EMPLOYMENT TRIBUNALS

Claimant: Miss J K Dabb

Respondent: Royal Mail Group Limited

FINAL HEARING

Heard at: Birmingham (in public; by CVP) **On:** 14 & 15 April 2021

Before: Employment Judge Camp

Appearances
For the claimant: Mr J Morgan, counsel
For the respondent: Ms L Roberts, legal executive

RESERVED JUDGMENT

The claimant was not unfairly dismissed and her claim fails.

REASONS

1. The claimant was employed by the respondent, latterly as an Operational Postal Grade in the North West Midlands Mail Centre in Wolverhampton, from 10 May 2008 to 28 August 2020, when she was dismissed pursuant to the respondent's Attendance Policy. She claims unfair dismissal.

2. My decision, in summary is that although the respondent's decision-making was far from perfect, the dismissal was fair in law. This is not to say that it was the right decision to make, or that it was the decision that I, standing in the respondent's shoes, would have made. I have considerable sympathy for the claimant. A more sympathetic and compassionate employer would have given her a further opportunity to prove that her troubles were behind her and that she could sustain satisfactory attendance. But the respondent was within its rights to do what it did.

Issues & law

3. The issues I had to decide were:

    3.1 what was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal in accordance with section 98(1)(b) of the Employment Rights Act 1996 ("ERA"), namely unsatisfactory attendance;

3.2 did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant in accordance with ERA section 98(4)?

3.3 if the claim succeeds because the dismissal was procedurally unfair, and assuming the remedy is compensation only, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed? This is often referred to as the 'Polkey issue' – see Polkey v AE Dayton Services Ltd [1987] UKHL 8; see also paragraph 54 of the EAT's decision in Software 2000 Ltd v Andrews [2007] ICR 825.

4. Issue 3.1 is not substantially in dispute. In his closing submissions, Mr Morgan, claimant's counsel, said that while he was not formally conceding that this was a "*some other substantial reason*" dismissal, he would be focussing his submissions relating to liability on whether the dismissal was fair or unfair under ERA section 98(4). He put forward no positive case to the effect that the dismissal was not for a potentially fair reason and did not allege bad faith on the part of the respondent's decision-makers. That was a sensible approach to take. Given that no one is suggesting there was a significant reason for dismissal other than the claimant's attendance record, I am satisfied that, as in Wilson v Post Office [2000] IRLR 834 (cited in submissions by Ms Roberts for the respondent), the claimant was dismissed for "*some other substantial reason*" and that this is not an incapability or conduct case, nor one where the respondent has failed to establish a potentially fair reason.

5. So far as concerns the law relating to ERA section 98(4), I have taken into account the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. The main question I have asked myself is whether in all respects, both procedural and substantive, the respondent acted within that band.

6. Hand in hand with the fact that the band of reasonable responses test applies is the fact that I may not substitute my view of what should have been done for that of the reasonable employer. I have to guard myself against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and to remind myself that only if the respondent acted as no reasonable employer could have done was the dismissal unfair. Nevertheless (see Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677): the band of reasonable responses test is not infinitely wide; it is important not to overlook ERA section 98(4)(b); Parliament did not intend the Tribunal's consideration simply to be a matter of procedural box-ticking.

The facts

7. There were three witnesses: the dismissing officer, Mr M Webb, at the time a shift manager at North West Midlands Mail Centre; the appeal officer, Mr G Trunks, at the time an Independent Casework Manger based at Grantham Delivery Office who has since retired; the claimant herself. There was an electronic file of documents running to 250 pages.

8. In terms of what happened, very little, if anything, of importance to my decision is in reality in dispute.

9. The respondent's Attendance Policy was created further to a collective agreement between the respondent and the CWU.

10. Part of that policy applied to the claimant was a three-stage process, potentially ending in dismissal. The first stage was called Attendance Review 1 or "AR1", the second was Attendance Review 2 ("AR2"), and the third was called Consideration of Dismissal, abbreviated to "CoD". If an employee had a certain number of absences and/or certain length of absence, a prompt for a meeting was triggered. At the meeting, a manager would decide whether or not to issue the formal notification of AR1 or AR2, as the case might be, or, at the CoD meeting, whether or not to dismiss.

11. The prompt for an AR1 meeting at the relevant time was four absences or 14 days absence in a 12-month period. The prompt for a AR2 meeting was two absences or 10 days in the 6 months following an AR1 notification. The trigger for a CoD meeting was two absences or 10 days in the 6 months following an AR2 notification. Certain types of absences were discounted; that is not a factor in the present case.

12. Managers operating the policy had a discretion at each stage, and within the policy itself there was no presumption of any particular outcome. However, on the (admittedly limited) evidence available to me, the clear impression I get is that if a prompt was triggered in accordance with the policy, the onus in practice was on the employee at the subsequent meeting to dissuade the manager from issuing the notification or, in the case of a CoD meeting, from dismissing[1].

13. I think it was within the band of reasonable responses for the respondent to operate its Attendance Policy in that way. In particular, in relation to someone like the claimant, who has access to trade union representation at all relevant times and who had a trade union representative at the CoD meeting following which the respondent decided to dismiss her, both the employee and the trade union representative would expect it to operate like that and would approach those meetings accordingly. In the present case, I am anyway satisfied that both the claimant and her trade union representative did indeed did approach the critical CoD meeting in that way. That this was the case is clear to me from what they said during the course of it.

14. The relevant background to the claimant's dismissal goes back to September 2018, when the claimant had accumulated enough sickness absence for find herself in a CoD meeting for the first time. The background to this was that she had had a number of personal issues which had affected her health. She had moved from Croydon to Wolverhampton, with the respondent's blessing, in January 2017 and had moved into a new flat in August 2018, which had assisted her both with her personal and her health problems.

15. There is a dispute between the claimant and the respondent as to whether or not the claimant should have been facing a CoD meeting in September 2018. The claimant's assertion that she should not have been is based on what I consider to be a misinterpretation of the respondent's Absence Policy. I also note that during the meeting the claimant accepted the sickness absence record being used was accurate

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[1] For example, Mr Webb's dismissal letter begins, "*I met with you … to hear your reasons why you should not be dismissed because of your unsatisfactory attendance*", rather than, for example, something like, "I met with you to decide whether or not you should be dismissed because of your unsatisfactory attendance."

and that the claimant had a trade union representative at that meeting who – as best I can tell from the written record of it – appears not to have suggested that it should not have been taking place.

16. In any event, what I think is important about that CoD meeting is its result: the claimant was given another chance. The meeting notes record that, "*Mrs Dabb would like to explain that if she loses her job she will be homeless and will be unable to provide for herself and her son. Mrs Dabb would like the chance to prove herself and has cited the improvements in how she is managing her personal circumstance … Mrs Dabb is aware of the consequences of poor attendance and … will not be in this position again … Mrs Dabb had provided* [evidence] *proactively to improve her attendance at work*".

17. The claimant did indeed manage to improve her attendance in the 6 months following the CoD meeting and that particular episode of absence management was closed in March 2019, with no further action being taken on it.

18. Unfortunately, though, the claimant then had five periods of absence totalling 22 days. This triggered an AR1 meeting and she was duly issued with an AR1 on 16 July 2019. The paperwork relating to the AR1 has gone missing. However, I am satisfied on the basis of the documentary evidence there is that it was properly issued. The claimant does not, I note, deny any of the absences in question, and they take her well over the threshold of four absences or 14 days' absence in a 12-month period. In addition, she has not suggested in her evidence that there was any particular reason why an AR1 should not have been issued on that occasion.

19. During October and November 2019, the claimant had two further periods of absence, totalling 14 days. That took her well over the threshold trigger for an AR2 meeting.

20. The meeting took place on 20 November 2019. The claimant said she did not want trade union representation. She agreed with the absence record being used, except that an absence in November 2019, which was down as being for a fever, was for a viral infection. When asked to explain her unsatisfactory attendance, she said that she used to get stressed out by her son and that he used to make her ill, but that her son no longer lived with her and only stayed with her over the weekends. She said that there wasn't any particular reason why an AR2 should not be issued and that she was having to sort her life out. She also said that she would make sure she attended for her duty, and that but there was nothing the respondent could do to support her attendance as it was "*all down to her*". These findings about what happened at the meeting are based on the contemporaneous meeting notes, which were signed as a true record by the claimant on 29 November 2019.

21. The next relevant thing that happened was that the claimant went off sick from 10 February 2020. For reasons that are unclear, this period of sickness absence, which ran to 9 April 2020 and was 53 working days long, was recorded as two periods of absence; whereas, as I understand it, it was single continuous period of absence. Be that as it may, whether it was one or two periods of absence, it triggered a CoD meeting.

22. The reason for the claimant going off sick was that the claimant had developed a drink problem. In her witness statement, she stated that she simply "*stopped going to work*". She developed health problems and on 8 March 2020 went into hospital for 8 days. When she came out of hospital, she was advised to recuperate at home. She returned

to work as soon as she was well enough to do so. She had no further sickness absence between 9 April 2020 and her dismissal in June.

23. Before the CoD process began, the claimant had had, on 20 April 2020, a return to work interview and was put on a phased return. There was also a referral to the respondent's provider of occupational health services, a company called Optima Health. A Dr Muhammed Baig, an Occupational Physician, conducted a telephone discussion with the claimant (I understand that the consultation was by telephone rather than in person because of the pandemic) on 7 May 2020. Dr Baig's report of that date speaks for itself, but I shall highlight one or two parts of it.

24. The report linked the claimant's, Mrs Dabb's, admission to hospital to alcohol. One potentially significant thing in the report is that statement that, "*All absences due to diarrhoea and vomiting were related to alcohol abuse.*" The reason that is potentially significant is that, according to her sickness absence records, absences in February and October 2019 were connected with vomiting. The claimant now says that the only absence she had which was alcohol-related was the long absence from February to April 2020. Be that as it may, the report continues: "*Mrs Dabb today sounded motivated and denies drinking. If she is able to do that, then she should remain well and be able to attend work regularly. Her prognosis should then be good.*"

25. On 15 May 2020, following receipt of Dr Baig's report, Mr Webb sent the claimant an invitation to a CoD meeting. The invitation was in the respondent's standard form. The meeting took place on 28 May 2020. The claimant was accompanied by her trade union representative. There are notes of the meeting, signed as a true record both by Mr Webb and the claimant herself, to which I refer.

26. Mr Webb's decision to dismiss is set out in a letter dated 4 June 2020 to which I also refer. In his oral evidence Mr Webb confirmed that it was based on a template. It contained at least two things that were arguably inappropriate. The first was the fact that in the letter, the claimant's entire absence history going back to 2008 was set out. The impression given by this was that historical absence was a factor in the decision to dismiss. The second was a reference to five unauthorised absences at the beginning of 2018. Under cross-examination, Mr Webb was unable substantially to explain why those five absences were referred to if they were wholly irrelevant (as I think he – rightly – accepted they should have been, because the claimant was not facing dismissal for unauthorised absence but because of sickness absence).

27. The claimant appealed the decision to dismiss, through her trade union representative. The appeal hearing with Mr Trunks took place on 25 June 2020. The claimant again had a trade union representative – someone different from the individual who had accompanied her to the CoD meeting. There are contemporaneous meeting notes. Mr Trunks typed them up himself and sent them on 26 June 2020 to the claimant, who agreed them by return of email. The claimant now disputes the accuracy of parts of them, but has not produced notes of her own, nor any notes made by her trade union representative. The main dispute about the notes concerns whether the claimant said two things attributed to her about her drinking. During cross-examination, it seemed to me that what she was saying was that she didn't think she would have said them, but that she couldn't really remember, and that she accepted the accuracy of at least the gist of the notes. I accept they are accurate in all important respects (having, it seems to me, no good reason not to do so), but do not, in any event, think the differences

between the claimant and the respondent about them are significant in relation to what I have to decide.

28. Mr Trunks was conducting a rehearing and making a fresh decision from scratch, rather than undertaking a review of Mr Webb's decision. He could and would have carried out further investigations had he deemed it necessary, which he didn't.

29. Mr Trunks sent his decision rejecting the claimant's appeal by a letter of 15 July 2020, to which a 6 page document providing detailed reasons was attached.

30. In light of their oral evidence, it is clear that the main factor in Mr Webb's and Mr Trunks's decisions – even more so in relation to the latter than the former – was their assessment that the claimant was likely to have further sickness absence problems. In making that assessment, they both took into account not just the periods of sickness absence that led to the AR1 in July 2019 and the AR2 in November 2019 and to her CoD meeting in May 2020, but to her absence history over the longer term. Particularly important in this respect was the fact that she had had a CoD meeting less than 2 years earlier, and had on that occasion been given another chance, on the back of her promises to the effect that she would ensure she was not in the same position again.

31. One last fact, not so far mentioned, is the existence of what was described during this hearing as the respondent's "alcohol and drugs policy". Considerable weight has been put on this document by the claimant in her evidence, and more particularly by Mr Morgan on her behalf.

32. It is not, in fact, a policy at all, but a guide for employees, which sets out (see the "*Overview*" section at the start of the Guide), "*standards expected from all employees regarding alcohol … and drugs in the Royal Mail Group*", and it, "*provides details of what is available to employees when they require support with alcohol or drug use. It explains the behaviours expected when attending for work and how breaches of these standards will be dealt with*".

33. On the face of it, and in my view in actuality, the Guide does not impinge upon the respondent's Attendance Policy to any extent. It certainly does not, as Mr Morgan was effectively suggesting by his questions in cross-examination and in submissions, require decision-makers in the positions of Mr Webb and Mr Trunks to treat alcohol-related sickness absence differently, and more sympathetically, than other forms of non-disability-related sickness absence.

34. I make this point notwithstanding the fact that, by skilful cross-examination, Mr Morgan to an extent managed to get Mr Webb and Mr Trunks to agree with him that this guide applied to them and was relevant – or potentially so – to their decision-making relating to the claimant. The guide did indeed apply to them, at all times, just as it did to all employees in the Royal Mail Group. It could indeed be relevant in a sickness absence case. To use as an example an adapted version of one given by Mr Trunks when answering Mr Morgan's questions: if the claimant had mentioned having a drink problem during her AR2 meeting in November 2019 (which she didn't), the manager dealing with that meeting – a Mr C Brown – could have drawn to her attention the guide, and in particular the sources of support mentioned in it. But that is something rather different from the guide affecting the substantive outcome of a CoD meeting.

Decision on the issues

35. I have already accepted that dismissal was for a potentially fair, "*some other substantial*" reason: unsatisfactory attendance. I shall now go through what I consider to be the arguments that most strongly support a finding that the dismissal was unfair under ERA section 98(4) and/or that have been particularly emphasised in submissions. When doing so, I shall be using the words "reasonable" and "unreasonable" (and related words) as short-hands for within and outside the band of reasonable responses.

36. One broad point that is worth making at this stage is that the Attendance Policy envisages people being dismissed without them having done anything objectively wrong (e.g. malingering), without their particular sickness absence necessarily having caused the respondent any great difficulties, and without there necessarily being any capability issues, of the kind that often arise in relation to long-term sickness absence. I think that behind a lot of the claimant's arguments, unspoken, is the idea that to dismiss people in such circumstances is inherently objectionable and unfair. I disagree. It is not difficult to see how having a number of employees with irregular attendance would cause significant problems for the respondent and for their colleagues with better attendance records, and might well cause unfairness towards and/or resentment amongst the latter. Although the respondent would, of course, need to consider individual circumstances in order to dismiss fairly in any given case, the fact that the Attendance Policy was the product of a collective agreement with the recognised trade union (the "Attendance Agreement"), and the way it was applied in practice – see paragraphs 12 and 13 above – without evident trade union objection[2], show the reasonableness both of the policy itself and of the respondent dismissing someone for unsatisfactory attendance without examining the impact on the respondent's business of that individual's absences.

37. Turning to more specific points:

    37.1 I have already – see paragraph 33 above – rejected the argument that it was unreasonable of Mr Webb and Mr Trunks not to have taken the *Alcohol and Drugs Guide for employees* into account in deciding whether or not to dismiss the claimant. Different employers may legitimately adopt different approaches to employees with drug or alcohol problems, in particular as to how to treat sickness absence caused by those kinds of problems. It was open to the respondent to do as it did in this case, which was, broadly, to treat it the same as any other kind of sickness absence that was not caused by a disability. It was no part of the claimant's case as presented in Tribunal, nor was it suggested to Mr Webb or Mr Trunks in cross-examination, that they treated the claimant worse than they would have done had her absence in 2020 not been alcohol-related. The gist of what was put to them was that they should have treated her better, because of the Guide; and I don't accept that.

    37.2 Much has been made of the lack of notes relating to the AR1 of July 2019. It is fair to highlight, as Mr Morgan for the claimant has, the fact that the Attendance Agreement includes a statement that the manager dealing with a CoD meeting

[2] The claimant's trade union representatives at her two CoD meetings raised no objections, and I am sure that if there was any evidence of trade union disquiet about the way in which the respondent operated the Attendance Policy, it would have been presented to me.

should be provided with "*All records of review meetings 1 and 2*", but that does not mean that where such records have gone missing, it is unreasonable for the respondent to proceed on the assumption that everything has been done properly and that the lack of paperwork does not matter; at least where, as in this case, the only specific point put forward at the CoD meeting or the appeal on behalf of the employee – the claimant – concerning the AR1 was demonstrably an erroneous one.[3]

37.3 A better argument that has been put forward on the claimant's behalf is that by mentioning unauthorised absences in his dismissal letter of 4 June 2020, Mr Webb showed he had taken them into account, which he should not have done because they were an irrelevant consideration. For the dismissing officer to take into account something that the employee was given no opportunity to comment on, and which was not part of the 'charge sheet' the employee had been told she was facing, would in many cases make for an unfair dismissal. However, it does not do so in the present case because: the unauthorised absences were not, I think, a significant part of Mr Webb's decision; there was a full appeal and I am satisfied that Mr Trunks did not base his decision to any extent on unauthorised absences.

37.4 It has been suggested on the claimant's behalf that Mr Webb and Mr Trunks failed to give any, or any adequate weight to the fact that the claimant had no further sickness absence after her return to work in April 2020. I accept as reasonable Mr Trunks's response to questions in cross-examination concerning this, to the effect that it is to be expected that an employee facing dismissal for unsatisfactory attendance will have no sickness absence while the immediate threat of dismissal is hanging over them, and therefore the claimant not going off sick between April and July 2020 was not significant.

37.5 During the appeal meeting, a point was made about the fact that the amount of special leave the claimant had had was mentioned in the AR2 decision. Suffice it to say that I agree with what Mr Trunks said about this in his appeal decision document, from around half way down its fourth page.

38. Probably the claimant's strongest argument, and what I saw as Mr Morgan's main point in submissions, was that, although both Mr Webb and Mr Trunks based their decisions on a belief that the claimant, if given another chance, was likely to have unsatisfactory attendance in the future, there was: inadequate investigation of that issue during the CoD and appeal meetings; a lack of objective evidence to support such a belief; and no real explanation provided as to the basis upon which they had formed it. What was put forward on behalf of the claimant was along these lines:

38.1 The only evidence the respondent had – from the claimant herself – was that she had stopped drinking. If this was accepted – and the submission was that it should have been – Dr Baig had confirmed she should, "*be able to attend work regularly. Her prognosis should then be good.*" This meant there was no good reason to think there would be another absence like the one in 2020 that had led to the CoD meeting. If Mr Webb and Mr Trunks were in any doubt as to the position vis-à-vis

[3] See the second bullet point on the third page of the dismissal letter of 4 June 2020.

the claimant's alcohol dependency, they should have reverted to occupational health.

38.2 The root cause of most of the claimant's sickness absence over the years was what could labelled family issues. There was little or no discussion with the claimant about whether those issues had been resolved sufficiently for there to be cause for concern about them leading to unsatisfactory attendance in the future, and therefore no justification for having such a concern – or, at least, it would be unfair for the respondent to decide to dismiss on the basis of such a concern, given it had not been discussed with the claimant.

39. My conclusion is that although the claimant's argument is a fair one, and that Mr Webb's and Mr Trunks's reasoning (or lack of it) would not, for example, be adequate were they acting in a judicial capacity, this part of the claimant's submissions sets too high a standard for their decision-making.

40. The question of whether someone who has a history of unsatisfactory attendance is likely to have attendance issues in the future is rarely going to have a clear answer. In the present case, no amount of occupational health evidence or discussions with the claimant was likely to be of much assistance. Dr Baig could not say – and did not express a view on – whether the claimant had indeed stopped drinking or, if she had, whether she would have the will-power to abstain in the medium to long-term. The claimant was certain to say that any ongoing family problems would not affect her attendance. Her absence history was plainly relevant here. In circumstance where her sickness absence record was so against her, and where she had already been given a second chance, the onus was very much on her to put forward evidence and convincing argument to support her contention that her sickness absence problems were behind her – to persuade the respondent that she should be given a third chance, in other words. It was not on the respondent to investigate and gather evidence to prove otherwise. And the claimant, who had assistance from her trade union, had every opportunity to do so.

41. In addition, there were a number of different reasons for the claimant's sickness absence over the years, including, in particular, for the sickness absence that had led to the AR1 and AR2. No significant part of the sickness absence that was part of the absence management process culminating in the CoD meeting in 2020 was for something in relation to which the respondent could say to itself with any confidence that it probably wouldn't happen again, such as a road traffic accident.

42. Mr Webb and Mr Trunks were engaged in speculation. It seems to me it was reasonable for them to speculate, based on the claimant's absence history, including the fact that she had previously made promises to remedy things which she had been unable to keep and their own (in Mr Trunks's case, very extensive) experience, that the claimant was one of those employees who just could not maintain satisfactory attendance over the longer term; that what the reason for the absence would be next time was impossible to say; but that there would be a next time. Neither of them explained their thought-process quite in this way, but considering their evidence as a whole, I think that this is what it boiled down to.

43. I am not for a moment suggesting that they were right about this, but it was open to them to take that view, and it was a view that did have a real evidential basis.

44. In conclusion, I am unpersuaded by any the main arguments that have been advanced on the claimant's behalf in support of her claim, and there are no others I am aware of that would lead me to conclude that her dismissal was unfair. The claimant was, then, fairly dismissed in accordance with section 98 of the Employment Rights Act 1996.

45. Finally, I turn to the Polkey issue. Having considered the matter carefully, I am afraid I do not think I can say with confidence what Polkey reduction I would make were the claimant's dismissal unfair. My answer would necessarily depend on what I had got wrong in my decision on liability; what the source(s) of the unfairness was/were. What I can say is that if the source of unfairness was anything that could be characterised as procedural – anything that could have been put right by Mr Webb and/or Mr Trunks – there would have to be a significant chance that the claimant would still have been dismissed even if that source of unfairness had not been present.

Employment Judge Camp

12 July 2021