# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Manradge

**Respondent:** Royal Mail Group Ltd

**Heard at:** Nottingham

**On:** 15 January 2019

**Before:** Employment Judge Faulkner (sitting alone)

**Representation**

**Claimant:** Mr F Bolger (lay representative)
**Respondent:** Ms S Hobson (Solicitor)

# JUDGMENT

The Claimant was not unfairly dismissed. Accordingly, his complaint of unfair dismissal is not well-founded.

# REASONS

**Complaint**

1. The Claimant complains of unfair dismissal only.

**Issues**

2. It was agreed at the outset of the Hearing that the Tribunal would deal with the question of liability only, going on to deal with remedy should the Claimant succeed in his complaint. It was also agreed therefore that the issues to be decided were as follows:

2.1. Has the Respondent shown the reason for dismissal?

2.2. If it has, was it a fair reason within section 98 of the Employment Rights Act

1996 ("ERA")? The Respondent relies on "some other substantial reason", namely the Claimant's frequent absence.

2.3. If there was a fair reason, was dismissal for that reason fair in accordance with section 98(4) ERA? That includes considering whether the Respondent followed a fair process in dismissing the Claimant and whether dismissal was within the range of reasonable responses of a reasonable employer.

## Facts

3. The parties produced an agreed bundle of over 170 pages. The Respondent produced witness statements for John Cairns, a shift manager who dismissed the Claimant, and Cindy Chattaway, an independent casework manager who heard the Claimant's appeal. Mr. Bolger also produced a witness statement, though neither the Respondent nor I had any questions for him and so he did not give oral evidence; I note that he was representing the Claimant in a personal capacity rather than as a representative of his trade union. It was agreed that the Claim Form should be taken as the Claimant's witness statement. I therefore heard oral evidence from Mr Cairns, Ms Chattaway and the Claimant. The parties agreed that I should read, before hearing that evidence, the Attendance Agreement between the Respondent and the Communication Workers' Union, together with any other documents referred to in the Respondent's witness statements. I made clear that it was for the parties to draw my attention to anything else within the bundle that they wished me to take into account.

4. Page references in these reasons are references to the bundle. There were also a small number of additional documents which Mr. Bolger had sent to the Tribunal before the Hearing. Although I omitted to raise this with the Respondent, I have taken account of that material in reaching my decision, on the basis that it had also been disclosed to the Respondent (being attached to Mr Bolger's statement) and given that in any event it did not have a material influence on my substantive conclusions. Based on all of this material, I make the following findings of fact.

### Background

5. The Claimant was employed by the Respondent from December 2013 (his Claim Form states, it appears incorrectly, 13 January 2013) until 16 July 2018. He was employed as an Operational Postal Grade at Nottingham Mail Centre.

6. The case is focused on an Attendance Agreement made between the Respondent and the Communication Workers' Union in or around 2015, which is designed to set out minimal national attendance standards for the Respondent's staff and also specifies what will happen when those standards are not met. The Agreement is at pages 26 to 29; the Respondent's Attendance Policy, which repeats much of what is stated in the Agreement, is at pages 30 to 42 and seems to be in large part repeated in a further policy document at pages 43 to 51.

7. The Respondent cites as the reason behind the Attendance Agreement its Universal Service Obligation ("USO") related to customer service and specifications for collection and delivery. The Respondent is audited against the USO by Ofcom. The Respondent says that the Attendance Policy is therefore necessary to enable it to provide an efficient and reliable service. It is applied to all employees who take regular or other absence from work because of medical conditions where the condition does not justify medical retirement. The Agreement (page 26) says that its aim is "*to support employees in achieving and*

*maintaining a consistently good level of attendance … by outlining and encouraging understanding of clear standards*". The Policy (page 30) describes as its purpose supporting employees in "*achieving and maintaining a consistently good level of attendance*". Neither the Claimant nor Mr Bolger challenged the importance of good employee attendance to the Respondent's business and the fulfilment of the USO.

8. There are three stages to attendance management set out in the Policy – again, see page 30. The first is Attendance Review 1 (AR1) where there have been four absences or fourteen days of absence in a 12-month period. AR1, which is in effect a first warning, expires if attendance improves over the next 12 months. If, however, an employee incurs two further absences or absences totalling ten days or more within six months of the AR1, the second Attendance Review (AR2) is issued. This is in effect a final warning. There is explicitly no right to appeal either the AR1 or the AR2. Mr Cairns suggested that there might be an option to appeal at those stages if there were procedural flaws, but otherwise any points in mitigation are considered when dismissal comes to be considered. This occurs if an employee takes a further two absences or absences totalling ten days or more within the six months following the AR2.

9. The Policy provides (page 31) that at an attendance review meeting, where either an AR1 or AR2 might be given, "*the manager will outline the attendance record and ensure that the employee understands that the standard has not been achieved and why the standard is important*". It goes on to say, "*The manager will explore with the employee ways in which their attendance might be improved. The employee will have the opportunity to raise any issues, concerns or mitigating factors. Following the review meeting, the manager will reflect before making a decision whether to issue a formal notification or not. Each case must be treated on its merits; the manager must consider everything, including what the employee discussed. The employee will be advised in writing of the decision and the standard expected in future*".

10. In relation to part-day absences, which is a key issue in this case, the Attendance Agreement says (page 27), "*part day absences will not normally be considered [i.e. counted as part of an employee's absence record]. If the number of part-day absences has become excessive, the matter will be discussed with the employee in line with the principles of this procedure. Further part-day absences may be counted against the attendance standards, following written notice in advance*". The Policy states (page 32), "*where an employee has to leave work early due to illness, this will not normally be counted for the purposes of the formal attendance process though the part-day absence should still be recorded*". It goes on to say, at page 34, "*a part-day absence is where an employee has worked for part of their duty and due to illness is unable to continue working. These absences will still be reviewed but will not usually count towards the formal attendance process. Where the number of part-day absences has become excessive or a pattern starts to emerge a manager should discuss it with the employee and advise them in writing that should this continue, future part-day absences may be counted towards the formal process*".

11. The Claimant said he was guilty of not putting effort into reading the Agreement and Policy though he was aware of the need for back to work meetings. The statement of his terms and conditions of employment is at pages 53 to 65, signed by the Claimant on 16 June 2014. At page 59, under the heading "Attendance", it reads "*Throughout the period of your employment your attendance, health and efficiency will be reviewed in accordance with the relevant Royal Mail policies. These policies do not form part of your contract of*

*employment and may be amended/replaced from time to time*". The Claimant accepted that he had signed a contract including that term.

**The Claimant's absences**

12. A computer-generated record of the Claimant's absences is at pages 70 to 73; the Claimant accepts the accuracy of that record. The key absence, which lies at the heart of the dispute in this case, was that taken on 21 May 2017. It is agreed that the Claimant attended work for around 45 minutes at the start of his shift. He then went home because of a migraine. The resulting "Employee Absence Declaration" form is at page 83 and was signed by the Claimant. Part of the form contains the statement, "*I wish the period of absence detailed below to be treated as self-certificated sick leave…*", with the first and last day of self-certificated absence being noted as 21 May 2017. The form is signed by the Claimant. At pages 84 to 86 there is a record of the "Welcome Back Meeting" ("WBM") which followed that absence. Again, the Claimant has signed that record. It states the reason for absence as "*related to stress due to death in the family, that brought on the migraine on Sunday*" and indicates that there are no other issues or concerns, in or outside of work, that may be affecting the Claimant's health or attendance that the manager should have been made aware of. Similarly, the record states that there is nothing further the manager could do to help the Claimant maintain his health and attendance.

13. The Claimant was given an AR1 (first warning) on 7 June 2017 by a Shift Manager, Mr K Hawksworth, after four absences totalling fourteen days, including that of 21 May. The absences were for various reasons – virus, dizziness, sinusitis and migraine. A record of the Claimant's meeting with Mr Hawksworth on 6 June 2017 is at pages 89 – 90. The record contains a standard prompt for the manager to offer opportunity for an explanation of the reasons for absence and any circumstances affecting the employee's ability to attend work, together with a further prompt requiring the manager to check with the employee whether the absences shown on their attendance record are correct. The Claimant accepts that he indicated by signing the form that he was aware of the attendance standards and that the absence records were correct. The record of the meeting also notes the Claimant as stating that the last absence, that on 21 May 2017, had occurred after he had done about 45 minutes of his shift. In his evidence to the Tribunal however he said it had not been explained to him what the impact of a part-day absence was – he did not understand "the depths of things".

14. The account of the meeting also records the Claimant mentioning two bereavements in the family and that he was struggling with stress. The Claimant accepts that this is an example of him disclosing his personal circumstances to Mr Hawksworth. The warning given by Mr Hawksworth following the meeting is at pages 92 to 93. The Claimant confirmed in evidence that he received that letter. He signed the reply page at page 94 to confirm that he understood the contents and was aware of the attendance standards required. The letter stated that if the Claimant incurred further absences which exceeded the attendance standards, further action may be taken which may lead to his dismissal.

15. On 24 August 2017 – see page 103 – the Claimant was called to a further attendance review meeting with Mr Hawksworth, following two further absences amounting to eight days, for stress and dizziness. The Claimant accepts that the part-day absence on 15 June 2017, recorded at page 95 as part of a longer absence ending on 22 June 2017, did not count towards his absence record because the Respondent recognised it as a part-day – see also the computerised

record at page 71 for confirmation. The record of the review meeting, which took place on 30 August 2017, is at pages 105 to 107 and is again signed by the Claimant. The note records the Claimant as stating that he was aware of the absence standards and that he thought the absences were correct. He referred to a death in the family and that it was the stress of all the family looking up to him for their support that he found difficult. Again, the Claimant accepts that this was an example of him disclosing his personal circumstances to Mr. Hawksworth. A request was made, it is agreed by the Claimant's union representative who attended the meeting with him, that if an AR2 was issued the Claimant would want it backdated "*to the appropriate date*" which it is agreed meant the date of the relevant WBM rather than the date of the review meeting itself. The note concludes by stating that the Claimant was taking advantage of a form of helpline assistance but did not require any more support. An AR2 was issued on 31 August 2018 – see pages 108 to 109. The Claimant said in evidence that he understood from the letter that further absence could lead to his dismissal.

16. At page 111, there is another Employee Absence Declaration form, this one for 1 October, 2017. The Claimant attended a WBM two days later, the record of which is at pages 112 to 114. The document was signed by the Claimant. On page 114 it says, "*Had discussion around attendance being close to triggering a prompt 3*"; it is well-recognised that this means consideration of dismissal. The Claimant accepts he knew that this was the case, though he said he did not otherwise understand the discussion. I do not accept that evidence given the straightforward nature of the notes recorded and the fact that the Claimant signed them. The Claimant accepts that he did not ask for any help at the meeting. He said that he should have spoken up, but promised himself he would not do so because of matters he had heard widely discussed about others on the shop floor. This is something I will return to below.

17. At page 115 there is a record of a further absence on 31 December 2017. It explicitly records that the Claimant retired sick ("R/S") at 10.00 a.m. Cross-referencing that to the computer records at page 70, the Claimant accepts that this was not counted as an absence. There was a further, routine WBM on 3 January 2018 – see pages 116 to 118 – in which the Claimant said that there was nothing further he needed by way of assistance. The next absence was from 11 February to 18 February 2018, recorded at page 119. This is what led the Respondent to consider the Claimant's dismissal, the Claimant having had a further two absences amounting to nine days in total since the AR2.

**Consideration of dismissal**

18. Responsibility for considering whether the Claimant should be dismissed fell to Mr Cairns. Before meeting the Claimant, he obtained an occupational health report, which was received on 9 March 2018 – pages 123 to 124. The report recorded the Claimant's absences between December 2016 and February 2018, with those on 15 June and 31 December 2017 respectively noted as not counting towards the absence record. The absence on 21 May 2017 was listed as a one-day absence. The Occupational Physician stated that the Claimant had said he had been "*suffering from stress triggered by stressful events at home*" and said that the Claimant had not wanted to declare these issues to the Respondent or his GP, which meant that the absence report documentation did not reflect the real reasons for his absence. It went on to say that the Claimant was currently at work on full duties and fit for his substantive work without restrictions, concluding that his condition was improving and would eventually resolve fully, also stating

the opinion that the Claimant was not covered by the Equality Act – that is disabled for those purposes.

19. Mr Cairns says in his statement, and I accept, that he reviewed before meeting the Claimant the records of the AR1 and AR2 interviews and a copy of the Claimant's computerised sickness absence record. After some delay, the Claimant met with Mr Cairns on 11 April 2018, the Claimant being accompanied by Mr Bolger. The record of the discussion is at pages 125 to 128. Mr Bolger gave an account of the domestic difficulties the Claimant had been experiencing. The Claimant is recorded as saying that he did not ask for support because he was concerned about confidentiality within the business. When Mr Cairns asked the Claimant for evidence of his concerns, the Claimant referred to conversations he had heard on the shop floor. Mr Bolger went on to say to Mr Cairns that stress was the reason for all of the Claimant's absences even though other reasons were stated on the documentation of some of the absences. He also raised on the Claimant's behalf that the first warning was issued before the interview with Mr. Hawksworth on 6 June 2017, that the absence in December 2016 should have been recorded as seven days rather than eight because of a bank holiday, and that the absence on 21 May 2017 should not recorded as a day of absence at all because the Claimant had worked for 45 minutes at the start of his shift.

20. Mr Cairns was content not to take into account the Claimant's absence on 25 December 2016 given that this was of course a bank holiday. He therefore treated the absence in question as a seven-day rather than an eight-day absence. It is agreed this that made no difference to the overall position at the time of the AR1 being issued.

21. As for 21 May 2017, Mr Cairns said in evidence that it was clear to him that the Respondent's policy was that it if an employee worked for two hours or more it would not be counted to their absence record, but if they worked for less it would. This was borne out of his 34 years of working in the business and observing that policy being applied. He did not interview anyone other than the Claimant before making his decision, which was therefore based on his own experience. In his statement, he referred to the importance of the USO and said that although there was nothing in the Attendance Agreement which stated how long an employee had to work before absence for part of a day would not count as part of their record, a line had to be drawn somewhere. He reviewed before making his decision the notes of the WBM at pages 84 to 86 (see his statement at paragraph 29). He says that there was nothing in this document recording the Claimant as saying that it was a part-day absence. He therefore concluded that in signing this form the Claimant had acknowledged that 21 May 2017 was properly to be regarded as a full day's absence. Mr. Cairns did not take advice from human resources as he believed that all of the paperwork indicated that this was the correct position.

22. Mr Cairns' evidence is that in making his decision regarding the Claimant's absence overall, he took into account the mitigating factors put forward by the Claimant at their meeting, namely the Claimant's case that his absences were due to stress and domestic problems. Mr Cairns was not satisfied however that the Claimant had put forward any evidence to support his assertion. His evidence is that all that the Claimant had said was that he lacked confidence in management, but he had not produced any example of a discussion with management which had then been leaked to the shop floor.

23. As for the occupational health report, Mr Cairns noted in particular the conclusion that the Claimant was not covered by the definition of disability under the Equality Act 2010. When I asked Mr Cairns whether the Claimant's case that his absences were all due to stress meant that he ought to have stepped back from a decision to dismiss, Mr Cairns said that it did not because there was no evidence of why the Claimant could not speak to management about his personal circumstances. For the same reason, he did not consider whether steps should be taken to establish the cause of the Claimant's stress and what support he could be offered. He noted the many days of special leave which the Claimant had been granted (a number of such days can be seen on the computerised records at pages 70 to 72) but said that this was outside the Attendance Agreement and did not come under his control. He was also aware that the Respondent had previously changed the Claimant's working pattern to accommodate his difficulties working on Sundays.

24. In his letter of 19 June 2018, Mr Cairns informed the Claimant that he had decided to dismiss him – see pages 129 and 130. I accept Mr Cairns' evidence that he recognised the gravity of this decision. The letter said, "*Having carefully considered your circumstances and the points made by you at the meeting, I have concluded that your current attendance record is unacceptable and is unlikely to improve in the foreseeable future. //My decision is that you will be dismissed on the grounds of unsatisfactory attendance. The reasons for my decision are: //the good faith that Mr Manradge will improve or maintain his attendance has dissolved. //This belief can be supported in that whilst awaiting the decision for this consideration for dismissal Mr Manradge incurred a further absence of five days. //Mr. Manage is not covered by the Equality Act*". The letter went on to say that the Claimant would "*not disclose the reason for depression/stress stating he has confidentiality issues. He could not provide evidence to support this belief, thus denying his employer the opportunity to support an improved attendance*". The letter also referred to the change in weekend working which had been arranged and then dealt with the formalities relating to notice and appeal.

25. Mr Cairns said in evidence that his reference to "good faith" related to having no confidence that if the Claimant was put back to being on a warning, things would improve. He thus says that he did not take into account the five days of absence that took place after the period that was being assessed at the hearing, but did take it into account in deciding that based on the absences up to the hearing, the Claimant should be dismissed because things were not likely to improve. He says that he referred to the Equality Act because the Respondent would have been "duty bound" to find reasonable adjustments if the Claimant was covered by the Act. As to the warnings being dated earlier than the attendance review meetings, Mr Cairns thought this to be advantageous to the Claimant as it meant the review periods over which he needed to demonstrate an improvement in attendance had started at an earlier point.

**Appeal against dismissal**

26. The Claimant appealed against his dismissal. His appeal was considered by Ms Chattaway. She carried out a full re-investigation and re-hearing and is clearly a very experienced appeal officer.

27. Ms Chattaway met with the Claimant on 4 July 2018, the Claimant being accompanied by Simon Edmunds a divisional representative of the CWU. The notes of the hearing are at pages 138 to 142. Mr Edmunds raised a number of points on the Claimant's behalf. Although not entirely clear, the first appears to

have been the backdating of the first warning. The second was the fact that the part-day absence on 21 May 2017 had been taken into account and that if it had not been, the Claimant would not have reached the consideration of dismissal stage. The third point was the personal difficulties the Claimant had been experiencing which Mr. Edmunds submitted the Respondent had not taken into account in deciding to dismiss him.

28. The notes record Ms Chattaway asking the Claimant why he did not raise any question about 21 May 2017 at the AR2 hearing. The Claimant is recorded as replying that he should have identified it, but did not really understand the Policy at that point. The notes then record the Claimant providing Ms Chattaway with a copy of two prescriptions relating to medication for depression; he also confirmed that he had not been back to the GP since the prescriptions were issued. His GP had talked to him about counselling but this had not been progressed either. Ms Chattaway is also recorded as noting that a lot of the Claimant's absences, including those for special leave, took place on Sundays. The Claimant indicated that this was because he had to look after his children, but also because he and his late mother used to do things together on Sundays and so he found it an emotionally difficult day.

29. After meeting with the Claimant, Ms Chattaway held separate interviews with each of Mr Hawksworth, Mr K Patel (Weekend Shift Manager) and Mr D Terry who worked in the Respondent's book room, which is where a record is made of whether employees attend work, and if not why not. Mr. Patel (see pages 150 to 151) referred to the change in the Claimant's working hours which had been agreed by the Respondent some time before and to the special leave for the Claimant which the Respondent had also supported. As to what constituted a part-day absence, he said that this was when someone attended for the first two hours of duty and then went sick, whereas if they went sick before two hours had been worked it would be classed as a full day of absence. Mr. Patel described this as being logically necessary to stop people "taking the mickey" out of the attendance system. He also said that this arrangement had always been the case, even when he was working in Leicester and he believed that other employees were aware of it because at WBMs the employee would always be informed if an absence was being classed as a part-day absence. Mr Hawksworth likewise told Ms Chattaway (see pages 153 to 154) that anything over two hours would be viewed as a part-day. He described this as common knowledge and said he believed it was what was in place at Derby as well. He believed that everyone at the Nottingham Mail Centre was aware of this arrangement; he also believed it had been agreed between the Respondent and the trade union. Mr Hawksworth also informed Ms Chattaway that he had backdated the AR1 to the date of the WBM and that the AR2 had been backdated in the same way at the request of the Claimant's union representative. Mr Terry (see page 147) said that any absence over an hour would be classed as a part-day absence – this is what he had been told by the book room manager a few years previously. He had been applying this practice for three or four years, though he did not know whether employees would be aware of it.

30. Ms Chattaway also interviewed Mr Cairns – see pages 145 and 146. She asked what his understanding was of part-day absences. His reply was that if someone had worked less than two hours, he considered it a full-day absence. He said that it had always been two hours as long as he could remember, and whilst he could not recall anyone telling him this was the case specifically, it was just what was known by people on the operational floor. He could not say for certain that everyone knew about this across all shifts, but he was certain that

everyone on the night shift was aware of it – that was the shift he was assigned to.

31. Ms Chattaway sent the records of the additional interviews to the Claimant, inviting him to comment upon them – see pages 155 and 156. The Claimant says that he did not provide any comment because he did not think it would help, though this was not because he accepted what witnesses had said.

32. In reaching her decision, one of the issues to be considered by Ms Chattaway was the backdating of the Attendance Reviews. Whilst she concluded that the date should normally be the date on which it is issued, the fact of backdating actually meant that the six-month review period for improved attendance started earlier and finished earlier and was thus an advantage to the Claimant. In any event, whichever date had been applied to the Attendance Reviews, the Claimant would not have reached the minimum standard of attendance required.

33. The key issue for Ms Chattaway to consider was plainly the counting of the part-day absence on 21 May 2017, as it is accepted that if this were put out of account the Claimant would not have received the AR1 and therefore at the point of his meeting with Mr Cairns would not in fact have been liable to consideration of dismissal.

34. On this issue, Ms Chattaway said that the interviewees were consistent in saying that a minimum of two hours (or in Mr Terry's case, one hour) had to be worked in order to avoid the day counting as part of the absence record. She said in oral evidence, and the interview notes make clear, that she had not prompted the witnesses by suggesting to them that there was a two-hour rule; they had volunteered this information themselves. She concluded that the Claimant was aware of the practice the various witnesses had referred to because it was suggested by all of them that it was well known within the Nottingham Mail Centre and indeed elsewhere. She concluded that whether one hour or two, the Claimant's absence on 21 May 2017 did not meet the minimum requirement. Ms Chattaway was also able to ascertain from her enquiries with Mr Terry an example of another employee who had been recorded as absent for a day when he had worked less than 2 hours. Mr Terry confirmed this in an e-mail to Ms Chattaway on 8 July 2018 – see page 149. It was also her unchallenged evidence that as part of her investigations into the case she contacted the Respondent's Head of Policy who told her that the two-hour rule was custom and practice and was known locally in each unit.

35. Another point considered by Ms Chattaway in reaching her decision, and which she emphasised in her oral evidence, was that "a line had to be drawn somewhere", as otherwise an employee could attend work for a minute, then go home sick and not have the day counted as sickness absence. She said that the references to part-days in the Attendance Agreement (e.g. at page 34) were about becoming ill part way through a shift and were not intended to cover those who arrived at work already ill. She also noted in her evidence that the Attendance Agreement referred to part-day absences not <u>usually</u> counting towards the formal attendance process. Although she agreed that the lack of clarity in the Agreement on this matter was unhelpful, she did not think it unreasonable to record a full day absence when someone had only worked for 45 minutes.

36. In relation to the specifics of the Claimant's absences, Ms Chattaway referred in her evidence to page 115, the Employee Absence Declaration completed by

the Claimant and Mr Hawksworth in respect of the Claimant's absence on 31 December 2017. She noted the express reference to the Claimant having retired sick on that day at 10.00 a.m. and noted that there was no such reference to the Claimant having retired sick on the equivalent form completed for 21 May 2017 – page 83. She said that the Claimant had thus been absent for a number of part-days which had not counted against him because he had worked for more than two hours. Ms Chattaway also referred to page 90, which is part of the record of the meeting which led to the AR1, drawing attention to the Claimant's confirmation in that document that the absences were correct correctly recorded. That included the absence on 21 May which is expressly referred to. It was on this basis that Ms Chattaway concluded that the Claimant would have been aware at the AR1 stage, and the Claimant and his union representative at the AR2 stage – when she believed the AR1 paperwork would have been considered – that this absence was being taken into account. She concluded that by not challenging this paperwork, the Claimant had accepted that it was right to record it as a full day of absence.

37. Finally on the question of part-day absence, Ms Chattaway said in oral evidence that prior to the introduction of the Attendance Agreement in 2015, the Respondent's attendance policy stated in writing that an individual had to work for at least two hours if a part-day absence was not to be counted against them. She did not say this in her written statement, but it was not challenged by Mr Bolger and therefore I accept it.

38. As to the Claimant's case that the dismissal decision did not take into account his personal circumstances and his case that he had not accurately reported the reasons for his absence, Ms Chattaway felt that this was disingenuous. This was on the basis that the Claimant had been detailed in his account of his absences at the time, some of which included stress, and that it was also said by the Claimant that he did not want to declare the true reasons to his GP which she found improbable. She also noted that he had also felt confident enough to agree a change to his working hours because of domestic issues will as well as making requests for special leave for the same reasons. Furthermore, she felt the Respondent had been entitled to accept what the Claimant had said at face value at the time.

39. Ms Chattaway also felt that the Respondent had been very supportive of the Claimant, offering counselling, adjusting his hours (which he said had helped him – see page 142 which was part of the record of her interview with the Claimant) and having informal discussions outside of the formal attendance management procedure. The fact that the Claimant was able to give her what appeared to be unsubmitted prescriptions for the medication prescribed by his GP and the fact that he had not gone back to his GP since also suggested to Ms Chattaway that no mitigation case had been put forward which suggested she should reach a different conclusion to that reached by Mr Cairns. She said that the crux of her decision was whether she could have confidence that his attendance would improve going forwards. In that regard, there was nothing the Claimant produced to her which showed that he could give the Respondent the service it required, notwithstanding the support he had been given at attendance meetings, by way of special leave and in the adjustment of his working hours.

40. Ms Chattaway therefore decided to uphold Mr Cairns' decision. She sent a detailed report to the Claimant by her letter of 16 July 2018. The letter is at page 157 and the report at pages 158 to 170. In the report, she recounted in detail the evidence given by the Claimant and by the other witnesses and then set out her conclusions which, with the exception of her reference to the Respondent's

previous attendance policy, were in line with those given in her evidence to the Tribunal as recounted above. In conclusion, whilst she noted that the Claimant had not incurred further absence since the end of May 2018, he had worked for similar periods in the past but had then been unable to sustain the improvements which historically had only been short term. He had not been dismissed because of a single absence but because of the irregular pattern of his attendance over the whole of his four years of employment. She concluded that there was no underlying ill health condition that could reasonably be said to have been a factor impacting on his ability to attend routinely and regularly and therefore it was reasonable in her view to expect he should be able to attend to the required standard. She regarded past attendance as the best indicator of future attendance. For these reasons she turned down the Claimant's appeal.

41. In one of the documents attached to Mr Bolger's statement, there is a website printout indicating that shortly after the Claimants dismissal, on 26 July 2017, the Respondent introduced a change to its Attendance Policy specifically in relation to the recording of part-day absences, although there is no reference to a specific period of time that must be worked in order for the absence not to be counted on the employee's record. Mr Bolger also referred in his statement to an email from a CWU policy adviser to Mr. Bolger dated 17 July 2018, also attached to his statement. The adviser states that there has never been an agreed definitive length of time that constitutes a part-day absence, and that the union would expect an individual to be written to in advance to say that further part-day absences would be counted if it became excessive. The e-mail goes on to say that this is an issue that has been debated between the union and the Respondent for some time and that there is no fair and consistent practice across the business.

**Law**

42. Section 98 ERA says:

"*(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.*

*(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case*".

43. As Section 98(1) ERA puts it, it is for the employer to show the reason, or if more than one, the principal reason for the dismissal. The question to be considered is what reason the Respondent relied upon. The case of **Abernethy**

**v Mott, Hay and Anderson [1974] IRLR 2013** is long-established authority to the effect that the reason for dismissal is "a set of facts known to the employer or as it may be of beliefs held by him, which cause him to dismiss the employee". That case also made clear that the reason given by an employer does not necessarily constitute the real reason for dismissal. The reason or principal reason is to be determined by assessing the facts and beliefs which operated on the minds of the decision-makers, leading them to act as they did in effecting the Claimant's dismissal.

44. In the present case, where what is relied upon is the category of "some other substantial reason", if and when the Respondent has established the reason for dismissal, it must be then considered whether the reason was a fair one, namely whether it was a substantial reason, that is not trivial or frivolous, and could – not at this stage that it did – justify dismissal of someone holding the Claimant's position.

45. If the Respondent shows the reason and establishes that it was a reason falling within section 98, the Tribunal must then go on to consider section 98(4) ERA in order to determine whether the dismissal was fair. The burden is no longer on the Respondent at this point. Rather, having regard to the reason or principal reason for dismissal, whether the dismissal is fair or unfair requires an overall assessment by the Tribunal, and depends on whether in the circumstances, including the size and administrative resources of the business, the Respondent acted reasonably or unreasonably in treating the reason as a sufficient reason for dismissing the Claimant. This is something which is to be determined in accordance with equity and the substantial merits of the case. This overall assessment is in part concerned with the steps taken by the Respondent to effect dismissal and certainly requires an assessment of the reasonableness of the decision to dismiss. In all respects, the question is whether what the employer did was within the band of reasonable responses of a reasonable employer – **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23**.

46. The Employment Appeal Tribunal in **Lynock v Cereal Packaging Ltd [1988] ICR 670** held that some of the factors an employer may need to take into account in fairly deciding whether to dismiss an employee in cases of intermittent absence perhaps included: "*the nature of the illness; the likelihood of it 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 the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the carrying out of the policy; the important emphasis on a personal assessment in 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 that the point of no return, the moment when the decision was ultimately being made may be approaching*". One might add to that list the employee having a reasonable opportunity to improve his attendance. Ms Hobson referred to **Royal Mail v Spence [2003] EATS/0040/03**, a decision of the Scottish EAT. The attendance procedure followed in that case seems to have been identical to that in the present case, although the grounds on which the fairness of the dismissal decision was challenged were different. On the basis that the agreed attendance procedures were not categorised as unfair and had been followed to the letter, the EAT said there was a presumption in favour of dismissal if the stage 3 part of the process had been passed and there was no issue of unfairness in the way it had been handled. It added that, "*it must be borne in mind that the entire motivation behind this scheme is for the employer to maintain*

*a level of manpower to enable it to maintain its public service and regular absentees have to expect, at times, treatment which might appear to be harsh*".

47. The assessment of fairness under section 98(4) includes what took place at the appeal stage also - **West Midlands Co-Operative Society Ltd v Tipton [1986] ICR 192**. It is also well-recognised that an appeal can correct – or cure – anything that is deemed to have been unfair at the dismissal stage.

48. In summary, what is important is to answer the question posed by section 98(4) and in doing so to make an overall assessment of the facts as I have found them to be.

**Analysis**

49. The first issue I have to decide is whether the Respondent has shown the reason for dismissal. There was no challenge to its case that the reason for dismissal was the Claimant's repeated absences and the consequent breach of the standards set out in the Attendance Agreement. Moreover, there is no suggestion anywhere in the documentation, witness statements or oral evidence that there was any other, hidden reason. It is clear therefore that the reason for dismissal has been shown by the Respondent to be the fact that the Claimant's attendance record fell short of the expected standards.

50. The next question is whether this was a fair reason for dismissal within the meaning of section 98 ERA. As noted, the Respondent relies on the category of "some other substantial reason". First, it is clear that the established reason was a substantial reason for dismissal. I say this on the basis that the need for particular attendance standards was agreed with the CWU nationally and on the basis of the importance of the Attendance Policy in enabling the Respondent to maintain its competitiveness in a challenging commercial environment and meet the USO. All of this was accepted by both Mr Bolger and the Claimant. In no sense can a national policy agreed with a trade union to apply to thousands of employees in order to meet legitimate commercial and regulatory obligations be described as trivial or frivolous. Secondly and similarly, I am satisfied that this substantial reason could justify the dismissal of someone holding the Claimant's position. It is accepted that the Attendance Agreement and the standards it enshrines applied to all employees including the Claimant. It is therefore clear that poor and unreliable attendance by the Claimant could have a substantial adverse effect on the Respondent notwithstanding the large number of other employees within the business.

51. I am therefore satisfied that the reason the Respondent has shown for dismissal fell within the category of some other substantial reason which could justify dismissal of someone holding the Claimant's position. The crucial question in this case therefore is whether dismissal for this reason was reasonable in all the circumstances of the case as required by section 98(4) ERA.

52. My focus in this respect must be on the Respondent's conduct in dismissing the Claimant and considering his appeal. It is not for me to substitute my view for that of the Respondent. Rather, the question is whether what the Respondent did was within the range of reasonable responses of a reasonable employer. It might be that I would have stipulated more liberal attendance standards than the Respondent and it might be that I would have provided the opportunity for appeals at the warning stages. All of that is beside the point however, particularly where such comprehensive arrangements have been agreed with a

trade union. I must only find that what the Respondent did was unfair in these or other respects if what it did was something that a reasonable employer could not reasonably have done.

53. I took great care during the course of the hearing to establish precisely what case the Claimant was putting to me as to why the dismissal was said to be unfair in this respect, whilst of course making clear that I could not help the Claimant to put his case, whether directly or by helping Mr Bolger who I acknowledge is unfamiliar with Tribunal proceedings. In the course of our exchanges, Mr Bolger made clear that it was accepted that the Attendance Agreement was essential to meeting the Respondent's obligations under the USO and had been agreed between the Respondent and the union. He said that it was defective only in relation to when a part day absence would count towards a sickness record. He was also clear that the various trigger points stipulated by the Attendance Policy were fair and were therefore not in dispute in this case either.

54. Mr Bolger says in his witness statement that the Claimant's absence was not excessive, but when I asked him about this, he accepted that if – contrary to the Claimant's case – 21 May 2017 was properly included as part of his attendance record, the trigger points under the Policy would have been met. He suggested that there had been other staff who were treated more leniently; when I put to him that an argument of unfairness because of inconsistency would be a significant change in the case which the Respondent would not have prepared to defend, Mr Bolger replied that the Claimant was purely looking at the issue around part-day absences. I note in any event that other than this comment from Mr Bolger, there was no evidence before me that employees in truly parallel circumstances to the Claimant had been treated differently. Mr Bolger also said that other than the issue of part-day absence, there was no challenge to the fairness of the earlier warnings given by the Respondent.

55. Out of an abundance of caution, and given Mr Bolger's self-confessed inexperience in the employment tribunal, I have considered whether there was anything in the clarification of the case as set out above that was not supported by the evidence. I have concluded that there was not. Where an attendance agreement has been negotiated with a trade union and is so well-known, and the reasons for it accepted, it is difficult to conceive that the arrangements set out within it could be categorised as unreasonable. Subject to the question of the part-day absence, it is a matter of calculation whether the Claimant met the agreed trigger points and it is agreed he did. As I have said, there was no positive case advanced about inconsistency of treatment. As for the warnings, whilst it might be thought unusual for there to be no right of appeal at those stages, again the fact of agreement with the trade union at a national level, the absence of any challenge to that arrangement from the Claimant or the union within the internal process, and the opportunity to mount a challenge when dismissal is being considered lead me to conclude that the warning stages could not be considered as unfair. Mr Bolger's concessions were therefore eminently sensible. They cover many of the issues identified by the EAT in **Lynock** as being potentially relevant to an assessment of fairness.

56. As for other elements of fairness highlighted in **Lynock** and relevant to this case, the Respondent obtained an occupational health report before considering dismissal which indicated there was no underlying illness that needed to be taken into account. No such case was put forward by the Claimant either, though I will return below to his case in respect of mitigation. It is also abundantly clear that at

various points, in fact even from the AR1, the Claimant was warned of the possibility of dismissal should his attendance not improve.

57. All of the above is to say that the Claimant's challenge to the fairness of his dismissal focused on two matters, principally the fact that the part-day absence on 21 May 2017 was taken into account and secondly that the Respondent did not properly consider the reasons for his absences, in other words the question of mitigation. At both the dismissal and appeal hearings his representatives also raised the question of the backdating of the warnings. I can deal with this very briefly. It was not mentioned in the Claim Form nor pursued before me. In any event, as both Mr Cairns and Ms Chattaway found, the backdating of the AR2 was requested by the Claimant's trade union representative and the backdating on both occasions was actually advantageous to the Claimant. In these circumstances, whilst Ms Chattaway did not regard it as good practice, I cannot see how doing so was in any way unfair.

58. I turn first of all therefore to the question of whether the fact that the Respondent took into account the part-day absence on 21 May 2017 was outside the band of reasonable responses. The Respondent accepts that the Claimant would not have been liable to be dismissed under the Attendance Agreement had he not been absent on that date. He would have been liable to dismissal, it is contended, shortly thereafter, because of further absence, though of course that is not a point relevant to a liability decision.

59. Assessing Mr Cairns' decision first, it is clear that he relied on his own understanding and experience of what might be called custom and practice in respect of part-day absences in order to reach his conclusion that the Claimant's absence on the day in question properly formed part of his attendance record. He also concluded, quite permissibly in my view, that a line had to be drawn somewhere if – to use my words, not his – perverse results were to be avoided. In addition, he took into account – again permissibly in my view – the fact that the Claimant signed the WBM form after the absence on 21 May 2017, effectively acknowledging that it was to be treated as an absence counting as part of his record.

60. I would be hesitant to say that Mr Cairns' conclusion based on this information fell outside of the range of reasonable responses. If it did however, there is no question in my mind that any unfairness to the Claimant that resulted was cured at the appeal stage. Mr Cairns did not carry out any wider investigation to establish whether his own understanding of the relevant practice was sound, and it might be said that this was unfair. Ms Chattaway did carry out such an investigation however and she is to be commended for the careful and thorough way in which she went about it. Without wanting to be unduly critical of Mr Cairns, it is also clear from Ms Chattaway's report that her reasoning process in drawing the same conclusions as Mr. Cairns was more robust and comprehensive.

61. As a result of her enquiries and deliberations there were three main factors which led Ms Chattaway to conclude that it was reasonable to take into account the part-day absence. The first factor was the evidence she had collected from Messrs Patel, Terry and Hawksworth. She had deliberately not led them to give a particular answer as to what the arrangement was and although Mr Terry gave an answer different to that of his colleagues, it was clear across the board – supported by her discussion with Mr Cairns himself – that working for 45 minutes did not constitute working for a part-day such that it should be discounted from the record. She also correctly noted the evidence of two of these witnesses that

this was a practice which applied in other locations and, more pertinently, that the same two witnesses, together with Mr Cairns, described it as a practice that was applied and well-known at the Nottingham Mail Centre. She also obtained practical confirmation of that evidence from Mr Terry, namely his example of how the practice had been applied to somebody else. Particularly when the Claimant did not challenge all of that evidence, having been given the opportunity to do so, it cannot be said to have been unreasonable for Ms Chattaway to accept its veracity.

62. The second factor in Ms Chattaway's deliberations, similar to that considered by Mr Cairns, was that logic suggested that 45 minutes was not sufficient to count as a part-day at work. This was something Mr Patel was particularly keen to emphasise in his interview. This was also a reasonable conclusion for Ms Chattaway to draw in my judgment, including for the reason that the Attendance Agreement and Attendance Policy state that parts days will not "usually" or "normally" be taken into account, which suggests that on occasions and in some circumstances they might. Whilst it is said in both documents that if part-days are to be taken into account an employee will be notified in writing, that is expressly said to be the case when the number of part-day absences becomes excessive. The wording of the Agreement/Policy, but particularly an assessment of what was sensible and logical, means that this too was a reasonable factor to take into account in deciding that the absence in question should count towards the Claimant's attendance record.

63. The third factor in Ms Chattaway's deliberations was the paperwork issued to the Claimant during the various stages of the attendance management process. It is not entirely clear on the evidence before me whether the AR1 paperwork was available to the Claimant and his union representative at the AR2 stage. It is nevertheless clear that the Claimant knew at the WBM which followed his absence on 21 May that it was being taken into account as part of his record and that it was being taken into account at the AR1 stage which followed shortly thereafter. It was explicitly part of the discussion at the AR1 meeting – see pages 89 to 90, in which the Claimant also confirmed that the absences recorded by the Respondent were correct. It was reasonable to conclude therefore that he knew the absence was in play, and so he could have shared this with his union representative if the union representative did not know about it, once he reached the AR2. It is also abundantly clear that the Claimant knew that his employment was under threat, at least after the AR2 stage, because of an absence record that included his absence on 21 May 2017, before he incurred further absences that led to consideration of dismissal. All of these were matters which could reasonably be taken into account and led to the reasonable conclusion that the absence should be part of the record. If any confirmation were needed, it was provided by the fact that the record of the absence on 21 May 2017 was different to that recorded for two other part-day absences, although that was a rather more esoteric point which may not have been immediately obvious to the Claimant at the time.

64. Whilst it is certainly regrettable that the position in respect of part-day absences is not clearly set out in the Attendance Agreement or Attendance Policy – which Ms Chattaway herself recognised was far from ideal – for the reasons given above, as particularly articulated by Ms Chattaway, it was not unfair, that is not outside of the range of reasonable responses, for the Respondent to conclude that the absence on 21 May 2017 could properly be taken into account in assessing the Claimant's attendance record. I have noted the email from the policy adviser at the trade union to Mr Bolger and the Respondent's general communication after the Claimant's dismissal regarding

part-day absences, but neither affects my conclusions. The main point of course is that neither of these were available to Mr Cairns or Ms Chattaway at the time they made their decisions, which is the time I have to focus on. In any event, the general communication says nothing about what will and will not be taken into account and the email from the policy adviser does not contradict what Ms Chattaway discovered from her investigations about local practice, particularly that which was generally understood to apply in Nottingham.

65. I can deal more briefly with the question of whether the Respondent acted reasonably in not stepping back from a decision to dismiss based on the reasons for the Claimant's absences, specifically that a number of them (or, as he asserted, all of them) seem to have been related to stress. Mr Cairns seems to have focused both at the disciplinary hearing and in his evidence before me on the fact that the Claimant did not provide any evidence that confidentiality was not retained by management. That conclusion seems to me to have been sound as far as it goes. What he did not so clearly engage with however was whether the nature of the Claimant's absences meant that dismissal was not appropriate. If that was unfair to the Claimant, then again it is clear that any unfairness was cured at the appeal stage. The question of whether the reasons for absence should lead to a decision other than dismissal was expressly considered by Ms Chattaway. Based on the records of the WBMs, she concluded, reasonably in my judgment, that the Claimant had in fact been able to articulate the true reasons for all of his absences, including when that reason was stress. In more than one WBM he had explained his personal circumstances quite explicitly. She also legitimately noted the support the Respondent had given him, such as changing his hours and giving him multiple days of special leave, which also tended to show that he had been able to explain his domestic difficulties in the past. Equally legitimately she noted that he did not pursue counselling or return to his GP after an initial prescription of medication for depression.

66. All of these matters were plainly appropriate to take into account and constituted considerable evidence for the reasonable conclusion that the nature of the context in which the Claimant had been absent from work had been amply accounted for by the Respondent. I do not find therefore that the decision to reject the Claimant's plea in mitigation was unreasonable. Moreover, as indicated in **Spence**, the results may seem harsh – in my judgment they were much harsher in that case that in this – but with such a clear Agreement and Policy and no case of inconsistency, whatever the reasons for the Claimant's absences, having reached the conclusion set out above in relation to the part-day, dismissal was bound to follow.

67. For all of the reasons I have given, particularly the nature of the agreement for managing attendance, the fact that the procedure set out in the Attendance Policy was correctly followed, the detailed consideration (particularly by Ms Chattaway) of whether the part-day absence should be taken into account, the reasonable conclusion that it could, and the reasonable conclusion that the reasons for the Claimant's absences should not lead to a decision to put him back to the warning stage, dismissal was plainly within the band of reasonable responses.

68. For these reasons the Claimant's complaint of unfair dismissal is not well-founded. It is therefore dismissed.

Employment Judge Faulkner

Date: 28 January 2019
JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE