EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Foster**

Respondent: **Royal Mail Group Ltd**

Heard at: **Southampton** **On: 12 and 13 December 2018**

Before: **Employment Judge Hargrove sitting alone**

Representation
Claimant: **Mr D Percival, Trade Union Representative**
Respondent: **Mr P Loftus, Solicitor**

JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. The claimant was unfairly dismissed.

2. There was a ten percent risk that the claimant would have been fairly dismissed within the period of twelve months from the date on which she was in fact dismissed and to that extent the compensatory award falls to be reduced.

REASONS

1. By an ET1 claim form dated 17 July 2018, the claimant claimed unfair dismissal. She had been employed from 1995 as a post woman at Portsmouth until 2015 and latterly at Southampton from 16 April 2016, until her dismissal with effect from 11 July 2018. The grounds for dismissal relied upon by the respondent was the claimant's perceived failure to comply with the respondent's attendance standards in relation, in the claimant's case,to sickness absences from 2016 to 2018. This was properly characterised as some other substantial reason of a kind justifying dismissal under Section 98(1)(b) rather than a reason related to capability under Section 98(2)(a) of the 1996 Act.In that connection I have been referred by Mr Loftus to Wilson v The Post Office 2000 IRLR page 834 Court of Appeal. As was stated in Abernethy v Mott Hay and Anderson 1974 IRLR page 213 by Lord Justice Cairns: "A reason for the dismissal of an employee is a set of facts known to the employer, it may be beliefs held by him which caused him to dismiss the employee".

2. The essential issues in this case centre upon the fairness of the dismissal for the stated reason. Section 98(4) of the Employment Rights Act provides:

> "The determination of the question whether the dismissal is fair or unfair having regard to reasons shown by the employer
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee,
>
> (b) shall be determined in accordance with equity in the substantial merits of the case".

3. The test of reasonableness to be applied is that of the hypothetical reasonable employer, otherwise known as the band of reasonable responses test. I am reminded by Mr Loftus of the authorities including that of Post Office v Foley 2000 IRLR page 827 and Royal Mail v Bentz, a Scottish EAT case reported at 004/03. The Employment Tribunal is not entitled to substitute its own view of what would have been reasonable on the part of the employer for that of the employer who acts within a band of reasonable responses.

4. The tribunal heard evidence from the dismissing officer Mr Adzayao-Botsoe (referred to hereinafter as MAB) and the Appeals Officer Mr David Martin (DM). The claimant herself gave evidence and called Mr Stubbs the CWU representative at stage 3 of the attendance review procedure (otherwise known as the consideration of dismissal or COD). There was a bundle of 168 pages of documents.

5. The relevance attendance policy of 2013 is set out at pages 37-45. There are a series of absence triggers (not exclusively for sickness) which may lead to an attendance review meeting. These are set out at page 44 of the bundle. At stage 1 an attendance review will take place if there is a history of four absences or fourteen occasions of absence in a twelve months period. Thereafter, an attendance review at stage 2 will occur if there are two absences or ten days of individual absences in the next six months following an attendance review at stage 1. Finally, at stage 3 there is the COD procedure which is triggered if there are two absences or ten days in the next six months following the stage 2 review. There are a series of guiding principles set out at page 38. The process may start with an informal discussion with the manager to identify and address issues but where there is no improvement the manager will consider whether to proceed to a review meeting. There is specific guidance set out to deal with sickness absences. Material to the present case is that absences arising from disability "will normally be discounted when deciding whether the standards have been met" but "in circumstances where it is justifiable to do so, the manager may count the absence". There are also rules about the conduct of the AR meetings at stages 1 and 2 and the COD meeting at stage 3. There is an obligation on the original manager to prepare all the paperwork before the meetings take place.

6. With this guidance in mind I now set out details of the application of the policy to the claimant in the process leading up and including her dismissal. The claimant's absence record is helpfully set out in a document at page 70 and it is noteworthy that the claimant had a good absence record from about 2011 –

1016. It is evident that following a road traffic accident earlier she had a significant amount of time off.

The AR1 Process

7. The claimant had a period of sickness absence from the 8 – 24 February 2016, a period of seventeen days including weekends. The absence record shows that it was for lower back pain. At that time her line manager in Portsmouth was Ian McClachlan. There was a history to this condition. it is clear from the Occupational Assist report dated 17 March 2016 at pages 72a – d that a reference must have been made to OH by Mr McClachlan,because the report was addressed to him. Two separate conditions were identifiied; the first being lower back pain; and the second a left shoulder condition which was ongoing and likely to be more troublesome. The Occupational Health Advisor opined that both would be considered as a disability under the Equality Act.

8. A copy of this report was produced by the claimant during the Employment Tribunal disclosure process but only after the claimant's dismissal at the end of the application of the attendance policy. I accept that it was not provided by the claimant to the respondent notified during the dismissal process, but I accept that she only found it amongst other papers at the later stage of the process of preparing for the tribunal. The respondent seeks to argue that since it was not produced by the claimant during the dismissal process the respondent cannot be blamed for not taking it into account. That ignores the fact that the report was originally obtained by the respondent in March 2016 and should have been retained in the claimant's personnel records and made available during the processes which later followed. It is not the claimant's fault that the respondent had apparently lost it. It is an important document because if it had been taken into consideration by the respondent the absence would or should have been discounted altogether as being disability related. No justification has been put forward by the respondent at this hearing for not taking it into account or for ignoring it. Yet more seriously, the absence was considered at the time – in March 2016 by the claimant's then line manager. He decided not to issue a AR1 to the claimant because she was due to leave Royal Mail in four weeks before the move from Portsmouth to Southampton; it was her first time off sick in about five years; and the injuries were due to a road traffic accident (see the letter to HR from Mr McClachlan dated 17 March 2016 page 72). The respondent points out that the letter does not specifically mention disability but the evidence at the Employment Tribunal points to the fact that the claimant had had problems requiring operative treatment following the road traffic accident in about 2010 and the respondent was reimbursed sick pay from the compensation from the claimant's subsequent personal injury claim. It was only when the claimant started to undertake night shifts in 2016 that problems started to arise with her back. I do not consider it significant that Mr McCachlan's letter to HR did not specifically refer to the report. The report is dated the same day as that letter and it is possible that he had not seen it at the time that he decided not to apply the AR1.

9. Notwithstanding that no action was taken by the respondent in March 2016 under the Absence Management Policy, that period of absence was in effect resurrected by the respondent when the claimant had a further period of one day's absence on 31 January 2017, apparently with a cold or possibly stress, just within the twelve month trigger period for an AR1.At that time,the claimant's line manager was Mr Bilsby. On Tuesday 14 February 2017 he issued an invitation to the claimant to attend a formal AR1 meeting at 3.00am on Friday 17

February 2017. During that period the claimant was working Monday – Wednesday night shifts only at the rate of 31 hours a week or so but not, I accept, on Fridays. The claimant admits having signed the document inviting her to the hearing and indicating that she did not intend to be accompanied. She claims that she was given it to sign by Mr Bilsby and that he then took it away, while she was working on the Tuesday, and . She claims that no stage 1 hearing subsequently took place on the Friday when she was in any event not working I accept that she was was not working on that day. An absence and overtime document provided by the respondent during the disclosure process tends to support her. There are very sparse notes of the supposed meeting at pages 85 – 88 but these were not signed either by Mr Bilsby or,more importantly, by the claimant at the designated place. Nor does the form indicate that she refused to sign. Similar criticisms apply to the outcome letter at pages 89 – 90. It is significant that MAB, during his later investigation prior to the Stage 3 had been unable to find any record at the dismissal hearing in the archives (where they should have been filed) and on 3 March 2018 he emailed an enquiry and the unsigned forms apparently appeared on Mr Bilsby's desk the next day. Where they had been in the meantime is unclear. This issue arose during MAB's investigation at the third stage in 2018.

10. Following MAB's interview of the claimant in the presence of Mr Stubbs on 22 March 2018 (see pages 116 onwards), where the claimant denied having received the paperwork for the AR1 and the AR2, MAB emailed a further enquiry to Mr Bilsby and Mr Carson, who had conducted the AR2 later (see page 122). Both confirmed that they had held respectively an AR1 and an AR2 meeting with the claimant, but there is no explanation tendered as to why the copies produced are unsigned nor is there any explanation as to how they did not end up in archives. Neither has been called to give evidence to the Employment Tribunal nor have signed statements been taken from them.

11. Returning to the circumstances of the AR1 issued by Mr Billsby, there are the following what I regard as serious defects both in form and substance. First, the seventeen day absence in February 2017 was resurrected when it had been laid to rest by Mr McClachlan at the time. It was in any event an absence which should have been ignored as disability related. Mr McClachlan had undertaken an AR1 process and had decided to ignore the absence. There is in my view no basis for an argument that his decision was fundamentally wrong. Although Mr McClachlan left the employment of the Royal Mail later in 2017, no attempt has been made by the respondent to contact him. The respondent's policy for managing absences, which I note was agreed with the trade union, is justified if properly applied notwithstanding its apparent harshness, in the sense that it may result in dismissal for sickness absences for which the employee is not to blame. It is justified in order to maintain a regular service. Nowhere, however, does it specifically allow for the later consideration of an earlier AR1 process which has not resulted in a formal record being entered of the absence. The result was that it was reopened when in fact the claimant had only had one day's additional absence in the succeeding eleven months. I anticipate that the aim of the AR process is to give a warning to an employee of the possible consequences of further absences having had tad taken into account earlier absences. There is no evidence that Mr McClachlan warned the claimant that the February 2017 absence could be resurrected if she had any further days of absence in the succeeding twelve months. As was pointed out at stage 3, if Mr McClachlan had issued an AR1 on 17 February 2016, the claimant would not have breached it because she had no absences during the succeeding six months. In these circumstances I find that no reasonable employer in the position of the

respondent could have properly reached the conclusion apparently reached by Mr Bilsby on 17 February 2017 that the claimant had passed the AR1 threshold. That decision, if it was made, was procedurally and substantively flawed. Procedurally because important documents were not made available to him I have serious doubts whether a proper AR1 hearing actually took place and the documents purporting to record the decision were unsigned by the claimant and not lodged in the archive. Substantially, because the seventeen day of absence should properly have been ignored because it was disability related and had been discounted by Mr McClachlan and in any event no reasonable employer should have interpreted the attendance policy as entitling the absence to be resurrected in these particular circumstances. That is sufficient to render the subsequent application of the policy at the AR2 stage and at the COD stage invalid. If the claimant was not properly the subject of the AR1 then the employer and Mr Carson should have considered investigating the policy at stage 1. In that respect, it is common ground that the claimant was signed off sick by his GP from 31 July with reactive depression and anxiety – there was some form of family dispute going on in the background - and remained off work until 9 August for ten days, four days short of the threshold for the imposition by him of an original AR1. The claimant would never in those circumstances have reached the COD stage. There are also procedural failings in the case of Mr Carson in that the summary of interview was wrongly dated 28 August. Apparently that was the date it was originally booked but it was put back to 12 September, which is confirmed by the outcome letter at page 99; and the notes are again. I am minded to accept that an AR2 hearing did at least take place but I am not sure that the claimant was actually issued with an outcome letter, which the policy required.

12. A further period of absence then commenced on 4 December 2017 and continued to 1 February 2018 a period of sixty days. These are medically certificated as being for reactive depression and anxiety. This caused MAB to commence the COD process by an invitation to interview letter of 16 March 2018 (see page 113 onwards) properly signed for by the claimant. The notes of interview on 22 March, where the claimant was attended by Mr Stubbs are at pages 116 – 120.

13. Following the hearing MAB then contacted Mr Bilsby and Mr Carson for a second time as set out above. It is not in dispute that MAB did issue the outcome letter, dismissing the claimant on 11 April 2018 (see page 124). The claimant appealed and the appeal was dealt with by Mr Martin at a hearing on 2 May. In the meantime, a second report had been obtained from Occupational Health assist dated 25 April 2018, identifying that the claimant's depression was <u>not</u> considered a disability under the Equality Act. The depression arose from family problems which were expected eventually to resolve but the dismissal itself had been a considerable set back to her condition. The notes of the appeal hearing of 2 May 2018 conducted by Mr Martin (pages 138 – 142). Mr Martin rejected the appeal having made some further enquiries which he did not share with the claimant. I need say little about the processes surrounding the COD decision on the appeal.

14. Neither the original COD hearing nor the appeal cured the fundamental defect in the earlier policy application, notwithstanding that the claimant had raised the issue during that process. The overall decision to dismiss did not fall within a band of reasonable responses. Therefore the decision is that the claimant was unfairly dismissed.

15. There is a Polkey issue. This is a remedy issue arising from Section 123(1) of the Employment Rights Act. That provides as follows: "The amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer."

16. The Employment Tribunal has to decide whether the amount of the compensatory award should be reduced to reflect the risk that notwithstanding that the original dismissal was unfair the employer could or would subsequently have fairly dismissed the claimant at some stage in the future in this case for poor attendance, which would have required the proper application of the attendance management procedure. Clearly the respondent would have been well justified in applying the AR1 stage in March 2018. By that stage the claimant had had seventy days of absence within the preceding six months period. I have taken into account, however, that the claimant had by the time of the appeal returned to work following a structured return process when she had been on reduced hours.

17. I also have taken into account the claimant's previous good attendance record from 2010 – 2016. I find there was however, a slight risk that the claimant's health would have broken down again, leading to a further application of the procedure at stage 2 and to a COD. I conclude that there was a ten percent risk that it would have occurred in the twelve month period from March 2018.

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Employment Judge Hargrove

Date 9 January 2019