



EMPLOYMENT TRIBUNALS

Claimant: Mr D C Hulme

Respondent: Enviroplas Ltd

Heard at: Manchester via CVP

On:10 November 2020

Before: Employment Judge Serr

Representation

Claimant: Mr C Atkinson (Solicitor)

Respondent: Mr A Stebbings (Company Director)

JUDGMENT having been sent to the parties on 20 November 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a letter dated 27 November 2020 the Respondent requested a “written transcript of the proceedings”. No transcript of proceedings is provided in the Employment Tribunal to parties, despite the hearing on this occasion being conducted by cloud video platform. The Tribunal has instead treated the request as one for written reasons under the Tribunal Rules.

The Issues

2. The case was subject to a Case management hearing on 27 July 2020 where the Employment Judge identified what he understood to be the issues in the case. The Employment Judge was hampered by a lack of representation by the Respondent due to possibly technical issues at that hearing. At the outset of the present hearing the Tribunal attempted to further refine the issues with the assistance of the parties. The following issues were identified as those the Tribunal was invited to adjudicate upon. For completeness, the Tribunal also records key matters that were agreed.

- (i) The reason for the dismissal- The Respondent indicated that the reason for dismissal was erratic attendance and punctuality. The Respondent indicated that the manner in which the Claimant took

his absences including being absent without proper fit note authorisation was part of the reason for the dismissal. The Claimant accepted that the reason for the dismissal as he understood it was unauthorised absence. There was some debate between the parties and the Tribunal at the outset of the hearing as to whether the reason being relied on fell within section 98 (2) (a) that is capability or section 98 (2) (b) conduct. This is a matter addressed by the Tribunal in its conclusions.

- (ii) Did the Respondent act reasonably in treating its reason indicated above as a sufficient reason for dismissing the employee Mr Atkinson on behalf of the Claimant relied on a failure to follow policy, a failure to take into account fit notes, a failure to follow the capability process and the failure to offer an appeal against dismissal.

 - (iii) Did the Claimant if unfairly dismissed contribute to his own dismissal and/ or should any claim for compensation be reduced to reflect the likelihood that the Claimant would have been similarly dismissed at a future point- contributory fault and the “*Polkey* principle”.

 - (iv) Wrongful dismissal- did the Respondent dismiss the Claimant in breach of the Claimant’s employment contract thereby requiring that the Respondent to pay the Claimant 8 weeks’ notice pay.
3. It was agreed that issues of remedy, if relevant, were to be left to be determined after the current hearing and in addition an outstanding claim for holiday pay which had not been as yet particularised would also be left to be dealt with following the resolution of this part of the hearing.

Facts

- 4. The Tribunal had before it a 101 page bundle and separately an employment contract and heard evidence from Mr Stebbings company director for the Respondent and the Claimant himself.

- 5. The Tribunal made the following findings of fact on the balance of probabilities.

- 6. The Respondent is a manufacturer of plastic fabrications. It currently employs 29 to 30 employees and also has what Mr Stebbings referred to as subcontractors, that is self-employed persons on its books which number approximately 4. The Claimant was employed as a fibre glass laminator from the 3rd of January 2012 until his eventual dismissal with effect from the 31st of January 2020. The Claimant was provided with an employment contract but did not return or sign it. Clause 10 made reference to a sickness absence procedure in a staff handbook. The Tribunal was provided with the contract but not the handbook.

- 7. In the first half of 2017 the Claimant received a number of written warnings for what was said to be issues in respect of his absence and punctuality.

The Tribunal has seen written warnings dated the 24th of January 2017 the 1st of February 2017 and the 11th of July 2017. The January warning was live for 12 months, the February warning for six months and the July warning also for six months. The warnings all indicated that the improvement expected from the Claimant was that he should punctually attend work and if absent to notify before 9:00 AM via the landline on the first day of absence with follow up calls if the absence was going to be more than one day. The warnings all provided a right of appeal which do not appear to have been exercised by the Claimant .

8. Despite a number of warnings all being given in close proximity none of them were escalated up to a final warning, but rather all indicated they were simply a written warning or a verbal and written warning. The warnings also somewhat unhelpfully conflate absence and what could be said to be conduct issues related to the absence. This it may be observed has been a feature of the present case.
9. The Claimant was absent between the 29th of August 2017 and the 12th of September 2017 with chest pain. Further absences occurred on the 20th of September 2017 to the 18th of October 2017 and again the fit note indicated that the Claimant was absent with chest pain.
10. The Claimant was absent again on the 22nd of June 2018 to the 12th of July 2018 the fit note covering this period indicated that the Claimant was absent with investigation for stress.
11. The Claimant was absent between the 12th of July and the 30th September 2018 and the fit note gave the reason as depression and stroke. The Claimant was also absent on the 1st of October 2018 to the 28th of October 2018 and again the fit note indicated that the reason for absence was depression and previous stroke. Finally, in 2018 the Claimant was absent between the 30th November to the 27th of December and again the fit note indicated the reason for absence was depression and previous stroke.
12. On the 11th of December 2018 the Claimant was issued with an SSP 1 advising him that from the 3rd of January 2019 he would no longer be able to claim statutory sick pay from the Respondent .
13. The Claimant appears to have been absent from the beginning of January 2019 eventually returning to work on the 12th of March 2019. The Claimant did provide fit notes it seems for some of this period Including a fit note covering the period the 15th of February 2019 to the 17th of February 2019 and a fit note covering the period the 18th of February 2019 to the 11th of March 2019. These fit notes gave the reason for absence as depression and stroke. Fit notes however were not provided as they ought to have been prospectively to cover a period moving forward. The note covering the period 15th February 2019 to 17th of February 2019 appears to have been provided on the 15th of February 2019. No further sick note was provided immediately after the ending of that sick note on the 17th of February 2019. The Claimant was contacted by the Respondent by phone on the week commencing the 11th and 18th of February 2019 and was written to on the 25th of February 2019. The letter of the 25th of February 2019 was headed

return to work and stated that “further to the ending of your sick notification and to your visit to the works where you advised your intention to return to work and obtain a fitness certificate to date some two to three weeks on we have not had any contact whatsoever from you”. The letter went on to request that the Claimant make contact with a view to a return-to-work meeting and to discuss any health issues.

14. The Respondent wrote a further letter dated the 4th of March 2019 to the Claimant which was headed re unauthorised absence. The letter stated that the Claimant had been absent from work without providing any reason whatsoever and his conduct implied that he had resigned his position with the company. He was asked to contact Alan Stebbings of the Respondent as a matter of urgency and in any event by no later than two o'clock on the 8th of March 2019.
15. A meeting took place between Mr Stebbings and Mr Barlow of the Respondent (a director and the Claimant's line manager) and the Claimant on the 11th of March 2019. At that meeting the Claimant provided a fit note covering the period of the 18th of February 2019 to the 11th of March 2019. The Claimant stated that he was fit and ready to return and confirmed that he was not taking any medication that could have impaired his ability to perform his normal duties. The notes of that meeting also state that it was voiced as a concern that his previous attendance and reliability were somewhat sporadic and the Claimant is noted as stating that he would endeavour to be reliable and punctual in his attendance and would welcome any overtime working available.
16. Around about this time the Respondent employed an additional person in the fibreglass shop with additional duties and responsibilities because of the level of demand for its products. The Claimant was absent from work again between the 8th of May and the 19th of May 2019 and the fit note indicates the reason for the absence as restless legs. The Claimant had a further period of absence between the 20th of May 2019 and the 31st of July 2019 and a return-to-work meeting following that period of absence indicated that the Claimant was confident he was fit for work and expected to return on the 3rd of September 2019.
17. The Claimant had further periods of absence between the 1st of August 2019 to the 30th of September 2019 the sick notes covering this period indicate the reason for absence as depression and stroke. There were additional sickness absences evidenced by fit notes presented to the Tribunal on the 1st of October 2019 to the 28th of October 2019 and on the 30th of November 2019 to the 27th of December 2019. The reasons given for absence are again depression and previous stroke on both fit notes covering this period.
18. On the 18th of November 2019, The Claimant received a verbal and written warning following a meeting for what was said to be conduct /performance. The document evidencing this written warning indicates that the Respondent was unhappy with the Claimant's absence/punctuality and the document states that we do not feel that the amount of time off and late attendance are reasonable. The warning was said to be live for a six-month

period and the improvement expected was punctual attendance and if absent notification before 9:00 AM via landline on the first day of absence. The letter also states that “the likely consequences of insufficient improvement is further disciplinary action, and it is prudent to warn you at this stage that the company may consider dismissal as part of this process”.

19. In January 2020 the Claimant returned late on the first day back of the new working year with a sore arm and was unable to work. Following this the Claimant was absent on the 7th of January 2020 and the 13th of January 2020. These absences were not authorised by any sickness note nor did the Claimant indicate to the Respondent the reason for the absence. On the 15th of January 2020 the Respondent received a letter from greenacre environmental systems limited confirming the cancellation of an order. The Tribunal accepts the evidence of Mr Stubbings that the Claimant was at least in part responsible for the fulfilment of this order. The reason given by greenacre for cancelling the order was the fact that the work had not been started and the equipment was due for delivery in less than a week. The Tribunal accepts that the Claimant’s continued absences contributed to the cancellation of the order by greenacre.
20. On the 17th of January 2020 the Claimant received a final warning from Mr Stebbings and Mr Barlow. There was some debate between the parties about whether in fact this letter had been received by the Claimant. The Tribunal prefers the Respondent’s evidence on this point. Mr Stebbings was quite clear in his evidence that the letter had been sent as far as he was aware, all previous warning letters had been received and the later letter of the 31st of January 2020 which confirmed the reasons for the dismissal confirm that on Friday the 17th of January the Claimant was in work and in fact was late attending.
21. On the 24th of January 2020 the Claimant failed to attend work and did not indicate to the Respondent that he was going to be off or the reason why. On Monday the 27th of January 2020 the Claimant arrived for work where he was met by Mr Stebbings and Mr Barlow. Mr Stebbings and Mr Barlow summarily terminated the Claimant’s employment at that point. There was no investigation as to the reasons for the Claimant’s absence and the Claimant was not offered any right of appeal against their decision. On the 31st of January 2020 the Claimant was sent a letter from Mr Stebbings and Mr Barlow. The letter clarified the reasons for the Claimant’s dismissal which had not been fully indicated on 27 January 2020. The letter states “despite verbal requests and written warnings your attendance did not improve e.g. the week commencing Monday the 13th of January no show no call on the Monday at 10:30 AM on Tuesday the 14th we were informed you had a bad tummy and will be in on the Wednesday on Friday the 17th of January you were 17 minutes late. Week commencing the 20th of January we only received a call at 3:00 o’clock to explain to us your uncle was not good. As you arrived for work on Monday the 27th of January it was explained to you that there had been no improvement in your attendance and your absence had led to one client retracting work from us as we were failing to meet targets for his deliveries. We sincerely hoped that the final warning would have brought an all-round improvement sadly this does not prove to be

Please contact either of us should you wish to discuss the aforementioned issues in full". The Claimant was paid up until 31 January 2020.

The Law

22. The Claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.
23. The potentially fair reasons in Section 98(2) include a reason which:-
"relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".
24. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.
25. Where the Respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in section 98(4): "...the determination of the question whether the dismissal is fair or unfair (having regard to the reasons 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". The starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or outwith that band.
26. In cases of lack of capability fairness usually demands that before dismissal an employer should inform the employee what is required, inform the employee of the ways in which he is failing to perform his job adequately, warn him of the possibility that he may be dismissed because of this and provide him with an opportunity to improve. In contrast to cases of a lengthy period or periods of sickness absence for a single underlying cause, cases of persistent short-term absences caused by unconnected minor illnesses will not usually require the obtaining of medical evidence, as such evidence will be of little utility to an employer. Rather the employee should be told what level of attendance he is expected to attain, the period within which that is to be achieved and that dismissal may follow absent improvement.

Conclusions

Reason for Dismissal and Fairness

27. The Tribunal begins by addressing the question of the reason for the Claimant's dismissal. This has been made more difficult by the fact that the Respondent has in its communications conflated reasons connected with conduct- that is being absent without leave, not properly authorising leave etc. with issues of capability, that is the absence itself. As Discipline and Grievances at Work The ACAS Guide 2019 Appendix 4 Dealing with Absence ("The Guide") states "A distinction should be made between absence on grounds of illness and injury and absence for no good reason which may call for disciplinary action." Ultimately it is for the Tribunal to determine where there are a number of reasons for the dismissal what was the principle reason under section 98 (1). The Tribunal is satisfied in this case the principle reason for the Claimant's dismissal was capability- that is the frequency and type of absences that the Claimant was having. The Tribunal accepts that the Respondent was also concerned about the fact that there were some unauthorised absences or absences that were authorised retrospectively in that sick notes were given following a period of sickness absence rather than in advance of it. That said having heard the evidence of Mr Stebbings and having considered the documentation particularly the letter of the 17th of January 2020 and the letter of the 31st of January 2020 it is clear to the Tribunal that the principal concern of this employer was the frequency and unpredictability of absences that the Claimant was experiencing.
28. Having concluded that the Claimant was dismissed for capability which is a potentially fair reason within the meaning of section 98 of the Employment Rights Act the Tribunal must go on to determine whether the employer has acted reasonably or unreasonably in treating capability as a sufficient reason for dismissing this employee.
29. The sickness absence record of the Claimant could be fairly categorised as extremely poor from at least 2017. The Claimant was warned on several occasions in the first half of 2017 that his continued absence was having a detrimental effect on the employer's business. In 2017 2018 and 2019 the attendance record of the Claimant did not improve and the Tribunal notes that the nature of the absences were such that they could not be predicted or easily accommodated by the Respondent being of variable length and for variable reasons. Mr Stebbings when asked by the Tribunal why the employer continued to give warnings to the employee rather than escalate the matter further to a final warning in 2017 or 2018 indicated that the business was nice people and didn't want to escalate up to a final warning rather it wanted to try and deal with the matter at a lower level.
30. The Claimant continued to be absent for a number of periods and for a number of different reasons throughout 2019 leading to a further warning

on the 18th of November 2019. Again, that warning indicated that the employer was unhappy with the amount of absence as well as punctuality of the Claimant. The Claimant received a final warning on the 17th of January 2020 and the Tribunal notes that that is the first time that the Respondent had been minded to issue a warning in those terms. It is not a coincidence that the final warning followed on from the loss of the order that the Claimant was assigned to and that the Respondent rightly held was partly responsible for the loss of because of his absences.

31. So the Tribunal is satisfied that the Respondent had serious grounds for concern about the Claimant's absence on the 27th of January 2020 and further that the Claimant had been left in no doubt about those concerns through the final warning issued on the 17th of January 2020 and the imminent possibility of dismissal without improvement. That said the manner in which the Respondent, ultimately dismissed the Claimant on the 27th of January 2020 by not engaging with the Claimant in terms of asking him the reasons why he had been previously absent on the 24th by not undertaking any sort of investigation whatsoever and by not offering the Claimant an appeal renders the dismissal unfair. No reasonable employer in the position that the Respondent was would have dismissed in this manner even with the history of absences that the Claimant had and even with the previous warnings. It was a question of basic fairness to afford the employee who had been employed for some eight years at this point at least a form of interview, some form of investigation and an appeal against his dismissal. In this respect the Guide is of some assistance. Under frequent and persistent short-term absences the guide states inter alia

- *if there is no improvement, the employee's length of service, performance, the likelihood of a change in attendance, the availability of suitable alternative work where appropriate, and the effect of past and future absences on the organisation should all be taken into account in deciding appropriate action.*

In order to show both the employee concerned, and other employees, that absence is regarded as a serious matter and may result in dismissal, it is very important that persistent absence is dealt with promptly, firmly and consistently.

32. The guide also states under longer term absences (although applicable to short term absence dismissal as well)

where dismissal action is taken the employee should be given the period of notice to which he or she is entitled by statute or contract and informed of any right of appeal.

33. The Tribunal accordingly finds that the Claimant's dismissal was unfair because of the manner in which he was dismissed on the 27th of January, the absence of any investigation and meeting with the Claimant of any sort which would have allowed for the Respondent to fully reflect on the relevant matters outlined above and the failure to offer the Claimant an appeal against his dismissal to an independent decision maker. These are the only

grounds for which the Tribunal finds that the Claimant 's dismissal was unfair.

Polkey and Contributory Fault

34. So far as contributory fault is concerned the Tribunal accepts that a finding of contributory fault in a capability dismissal is the exception see *Slaughter v Brewer and Sons* (1990 IRLR) 426. As the principal reason is one of capability a deduction for contributory fault would not normally be appropriate in the present case. That said as the Tribunal has indicated, while this is principally a capability dismissal there are culpable and blameworthy elements and it is clear that the Claimant has on a number of occasions been absent without any notice provided to the employer and without any authorisation and by obtaining sicknotes retrospectively. These factors are intertwined to some extent with the principal reason for dismissal. They are blameworthy and culpable conduct justifying a reduction in both the basic and compensatory awards albeit the Tribunal recognises the different statutory tests set out in s122 and 123 Employment Rights Act 1996.
35. Turning to the question of whether but for the procedural failings identified the Claimant would have been dismissed fairly in any event (the so called Polkey principle) the Tribunal is completely satisfied that this is a case where there is a significant risk that the Claimant would have been fairly dismissed in any event. As previously indicated the Claimant had a poor sickness record and had received a number of warnings in the past. However, matters had clearly come to a head as of January as indicated by the final written warning given for the first time on the 17th of January that followed on from the loss of the greenacre contract. Even if the Respondent had fully investigated the matter, spoken to the Claimant as it should have done inquired as to his current state of health and whether in fact further absences were likely in the future and afforded him an appeal by an independent decision maker, given his record of absence and given the various reasons for those absences and the unpredictable nature of it as well as the failure to improve despite repeated warnings it seems in the Tribunal's view that it is highly likely that the Respondent would have been unsatisfied with any assurances given by the Claimant. Further while the Tribunal has found that the principle reason was capability the Respondent had serious concerns about the manner in which the Claimant was taking absences without on occasion authorisation and without proper notification and these are matters that in the Tribunal's view would have entitled the Respondent to dismiss the Claimant fairly in due course. The Tribunal is satisfied that the Claimant would have been dismissed at the end of an investigation and appeal process and given the size of the employer's undertaking this is likely to have only taken 4 weeks in total.

Wrongful Dismissal

36. Finally, the Tribunal addresses the issue of wrongful dismissal. Lawful summary termination of an employment contract for sickness absence is rare. The Claimant's sickness absence in the present case would not be a reason for justifying summary termination. The Tribunal has found the principal reason for the dismissal was capability and while there were conduct concerns this was not the principal reason for the dismissal. The Tribunal does not find that the Claimant was in fundamental breach of contract at the date of dismissal and while there had been conduct issues identified in the past these had not resulted in termination of the employment contract. The Claimant was entitled to be dismissed with notice.

ASHLEY SERR
Employment Judge

22 December 2020

REASONS SENT TO THE PARTIES ON

.18 January 2021

FOR THE TRIBUNAL OFFICE