EMPLOYMENT TRIBUNALS

Claimant: Mrs S Gomes Hamel-Smith

Respondent: Serco Limited

Heard at: London South Employment Tribunal (by CVP)
On: 25 March 2021

Before: Employment Judge Abbott (sitting alone)

Representation
Claimant: Mr R Hamel-Smith, lay representative
Respondent: Mr I Moss, employee

JUDGMENT

1. The name of the Respondent is amended to Serco Limited.

2. The claim for unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

3. The Claimant, Mrs Gomes Hamel-Smith, was employed by the Respondent, Serco Limited, as a Prisoner Custody Officer from 28 July 2008 until her dismissal on 14 February 2020.

4. The Claimant claims that her dismissal was unfair, within section 98 of the Employment Rights Act 1996 ("ERA"). The Respondent resists the claim. It says that the Claimant was fairly dismissed on grounds of capability, alternatively some other substantial reason, on the basis of her failure to maintain a consistent attendance level in compliance with company policy. The Respondent also says that it followed a fair procedure prior to effecting the Claimant's dismissal, in accordance with company policy.

5. The case came before me for Final Hearing on 25 March 2021. The

Claimant was represented by her husband, Mr Ryan Hamel-Smith, and gave evidence (though provided no witness statement). The Respondent was represented by its Employment Relations Partner, Mr Ian Moss, who called evidence from Mr Liam Flavin, who was an Operations Manager for the Respondent at the time of the Claimant's dismissal and provided a witness statement. I was also provided with a 293-page Bundle of Documents.

Issues for determination

6. At the outset of the hearing, I agreed with the parties the issues for me to decide. In view of the time available for the hearing, I did not ask the parties to deal with issues concerned with remedy in evidence and submissions.

    (1) What was the principal reason for the Claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) ERA?

    (2) If so, was the dismissal fair or unfair within section 98(4) ERA and, in particular, did the Respondent in all respects act within the band of reasonable responses?

Findings of fact

7. The relevant facts are, I find, as follows. Where it has been necessary for me to resolve any conflict of evidence, I indicate how I have done so at the relevant point. References to "[xx]" are to page numbers in the Bundle of Documents. Only findings of fact relevant to the issues, and those necessary for me to determine, have been referred to in this judgment. I have not referred to every document I have read and/or was taken to in the findings below, but that does not mean such documents were not considered if referred to in the evidence/the course of the hearing.

8. The Claimant was employed by the Respondent as a Prisoner Custody Officer from 28 July 2008 until her dismissal on 14 February 2020.

9. The Respondent operates a Company Standard Operating Process on Sickness Absence Management ("CSOP") which applied to the Claimant. The CSOP requires managers to monitor the sickness absence of employees and, where there is repeated absence that exceeds defined "Sickness Absence Trigger" levels, to commence the three-stage Absence Management Process [96].

10. The Sickness Absence Triggers for the different stages of the Absence Management Process under the CSOP are [96-100]:

    (1) Stage 1 Trigger: 4 occasions of absence during a rolling consecutive twelve month period from the first day of the last occurrence of absence OR 10 working days' absence during a rolling consecutive twelve month period from the first day of the last occurrence of absence OR any unacceptable level and pattern of absence.

    (2) Stage 2 Trigger: any further absence within a twelve month period from the issuing of a Stage 1 warning.

(3) Stage 3 Trigger: any further absence within a twelve month period from the issuing of a Stage 2 warning.

11. Absences as a result of accidents at work or disability-related illnesses are not to be counted towards triggers, but do form part of an employee's overall attendance record [97].

12. An employee has the right to appeal a decision under any stage of the Process [100].

13. The Claimant had 5 occasions of absence during the twelve month period prior to 23 September 2017, namely [109-122; 243-246]:

    (1) 5 December 2016 (1 working day);

    (2) 18 January 2017 (1 working day) due to back pain.

    (3) 20 February 2017 (1 working day) due to bleeding.

    (4) 5-10 April 2017 (4 working days) due to severe flu.

    (5) 23 September 2017 (1 working day) due to asthma.

14. The Stage 1 Trigger having been met, the Claimant was invited to an Absence Meeting which took place on 20 November 2017. The minutes of that meeting are at [141-142].

    (1) The minutes are misdated 20 November 2018 rather than the correct date of 20 November 2017.

    (2) The basis of the trigger is misreported - the minutes indicate that the Claimant was invited to agree that she had 18 days, 3 periods of absence in the last 12 months, and did so – though as indicated in the previous paragraph the trigger had in fact been met.

    (3) The Claimant was asked if she could suggest any ways that she could help improve her absence record. She offered no suggestions.

    (4) The Claimant was asked if she would benefit from an occupational health referral, though no explanation was given of what that would entail. She answered no.

    (5) The meeting ended with the Claimant being told she would be issued with a stage 1 warning, and the consequence of this was explained – that any further absence within the live period of the warning (12 months from 23 September 2017, though under the CSOP this should have run from the date of the meeting) would trigger Stage 2 of the process.

15. The Claimant did not appeal the issuance of this Stage 1 warning.

16. Subsequently the Claimant had further absences from work, as follows [123-131; 247-248]:

(1) 12 March to 1 May 2018 (35 working days) due to hip pain;

(2) 12-13 July 2018 (2 working days) due to asthma;

(3) 4-21 September 2018 (14 working days) due to a chest infection.

17. The Claimant was invited for a Stage 2 meeting, initially scheduled for 18 October 2018 and then rescheduled to 25 October 2018. This meeting did not take place on either of these days due to the Respondent's operational needs. However, before the meeting could be convened, the Claimant suffered an ankle injury in an accident whilst working on 29 October 2018 leading to a further period of absence [137-140; 143-150; 248-249]:

    (1) The Claimant was absent from 30 October 2018 to 4 January 2019 (46 working days)

    (2) She returned to work on 7 January 2019 but was sent home as she was not fully-fit to work, leading to a further 15 working days absence before she returned on 28 January 2019.

    (3) She had a further absence 7-8 February 2019 (2 working days), with a phased return thereafter.

18. Once the Claimant had returned to work, the Stage 2 meeting took place on 20 February 2019. The minutes of that meeting are at [151-155] and record the following.

    (1) That the Respondent would include the ankle-related absences into the Stage 2 process, notwithstanding that they occurred after the initial invite to a Stage 2 meeting, as "*it would be unfair to use it as a stage 3*".

    (2) That the Respondent did not regard the Claimant's accident on 29 October 2018 as an "*accident at work*" for the purposes of the CSOP, and was therefore a potential trigger.

    (3) That the Respondent was satisfied that any of the Claimant's absences since 23 September 2017 could have triggered the stage 2 process and, in the context of the Claimant's overall attendance record, a Stage 2 warning was appropriate.

    (4) That the Claimant was warned that any further sickness absence will trigger stage 3 of the Process which could lead to dismissal.

    (5) That the Claimant made enquiries as to the process for appealing this decision.

19. The Claimant did not ultimately appeal the issuance of this Stage 2 warning.

20. The Claimant was then absent from work on 3 July 2019 (1 working day) due to having suffered an asthma attack [157-160]. As a consequence, she was invited for a Stage 3 meeting.

21. The Stage 3 meeting was held on 19 July 2019. The minutes are at [166-

168]. Mr Flavin led the meeting accompanied by a note-taker; the Claimant attended with her Union representative Mr D Bushell. Mr Flavin concluded that, as the Claimant had several previous absences due to asthma, it would be prudent to refer the Claimant for an Occupational Health ("OH") assessment and reconvene the meeting once the report is received.

22. The OH report was duly obtained and is dated 9 August 2019. A copy is at [169-170]. The report records the author's opinion that "*given the length of time she has experienced the asthma, it is likely this would be classified as a disability under the Equality Act 2010*". Otherwise, the report concludes that the Claimant was medically fit for work.

23. The Stage 3 meeting was reconvened on 13 September 2019. The minutes of that meeting are at [173-174]. Mr Flavin stated that the Claimant "*should have been given better advice and support*" earlier in the process. He concluded that no further action should be taken, on the basis that absence related to the Claimant's asthma should not count toward a trigger, but warned that any absences not related to asthma would fall to be managed under the Absence Management Process. By consequence, the Claimant remained on her Stage 2 warning which was effective from 20 February 2019.

24. The Claimant was then absent from work on 27-28 November 2019 (2 working days) following a fall outside of work, and then again from 1-28 January 2020 (19 working days) following a fall down stairs at home [177-184]. Neither of these incidents were caused by the Claimant's prior ankle injury or her asthma. As a consequence, she was again invited for a Stage 3 meeting.

25. The further Stage 3 meeting was held on 14 February 2020. The minutes are at [187-189]. Mr Flavin led the meeting accompanied by a note-taker; the Claimant attended with her Union representative Mr D Bushell. Mr Flavin concluded that, as the most recent absences were unrelated to the Claimant's asthma, there was nothing to be gained from a further OH assessment. Having discussed the reasons for the recent absences, and heard submissions made on the Claimant's behalf, Mr Flavin took a 20 minute adjournment to discuss matters with HR advisors.

26. On resumption of the meeting, Mr Flavin informed the Claimant that taking account of all the circumstances, it was his decision that the Claimant be dismissed. Mr Flavin informed the Claimant of her right to appeal.

27. Mr Flavin confirmed his decision in writing by a letter dated 18 February 2020 [191-192]. In error, Mr Flavin failed to attach the minutes of the Stage 3 meeting to this letter, but followed up with those the following day.

28. By an email dated 27 February 2020 [195-196], the Claimant lodged an appeal against her dismissal. The grounds of that appeal were as follows:

    (1) Certain guidelines not followed as set out within the CSOP. Specifically, Mr Flavin's references to the earlier Stage 3 meeting.

    (2) Mr Flavin's failure to make a further OH referral.

(3) The Respondent's failure to support the Claimant in respect of her injuries in accordance with CSOP Section 5.3.2.

(4) The Respondent's non-compliance with CSOP Section 5.11 under which accidents at work should not be counted toward sickness triggers.

29. An appeal hearing was originally scheduled for 11 March 2020 [197]. On the Claimant's request, in order to provide further time to identify a suitable representative, Ms Stow offered to move the hearing to 16 March 2020. The Claimant indicated she could not attend on that day, so the hearing was rescheduled to 24 March 2020 [199].

30. By an email dated 23 March 2020, the Claimant sought a further adjournment on the basis that she would be unable to travel due to Coronavirus [201-202]. In response, the appeal officer, Ms Jane Stow, refused a further adjournment, but instead offered to hold the hearing via Skype and sent an invite to a Skype meeting [204].

31. Later that day, the Claimant enquired about provision of papers to her representative [203]. Ms Stow responded to explain that the Claimant would need to speak to her representative before the Skype meeting.

32. Ultimately, the Claimant did not join the Skype meeting on 24 March 2020, and Ms Stow elected to proceed in her absence. The minutes of the meeting are at [205-206], in which Ms Stow summarised the points raised by the Claimant in her grounds of appeal and her intended investigations. In her evidence the Claimant suggested that she had made numerous attempts to contact Ms Stow on the day because she had technical difficulties in joining the Skype meeting. However, no text messages or emails were produced to demonstrate this and, in any event, it was the Claimant's responsibility to ensure she was able to connect in good time.

33. Following her investigations, Ms Stow issued an appeal outcome letter on 1 April 2020 upholding the decision to dismiss [257-258]. In summary, Ms Stow concluded that:

(1) Mr Flavin had made clear at the earlier Stage 3 meeting that the Claimant would remain on a Stage 2 warning until 21 February 2020. There was an absence event while that warning remained live which triggered the further Stage 3 meeting. This was in line with the CSOP.

(2) Mr Flavin's decision that a further OH referral was not necessary was appropriate.

(3) Phased returns to work (CSOP Section 5.3.2) are an option, but it is not always necessary to accommodate this.

(4) The Stage 3 trigger(s) were not the result of accidents at work (CSOP Section 5.11).

34. The Claimant presented her claim to the Tribunal on 14 May 2020. The claim was presented in time and the Tribunal has jurisdiction to hear it.

Relevant law and conclusions

35. Section 94(1) ERA provides that an employee has the right not to be unfairly dismissed by their employer. It is not in dispute that the Claimant was a qualifying employee and was dismissed by the Respondent.

36. Section 98 ERA deals with the fairness of dismissals. There are two stages within this section.

    (1) First, the employer must show that it had a potentially fair reason for the dismissal, *i.e.* one of the reasons listed in section 98(2) or "*some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*" ("SOSR") (section 98(1)(b)).

    (2) Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider whether the employer acted fair or unfairly in dismissing for that reason. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

37. These two stages align with the two issues identified at paragraph 6 above.

Issue 1: potentially fair reason?

38. There is useful guidance from the Court of Appeal on the proper label for a dismissal on the grounds of an unsatisfactory attendance record. In *Wilson v Post Office* [2000] IRLR 834, the claimant was dismissed for unacceptable levels of short-term absence. In its response to the claim for unfair dismissal, the Post Office cited "*incapability by reason of unsatisfactory attendance record*" as the reason for dismissal. The ET found that the reason for dismissal was incapability on the ground of ill health and that the dismissal was unfair. The Court of Appeal remitted the case, having found that the real reason for dismissal was not capability but the claimant's failure to comply with the Post Office's attendance procedure, which therefore fell within SOSR.

39. In this case, it is clear that the Claimant was fit for work at the time of her dismissal. The circumstances are analogous to *Wilson*. I therefore find that the reason for the Claimant's dismissal was SOSR, specifically the Claimant's failure to comply with the CSOP. This is a potentially fair reason for dismissal.

40. I note that this is not the label that Mr Flavin put on the reason for dismissal (he cited capability in his letter at [191]). However, the facts that led the Respondent to dismiss were known to the Claimant at the time of the dismissal - this is a simple issue of mislabelling which has no consequence

for this case and can be ignored (consistent with the decision of the Court of Appeal in *Abernethy v Mott, Hay and Anderson* [1974] ICR 323.

Issue 2: was the dismissal fair?

41. As section 98(4) ERA makes clear, it is not enough that the Respondent has a reason that is capable of justifying dismissal – the Tribunal must be satisfied that, in all the circumstances, the Respondent was actually justified in dismissing for that reason. The approach the Tribunal must adopt was helpfully summarised by Browne-Wilkinson J sitting in the Employment Appeal Tribunal in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17:

"*We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [S.98(4)] is as follows:*

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

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

(3) 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;

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

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

42. I have each of these points clearly in mind in reaching my decision.

43. Section 98(4) ERA requires me to consider all of the circumstances. The section particularly calls out "*the size and administrative resources of the employer's undertaking*". Here, the Respondent's undertaking is of a significant size, employing 20,000 people in Great Britain according to the ET3, and has considerable administrative resources.

44. Consistent with this, the Respondent has a clear and comprehensive absence policy, the CSOP, to which the Claimant was subject. The Claimant's absences were addressed consistently with that policy:

    (1) The Claimant's absences listed at paragraph 13 above triggered a Stage 1 meeting in accordance with the CSOP. Although the CSOP provides that a Stage 1 written warning is not the only possible outcome of such a meeting, it cannot be said that in the

circumstances it was unreasonable for such a warning to be issued. In particular, there was no obvious underlying medical cause for all of the absences (which were for a variety of reasons) which would have indicated a need for an OH referral. Moreover, the Claimant did not appeal the decision to issue a Stage 1 written warning.

(2) Any one of the Claimant's absences listed at paragraph 16 above could have been used as the trigger for a Stage 2 meeting in accordance with the CSOP. In fact, it was the last of these which was used as the trigger. As for Stage 1, although the CSOP provides that a Stage 2 written warning is not the only possible outcome of such a meeting, it cannot be said that in the circumstances it was unreasonable for such a warning to be issued. Again, there was no obvious underlying medical cause for all of the absences (which were for a variety of reasons) which would have indicated a need for an OH referral. Moreover, the Claimant did not appeal the decision to issue a Stage 2 written warning.

(3) The Claimant's absence as a result of her accident at work described at paragraph 17 above was never, in fact, used as a trigger under the CSOP (notwithstanding the Respondent's indication that it would not regard it as an "*accident at work*" for the purposes of the CSOP). Accordingly, the Claimant's submission that there was any unfairness in this respect is misplaced.

(4) The Claimant's absence identified at paragraph 20 above triggered a Stage 3 meeting in accordance with the CSOP. Mr Flavin acted reasonably in making an OH referral in view of the reason for the absence in question (asthma), and then in taking no further action following receipt of the OH report. It was also reasonable (and consistent with the CSOP) for Mr Flavin to leave the existing Stage 2 written warning in place, and I reject the Claimant's submission that he should have done anything other than what he did. Mr Flavin could not reasonably be expected to unpick or unwind what had happened at the earlier Stages in circumstances where there had been absences for a variety of reasons, not just asthma-related, and where the Claimant had not herself appealed the earlier decisions.

(5) The Claimant's absences identified at paragraph 24 above triggered a further Stage 3 meeting in accordance with the CSOP. Mr Flavin acted reasonably in determining that a further OH referral was not necessary – the triggering absences were unrelated to the Claimant's asthma or any other obvious underlying health conditions. In those circumstances, and taking account of the overall picture of the Claimant's absence record, it was within the band of reasonable responses for Mr Flavin to dismiss the Claimant for failure to comply with the CSOP.

(6) The Claimant was offered the opportunity to appeal at each Stage, only availing herself of that opportunity at Stage 3. Ms Stow investigated the grounds raised in the Claimant's appeal and was entitled to reach the conclusion she did.

45. It follows from the above that I conclude the Respondent was justified in dismissing the Claimant for failure to comply with the CSOP. That is not the end of the story, however, as I must also consider whether the dismissal was nevertheless unfair because the Respondent failed to follow a fair procedure. I find that the procedure was, overall, fair.

    (1) The Respondent complied with its internal policies and procedures (*i.e.* the CSOP).

    (2) There was a delay in convening the Stage 2 meeting; however, this was justifiable in view of the Claimant being absent from work during the relevant period.

    (3) The Claimant was offered the opportunity to appeal at each Stage of the process, but chose only to take that opportunity at Stage 3.

    (4) Though (as the Claimant submitted) Mr Flavin recognised, with the benefit of hindsight, that the Claimant should have benefitted from "*better advice and support*" at an earlier stage, the fact is that the Claimant had a very poor overall absence record and Mr Flavin was reasonably entitled to have regard to that. The failure to provide such "*advice and support*" at an earlier stage did not, in all the circumstances, render the dismissal procedurally unfair. Support is a two-way street, and there is no evidence that the Claimant was actively seeking support from her employer. Moreover, the Claimant was offered a series of opportunities within the procedure adopted (after the Stage 1 warning; after the Stage 2 warning; after the first Stage 3 meeting at which no further action was taken) to improve her absence record but did not do so.

    (5) At the appeal stage, the Respondent sought to accommodate the Claimant in finding a representative by delaying the appeal hearing. Contrary to the Claimant's submission, it was the Claimant's responsibility to provide her representative with papers and brief him, and she had ample time to do so (notwithstanding the short – one day – delay in being provided with the minutes of the further Stage 3 meeting). It was also the Claimant's responsibility to attend the hearing if she had any additional arguments to present – she did not do so (and there is a lack of evidence as to why – see paragraph 32 above). Nevertheless, Ms Stow considered and investigated the grounds identified in the Claimant's appeal letter.

    (6) Insofar as there were errors in some documents (as I have found there were), that is unfortunate - particularly for a major undertaking like the Respondent – but, contrary to the Claimant's submission, is not indicative of an unfair procedure when viewed as part of the overall picture.

46. Accordingly, I find that the dismissal was fair within section 98(4) ERA, and that the Respondent in all respects acted within the band of reasonable responses. The claim fails and is dismissed.

Employment Judge Abbott
Date: 1 September 2021

JUDGMENT SENT TO THE PARTIES ON
Date: 7 September 2021

FOR THE TRIBUNAL OFFICE

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