EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4113084/2018

Held in Glasgow on 1 & 2 November 2018

Employment Judge: Mel Sangster (sitting alone)

Mrs A Gilchrist	**Claimant** **Represented by:** **Mr P Deans** **Solicitor**
Caledonian MacBrayne Crewing (Guernsey) Limited	**Respondent** **Represented by:** **Ms L Shaw** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that claimant was unfairly dismissed by the respondent. The respondent is ordered to pay the sum of £19,510.75 to the claimant as a result.

REASONS

Introduction

1. The claimant presented a complaint of unfair dismissal. The respondent admitted the claimant was dismissed, but stated that the reason for dismissal was some other substantial reason (SOSR) of a kind such as to justify the dismissal of the claimant, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in treating SOSR as sufficient reason for dismissal and that they had acted within the band of reasonable responses.
2. The respondent led evidence from Gordon Smith (**GS**), Retail Development Manager with Calmac Ferries Limited, Johnathan Harris-Lowe (**JHS**),

Director of the Respondent and Christine Roberts (**CR**) HR Director, David MacBrayne Group. The claimant gave evidence on her own behalf.

3. A joint set of productions was lodged. Parties also, helpfully, provided an agreed list of issues and agreed chronology. Whilst the agreed list of issues indicated that the respondent intended to rely on capability as an alternative reason for dismissal, during the course of the hearing before the Tribunal the respondent clarified that they were only relying on SOSR as the reason for dismissal. It was also clarified that the respondent did not seek to argue that the claimant contributed to her dismissal, as outlined in the agreed list of issues.

Issues to be Determined

4. Was the reason for the claimant's dismissal a potentially fair reason, within the meaning of s98(1) or (2) of the Employment Rights Act 1996 (the **ERA**)?

5. Was the claimant's dismissal for that reason fair in all the circumstances, in terms of s98(4) ERA?

6. If the dismissal was unfair, what, if any, remedy should be awarded taking into account section 123(1) ERA and in particular whether, if procedurally unfair, the claimant would have been dismissed in any event (***Polkey v AE Dayton Services Limited [1987] 3 All ER 974***).

Findings in Fact

7. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

8. The respondent is a wholly owned subsidiary of Calmac Ferries Limited, who are in turn a wholly owned subsidiary of David MacBrayne Limited. David MacBrayne Limited is owned by the Scottish Government. The respondent provides all seagoing staff (approximately 770) to Calmac Ferries Limited. David MacBrayne HR (UK) Limited (also a wholly owned subsidiary of David

MacBrayne Limited) manages all day to day HR issues for the respondent. Calmac Ferries Limited operate approximately 33 passenger and vehicle ferries between the Scottish mainland and islands off the west coast of Scotland, some of which are lifeline services.

9. The respondent follows an 'Employee Support and Attendance Procedure' (the **Procedure**) which is applicable throughout the David MacBrayne group of companies. This was introduced in November 2015, following discussion with the recognised trade unions. This sets out the procedure for notification of absences, return to work and management of absence. Section 7 of the Procedure relates to management procedures for short term repeated absences. Section 8 of the Procedure relates to management procedures for long term absence.

10. Within section 7 of the Procedure, under the heading *'Management Procedures for Short Term Repeated Absences',* it is stated that *'The company will look at your level of absence over a 12 month rolling period as a trigger for a absence management.'* Three trigger points are then detailed. At each stage, potential outcomes are detailed. Each stage makes it clear that the potential outcome would only be implemented if there is *'no underlying medical condition or other mitigating circumstances.'* It is made clear that *'At each stage all the facts (including any underlying medical conditions and/or mitigating circumstances) will be fully considered and any relevant medical advice will be sought before any warnings are given. This may require referral to occupational health.'* Mitigating circumstances would be, for example, someone having an accident at work.

11. Within the Procedure, under the heading *'Management Procedures for Long Term Absence'* it is stated that '*absence becomes long term after being off sick for more than 2 weeks, where your absence is expected to continue for a further period of 2 weeks or more'* and that *'management of long-term absence is much more about maintaining contact with you'.* The Procedure then details procedures for consideration of issues such as fitness to return to work, reasonable adjustments and dismissal, through contact with the

individual who is absent. Key milestones, at which information should be obtained to make an informed decision about continued employment, are specified as being at 3, 6 & 9 months of absence. The trigger points, which are detailed under section 7 of the Procedure are not replicated or referred to in section 8.

12. The Procedure also details sick pay provisions. Entitlements increase depending on length of service. Employees with 10 years' service or more are entitled to company sick pay equalling 26 weeks' full salary and 26 weeks' half salary, in any rolling 12 month period.

13. Sickness absences levels were higher in the respondent's business than any other part of the David MacBrayne group, and higher than the UK average. This is difficult to manage operationally, as rotas are generally set a year in advance. There is also a significant cost as, in addition to the generous sick pay provision, staff who cover for others are entitled to be paid at three times their hourly rate. Cover is normally required as there are minimum manning levels for sea going vessels. If they are not met the vessel cannot sail. Fines can be imposed if vessels to not sail on time.

14. The claimant's employment with the respondent commenced on 12 July 2004. She was employed by the respondent as a Steward. She generally worked on the service between Wemyss Bay to Rothesay. Her role included: serving refreshments to passengers; dealing with general enquiries from passengers; positioning the gangway to enable passengers to embark/disembark the vessel; and counting passengers on/off the vessel.

15. On 5 January 2016, the claimant was issued with a level 1 attendance warning, as a result of three, short term, absences commencing on 21 August, 13 September and 16 December 2015. These absences were for unrelated reasons. She was informed that her absence would continue to be monitored until 4 January 2017 and, if she had a further two occasions of sickness, or accrued 10 days' absence prior to then, she would be asked to attend a further absence review meeting.

16. On 6 April 2016, the claimant was involved in an accident while undertaking her duties. The accident occurred as she was positioning the gangway for passengers to disembark/embark the vessel. While positioning the gangway, she twisted her left knee badly. Her left knee immediately became swollen. A cold pack was applied, but to little effect. Due to concern at the extent of the swelling, she left the vessel to enable her attend the accident and emergency at her local hospital. An accident report was completed by the respondent recording the circumstances of the accident and the fact that the claimant ceased working as a result

17. The claimant was advised by medical staff at the accident and emergency department that the trauma had caused an inflammation in a varicose vein in her knee and she required to rest and keep her leg elevated. She was advised that there was a risk the vein could burst and informed that she must call for an ambulance immediately if it did. She remained off work as a result.

18. About a month later, around the start of May 2016 and while still off work, she experienced acute pain in the same knee, and passed out as a result. She was taken to hospital and advised by them that she had developed thrombophlebitis - an inflammation of the vein in her left knee, due to a blood clot within the vein. This was caused as a result of twisting her knee the previous month. She was again advised to rest and keep her leg elevated.

19. She was referred to Guy's and St Thomas' (also known as Dreadnought) Hospital in London for further examination and potential laser treatment. By the time she attended that appointment, her symptoms had improved and she was advised that treatment was not required: she should merely continue to take painkillers for the discomfort she continued to experience in her left knee. A report from the hospital, dated 14 June 2016, was provided to the respondent by the claimant.

20. She remained absent from work, as a result of the accident on 6 April 2016, until 23 May 2016. She ultimately returned to work on 13 July 2017 (the

reasons for this delay were not explained to the Tribunal, but are presumed to be the Claimant's shift pattern and holidays).

21. On the day she returned to work, the claimant attended a return to work interview, which was conducted by the lead steward. He completed a form as he conducted the meeting. He asked the claimant to sign the form at the end of the meeting, which she did. She did not however read the form which had been completed, nor was she asked to do so. The form merely required a signature from the employee. There was no requirement or indication that the employee should confirm the content of the form was correct or accurate.

22. The return to work form indicated that the claimant's absence had been due to *'thrombosis of right knee…varicose veins…blood clot'*. In response to a standard question upon the form *'was the absence of related to an accident at work?*', *'no'* is circled. The claimant was however certain that her absence was solely related to the accident she suffered while undertaking her duties on 6 April 2016. Also, her absence related to thrombosis, due to a blood clot, of the left knee, not the right knee. Had she been asked to read the form prior to signing it, the Tribunal find that these errors would have been identified.

23. By letter dated 20 July 2016, the claimant was invited to a further absence review meeting. The letter stated that the meeting would be held as a result of the claimant accruing 10 days' absence, since being placed on a Level 1 attendance warning. She was informed that, '*if there are no mitigating circumstances or underlying health condition identified, we may, after investigation, place you on a Level 2 Attendance Warning and formal monitoring will be put in place for a further 12 months.'*

24. The absence review meeting took place on 3 August 2016. It was conducted by Donald MacKillop and Brenda Connor, Regional HR Manager with David MacBrayne HR (UK) Limited, was also present. The claimant was not accompanied. The claimant's absence from 6 April to 23 May 2016 was discussed. The claimant noted that this was due to a blood clot in her leg,

which was extremely painful. She explained that she had been referred to Dreadnought Hospital as a result and had a follow up appointment on 2 September 2016. She explained that she was no longer on any medication and that the only ongoing treatment was to elevate her leg at night, if required.

25. Following the meeting, by letter dated 31 August 2016, the claimant was issued with a level 2 attendance warning and advised that her absence would be monitored until 2 August 2017. The letter stated that *'no mitigating circumstances or underlying health conditions were brought to our attention at the meeting.'* The claimant was offered the right to appeal against that decision, but did not do so.

26. On 23 September 2016, the claimant was sent home as she was sick whilst on board the vessel. She remained off for two days and returned to work on 26 September 2016. An absence review meeting took place on 18 October 2016, at the result of this absence. This was again conducted by Donald MacKillop, with Brenda Conner in attendance. On that occasion it was determined that no action should be taken, as there were mitigating circumstances. The claimant was informed of this at the meeting and this was confirmed, in writing, by letter dated 24 October 2016.

27. In February 2017, as a result of continued pain in her left knee, the claimant started a course of physiotherapy.

28. In June 2017 the claimant's left knee became swollen and she attended her doctor. She was advised that fluid had built up behind the knee, due to the swelling in the damaged vein. This was putting pressure on the kneecap, causing her pain. The vein had been damaged as a result of the accident she had in April 2016. She was advised that she required to rest and keep her knee elevated, until the swelling subsided. She was absent from work as a result, from 15 June 2017 onwards.

29. During her absence she was again referred to specialist doctors at Dreadnought Hospital and also attended Gartnaval Hospital for an MRI scan.

30. On 20 December 2017, the claimant attended an informal meeting to discuss her ongoing absence. GS, who had recently taken over responsibility for the area the claimant worked in, attended this meeting and Brenda Connor was also present. The claimant was accompanied by Brian Reynolds, of RMT trade union.

31. GS had received training on the Procedure. His view was that the Procedure should be followed in a consistent manner. His understanding was that managers have no discretion: the triggers are clearly defined and should be applied strictly. This removes ambiguity and makes it easier for managers to manage. GS was clear that issues such as length of service and previous employment history should not be taken into account at any stage

32. At the meeting on 20 December 2017, the claimant's long-term absence was discussed. The discussion included the potential treatment for the claimant's condition, her prognosis, the potential of the claimant moving to alternative, shore based, positions if she was able to return to work or, failing which, the potential of termination of the claimant's employment, on the grounds of capability. It was clear to all present that the reason for her absence was ongoing issues with her knee. She explained that her condition was improving - she was more mobile and no longer using a crutch, but that she continued to take anti-inflammatory tablets and painkillers, as well as attending physiotherapy. The claimant explained during the meeting that she expected to be in a position to return to work in the near future. At the meeting there was no reference to the claimant's continued employment being at risk as a result of having hit absence triggers.

33. The claimant was keen to return to work and, on 9 January 2018, attended an examination with the Maritime Coastguard Agency to ascertain whether she was fit to return to a seafaring role. She was declared fit to do so. She informed the respondent of this and they requested that she attend an occupational health appointment, prior to returning to work. She attended for

this assessment on 22 January 2018. A report was produced that day, which confirmed that the claimant intended to return to work on 24 January 2018 and was fit to do so. The report contained recommendations for a phased return. The report confirmed that the claimant's absence had been due to left knee pain and that the original injury occurred at work, when the claimant *'twisted her knee when putting the gangway on the boat/ferry'.*

34. The claimant returned to work on 24 January 2018 and had no further absences prior to the termination of her employment on 11 April 2018.

35. By letter dated 5 February 2018, the claimant was invited to a level 3 absence/contractual review meeting. The reason for this was that, since being placed on a level 2 warning on 3 August 2017, the claimant had had one further period of absence. She was advised that *'if there are no mitigating circumstances or underlying health condition identified, you may be dismissed from the Company.'*

36. The meeting took place on 16 February 2018. The meeting was conducted by GS and Brenda Connor was also in attendance. Brian Reynolds accompanied the claimant. At the meeting the claimant indicated that *'the problem with her knee all stemmed from an accident at work in 2016 where she was doing the gangway and twisted her knee.'* She then explained in detail the issues which she had experienced with her knee since then and the medical treatment received. BS summarised this as follows *'there was a closure of the vein, blood clot, now fluid on the knee and there would be no replacement unless absolutely necessary*.' At the conclusion of the meeting, BS indicated that he would like to seek further medical information in relation to the claimant's knee, prior to making any decision. His rationale for doing so was to ascertain whether the claimant had an underlying medical condition. The claimant consented to this.

37. A medical report was thereafter received by the respondent from the claimant's GP. The report referred to questions posed by the respondent,

which were not produced to the Tribunal. The report, dated 5 March 2018, indicated that the claimant's knee issues began in June 2016 and related to her right knee. It noted that the pain in her knee continued, so she was referred for physiotherapy in February 2017. That resulted in little improvement, so she was referred to orthopaedic surgeons in September 2017 and to a further specialist thereafter. Those investigations remained pending. The report stated *'you had asked me if I consider this is as an ongoing problem and the answer is yes but we need to wait for the specialist report to see whether this could be curable or not… at this point I do not think that this is a disability as this could still be treated. Don't forget we are still awaiting her further assessments'*.

38. The medical report was not discussed with the claimant. Had this been done, the errors in the report (the reference to the right leg, rather then the left, and the reference to issues starting in June 2016, rather than April 2016) would have been identified. Instead the respondent merely sought to reconvene the absence of review meeting to deliver an outcome. The meeting was initially scheduled for 28 March 2018, but the claimant did not receive the letter, dated 26 March 2018, inviting her to this meeting. Attempts were made to reconvene the meeting, but this did not prove possible due to issues such as Easter holidays and unavailability of the claimant's trade union representative. The respondent accordingly suggested that they merely write to the claimant to advise her of the outcome. She agreed to this suggestion.

39. GS reached the conclusion that the claimant did not have an underlying health condition. He concluded that there was no pattern or link between the issues the claimant experienced with her knee, which were variously stated as varicose veins, baker's cyst, thrombosis and cartilage damage. He took into account that surgery was not required. He understood that, while the replacement of the claimant's kneecap had been discussed, it was found this was not necessary at that stage. Had surgery been required then this would have, in his view, meant that the claimant did have an underlying health condition. He also placed considerable emphasis on the fact that the claimant

was currently fit to work – her doctor and occupational health had deemed that she was fit to return to work. Whilst the claimant still had some ongoing symptoms, these could be dealt with by physiotherapy and painkillers. The fact that she was currently fit was a significant factor in GS concluding that she could not, as a result, have an underlying health condition.

40. He also concluded that there was no link between the absences and the accident the claimant had while working in April 2016. If there had been a link, this would have constituted a mitigating circumstance.

41. As a result of his conclusion that there was no underlying health condition or mitigating circumstances, GS felt that he was bound, given the lack of discretion under the Procedure, to conclude that the claimant should be dismissed. No other circumstances were taken into account, as GS was clear that this was not permitted under the Procedure.

42. A letter was prepared to inform the claimant of this, which GS approved. The letter was not however signed by GS. Rather, it was signed by JHL, who had not been present at the absence review meeting. This was done because GS, who conducted the absence review meeting, was not employed by the respondent: he was employed by Calmac Ferries Limited. The claimant was an employee of the respondent and it was felt by the respondent that only a director of that company could/should make a decision to dismiss. GS accordingly made a recommendation to JHL, based on his views having heard and considered all the evidence. In this case JHL agreed with that decision, so followed the recommendation. There was no discussion between GS and JHL in relation to this before JHL signed the letter. There have been other cases however, where similar circumstances existed, where JHL did not agree with the recommendation made.

43. On 13 April 2018 the claimant received a letter from the respondent dated 12 April 2018, advising that her employment had terminated with effect from 11 April 2018. The letter stated that the reason for the dismissal was *'that you have had a period of absence since being put on a Level 2 Attendance*

Warning and no mitigating circumstances were brought to the attention of the attendees at the meeting.' The reason for dismissal was stated to be 'some other substantial reason', as the claimant's level of attendance at work was unacceptable.

44. The claimant was very upset on receiving this letter. She thought she had demonstrated that her absence was due to an underlying health condition, and provided mitigating circumstances, in that her knee issues were caused by an accident at work. She prepared and submitted an appeal against her dismissal later that day. This listed three particular grounds of appeal, as follows:

a. That the company had not followed due process;
b. That all absences were certified, so there was no unauthorised absence from work; and
c. That her good service was not taken into account.

45. An appeal meeting took place on 21 May 2018. JHL chaired the appeal meeting (attending by telephone). Ross Moran, Head of Service Delivery (South), Calmac Ferries Limited, and BC were also in attendance. The claimant was accompanied by Gordon Martin of RMT trade union.

46. At the meeting it was clarified that, while some of the medical reports refer to right knee issues, this is was an error (which the Tribunal finds stemmed from an error on the A&E report dated 6 April 2016). It was clarified, and accepted, that all issues were in fact related to the left knee. The reason for each absence was discussed, as well as the treatment received throughout. Gordon Martin stated that all absences in relation to the claimant's knee were an underlying health condition and as a result of the accident at work which the claimant had in April 2016. In response to particular questions asked, the claimant confirmed that she was, at that stage, in excellent health with no ongoing medical conditions.

47. JHL adjourned the meeting to consider matters. Following an adjournment JHL indicated that *'based on the medical information supplied, and by Anne's own admission, we have to accept that there is no underlying health condition…Anne has said that she is not suffering, and both her doctor and Occupational Health said that she was fit to work. OH mentioned that she is unlikely to be covered by the Disability Act. I am going to uphold the decision for dismissal on the ground of poor attendance.*'

48. This decision was confirmed by letter dated 29 May 2018 from JHL to the claimant. In that letter each ground of appeal is addressed in turn. The letter then states *'There is no evidence to suggest the issues you experienced with your knee are an underlying health condition as both your GP and Occupational Health determined you were fit for work. Occupational Health also indicated that you were unlikely to be deemed to have a disability under the Equality Act. You confirmed at the meeting that you were excellent health (no problems) and not suffering from any medical condition. I therefore uphold the original decision of the Company in relation to your dismissal.'*

49. The claimant was aged 58 at the time of her dismissal. Immediately prior to her dismissal, her annual salary was £23,531 and she worked, on average, 6 hours overtime each month, earning, on average, an additional £64.64 gross per month. Her gross weekly pay was accordingly £467.43 Her employer made a contribution to her pension of 29.6% of her salary. She did not receive any other significant benefits in relation to her employment. She received a payment in lieu of notice equivalent to 12 weeks' salary on termination, amounting to £5,430.23 (gross).

50. Since her employment terminated, the claimant has secured three other part time roles, two of which are continuing. Those two roles are as a cleaner and dining room supervisor. She works 10 and 7.5 hours per week respectively. She earns £8.51 per hour in relation to both of these roles. She is keen to obtain full time employment again and makes weekly enquiries with the job centre, but she lives on Rothsay and employment opportunities there are

limited. She has applied for a number of other roles with Argyll and Bute Council and is awaiting to hear in relation to two roles. She has not received any job seekers allowance or any other additional benefits since the termination of her employment.

Relevant Law

51. S94 ERA provides that an employee has the right not to be unfairly dismissed.

52. In cases where the fact of dismissal is admitted, as it is in the present case, the first task of the Tribunal is to consider whether it has been satisfied by the respondent (the burden of proof being upon them in this regard) as to the reason for the dismissal and that that it is a potentially fair reason falling within s98(1) or (2) ERA.

53. If the Tribunal is so satisfied, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s98(4) ERA. The determination of that question (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."*

54. In determining whether the employer acted reasonably, it is not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law, as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure

adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones [1982] IRLR 439***).

Submissions

Respondent's submissions

55. On behalf of the respondent, it was submitted that the respondent had a sound business reason for dismissing the claimant. She was dismissed for some other substantial reason, due to unacceptable absence levels. The reason for dismissal cannot be capability, as the claimant was fit for work when she was dismissed.

56. A reasonable procedure was followed. The respondent followed their absence management procedure. Appropriate warnings had been given, which had not been appealed. The claimant had had an opportunity to improve her attendance, but had not done so. She had been warned that she could be dismissed. Medical input was sought. There was no unfairness to the claimant in JHL rubber stamping the decision which GS had made. The claimant was then afforded the opportunity to appeal.

57. Dismissal was within the band of reasonable responses open to the respondent. Given the medical evidence, it was reasonable for GS to conclude that the absences were not related to each other or to the accident she had at work in April 2016. It was reasonable for the respondent to manage the claimant's absence by reference to trigger points.

Claimant's submissions

58. On behalf of the claimant, it was submitted that it was not appropriate for the respondent to rely on SOSR as a reason for dismissal in the circumstances. Whilst the respondent referred in evidence to the operational and financial impact of absence, there was no evidence that this was a consideration at the time the claimant was dismissed or on appeal. No consideration was given to whether the claimant's attendance record would improve – the only consideration appeared to be that triggers had been hit. This was inappropriate as the claimant should have been managed under the long term absence procedure, which does not refer to triggers.

59. Whether classed as short term or long term absence, the appropriate provisions of the Acas guide in relation to absences were not followed and the respondent did not take into account the factors they ought to have. The respondent failed to follow their own procedures.

60. GS made a recommendation regarding the claimant's continued employment. JHL made the decision to dismiss and also determined the appeal. This was unfair and a breach of the Acas Code of Practice.

Discussion & Decision

61. The Tribunal referred to s98(1) of the ERA. It provides that the respondent must show the reason for the dismissal, or if more than one the principal reason, and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the Respondent had established a potentially fair reason for dismissal.

62. GS and JHL were clear that the reason for the claimant's dismissal was her unacceptable absence levels. They understood that the claimant was fit to work at the time of her dismissal, but found that her historical persistent short term absences, due to unrelated reasons, justified dismissal. In these circumstances, the Tribunal accepted that the reason for dismissal was some other substantial reason – a potentially fair reason under s98(1)(b).

63. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason is shown by the Respondent. The answer to that question depends on whether, in the circumstances (including the size and administrative resources the employer is undertaking) the Respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee. This should be determined in accordance with equity and the substantial merits of the case. The Tribunal was mindful of the guidance given in cases such as ***Iceland Frozen Foods Limited*** that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the Respondent. There is a band of reasonableness within which one employer might reasonably dismiss the employee, whereas another would quite reasonably keep the employee on. If no reasonable employer would have dismissed, then dismissal is unfair, but if a reasonable employer might reasonably have dismissed, the dismissal is fair.

64. The Tribunal addressed this issue by considering the following questions

a. Did the respondent act reasonably in treating SOSR as a sufficient reason for dismissal?
b. Did the respondent follow a fair procedure in doing so?

65. The Tribunal firstly considered whether the respondent acted reasonably in treating SOSR as a sufficient reason for dismissal.

66. The Tribunal found that dismissal of the claimant on the grounds of some other substantial reason did not fall within the range of reasonable responses that a reasonable employer in the same circumstances might have adopted. The Tribunal reached this conclusion for the following reasons

<u>Reasons for absence</u>

67. The respondent determined that the claimant should be dismissed due her unacceptable levels of absence, which was not caused by an underlying health condition and, in respect of which, there were no mitigating circumstances.

68. It is clear that the absences leading to the level 1 attendance warning were unrelated, short term absences. The claimant's absences from 6 April - 23 May 2016 (which led to the level 2 attendance warning) and from 15 June 2017 – 15 January 2018 (which led to her dismissal) were however solely due to ongoing issues in relation to her left knee.

69. At the point the respondent determined the claimant should be dismissed they had the following information in their possession, or available to them:

a. The accident report completed on 6 April 2016, stating that the Claimant had had an accident at work that day, which resulted in her twisting her left knee and her requiring to cease work;
b. Her absence records, which demonstrated that she remained absent from that day until 23 May 2016;
c. A report from the Accident and Emergency department of Argyll & Bute CHP confirming that she had attended on 6 April 2016 due to 'varicose vein (swelling) leg' and confirming their advice to rest and follow up with her GP;
d. A report from Dreadnought Hospital dated 14 June 2016, confirming that her 2016 absence was related to left knee pain and swelling;
e. Her return to work form dated 13 July 2016 stating that her absence, from 6 April to 23 May 2016 was due to thrombosis of the knee and a varicose vein blood clot;
f. The minutes of the absence review meeting held on 3 August 2016, where the claimant explained that her absence had been related to a blood clot in her leg;
g. The occupational health report dated 22 January 2018, which indicated that her 2017/18 absence was as a result of left knee pain,

which had been caused by an accident at work when the claimant *'twisted her knee when putting the gangway on the ferry/boat.'*

h. The claimant's position, as stated at the disciplinary hearing, that *'the problem with her knee all stemmed from an accident at work in 2016 where she was doing the gangway and twisted her knee'*; and

i. The medical report from the claimant's GP, dated 5 March 2018, which stated the issues in the claimant's knee began in June 2016 and were an ongoing problem. It stated that the results of the most recent investigations were awaited.

70. The Tribunal find that no reasonable employer, faced with this information, would have concluded that there was no underlying health condition or that there were no mitigating circumstances. Each is considered in turn below:

a. There was no underlying health condition. The absences in 2016 and 2017/18 were linked to the ongoing problems with the claimant's left knee. The Tribunal noted that, despite the position set out in the appeal outcome letter, JHL accepted in cross examination that it was clear that the claimant's absences in 2016 and 2017/18 were linked. The Tribunal also noted from the evidence given by GS and JHL that their conclusion that the claimant did not have an underlying health condition was significantly influenced by the fact that the claimant did not require to have surgery and, at the time of the stage 3 hearing/appeal, the claimant was fit to work. That however was a position which no reasonable employer would have adopted. A reasonable employer would have considered whether the claimant's absences were caused by an underlying health condition and assessed this on the basis of the medical evidence, not by reference to whether surgery was required. The respondent did not do so.

b. That there were no mitigating circumstances. The issues with the Claimant's left knee, and her absence as a result, commenced on 6 April 2016, the day that she had an accident at her place of work. The

respondent was aware of that accident: they completed an accident report form and released the claimant from her duties on board the vessel, so she could attend accident and emergency. She remained off work from the date of the accident until 23 May 2016. The medical evidence which the respondent had stated that she continued to experience issues from then until February 2017, when she was referred for physiotherapy. That resulted in little improvement, so she was referred to orthopaedic surgeons in September 2017 and then to a further specialist thereafter and those investigations remained pending at the time of the claimant's dismissal. The occupational health report obtained by the respondent in January 2018 confirmed that the most recent absence had been due to left knee pain and that this was related to the injury she sustained at work. The GP report confirmed that the issues with the claimant's knee started in 2016. Faced with this information, no reasonable employer would have concluded that the claimant's absences were not linked to her accident at work and, accordingly, that there were no mitigating circumstances.

71. Whilst some of the reports referred to the claimant's issues being in her right knee, rather than her left, the Tribunal finds that a reasonable employer, faced with these circumstances, would have clarified, with the claimant and/or the medical professionals, whether the issues related to one knee or separate knees, prior to making a decision. Had this been done by GS during the course of the stage 3 absence hearing, the claimant would have clarified, as she did at the appeal hearing, that the issues all related to her left knee and the reference to her right knee stemmed from an error in the accident and emergency report.

Failure to Follow Internal Procedure

72. The Procedure sets out, in separate sections, the procedure for managing short term and the procedure for managing long term absences.

73. The claimant's absences in 2016 and 2017/18, as a result of their duration, fell squarely within the express definition of long term absence under the Procedure. The respondent acknowledged in evidence that the meeting in December 2017 was held in accordance with the long term absence procedure. It is also clear from the issues discussed that the claimant was, at that stage, being managed by reference to the long term absence procedure.

74. The claimant was dismissed reference to the triggers in the short term absence procedure, following a period of long term absence. None of the respondent's witnesses could give any explanation for why the claimant was managed by reference to the triggers contained in the short term absence procedure, notwithstanding the fact that the absence was long term in nature and there was a separate procedure for managing long term absence. Their only explanation was that 'it was all one procedure', so the triggers still applied. That is clearly not the case however: the procedures for managing short term and long term absence are set out in distinct sections of Procedure, under distinct headings. The long term procedure does not incorporate any such triggers, or make reference to the triggers detailed in the short term procedure. The Tribunal find that no reasonable employer would have managed the claimant by reference to the triggers set out in the procedure for managing short term repeated absence, given the circumstances.

75. Even if the claimant was being managed by reference to the short term procedure, the short term procedure clearly states that absence levels will be reviewed *'over a 12 month rolling period as a trigger for absence management'*. There was more than 12 months between the claimant's 2016 absence, which ended on 23 May 2016, and the 2017/18 absence, which commenced on 15 June 2017, (the two days' absence in September 2016 having been discounted due to mitigating circumstances). Notwithstanding

this, the respondent proceeded to dismiss the claimant, as a result of having hit the stage 3 trigger point. No reasonable employer would have done so.

Failure to consider other factors when reaching decision to dismiss

76. GS gave very clear evidence that he felt he had no discretion: the claimant had hit the triggers, which should be strictly applied, so he had no option but to dismiss her. He did not take into account the claimant's length of service or previous employment history when reaching the conclusion that she should be dismissed. He did not consider whether she could be redeployed to another part of the business. He did not consider the fact that, from 15 January 2018 until the date of her dismissal (12 April 2018) she had not had any absences. A reasonable employer would have taken these factors into account.

Procedural Fairness

77. In considering the fairness of the dismissal in accordance with s98(4) the Tribunal also required to consider whether a fair procedure was followed.

78. The Tribunal noted that GS chaired the stage 3 absence hearing, which resulted in the claimant's dismissal. GS's decision, having done so, was that the claimant should be dismissed. He did not however sign the letter of dismissal. That was signed by JHL as he was a director of the respondent. JHL reviewed the decision made, to ascertain whether he agreed with this, before signing the letter. Whilst he agreed with the decision made on this occasion, he stated that he had in the past, in similar circumstances, reached a different conclusion and altered the decision.

79. Given that JHL agreed with GS's decision in this case, GS remained the effective decision maker. There was no unfairness to the claimant in JHL signing off the letter and the decision made by the person who had reviewed all the evidence and heard, first hand, the claimant's position.

80. It did however mean that JHL, having reviewed the evidence prior to the claimant's dismissal and having reached the conclusion that the claimant should be dismissed, was no longer impartial. It was therefore entirely inappropriate for him to hear the claimant's appeal. It is a basic principle of fairness that appeals should be dealt with impartially, by someone who has not previously been involved in the case. JHL had previously been involved in the case. He had reviewed the evidence and determined that he agreed with GS's conclusion the claimant should be dismissed. It was entirely inappropriate for him to then determine the claimant's appeal. There was no explanation as to why JHL, and not another senior member in the respondent company, or indeed the wider group, could not have heard the appeal.

Conclusions re s98(4)

81. For these reasons, the Tribunal concluded that the respondent acted unreasonably in treating some other substantial reason as a sufficient reason for dismissal. No reasonable employer would have dismissed the claimant in these circumstances. The claimant's dismissal was substantively and procedurally unfair.

Remedy

82. The claimant seeks compensation as a remedy for unfair dismissal. In assessing the appropriate level of compensation, the Tribunal considered the following issues.

Polkey

83. Given that the Tribunal's finding that the dismissal was unfair is not restricted to procedural irregularities, a reduction in any compensation awarded on the basis of ***Polkey*** is not appropriate.

The Acas Code

84. The Tribunal find that this was not applicable in the circumstances, so no uplift is appropriate.

Mitigation

85. It was accepted by the respondent that the claimant had made appropriate attempts to mitigate her loss to the date of the Tribunal hearing. The claimant seeks losses, based on her current earnings, to 11 April 2019 (a year from the date of termination of her employment). The respondent sought a reduction of 25% in any future loss figure to take account the possibility of her securing another role. Given that the claimant gave evidence that she had applied for other roles, and that there was the prospect of securing additional part time work, or a full time role, the Tribunal find this to be reasonable.

86. The claimant's previous net earnings, including employer's pension contribution, were £516.95. The Claimant's current net earnings are £148.92. This gives an ongoing weekly loss of £368.03.

87. The claimant has not claimed any relevant benefits since the termination of her employment with the respondent, so the Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

Calculation of Compensation

Basic Award

Basic award (19.5 x £467.43)	**£9,114.88**

Compensatory Award

Past loss

Loss of earnings to 1/12/18 – 33.4 weeks at £383	£12,792.20
Pension Loss to 1/12/18 – 33.4 weeks at £133.95	£ 4,473.93

Loss of statutory rights	£350.00
Less PILON (net)	(£4,476.00)
Less, sums received through mitigation	(£7,878.27)
Loss to date	**£5,261.86**

Future loss

18.6 weeks at £368.03 per week	£6,845.36
Less 25%	£1,711.35
Future loss	**£5,134.01**
Total Compensatory Award	**£10,395.87**

Employment Judge: Mel Sangster
Date of Judgment: 30 November 2018
Entered in register: 03 December 2018
and copied to parties