EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S Brown	**v**	**Royal Mail Group Limited**

Heard at: Watford **On:** 5 September 2019

Before: Employment Judge Wyeth

Appearances:

For the Claimant: Miss P Robinson, Counsel
For the Respondent: Mrs A Kent, Solicitor

JUDGMENT having been sent to the parties on 16 September 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

The Claim

1. By way of a claim form issued on 9 April 2019, the claimant brought a complaint of unfair dismissal. Miss Robinson helpfully confirmed at the outset that no other complaints were being pursued by the claimant.

The Issues

2. Having established that this claim was one of unfair dismissal only, with the assistance of the representatives for each party it was agreed that the issues to be resolved in this case were as follows:

    2.1 Insofar as there was any real dispute as to the potentially fair reason for dismissal (which appeared not to be significantly contested), did the respondent have a potentially fair reason for dismissing the claimant, namely capability and/or some other substantial reason of the claimant failing to comply with the respondent's absence policy?

    2.2 Did the respondent follow a fair procedure in relation to the dismissal? The claimant raises two challenges to the procedure: firstly, the respondent miscalculating or incorrectly applying dates of absence applicable to the policy; and secondly, that the dismissing officer should not have been Mr Buaka, (despite being a second line manager) and a different manager should have been appointed to conduct the process leading to the claimant's dismissal.

2.3 Was the decision to dismiss the claimant within the range of reasonable responses open to a reasonable employer? The claimant sought to attack that decision on the basis that the respondent should have considered alternatives to dismissal, namely extending or issuing a new second attendance review notice.

2.4 In the event that the dismissal is found to have been unfair, does the respondent prove that if it had followed a fair procedure the claimant would have been fairly dismissed in any event (and/or to what extent and when) having particular regard to the claimant's dates of absence?

3. Notwithstanding the above, the representatives agreed that the real focus of this case rested upon whether or not a decision to dismiss fell within the band of reasonable responses and whether or not a fair procedure had been followed in the process leading up to the dismissal having regard to the two discreet points identified above.

Procedure

4. At the outset of the hearing I was provided with an agreed bundle of documents consisting of circa 184 pages ("the Bundle"). Unless stated otherwise, all page references below refer to the Bundle. I also had before me, two witness statements on behalf of the respondent, one for the dismissing officer, Mr Luke Buaka, and one for the appeal officer, Mrs Julie Forde and a witness statement provided by the claimant. I heard evidence from those witnesses in that same order. Oral evidence was completed by lunchtime and I was able to hear full oral submissions immediately upon returning in the afternoon.

5. During the hearing I explained that in terms of any written reasons and Judgment provided, which are now published online, I would be using initials to identify individuals who have either not attended this Hearing or did not give evidence. I would however, continue to use the full names of those people who were witnesses in these proceedings.

The Facts

6. I make the following findings of fact in this case.

7. The claimant commenced employment with the respondent as an operational postal grade at the Willesden delivery depot on 12 October 2015. His position could be more colloquially described as a 'postman'. The respondent is well-known. It is a very large employer and runs the national postal service. Within his team, the claimant's immediate line managers were jointly AM and MM.

8. Mr Buaka was the line manager of AM and MM and therefore the claimant's second line manager (other organisations might describe Mr Buaka as the claimant's 'grandparent line manager').

9. The respondent has an Attendance Policy which it has agreed with the

Communication Workers' Union ("CWU"). Unsurprisingly it includes minimum standards of attendance and is designed to encourage high levels of attendance and reliability from staff. A copy of that policy can be found at pages 25-33. Parts of that policy appear to be duplicated or reinforced in essence in what is described as the Attendance Agreement, which is, by all accounts, a national attendance agreement between the respondent and the CWU. It, too, sets out what the expectations are for both managers and employees.

10. In accordance with the Attendance Policy an employee may be issued with warnings in the following circumstances. Firstly, an "Attendance Review 1" warning may be issued should an employee be absent for four absences or 14 days in any rolling 12 month period. If, having been issued with the Attendance Review 1 notice, an employee incurs a further two absences or a single absence of 10 days or more within the six month period following the date of the review notice being issued, an "Attendance Review 2" notice may be issued. Thereafter, if the employee incurs a further two absences or a single term absence of 10 days or more within the six month period following the date of the Absence Review 2 notice being issued, the respondent may consider dismissing the employee for poor attendance.

11. This summary of the attendance policy was repeatedly set out in letters to the claimant relevant to the process that was applied to him. The process for an attendance review (which is the same for both first and second reviews) is set out on p29. The policy states that employees will be given a minimum of three days' written notice of the attendance review meeting along with details of their attendance record. It says:

> "Attendance Review Meeting.
>
> At this meeting the manager will outline the attendance record and ensure that the employee understands the standard has not been achieved and why the standard is important."

It simply refers to "the manager" and does not specify precisely who that should be.

12. On page 6 of the policy (p30), it states that, at the consideration of dismissal stage after an Attendance Review 2 has been issued:

> "…if the attendance standards are again not met the employee will *normally* [my emphasis] be invited to a meeting with their second line manager to discuss consideration of their dismissal."

There does appear to be some possible ambiguity about whether or not a second line manager can be involved in the initial process in terms of Attendance Reviews 1 and 2. Box one of the first Table on p30 (dealing with the third stage: consideration of dismissal) suggests it might be a different manager to whoever managed the first or second review as it states that the "original manager will prepare all the paperwork for the appropriate manager who must have the authority to dismiss. The manager may refer the employee to an occupational health service." This suggests, therefore, that there may be a need for a different manager to deal with possible

dismissal at the Third Attendance Review stage. The basis for this is not set out in the Policy but it was submitted on behalf of the respondent that this was anticipating a situation in which a manager who deals with the first review or second review did not have the authority to dismiss, thus requiring someone of second line manager status to conduct the third stage. Irrespective of the force of this submission, I am satisfied that the Policy does not expressly exclude a manager who has the authority to dismiss from conducting either of the initial two stages of the process in addition to the third and final stage.

13. After each absence there is an expectation that an informal welcome back meeting will be held. This is not referred to in the attendance policy itself but is included in the national Attendance Agreement between the respondent and the CWU. During cross-examination, Ms Robinson took the dismissing officer, Mr Buaka, to certain extracts from that document at p35. On page 6 of that document it states:

> "Following any period of absence an informal welcome back meeting will be held between the employee and their manager, ideally on the first day back…"

It also sets out the purposes of the meeting, which, in reality, are matters of common-sense. Effectively, those purposes are to ensure that the employee is being provided with sufficient support and that the employer is gaining as much information as possible to know about the reasons for the absence and whether or not there are any underlying problems.

14. I accept that, although those meetings are intended to be informal, they are a requirement in terms of the process to be followed and there is an expectation that when somebody is absent they will have a 'welcome back' meeting on their return.

15. Need it be said, the attendance review meetings and the 'welcome back' meetings are intended to help inform any manager dealing with poor attendance issues, but the trigger for any formal process is the extent of the absences themselves, as already referred to above and as outlined in the Attendance Policy. It is not the case, as was suggested on behalf of the claimant, that a trigger can only apply if there is a 'welcome back' meeting and on the evidence before me, I reject any such suggestion. The trigger process is clear and unequivocal: the Attendance Review process will be followed if an individual is absent within the criteria described.

16. It is not disputed that the claimant had the following absences:

    16.1 Within just a few months of starting his employment, from 4 December 2015 to 7 December 2015, he had his first period of absence of four days with diarrhea;
    16.2 From 26 October 2016 to 27 October 2016 the claimant was absent for two days apparently due to back pain;
    16.3 From 5 January 2017 to 9 January 2017 the claimant had five days' absence because of vomiting;
    16.4 From 23 March 2017 to 25 March 2017 the claimant was absent due to a stomach upset;
    16.5 From 28 April 2017 to 29 April 2017 the claimant had two days'

absence for flu-like symptoms;

16.6 On 30 June 2017 to 1 July 2017 the claimant had two days' absence due to an ankle injury;

16.7 On 28 September 2017 the claimant had one day's absence due to a stomach upset;

16.8 On 1 December 2017 to 2 December 2017 the claimant had two days' absence due to a stomach upset;

16.9 On 1 March 2018 to 3 March 2018 the claimant had three days' absence due to an ingrowing toenail which apparently required surgery;

16.10 From 29 May 2018 to 29 September 2018 the claimant had 124 days' absence due to lower back pain, hemorrhoids and an abscess, the latter two conditions requiring some hospitalisation.

None of the above is disputed. In effect, the claimant had 10 periods of absence over a period of just under three years from the date the claimant commenced employment with the respondent. Indeed, he had a total of 148 days' absence within a period of employment of less than three years at the point at which his last period of absence came to an end.

17. The claimant's four absences between 26 October 2016 and 28 April 2017 triggered the Attendance Policy and he was invited to a first attendance review meeting on 19 May 2017. I interpose at this stage that I accept on the evidence before me that the claimant had sufficient notice of all the meetings that he was invited to in relation to his absenteeism.

18. The first Attendance Review meeting was held on 19 May 2017, with a Mr Buaka, the claimant's second line manager. I accept Mr Buaka's evidence that the reason he undertook the meeting rather than one of the claimant's immediate line managers was because one of those managers was, himself, absent, there were staffing difficulties and it was important to get the meeting underway and for it to be held as soon as possible. That is entirely consistent with the expectation under the policy (that these meetings would be held within 14 days). Following that meeting Mr Buaka decided to issue an Attendance Review 1 notice.

19. Insofar as it is relevant, there was a dispute about whether the claimant had the opportunity to make representations about the first of those four absences (in October 2016) because there appears to be no 'welcome back' record in existence. It is now suggested by the claimant that this absence was work-related and should have been discounted. Mr Buaka accepted that he had not conducted any 'welcome back' meeting following that absence and could not say whether anyone else had.

20. Whether or not any 'welcome back' meeting took place, I reject the suggestion that the claimant was not in a position to make representations about his absence in October 2016. Even if there was no 'welcome back' meeting, I do not accept that this caused any unfairness, procedurally or otherwise, to the claimant. The notes of the Attendance Review meeting on p71 show that the claimant had the opportunity and did indeed make representations about his absences that were the trigger for that meeting. Whilst these do not specifically refer to the October absence, I am entirely satisfied on the evidence that in all probability the claimant would have

challenged the need for a meeting at all if the October 2016 absence had not (or should not have) formed part of the trigger for the meeting or if he believed it not to be relevant to the meeting in some way. Furthermore, if the claimant considered this absence was caused by any work-related accident or injury, he could and would have raised it in the same way that he did subsequently about his later period of absence in June 2017 (to which I refer below). Notably, the claimant never raised any concern about this issue either a) as part of the process itself, or b) at the dismissal meeting or c) on appeal.

21. There is a dispute between Mr Buaka and Mrs Forde (the appeal officer), as to whether a review notice was given at that meeting on 19 May 2017 (as Mrs Forde contends) or whether it was not issued until Mr Buaka sent his letter to the claimant on 15 June 2017 (according to Mr Buaka). The claimant says this is significant because the second stage (Attendance Review 2) monitoring period of six months begins on the date formal notice is issued and that, in turn, impacts upon whether subsequent absence falls within that period so as to be taken into account to trigger the second stage.

22. The notes of the meeting on 19 May 2017 start at p70 and the material part is on p71 to 72. There can be no doubt that the notes refer to a discussion about whether an Attendance Review 1 Notice should be issued. The notes state:

> "I explained to Mr S Brown the attendance process in Review 1 to consideration for dismissal Review 3 and how it works. At the end Mr Brown confirmed that he understood the attendance standards. I asked Mr S Brown whether there was any reason why I shouldn't issue this Review 1. Mr S Brown replied "I don't go sick just for the sake of going sick. It is only when I am poorly that I will not come to work so all my sicknesses were genuine." I reminded Mr S Brown that we do not question the genuineness of any absence. I informed Mr S Brown that I will produce the records of the meeting which he has the right to amend if I missed anything and then sign the notes to confirm that I captured everything. After that I will write to him with a rationale on my decision. I also informed Mr S Brown that there is no appeal provision for my decision on this Attendance Review 1."

23. From the above I do not consider the notes confirm one way or the other whether a notification was actually expressly given at that meeting. The wording appears to be rather ambiguous. It could be read either as a notification being given there and then or that Mr Buaka was intending to go away, consider the position and write to him with his decision. Further ambiguity is created by the words that appear on p72. In the middle of that final page in printed form it states: "Let the employee know that you will be reflecting on the discussion and you will advise them of your decision of whether to issue a formal notification or not." This implies that a decision is not issued at the meeting.

24. Mr Bauka's follow-up letter of 15 June 2017 suggests that the decision had not been confirmed at the meeting on 19 May 2017. He says in that letter:

> "Thank you for attending your review meeting on 19 May 2017. I have taken into consideration your circumstances and the points that you raised during the meeting. I have decided that it is appropriate to issue the Attendance Review 1. My reasons for taking this decision are that your attendance has fallen below the standards expected of all Royal Mail

employees. I have taken into account the points you raised at the interview but decided to issue a Review 1 because we do not question the genuineness of any absence. My decision is based on the standard set for all Royal Mail employees."

He then explains that there is no right of appeal.

25. Again, there is some ambiguity in this letter about when the relevant period for triggering the second stage of the Absence Policy begins because he also says:

"I need to let you know that if, from the date of your meeting you incur further absences which exceed the attendance standards, further action may be taken which may lead to your dismissal under the formal attendance process."

However, following that paragraph, Mr Buaka then sets out a reminder of what is stated in the Attendance Policy. He explains that under the policy an Attendance Review 2 (the second stage) will be prompted by two absences or 10 days in the next six months following an Attendance Review 1 *formal notification* [my emphasis]". If the letter itself amounted to formal notification then technically what Mr Buaka had written in the earlier paragraph was inaccurate and time would not start to run from the date of the meeting.

26. I can appreciate why there might be some confusion about whether or not formal notification was issued at the meeting on 19 May or not until Mr Buaka's letter of 15 June 2017. Likewise, I can understand why Mrs Forde took a different view about that, not least because of the ambiguity I have referred to above. I do, however, accept Mr Buaka's evidence that he intended his letter to be formal notification of the issuing of an Attendance Review 1 notice and that any ambiguity arising from the words used in his letter was not intended to override the mechanics of the policy. I am satisfied evidentially that the letter of 15 June 2017 was the formal notification of the Notice but for reasons I come to it makes no material difference to the fairness of the process followed or the outcome in any event.

27. Mr Buaka, believing the next trigger date to run from 15 June 2017, invited the claimant to a second stage attendance review meeting on 17 October 2017 because of the claimant's absences on 30 June 2017 and 28 September 2017. The claimant was accompanied by a Trade Union representative, PB. At this meeting the claimant maintained that his absence on 30 June 2017 was due to an accident whilst at work. Although there was some uncertainty about whether this was a non-blameworthy accident because it was unreported, Mr Bauka agreed to discount this absence and concluded, accordingly, that it was not appropriate on this occasion to issue an Attendance Review 2 Notice. I consider this relevant to the suggestion by the claimant that Mr Buaka had a tendency not to act even-handedly towards the claimant. I entirely reject that assertion and I am not at all persuaded that Mr Buaka behaved in a way that was anything other than even-handed towards the claimant.

28. Shortly thereafter the claimant was absent again on 1 December 2017 for two days. Mr Buaka considered that this absence, coupled with the earlier

absence on 28 September 2017 (discussed at the previous second stage Attendance Review meeting in October where no notification was issued), triggered a further second stage Attendance Review meeting. The claimant was invited to a meeting on 20 December 2017 which he attended with his Trade Union representative, PB. This time the meeting was conducted by his direct line manager, Mr AM and not Mr Buaka. Mr AM listened to the claimant's reasons for absence. In his letter of 20 December 2017 (p86) the claimant was informed that a formal Stage Two Absence Review notification was being issued by Mr AM.

29. The claimant's absence record did not significantly improve thereafter. The claimant was then absent for a period of three days, on 1 to 3 March 2018 with an ingrowing toenail. Two months later, the claimant commenced a period of absence for a total of 124 days, initially with lower back problems but then with hemmorhoids and an abscess, both of which involved hospitalisation. This triggered the third stage of the Attendance Policy, consideration of dismissal. In accordance with the respondent's policy the claimant was referred to an Occupational Health assessor and a report was prepared and sent to the respondent on 6 November 2018. No doubt this led to some delay in the process and the ability to hold a Stage Three meeting. Importantly, the report (p88) confirmed that the claimant is normally fit and well and has no other underlying health problems. Under the heading "Capacity for Work" it states that "Mr Brown is fit for his contracted role, no adjustments or modifications are needed. Current Outlook – there is no obvious medical reason why he should not be able to give regular and effective [sic] in the future". Under the section headed "Disability Advice" the author states "In my opinion Mr Steadman Brown is not covered by the Equality Act".

30. On 4 December 2018 Mr Buaka wrote to the claimant informing him that he was considering dismissing the claimant for unsatisfactory attendance. The claimant was invited to a meeting on 11 December 2018 which he attended. I accept Mr Buaka's evidence that he considered the claimant's file and had a good understanding of his absence record in advance of that meeting. Having considered the claimant's entire absence history, previous attendance review meetings, medical evidence from the occupational health expert and points made in mitigation by the claimant, Mr Buaka determined that the claimant's employment should be terminated upon four weeks' notice.

31. I fully accept the respondent's case that the claimant's absence put significant and material pressure on other employees and the service the respondent was obliged to provide to its users. I also accept that Mr Buaka undertook a proper and balanced consideration of all material facts before reaching the conclusion that the claimant's employment should be terminated, a decision that he was entitled to reach under the terms of the respondent's Attendance Policy and the attendance agreement with the CWU.

32. The claimant appealed the decision but provided no specific reasons as a basis for the appeal. His appeal was conducted by Mrs Forde who met with the claimant and his Trade Union representative, KC, on 22 February 2017. Mrs Forde carried out further investigations following that meeting and

wrote to the claimant on 4 March 2019. In her letter, Mrs Forde set out the results of those further investigations and invited the claimant's comments on this further evidence, which the claimant subsequently provided. Nothing material rests on any of that and it is not necessary to deal with that aspect of the appeal any further in my findings of fact.

33. As referred to already, Mrs Forde determined that the claimant should not have been invited to a second stage Attendance Review 2 meeting following his absence in December 2017 because she believed the claimant had received his Attendance Review 1 notification at the meeting on 19 May 2017 rather than in the subsequent letter of 15 June 2017. Accordingly, in her view, the December 2017 absence fell outside the six-month period post the Stage One notification. I have already concluded on the evidence that the Stage One notification was not issued to the claimant until Mr Buaka's letter of 15 June 2017. Accordingly, this was a misunderstanding and misinterpretation of the position by Mrs Forde. Nevertheless, she considered that it made no material difference to the position or final outcome because, looking at the claimant's absence record, he would still have needed to attend a Third Stage consideration of dismissal meeting following his lengthy absence in 2018.

34. In reaching that conclusion Mrs Forde made the following assessment having considered the claimant's absence record and dates (p175). Mrs Forde calculated that, irrespective of the process that was followed, the claimant would have triggered an Attendance Review 1 meeting sometime after 28 September 2017 because of the previous four periods of absence within a twelve-month period (namely on 5 January 2017, 23 March 2017, 28 April 2017 and 28 September 2017). Thereafter, the claimant would have been absent on a further two occasions within six months of that Attendance Review 1 notification because of his absences on 1 December 2017 and 1 March 2018. That would have triggered a further Attendance Review meeting and notification. The claimant's further period of absence from 29 May to 29 September 2018 (vastly exceeding the 10 days) would have triggered a Third (and final) Attendance Review meeting and a consideration of dismissal. As such, even if Mr Buaka was wrong, there was no material impact on the fairness of the dismissal according to Mrs Forde and she ultimately upheld Mr Buaka's decision to dismiss.

The Law

35. The law relating to unfair dismissal is predominantly contained in Part X of the Employment Rights Act 1996. The respondent must first demonstrate that the claimant has been dismissed for one of the potentially fair reasons set out in s98 (in this case, capability or some other substantial reason). The tribunal must then consider whether the dismissal was generally fair and, more specifically, whether the employer acted reasonably or unreasonably in treating that reason as sufficient for dismissal. The burden of proving whether or not a dismissal was reasonable is a neutral one.

36. In accordance with the seminal case of Alidair Ltd v Taylor [1978] ICR 445, CA the respondent is not required to have conclusive proof that the claimant is incapable of performing his role, only an honest belief on reasonable grounds. The Alidair test is perhaps of less significance in cases of

persistent short term absenteeism. Nevertheless, a respondent must be satisfied that any particular circumstances relied upon warranted dismissal.

37. When deciding the issue of reasonableness, the tribunal must apply the band of reasonable responses test. Consequently it cannot substitute its own view for that of the employer but must instead ask the question as to whether no reasonable employer would have dismissed in those circumstances. Only then will a tribunal conclude that a dismissal fell outside the band of reasonable responses.

38. Furthermore, the band of reasonable responses test also applies to the extent of any investigation required to be conducted by the respondent. Again, the tribunal cannot substitute its own view as to what it would have done to investigate the matter but must instead ask itself whether what was done in terms of the investigation fell within what a reasonable employer would have done in those circumstances (J Sainsbury plc v Hitt [2003] ICR 111, CA).

39. In accordance with the EAT guidance provided in International Sports Co Ltd v Thompson [1980] IRLR 340, when considering cases of persistent intermittent absenteeism the respondent should a) carry out a fair review of the attendance record of the claimant and the reasons for absence; b) give the claimant an opportunity to make representations; and c) give appropriate warnings of dismissal if the situation does not improve. In the event that there is no adequate improvement in attendance then dismissal will usually be justified regardless of the fact that absences may be for genuine reasons. In essence, an employer is entitled to say 'enough is enough' particularly in industries or circumstances where absences may be highly disruptive and damaging.

40. If compensation is to be awarded then the tribunal must order the respondent to pay a basic award (calculated on a standard formula) and a compensatory award. In accordance with s123(1) ERA the compensatory award is to be such amount as the tribunal considers just and equitable. Both awards may be subject to reductions for certain reasons. The only potentially relevant adjustment in this case would be to the compensatory award which may be reduced where it is evident that the claimant might have been dismissed fairly regardless of any actual unfair dismissal (the Polkey principle).

Applying the law to the facts

41. I have no hesitation in concluding that the respondent's reason for dismissing the claimant was his regular and persistent absenteeism and thus related to his capability for performing work of the kind which he was employed to do (s98(2)(a) ERA 1996).

42. The respondent has never suggested or inferred that the claimant's absences were not genuine but, need it be said, dismissal for regular short term absences is not dependent upon any question of blameworthiness. Inevitably, regular absence for varying short-term ailments can be, and often is, extremely disruptive in a working environment. It not only causes problems for the employer but also places tremendous pressure on other

employees who are required to absorb the difficulties and the complications that arise from unplanned and unexpected non-attendance. However unfortunate or regrettable, subject (of course) to following a fair and reasonable process, an employer is entitled to determine that an employee's absence record is sufficiently poor to justify the termination of their employment.

43. Turning to the question of whether the respondent followed a fair procedure, I am satisfied that the procedure followed by the respondent fell well within the band of reasonable responses of a reasonable employer.

44. For the reasons set out in my findings of fact, the respondent properly followed its Attendance Policy. The claimant received the Attendance Review 1 notification on 15 June 2017. As such, Mr Buaka and AM were entitled to commence the Attendance Review 2 (second stage) process (on both occasions) when they did. The respondent was not in breach of its policy in that regard. Mrs Forde was wrong to conclude that Mr Buaka was mistaken over the dates but regardless, Mrs Forde was entitled to determine (even on that mistaken belief) that Mr Buaka's purported error made no real difference in terms of a fair process. Whilst the timing of the notices might have been different, the claimant's pattern of absences was such that the same outcome would have resulted under the respondent's policy regardless. In any event, had Mrs Forde been correct regarding the alleged mistake in relation to the application of the policy (contrary to my finding), such a mistake was not sufficiently material or contrary to the spirit of the policy so as to render the procedure followed by the respondent unfair in any way or outside the band of reasonable responses of a reasonable employer. The claimant was not under threat of dismissal at either of the points when he was issued with a First and, then, Second Attendance Review notice. Whether or not the second of these was issued strictly in accordance with the policy (and I am satisfied that it was), at that point the claimant was under no illusion that his attendance record had to improve. It did not; it worsened significantly. As it transpired, the claimant had a further substantial period of absence which entitled the respondent to consider his dismissal regardless of any potential earlier error under the policy.

45. Even if the respondent had no policy, as a matter of common sense, it would have been entitled to decide whether or not it was appropriate to keep the claimant in employment after such a substantial period of absence in 2018 and the frequency of previous episodes of absence. I am satisfied that there was no procedural unfairness in this process notwithstanding the suggestion by the appeal officer that the manager had not calculated the timetable correctly. In any event, I have already rejected that and found that he did.

46. Likewise, even if the claimant did not have a proper opportunity to make representations about his absence in October 2016 (which is contrary to my findings on the evidence) this period of absence accounted for two days out of a total of 148 days at the point his dismissal was being considered (albeit that a further two days in June 2017 were disregarded because the claimant maintained the ankle injury was work-related). There is no question that the claimant had a very poor absence record in a relatively short period of

service. Notwithstanding the size of the respondent, such poor absence record and, in turn, reliability, would inevitably place the respondent under immense pressure because, although it is a large employer, its principal purpose is to distribute and deliver mail as quickly as possible with the expectation that this will be achieved within the following day or two. Accordingly, disregarding the October 2016 absence would have made no difference to the outcome.

47. I am also satisfied that the involvement of Mr Buaka in the various stages of the process including the claimant's dismissal did not result in the dismissal (or the procedure followed) being unfair in any way. Notwithstanding the potential ambiguity in the Attendance Policy, the terms of that policy did not expressly exclude or prohibit a manager of Mr Buaka's status to be involved in the initial two stages of the process. The policy did appear to require Mr Buaka to conduct the Third Attendance Review stage as the claimant's 'second' line manager. By that stage, dismissal of the claimant was the consideration, and it was entirely proper that a manager of Mr Buaka's seniority be tasked to make such a significant decision. I reject any suggestion that Mr Buaka's involvement in the earlier first stage created any conflict (actual or perceived). There was no evidence before me to sustain that assertion. On the contrary, when Mr Buaka undertook the first of the two Attendance Review 2 meetings on 17 October 2017, he determined that he should not issue a Notice. Accordingly, there was nothing inherently wrong or procedurally unfair about the fact that Mr Buaka happened to be involved in the issuing of the Attendance Review 1 notice. In any event, Mr Buaka was not the only person involved in the initial stages of the Attendance policy. Mr AM (the claimant's direct line manager) was responsible for conducting the latter of the two Attendance Review 2 meetings.

48. When considering what a reasonable employer would have done, unlike in a case of misconduct, there is nothing inherently unfair or unreasonable about having a person who is familiar with the attendance record and absence history of the individual who is facing the loss of his (or her) job, undertake that decision. Having somebody who has no knowledge of the history could indeed result in an ill-informed and unfair decision being reached. I am therefore entirely satisfied that Mr Buaka's involvement was appropriate and came nowhere close to falling outside the band of what a reasonable employer would have done.

49. Did the decision to dismiss the claimant for his absenteeism or rather, capability fall outside the band of reasonable responses of a reasonable employer? Again I have no hesitation in finding that such a decision was well within the band of reasonable responses in these circumstances. The claimant had both substantial and repeated periods of absenteeism over a relatively short period of employment (of under three years). That level and frequency of absenteeism caused significant disruption to the respondent. Furthermore, the respondent had in place a process and detailed policy of how it would approach the issue of regular and persistent absenteeism, setting out the expectations of employees and the consequences if they fell short of those expectations. The decision to give the claimant notice to terminate for this reason was not in any way unfair. Mr Buaka took into account all relevant factors including the likelihood of any improvement in

the claimant's attendance record. He was entitled to take the position he took in that regard. This was a clear case of 'enough is enough'.

50. For the reasons set out above, I am entirely satisfied that the respondent followed a fair procedure leading up to and including the decision to dismiss the claimant. Nevertheless, for completeness, if I had found that the procedure was unfair as asserted by the claimant, I am firmly of the view that irrespective of any alleged shortcomings in the procedure the claimant would have been in no better position had the respondent acted differently. The claimant would still have been dismissed in the circumstances and insofar as it is alleged to have failed to do so (contrary to my findings) following a fair procedure would have made no difference to that outcome.

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Employment Judge Wyeth

Date: ……21/11/2019…….

Judgment sent to the parties on

.....25/11/2019.....

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For the Tribunal office