EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107825/2019

Held in Glasgow on 26 November 2019

Employment Judge L Doherty

Mr C McEwan	**Claimant** **In Person**
Brake Bros Limited	**Respondent** **Represented by:** **Mr Hay -** **Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the Claimant was not unfairly dismissed and the claim is dismissed

REASONS

1. The claimant presented a claim of unfair dismissal on 24 July 2019.

2. The claim was resisted by the respondents; they accept the claimant was dismissed; their position is that dismissal was for some other substantial reason (an SOSR) in terms of section 98 (1) (b) of the Employment Rights Act 1996 (the ERA) and was fair. The SOSR is said to be the claimant's unacceptable level of intermittent absence from work. The respondents' alternative position is that the dismissal was fair by reason of conduct.

3. A final hearing took place over three days. The claimant represented himself, and the respondents were represented by Mr Hay, Council.

4. The issues for the tribunal were firstly, whether the respondents had established a potentially fair reason for dismissal; in the event of the tribunal

was satisfied that they had done so, it had to determine whether dismissal was fair or unfair applying the test in section 98(4) of the ERA.

5. The remedy sought is compensation.

6. For the respondents, evidence was given by Mr McArdle, the Distribution Manager at the respondent's Newhouse depot, and Mr Harvey, the General Manager of the Dundee site. The claimant give evidence on his own behalf, and evidence was given on his behalf by Mr Muldoon, his Trade Union representative. Part of the claimant's evidence in chief was given by way of statement which he read.

7. Both sides lodged documentary productions.

Findings in Fact

8. From the evidence and information before it the tribunal made the following findings in fact.

9. The respondents are a large company engaged in the business of food and drink production and delivery. A very significant element of the business is involved in the logistics of delivering food and drink. The respondents have 28 sites across the UK with three sites in Scotland, at Newhouse, Dundee, and Inverness. Newhouse is the largest site in Scotland and employs around 360 staff.

10. A significant element of the respondent's business in Scotland is the delivery of food and drink to schools, and under government contracts to prisons or care homes. They also have a large independent base of customers. Deliveries to Primary Schools take place on average once a week, and to Secondary Schools, twice a week. The extent of weekly deliveries to other customers depends on the volume of goods ordered.

11. Deliveries to schools and care homes/prisons can only be done at particular times because of the window available to take delivery at those type of institutions. School deliveries require to be completed prior to 1.30/2pm as the

school kitchens close; there are restraints on deliveries times to Care Homes/Prisons because of their internal resources.

12. All of the vehicles which are operated from the Newhouse depot are 18 tonne refrigerated vehicles with lifts to on and offload goods.

13. Typically, drivers as Newhouse depot come on site between 4:30 am and 6am and allocated routes with between 15 to 17 drops. There is one driver per vehicle. The driver will return to the depot typically between 1pm and 4pm depending on the route, and the extent of the deliveries. On return to the depot the cages where the goods are stored are offloaded and put back into the warehouse. Drivers can call for 'support' from other drivers if they are running late or encountering other difficulties on route, but this is not guaranteed. Drivers have fixed contractual hours of 45 hours per week.

14. The delivery of food and drink on time to customers is extremely important to the respondent's business. They are subject to time constraints for delivery slots to some customers particularly schools, and the goods which the deliver are often perishable. They consider they are vulnerable to competition, in particular from other more localised hauliers, in the event they fail to make delivery slots on time; failure to deliver goods on time under government contracts impacts negatively on their tender process for that element of their business. The logistics of organising deliveries is therefore a significant part of the respondent's operations.

15. The Newhouse depot has a pool of 150 drivers and operates a fleet of 115 vehicles. Most of these vehicles go out on a daily basis and the respondents have a target of a maximum of five percent, or six vehicles, per day being off the road for technical reasons at any one time.

16. Not all of that pool of 150 drivers are available on a daily basis, which reflects annual leave/absences/training. From the 150 drivers, 21 drivers are allocated to Team Support. Team Support drivers are intended to cover aspects of holiday or absence. There are in the region of 12 to 14 Team Support drivers available on any given day, again reflecting holidays / absences/training.

17. In the event a driver is unable to drive a planned route, and there is no contingency available from Team Support, the respondents on occasion use office staff who are also trained HGV drivers to carry out deliveries. This however impacts on their office work, as these individuals are generally unfamiliar with the routes, which can occasion difficulties in making deliveries. The respondents can also on occasion use driver from another depot, although this can impact on the work of the other depot. The respondents on occasion use agency drivers, but there is a cost to this, and the agency drivers are not trained and are unfamiliar with the routes and customers which can cause delay and difficulty in deliveries.

18. Driver absence impacts badly on the logistical exercise which the respondents have to undertake. The respondents rely on drivers attending work when they are scheduled to do so in order to do the scheduled jobs and provide customer service. Because of the major impact of absence on their business, the respondent's attempt to manage employee absence, and have an Absence Policy (the policy) in place (pages 31 a to 31h of the bundle) to do so.

19. The Policy states under; Policy *overview;*

At Breaks we know that having engaged, healthy colleagues means we can provide the best possible service to our customers, every day. It's important we all do what we can to ensure we are at our best and keep ourselves fit and healthy to attend work.

We all understand the impact absence from work can cause. Colleagues absence can affect the morale of other team members as a workload may increase, it can cause operational difficulties, missed deadlines and often increased costs. We hope that all colleagues are able to attend work, as they're paid to do, and this policy aims to minimise absence levels across the Company.

However, we do recognise that there are times when colleagues are genuinely unable to work due to sickness, injury, or other reasons. We want to be able to support colleagues effectively when needed and also help them return to work as quickly as possible'.

20. The policy contains at section 5:

Procedure for managing concerning attendance levels

We will use the following criteria to help identify any increased levels or patterns of absence. We will then work with colleagues concerned to understand any increased level or pattern of absence. These absences may be sick or non sick -related absences. The common triggers for identifying concerning absence levels are given below:

- *more than 3% absences or three occasions and a rolling 12 month period.*
- *any other concerning pattern of absence*
- *If any of these triggers are met formal review of your absence levels will be undertaken by your line manager. As a result of this review formal action may be taken and Company Sick Pay may be withheld.*
- *For absences directly related to maternity please refer to our Maternity Policy and for disability please refer to our Ill health Capability policy.*

6. Possible outcomes of poor absence and exceeding the trigger points.

Stage 1 Meeting – Absence Monitoring Period*.*

It may be considered appropriate to place you on a Monitoring period of up to 6 months. You will be invited to a stage I meeting to review the overall absence if your absence from work meets one of the common triggers.

Following a Stage 1 Meeting, if we decide your absence is not meeting our required standards and there are no mitigating circumstances will give you a warning of the required improvements necessary, setting out;

- *the reasons that you have failed to meet the attendance expectations*
- *targets for improvement*
- *a period for review*

- *next steps that may help improve your attendance, for example attending Occupational Health review*
- *the consequence of failing to improve within the review period, or if a further absence is taken.*

……

Should your attendance level improve to agreed levels within a rolling six month period, will be taken off monitoring.

Any additional absence during the monitoring period may trigger further formal action to be considered and he will be invited to a stage 2 meeting.

An absence monitoring warning will normally remain on your file for a period of six months from the date of issue. After the active period, the warning will remain permanently on your personnel file but will be disregarded in deciding the outcome of future absence management meetings, unless a pattern emerges whereby attendance is acceptable only whilst colleague is a monitoring.

…

Stage 2 Meeting-Final Warning of required improvement

You will be invited to a stage 2 meeting where your line manager will review your levels of absence, the reasons for any absence, any patterns and what if anything could have prevented your absence.

Following this meeting, if your line manager concludes that your absence is unacceptable and there are no mitigating reasons, you will be given a final written warning of required improvement and where appropriate next steps to support you attendance at work.

A final written warning will normally remain on your file for a period of 12 months from the date of issue. After the active period, the warning will remain permanently on your file but will be disregarded in deciding the outcome of future absence management meetings, unless a pattern emerges whereby

attendance is acceptable only whilst the colleague is on either monitoring or a final warning.

…

Your absence will be monitored during the live period and we will write to inform you of the outcome:

- *If your line manager is satisfied with your attendance, no further action will be taken;*
- *if your line manager is not satisfied, at any point in the review period, the matter may be progressed to Stage 3*

<u>Stage 3 Meeting – Dismissal</u>

We may decide to hold a Stage 3 absence recovery meeting if there is no improvement in your attendance level. Paragraph you will be invited to a stage III meeting where your line manager will review your levels of absence, the reasons for any absences, any pattern and what if anything could have prevented your absence.

We will send you written notification of the meeting as set out above. Following the meeting, if we find that your absence is unacceptable, we may consider a range of options including;

- *Dismissing you*
- *Extending the final warning and setting a further review (in exceptional cases we believe a substantial improvement is likely within the review period).*

Dismissal will normally be with full notice or payment in lieu of notice, unless your reason for absence amounts to gross misconduct, in which case we may dismiss you without notice or any pay in lieu of notice.

…….

Long – Term Sickness Absence

Long- term sickness absence is usually considered to be any period of sickness absence of four calendar weeks or more. Long – term sickness absence is managed separately to short term sickness absence as separate considerations are a necessary. Further details are available in our Long Term Sick and Ill Health Capability Policy."

21. The Policy provides for a right of appeal within seven days against the outcome of any stage of the procedure. It also provides that an appeal meeting will be held normally within seven days of receipt of the appeal, and that the respondents will confirm their decision in writing, usually within seven days of the appeal hearing.

22. The Policy provides that the date dismissal takes effect is not delayed pending the outcome of an appeal.

23. A copy of the Policy is given to each of the respondent's employees when they commence working with the respondent, and updated Policies are provided when issued. A copy is also available online, and there is a computer in the staff canteen at the Newhouse Depot which employees can access at work. The terms of the Policy in relation to trigger points is generally well known by the respondent staff and was well known by the claimant.

24. The claimant, whose date of birth is 12 July 1978, commenced employment with the respondent's as an LGV driver on 10 October 2003. He was based at the Newhouse Depot. The claimant's income from his employment was £554 gross and £428 net per week. The claimant's contract was subject to a 12 week notice period.

25. Unite are a recognised Trade Union by the respondents, and the claimant has been a member of Unite for around 12 years.

26. The claimant's absence history with the respondents for the period 13 October 2003 up into the dismissal is included at pages 32 to 35 of the Bundle. His total sick days over that period was 156.5, which was a percentage absence of 3.85%.

27. The claimant was absent from work for a period of five days, from 18th to 26th of December 2017, with a throat infection.

28. The claimant was thereafter absent from 21 June to 3 September 2018 (46 days). The claimant's Absence History at page 34, notes that the reason for this was 'back pain'.

29. The claimant's absence of 46 days from June to September triggered Stage 1 of the Policy. One of the four Distribution Shift Managers (DSMs) at Newhouse, Mr Grant, wrote to the claimant on 3 September (page 37/38), asking him to attend a formal attendance review stage 1 meeting. The letter inviting him to that meeting noted that he had been absent from work on a total of two occasions over a rolling 12 month period, totalling 51 days of absence; details of this of this were provided. The claimant was provided with a copy of the Policy.

30. The claimant attended the stage 1 review meeting with Mr Grant, minutes of which are produced at pages 39/41. The minutes record Mr Grant discussing the claimant's absence history and explaining the trigger points under the Policy. It was noted that the claimant responded that he understood this. The minutes note that Mr Grant asked the claimant what steps he was taking to minimise his absence from work, and that the claimant responded that this was '*just a freak accident'*, and that he had stood on a brick when walking with a friend and fell over.

31. Mr Grant asked if there was any assistance which could be offered, and the claimant said that he had a current referral for occupational health. It was also noted that the claimant accepted, when asked, that he understood the impact his absence was having on the workplace, but he stated that he would hopefully be back to normal soon. The claimant was asked if he wished to add anything but responded no. The claimant signed the minutes of that meeting, as did Mr Grant.

32. Mr Grant subsequently issued the claimant with first written warning, as the outcome of the formal attendance review (page 43). That warning recorded the claimant's absence over the 12 month period, and the triggers which that

had reached. The warning also confirmed that the claimant would be placed on absence monitoring for a period of six months during which time the respondent expected him to improve to the required company standard of absence which was less than 3%, less than eight days in a 12 month period, or three occasions. The claimant was advised that if such monitoring was not met or sustained during this monitoring, another meeting would be held and that he may be issued with a further warning. He was advised the warning would expire on 5 March 2019.

33. The claimant was advised that he had the right to appeal against that warning. The claimant did not appeal the imposition of that first written warning.

34. The claimant was absent again for a period of 19 days, commencing on 16 October 2018. At the claimant's return to work interview on 12 November, he stated that the absence was work-related. The respondent did not accept this, and the return to work interview notes noted that the injury/illness was not work-related.

35. The background to this absence was that the claimant sustained an injury, straining his back, while making a delivery to a nursing home where the access path was uneven. The respondents inspected the site after the accident, but formed the view that the claimant, in line with his Health and Safety training, should not have offloaded the cages onto the path, but instead used the side barrel available to make the deliveries. They therefore did not accept that the accident was work-related. The respondents did not own the site and had no control over or input into the repair of the path. The path was repaired shortly after the claimant's accident.

36. The respondents DSM, Mr Campbell, referred to the claimant to occupational health on 23 October 2018 and he was seen on 1 November. An occupational health report was produced (page 52/3) which stated that the claimant's symptoms were improving and that it was likely that he would be fit to return to work within 7 to 10 days. The report noted that physiotherapy can be beneficial in the rehabilitation of back pain, but the claimant had informed them that he had engaged in physiotherapy in the past and had not found it

beneficial. The report stated it was likely that the claimant would benefit from a phased return, for example half his contractual hours during week one, increasing over a four-week period. The report also recommended, if feasible, that working with a 'buddy' during the initial return would reduce manual handling tasks. There was no recommendation for adjustments under the Equality Act.

37. The claimant was asked to attend a formal attendance review Stage 2 meeting by DSM, Kenny Ralston. The letter asking to attend the meeting set out his absences from 18 December 2017 16 October 2018, which totalled 70 days absence over three occasions during the last 12 months. The claimant was again provided with a copy of the Policy. The meeting took place on 12 November 2013; notes of the meeting are produced at pages 48 to 51 of the Bundle.

38. At the outset of the meeting the claimant was asked about his current state of health and stated that since returning to work he had been supported for a couple of days and that he been taking his time and ben more careful. He also stated that he been fit for duty on coming back but driving work had been sore. He said he thought that was because he had been off work for such a length of time and was unfit and out of the swing of things.

39. Mr Ralston reviewed the claimant's absence and the reasons for it; the claimant accepted his periods of absence. Mr Ralston asked what measures the claimant had been taking to minimise his absence, and the claimant responded to the effect that he had been unlucky with his absences and that he tended to look after himself. The claimant declined any further assistance, and confirmed he understood the impact of his absences on the workplace. Mr Ralston reviewed the Policy with the claimant and explained the next stage under the Policy to the claimant, who confirmed he understood it. The claimant signed the minutes of the meeting.

40. Mr Ralston issued the claimant with a final warning in a letter dated 16 November 2018 (page 54). The letter confirmed that the claimant would be on absence monitoring for a period of 12 months, and that the warning would

expire on 16 November 2019. It was confirmed that the claimant had a right of appeal. The claimant did not appeal the imposition of the final warning.

41. On 14 March 2019 claimant attended work, having had root canal treatment the previous day. He was in pain and had a sleepless night and he advised Mr Grant the D S M, about his condition. The claimant asked if he could be accommodated to attend an emergency dental appointment, and he asked for emergency or unpaid leave, which requests were refused.

42. From this discussion with the claimant Mr Grant understood that he had had a sleepless night, was in pain, and taken Tramadol to ease his condition, and from his observation of the claimant and this information, he decided that the claimant was not fit to drive, and sent him home, telling him to report this as an absence, in line with the Policy. Mr Grant sent an email to others involved in Operations on 14 March confirming the position (page 55).

43. The claimant returned to work on 18 March. He was asked to attend a formal attendance review, stage 3 meeting on 22 March. The letter of invite noted his absences from 21 June 2018 to 14 March 2019, which totalled 66.5 days absence. The letter advised that the meeting may result in a sanction being applied in line with the Policy up to and including dismissal.

44. The Stage 3 meeting was conducted by Mr Campbell, and notes of the meeting are produced at pages 61 to 64. The claimant attended the meeting accompanied by his Trade Union representative, Mr Muldoon.

45. At the outset of the meeting claimant was asked about his state of health since returning to work. He is noted as stating that '*face/head was numb-could cut it with a knife. Not far from a breakdown. Has this before and it went on for six months. If a nerve is hit it can cause trauma.'*

46. In the course of the meeting the claimant confirmed that he had had an occupational health referral, and a physio referral but stated that it had not helped. Mr Campbell asked the claimant if he agreed to another referral, to which the claimant agreed.

47. Mr Campbell asked the claimant if he understood the impact his absences were having on the workplace, and the claimant responded that he did. He stated that he had not slept that he was trying to get emergency leave to allow him to go to the dentist and he had no holidays left that he had to contact IMAS (the absence reporting line) due to being unable to attend work.

48. Mr Campbell reviewed the policy with the claimant, who confirmed that he understood it. Towards the end of the meeting the claimant confirmed that he had nothing to add. Mr Muldoon said that there was a lot going on with people's mental health at the moment and he asked if Mr Campbell would consider extending the warning due to the nature of the absence.

49. At the conclusion of the meeting Mr Campbell decided to reissue the claimant's final warning from the date of the meeting, and that it would remain live for a further 12 months. The minutes of the meeting were signed by the claimant, and Mr Muldoon.

50. No further offer of physiotherapy was made to the claimant prior to the termination of his employment.

51. The outcome of the meeting was confirmed to the claimant in a letter dated 25 March 2019, in which he was advised that he was placed on a reissued 12 months final warning expiring on 18 March 2020. The claimant was again advised that he had the right to appeal this decision, but he did not do so.

52. On Tuesday 24 April, the claimant attended work after a restless night sleep caused by acid reflux. He spoke to Mr McMaster, a Team Support driver, to ask for support. Mr McMaster passed this on to the DSM, Mr Grant. Another driver, Mr Stirling, formed the view that the claimant was unwell and telephoned the Mr Grant to report his concerns.

53. Mr Grant and Mr McMaster met with the claimant, and Mr Grant took the view that the claimant was unfit for work and could not drive an LGV vehicle for health and safety reasons. The claimant did not accept this and maintained he was fit to drive. Mr Grant however arranged for the claimant to be driven

home, and for another driver (Mr Wallace) to drive the claimant's car. The claimant was advised to report this as our day's absence via IMAS.

54. The claimant returned to work on 24 April, and attended a return to work interview with Mr Grant, notes of which are produced at page 84/85. The claimant was angry at having been sent home by Mr Grant, and maintained that he had been fit to work, with Mr Grant maintaining his view that the claimant was not fit to drive.

55. The claimant was asked to attend a formal review Stage 3 meeting with Mr McArdle, who was Mr Grants line manager, in letter dated 25 April 2019. The letter was in the same format as the previous letters inviting the claimant to review meetings and recorded his periods of absence from 21 June 2018 to 23 April 2019, which totalled 61 days, and four absences.

56. The claimant was advised that this level of absence could be deemed unacceptable and that the meeting may result in a sanction in line with the Policy, up to dismissal.

57. The claimant was also given four witness statements which had been obtained by Mr McArdle about the events of 23 April. Statements were provided from Mr Grant, Mr McMaster, Mr Stirling, and Mr Wallace.

58. Mr McMaster's statement recorded that on the morning of 23 April he had been approached by the claimant asking if he could have assistance for the day due to not having slept all night as he was unwell with acid reflux. Mr McMaster stated that he declined the request due to only having one spare driver available at his disposal, but he made arrangements with the claimant to get support to him later, writing it in the hand over notes, and mentioning it to Mr Grant. He stated that he spoke with Mr Grant, and it was agreed that they would monitor the claimant before his departure to ensure he was fit to carry out his duties. Mr McMaster stated that he had a meeting then with the claimant and Mr Grant, during which the claimant admitted to being really unwell and not in a fit state to carry out his duties, and that he asked if he could do some office work instead. Mr McMaster stated that collectively it was decided that the best outcome would be for the claimant to go home for health

and safety reasons, however the claimant was reluctant to do so as he was on an extended final warning for absence.

59. Mr Stirling's statement stated that on the morning of 23 April he noticed the claimant with his head on his box and asked if he was okay. Mr Stirling stated the claimant told him that he was not okay, and he had been up all night being sick. Mr Stirling told the claimant that he should tell Mr Grant, as he was not fit to drive. Mr Stirling recorded that just before he left the depot, he noticed the claimant still with his head on his box, and after he left, he telephoned Mr Grant, to say he was concerned about the claimant not being well, and that he should not be driving.

60. Mr Wallace stated that he drove the claimant's car with the claimant's permission, and that the claimant complained about a lack of sleep due to acid reflux and described to him how he had been ill.

61. Mr Grants statement recorded that on 23 April he saw the claimant at the driver's desk but thought nothing of it. He recorded that he was subsequently approached by Mr McMaster who advised that the claimant told him he was feeling unwell and would probably need support as he had not slept. Mr Grant stated that he agreed with Mr McMaster to prioritise the claimant's request and to check his welfare to establish what support he required.

62. Mr Grant then recorded that he had met with the claimant, who reported as having had no sleep, and he established that the claimant was clearly visibly unwell. Mr Grant advised that he advised the claimant that he would not be driving an LGV vehicle or work on site due to the information provided. The claimant said he was currently on an extended warning and he was concerned about losing his job, but that Mr Grant felt that in the circumstances given the claimant's condition, and the health and safety of the claimant and others, that the correct decision was to send the claimant home, and he subsequently confirmed this in an email to Mr McArdle.

63. Prior to the Stage 3 meeting taking place, Mr McArdle received a pack of documents which included all of the minutes of the Review meetings which had taking place, the claimant's absence history, the warnings which have

been given, together with the witness statements from the four witnesses to the incident on the 24th of April. He also had a copy of the occupational health report and the Policy.

64. The Stage 3 meeting took place on 30 April, with Mr McArdle. The claimant was accompanied by Mr Muldoon. Minutes of the meeting are produced at pages 95 to 104. The meeting began with Mr McArdle asking the claimant if he was 'ok' to proceed with the meeting and the claimant confirmed he was. Mr McArdle asked a number of questions to confirm the claimant's periods of absence, the issue and reissue of a final warning, and the claimant's understanding of the impact of absence on the business.

65. Mr McArdle asked the claimant to explain in his own words how he was feeling medically on the day of his absence. The claimant said he felt he could do is duties and that he was fit to drive. He said he asked Mr McMaster if he could get help later in the day. He said he was standing at the back as he normally did, and later found out that a driver phoned Mr Grant, and he took that driver's word. The claimant said some of the statements were exaggerated.

66. Mr McArdle asked the claimant why he did not drive his own car home? The claimant responded that he was forced into it and did not think the other driver was insured. Mr McMaster asked the claimant if he was disagreeing with the statements, and the claimant responded that some of it was untrue. He stated that if he was not fit then he would not have driven his own car to work. Mr McArdle put to him that Mr McMaster said he admitted to being unwell, but the claimant said he disagreed with that, and said it was a call from Mr Stirling that changed Mr Grant's mind. The claimant said that Mr Grant did not see him until he sent for him, and he had then taken what Mr McMaster said and put that into to his statement. The claimant said that he has suffered from insomnia since the incident happened and nobody shown concern.

67. Mr McArdle said he had four statements from managers and colleagues. The claimant said he was not 100%, but he could do his job; he had a lack of sleep due to acid reflux. Mr McArdle put to him that he had his head in his hands. The claimant said he was there for about half an hour and thought he would

rest. He said that Alex Stirling telephoned, and everything changed at that point and he was told he was not fit to drive an 18-tonne vehicle. The claimant said his girlfriend would not have allowed him to drive had he not been fit.

68. Mr McArdle put to him that he saw a genuine welfare concern. The claimant responded that it was not a concern for his long-term welfare. He questioned why he was not taken to hospital if that was the case; he said that the situation had been orchestrated by Mr Grant.

69. Towards the end of the meeting, Mr McArdle asked the claimant did he have anything to add before he adjourned. At this stage of the meeting, Mr Muldoon said the claimant was trying to minimise his absences by taking medication and going to the doctor. He said that the 46 days 19 days absences due to work-related injuries. He said 19 days absence was due to a pothole at a nursing home which was then filled in. Mr Muldoon said that these two occasions where work-related, and the claimant had attended work on the other two occasions. He said the claimant had pleaded with his manager to get something to do rather than be sent home.

70. Mr McArdle adjourned the meeting for approximately half an hour, and then resumed to deliver his decision.

71. Mr McArdle concluded that there was a genuine welfare concern on the part of Mr Grant when he sent the claimant home on 24 April. In reaching this conclusion he took into account that there were statements from two drivers, and two managers which suggested the claimant was unwell. Mr McArdle concluded that he had no reason not to accept what they said. He was satisfied that there was a legitimate health and safety concern which resulted in Mr Grant deciding not to send the claimant out to drive an 18-tonne truck in circumstances where a legitimate assessment had been made that he was not fit to do so. He did not conclude that Mr Grant had orchestrated the situation in order to dismiss the claimant.

72. Mr McArdle advised the claimant that he had considered the information which he had, and the concerns that have been raised in the course of the meeting. Mr McArdle indicated that he appreciated the claimant's efforts to

attend work on his last two absences but that he was satisfied the claimant was unfit to carry out his duties on those occasions.

73. Mr McArdle took into account the claimant's length of service. Although he did not doubt the genuineness of the claimant's illnesses, he attached considerable weight to the fact that he had been absent for 67 days over four occasions in a 12 month period. He also took into account that the claimant had not appealed any of the previous warnings, and there was an appeal process in place at each stage, which he could have utilised, He also took into account that he had signed the minutes of the review meetings which had preceded those warnings. In light of the content of the minutes, and the failure to appeal the warnings, he did not conclude that the two earlier periods of absence were work related. Mr McArdle took into account the claimant was reissued a final warning for attendance in March 2019. He took into account the impact on service of a driver like the claimant not attending for work, and the need of the business to manage absence within the terms of the Policy. Taking all these factors into account Mr McArdle's decision was that the claimant should be dismissed with immediate effect, but with payment of notice.

74. The minutes of the meeting were signed by the claimant, and Mr Muldoon.

75. Mr McArdle confirmed his decision to the claimant in the letter of 3 May 2019 (113/114), and he was advised of his right of appeal.

76. The claimant had sent a letter of grievance to the respondent's, which he delivered to the gatehouse of the Newhouse depot, on the day of the stage 3 review meeting with Mr McArdle. This grievance effectively complained about the fact that Mr Grant had sent him sent him home, that the claimant considered he was fit to drive, and that Mr McMaster had orchestrated the situation. Mr McArdle did not receive this letter of grievance until after he had concluded the Stage meeting. He took advice, and wrote to the claimant on 7 May (120/121) confirming that as the points in the letter of grievance were essentially the same as the submissions made at the Review Meeting and that he had had regard to the claimant's submissions in making his decision

to dismiss the claimant from his employment no further action would be taken. The claimant was advised that if he disagreed with that finding on those matters, he could raise this as part of the appeal process. 3

77. The claimant appealed the decision to dismiss him, in an email dated 7thMay (122). In his appeal the claimant stated that the letter inviting him to the Stage 3 meeting stated that a discussion and review would take place regarding his absence levels. He said letter contained the points that were to be discussed, however no proper discussion never transpired, and the meeting became more of a question and answer session. He complained the questions asked were closed, and moved on from each question abruptly, not giving him adequate time to respond. He said that he felt that the meeting was purely a formality and that the outcome was predetermined. The claimant stated that points which could have influenced the decision not to terminate his contract were not heard, and he was not given and ample opportunity to respond.

78. The claimant points of appeal were that his state of health and diagnosed health issues; he had been receiving medication for anxiety and depression, acid reflux, and tramadol for chronic pain because of injuries suffered at work. That the reasons for his periods of absence were not fully discussed and taken into consideration. The claimant stated that he agreed that his record shows that he been absent from work on four occasions however on two of those occasions he had reported for work and was sent home by Mr Grant, and he believed that he had been sent home by Mr Grant strategically in order to have him dismissed. He stated his other two absences were due to work related injuries which were not his fault as he followed the appropriate health and safety and risk assessment guidelines.

79. The appeal was conducted by Mr David Harvey, the Distribution Centre Manager for Dundee, and the hearing took place on 23 May. In conducting the appeal Mr Harvey could consider the process and substance of the decision to dismiss.

80. In advance of the appeal hearing Mr Harvey received all of the paperwork generated by the absence management process, comprising of notes of the

review meetings, the claimant's absence record, warnings issued to him, return to work meeting notes, occupational health report, and witness statements and the Policy.

81. The claimant attended the meeting again accompanied by Mr Muldoon. Minutes of the meeting are produced at pages 127 /130. At the outset of the meeting that claimant reiterated his points of appeal in relation to his complaint that Mr McArdle had not conducted a fair meeting; his last two absences; and the fact that one of his previous absences was a work related injury sustained at nursing home where potholes had been repaired within a week of him having had his accident.

82. When it was put to him, the claimant accepted that Mr McArdle had given him the opportunity at the end of the meeting to raise anything else, but said that he was apprehensive and anxious about being dismissed. He said Mr McArdle did not follow things detailed in the letter calling him to the meeting and spoke over him when he tried to say something.

83. Mr Harvey asked the claimant if he was given an opportunity before the recess to say anything. Claimant confirmed he that he was, but he felt lost and bamboozled by the whole thing of the meeting was not conducted in the right way.

84. After some discussion of the points of appeal Mr Harvey asked the claimant if he had anything else to add. At this point Mr Muldoon suggested to the claimant that he should speak. The claimant then outlined that he was currently in good health, but he reiterated that he is prescribed medication for stress and anxiety; that he suffers from acid reflux for which he takes medication, and that he is prescribed tramadol for pain in his legs. The claimant stated he did not think of policy was fair, in that the treated office staff and drivers in the same way despite the differences in their work.

85. The claimant stated that he had been coerced by his manager, Mr Grant to go home.

86. Mr Muldoon said that the claimant could have been offered support by Mr Grant and questioned why the claimant was not helped when he asked for this, and that Thursday was a quiet day and that there must have been extra people who could cover.

87. After further discussion the claimant was again asked if there was anything else that he wished to bring up, but said no.

88. Mr Harvey then adjourned the meeting to consider his decision. In doing so he carried out some further investigations. In particular Mr Harvey investigated the reasons for the 46 day and 19 day absences which had triggered steps in the review procedure. He considered the minutes of the meeting which had generated the first warning on the back of the 46 day absence. He noted that in the minutes of the claimant had attributed this to the accident to the fact that he stood on a brick and fell over. He also took into account that the claimant had signed these minutes, and has not appealed the warning, and therefore he did not accept that this accident was related to an injury at work.

89. Mr Harvey also looked into the reasons for 19 day absence which was also said by the claimant to have been caused by an accident at work. Mr Harvey obtained the respondent's accident investigation report. The respondents had carried out an investigation of the accident and produced a report. The investigation concluded that the path surface was uneven, and the claimant had strained his back pulling cages over it. However, the investigation also concluded that the claimant should have followed his health and safety training, by carrying out a dynamic risk assessment, and should not have attempted to pull the cages over the uneven surface, but instead should have used the stack barrel available to unload the goods, even if this would have taken him longer.

90. In light of this conclusion Mr Harvey was not satisfied that this absence should be treated as a work related injury as it could have been avoided.

91. Mr Harvey did not accept that Mr McArdle had conducted the Stage 3 meeting unfairly. In reaching this conclusion he noted that in that the minutes, which

the claimant has signed is accurate, Mr McArdle had asked a mixture of closed and open questions which the claimant had responded to, and that he had asked the claimant if he had anything else to add, giving him an opportunity to speak, before adorning to consider his decision.

92. Mr Harvey considered the points made by the claimant about not being supported. He did not conclude that there was a lack of support, on the basis that every day is a different, and the logistical exercise which the respondents have to carry out needs to take account of holidays/training. He accepted that the Thursdays where less busy than Mondays and Fridays, however he also took account of the fact that there would also be less drivers scheduled to work. He did not consider it realistic that a driver complaining of not feeling well would necessarily be able to get support, because of the respondent's limited resources. He considered this expectation was unrealistic.

93. Mr Harvey was satisfied on the basis of the statements from Mr Grant, Mr Wallace, Mr Stirling, and Mr McMaster that there was a legitimate health and safety reason in Mr Grant's mind in not allowing the claimant to drive and sending him home. He did not accept in light of the statements which he had that Mr Grant had unfairly or strategically orchestrated that situation.

94. Mr Harvey spoke to Mr Campbell about the Stage 3 meeting which he conducted. Mr Campbell told him that he asked about stress, but nothing was mentioned. Mr Harvey took into account that the claimant was suffering from stress, in the lead up to the Stage 3 meeting, but said that he did not wish to delay that meeting. Mr Harvey also took into account that Mr Campbell had taken the decision to extend the final warning on that occasion.

95. Mr Harvey had the Occupational Health report, but there was no discussion about this in the course of the appeal hearing.

96. Mr Harvey took into account the claimant's length of service, and the points made in the appeal. He concluded that there had been a discussion of the claimant's absences throughout the process and the state of health had been discussed. He concluded that the claimant's illnesses were genuine, but taking into account the claimant's absence record, the fact that it he has been

on a final warning, and the high impact absence had on the business, he decided to confirm the decision to dismiss the claimant.

97. Mr Harvey wrote to the claimant on 4 June 2019 (132/133) confirming his decision. Mr Harvey's decision was delivered 14, as opposed to 7 days after the date of the appeal.

98. The claimant received his P 45 from respondents on 21st of May.

99. The claimant was paid 12 weeks' pay in lieu of notice.

100. After the termination of employment, the claimant undertook refresher training, and registered with an Agency for driving work.

101. The claimant began working with the Agency and was assigned as a driver to the Cooperative distribution centre, where he has worked regularly since 24th May 2019. The claimant hopes that he will be taken on by the Cooperative on a permanent basis at some point in the future. The claimant now has to work Saturday and Sunday shift which he previously did not have to do. The claimant's income from that employment is approximately £500 per week.

102. While in his employment with the respondent's the claimant benefited from a pension to which the respondents contributed 3% of his salary, and the claimant paid £60 per month.

Note on Evidence

103. There was not a great deal of conflict in the evidence which the tribunal heard, however there were some issues which the tribunal had to resolve.

104. The respondent's witnesses impressed the tribunal as being in the main credible and reliable. Mr McArdle give convincing evidence about the logistical exercise which the respondents have to undertake in the conduct of their business, the pressures which they are under. Both witnesses gave credible evidence about the impact of driver absence on the work which the respondents do, the resources they have to deal with it, and the impact this has on other resources which might be available.

105. The evidence which both witnesses gave about the claimant's absent management process and dismissal/appeal was consistent with the contemporaneous documents before the tribunal.

106. The tribunal did not form the impression that the claimant in anyway sought to deliberately mislead, however it did form the view that from time to time his perception that he had been unfairly treated coloured his evidence to some degree. The tribunal formed this impression in relation to the claimant's evidence that he was not given a fair hearing by Mr McArdle and the outcome of that meeting and of the appeal meeting was predetermined.

107. Both Mr McArdle and Mr Harvey give convincing evidence about the steps which they took prior to conducting the review hearing and appeal hearings with the claimant. For Mr McArdle that involved consideration of the previous review meetings under the Policy and their outcomes, and his obtaining statements from the witnesses to the incident on 24th April. Furthermore, the minutes of the meeting with Mr McArdle which the claimant and Mr Muldoon signed, indicated that he had asked the claimant open questions about what had happened, and he had given him the opportunity to say anything else that he wished to say before adjourning the meeting. This approach on his behalf did not support the conclusion that the meeting was conducted unfairly, or that he had predetermined the outcome. In reaching this conclusion the tribunal take into account that Mr Muldoon gave evidence to the effect that Mr McArdle always dismissed employees at a Stage 3 meeting. That however was not put to Mr McArdle in cross examination, there was no evidence beyond Mr Muldoon's assertion that that was the case to establish this, and therefore the tribunal did not draw any significant adverse inference from Mr Muldoon's evidence on this point.

108. Mr Harvey give convincing evidence about the steps which he took prior to concluding the appeal, which included investigating the reasons for the claimant's earlier periods of absence, looking at the minutes of the previous meetings, and speaking to Mr Campbell. It was also apparent from the minutes of the appeal meeting that the claimant was given the opportunity to

say whatever he wished to say, and both these factors are inconsistent with the notion that the outcome was predetermined.

109. The tribunal also heard evidence from Mr Muldoon. While Mr Muldoon's evidence as to the steps he took to advise and accompany the claimant to the absence review meetings was a relevant and in the main credible, not all of Mr Muldoon's evidence was directly relevant to the issues which the tribunal had to resolve, and he gave his opinion on some matters, for example the unfairness of the Policy to drivers as opposed to office workers, which is not a matter for the tribunal.

110. Mr Hay submitted there was an issue of credibility in relation to the accuracy of the notes which were taken of the Absence Review meetings.

111. A suggestion was made by the claimant in cross examination that the minutes of these meetings, in particular, the minutes taken form the meeting with Mr McArdle was not accurate, and not everything that he had said was recorded. Some support for this was given by the evidence of Mr Muldoon, who pointed out that he was only recorded as having made one contribution to that meeting, when his recollection was that he had said more. Mr Muldoon however was unable to give any detail of what he said, which was omitted from that minute. The minutes of all the review meetings were signed by the claimant, and the minutes of the meeting conducted by Mr McArdle were signed as being accurate by the claimant and Mr Muldoon, and in light of this there tribunal was satisfied that albeit they were not a word for word account of what was said, these minutes represented an accurate record in the round of what was discussed.

112. Mr Hay submitted another conflict arose over whether the claimant was deliberately sent home by Mr Grant who wish to orchestrate his dismissal. It was a claimant's position at the Tribunal, and indeed in the course of the review and appeal hearing, that this was the case.

113. The tribunal did not hear from Mr Grant. The test which it has to consider however is whether the respondents had reasonable grounds on which to form the belief which they did as to the reasons why the claimant was sent

home by Mr Grant. Both Mr McArdle and Mr Harvey had witness statements from four employees, two form managers, and two from were drivers, all confirming that the claimant was unwell. In light of that it was not unreasonable for them to form the view that Mr Grant's decision to send the claimant home was a legitimate one because of health and safety concerns about having the claimant drive an 18 tonne truck in circumstances where he appeared to Mr Grant and others to be visibly unwell.

Submissions

Respondents Submissions

114. Mr Hay provided some written submissions, which he supplemented with oral submissions. He began with observations on the evidence, and then addressed the tribunal on the relevant law.

115. Mr Hay took the tribunal to the case of *International Sports Company v Thomson (1980) IRLR 340* and the judgement of the EAT in that case.

116. He submitted that the correct question is not a judgement over the attendance trigger rule, or its level, but the actual attendance level of the employee.

117. Mr Hay submitted that the yardstick by which to measure such a decision is the band of reasonable responses - *Iceland Frozen Food v Jones (1983) ICR 17.*

118. Mr Hay submitted that the relevant test was later considered by the EAT in *Lynock v Cereal Packaging Ltd (1988) ICR 670.* In that case the EAT accepted that the reason was 'capability', as was a matter of common ground, but it noted that it might possibly have been a question of conduct and there must be a very fine line between the two (paragraph 672D-E).

119. Mr Hay submitted that cases where the reason for dismissal is, as in this case, an unacceptable level of intermittent absence are slippery to categorise, but that ultimately what the tribunal has to decide upon is the sufficiency of the reason and the fairness of the decision to dismiss.

120. Mr Hay also refers to the case of *Davies v Tibbett and Britain plc (200) UKEAT/0460/99* where regular attendance was an important factor in the case concerning the transport of goods. He referred in particular to paragraphs 2, 3,4. The EAT in that case continued to consider *Thomson* as a relevant guidance in cases of this kind (paragraphs 14-15).

121. Mr Hay then addressed the tribunal on the factors in this case, applying the guidelines in Lynock. He took the tribunal to the length of the claimant's absences and the spaces of good health between them and submitted there were considerable absences over rolling 12 month period starting from June 2018 onwards. At the point of dismissal there were 67 days of absence over a 12 month period which was 25.7%.

122. Mr Hay submitted there was a need for the respondents for the work to be done by the claimant. This was spoken to by both of the respondent's witnesses, in terms of the nature of the products which will be delivered and the restrictions on delivery times.

123. In relation to the impact of absence on others who work with the respondents, and Mr Hay submitted that both the respondent's witnesses spoke to the real issue of resources at the depot. Deliveries required to be made, and the allocation of drivers to vehicles meant that while there were some contingency available, it could not be relied upon without potentially having to redeploy another worker from the substantive duties to perform the delivery run.

124. Mr Hay referred to the adoption and carrying out of the Policy. The Policy was readily available to all staff and was referred to by managers during the relevant meetings and was followed.

125. Mr Hay also referred to the important emphasis on a personal assessment of the ultimate decision, and this was demonstrated by the decision to reissue the Final Written Warning by Mr Campbell.

126. Mr Hay also referred to the extent to which the difficulty of the situation and the position of the employer had been made clear to the employee and

submitted this to be made clear in the general sense by the absence policy and dealt with again in the absence review meetings.

127. Mr Hay submitted that the respondents were reasonably in a position in these circumstances, judged against the band of reasonable responses, to say that enough was enough and to dismiss with notice.

128. In relation to remedy, as far as the basic award was concerned, Mr Hay submitted that the effective date of termination was at 30 April 2019 the claimant had 15 years continuous service, and the statutory cap on a week's pay of £525 applied.

129. Any award of compensation should reflect the fact that the claimant was paid 12 weeks' notice, and then there for any loss should not commence until 23rd July. After that date the claimant has in fact been paid more than he had been when employed by the respondents. Credit should be given for that during the notice period. Mr Hay submitted that if there was any award for future loss this should be restricted to three months, which is also the period during which any loss of pension should also be awarded. Loss of pension should be assessed at 3% of gross pay.

Claimant's Submissions

130. The claimant submitted that his dismissal was unfair. He disputed that his period of 46 days absence was not work related. It was noted that he was absent because of back pain on the respondent's records, and Doctors' lines have been submitted to support this. The claimant did not accept that Mr Grant was entitled to send him home because of a health and safety risk.

131. The claimant referred to the case of *International Sports*, and submitted that he also had a chronic illness and that for eight years he has been on Tramadol for chronic pain, and fluoxetine for depression, and on medication for 25 years because of Acid Reflux.

132. In comparing the case of *International Sport* to his own, the claimant submitted that fair reviews were required, that did not happen in his case.

133. The claimant referred to paragraph 15 of the *Davis* case which he submitted was authority for the fact that there should be fair review of the absence and appropriate warnings, and he submitted that did not happen in his case.

134. The claimant submitted the respondents said they have staff shortages and that was one of the reasons he was not supported on the day of his tooth extraction. The claimant submitted however that on the second occasion, there was a driver available, as a David Marshall had driven him home (in breach of the Policy), and he submitted that the respondent's concerns were exaggerated.

135. The claimant submitted that the respondents did not adhere to the Policy, and he referred to the aims and overview of the Policy. He submitted that the Policy was unfair and had a detrimental effect on his mental health. It was unrealistic to think that a driver would not hit trigger points. Mr Muldoon agreed the policy was unfair. The respondent failed to support the claimant or put measures in place to help him.

136. The claimant submitted that the first trigger under the policy was back pain which was caused by an accident when he was dragging cages. The respondents failed to follow their Policy. He submitted that the respondents failed to implement the Long Term Sickness Policy. The claimant submitted that he followed safe system of work and carried out and dynamic risk assessment at work. He submitted that this absence should be struck from his record.

137. In relation to the second trigger absence, the claimant submitted that he had carried out a dynamic risk assessment and the respondents had not repaired the path until after his accident, although he had reported as having been uneven. He submitted that the investigation must have concluded that the claimant was not at fault as otherwise he would have been asked to attend a disciplinary hearing because of his failure to follow health and safety procedures. The claimant submitted that after this accident he had a referral to occupational health, but the respondents did not follow the occupational health advice, and he was never offered physiotherapy.

138. In relation to the third trigger absence, the claimant submitted that Mr Grant unfairly refused to grant his request for emergency leave, and he was sent home. He was not referred to the Medical and Dental policy which should have been referred to on this occasion.

139. In relation to the final trigger absence, the claimant submitted that he was fit for work, and it was Mr Grants decision to send him home despite the fact that he was capable of driving. The claimant submitted that as a driver of 16 years' experience and could assess the situation. The claimant questioned Mr Grants concern for him and submitted that if he had been so concerned then he should have called an ambulance to take the claimant to hospital, and therefore he failed to support the claimant on this occasion and had no concern for his health and safety.

140. The claimant submitted that the decision to dismiss him was a formality and was predetermined. He submitted the appeal was also predetermined, pointing to the fact that he had received his P 45 prior to the appeal hearing taking place.

141. The claimant submitted that the respondents also breached their own Policy and that the appeal decision was not issued within seven days.

142. The claimant submitted that he found the review meetings difficult, and he was suffering from stress. He submitted that he would have signed anything, and he said little, just to remove himself from the situation. He submitted that his mental welfare suffered, and he was living in fear of losing his job. He submitted he addressed his mental state at the review meeting and the respondents did not support him.

143. The claimant submitted that the respondents did not adhere to their absence Policy; they did not adhere to their Long-Term Sickness Policy; they did not adhere to the Mental and Dental policy; they did not adhere to the Safe System of Work policy; they failed to provide the support outlined in the Occupational Health report; and they had failed to support him on numerous occasions thus failing to reduce his absence level.

Consideration

144. Section 94 of the ERA provides for the right not to be unfairly dismissed.

145. Section 98 provides;

"*(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

(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 the justice justify the dismissal of an employee holding the position which the employee held.

…….

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard shown by the employer)-

(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."

146. The burden of proof rests with the respondents to establish the reason for dismissal.

147. The reason for dismissal advanced by the respondents in this case is the claimant's unacceptable level of intermittent absence from work, which is said to be an SOSR.

148. In order to qualify as an SOSR the reason must be substantial, and not frivolous or trivial. The tribunal at this stage has to find that the reason could,

but not necessarily does, justify dismissal. Consideration of whether reason justifies dismissal is part of the tribunal's assessment of the reasonableness of the dismissal under Section 98(4) of the ERA.

149. There was no question that respondents genuinely believed that the claimant had been absent for each of the periods of absence which triggered the Policy review process. Albeit the reasons for those absences may have been in issue, there was no dispute that the claimant was absent for those periods.

150. It could not be said that 4 periods of absence, totalling 67 days of absence over 12 months which resulted in a 25,7% absence over that period, could not potentially amount to a substantial reason to dismiss. The Tribunal was satisfied that the respondents dismissed the claimant because of that intermittent absence, and therefore was satisfied that the respondents had established a potentially fair reason for dismissal.

151. Having reached that conclusion, the tribunal went on to consider whether dismissal was fair or unfair under Section 98(4) of the ERA. The tribunal reminded itself that in applying this section the burden of proof is neutral, and that in considering both the procedure adopted by the respondents, and the decision to dismiss, the tribunal has to apply the band of reasonable responses test, applying the objective standard of a reasonable employer.

152. The tribunal obtained guidance from the case of *Lynock* referred to by Mr Hay.

153. What was said in that case was;

'*The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in her judgement- sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Second, every case must depend upon its own facts, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following; the nature of the illness; the likelihood of its recurring or some other illness arising;*

the length of the various absences and the the space of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and position of the employer had been made clear to the employee so that the employee realises that the point of no return, the moment with the decision was ultimately being made may be approaching '.

154. In applying the test of reasonableness under Section 98(4) the Tribunal considered the factors identified by the EAT in this passage.

155. The absence of history for which the claimant was dismissed was a period of 67 days over a rolling 12 month period, over four periods of absence. The claimant was absent from 21 June 2018 until 3 September 2018; he was thereafter absent from 16 October until 12 November. The claimant again was absent from the 14 to 18 March, and thereafter 23 to 24 April.

156. The respondents were reasonably entitled to conclude that there was no connection between those absences. Albeit the claimant's absence history at page 32 records his June to September absence as being on account of back pain, in the notes from the Stage1 review meeting which followed on the 46 day period of absence the claimant attributed this absence to a 'freak accident,' falling over a brick and injuring his ankle. The claimant put to Mr McArdle and Mr Harvey in his cross examination that this absence was because of an accident at work and that there were Doctors lines to support that he had had a back injury before falling over. This however was not raised by the claimant at any stage during the absence review meetings, or his appeal against the decision to dismiss him. It was not unreasonable therefore for Mr McArdle, and Mr Harvey to conclude that this period of absence was due to an ankle injury and was unconnected to an accident at work or because of back pain.

157. The second period of absence was because of back pain. The claimant submitted that the respondent should not have considered this absence as it

was as a result of an accident at work when he pulled cages over an uneven path going into a nursing home.

158. The fact that the claimant considered this absence was due an accident at work is flagged in the initial return to work interview notes. However, the claimant did not maintain this position at the Stage 2 meeting, and he signed the minutes of that meeting, and he did not appeal against the imposition of the stage 2 warning. In those circumstances it was not unreasonable for Mr McArdle to conclude that the second period of absence was not work-related and was for a separate reason to the first period of absence.

159. At the appeal, the claimant again stated that this absence was because of a work related injury. Mr Harvey carried out investigations into that. He considered the accident investigation report which the respondent had carried out at the time, and having done so, on the basis of the information in that report formed the view that the claimant had not followed his Health and Safety training in that he should not have a not have offloaded the cages and tried to pull the cages onto an uneven path. Mr Harvey was therefore not prepared to treat this as an absence which was caused by accident at work.

160. The approach taken by Mr Harvey in investigating matters by considering the inspection report which was carried out at the time, was not unreasonable. The view he took of matters thereafter was not necessarily one which all employers would have adopted, but equally applying the objective test of a reasonable employer it could not be said that his conclusion was one which fell out with the band of reasonable responses.

161. The claimant relied upon the fact that he had previously reported the uneven path, and that the path was filled in after his accident. However, the nursing home was not owned by the respondent's and therefore when the path was repaired was not a matter over which the respondents had control, and the Tribunal could draw nothing from the timing of this repair.

162. The next two periods of absence were of much shorter duration, and where for unconnected reasons, being the aftermath of root canal treatment, and acid reflux.

163. The claimant submitted that the respondents were in breach of their policy, in that they did not take into account his medical condition, and he cited his condition of depression, acid reflux, and pain in his back and legs. None of this however was put to the respondents in the course of Review meetings. The claimant submitted that he did flag his mental health to Mr Campbell. There was mention of the claimant being near a 'breakdown' in his meeting with Mr Campbell. That appeared to be said however in the context of the claimant explaining the difficulties which his dental treatment was causing, there was nothing to suggest that this had been expanded upon any significant degree. There is no reference to any mental health difficulties in the OH report. Mr Muldoon towards the conclusion of the meeting made a general statement about 'people's mental health' but nothing specific about the claimant.

164. There was therefore nothing to suggest that the respondents were aware of any of the ongoing conditions which the claimant identified in his submissions until the point of the appeal. Even by that stage however there was nothing in that which would reasonably to suggest that the absences were linked, which may reasonably have required the respondents to carry out medical investigation. The Tribunal also observes that this is not a is not a disability discrimination case.

165. The Claimant also submitted that the respondents were in breach of their Policy by failing to provide the support identified in the OH report and by failing to offer him physiotherapy. In the notes of the review meeting with Mr Ralston it was noted that the claimant had been supported for a 'couple of days'. He also stated that he was fit for duty in the course of that meeting but stated that driving had been sore. The OH report had stated that it was likely that the claimant would benefit from a phased return and give an example of half his contractual hours during week one, increasing over a four-week period, and that if feasible, he should work with 'buddy'.

166. There was nothing however to suggest that had the respondents carried out in full the recommendations in OH report that this would have reduced the claimant's overall absence, as his absences were on the face of it for entirely

unconnected reasons. There was nothing which suggested that offer of further physiotherapy, would have reduced the periods of absence which the claimant had in September and October or prevented further to absences which triggered the review stages in Policy.

167. The respondents were reasonably entitled to conclude that the claimant had considerable absences over a 12-month rolling period, which were for unconnected reasons.

168. In submissions the claimant submitted that the respondents were in breach of their policy by failing to refer him to the Medical and Dental policy, however none of the respondent's witnesses were questioned about this, and there was no copy of this policy available to the tribunal, therefore the tribunal could not take anything from this.

169. The claimant also submitted that the dismissal was unfair because the respondents had not considered his first absence under their Long Term Absence Policy, and that there was provision for this in the Policy.

170. The Policy does state that long-term absence will be considered under the Long-Term Absence Policy and defines long-term absence as an absence of more than four weeks. On the face of it therefore respondents did fail to adhere to their Policy, however the tribunal was not in a position to assess the reasonableness of this or otherwise in terms of the decision to dismiss, as none of the respondent's witnesses were questioned about this, and the Long Term Absence policy was not produced.

171. The respondents were also reasonably entitled to conclude that there was a need for the claimant to do the work he was employed to do, and to attach considerable weight to that. The respondents were reasonably entitled to take into account logistical complexity of the delivery arm of their business, reflecting the importance of making deliveries on time, the restrictions on delivery slots, and perishable nature of the goods which they deliver. These were factors which significantly impacted on the importance of drivers attending for work to do their job.

172. The respondents were reasonably entitled to consider the impact of absences on others who work. The flavour of the evidence from the witnesses, including Mr Muldoon, was that absence did impact on others. The tribunal was satisfied that as a matter of fact, while there was some contingency, driver support could not be guaranteed, and that if an office employee who was also a driver had to do deliveries this could potentially cause issues with the delivery and impact on the work which was needed to be done in the office.

173. Mr Muldoon at the appeal hearing submitted on behalf of the claimant that accommodation could be made, particularly as one of the days absence was a Thursday which was a quieter day. It was plausible however that, as spoken to by Mr Harvey, the respondents would have scheduled less drivers on the quieter days, and therefore there would not necessarily be more contingency available to them, and it was not unreasonable for Mr Harvey to take this into account in reaching his decision. The claimant submitted that Mr Wallace who drove him home was a spare driver on his last day of absence, however there was no evidence before the Tribunal, beyond the claimants accretion, or before Mr McArdle or Mr Harvey which supported this, and it was not a factor which it could be said the respondents acted unreasonably in failing to take into account.

174. The tribunal also took into account the adoption and carrying out of the Policy. The tribunal was satisfied that the respondents introduced the policy in order to manage absence which had a significant impact on their business, and that it was not unreasonable for them to do so. The tribunal was satisfied that the Policy was distributed to the staff, who were familiar with it, in particular the trigger points under the absence review procedure. The claimant accepted that he was aware of these trigger points. On each occasion when the claimant was asked to attend a review meeting, he was provided with a copy of the Policy, and the Policy was referred to, and therefore respondents were reasonably entitled to conclude that the claimant was familiar with the Policy.

175. As is apparent from the findings in fact the claimant was called to review meeting at each stage when he reached the trigger point under the Policy; he signed the minutes of those meetings, and he subsequently received

warnings in line with the Policy provisions. The claimant submits that the respondents were in breach of the Policy in that they failed to adhere to the provisions under the heading *Policy overview,* at point 1 in the Policy. His position was that the respondents did not support him effectively when he needed it and did not help him to return to work as quickly as possible. It appeared to the tribunal that lack support he referred to was the decision of Mr Grant on two occasions to send him home. For the reasons given above however, the tribunal could not conclude that the respondents were unreasonable and accepting that Mr Grant had legitimate reason for sending the claimant home on the occasions when he did.

176. The tribunal was satisfied that the respondents adhered to the Policy in terms of the procedure which they applied in fixing each of the Stage 1 to 3 meetings, in the information which was given to the claimant prior to and following each of these meetings, in the information provided at the disposal stage, and in providing for a right of appeal.

177. The tribunal takes into account the claimant's submission to the effect that the appeal procedure was unfair because the decision on appeal was not communicated within seven days but took 14 days. The policy terms do not provide a strict seven-day limit and could not be said that applying the objective test of a reasonable employer that delivering the appeal decision out with the seven-day period, but within 14 days rendered the decision to dismiss unfair.

178. In taking the decision to dismiss the claimant, Mr McArdle, and subsequently Mr Harvey were reasonably entitled to conclude that the claimant was aware of the Policy provisions, and that the Policy had been adhered to in terms of the management of his absence.

179. The tribunal also consider the extent to which there was personal assessment in the ultimate decision to dismiss. There is support for the conclusion that there was personal assessment, in that at the Stage 3 review meeting carried out by Mr Campbell he took the decision to extend the final warning, rather than dismiss. The fact that this was the case supported the conclusion that he

exercised discretion in his application of the policy. The tribunal was also satisfied that both Mr McArdle and Mr Harvey assessed the claimant's circumstances before taking the decision to dismiss and reject the appeal. For the reasons given above, the Tribunal was not persuaded the decisions taken by Mr McArdle and Mr Harvey were predetermined. The Tribunal did not conclude that the decision to dismiss, or refuse the appeal, were automatically taken because the claimant had reached the trigger points under the policy.

180. The Tribunal and considered whether the decision to dismiss because of the claimant's intermittent absence over the 12 month period was one which fell within the band of reasonable responses, applying the objective test of a reasonable employer. In considering this took into account both said in the case of *Iceland Frozen Foods* referred to above. That was that the correct approach for the employment tribunal to adopt in answering the question posed by section 98 (4) is as follows;

(1) the starting point should always be the words of section 98 (4) themselves;

(2) in applying the section on employment tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the employment tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employers conduct an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) for many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the employment tribunal, as industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismiss this fair; if the dismissal falls out with the band it is unfair.

181. The factors which Mr McArdle, and subsequently Mr Harvey in dealing with the appeal, took into account in reaching their decisions included the claimant's length of service, his absence of 67 days or four occasions a 12 month period, the fact that the claimant had been taken through the Policy, and warnings issued in line with that Policy, and that the claimant had not appealed against any of those warnings, the fact that the claimant had been on a final written warning, but that had been reissued in March, but that he been absent again, and the impact of absence on the business.

182. It could not be said that it was unreasonable for respondents to take these factors into account in reaching their decision.

183. While some employers may not have taken the decision to dismiss, taking into account the nature of the respondent's business, the impact of absence on that business, the fact that the respondents adhered to a Policy and attempts made to manage the claimant's absence, and the extent of the claimant's absence over a 12 month period, it could not be said that the decision to dismiss was one which fell out with the band of responses, and therefore the tribunal concluded that dismissal was fair tribunal and the claim is dismissed.

Employment Judge:	L Doherty
Date of Judgement:	06 December 2019
Entered in Register,	
Copied to Parties:	11 December 2019