EMPLOYMENT TRIBUNALS

Claimant: **Sylvia Rowley** Ms Sylvia Rowley

Respondent: **Department for Work & Pensions**

Heard at: Leeds **On:28-30 January 2020**

Before: Employment Judge Rogerson

Representation
Claimant: Mr. D Maxwell (counsel)
Respondent: Mr. J McCracken (counsel)

RESERVED JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.

REASONS

Issues.

1. The issue in this case was relatively straightforward for a complaint of unfair dismissal, for an agreed potentially fair reason of ill-health capability but took 3 days to hear. On the facts as found by the tribunal, and applying section 98(4) of the Employment Rights Act 1996, the issue to determine was had the respondent acted reasonably or unreasonably in dismissing the claimant for that potentially fair reason? If so what was the appropriate remedy?

Findings of fact

2. I heard evidence for the Respondent from Mr. N Phillips (claimant's line manager) Mr. Steven Broderick (Operations Manager/dismissing officer) and Ms. A Walker (Cluster Manager/ appeals officer). For the claimant I heard evidence from the claimant. I also saw documents from an agreed bundle. Most of the factual background was not in dispute. From the evidence I saw and heard I made the following findings of fact:

3. The claimant was employed as an administrative officer from 9 March 2009 until her dismissal on by letter on 6 November effective on 7 November 2019 with a payment made in lieu of notice.

4. The claimant was dismissed because of her continued absence from work from 3 January 2019 to 7 November 2018 because an expected date to consider a return to could not be given, and there was no prospect of a return to work within a reasonable time scale thereafter. Mr. Broderick's letter of dismissal identifies the claimant's barrier to her return to work which was that she felt issues raised by her solicitor were not resolved to her satisfaction, she wanted an admission of liability and she could not return to work without a favorable resolution. Mr. Broderick had delayed any decision, pending the DWP's legal team response. That response was provided to the claimant's solicitor confirming the respondent's position that it *"had acted appropriately, provided the appropriate level of support and that policies and procedures had been followed".*

5. By his letter of dismissal dated 6 November Mr. Broderick confirmed the position that "*DWP legal team have responded to the claimant's solicitor to confirm all appropriate action has been considered and taken, so there is no case to answer"*. He records the fact that the claimant believed *"her legal case remains open and in the hands of her solicitor"* and that instead of a return to work date she had provided fit notes from her GP confirming a continuing absence from work without a likely return to work. He decides "*therefore an expected date to consider a return to work cannot be given and there is no prospect of a return to work within a reasonable time scale"* and in those circumstances dismissed the claimant.

6. The letter and Mr. Broderick's rationale for making the decision to dismiss were not in dispute. The claimant and respondent had reached an impasse because of the position the claimant had chosen to adopt. The respondent had agreed a return to work plan, a new team a new manager and had put in place all reasonable steps for a return to work prior to the dismissal decision. The only barrier to a return to work, was the fact the claimant required a favorable resolution (admission of liability) which the respondent reasonably concluded (based upon legal advice) it could not do.

7. That was the position by the end of the claimant's employment. How the parties got to that position is well documented in the detailed records of the meetings, the keep in touch discussions during the claimant's absence, the written communications, the policies and procedures, none of which are disputed.

8. On 20 December 2017, the claimant was issued with a first written warning following an unauthorised absence from work on 29 November 2017, when the claimant had left work early without permission. The claimant accepts that prior to this occasion there had been other occasions when she had left work early and she had been warned that further incidents could result in formal action.

9. Prior to issuing the warning Mr. Phillips followed the respondent's disciplinary process. The claimant was represented and had the opportunity to make representations. Mr. Phillips issued the warning after considering those representations and the mitigation put forward by the claimant. He provided a detailed rationale to explain why he did not accept that mitigation to impose a lesser sanction of informal action. The claimant unsuccessfully appealed the warning to another more senior manager and that appeal process concluded on 6 February 2018.

10. The disciplinary procedure for the first written warning issued to the claimant was properly followed by the respondent. It is not appropriate for this tribunal to step into the shoes of the employer and go behind a warning properly given which was upheld after challenge on appeal. The claimant is/was still unhappy with that warning having exhausted the respondent's internal procedures for challenging disciplinary decisions.

11. The second issue of concern for the claimant was a grievance she had raised alleging bullying/harassment by a colleague in her team. The claimant's grievance was raised on 4 January 2018 by way of a detailed letter of complaint. The claimant had a meeting on 2 February 2018 with Lynda Evans, a grievance officer and Cluster Manager based in Stockton (external to the claimant's area of work). The claimant was given the opportunity to and did expand on the matters raised in her letter. The next stage of the process was an investigation of the complaints made but before that could happen the claimant withdrew her grievance by email on 6 February 2018. In her email the claimant confirms that she has made the decision because to pursue it would not be 'beneficial' for her. She refers to a lack of advice from the union but says "*I don't think retribution from one particular individual is warranted or even fair to that person*". Lynda Evans did not simply accept the withdrawal at face value based on the email. She contacted the claimant to satisfy herself that the claimant was withdrawing her grievance for the right reasons. After speaking to the claimant, she was satisfied that the claimant had made an informed decision and she accepted it.

12. Both the disciplinary and grievance processes were followed correctly by the respondent and by 6 February 2018 both processes had been concluded. The claimant's absence from work was managed by her line manager Mr. Phillips under the long-term absence procedure which defines a long-term absence as one that reaches 28 days. The absence management procedures provide for regular reviews with the absent employee, keep in touch contact by the line manager with the employee (KIT), occupational health input, and an occupational health case conference at the 3 months stage. The procedure provides that when dismissal is considered it is a 'last resort' and must be justified by the individual circumstances. Managers are required to ensure all the procedures have been followed correctly, that in the case of long term sickness a return to work within a reasonable timescale is unlikely or uncertain and there are no further reasonable adjustments that can be made to help the employee return to satisfactory attendance.

13. From the 3 January to the claimant's dismissal on 7 November each fit note provided by the GP cited 'work related stress'.

14. The claimant raised a grievance against Mr. Phillips for issuing her with a written warning. Although that grievance was not upheld, after May 2018, Mr. Phillips was no longer the claimant's line manager.

15. During the time Mr. Phillips managed the claimant's absence for work related stress he obtained Occupational Health Advice (dated 23 January 2018) which advised that the work-related issues needed to be handled for a return to work. Unfortunately, the claimant declined to fill in a stress risk assessment questionnaire for a stress risk assessment to be conducted she declined to complete a return to work plan and she declined mediation as a way of helping her get back to work. Mr. Phillips found the claimant was uncooperative in helping him help her get back to work. On 19 March 2018 he decided it was appropriate to refer the claimant to a decision maker (Mr. Broderick) to consider whether dismissal was appropriate.

16. Although the claimant takes issue with the word 'decline' in the records made at the time, she accepts having been taken to the notes of the discussions she had with Mr. Phillips, that on each occasion when she was asked to, she refused mediation, and she did not complete the stress risk questionnaire template or the back to work plan. On that basis Mr. Phillips was entitled to conclude as her line manager that she was being uncooperative by declining to take steps that would identify and resolve the stress issues which meant a return to work was more unlikely.

17. On 12 April 2018, further Occupation Health Advice was received advising the manager to carry out a stress risk assessment. Although Mr. Broderick, as the decision maker, could have acted on the referral made by Mr. Phillips, on advice, he decided that because of the claimant's grievance against Mr. Philips, he should delay making his decision until that grievance was resolved. He informed the claimant of that decision on 16 April 2018.

18. By letter dated 24 April 2018, the claimant was informed her grievance was not upheld. She appealed that decision. Her appeal was unsuccessful and the outcome was confirmed to her on 23 May 2018.

19. Mr. Broderick arranged a decision maker meeting for 6th June 2018. That meeting was cancelled, because the claimant's union representative informed Mr. Broderick that the claimant would be returning to work on 9 July 2018. As a result, Mr. Broderick wrote to the claimant on 6 June 2018, asking her, if she could complete a stress management plan, an individual stress self-assessment template and a back to work plan. He advised her of her new Operations Manager (Lisa Gayton) who would contact her to facilitate this and to discuss any necessary reasonable adjustments. The letter warns the claimant that if she does not return to work she is at risk of dismissal

20. The claimant did not return to work on 9 July 2018 and submitted a further fit note citing 'work related stress'. On 30 June 2018, her

solicitors wrote to Lisa Gayton alleging whistleblowing, raising a formal grievance, alleging that the written warning issued was unfair and that the claimant had been bullied into withdrawing her complaint.

21. On 26 July 2018, the government legal department responded on behalf of Lisa Gayton seeking further information of the alleged disclosures made of whistleblowing, denying any unfairness for the warning given and confirming the grievance had willingly been withdrawn by the claimant. The response asserts the respondent's position that due process had been followed and the claimant had been supported throughout her absence. The letter ends with the stated position that "*it would not be appropriate to consider or respond to your request for settlement"*.

22. Mr. Broderick was unaware of the details of the letters but on 21 August 2018, wrote to the claimant informing her that he had been advised that the claimant's solicitor had written once more with a set of concerns and demands and that he would delay any decision until the legal team got back in touch with him.

23. Further Occupational Health advice was obtained and Lisa Gayton discussed a return to work plan with the claimant offering solutions to help her return to work. The detailed record of the discussion between the claimant and her manager on 28 September 2018, confirms all the steps discussed (358AD). This includes a phased return, adjusted duties, a new team and change of team leader and a back to work plan. Lisa Gayton was taking all the steps she could as the manager to help her and she asked the claimant to complete the stress risk assessment. The claimant failed to do this and offered no reason for that failure. By this time the latest fit note from the claimant's GP had identified the claimant might be fit to return with "*phased return / amended duties / new team" and "wants grievance dated 30.06.2018 to be dealt with"*. The GP notes record that the latter request was noted on the fit note because the claimant's solicitor had requested this.

24. Lisa Gayton asked the claimant what 'resolution' would enable the claimant to return to work. The claimant response was that she wanted "a favorable response to her grievance". This meant an admission of liability in relation to her warning and the withdrawn grievance. She refers to her solicitor lodging a claim to the Tribunal if a favorable response was not received.

25. On 29 October 2018, during another keep in touch discussion the claimant again confirmed that the barrier to her returning to work was the resolution she wanted to her solicitor's letter.

26. Mr. Broderick was provided with the notes of these discussions and he made his decision by letter on 6 November 2018. He considered all the information he had from Occupational Health, the representations made by the claimant in meetings with him and through the Keep in Touch process with the management team, the support provided, the reasonable adjustments offered and the advice he obtained from HR.

27. He set out in writing his detailed rationale, unchallenged in cross examination, which shows a careful consideration of all the information he had before him. He accurately sets out the claimant's position that she does not feel she can come back to work while she considers the issues raised by her solicitor are unresolved. He tells her that the DWP's legal team had responded to the claimant's solicitor to confirm all appropriate action has been considered and taken so there was 'no case to answer'. He decided to dismiss the claimant because of this impasse that had been reached and the fact that rather than intimating a return to work the claimant had provided further fit notes from her GP, extending her absence. He concludes "*therefore an expected date to consider a return to work cannot be given and there is no prospect of a return to work with a reasonable timescale*". For those reasons he dismissed the claimant.

28. The claimant complains that it was unfair not to have a further meeting but does not say what difference a further meeting would have made if her position as recorded by her managers was accurate and remained unchanged. She had resolved in her own mind that her solicitor and the tribunal process was the way forward rather than a return to work. She saw that as the only way to continue to challenge the properly decided outcomes of the disciplinary and grievance processes. If she genuinely wanted to communicate a return to work she could have communicated that easily before dismissal, after her dismissal or at the appeal stage. All reasonable adjustments had been agreed and the only outstanding issue was for the claimant to agree to return to work. Mr. Broderick had told the claimant in June he was deferring his decision making. The claimant knew that if she had told her manager she was returning to work she could avoid dismissal, because that is exactly what had happened, when a return to work had been intimated by her union in July 2018.

29. On 9 November 2018, the claimant appealed her dismissal. On 10 November 2018, the claimant presented her claim to the employment tribunal.

30. Her appeal was heard by Ms. Adele Walker (Cluster Manager) on 4 December 2018. Ms. Walker considered all the matters the claimant wished to raise. The claimant again chose to focus on the written warning and her withdrawn grievance rather than try to persuade Ms. Walker that she could return to work and wanted to return. Ms. Walker carefully considered the appeal before dismissing it. She concluded that Mr. Broderick had acted responsibly and properly based on the information he had and that all procedures had been properly followed. She provided a detailed outcome letter dated 18 December dealing with each point raised by the claimant in her appeal.

Applicable Law.

31. A potentially fair reason for dismissal relates to capability (section 98(2)(a) Employment Rights Act 1996. Capability in relation to an employee includes capability assessed by reference to 'ill-health'.

32. If, as in this case the employer has shown that capability was the reason for dismissal then section 98(4) applies to decide the fairness of the dismissal for that potentially fair capability reason. The section requires that:

> "*the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*
>
> *a) depends on whether in the circumstances (including the size and administrative resources of the employers 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.*

33. It is not for the Tribunal to substitute its view for the employer but to review the reasonableness of the employer's decision. The question for the employment tribunal is whether the decision to dismiss fell within the band of reasonable responses, which is to say that a reasonable employer may have considered it sufficient to justify dismissal (Iceland Frozen Foods-v- Jones 1983 IRLR 439 EAT).

34. Relevant factors to consider in determining the fairness include whether the employer has consulted with the employee about their ill-health, the effect this has on their ability to do their job, how this might change in the future and any alternative role the individual might undertake instead (East Lindsey District Council -v- Daubney 1977 IRLR 181 EAT). Also, consideration of the prognosis (current level of fitness/likely future level fitness), what can be done to get the employee back to work, an employee's refusal to cooperate and whether the employer can be expected to wait any longer for the employee to return.

Conclusions

1. The claimant's dismissal was for a potentially fair reason (ill-health capability) after an absence of 11 months for 'work related stress' with no prospect of a return to work at the time the decision was made. The reason why there was no prospect of a return to work date at the time of dismissal was because the claimant's return to work was conditional on her getting a favorable response to her solicitor's letter of complaint of the 30 June 2018. The respondent's legal department's response to that letter was not the favorable response the claimant wanted because the respondent did not agree with the claimant's solicitor's assertions or demands.

2. The claimant had made her position very clear to her manager Lisa Gayton, who was doing everything she could do to get the claimant back to work. Her manager had been supportive during the KIT discussions in September and October 2018. She agreed to make all the reasonable adjustments requested by the claimant. She agreed a phased return to work, adjusted duties with a new team/team leader and drew up a detailed back to work plan. If the respondent did not want to help the claimant get back to work, none of those steps would have been taken. A great deal of time and resource had been spent by

the respondent during the claimant's absence to try to help the claimant get back to work.

3. Without the claimant's cooperation and a genuine desire on her part to return to work that effort was wasted. There was a continuing failure by the claimant in the '11' month absence period to complete a stress risk questionnaire which would have helped the respondent complete a stress risk assessment. The claimant also refused mediation in circumstances where she had chosen to withdraw her grievance. Her position after her solicitor's letter of 30 June 2018 became even more entrenched. She decided that unless she had the outcome she wanted to resolve her complaint, there was no prospect of a return to work. Mr. Broderick identified in his rationale that the consequence of that decision was that there was no real prospect of a return to work after such a lengthy absence, so how much longer could the employer be expected to wait.

4. Mr. Broderick considered all the relevant information before reaching his decision. He was not quick to move to dismissal delaying his decision from the referral on 19 March 2018 to dismissal on 7 November 2018. He delayed his decision in June 2018 because the claimant intimated (via her union) a return to work in July 2018. If the claimant had returned to work that would have been the end of the process. He delayed again to await the outcome of the grievance raised by the claimant against Mr. Phillips for referring the claimant to a decision maker and he delayed again for an outcome on the claimant's solicitor's letter. Those delays ensured fairness to the claimant and allowed the claimant more time for a return to work before a decision was made.

5. Mr. Broderick properly and reasonably made the decision to dismiss the claimant based on a review of the up to date position having satisfied himself that all reasonable steps were taken by the manager to help the claimant back to work. His decision falls within the band of reasonable responses open to a reasonable employer in those circumstances. A lengthy absence of 11 months and no return to work likely in the foreseeable future. The claimant did not have a further meeting with Mr. Broderick before her dismissal but that did not make the dismissal decision unfair. The claimant had already had one meeting when a decision to dismiss could have been made. She knew a decision following that meeting was being delayed and the reasons for the delay. She knew her manager was providing information to the decision maker and that the information provided was accurate. Furthermore, the appeal process gave her another opportunity of having a meeting where she could say whatever she wanted to say before an appeal decision was made. She did not use that opportunity to contradict anything her managers had recorded her saying previously or more importantly to offer a date for a return to work.

6. Ms. Walker at the appeal stage explored all the areas raised by the claimant in her appeal. Nothing changed between dismissal and the appeal. It is open to a reasonable employer still faced with these circumstances and no prospect of a return to work, to uphold the decision to dismiss. By the appeal stage the claimant had started the

tribunal process. The reality was that the claimant was unable to accept that decisions properly made by the respondent (to issue her a written warning for her unauthorised absence and to accept her decision to withdraw her grievance). Her attempt to challenge those decisions via her solicitor failed, and the claimant was unable to accept that outcome. That was why she sought to challenge those decisions using the tribunal process. The claimant has however ignored the fact that it was her conduct in withdrawing her grievance that resulted in that process ending and her conduct in leaving work without permission that had resulted in a warning.

7. Mr. Broderick at dismissal and Ms. Walker at appeal followed a fair procedure and acted reasonably in dismissing the claimant and upholding the dismissal on appeal. Having regard to the requirements of section 98(4) and the findings of fact made I was satisfied the decision to dismiss was fair and falls within the band of reasonable responses. The complaint of unfair dismissal therefore fails and is dismissed.

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Employment Judge Rogerson

3 February 2020