EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr L Townsend **v** Department of Work and Pensions

Heard at: Manchester (by Cloud Video Platform ('CVP'))

On: 23, 24, 25 and 26 March 2021
28 April 2021 (in chambers)

Before: Employment Judge Johnson

Members: Ms S Khan
Mrs M Conlon

Appearances
For the First Claimant: in person
For the Respondent: Mr T Holloway (counsel)

JUDGMENT

1. The claimant was disabled within the meaning of section 6(1) of the Equality Act 2010 by reason of his depression and that respondent had relevant knowledge of this disability from 30 January 2018.

2. The complaint of discrimination arising from disability contrary to section 15 of the Equality Act 2010 is not well founded and is dismissed. This means that the claimant's claim is unsuccessful.

3. The claimant was fairly dismissed for the fair reason of capability. This means that the claimant's complaint of unfair dismissal is unsuccessful.

REASONS

Background

1. These proceedings arise from the claimant's employment with the respondent from 18 July 2016 to 13 May 2019 when he was dismissed on

grounds of capability. The claimant was employed as a case manager in the personal independent payments team.

2. The claimant commenced proceedings in the Tribunal following a period of early conciliation from 12 August 2019 until 6 September 2019 when he brought complaints of unfair dismissal and disability discrimination.

3. The claimant suffers from the depression and anxiety. The respondent accepted that the claimant was disabled during the material time of the claim, but asserts that it did not have knowledge of the condition, nor could it have reasonably been expected to have knowledge at the material time.

4. The claim was the subject of preliminary case management hearing before Employment Judge Parkin on 9 January 2020, Employment Judge Feeney on 16 April 2020 and Employment Judge Allen on 10 September 2020. The case was listed for a 4 day hearing commencing on 23 March and concluding on 26 March 2021.

5. On 10 September 2020, Employment Judge Allen refused the respondent's application to strike out the claimant's claims.

The Issues

6. The issue were identified in section (12) of the Record of the Preliminary Hearing of Employment Judge Feeney dated 16 April 2020 and which were as follows:

   <u>Discrimination arising from disability – section 15 Equality Act 2010</u>

   i) Did the following things arise in consequence of the claimant's disability:

      (a) The claimant's absence?

   ii) Did the respondent treat the claimant unfavourably as follows:

      (a) By dismissing him;

      (b) By not upholding his appeal?

   iii) Did the respondent treat the claimant unfavourably in either of those ways because of the matter arising, i.e. the claimant's absence?

   iv) If so, has the respondent shown that the unfavourable treatment was a proportionate means of achieving a legitimate aim? The respondent relies on the following of its legitimate aim: maintaining

reasonable attendance amongst its workforce and for the needs of the business, delivering an efficient and acceptable service to the public and maintaining consistency in the application of the attendance management policy.

v) Alternatively, has the respondent shown that it did not know and could not reasonably have been expected to know that the claimant had the disability?

Unfair dismissal

vi) What was the principle reason for dismissal and was it for a potentially fair one in accordance with section 98(1) and (2) of the Employment Rights Act 1996? The respondent asserts it was for either capability or some other substantial reason.

vii) If so, was the dismissal fair or unfair in accordance with section 98(4) Employment Rights Act 1996, and in particular did the respondent in all respects act within the band of reasonable responses?

Remedy

viii) The question of remedy would be concluded within the usual principles when dealing with complaints of disability discrimination and unfair dismissal, as appropriate and in the event that one or both of the complaints was successful following the conclusion of the hearing of all matters relating to liability.

The Evidence Used in the Hearing

7. The claimant gave oral evidence. He informed us he was anxious during the hearing and in accordance with the relevant sections of the Equal Treatment Bench Book and the overriding objective under Rule 2 of the Employment Tribunals' Rules of Procedure, he was given the opportunity to have as many breaks as he required. Additionally, he had an urgent medical appointment on the morning of 24 March 2021 and it was agreed by the Tribunal that day 2 of the hearing would not start until that afternoon. The Tribunal is also grateful to Mr Holloway for his patience in this regard and for his willingness to adjust his pace of cross-examination, to ensure that Mr Townsend could fully participate in the hearing. The Tribunal thanks Mr Townsend for his contribution to the hearing.

8. For the respondent, Pam Jordan (former line manager), Kimberley Williams (Operations Manager in the Personal Independence Payment

('PIP') Team), Carly Leahy who was the dismissing officer and Ian Pratt, who was the appeal hearing officer, gave witness evidence.

9. There was a hearing bundle provided numbering more than 300 pages and which was made available to the parties. Some additional documents were produced during the hearing, but these were relatively few in number and as they were not contentious, were added to the bundle with the agreement of the parties.

Findings of fact

Background

10. The respondent is a large government department and employs many government officers. It manages the provision of state benefits and credits and operates across the whole of the United Kingdom and Northern Ireland, with regional offices located in many towns and cities. As a large employer, the respondent has access to its own internal Human Resources (HR) staff and uses many different HR policies and procedures to assist managers in managing staff and the many different issues that can arise in the workplace.

11. The claimant was employed by the respondent from 18 July 2016 and was employed in the Personal Independence Payments team (known as the 'PIP' team) in Blackpool. He was employed as a case manager and it is understood that this was on a full-time basis. As PIP payments are designed to support and give independence to members of the public who have disabilities or complex needs, the effective and efficient management of claims and cases is particularly important in this service.

12. A copy of the respondent's Attendance Management Procedure was included in the bundle. A 2018 and a 2019 version of this procedure was included within the bundle, but in terms of substance, both deal with the same issues and process. The procedures are lengthy documents and provide details of employee and manager obligations, how sickness absence is reported, formal actions in relation to both short term and long-term sickness absence, including when dismissal should be considered.

13. Following each absence, an employee would have a welcome back meeting with their line manager and consideration would be given as to whether an Occupational Health ('OH') referral should take place. Absences which involved 4 separate 'spells' of any duration or 8 working days cumulatively in a rolling 12-month period would cause a 'trigger point' to be reached prompting a health and attendance improvement meeting ('H&AIM'). However, disabled employees may have this trigger point increased to take account of disability related absences. The H&AIM is

intended to be 'welfare focused' with the aim of understanding the reasons for the absence and what can be done to achieve satisfactory levels of absence. The outcome of the H&AIM can include a decision of no further action or the imposition of a warning and whether supportive measures and/or OH advice is required. There are two levels of warning with afirst written warning and a final written warning, the latter being imposed when attendance is unsatisfactory during the period of the first written warning or the sustained improvement period which follows it. Dismissal is only considered if an employee exceeds the trigger points following a final written warning. Detailed information is provided within the procedure as to process when dismissal is being considered and whether alternative lesser sanctions should be imposed.

14. Mr Townsend gave oral evidence during the hearing that he had identified having a disability by reason of his depression when he started work with the respondent. He asserted that he provided information relating to previous sickness absence when he completed a new starter form for his trainer. This was disputed by the respondent and these documents had not been made available as Mr Townsend had not requested its production as part of disclosure. The only information within the bundle relating to this disclosure, was provided in a note produced by Dorcas Butler during an absence review meeting where Mr Townsend described providing details of sickness absence in the year prior to his starting employment with the respondent and informing HR of his depression and stress. On balance, the Tribunal does accept that Mr Townsend may have completed a form relating to this sickness absence when he started work, but does not accept that he provided sufficient information which would have alerted the respondent to a disability.

<u>First absence period</u>

15. In 2016 Mr Townsend was absent for 2 days in November 2016 and also on 13 December 2016, by reason of sickness and vomiting. He was then absent with a headache on 28 February 2017. On each occasion, he had a welcome back meeting with his manager, he agreed that no OH referral was required and it was agreed that no formal procedures had been triggered.

16. Following his next absence on 6 July 2017 with a sickness bug, he agreed that no OH referral was required, but on 10 July 2017, he was invited to an Attendance Review Meeting by his then line manager, Pamela Jordan. This meeting took place on 18 July 2017 and in a letter sent on 21 July 2017, Mr Townsend was given a *first written warning* with a *six month review period from 18 July 2017 until 17 January 2018 and a 12 month sustained improvement period afterwards.* It noted that Mr Townsend had

mentioned anxiety and depression since 2015, but that he was taking medication and he confirmed that he did not have a disability.

17. The Tribunal noted that Mr Townsend did not appear to attribute these absences to his depression in his meeting with Ms Jordan, although he suggested that his sickness might be connected with anxiety arising from pressures outside of work. The Tribunal does find it surprising that as his line manager, Ms Jordan did not become concerned as to the possibility that Ms Townsend was disabled by reason of his depression, especially given the diagnosis in 2015, continued use of medication to control the condition and his reference to anxiety. Although she did enquire as to whether he was seeing his GP, she did not appear to suggest to Mr Townsend that an OH referral might be of assistance. This is something which a reasonable manager would be expected to consider under the Attendance Management Procedure. In evidence the claimant said he did not feel supported by his manager as this was the first time he had shared his anxiety and it had as he saw resulted in a first written warning. However, the claimant did not appeal the decision to impose a first written warning.

Second absence period

18. On 28 September 2017, Mr Townsend was absent with what he described as *'flu like symptoms'.* He was then absent on 13 October 2017 with diarrhoea and on 29 November 2017 with a headache which he attributed to lack of sleep. On each occasion, Mr Townsend was the subject of a welcome back discussion and did not request OH referrals.

19. A further absence took place on 3 to 5 January 2018 with a further stomach complaint. Mr Townsend declined an OH referral at the welcome back discussion. He was then invited to an Attendance Review Meeting by Dorcas Butler which took place on 19 January 2018. Mr Townsend identified having depression and stress and he agreed that a referral to OH should take place, but he declined the offer of a *'stress reduction plan'.* The letter summarising the Attendance Review Meeting confirmed that Mr Townsend had been given a final written warning with a six-month review period from 31 January 2018 until 30 July 2018 and a 12 month sustained improvement period thereafter from 31 July 2018 until 30 July 2019.

20. The first OH report was prepared on 29 January 2018 and it identified Mr Townsend as having depression, but that it was unrelated to his work. It recognised that Mr Townsend was likely to be disabled because without his medication the condition would have '*a significant impact on his ability to carry out normal day to day activities'.* It concluded that Mr Townsend was fit for work and without any adjustments being required to support any impairments arising from his depression.

21. At this point, Mr Townsend had clearly identified having depression and stress and this was supported by the first OH report. In his meeting with Ms Butler on 19 January 2018, her note records his discussion at the Attendance Review Meeting concerning his depression and how it impacts upon his physical health with specific reference to '*loose bowels'* and other symptoms. However, OH did not suggest that the historic absences from work were caused by Mr Townsend's depression and he did not appeal the decision to impose a final written warning because of his absences.

Third absence period

22. Mr Townsend then experienced further sickness absence on 27 February 2018 due to headaches and sickness and on 23 April 2018 because of diarrhoea. A further absence on 1 August 2018 took place because of an upset stomach. He declined OH referrals at welcome back meetings which followed, and which took place in the usual way. However, following the August absence, he was invited to a further Attendance Review by Kimberley Williams which took place on 13 August 2018. The letter which was sent following this meeting on 15 August 2018 confirmed that Mr Townsend's absence had been satisfactory, but with a warning that formal action could take place if his absence did become unsatisfactory while under the ongoing sustained improvement period.

23. Mr Townsend was next absent on 5 November 2018 by reason of lack of sleep and stomach problems and upon his return to work was invited to an Attendance Review Meeting by Kimberley Williams. This was because of his absences which had taken place during his sustained review period. The meeting which was due to take place on 13 November 2018 was postponed because Mr Townsend was awaiting a further OH report which could not be completed until further information had been provided by his GP.

24. A further report was produced by OH on 15 November 2018 which described Mr Townsend as having moderately severe anxiety and severe depression. It was noted that it would be beneficial for him to remain in work, but that he would need support. It suggested that Mr Townsend would struggle to arrive at work on time and that if feasible, he be allowed to work only mornings until his treatment could be reviewed by his GP. A stress risk assessment was recommended and also the provision of a 'mental health buddy', but the respondent was also warned that depression was condition which could go from remission to relapse.

25. A meeting took place on 20 November 2018 at which Mr Townsend met Kimberley Williams and they discussed and agreed reasonable adjustments. It was recognised that he was in the process of adapting to

new medication and until it took effect, he would be allowed to work 6 hours per day starting no later than 11:30am, with a *'flexi credit'* being given so that his flexible working deficit did not increase during this time. Additionally, Ms Williams or a colleague would call him, should he not arrive at work by 12 pm so that they could check that he was OK. She also promised to send a self-assessment form for Mr Townsend to complete so that he could request a stress risk assessment and she would submit a request a Disabled Employee Trigger Point, *('DETP')* to consider whether his trigger point under the Absence Management Procedure should be adjusted. As a consequence, Mr Townsend was given an additional 4 day sickness absence before the trigger was reached. These measures were confirmed in a letter which Ms Williams sent on 21 November 2018. The Tribunal understood that the reduced hours did not impact upon Mr Townsend's full time salary, but it did prevent him from being able to access overtime.

26. On 28 November 2018, 10 December 2018 and 3 to 7 January 2019, Mr Townsend was absent because of his low mood. Welcome back meetings took place as normal and on 8 January 2019, he as recorded as declining assistance such as mental health first aiders. However, Mr Townsend had independently contacted the respondent's 'PAM Assist' support on 11 December 2019 and was awaiting a call back concerning further support.

27. A further absence took place on 31 January 2019 and appeared to relate to Mr Townsend's mental health. At his welcome back meeting which took place on 1 February 2019, Mr Townsend mentioned to Ms Williams that he was struggling with gambling addiction and requested a return to full time working, which would allow him to work overtime. However, he confirmed that he was still struggling with his mental health and that he was going to see his GP so that he could review his medication.

28. Ms Williams invited Mr Townsend to an Attendance Review Meeting which took place on 8 February 2019. During this meeting, Ms Williams discussed Mr Townsend's condition and what steps were being taken to support him. It was noted that he declined the stress risk assessment and the mental health buddy previously offered and other possible adjustments were discussed. It was noted that his performance was not an issue, even though reduced performance was something that the respondent. Mr Townsend was clearly bothered about returning to full time work, but understandably Ms Williams was concerned that this was purely to allow him to access overtime to help him resolve financial difficulties arising from gambling. Ms Williams confirmed the discussion in her letter dated 8 February 2019 and confirmed that his absences needed to be considered at a formal meeting before a decision maker to consider whether Mr Townsend should be dismissed, demoted or whether continued support should be offered.

29. It appears that Ms Williams did agree to return Mr Townsend to full-time work as requested. She acknowledged that she was *'slightly unsure about whether it was good for Mr Townsend to work overtime at that time, but Mr Townsend had made it clear that he would feel better by increasing his income'.* The Tribunal acknowledges that Ms Williams was in a difficult position and that with hindsight, it is easier to judge the wisdom in the decision that she made. While she was the manager in this meeting, she also had to consider what steps were likely to improve his attendance. There was no evidence that her decision would have harmed Mr Townsend and indeed, she was faced with an employee who informed her ofgambling debts arising from an addiction and that he needed to increase his income. She offered to refer him to OH and he refused. Under these circumstances, although Mr Townsend later criticised her decision to support his request, at the time it was granted, it was well-intentioned and was aimed to support him when faced with significant stress regarding his gambling problems.

30. Ms Williams commenced long term sickness absence from 11 March to 14 May 2019. It was clear to the Tribunal that Mr Townsend found Ms Williams to be a particularly supportive manager and he felt that she understood his health issues. During her absence, the respondent did not seem able to provide Mr Townsend with an alternative manager who could provide similar support. Ms Williams asserted that she properly handed over this matter to Dominic Thornhill who took over her workload, but he did not appear to have the same working relationship with Mr Townsend.

Referral to a decision maker

31. On 13 February 2019, Mr Townsend was informed that he would be invited to attend a meeting before the decision maker, Trevor Messitt and was subsequently invited to a meeting by letter dated 19 February 2019. Trevor Messitt then wrote to Mr Townsend and explained that he would not dismiss or demote him because his absences had not exceeded the DETP, but that his absences would continue to remain under review.

32. Mr Townsend was absent on 27 to 29 March 2019, again because of mental health issues. At the next welcome back meeting, he was referred to OH.

33. A further report was produced by OH on 3 April 2019 and they confirmed that due to Mr Townsend's mental health symptoms being severely anxious and depressed, he was not fit for work and that it would take a few weeks before he was fit to return to work. No adjustments were recommended by OH and his GP provided a fit note on 4 April 2019 for one month with *'recurrent depression'*.

34. Mr Townsend remained absent from work and on 18 April 2019, he was referred to a further meeting before a decision maker because of his *'irregular attendance'*. The decision maker appointed was Carly Leahy.

35. A particular issue arose at this stage because Mr Townsend's absences which had been in the past, been short term in nature, now became continuous and longer term from 4 April 2019. A further letter was sent on 30 April 2019 from Dominic Thornhill and headed '*Continuous Absence – Invitation to a Formal Health & Attendance Improvement Meeting'.* This referred to the 28 days absence during which began on 4 April 2019 and which had been authorised by Mr Townsend's GP. This separate to the *'irregular attendance'* referral where Mr Leahy was the appointed decision maker. The Tribunal finds it unfortunate and surprising that despite having knowledge of Mr Townsend's depression and his previous sickness absence history, the respondent did not adopt a more holistic approach in considering his absences. It would have been very simple to include the continuous absence as part of Ms Leahy's decision-making meeting as the separate processes were very confusing. While managers might argue that this is not provided within their procedures, it is reasonable to expect an organisation of the size of the DWP, to demonstrate greater flexibility when managing complex sickness absence cases, especially where the employee has significant mental health issues, including anxiety.

36. Mr Townsend was invited to a decision maker meeting before Ms Leahy on 3 May 2019. He attended this meeting and was accompanied by his friend Damian Anderson. A note taker as also present. It appears from the note of the hearing that Ms Leahy solely focused upon the irregular attendance and did not appear to deal with the continuous absence being managed by Mr Thornhill. She explained the previous absence history and the written warning and final warning which had been previously imposed. She explained that she could consider dismissal, demotion or continued support.

37. Mr Townsend was given an opportunity to explain his ongoing health issues and he confirmed that he had been signed off sick by his GP since 4 April 2019 and that he remained unfit to work until his GP reviewed him on 16 May 2019. He was, nonetheless, keen to request that he be returned to full-time working so that he could improve his financial situation by working overtime. He confirmed that he was looking to return to work when his current fit note ended and Ms Leahy informed him that if so, further absences during the sustained improvement period could result in a further referral to a decision maker. She confirmed that she would provide her decision within 5 working days.

38. Ms Leahy did not send her decision letter until 13 May 2019 and confirmed that her decision was to terminate Mr Townsend's employment because of unsatisfactory attendance. She felt that continued support had been provided by management and that he had failed to satisfy the sustained improvement period following the final written warning and had been unable to maintain a satisfactory level of attendance. She said that she took into account his absence records, which she believed would continue on his return, the evidence that he gave to her on 3 May 2019 and the steps taken by line managers during the sustained improvement period following the final written warning. She felt that demotion was not appropriate, and that changing Mr Townsend's job would not improve his attendance. He was paid his 13 weeks' notice, but was not required to attend work. Additionally, he was paid 100% compensation under the Civil Service Compensation Scheme reflecting his efforts made to improve attendance. He was offered the right of appeal.

The Appeal

39. Mr Townsend decided to appeal, and his GP prepared a letter on 14 May 2020 which was sent to the respondent and which advised that dismissal would adversely affect his mental health and that he was *'very optimistic about returning my patient back to fitness and employment in the next few months and I hope that you feel able to support him in achieving this'.*

40. The appeal took place on 12 June 2019 before Ian Pratt, who was a manager based outside of Mr Townsend's workplace and who was independent of the earlier process which led to his dismissal. Mr Townsend was supported by David Hetherington and a note taker took a note of the meeting.

41. The appeal took the form of a review of Ms Leahy's decision. Mr Townsend provided Mr Pratt with a copy of his GP's recent letter supporting his appeal and which Ms Leahy was not able to consider. Mr Townsend explained that he had engaged with the respondent to improve his sickness levels and that he did not feel the respondent properly understood his medication and the time that it took for it to work properly. He also identified some procedural issues which included grammatical errors in his dismissal letter, that his companion was not named, that the decision letter was not on headed paper and that he was not provided with a copy of the meeting notes to sign his approval and return.

42. Mr Townsend also mentioned his request to work full-time, and he said that Ms Williams had allowed it. He said that she should not have agreed to this given his mental health issues and that she failed in her duty of care. He also felt that he should have had more support from line managers. The meeting was very long, and this was clear from the

hearing notes available to the Tribunal. At the end of the meeting, Mr Townsend confirmed that he felt he had been able to share all the information that he wanted to present. Mr Pratt explained that he had to make some further enquiries and would provide a decision within 5 working days.

43. Mr Pratt replied by letter on 17 June 2019 and explained that he needed a further 10 working days to complete his decision. However, he provided the meeting notes to Mr Townsend and asked him to sign and return a copy confirming its accuracy.

44. He then wrote on 28 June 2019 explaining that there would be a further delay as he needed to meet with Mr Leahy and might not be able to do so for up to 7 weeks. However, he confirmed that as soon as he had done so, he would reply within 5 working days. Ms Leahy confirmed to the Tribunal that this lengthy delay was caused by her admission for emergency abdominal surgery, followed by a phased return to work. While the Tribunal acknowledges that it would not have been reasonable to provide Mr Townsend with all this information in Mr Pratt's letter, it would have managed his expectations far better if at least some reference had been made concerning Ms Leahy being unavailable due to health issues. Mr Pratt did keep in touch with Mr Townsend and informed him of delays as they happened, but once it became clear that the delays were no longer minor in length, it would have been helpful to be more candid with him as to the exceptional reasons involved.

45. Mr Pratt then wrote to Mr Townsend on 5 August 2019 confirming that he had finally met with Ms Leahy and would provide a decision by 9 August 2019.

46. A decision letter was sent on 8 August 2019 and Mr Pratt advised that the appeal was not upheld. He said that the additional information which Mr Townsend had provided, did not provide anything new and which Ms Leahy did not have knowledge of when making her decision. He confirmed that she considered the return to full time work, his change in medication and engagement with healthcare professionals and an intention to return to work. He was satisfied that the dismissal arose from a fair and proper process and that any errors identified by Mr Townsend did not affect the overall fairness of the decision reached. He acknowledged that there were areas of the process that could be better managed and that he had discussed these with Mr Leahy.

47. The Tribunal did consider the evidence of both Ms Leahy and Mr Pratt. Ms Leahy was a credible and reliable witness who acknowledged her shortcomings and that upon reflection she could have managed the decision-making process better, but remained satisfied that her decision to

dismiss was correct. Mr Pratt did face difficulties because of Ms Leahy's absence, but he did try to deal with the appeal as quickly as he could and did keep Mr Townsend informed as to the delays involved. His evidence was also credible and reliable.

48. The Tribunal recognised that Mr Townsend found the hearing very stressful but noted that he gave evidence clearly and openly. He acknowledged circumstances where he gave incomplete information and remained appreciative of Ms Williams' support, despite the comments that he made about her management decision at the appeal hearing.

Law

Unfair dismissal (Employment Rights Act 1996 ('ERA'))

49. Under section 98(1) of the Employment Rights Act 1996, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to capability is a potentially fair reason falling within section 98(2).

50. The reason for the dismissal is the set of facts or the beliefs held by the employee which caused the employer to dismiss the employee. In determining the reason for the dismissal, the Tribunal may only take account of those facts or beliefs that were known to the employer at the time of the dismissal; see W Devis and Sons Ltd v Atkins 1977 ICR 662.

51. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

52. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the

Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

53. In Polkey v Dayton Services Ltd [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it.

54. Nor is it for the Tribunal to substitute its own decision as to the reasonableness of the action taken by the employer. Mr Holloway referred to the case of Sainsbury's Supermarkets Ltd v P J Hitt [2002] EWCA Civ. 1588 in relation to this particular matter.

55. The Polkey principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects, then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Guidance as to the enquiry the Tribunal must undertake was provided in Ms M Whitehead v Robertson Partnership UKEAT 0331/01 as follows:

    (a) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?

    (b) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?

    (c) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

Disability Discrimination (Equality Act 2010 ('EQA'))

56. Under section 6(1) EQA, a person has a disability if they have a physical or mental impairment, which has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

57. Under section 15 EQA, an employer discriminates against an employee if:

    a) The employer treats the employee unfavourably because of something arising in consequence of their disability;

b) The employer cannot show that this unfavourable treatment was a proportionate means of achieving a legitimate aim; and,

c) The employer can show that it did not know, and could not reasonably have been expected to know that the employee had the relevant disability.

58. Mr Holloway provided detailed submissions following the hearing concerning this particular complaint and made reference to a number of cases dealing with the discrimination under section 15 EQA.

59. With reference to Jesudason v Alder hey Children's NHS Foundation Trust [2020] EWCA Civ 73 at para. 62; and the decision thatr an unjustified sense of grievance is not enough to constitute a detriment.

60. Similarly, he reminded the Tribunal that in accordance with the decision Fanutti v University of East Anglia UKEAT/0182/17/DM following Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11 [2013] ICR 337, should adopt an objective approach to the determination of reasonableness and this may involve a determination that a reasonable employee would have recognised the need for matters to be investigated and addressed.

Discussion and Analysis

Discrimination arising from a disability

Was the claimant disabled?

61. Mr Townsend was clear in his evidence that he had suffered from depression since 2015 and that he had required medication to ameliorate this condition.

62. The respondent accepts that Mr Townsend was disabled by reason of his depression, but did not know and could not know that he was disabled by reason of the absences which occurred during his employment with the respondent, and which did not specifically refer to depression or anxiety. Instead, they referred to a variety of conditions, but typically they would involve stomach or digestive issues, headaches or poor sleep.

63. It is fair to say that Mr Townsend's absences were sporadic until his long-term sickness absence began on 4 April 2019. However, it would be unrealistic for the respondent to argue that it was oblivious to the possibility of disability before this date.

64. The Tribunal acknowledges that there is insufficient evidence available to suggest that Mr Townsend notified the respondent of his disability at the point when he started work for them. However, he had already mentioned a long-standing condition of depression as early as 18 July 2017 at his meeting with Pam Jordan. As a manager, it would have been reasonable to expect Ms Jordan to make further enquiries concerning this condition and encourage Mr Townsend to agree to an OH referral. As it was, Mr Townsend was recorded as stating that his depression was not a disability and made reference to difficult personal circumstances. On balance, Ms Jordan was perhaps deterred from making any further enquiries and the respondent remained unaware of the disability in July 2017.

65. However, by the time of the first referral to OH on 29 January 2018, there was a recognition in the OH report that Mr Townsend may be disabled by reason of his depression. The relevant section in the OH report dated 30 January 2018, gave a careful consideration of the necessary requirements of section 6 of the EQA and this report was provided to them, the respondent must have been aware that the claimant was disabled by reason of his depression.

66. Additionally, at the Attendance Review Meeting on 19 January 2018, Mr Townsend stated he suffered from depression and stress and that this can affect his bowels and cause other symptoms. Consequently, when taking into account the OH report and these further comments by Mr Townsend, the respondent not only knew that he was disabled by reason of his disability by the end of January 2018, but also that absences involving physical symptoms were linked to his depression and anxiety.

Sickness absence being something arising from disability

67. The Tribunal finds that in all likelihood, Mr Townsend's absences throughout his employment with the respondent were probably caused or connected to his longstanding disability which predated the commencement of his employment with the respondent.

68. For the reasons given above, the Tribunal acknowledges that the respondent could not know that these absences related to his disability until the end of January 2018. This means that the respondent was not on alert as to the underlying mental health issues which may have caused or contributed to Mr Townsend's physical symptoms until those absences beginning with 27 February 2018 and continuing thereafter.

69. As such, those absences which took place before this date would have been managed and the warnings given, without any knowledge of a disability. This can be contrasted with the later involvement by Ms Williams, when she took into account Mr Townsend's disability and applied for the DETP to be allowed.

Was Mr Townsend treated unfavourably by being dismissed or not having his appeal upheld?

70. Ms Leahy dismissed Mr Townsend because of his failure to maintain an acceptable level of attendance and that he was unlikely to provide satisfactory attendance in future.

71. The reason for the failure to provide satisfactory attendance was without doubt connected to Mr Townsend's ongoing difficulties with arising from sickness absence. By the time of Ms Leahy's decision to dismiss, the respondent should have been well aware of Mr Townsend's disability and the impact that his mental health had on his physical symptoms which often gave rise to instances of sickness absence. Moreover, they were aware of the ongoing issues arising from medication and the difficulties which this caused him in being sleep satisfactorily.

72. Under these circumstances, at the date of dismissal, Ms Leahy would have been aware of Mr Townsend's disability, the impact on physical as well as mental health giving rise to sickness absence which ultimately affected his levels of attendance.

73. However, the Tribunal acknowledges that Mr Townsend was already subject to a written warning and a final written warning by the time that the respondent became aware of his disability and its impact upon his physical health.

74. The decision to dismiss was not one that was made quickly and arose following a lengthy period where he was subject to further reviews, adjustments including the application of the DETP of 4 additional days. It could be said that once the respondent had the relevant knowledge of the disability, it should have revoked the earlier warnings and started the process afresh. But the question is whether Mr Townsend was treated unfavourably because of sickness absence arising from his disability.

75. All employees are subject to the Attendance Management Procedure and unsatisfactory attendance will eventually trigger the relevant warnings and ultimately a meeting before a decision maker who will consider dismissal, demotion or further support. Mr Townsend was considered appropriately when the respondent did not know of his disability and the relevant warnings were issued in the same way as they would have been issued to any other employee not sharing his protected characteristic. Once his employer became aware of his condition during the third absence period which ultimately led to the referral to a decision maker, not only was he treated in the same way as those hypothetical employees, but he had also been allowed the additional DETP days by Ms Williams.

76. At the point Mr Townsend was dismissed, he had accumulated 15 days intermittent sickness absence. This was 3 days above the target which had been set for him if the standard employee allowance of 8 days plus the DETP of 4 days is taken into account. Mr Townsend had clearly triggered the referral to a decision maker and at a level which would have been significantly higher than normally allowed for an employee who was not disabled. Accordingly, while Ms Leahy's decision to dismiss was undoubtedly connected with poor attendance connected with sickness absence, the Tribunal does not accept that it amounted to unfavourable treatment as it was for a much higher level of non-attendance that would be normally allowed, had he not been disabled. This cannot amount to unfavourable treatment and nor was this the case when his appeal was dismissed.

The question of legitimate aim

77. Even if the Tribunal is wrong and Mr Townsend was subjected to unfavourable treatment because of something arising from his disability, the Tribunal must consider the respondent's defence under the legitimate aim of maintaining reasonable attendance amongst its workforce and for the needs of the business, delivering an efficient and acceptable service to the public and maintaining consistency in the application of the attendance management policy.

78. Mr Townsend did not seek to challenge this argument and the Tribunal accepts that this reason given by the respondent amounts to a valid legitimate aim. It may be considered by some to be a public body which has the resources to sustain high levels of absence, but in any event it remains an employer providing a vital service to those accessing it, who need benefits and credits for day to day living and often with serious disabilities and needs. Moreover, as a service funded by the taxpayer, it is essential that public money is spent efficiently.

79. Nonetheless, the respondent must ensure that in furthering this legitimate aim, it treats employees in a proportionate way.

80. Mr Townsend was treated properly under the Attendance Management Procedure which specifically provided for adjustments to be made in its application when dealing with disabled employees. Once Mr Townsend was identified as being disabled during the third period of absences following the warning being given, he was identified as being disabled by OH and its impact on his physical health. Ms Williams as already mentioned increased the trigger days under the DETP in the Absence Management Procedure and thereby ensured that he would be given 50% more sick days than was normally allowable.

81. For these reasons, not only did the respondent identify a genuine legitimate aim, it was also able to demonstrate that when applying this aim to Mr Townsend's case, it did so in a proportionate way.

Unfair dismissal

82. There was no dispute that Mr Townsend was dismissed by Ms Leahy following the meeting before a decision maker on 3 May 2019 and that the reason for the dismissal was his failure to maintain an acceptable level of attendance. This was asserted by the respondent as being a potentially fair reason of either capability or some other substantial reason under section 98(1) of the ERA.

83. This decision arose from Mr Townsend's failure to give sufficient regular attendance at work and through the application of the Attendance Management Procedure and the Tribunal accepts that the potentially fair reason of capability was the reason for the dismissal.

84. Mr Townsend accepted that the dismissal was connected with his attendance although he clearly felt the decision was unfair.

85. The respondent had a detailed Attendance Management Procedure which it applied to its employees and which was reviewed on a regular basis. Mr Townsend was subject to this procedure and it was applied throughout his employment.

86. He was subject to the relevant triggers which were applied under this Procedure and discussed each absence when he returned to work at a welcome back meeting with his line manager and informed about the application of the Procedure. He was offered an OH referral if he required one. When the triggers were reached, a formal meeting would take place and the warnings were imposed in line with the Procedure. Mr Townsend had written warning, a final written warning and was eventually referred to a meeting before a decision maker. He was offered the right of appeal following the imposition of each warning and chose not to do so. Once he was identified as disabled, Ms Williams applied for a DETP and his absence 'allowance' before reaching a trigger was increased by 50%. All this information was available to Ms Leahy as dismissing officer.

87. Mr Townsend was allowed to be accompanied at relevant meetings and exercised his right at the decision maker meeting and was allowed to present her case. However, while Ms Leahy could have exercised her discretion in a number of ways, at the decision maker's meeting it was clear that she had available information concerning absences, the opportunities for improvement, the use of OH and the account taken of Mr Townsend's disability by Ms Williams. She recognised that Mr Townsend did want to return to work but had to ask herself whether he would be able

to provide good levels of attendance based upon the information before her.

88. She did of course have discretion and it could be argued that her decision to dismiss was a harsh one and that Mr Townsend should have been given another chance, especially given his personal circumstances. However, the Tribunal must not substitute its views (or anyone else's views for that matter) in place of Ms Leahy. Instead, it must determine whether the decision to dismiss was fair. It was not an easy decision for her to make and the detailed consideration of the case is evidence of that. However, she clearly did consider alternative sanctions short of dismissal and confirmed that demotion was not a viable lesser option either. Ultimately, the Tribunal is satisfied that dismissal was a fair decision for her to reach and that it was by reason of capability.

89. There were a few procedural matters which the Tribunal queried during the management of Mr Townsend's absences. Ms Jordan was criticised for not investigating matters further when Mr Townsend mentioned his depression. However, in many ways the respondent was in difficulties due to Mr Townsend's initial refusal to accept an OH referral. Ms Williams may have regretted her decision to reinstate Mr Townsend to full-time work. But this was not something that directly related to the Attendance Management Procedure and its relationship with the ultimate dismissal. There were some minor errors identified in Mr Townsend's appeal, especially in relation to the drafting of the dismissal letter, the failure to use a letterhead and the failure to send a copy of the hearing notes with a copy for signature confirming acceptance. However, he was afforded the right of appeal before Mr Pratt, who carefully considered the issues which he raised and acknowledged the errors raised. While this might be the case, these matters did not adversely affect the overall outcome of the decision to dismiss. Mr Townsend had hit the necessary triggers to necessitate the meeting before a decision maker and had indeed exceeded them by the date of the decision to dismiss, even allowing for the DETP increase. There was no procedural fairness and Ms Townsend was in accordance with procedure, able to fairly dismiss Mr Townsend.

90. While the Tribunal has considered the question of contribution by Mr Townsend regarding his dismissal, it does not believe that this is case where it can realistically apply. Mr Leahy in the decision to dismiss made reference to the award of 100% compensation under the Civil Service Compensation Scheme reflecting his efforts made to improve attendance. Under these circumstances, Mr Townsend cannot be said to have contributed to the decision to dismiss him.

Conclusion

91. Accordingly, the decision of this Tribunal must be as follows:

a) Mr Townsend was disabled within the meaning of section 6(1) of the Equality Act 2010 by reason of his depression and that the respondent had knowledge of this condition and the impact that it had upon his physical health from 30 January 2019.

b) That Mr Townsend's complaint of discrimination arising from a disability contrary to section 15 of the Equality Act 2010 is not well founded and is dismissed.

c) That Mr Townsend was fairly dismissed by reason of capability and his complaint of unfair dismissal is not successful.

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Employment Judge Johnson

Date: 25 May 2021

Sent to the parties on:

25 May 2021

For the Tribunal Office