acceptable. The claimant has offered no evidence about the other three comparators beyond her assertions. The claim fails.

90. The one matter which was potentially capable of being supporting evidence, in the sense of calling for enquiry, was that despite the claimant's secretarial qualifications, the office work was offered to workers from Eastern Europe whose written English language skills were not as good as hers. We accept the respondent's evidence that what the night shift workers in the office did was computer based, and that we should not think of it as secretarial work involving drafting or written communication, in which the claimant was plainly adept.

Other points

91. In the course of this hearing, we heard about a number of matters to which the claimant asked us to attach weight. We bear in mind in dealing with them that they were not put to us as mere grievances, but as matters relevant to her dismissal. We now turn to some of them for the sake of completeness, and not because we accept the submission that they are necessarily relevant.

92. The relevance of the holiday form was, as we understood it, that the one episode of 6.5 hours absence on 22 February should have been discounted from the claimant's record because it was triggered by misconduct by a manager in drawing offensively on her holiday form, and that the original holiday form was required for her disciplinary hearing in order to make good that point.

93. Our finding is that on the claimant's evidence to us any scribbling on the holiday form was trivial and not offensive. We accept the respondent's evidence that the original holiday form was at some point mislaid, and we do not accept that the claimant acted reasonably in demanding the availability of the original as a pre-condition of attending her disciplinary meeting.

94. We also accept the commonsense logic of two related points. The first is that, as suggested in Mr Stewart's meeting notes, Mr Stewart and later Mr French were reasonably entitled to be sceptical that a disagreement with Mr Dorgu caused a stress-related headache 48 hours later. The second is that, as suggested in the dismissal letter, a single absence of less than one shift was just an isolated drop in the ocean of the claimant's overall attendance record.

95. The claimant also stated that she would not attend the disciplinary meeting until she had a typed transcript of the handwritten notes of her meeting with Ms. Wilby, Mr. Stewart and Mr. Coe on 4 May 2016 (293B to D). We find that the document was legible. The claimant was entitled to ask for a typed transcript but the document was an acceptable working document.

96. The claimant asserted that it was unfair to dismiss her, because the dismissal and her grievance process were inter-linked. We disagree. The claimant fully understood that they were two separate procedures, and that she had exhausted one, during which the disciplinary procedure was put on ice.

97. The claimant raised a number of issues in different forms about notes of meetings. Our general expectation of meeting notes is that they should be an accurate summary, not a transcript. We have no expectation that they record everything that was said, and as notes they cannot of course capture tone or inflection. It is good practice that notes are verified by everyone present, either by signature in the course of a meeting, and/or by signature at the end of a meeting, and/or by circulation of copies after a meeting.

98. It follows that our general experience is that most complaints about a meeting note being inaccurate or incomplete have some foundation in fact, namely they are a summary not a transcript. The claimant did not draw to our attention any matter of accuracy or completeness which we regarded as material to the issue of fairness.

99. However, her attack on the notes went much further, and the Judge's notes of her evidence record that she stated that pages 139 to 140 in the bundle (notes of the ARM on 2 February 2016) were not copies of the notes written during the meeting, which she asserted had been destroyed. She told the Tribunal that pages 139 to 140 were created long after the event, for the purposes of these proceedings, and that her signature at the foot of pages 139 and 140 had in her word been "superimposed", i.e. forged. She made the same allegation about other documents bearing her signature which were in the bundle.

100. The claimant was perhaps not aware that that was an allegation which was extreme and of extreme seriousness. It would require compelling evidence to make good, and there is no such evidence. It would require us to believe that Mr. Stewart, Mr. Ellis and Mr. Dorgu each agreed to engage in conduct which was gross misconduct and potentially criminal (in the proper sense of that word). We reject the allegation.

101. The claimant also made a number of other allegations of broadly bad faith on the part of the respondent, such as deliberate withholding of documents which might have been available or destruction of documents which would have assisted her. There was no such evidence and we make no such finding.

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Employment Judge R Lewis
20 November 2018
Date: ……

Judgment sent to the parties on

20 November 2018

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For the Tribunal office