EMPLOYMENT TRIBUNALS

Claimant: Ms Belinda Gilbert

Respondent: Home Office

RESERVED JUDGMENT

Heard at: Cambridge **On:** 6 and 7 January 2020

Before: Employment Judge KJ Palmer (sitting alone)

Appearances
For the Claimant: Mr L Varnam (Counsel)
For the Respondent: Ms K Balmer (Counsel)

RESERVED JUDGMENT

It is the judgment of this Tribunal that:

The Claimant's claim in unfair dismissal succeeds. The matter is to be set down for a remedy hearing with one day allowed, on **14 August 2020 in the Cambridge Employment Tribunal, 197 East Road, Cambridge, CB1 1BA at 10.00 a.m**.

REASONS

(1) This matter came before me as a two day unfair dismissal claim on 6 and 7 January 2020. Sadly there was insufficient time on the second day for the matter to be concluded and it was necessary therefore for directions to be given for the exchange of written submissions. Over the course of the next two months written submissions and replies were then submitted by those representing the parties albeit there were some delays in the submission of those arguments and then further delays in those submissions and replies reaching me.

(2) It is on the basis of that which took place on 6 and 7 January and the subsequent written submissions and replies that I now give this Judgment.

Findings of fact

(3) The Claimant presented a claim to the Watford Employment Tribunal on 10 July 2018 and the claim was a claim for unfair dismissal pursuant to her dismissal on 10 May 2018.

(4) The Claimant had been employed in various roles at Her Majesty's Passport Office in Peterborough from 2004 until her dismissal.

(5) The Tribunal heard evidence from the Claimant and for the Respondent from three witnesses, Mr William Jack, Operations Team Leader at the relevant time, Ms Alison Barnes, Service Delivery Manager at the relevant time and Mr Daniel Frost, Head of Operations. Her Majesty's Passport Office (HMPO) is a division of the Home Office. HMPO is the sole issuer of UK Passports and responsible for civil registration services through the General Register Office. HMPO has a number of offices nationally including an office at Aragon Court, Peterborough.

(6) The Peterborough Office was divided into a number of different departments. These included Postal Productions ("Production"), the Complex Referral Support Team ("CRST"), the Peterborough Searching Team ("PST"), Customer Service Liaison ("CSL"), the United Kingdom Delivery Team ("UKDT"), the International Delivery Team ("IDT") and the Counter-Fraud Team ("CFT").

(7) The Claimant worked in the production team from approximately 2012. By 2017 she was working within Team 14, Command C of which the head was William Jack from whom the Tribunal heard evidence.

(8) Prior to that the Claimant had worked in other departments.

(9) It is common ground that some time earlier in or about 2009 the Claimant had been diagnosed with Chronic Fatigue Syndrome ("CFS").

(10) The Tribunal heard evidence from the Claimant that she experienced difficulties in the workplace but most particularly with an agency worker named Diana. It is the Respondent's case that the Claimant fell out with Diana. The Claimant in her evidence suggests that there was a general feeling within the department that Diana was not pulling her weight. Whatever the circumstances the Claimant was signed off with depression and work related stress and CFS on 26 June 2017. The Tribunal had before it the appropriate Statement for Fitness for Work.

(11) She remained signed off sick until 25 August 2017 when she returned to work on the basis of a six week phased returned, gradually building up her hours over that time.

(12) On 6 October the Claimant asked her then Line Manager, Mr Jack to agree an extension of the phased return by two weeks. This was in line with a recommendation by her GP. This was refused. In his evidence Mr Jack explained it seemed unrealistic to expect that the Claimant would be able to return to full hours if he was to agree to extend the phased return by a further two weeks

and she was still someway off normal working hours and in fact was 2.5 hours away from daily normal working hours. He therefore did not think it realistic that she could return to work full time within the next two weeks. He gave evidence that he discussed the matter with the HR team and decided it was not appropriate to extend the formal phased return. What did happen was that the Claimant was offered a type of phased return which would effect a temporary reduction in hours and pay or have a temporary reduction in hours but make up the balance of hours from accrued annual leave or flexi time. The Claimant was not prepared to agree to this.

(13) Much was made in argument and in submissions before me about whether the approach of Mr Jack in these circumstances at this time was or was not reasonable.

(14) It is also the Respondent's case that prior to the phased return in August 2017 the Claimant was perhaps not as cooperative as she might have been in that she refused an occupational health referral and made little contact during July and August 2017 with Mr Jack to keep him informed of the position regarding her sickness.

(15) As with all such disputes on evidence it is a balancing act for a Judge decide in the face of conflicting evidence what the true picture was.

(16) From the evidence I heard I am bound to conclude that at this stage at least the Respondent and in particular Mr Jack was not behaving unreasonably and was engaging with the Claimant in an entirely appropriate fashion in an attempt to assist her return to work and to make such adjustments as were appropriate. I see no evidence at this stage in the process to suggest otherwise.

(17) I do not propose to repeat in detail the evidence I have heard save to say that at this stage I could not fault the Respondent's processes.

(18) There then followed a further period of sickness which commenced on 9 October 2017. The Claimant then remained off sick until 22 January 2018.

(19) During this second period of absence it is the Respondent's case that the Claimant was un-cooperative and failed to keep in proper touch with the Respondent. They argue that the Claimant refused to attend meetings and avoided both stress risk assessments and occupational health referrals. They say that pursuant to the attendance management procedure in place they sought to undertake further absence review meetings and by 21 November the Claimant had been absent for 92 days continuously discounting her brief return to work and the period before that since June 2017.

(20) I heard evidence from both Mr Jack and the Claimant and had before me an extensive bundle of documentation running to some 650 pages. I do not propose to repeat the contents of that bundle here. The material exchanges between the parties were cordial and in fact emails from the Claimant to Mr Jack actually thanked him for his help and assistance. A meeting was fixed for 21 November 2017 at which the Claimant did not attend. There was no indication from her why

she was not going to attend in advance. The Claimant in her evidence explained her absence by indicating that she wrote the wrong day in her calendar. She wrote 22 November instead of 21 November. She said she rang Mr Jack on 21 November to say that her union representative was not available on 22 November but that the meeting had already taken place. She said Mr Jack laughed. The meeting did not take place due to her absence and was then rearranged for 29 November. Under cross examination Mr Jack denied laughing.

(21) I do consider that Mr Jack's evidence under cross examination was a little uncertain. It is clear that his witness statement missed out a number of communications with the Claimant but I do not find that there is any evidence overall that the Respondent was doing other that attempting to assist the Claimant at this time. Relations between the Claimant and Mr Jack may not have been perfect, the Claimant was unwell and Mr Jack was operating in a busy environment. I do not consider any of the exchanges between them or that which took place to be unusual or untoward.

(22) The earlier 21 November meeting was rearranged for 29 November and once again the Claimant did not attend. On this occasion she wrote explaining that her union rep was not available. I do not find her non-attendance unreasonable in the circumstances. The Respondent chose to go ahead with the meeting on the basis that the Claimant could have sought another union rep to represent her.

(23) On 30 November 2017 the Claimant attended an occupational health appointment with Dr Ian Williams. He then produced a report which I had before me. In his report he explained that the Claimant felt unsupported by Mr Jack and his team and felt that her condition had not improved to the point where she was fit to return to work. He opined that it was unlikely that she would be in a position to return to work within three months. He did say that she may be able to return in a different team with a different manager but that this could not happen in the short term, say within a month. He does go on to say that in the right team he believes that she could work normal hours in due course.

(24) Mr Jack received a summary of Dr Williams' conclusions from the occupational health provider, Health Management. This was received by the Respondent on 22 December and was dated 8 December. This is a much truncated version of the report.

(25) Unfortunately this did not go into the level of detail which the report of Dr Williams went into and therefore it is a great shame that the Respondent was not fully appraised of Dr Williams' views.

(26) The Respondent accepts even on their own case that the occupational health report recommended that the Claimant return to a different team and a different Line Manager. However they also argue that the report makes it clear that the Claimant had Chronic Fatigue Syndrome and a reduced capacity for lifting/carrying/manual handling as well as issues with her focus and memory. This was in line with earlier reports. They accept that the report indicated that in such circumstances of a change the Claimant might be able to return. There was talk of a phased return of two to three months. In his evidence Mr Jack indicated

that he had not before these proceedings ever seen the full report of Dr Williams only the truncated occupational health report.

(27) He said that it was the first time he had been aware that the Claimant was indicating she felt unsupported by him.

(28) He wrote to the Claimant on 28 December in order to arrange a meeting for 5 January 2018 but decided to rearrange this to allow more time to collect information.

(29) In cross examination he accepted that in the New Year the Claimant really did take the initiative in her attempts to return to work.

(30) I regard this passage of cross examination to be key to this case.

(31) In his evidence Mr Jack accepts that it was in early January that the emphasis of the Respondent's activity and attitude towards the Claimant changed vastly. Having spoken to HR Mr Jack decided to move to a formal meeting at which the Claimant's dismissal would be considered.

(32) Not surprisingly he was cross examined at length on this.

(33) In my Judgment it is at this point the Respondent makes its critical mistake in dealing with the Claimant. At a time when they had seen, albeit a truncated report, which suggested that in some capacity the Claimant could return it seems to me a significant change that they should be considering dismissal.

(34) Critically Mr Jack met the Claimant on 15 January to discuss the OH report dated 8 December and a third SRA completed that day. In that meeting the Respondent accepts that they made an offer to move the Claimant to another command within the Production Team but under a different Line Manager. They argue that the Claimant rejected this. However under cross examination Mr Jack accepted that she didn't reject it, she simply asked for further details about that move. She did not say she would not move. When this was put to him he agreed that she had not rejected the move.

(35) It is my Judgment that it was entirely reasonable at that stage for the Claimant to seek further details of that move and when cross examined about whether those details were provided Mr Jack could not explain why they were not. He was persuaded under cross examination that paragraph 30 of his witness statement was therefore inaccurate. She did not unreasonably refuse to accept a return to work on that basis.

(36) In my Judgment this was a critical point in this case. The Respondent had every opportunity to further investigate the possibility of the Claimant coming back to work pursuant to the move they had suggested if they had only provided her with a little more detail. Instead surprisingly in my judgement they then moved very swiftly into considering the Claimant for dismissal on the grounds of ill-health incapability. At this point Mr Jack stepped out of the picture.

(37) In my Judgment the Respondent had a duty to further investigate in light of the OH report and in light of the Claimant's request for further details whether it would be possible for them to arrange a scenario where the Claimant might return on a phased basis into a new role with a different Line Manger. Sadly they did not do this. In fact they removed any suggestion of that new role under a different Line Manager once the dismissal process had commenced.

(38) The Claimant was asked to attend a dismissal meeting on 6 February. That formal invitation was sent on 23 January and made it clear that the purpose of the meeting was to consider whether the Claimant should be dismissed or whether her sickness absence level should continue to be supported. The meeting and therefore the decision to dismiss fell to be conducted by Ms Barnes from whom I also heard evidence. I have read and considered in detail the Respondent's evidence and the helpful and detailed submissions put forward by Respondent Counsel. I do not propose to repeat those here. It is the Respondent's case that in all the circumstances Ms Barnes genuinely reached the view that the Claimant would not be able to return to work and render reliable and effective service going forward in a production command. It is clear that in arriving at her decision Ms Barnes relied on advice from the HR caseworker at HMPO assigned to this particular matter. That caseworker produced a report which was before me. It refers amongst other things to the plethora of policies which should also be considered by a decision maker prior to the determining whether to dismiss in these circumstances. I do not propose to go through details of those policies but one key one was the attendance management procedure. They have been set out in detail in the Respondent's submissions.

(39) I accept and agree that it is very difficult in these circumstances for a decision maker to be able to exercise judgement and take a definitive view. However the report produced by HR being a case analysis submission is very regimented, mechanical yet is clearly is a genuine attempt to provide helpful advice. However the obligation on Ms Barnes was to look at matters in the round. Had she considered the OH report of 8 December and the letter from the Claimant's GP which was before her at the dismissal meeting and the fit note of 22 January from the Claimant's GP it is my Judgment that she should have stopped short of dismissal in these circumstances and considered the other alternatives particularly in light of the offer made to the Claimant on 15 January by Mr Jack which had not been clarified despite the Claimant's requests. She should have sought clarification of the medical evidence before her and even fresh medical evidence before dismissing the Claimant. This is the crux of this case.

(40) Accordingly it is clear to me that once Mr Jack had handed over to Ms Barnes was set in motion a chain of events which seemed almost inevitably to lead to the Claimant's dismissal.

(41) By a decision delivered on 8 February 2018 Ms Barnes dismissed the Claimant.

(42) That dismissal was subsequently appealed and the appeal was heard by Danny Frost, Head of Operations. I heard evidence from Mr Frost. He confirmed Ms Barnes' decision.

The issues and the law

(43) In this case the Claimant pursues a claim for unfair dismissal. Claims for unfair dismissal are governed by Section 98 of the Employment Rights Act.

(44) Under Section 98(1)(a) it is for the employer to show what the reason or if more than one the principal reason for the dismissal was.

(45) They must show that it is either a reason falling under sub-section (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.

(46) In this case it is the Respondent's case that the reason was capability and/or some other substantial reason.

(47) Where an employer has fulfilled the requirements set out above the determination of the question of whether the dismissal is fair or unfair falls under sub-section (4). This determines that fairness is based upon 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). Such determination shall be in accordance with equity and the substantial merits of the case.

(48) The Claimant's Counsel in submissions invited me to find that the Respondent failed in this case to establish a potentially fair reason for the dismissal. They rely on capability or some other substantial reason. This is based on their argument that the evidence of Ms Barnes was confused and she seemed not to understand the real reason for the dismissal. This is set out in their submissions which I don't propose to repeat.

(49) The Respondent says that the Respondent has demonstrated a potentially fair reason and they have referred me to various cases in their submission which I have considered.

(50) Every case turns on its own facts. However in this Judgment I have considered the following cases:

Spencer v Paragon Wallpapers Limited (1976) IRLR 373
Lynock v Cereal Packaging Limited (1988) IRLR 510
Cook v Thomas Linnell & Son (1977) IRLR 132
Alidair Limited v Taylor (1977) ICR 445
Whitbread Plc v Hall (2001) ICR 699
Taylor v OCS Group Limited (2006) ICR 1602

The reasonableness of the dismissal

(51) If I determine that the Respondent has demonstrated a potentially fair reason I then have to determine whether under Section 98(4) in all the circumstances they were reasonable in treating that as a sufficient reason to dismiss. In this regard I have taken due note of submissions before me in writing and have considered

the following cases: **Spencer v Paragon Wallpapers Limited (1977) ICR 301** and **O'Brien v Bolton St Catherine's Academy (2017) ICR 737**.

(52) I am asked by the Claimant to consider that the Respondent did not act reasonably in dismissing the Claimant for capability and/or some other substantial reason. They direct me to a quotation from **Spencer v Paragon Wallpapers** which states:

> "The basic question which has to be determined in every case is whether in all the circumstances the employer can be expected to wait any longer and, if so, how much longer?"

(53) They argue that at the time of her dismissal the Claimant was ready and willing to return to work. There was clear evidence that she had been pushing for a return prior to the dismissal meeting. They go on to say that Ms Barnes, the dismissing officer had before her information which was pertinent to the decision including the OH report of 8 December, the GP's letter of 29 January and the fit note of 22 January. This allied with the Claimant's own repeated statements in January that she wished to come back to work suggest that a decision to dismiss with this evidence in front of her was unreasonable. They say that the length of time that the Respondent would have had to wait for the Claimant to return to work in some capacity was not long bearing in mind the recommendations of the OH report and the GP's letter. They accept the Claimant was seeking to return to work in a different team but point out that it is bizarre that the Respondent has sought to dismiss the Claimant at precisely the time when she is best placed to return to work. One adjustment would appear to have put the Claimant in a well-placed position to so return. They go on to say that none of the additional matters raised by Ms Barnes to justify her decision was capable of doing so particularly in circumstances where the Claimant was ready and able to return to work. In respect of the additional matters put Ms Barnes failed to carry out any investigation or gather any additional evidence relying instead entirely on her subjective and genuinely inaccurate perception. The appeal simply repeated the failures of the original dismissal.

(54) The Respondent argues that they acted reasonably in treating the Claimant's capability and/or inability to provide an effective and reliable service going forward as a sufficient reason to dismiss. They refer to the attendance management policy, the length of time over which she was absent which amounted to 142 days sick leave. They refer to the amount of support, assistance and reasonable adjustments provided to the Claimant in order to try and help her return to work. They direct me to the three SRAs, the constant referrals to occupational health, the phased return in August 2017, the offer of an informal phased return in December and the offer of a permanent move away from her command in January 2018 as being evidence of support.

(55) They argue that the Claimant failed to engage fully with the Respondent's attempts to facilitate a return to work and/or with the absence management process on a number of occasions. They refer to the fact that the Claimant was off sick and presenting as substantially unwell at the time of her dismissal meeting, the fact that the Claimant did not engage properly with the dismissal officer during the dismissal consideration meeting, the fact that the Claimant was

unclear and/or contradicting herself and occupational health about her physical abilities and willingness to perform a PO1 role in productions. They refer to the fact that HMPO had been potentially willing to consider the option of a move to another department and the general cost of the public purse given the fact that HMPO is publicly funded. They deny that the Respondent was relying on out of date medical evidence when deciding to dismiss or that they should have further investigated the most recent medical evidence in front of them. They say that the OH advice indicated that the Claimant "might" be able to return to work with a phased return and a new manager. Ultimately however the Respondent in the shape of Ms Barnes did not feel that the Claimant's answers satisfied her such that a return was likely in the foreseeable future and would be successful long term.

Conclusions

(56) As in many such cases it is a difficult balancing exercise for the Tribunal to be able to determine the outcome of unfair dismissal claims particularly where the dismissal has been on the face of it a dismissal for continued ill-health.

(57) The balancing exercise is never an easy one and in this particular case I cannot be overly critical of the Respondent in the way in which they dealt with this matter. In fact until January 2018 I consider that the Respondent notably in the shape of Mr Jack was dealing with the Claimant's ill-health absences very well. They seem to be trying to engage with her and find out and investigate ways in which she might be able to return to work. They also sought regularly updates on her health and cannot be faulted.

(58) Their error occurred when not long after receiving the occupational health report of 8 December on 22 December they rushed somewhat headlong into a dismissal process and Mr Jack appeared to wipe his hands of the matter.

(59) On the evidence before me and on the particular facts of this case it seems to me thereafter that there was a certain inevitability about the decision to dismiss the Claimant. I was not particularly impressed with Ms Barnes' evidence. She seemed uncertain as to the reasoning she had employed in arriving at her decision.

(60) My conclusions might have been different had Ms Barnes not had before her certain up-to-date elements of medical evidence at the point of the original dismissal meeting. She had the most recent occupational health report albeit that that was just a very truncated précis of the report of Dr Williams. She had a letter from the Claimant's GP which was strident in its terms dated 29 January 2018 and she had the latest fit note dated 22 January 2018.

(61) In my Judgment any reasonable assessor at that time should have at least taken the time to investigate the issues set out in that medical evidence somewhat further before deciding to dismiss.

(62) It is here that I consider that the Respondent has failed.

The reason for the dismissal

(63) Applying that failure therefore and despite the somewhat vague evidence given by Ms Barnes under cross examination I do conclude that the reason for the dismissal of the Claimant was capability and that the Respondent has therefore satisfied the test under Sections 98(1) and (2).

(64) The reason for the dismissal was capability.

Reasonableness of that dismissal

(65) Where the Respondent's failure however leads me to conclude that they have unfairly dismissed the Claimant in this matter is when I apply the tests under Section 98(4) of the Employment Rights Act. I do not consider that in all the circumstances faced with the evidence before her it was reasonable for Ms Barnes to dismiss the Claimant by reason of capability.

(66) She should have further investigated the medical evidence before her and should have further investigated the possibility that the Claimant may be able to return to work in a different role under a different Line Manager as had been offered to her but without detail on 15 January 2018. It may well have been had that been discussed in detail and that detail provided and a formal alternative role offered to her the Claimant would have accepted it and matters would have moved forward without her dismissal.

(67) In short therefore I find the Claimant unfairly dismissed on the basis that the Respondent should have conducted further investigation and waited a further period of time and investigated the issues I have set out before finally determining to dismiss. The appeal simply confirmed the errors of the dismissing officer.

(68) For the reasons set out above the dismissal is unfair and the Claimant's claim in unfair dismissal succeeds.

Remedy

(69) The matter will be set down for a Remedy hearing on **14 August 2020** in the **Cambridge Employment Tribunal, 197 East Road, Cambridge, CB1 1BA to commence at 10.00 a.m**.

(70) On the question of remedy I am prepared to give some guidance so as to enable the parties to avoid the necessity of attending a Remedy hearing in the hope that they can achieve an agreed settlement on remedy between them.

Contributory fault

(71) In dealing with any remedy a Tribunal will have to consider the basic award and compensatory award which it will make and will have due consideration to Section 123 in respect of the compensatory award. Section 123(6) leads a Tribunal to consider whether the compensatory award should be reduced by such proportion as it considers just and equitable should it make a finding that the dismissal was in any way caused or contributed to by the action of the Complainant.

(72) It is also the case that a basic award can be reduced by a percentage for contributory fault.

(73) There is a short submission before me from the Claimant in this respect, a relatively short submission from the Respondent referring me to the cases of **Swallow Security Services Limited v Millicent (2009) All England 299** and **W Devis & Sons Ltd v Atkins (1977) IRLR 314**. My conclusion is that on the evidence before me and on the basis of the findings I have made it is not appropriate in the circumstances for me to make a finding that the Claimant contributed to her own dismissal. The dismissal was on grounds of capability and I cannot see any behaviour on behalf of the Claimant which would lead me to properly make such a finding.

Polkey reduction

(74) I have before me submissions from both parties on the question of a reduction under the House of Lords case of **Polkey** which is a well-known case in these circumstances. The case is **Polkey v AE Dayton Services Limited (1987) IRLR 503**. **Boulton and Paul Limited v Arnold [1994] IRLR 532** directs me that a Polkey reduction should be considered whether the dismissal was substantially or procedurally unfair.

(75) I have found the decision to be substantively unfair.

(76) Where a substantive finding has been made it is more difficult for a Tribunal to crystal ball gaze into the future and ascertain whether had a procedure continued was it likely and to what extent was it likely that a fair dismissal could have then taken place.

(77) However, in my Judgment this is one such case. What I know is that the Claimant had been sick for a lengthy period of time during 2017 and 2018. Whilst there was some evidence that she was keen and able to return perhaps in a different role there must at least have been a percentage chance that even had the Respondent done as I suggest above and further considered investigating those possibilities somewhat further on the basis of perhaps more medical evidence that in any event the Claimant would not have been able to return to work and provide effective service going forward.

(78) I do accept the Claimant's submissions that there is no medical evidence before me to enable me to draw that conclusion but I do not need there to be medical evidence. I can draw such a conclusion based on the other facts before me and the history of the Claimant's illness to date. It is reasonable therefore to conclude that there was a chance that in the future within a period of time the Claimant would not despite the adjustments referred to have been able to render effective performance and would have been fairly dismissed.

(79) However, I do not place the percentage likelihood of that happening as being high and therefore I give an indication that should this matter come before me for a Remedy hearing as set out and is not settled in advance I will be inclined to apply

a **Polkey** reduction to the compensatory award of 25%. I should point out that I am not bound by that and this is merely an indication to assist the parties in settlement negotiations. Should the matter come to a Remedy hearing I will reconsider any and all arguments relating to a **Polkey** reduction afresh.

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Employment Judge KJ Palmer

Dated: 6 July 2020

Sent to the parties on:

07/07/2020

For the Tribunal:

Jon Marlowe