EMPLOYMENT TRIBUNALS

Claimant: Mr E Ricketts

Respondent: Openreach Limited

Heard at: Manchester **On:** 10 September 2019

Before: Employment Judge Sherratt
Mrs A L Booth
Ms V Worthington

REPRESENTATION:

Claimant: In person
Respondent: Mr S Way, Counsel

JUDGMENT having been sent to the parties on 17 October 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Background

1. The claimant was employed by the respondent as a Customer Service Engineer from April 2013. He started with BT and then his employment transferred to Openreach Limited.

2. The respondent provides internet infrastructure throughout the country and is regulated by Ofcom. It is required to maintain an appropriate level of customer service.

3. The claimant was dismissed in relation to his attendance following a meeting on 21 August 2018. A letter dated 30 August gave the claimant five weeks' notice of termination to expire in October.

4. There was a preliminary hearing before Employment Judge Howard on 28 March 2019 and in her Case Management Summary at paragraphs 6 and 7 of her notes she set out the complaints and issues. She noted the complaints were of unfair dismissal and direct race discrimination. Just summarising, for unfair dismissal "can

the respondent advance a potentially fair reason", in this case some other substantial reason and if it can, was the dismissal in all the circumstances fair? For direct race discrimination: did the respondent treat the claimant less favourably by dismissing him without proper consideration of alternative options because of his race (set out as black Afro Caribbean) compared with his white colleagues in similar circumstances? There were two named comparators whose details will be referred to later.

The Evidence

5. The Tribunal has heard evidence from the claimant and he also produced two short witness statements. We have read those statements but what is in them does not carry the same weight as the evidence of a witness who has been to the Tribunal and has been subjected to cross examination.

6. The respondent called the evidence of Kieran Platt who was the claimant's second line manager who made the decision to dismiss; and Chris Taggart, the third line manager, who dealt with the claimant's appeal.

7. The Tribunal was provided with a bundle of documents containing in the region of 250 pages.

Findings of Fact

8. The Tribunal's factfinding process for the purposes of today is dealt with simply, because the way in which Mr Way summarised the facts in his written submissions from paragraphs 3-21 seems to us to be a fair summary, and so I do not see any point in going through all of those matters which could take quite some time, but we know the basic facts because we have all been here for these past three days hearing them and considering them.

9. Looking at what we are concerned with in more detail, it is the attendance procedure. We have it in the bundle and it appears to be a policy hung over from the BT days. It begins by setting out the scope of the procedure, for managing people where levels of sickness absence have an unacceptable operational impact on the business. It sets out the roles and responsibilities of employees, first line managers, second line managers and third line managers who are supported by HR and the Occupational Health service. It is for the second line manager to make a decision on dismissal.

10. Section 4 deals with extended absence and this is what we are dealing with here rather than a series of smaller repeated absences.

11. Reference is made at section 3 to a return to work discussion. There were discussions with the claimant not on a return to work basis because following the start of the sickness the claimant did not return to work, but there was a following of the process that refers to the position where an absence has been for an extended period. The discussion should include capability, arrangements for rehabilitation or adjustments, Occupational Health and other specialist advice. Those procedures seem to have been followed, and indeed as well as Occupational Health the claimant was referred for physiotherapy services.

12. Looking at extended absence, there is reference to the need to maintain regular absence in effective employment, and it goes on to say:

> "If a spell of absence becomes extended to the point where it is operationally unacceptable or permanent adjustments are required to effect a return to work and neither these nor alternative duties are viable, then termination of employment must be considered."

13. There is then the section for repeated absence and that provides for the giving of an initial formal warning followed by a final formal warning in respect of repeated absence. I know that one of the points made by Mr Ricketts is that he was not given any warnings before the respondent decided to dismiss him. That in our judgment is because the respondent was following the process for extended absence not using the process for repeated absence for which warnings are normally given, but I hope Mr Ricketts will see why in this case the respondent was not following the repeated absence process with warnings, it was following the long-term extended absence.

14. In either case the process goes on to termination of employment:

> "Termination of employment will need to be considered where an extended absence becomes unsustainable."

15. The second line manager must review the individual's case. The individual must be given written notification that termination of employment is being considered and it must include certain things. We have looked at the notification given to Mr Ricketts of the meeting when termination of his employment was being considered, and it would appear that the relevant factors were included in his letter.

16. The policy continues:

> "If the decision to made to dismiss, the second line manager must prepare a robust business rationale which takes into account all of the circumstances of the case. Grounds for dismissal may be unsatisfactory attendance."

17. The meeting is followed by a decision with a rationale: there was a meeting, there was a decision, there was a rationale issued. The dismissal letter also included a right of appeal, which Mr Ricketts exercised and it is now the time to move on to consider those matters in more detail.

18. The letter of dismissal was dated 30 August 2018 and it referred to the meeting on 21 August. It says:

> "I have taken into consideration the points raised at the meeting together with your previous employment history with BT and I am sorry to inform you that I have concluded that it would not be reasonable to keep your job open any longer. I have therefore authorised the termination of your employment on the grounds of unsatisfactory attendance in accordance with the attendance procedure."

19. The letter refers to the rationale document and that was sent to the claimant with the dismissal letter. It set out the background in terms of the current sickness

absence from 11 April 2018. It referred to previous absences from 27 June to 26 August 2016 and 24 July to 9 August 2017 with the total absences said to be 207 days in just over two years, with the claimant having been employed for around 5½ years. The rationale goes on to refer to the discussion at which it appeared that there was no work that could be found for the claimant in terms of restricted duties. It referred to the Occupational Health Service report and the physio. It went into the areas investigated and matters raised at the meeting, the discussion about what the claimant could or could not do, how the wrist injury for which he had initially gone off on sick seemed to have pretty much recovered but unfortunately as the wrist recovered the knee deteriorated with bursitis, and at the time of the decision being taken the view of Mr Platt was that he did not really have an idea when the claimant would be able to return to give full and effective service.

20. It is quite a lengthy document and I have summarised it. We have at the end a summary conclusion:

> "You have been off work since 11 April. You were subsequently assessed by the OHS and on 29 May they advised that you were currently fit for alternative work that does not involve any manual handling, and that is likely to be 4-8 weeks before you were well enough to return to your normal job.
>
> It was also advised by the physio on 18 June that you could have returned to work on restricted duties but due to the fact that you stated you could not drive or work at a PC for long periods of time, climb or do any heavy lifting, returning to work on restricted duties was not an option.
>
> Since this initial recommendation on the return to work from the OHS and physio you have had an additional two months off and have only now stated that you are willing to return to work on restricted duties but with no indication from your GP of what restrictions we need to put in place in order to accommodate your return to work regarding your wrist.
>
> Further to this you have now stated that your knee is now the main issue preventing a return to work and although you have had the physio have a look at this for you, you have not as yet had this injury assessed by your GP so we have no indication of what the injury is or what the likely recovery period will be other than when you initially went to the walk-in centre and they told you that you have bursitis and you have stated you are struggling to kneel down due to the injury. We therefore have only just been notified of this new issue with your knee and you are still unable to provide a definitive return to work date.
>
> I am basing my decision on all of the points above as well as the fact that as a business we need our engineers being able to provide a regular and effective service in order to meet our minimum service levels and provide a quality service to our customer, and you have had sick absences totalling over 210 days in the past ten years, have been on this current sick absence since 11 April and are still unable to give us a date where you will be fully fit to return to your normal duties. I am therefore now in a position whereby I can no longer sustain your absence."

21. The final paragraph is headed "Decision":

> "Taking into consideration all information currently available and the details submitted at the resolution, my decision is: termination of employment on the grounds of unsatisfactory attendance."

22. The claimant exercised his right of appeal and the appeal meeting was on 3 October 2018. It was at the appeal meeting that the question of discrimination on the basis of race was first raised. The claimant mentioned it orally and it was also set out in a document that the claimant produced for use at the appeal hearing. It was, however, only given to the appeal manager at the end.

23. The claimant made specific reference to two colleagues (SL and DL). It does not seem to me necessary to give their full names to protect them, but according to the claimant the company through the BT Passport Scheme implemented reasonable adjustments to support SL as he was unable to climb. DL had a capability issue due to his driving licence being withdrawn for 12 months. In this situation the company made reasonable adjustments by pairing him up with somebody else who did all the driving. The claimant says:

> "I question why the same support has not been offered to me and I can only assume the reason I haven't been supported is on the grounds of my race and the fact that I am black. You have clearly treated the two comparators who are both white more favourably."

24. The claimant knew one of them because he had for four days been involved driving DL around.

25. The question of race was discussed at the appeal meeting. The claimant was allowed to have his say on these matters. I should have said earlier that at both the first meeting when the claimant was dismissed and the appeal meeting the claimant had a representative from the Communication Workers Union to assist him in putting his case.

26. After the appeal meeting Mr Taggart took time to investigate the allegations of discrimination, finding out about the facts of the cases and discussing matters with the claimant's first line manager and his second line manager, and we have in the bundle the emails in which those matters are set out.

27. The procedure took some time before it came to a conclusion because it was not until 4 December, some two months on, that Mr Taggart sent the letter to the claimant giving him the outcome of the appeal. He said:

> "I have considered your appeal and the evidence surrounding the circumstances of your termination of employment under the attendance procedure. My reasons for this decision are set out in the attached rationale. I have therefore decided that the decision made by Kieran Platt on 30 August should stand and your appeal is declined. Your employment is therefore terminated on the grounds of unsatisfactory attendance and your last day of employment will remain as 3 October 2018."

28. Mr Taggart produced the rationale for his appeal decision. Within the rationale he made reference to the race issue as well as all of the other matters that were raised before him. As to the race issue he wrote this:

> "Having investigated both issues which Errol submitted to support his claim, I am satisfied that both cases were based on circumstances and not ethnicity. One being that permanent adjustments were required following an industrial injury, however this only applied to the climbing element of the job role and other elements were still able to be completed. The other was due to being unable to drive for a period of 12 months which could be accommodated as again all other elements of the job role were still able to be completed. Also at the time, which was over 5½ years ago, the business was able to accommodate two man teams where one person was not driving. The needs of the business have changed substantially over time as pressures from our regulator and expectations from our customers increase. All members of two man teams drive their own vehicles, identify if there is a safety risk and if not move on to a job as a singleton worker."

As confirmed in the email, the claimant stated he would not have been able to do this.

> "Openreach regularly supports people from all races with adjustments when the circumstances require. The business can sustain the adjustment and the individuals providing valuable service. I have also asked both Kieran and John if they made this decision and/or it influenced their actions at any point through this process because of Errol's race. Both adamantly deny the accusation. Looking at the available information I can see no evidence that the decision to terminate Errol's employment with Openreach was due to his race or that a lack of support was given on the same pretences. No further evidence or comparators were presented to investigate."

29. At the end of the document a summary conclusion is set out:

> "Errol has had an excessive amount of time off across the last two years which the business has been supportive with, but is unable to sustain. The business has tried to accommodate Errol and supported his absences significantly beyond the advice and recommendations issued by the OHS of when Errol would return to full duties. During this period Errol discussed alternative duties as evidenced by the email exchange with his manager, but due to continuing symptoms he did not feel able to return to any of the available alternatives offered. At the time of the second line review with Kieran and the date of the decision I do not believe there was a clear sight to the end of Errol's absence and return to effective service due to the mention of a different issue with his knee which was not existent previously beyond the wrist problem which would again prevent a return to full duties because he was subsequently having difficulty kneeling. The business with ever increasing demands being placed on it by regulators and customers cannot accommodate such large periods of ineffective service from its employees. The review by Errol's GP on 30 August only comes after the decision to terminate his employment on 30 August."

Decision:

> "Taking into consideration all information currently available and the details submitted at the resolution my decision is: appeal is rejected – the decision of second line manager remains the same (termination stands)."

30. I should state for the sake of completeness that the job carried out by the claimant and fellow engineers involves kneeling, standing, climbing, lifting, etc. all of which would in our judgment be hampered by problems with wrists and/or knees.

Submissions

31. After the Tribunal had heard the evidence the parties were invited to make their submissions. The claimant made his submission explaining why in his view he believed that the dismissal was unfair and the then the represented respondent made submissions which obviously included matters of law.

32. We have taken into account the submissions made by both sides. I will not at this point set them out, but it is important in our judgment that we refer to a recent case in the Employment Appeal Tribunal, the case of **Mr R Kelly v Royal Mail Group Limited UKEAT/0262/18/RN** at the Tribunal on 14 February 2019, a decision of The Honourable Mr Justice Choudhury, the President of the Employment Appeal Tribunal sitting alone.

33. Mr Way took us to various passages within the Judgment, but it was a case factually concerning attendance. In that case the attendance problem was a number of short-term absences rather than a lengthy absence but the principles set out by Mr Justice Choudhury would appear to read across to the case that we are dealing with. In that case it said that the respondent operated an attendance policy which had been agreed with the Communication Workers Union. It was not evidenced before this Tribunal that the policy operated was one agreed with the Communication Workers Union, but there is no doubt there was a clear policy made available to the employees of Royal Mail Group Limited. Royal Mail Group years ago was the Post Office, which included British Telecom etc., and so it may be that similar policies have trickled down to the various offshoots of the companies leading to the one now in use at Openreach.

34. At paragraph 8 of the Judgment referring to the facts of that particular case the manager concluded, having regard to the whole of the claimant's sickness record and more recent absences that he could not have confidence in the claimant maintaining satisfactory attendance in the future; he therefore decided to dismiss the claimant.

35. Paragraph 12 of the Employment Appeal Tribunal's Judgment makes reference to the decision of the Tribunal at first instance sitting in Leeds. Paragraph 12 states as to unfair dismissal the Tribunal found that the reason for dismissal was "some other substantial reason in that the respondent had lost confidence that the claimant would maintain his attendance record or provide reliable attendance. The Tribunal's reasons in this regard are set out as follows", and there the Judge quoted paragraphs 49, 50 and 51 of the Tribunal's Judgment. They referred to the respondent submitting a lack of confidence that the claimant would maintain his

attendance or provide reliable attendance was "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the employee held". They accepted the evidence that the management had lost confidence in the claimant's ability to give attendance in future, that it would improve or become reliable. They accepted the evidence that that was the reason for the dismissal, and it was found in that case there was a loss of confidence in reliable attendance which was sufficient to justify dismissal of an employee in the claimant's position. They found the respondent had shown the reason for dismissal fell within section 98 as "some other substantial reason". They considered the dismissal was rather harsh given the information available to them. They found the procedure followed by the respondent was reasonable and in accordance with the policy. The claimant had opportunities to put his side and was represented by his trade union. He had the opportunity to appeal and they considered matters had been dealt with in good faith by the Post Office in that case. They reached the conclusion that whilst the decision to dismiss was somewhat harsh, in the respects set out above they did not consider it was so harsh that no reasonable employer would have dismissed in the circumstances. They say:

> "Whilst another employer or indeed we ourselves had we been the employer might have waited to see whether the claimants improved over the coming years, but that is not the test we are required to apply under section 98(4) of the Employment Rights Act 1996."

36. The Judgment then went on to refer in paragraph 20 to the reason for dismissal:

> "Whilst absence related dismissals can fall under the rubric of capability within the meaning of section 98 of the ERA, there is no hard and fast distinction such that all absence related dismissals must be so categorised. In the present case the issue is not so much whether or not the claimant was capable or unable to do his work as a result of ill health but that his attendance was unreliable and unsatisfactory. That, it seems to me, is perfectly capable of falling into the residual category of some other substantial reason."

37. At paragraph 23:

> "What is important is the factual basis for dismissal being put forward by the employer. In this case the respondent has at all times relied upon unsatisfactory attendance as a reason for dismissal and that factual basis for the dismissal has not changed."

38. At paragraph 26:

> "It would be surprising if conduct which is in line with the policy, in particular one that has been expressly agreed with a relevant trade union, was to be regarded as unfair. Of course, it is not impossible that conduct in line with a policy may be unfair. There may be situations where notwithstanding that the conduct is in line with policy the circumstances are such that fairness demands a different approach be taken."

39. Towards the end of paragraph 57:

> "The Tribunal acknowledged that the decision to dismiss was a harsh one but nevertheless was not so harsh as to be able to say that no reasonable employer could have dismissed in the circumstances. In coming to that conclusion the Tribunal took into account all relevant circumstances."

The Law

40. The law that we have to apply is to be found in section 98 of the Employment Rights Act 1996, and in sections 13 and 23 of the Equality Act 2010.

41. Section 98 says that:

> "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 the reason or if more than one the principal reason for the dismissal and 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."

42. In subsection (2) the only relevant one would be a reason which relates to the capability of the employee for performing work of the kind which he was employed by the employer to do.

43. Section 13 of the Equality Act 2010 provides that:

> "A person (A) discriminates against another (B) if, because of a protected characteristic A treats B less favourably than A treats or would treat others."

44. The protected characteristic of race is defined in section 9 of the Equality Act 2010 and the claimant has the characteristic relevant in terms of race to bring such a claim.

45. Section 23 of the Equality Act 2010 deals with comparison by reference to circumstances and says that on a comparison of cases for the purpose of section 13 there must be no material difference between the circumstances relating to each case.

Conclusion

46. What was the reason for the dismissal? We have looked at the evidence to be found in the letter of dismissal and in the rationale. We find that it was a reason relating to the claimant's attendance with the respondent following the attendance policy. It seems to us that the reason for dismissal was based upon "some other substantial reason" rather than a reason relating to the capability of the claimant, and where we are dealing with "some other substantial reason" rather than capability then the potential future ability is less important than when looking at SOSR, which in this case involved looking backward at the attendance record rather than necessarily looking forward to the prospects for the future.

47. As to fairness the respondent in our judgment followed its own process which led it to the conclusion that the claimant's absence could not be sustained taking into account the overall period of absence since the claimant started.

48. Like the Tribunal in **Kelly** referred to in the Employment Appeal Tribunal decision, had we been managing the claimant we might not have reached the decision that Mr Platt did, but as the **Kelly** Tribunal set out: that is not the test. We have to consider whether a reasonable employer could have reached the conclusion to dismiss in the particular circumstances of the case. Was the decision to dismiss within the range of reasonable responses i.e. one which an employer could have reached? In our judgment, yes it was. It may be harsh, to the claimant’s view it certainly was harsh, and although we may have decided differently had it been our decision, that is not sufficient as a matter of law to enable us to find that this dismissal was unfair, therefore the unfair dismissal claim must fail.

49. As to the direct discrimination on the grounds of race, we have in mind the claimant's comparators. We have described them above. Neither was dismissed, neither was in the same particular circumstances of the claimant, and so there were material differences between the circumstances relating to the two comparators and the circumstances of the claimant, thus making the two gentlemen not proper or appropriate comparators for the claimant.

50. However, looking at the matters that we have had to consider we take the view that the dismissal of the claimant was not motivated by his race but was caused by the respondent following the attendance policy which states the need for the business to have employees who could render effective service, and unfortunately for the claimant through no fault of his own his own his circumstances meant he could not. That was why in our judgment he was dismissed. We do not find that there was any element of discrimination in the dismissal, so this claim also fails.

Employment Judge Sherratt

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13 November 2019

REASONS SENT TO THE PARTIES ON

15 November 2019

FOR THE TRIBUNAL OFFICE

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