EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 41113109/2018

Held in Glasgow on 12,13 & 14 December 2018

Employment Judge Shona MacLean

Ms B Hastie — Claimant
Represented by:
Ms L Jones
Solicitor

McAlpine & Company Limited — Respondent
Represented by:
Mr R Turnbull
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's unfair dismissal claim is dismissed.

REASONS

Background

1. In the claim form sent to the Tribunal's office on 3 August 2018, the claimant claims unfair dismissal. She says that there was no fair reason for dismissal; dismissal was not within the band of reasonable responses; and the process was unfair. The claimant seeks compensation.

2. In the response, the respondent denies that the claimant was unfairly dismissed. The respondent says that the claimant was dismissed for a fair reason in terms of section 98(1) of the Employment Rights Act 1996 (the ERA) being capability and/or conduct in terms of section 98(2) of the ERA. The

respondent says the claimant's dismissal was fair and reasonable in the circumstances of the case and in accordance with section 98(4) of the ERA. However, the respondent argues that if the dismissal was unfair, the claimant would have been dismissed in any event and seeks reduction in any compensatory award and any compensation awarded should be reduced to reflect the claimant's contributory conduct.

3. The Tribunal heard evidence from Jim Graham, former General Manager. The claimant gave evidence on her own account. The parties produced a joint set of productions and very helpfully prepared an agreed statement of facts.

4. The Tribunal has set out the facts as found that are essential to the Tribunal's reasons or to an understanding of the important parts of evidence.

5. The representatives prepared written submissions. The Tribunal has summarised the submissions and dealt with the points made when setting out the facts, the law and the application of the law to those facts.

6. The Tribunal's approach during its deliberations was to consider the issues that it had to determine which were as follows:

   a. Was the reason for the dismissal a potentially fair reason in accordance with section 98 of the ERA?

   b. If so, did the respondent act reasonably in treating such a reason as a sufficient reason for dismissing the claimant?

   c. What remedy if any should the Tribunal award?

Findings in Fact

7. The respondent is a company that manufactures plumbing products.

8. The claimant was employed by the respondent from 5 November 1995 to 13 April 2018. Her role was as a General Operator in the respondent's factory at Hillington, Glasgow.

9. Until July 2018 Jim Gibson was General Manager at Hillington. John Gordon was Assistant General Manager. The claimant was managed by Brian Patterson, Production Manager. The respondent also has factories in Johnstone and Thornliebank where Steven Beech and David Lang are General Managers respectively.

10. The respondent has a company handbook which contains its disciplinary procedure; disciplinary rules; absence/timekeeping/holiday rules; harassment policy and grievance procedure (the Handbook). The Handbook was developed in consultation with the respondent's recognised trade union, Unite.

11. The respondent's employees, including the claimant confirmed by signing a document, when collecting a copy of the Handbook, that they had received a copy.

12. In 2014 the claimant raised a grievance which Mr Gordon investigated. The outcome of the grievance was outlined in a letter dated 14 October 2015. The claimant was given a right to appeal that decision. She did not appeal. This grievance was not raised by the claimant during any subsequent proceedings in which she was involved nor was it considered by Mr Graham.

13. The Handbook contains a disciplinary procedure. It allows warnings of more than the "usual" 12 months to be issued in some circumstances and indefinite warnings for situations verging on gross misconduct. It provides that the next stage of the process after a final written warning may be dismissal. It also provides that an employee's *"conduct may be reviewed at the end of a warning's active period and if it has not improved sufficiently (or there have been other performance, timekeeping or attendance matters, whether raised formally under this procedure or otherwise) we may decide to extend the active period."* It sets out the right of an appeal against any disciplinary action.

14. The Handbook also contains absence rules which state: "*The following absence levels will normally trigger investigative action by the Company and will normally involve following the Disciplinary Procedure:*

Number of absences:
2 absences in a rolling 5 week period.
3 absences in a rolling 13 week period.
4 absences in a rolling 26 week period.
5 absences in a rolling 52 week period.
Or
Total Number of days:
20 days in a rolling 13 week period.
30 days in a rolling 52 week period.
Patterns of absence will also be monitored and an identified pattern may result in action being taken under the Disciplinary Policy."

15. On 8 February 2017, the claimant was involved in an incident where she had climbed inside a cardboard box and moved along a conveyor belt to jump on a colleague which created a health and safety risk. An investigation was carried out by Brian Patterson following which the claimant was invited by letter to a disciplinary hearing. The claimant was told that the allegation may be considered gross misconduct and a possible outcome was dismissal.

16. Mr Graham conducted the disciplinary hearing on 9 March 2017. The claimant was accompanied by a union representative. Notes were taken. The claimant accepted that her conduct, which was intended as a joke, created a health and safety risk. She did not challenge the evidence produced; and expressed remorse.

17. By letter dated 16 March 2017, the claimant was given a final written warning. Mr Graham wrote that the risk to health and safety was serious. He considered dismissal but given that she admitted to the misconduct, recognised the health and safety risk, expressed remorse, had a clean

disciplinary record and had significant length of service he believed that a final written warning was sufficient. However, he had concerns; the claimant could not be supervised for the duration of every shift and had to be trusted to behave appropriately when not being closely supervised; as he had doubts about the claimant's conduct or judgment Mr Graham decided to impose a final written warning for the period of 18 months. The final written warning expired at the end of the claimant's shift on 15 September 2018. The letter stated that "*if there is any misconduct while the warning remains live (including breaches of absence reporting policies or absence trigger points) then you may be dismissed even if that misconduct would not have otherwise, on its own, justified dismissal.*" The letter also stated that the claimant was entitled to appeal against this decision within one week.

18. The claimant knew that she had the right of appeal. She decided not to so after speaking to her trade union representative. The claimant did not appeal against this decision nor did she discuss the sanction with Mr Graham at the time or subsequently. As far as Mr Graham was aware the sanction was uncontested and fair in the circumstances.

19. On 23 March 2017, the claimant was scheduled to attend work at 10:55 but did not arrive until 16:02 because of a fall. She left work at 19:04 that day rather than 21:20. This was a single absence of a day.

20. On 16 May 2017, the claimant left work at 14:50 rather than her scheduled end time of 21:20, reporting that she was suffering from sickness and diarrhoea. This was a single absence of a day.

21. On 5 June 2017, the claimant did not attend work, reporting that she was suffering from a sickness bug. This was a single absence of a day.

22. By 5 June 2017, the claimant had been absent, three times in 13 weeks. Normally this would have triggered investigative action under the disciplinary procedure. Mr Graham was informed of the trigger point and the reasons for

the absences. He knew that if there was investigative action it was likely that the claimant would receive a first written warning. He was aware that the claimant was already subject to a final written warning. Mr Graham decided to take no action.

23. On 28 August 2017, the claimant did not attend work, reporting that she had tooth problems and had to attend an emergency dental appointment. This was a single absence of a day.

24. By 28 August 2017, the claimant had been absent, four times in less than 26 weeks. A further trigger point was hit. Mr Graham was again informed of this and the reasons for the claimant's absence. For the same reasons, as before Mr Graham did not take any action.

25. The claimant did not attend work between 8 and 11 January 2018, reporting that she had "*viral flu*" and a sickness bug. This was a single absence of four days. The claimant had, including this absence, been absent five times in less than 52 weeks. Again, Mr Graham did not take action for the same reasons as before.

26. On 14 February 2018, the claimant did not attend work, reporting that she had been in a car accident. This was a single absence of a day.

27. Between 21, 22, 26 to 28 February, 1, March 2018, the claimant did not attend work, reporting that she had neck pain as a result of a car accident. This was a single absence of six days.

28. The claimant was also absent between 5 and 8 March 2018.

29. On 12 March 2018, the claimant attended a return to work (RTW) interview with Julie Tannahill, HR Business Partner. The claimant explained that following the car accident she had returned to work but was experiencing "*agony in her neck and shoulders so had to go off sick*". She had attended her

doctor and was now fit to return to her duties. The claimant had prearranged leave between 14 and 20 March 2018.

30. Following the RTW interview Ms Tannahill recommended investigative action on the claimant's return from leave due to repeated unrelated absences over the last 52-week period that had cause a breach of "five in 52" per the Handbook.

31. There were other absences in this time which had been pre-arranged or treated as such because of the claimant's personal circumstances. Of those absences which remained, Mr Graham did not take action as quickly as the Handbook permitted or as he might have been done in some cases because of the final written warning issued to the claimant.

32. By letter of 22 March 2018, the claimant was invited to attend an investigation meeting. The respondent's allegation was that she had "*unacceptable absence level over the last 12 months from 23 March 2017 to 23 February 2018*".

33. At the investigation meeting on 26 March 2018, Ms Tannahill asked the claimant about the following absences which were being taken into account:

a. 23 March 2017: the claimant said that she had fallen when pulled by her dog while taking it for a walk. She had gone to the hospital and had cracked ribs and difficulty breathing. She had come into work but had to go home.
b. 16 May 2017: the claimant said that she could not remember this absence but if her form said she had sickness and diarrhoea that was genuine. Ms Tannahill said that her absences being genuine was not in dispute.
c. 5 June 2017: the claimant's form said sickness bug. She could not remember the absence so had nothing to add.
d. 28 August 2017: the claimant had tooth problems and had to attend an emergency appointment. She explained that she had lost a veneer and had a space in front of her mouth. The claimant telephoned the dentist but

could not be seen until the following day. She did not want to go into work with a gap in her mouth as she would not be able to talk or smile.

e. 8 to 11 January 2018: the form said that the claimant had "*viral flu*" and a sickness bug. The clamant said that she was "*totally ill on this occasion and had hallucinations*".

f. 14 February 2018: the claimant had a car accident. She said that she was traumatised and in a state.

g. 21, 22, 26, 27 and 28 February 2018: the claimant had neck pain. She said that she had gone off work again because she was in agony and was still struggling with muscular pain.

34. Ms Tannahill explained that no formal action had been taken previously but the claimant's absence over the last 12 months was being considered. The claimant asked why action had not been taken at the time and why now. Ms Tannahill explained that a lot of the claimant's absences had been discounted, which was fair but the claimant's absence over the last 12 months was being considered. The claimant was asked if there were any underlying health issues affecting her absences. The claimant said that there was not. She referred to depression and having time off to go to appointments. Ms Tannahill explained that these had already discounted. The claimant confirmed that there were no personal or work issues affecting her attendance at work and there was nothing that the respondent could do to improve the claimant's attendance. The claimant said that she would not be taking time off unless she really needed to. She did not get paid when she was off. She hoped not to get unwell in the future and was only off work when necessary.

35. Ms Tannahill prepared an investigation report dated 29 March 2018 in which the conclusion was that the claimant had breached the trigger points by (among other breaches) having five absences in 52 weeks and had had further absences since that breach. Ms Tannahill recommended that under the Handbook the claimant should be invited to a disciplinary hearing. Ms Tannahill's role was confined to advising on procedure, conducting

investigations and typing notes. She did not make any decisions. Only managers made the decisions.

36. On 9 April 2018 Mr Graham wrote to the claimant inviting her to a disciplinary hearing on 11 April 2018 to consider her attendance record. The letter explained that although there was no suggestion that her absences were not genuine the respondent monitors absence and considers taking action under the disciplinary procedure when certain trigger points are met. Enclosed within the letter were:

a. Spreadsheet showing the absences over the past 12 months.
b. Completed sickness absence forms.
c. Notice of the investigation meeting.
d. Minutes of the investigation meeting.
e. The investigation report.

37. The letter also explained that in addition to absences listed which hit various trigger points the claimant had had further absences and therefore it was now time to consider disciplinary action because of her level of attendance. The claimant was advised of her right to be accompanied and if the claimant had anything she wished to contribute she could do so at the disciplinary hearing. The letter concluded, "*You were issued with a Final Written Warning on 16th March 2017 which is still current. This means that this meeting may result in Dismissal*".

38. As the claimant had a prior personal appointment, the disciplinary hearing was re-arranged to take place later on 11 April 2018.

39. Mr Graham chaired the disciplinary hearing. Ms Tannahill took notes. The claimant was accompanied by Julie Wright, Union Representative.

40. The claimant said that her absences were genuine. Receiving the "*threatening letter*" made her ill. Mr Graham clarified that the letter to which the claimant was referring was the letter of 9 April which Ms Wight said was, "*a bit harsh*".

Mr Graham explained that it was the case and the letter had to detail the absences being considered and the potential outcome. The claimant questioned why she had not been pulled up about her absences in the past. Mr Graham explained that lots of previous absences had not been taken into consideration in the five in 52 weeks. More than seven absences had been discounted and Mr Graham had not any taken any action until now. The claimant reiterated that she cannot help being ill and did not take time off as it has a financial impact. This was making her ill and she had not slept and had been sick. There was never a problem with her absences and she did not take time off lightly.

41. By letter dated 13 April 2018 Mr Graham advised the claimant of the decision to dismiss her on 13 April 2018 with a payment of £3719.32 in lieu of notice and holidays accrued but not taken.

42. The letter set out that the outcome of the claimant's unacceptable level of absences had resulted in a written warning. As the claimant already had a final written warning on her record this resulted in her dismissal.

43. The absences taken into account were the ones set out in paragraph 33 above. Mr Graham acknowledged that the claimant did not have any warning in relation to her attendance but referred to the wording of the live final written warning. Accordingly, he considered that it was appropriate to take it into account.

44. Mr Graham acknowledged that the absences were genuine and had regard to the claimant's length of service. He also considered whether an alternative to dismissal was appropriate. He noted that he had already avoided taking action in relation to earlier breaches of trigger points given the potential outcome might have been dismissal. Mr Graham therefore felt that it was reasonable and appropriate to take action at this stage and significant and sufficient latitude by not taking action previously. He also thought that there was unlikely to be any improvement.

45. A copy of the disciplinary hearing notes was enclosed in the letter. The claimant was advised of her right of appeal.

46. By letter dated 17 April 2018 the claimant appealed against the decision to dismiss her. The grounds of appeal were:

a. There was insufficient consideration given to the claimant's explanation for her absences.
b. It was too harsh a penalty.
c. Her previous disciplinary record was clear and consideration should be given to imposing a lesser penalty than dismissal.
d. Mr Graham should not have taken the previous warning into consideration as it was more than 18 months old.
e. The claimant has long service which should be taken into consideration.

47. On 19 April 2018, the respondent invited the claimant to attend an appeal hearing to take place on 26 April 2018, chaired by Steven Scott, General Manager of the Coatbridge factory and David Lang, General Manager of the Thornliebank factory. The claimant was advised of her right to be accompanied.

48. On 24 April 2018, the claimant's representative requested another member of staff chair to the appeal hearing on the grounds that Mr Scott would not be impartial.

49. On 26 April 2018, the appeal hearing took place. It was chaired by Steve Beech, General Manager of the Johnstone factory, instead of Mr Scott. Mr Lang, General Manager, was also present as part of the appeal panel. Ms Tannahill took notes. The claimant was accompanied by Mr McGurk of Unite.

50. By letter dated 3 May 2018, the claimant was advised of the decision not to uphold her appeal. The letter enclosed the notes of the appeal hearing. The letter set out the reasoning of the appeal panel. It concluded:

"*In summary, we considered that it was fair to take account of the Final Written Warning as it was current at the time, the absences in question all occurred within 12 months of that warning being issued, the warning and the Handbook both make clear that it could be taken into account in attendance cases (and we did not accept your assertion that you did not realise that fact), you did not appeal against the warning and the company did delay before proceeding with the next stage of the disciplinary process in recognition of the impact of the warning.*

The Handbook which had been drafted in consultation with Unite provides that the next stage in the process after a Final Written Warning may be dismissal; given that the company paused considerably before taking the next step, dismissal was reasonable. As discussed, we have considered alternatives to dismissal but do not believe they are appropriate in all the circumstances, as sufficient latitude has already been shown. You appear to accept that your attendance record merited a formal sanction. We believe that you were aware of the potential consequences of reaching trigger points and, well in advance of action being taken, must have been aware that your absences had reached some sort of trigger points.

Therefore, while we have sympathy with your personal circumstances and recognise your length of service, we consider that sufficient consideration has already been given to that. Overall the process culminating in the decision to dismiss and the decision itself were fair".

51. At the termination of her employment the claimant was 49 years of age. She had been continuously employed by the respondent for 22 years. Her gross weekly wage was £508 which equated to £424 net pay. The claimant received pay in lieu of notice of £3,710.32.

52. The claimant was in receipt of benefits following the termination of her employment. She had been unable to look for alternative employment as she has been unwell.

Observations on witnesses and conflict of evidence

53. The Tribunal considered that Mr Graham gave his evidence honestly and candidly. Mr Graham and the claimant had a good working relationship. The Tribunal's impression was that Mr Graham was very supportive of and sympathetic to the claimant. He did his best to avoid the claimant facing investigative action and it was with reluctance that he reached the decision that he did. The Tribunal was satisfied that Mr Graham reached his own conclusion; neither Ms Tannahill or Mr Gordon were involved in the decision making.

54. The Tribunal considered the claimant's evidence was at times confused and unreliable. The claimant referred to bullying and harassment allegations or a breakdown in the relationships with senior managers. The incidents to which she referred were historical and related to a former supervisor to whom she no longer reported. While Mr Gordon had investigated the claimant's grievance it appeared to have be resolved satisfactorily and his involvement in the absence procedure was administrative. Mr Patterson was also involved in the claimant's absence management process as she would speak to him about the reasons for her absence and organise any prearranged absence. Again, the Tribunal's impression was that the claimant had a good working relationship with Mr Patterson.

55. Mr Graham said that employees received the Handbook and were trained on the absence policy. He was informed when employees absences reached trigger points and it was an option to take action. The claimant said that she was aware of there being absence triggers. It stuck in her mind that two absences in a rolling five-week period was a trigger. She was aware of other colleagues being spoken to about their attendance. However, it was common practice for the respondent to ignore the Handbook policies.

56. The Tribunal appreciated that the claimant might not know all the trigger points. However, she knew of them and had access to the Handbook. The

claimant followed the absence report procedure and knew how to organise pre-arranged absences. The Tribunal therefore considered that the claimant must have been aware the number of absences she had and had breached some trigger points.

57. The claimant inferred that she had been advised not to appeal the final written warning by one union representative and to appeal by another. However, she decided not to do so. In the Tribunal's view while the claimant did not personally know the first union representative, she was a union representative from another factory who would have been familiar with the procedures and the effect of the sanction. The claimant received advice at the time about appeal and she chose not to do so. There was no suggestion at the time or indeed when Mr Graham took the decision to dismiss that the final written warning was challenged.

58. Mr Graham said that he was aware of the claimant's personal circumstances and took account of them by classing then as pre-arranged absences. The claimant gave evidence about her absence on 23 March 2017 being related to an assault. It was inferred that Mr Graham knew this although it was not specifically put to him. This was the first occasion that the claimant has suggested that the absence was for a reason other than falling when taking her dog for a walk. The Tribunal could understand the claimant's reluctance to mention this to Ms Tannahill but found it strange that the claimant did not refer to this during the disciplinary hearing especially since Mr Graham readily discounted the claimant's absences if he felt able to do so.

The claimant also said that had she known that her absence was of concern should she would have thought twice about taking time off on 28 August 2017 for tooth problems. The claimant's evidence was that when this absence was reported to Mr Patterson it was treated jovially, he referred to her as Steptoe. Mr Graham was aware that the claimant had tooth problems and had to attend an emergency dental appointment. Despite having an opportunity to elaborate on the circumstances with Ms Tannahill and Mr Graham the claimant did not do. It was not put to Mr Graham whether this

absence could have been treated by him as anything other than sick absence.

59.

60.

Submissions

The Respondent

61. The claimant brings a claim for unfair dismissal. The respondent invites the Tribunal to dismiss this claim. The respondent contends that the evidence in this case establishes the dismissal was fair.

62. The respondent's position is that it was fair to take into account the final written warning for conduct because:

a. The respondent told the claimant that it would; and it is in the Handbook.

b. The claimant did not appeal against the respondent's clear statement in the final written warning that that the respondent would do that.

c. That final written warning, and its strict nature, has to be viewed against its background i.e. that she was lucky to avoid dismissal.

d. It can be fair to take into account conduct as one factor when assessing capability/suitability for continued employment; and

e. But for the warning for conduct, the claimant would still have been dismissed and so no unfairness arises from the respondent adhering to the terms of the warning and the Handbook.

63. From the evidence, the respondent has discharged its obligations under section 98(1) of the ERA. The reason for the claimant's dismissal was primarily her capability, which is a potentially fair reason for dismissal in terms of section 98(2)(b) of the ERA.

64. Mr Graham's evidence was that he dismissed the claimant on the grounds of her absences; that concerns the claimant's capability. There was no question in his mind that the claimant had committed misconduct when she had been absent.

65. The conduct final written warning was only relevant to the dismissal in respect of the respondent's procedures adopted and as part of the round of all the circumstances considered by the respondent. Conduct, to the extent that it was considered and relied upon by the respondent, is, in any event, also a potentially fair reason for dismissal. There were no other reasons for dismissal.

66. The next question for the Tribunal is whether the respondent's decision to dismiss the claimant and the procedure by which the decision was reached fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business, might have adopted in accordance with section 98(4) of ERA?

67. The "Burchell" (*British Home Stores Ltd* v *Burchell* (1978) IRLR 379) principles of fairness apply to ill health dismissals (see *DB Schenker Rail (UK)* v *Doolan* (2010) UKEAT/0053/09). A dismissal on grounds of capability relating to ill health will be fair, if, at the time of dismissal (a) the employer held a genuine belief that ill health was the reason for the dismissal; (b) the employer had reasonable grounds for holding that belief; and (c) at the time it held that belief, it had carried out as much investigation as was reasonable

68. Under the section 98(4) test, the Tribunal may view an employer's decision to dismiss as harsh but it will nevertheless be fair. For the decision to dismiss to be unfair, it effectively has to be a decision that no employer, acting reasonably in the circumstances, would have taken (see *Chubb Fire Security Ltd v Harper* (1983) IRLR 311and *Dundee City Council v Sharp* UKEATS/0009/11/BI).

69. Mr Graham genuinely and reasonably held the belief that the claimant was not capable of achieving or maintaining the required standard of attendance going forward, in circumstances when she was on a final written warning. He was justified in coming to that view given the investigation which had been

carried out by Ms Tannahill and the fact that the claimant had not appealed the final written warning, had admitted to the conduct that led to that warning,

70. It was legitimate for Mr Graham to rely on the final written warning. It was issued in good faith; there were prima facie grounds for imposing it; and it was not manifestly inappropriate to have issued it (see *Stein v Associated Dairies Ltd* [1982] IRLR 447 at paragraph 7 approved in Tower Hamlets Health Authority [1989] IRLR 394 CA; *Simmonds v Milford Club* UKEAT/0323/12, paragraph 20). This is not a case where it would be appropriate to open it up and identify whether that warning was appropriate.

71. The claimant suggest that it was unfair to rely on the final written warning when absence became unacceptable. There is no authority for that. What authority there is though is that a Tribunal should take into account *all* of the circumstances, as outlined in section 98(4) of the ERA.

72. It cannot be the case that no reasonable employer would have dismissed the claimant having had regard to all the circumstances. It is well established that an employer when setting a conduct or performance warning can take into account a range of factors, likewise for a fair reason for dismissal.

73. Can capability too not take into account a range of factors which, when viewed together, demonstrate an inability to perform to the standards required? The use of range of factors to measure “performance” or capability is normally in a performance management process and that is fair where individuals are made aware of the factors being monitored. So, in this scenario, her conduct (for which she was on a final written warning) together with her absences (for which she was given a warning) demonstrated an overall inability to perform.

74. She was well warned that her attendance would be taken into account when considering her “performance” during the period of the final written warning (and she chose not to appeal against that position). That warning, given the circumstances at that time was a generous outcome to her –and so it was

reasonable for the respondent to rely upon that generous outcome in the future when triggers were met. This holistic measurement of her performance or capability is not unfair when it is consistent with the Handbook and when she was well warned of that (and had been lucky to escape a misconduct dismissal previously).

75. The disciplinary record is commonly considered as part of considering whether dismissal is appropriate. The relevance of a final written warning for conduct to the subsequent attendance issues was articulated in the final written warning for conduct itself, in which she did not appeal. It stated that "*if there is any misconduct while the warning remains live (including breaches of absence reporting policies or absence trigger points) then you may be dismissed even if that misconduct would not have otherwise, on its own, justified dismissal.*" These conditions were consistent with the Handbook, which had been agreed following consultation with the recognised Trade Union, Unite. The letter made clear that the claimant was entitled to appeal against this decision within one week, and she did not do so.

76. Separately, even viewing her attendance alone, Mr Graham was of the view that it was not going to improve and, but for the final written waring, she would be dismissed for that alone. Accordingly, even viewing absences alone, the claimant was not capable of "performing" to the standards expected (which are set out in the Handbook)

77. There has been no breach of the Acas Code of Practice or the Handbook. It was not usual or a normal case – the claimant was on a final written warning throughout this period. The respondent did not rush to dismiss the claimant. On the contrary, it delayed taking action against the claimant until the impact of her absence on the company made it no longer appropriate. The respondent was conscious of her circumstances, and chose to exercise discretion where, after a year of doing so, she was still being absent, still unsatisfactory attendance, and the picture looked like that would continue.

78. Mr Graham described the extension of trigger points, showing leeway for those with underlying conditions or disabilities as common. But when it came to absences which did not relate to such issues, it was not. The claimant was given more leeway than normal even by completely discounting underlying conditions, disabilities or assault. Even the claimant accepted that the lack of action was in her favour and Mr Graham had been sympathetic towards her prior to her dismissal.

79. It was futile to have given the claimant any warnings. It cannot be a matter of unfairness because she said she could not change her behaviour, she wanted to be in work, it was financially worse for her. So, what else is there to suggest that the respondent ought to have given her warnings? There was nothing to alert the claimant that would have been worthwhile that had not already been within her knowledge. Even if she was given a warning, she would have been in the same position.

80. If the respondent was wrong and the claimant's ought to have been given warning on the trigger point, then she would have been given a warning, and then on the next breach, she would be given a final written warning, and then the next trigger point would lead to dismissal. Her absences alone warranted dismissal through escalating the warnings. And we have heard the only reason why this did not happen was because of her final written warning. That is not just relevant for deciding whether a fair process was followed, but it is also relevant to whether the dismissal is fair in all the circumstances. So even if the Tribunal considers that the respondent was wrong in its approach, she would have been dismissed anyway, then surely it is fair to dismiss her.

81. Mr Graham took the claimant's mitigating circumstances into account, but still decided dismissal was appropriate. Mr Graham considered the claimant's overall disciplinary record and length of service.

82. The decision to dismiss falls within the range of reasonable responses. By the appeal hearing there was no dispute that (a) the claimant's absences were

genuine and necessary; and (b) some form of action under the disciplinary policy was required.

83. By the decision to dismiss, the clamant had developed an absence pattern which in itself would resulted in dismissal. But for the final written warning, her absences alone were sufficient to dismiss the claimant and she would have been dismissed. That, in all the circumstances, must be relevant in considering whether the dismissal is fair. And while the Tribunal may be tempted to form the view that the respondent could have supported the absences longer, the way that the respondent chose to deal with the case was not unfair nor was it outwith the band of reasonable responses in all the circumstances of the case in light of the final written warning and its conditions. It was not reasonable to do so in light of there being no apparent change in her ability to maintain satisfactory attendance.

84. The respondent recognises that dismissal is a significant step to take and we have heard that Mr Graham considered alternatives to dismissal. He considered that an extension of the final warning period would not have been appropriate in the circumstances given the very serious nature of the conduct which amounted to various examples of gross misconduct as detailed in the disciplinary policy contained in the Handbook. More importantly, he considered that that was not appropriate because he did not think that would result in improvement in the absences in the future, and the level of absences were unacceptable to the respondent.

85. It cannot be said that no reasonable employer would not have taken into account a final written warning, where such an approach had been agreed in consultation with Unite, the recognised trade union. Also, the respondent applied its discretion in taking action and did not rush to dismiss in circumstances where, by the time of the decision, her absences alone warranted dismissal. Dismissal is entirely appropriate and within the band of reasonable responses.

86. The respondent has shown that it sought to investigate the claimant's complaints and concerns, and it took reasonable steps to consult with her. Ms Tannahill established the facts. Her recommendation concerned a disciplinary meeting. The claimant could have provided further information or said something different, and indeed, it may have resulted in a different outcome had she said her absences were related to a domestic dispute or depression, or some other mitigation. This was not a foregone conclusion at the investigative meeting or disciplinary hearing stage. The trigger points had agreed with Union and Mr Graham knew the impact from them from his own experience as manager. The trigger points were designed to demonstrate when there is a concern for the respondent with an individual's absences and he was entitled to be guided by them.

87. It was also quite reasonable for Mr Graham to consider likely future absence based on past absence. That did not need further investigation. It was never put to him that he ought to have. In light of all the circumstances, it was within the range of reasonable responses not to have explored this further, bearing in mind that an employer's duty is to carry out a reasonable investigation and it is not to leave no stone unturned (*Sainsburys Supermarkets Ltd v Hitt* [2003] IRLR 23).

88. Holding the investigation and issuing warnings earlier would have been futile. Not doing so was consistent with the Handbook. What the Tribunal must consider is fairness in all the circumstances. There is nothing that an additional formal meeting, warning, investigation would have achieved in these circumstances where the absences were genuine. The respondent's investigation and consultation was within the band of reasonable responses.

89. Mr Graham was clear that he had no involvement in the appeal process. When asked, he said he had overturned and his own decisions had been overturned. The appeal addressed each point raised by the claimant and further added to the reasonableness and fairness of the dismissal.

90. It is therefore submitted that the respondent reached the decision to dismiss after a reasonable investigation, following a fair procedure in all the circumstances. The Tribunal is invited to find that its dismissal of the claimant was fair in terms of section 98 and should dismiss the claimant's claim.

91. If the Tribunal needs to consider remedy the Tribunal was asked to consider a *Polky* reduction and a reduction for contributory fault.

The Claimant

92. The claimant claims unfair dismissal in respect of the respondent's decision to dismiss her on 13 April 2018. She seeks compensation for unfair dismissal.

93. The claimant was dismissed following disciplinary proceedings raised as a result of alleged unacceptable levels of absence. The respondent dealt with alleged unacceptable levels of absence as a conduct issue. This is unusual, although it was in line with the Handbook. Mr Graham accepted that it was seen by him as a capability issue, rather than a conduct issue.

94. There was no evidence that the claimant's absences were not genuine or that she did not follow absence reporting procedures. This would generally suggest that her absences should have been dealt with as a capability issue. It was dealt as a conduct issue because of the terms of the Handbook.

95. The respondent acted unreasonably in dealing with the absences as a conduct issue, even if this was the respondent's policy as set out in the Handbook. In the section of the Handbook relating to misconduct breaching absence trigger points is not listed as a matter normally dealt with under misconduct.

96. The way in which the respondent chose to follow and implement the Handbook was inconsistent. It did not follow its own rules in connection with convening RTW Interviews. In the Handbook, the absence policy states that it is there to encourage the employees to do what they can to improve their absence levels. The respondent was inconsistent when applying the absence

procedure relating to trigger points with the claimant. It did not alert her to trigger points being breach despite Mr Graham receiving such alerts throughout 2017 and 2018.

97. The claimant was aware of there being absence triggers. She admitted that she did not study the Handbook religiously. However, she was aware of absence triggers. In particular she knew that two absences in a rolling five-week period was a trigger. This stuck in her mind. However, it was common practice for the respondent to ignore the Handbook policies. Mr Graham chose not to raise the breach of trigger points with her.

98. The claimant was first alerted to concerns about her absence levels at the disciplinary investigation. This led to her dismissal. She was denied the opportunity to improve her absence levels. Mr Graham's evidence is that he did not see how she could improve her absence levels as they were beyond her control, but this was speculation as he had not discussed these absences with the claimant. The claimant said that had she known there was a concern about her absences, she would have taken this into account. She particularly stated that she would have thought twice about taking time off on 28 August 2017 for tooth problems. The claimant's evidence was that when this absence was reported to Mr Patterson it was treated jovially, he referred to her as Steptoe. Having never been invited to a RTW interview she was never asked to explain her absences and never warned of likely consequences of further absences. The claimant stated that she loved her job and her colleagues. Her job was her lifeline. She did not know she was in a position where she could lose her job. She would have dragged herself to work if she was able to. It is noted in the RTW interview minutes, that she returned to work after her accident whilst still in some pain. The claimant did not take her absences lightly.

99. At no time throughout 2017 until March 2018 did the claimant have any reason to believe her absences were a concern. The respondent picked and chose when to apply their own absence policy. Some colleagues were taken in and

spoken to about absences, some were not. The respondent was inconsistent when applying its policy, so it did not seem strange to the claimant that her absence levels were not raised with her. The claimant was denied an opportunity to demonstrate an improvement to her absence levels by the respondent's failure to raise its concerns with her earlier. It was too late by the time the investigation and disciplinary procedure commenced as this procedure led to her dismissal.

100. The only RTW interview the claimant was ever part of was on 12 March 2018, following a change in practice on or around 1 March 2018 in which there was no mention was made of other absences or trigger points. However, unbeknown to the claimant, there was a recommendation at the end of this RTW interview to proceed with a "disciplinary meeting".

101. The respondent's conduct and procedure is at odds with the ACAS Code on Discipline and Grievance. Best practice has not been followed in this case. There has been inconsistency in applying their own policies and inconsistence in treatment of difference employees in relation to absences. The claimant was not warned that her absences had been flagged up or that they were being scrutinised

102. It is submitted that the procedure adopted by the Respondent was unfair. Ms Tannahill was asked to look at the claimant's absences without her knowledge. Immediately following a RTW interview on 12 March 2018, Ms Tannahill recommended that the claimant be invited to a "disciplinary meeting". This was prior to any investigation having taken place.

103. The first opportunity the claimant had to address her absences was the start of the procedure which led to her dismissal, an outcome that Mr Graham said was inevitable in his evidence.

104. The absence on 23 March 2017 and 16 May 2017 were categorised as a part-day sickness absence. However, in the disciplinary process, they were categorised as a full day absence. This is an unfair.

105. The claimant was issued with a final written warning on 16 March 2018. It would expire in September 2018. The claimant believed the time period of the final written warning to be harsh. She did not appeal against the decision following advice from a union representative. This was not her usual union representative. However, her usual union representative returned to work and advised her she should have appealed against it. The claimant was experiencing difficulties in her personal life at this time and felt the easiest thing to do was to get on with things. In any event, the claimant felt that the final written warning would not affect her employment if she got through the 18-month period with no other conduct issues. Indeed, no other issues in respect of her conduct arose.

106. There is case law which supports the position that a final written warning can be taken into account when making a decision to dismiss, however these cases generally relate to conduct issues. There is no case law similar to the facts of this case, where a final written warning has been issued because of conduct, and a subsequent capability issue has arisen which leads to dismissal, where the final written warning is taken into account.

107. It was not reasonable to give weight to the final written warning for conduct when dealing with a capability issue, particularly when this was the first opportunity for the claimant to deal with the capability issue as part of a formal process. In applying an objective standard of the reasonable employer, the respondent did not act reasonably in dismissing the Claimant taking account the weight given to the final written warning (see *Bandara v British Broadcasting Corporation* [2016] UKEAT 0335_15_0906)

108. The decision to dismiss the claimant was not within the band of reasonable responses.

109. Bearing in mind that the Handbook was prepared alongside Unite, the Unite representative who advised the claimant and attended the appeal hearing stated that the decision to dismiss was harsh. The whole procedure from March 2018 onwards was the first opportunity, informally or formally, for the claimant to address her absences. It was the first time she was made aware that her employment was at risk. She had no notice before this process that her absence could result in her dismissal.

110. The respondent did not deal with the claimant's absences promptly or consistently rendering its decision to dismiss her on the first and only occasion her absences were raised outwith the band of reasonable responses.

111. The claimant had a long period of service and there was no evidence of any performance issues. There is evidence from the claimant that her absence levels would improve following this action being taken against her. There was no real evidence available of a substantial impact on the business of the claimant's particular absences. Indeed, the claimant had not been made aware of any impact from her colleagues at any time. She gave evidence that urgent jobs would already have been started by colleagues on an earlier shift than her and that she notified the respondent of her absence before work would normally be allocated at the start of her shift.

112. There were reasonable alternatives to dismissal. Whilst Mr Graham stated he had considered alternatives, he did not state what these were in his decision letter of 13 April 2018. The respondent could have chosen to impose no sanction. Although this may be unusual, the final written warning was live for a further five months. Thereafter, it would remain on the claimant's file for two further years. It could have been taken into account should any further issues have arisen in that time period in certain circumstances. The final written warning could also have been extended for a further period. Both of these options would have provided the claimant with an opportunity to demonstrate that she could improve her absence levels. She was fit and healthy and able

to work. She was now aware that her absences were a concern and were being monitored. The trigger points were now at the forefront of her mind. Her evidence was clear that she would have not have knowingly placed her employment at risk. Her evidence suggests that there would have been an improvement in her absence levels and it was reasonable to provide her with an opportunity to demonstrate this.

113. The respondent should have applied a broad approach of common sense and fairness (see *Earl v Slater and Wheeler* [1973] 1 WLR 51). Applying such an approach in this case, dismissal does not make common and sense and is not fair.

114. The claimant has produced a schedule of loss. She has been unable to work since her dismissal on medical grounds caused by the dismissal. The claimant wishes to return to work but is too ill to do so at the moment. She has sought assistance from her doctor and from a counsellor. The claimant has been unable to consider applying for new employment. She is not used to being unemployed and stated that she has never been out of work.

115. In addition to the sums set out in the schedule of loss, the claimant seeks compensation for loss of statutory rights totalling, £350. She also acknowledged having received a payment in lieu of notice of £3,719.32.

The Law

116. Section 94(1) of the Employment Rights Act 1996 (the ERA) provides that an employee has the right not to be unfairly dismissed by their employer.

117. Section 98 of the ERA provides that in determining if a dismissal is fair it is for the employer to show the (a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

118. A reason falls within subsection (2) if (a) it relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, (b) relates to the conduct of the employee, (c) redundant, or (d) contravention of an enactment. “Capability”, in relation to an employee, means her capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which she held.

119. If the employer shows the reason or principal reason for the dismissal and show that it falls within the category of reasons which the law specifies as being potentially valid reasons section 98(4) requires the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer and (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.

Discussion and Deliberation

120. The Tribunal started by asking what was the reason for the claimant’s dismissal? It is for the respondent to show the reason for dismissal and that it is a potentially fair reason. At this stage the Tribunal noted that it was not considering the question of reasonableness.

121. Mr Graham said that he dismissed the claimant because of her absences. The claimant’s invitation to the disciplinary hearing was to consider her attendance record. The letter dated 9 April 2018 explained that although there was no suggestion that her absences were not genuine the respondent monitors absence and considers taking action under the disciplinary procedure when certain trigger points are met. The letter dated 9 April 2018 referred to the final written warning issued on 16 March 2017 which was still current which meant that the hearing may result in dismissal. The disciplinary hearing focussed only on the claimant’s absences. The letter of 13 April 2018

referred to the outcome of the claimant's unacceptable level of absence as this resulted in her dismissal.

122. While the claimant referred to harassment allegations and breakdown in the relationships with senior managers it was Mr Graham who took the decision to dismiss and he had a good relationship with the claimant. The Tribunal was satisfied that the respondent had shown the reason for the dismissal was capability. The Tribunal therefore concluded that the respondent was successful in establishing that the dismissal was for a potentially fair reason under section 98(2) of the ERA.

123. The Tribunal then asked if the respondent act reasonably in treating such a reason as a sufficient reason for dismissing the claimant? The Tribunal noted that it had to determine whether the dismissal was fair or unfair, having regard to the reasons shown by the employer, and the answer to that question depends upon whether, in the circumstances (including the size and administrative resources of the employers' undertaking) the employer acted reasonably in treating the reason as a sufficient reason for dismissing the employee; and this should be determined in accordance with equity and the substantial merits of the case.

124. The Tribunal considered the reasonableness of the respondent's conduct. The Tribunal noted that it must not substitute its own decision as to what the right course to adopt for that with the respondent.

125. The Tribunal asked if Mr Graham held a genuine belief that ill health was the reason for dismissal and had reasonable grounds for so doing.

126. Mr Graham knew that the claimant had a current final written warning on her record as he had issued it. The final written warning had not been appealed. Accordingly, if a written warning about the claimant's attendance levels was issued under the Handbook he would need to consider whether dismissal was appropriate.

127. Mr Graham also knew that the claimant had already breached other attendance trigger points and he had treated her sympathetically because of

the final written warning. He was aware that the claimant had reported all absences to management, explained the reason for the absences and completed sick absence forms. The absences were genuine, not related to any underlying medical condition or disability and could not have been "improved" by the claimant. He therefore believed that issuing earlier warnings would not have resulted in an improvement.

128. The claimant submitted that at no time throughout 2017 and March 2018 did she have any reason to believe her absences were of concern. However, the Tribunal considered that Mr Graham genuinely believed that the claimant was aware of the triggers and the consequences of breaching them as the trigger points (which were unchanged) were mentioned in the Handbook and the claimant had received training. Also, the final written warning spelt out the consequences of unsatisfactory attendance. In the Tribunal's view Mr Graham's belief was not unreasonable; the respondent had provided the claimant with information.

129. The claimant criticised the respondent for being inconsistent with its absence policy. However, in the Tribunal's view to apply absence procedures in a mechanistic way might also be unfair and potentially discriminatory. The Tribunal considered that Mr Graham appeared take a case by case approach having regard to employee's personal circumstances.

130. The Tribunal was mindful that in relation to attendance levels Mr Graham issued the claimant with a written warning. Given the number of triggers that had been breached the Tribunal did not understand the claimant to suggest that a sanction of some sort was unreasonable. What was in issue was whether the final written warning should be considered given that it related to conduct.

131. The claimant said that she did not appeal the final written warning because she was experiencing difficulties in her personal life and wanted to get with things. She did not believe it would affect her employment if she got through the next 18 months with no further conduct issues.

132. The Tribunal was satisfied that there were obvious grounds for the final written warning being imposed. While the period of 18 months was unusual the Tribunal did not consider that it was inappropriate where other employers might reasonably have dismissed the claimant.

133. There was no appeal. The claimant's evidence was that she *only* took issue with the length of the final written warning. However, all her absences the absences all occurred within 12 months of the final written warning being issued. It was also never put to Mr Graham whether he had a different view of matters had the warning been for 12 months.

134. The Tribunal then considered whether it was reasonable having regard to section 98(4) of the ERA for Mr Graham to have taken the final written warning into account.

135. The Tribunal noted that the claimant's disciplinary record and length of service were considered when the claimant was issued with the final written warning. It also clearly stated that "*any misconduct while the warning remains live (including breaches of absence reporting policies or absence trigger points) then you may be dismissed even if that misconduct would not otherwise, on its own justify dismissal*." This was consistent with the Handbook.

136. The Tribunal considered that the claimant was put on notice of the consequences of further misconduct and absence during the period of the final written warning. There was no breach of the Acas code.

137. The claimant said that she was giving no warning of breach of trigger points under the absence procedure. The Tribunal did not consider that there was a requirement under the Handbook for the respondent to automatically give warnings to employees of triggers being reached. The triggers were indicators of the required level of attendance. Managers were informed if a trigger was breached. It was then for the manager to manage each employee's case on its merits having regard to the number and nature of the absences, the underlying reasons for it and any pattern of absence.

138. Mr Graham was aware that the claimant had breached various trigger points but deliberately did not initiate investigative action because of the potential consequences. He was aware of the reasons for the claimant's absences; they were genuine; and she attended whenever possible. Indeed, on some occasions she attended work and then went home.

139. Given the nature of the claimant's absences the Tribunal considered that instigating investigative action would not have resulted in improved attendance. The claimant's reaction to the "threatening letter" suggested to the Tribunal that giving warnings might have placed the claimant under stress as she had no control over her absences. In any event had the claimant received waringwarning her absences alone warranted dismissal through escalating the warnings.

140. The Tribunal therefore considered that it was reasonable for Mr Graham to have regard to the final written warning.

141. Next the Tribunal considered whether the decision to dismiss felt within the bands of reasonable responses.

142. The claimant attended a RTW interview with Ms Tannahill on 12 March 2017. That interview quite rightly in the Tribunal's view focussed on the claimant's recent absence for neck pain following a car accident; whether any adjustments were required and if there were any issues that the claimant wished to discuss with about her absence. It was only after the RTW interview that Ms Tannahill recommended a disciplinary investigation as the trigger of five absences in 52 weeks had been triggered.

143. The claimant had notice of the investigation meeting and the absences that were to be discussed. The Tribunal considered that the claimant was given an opportunity to elaborate on the absences; and advise of underlying health, personal or work issues. It was not in the Tribunal's view a foregone conclusion that the claimant would be invited to a disciplinary hearing although that was Ms Tannahill's recommendation.

144. Before the disciplinary hearing the claimant was provided with all the information that was in Mr Graham's possession including the spreadsheet showing pre-arranged and sick absences. Before the disciplinary hearing the claimant was provided with all the information that was in Mr Graham's possession including the spreadsheet showing how pre-arranged and sick absences. The claimant did not challenge the entries at the time or at her appeal. The Tribunal's impression was that Mr Graham did not want to terminate the claimant's employment and would have readily considered any explanation provided by her. No new information came to light.

145. The Tribunal felt that Mr Graham did consider alternatives to dismissal albeit tht he did not refer to this in his letter dated 13 April 2018.that he did not refer to this in his letter dated 13 April 2018. The claimant had already been given an extended final warning (18 months rather than the normal 12 months). The claimant had been given significant leeway and several absences were discounted. The claimant had breached other trigger points through no fault of her own and there was no reason why there should be an improvement in the future. It was in the Tribunal's view reasonable in the circumstances for Mr Graham to consider likely future absence based on past absence.

146. While the claimant said that her absences did not impact on production the Tribunal felt that the claimant did not have the same overview as Mr Graham of the disruption of intermittent and unpredictable absences on operational efficiency.

147. In all the circumstances the Tribunal concluded that Mr Graham's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted.

148. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage is relevant to reasonableness of the whole dismissal process.

149. The Tribunal then considered the appeal process. It was satisfied that Mr Graham was not involved in the appeal process and Mr Beech and Mr Lang

had no earlier involvement. From the notes of the appeal hearing and the letter advising of the outcome of the Tribunal considered that Mr Beech and Mr Lang thought about the points raised and set out their reasoning for reaching the conclusion that they did.

150. The Tribunal was satisfied that the respondent had carried out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage.

151. The Tribunal concluded that the dismissal was fair. Having reached this conclusion, the Tribunal did not consider it necessary to go onto determine the question of remedy.

152. The Tribunal therefore dismissed the claimant's claim for unfair dismissal.

Employment Judge: Shona MacLean

Date of Judgement: 20 December 2018

Entered in Register,

Copied to Parties: 21 December 2018