EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113028/2019

Hearing Held In Person at Glasgow Tribunals Centre on 18-19 October 2021

Employment Judge Murphy

Ms M McDonald	**Claimant** **In Person**
Marks and Spencer Plc	**Respondent** **Represented by** **Mr P Kerfoot,** **Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed. The respondent shall pay to the claimant a basic award of ONE THOUSAND THREE HUNDRED AND NINETY-SEVEN POUNDS STERLING AND FORTY PENCE (**£1,397.40**).

REASONS

Introduction

1. This final hearing took place in-person at the Glasgow Tribunals Centre.

2. The claimant was dismissed by the respondent on 23 July 2019 and complained of unfair dismissal. The respondent denies having unfairly dismissed the claimant.

3. The claimant gave evidence on her own behalf. The respondent led evidence from Donna McArthur, Section Manager, employed by the respondent at the material time at its Byres Road store.

4. Evidence was taken orally from the witnesses. A joint set of productions was lodged running to 138 pages. During the hearing, the claimant produced an additional document, comprising a two-page medical report from her GP.

Issues to be determined

5. The issues to be determined are as follows:

   (1) Was the claimant's failure to meet the attendance requirements prescribed by the respondent's sickness absence policy a substantial reason of a kind such as to justify the dismissal of the claimant holding the position of head baker in the Byres Road store for the purposes of section 98(1)(b) of ERA?

   (2) Did the respondent act reasonably in all the circumstances in treating this as a sufficient reason to dismiss the claimant, applying the test in section 98(4) of ERA?

   (3) If the claimant was unfairly dismissed, is she entitled to compensation, and if so, what compensation should be awarded?

Findings in Fact

6. The following facts were found to be proved on the balance of probabilities.

7. Abbreviations used are set out here.

AWP	Attendance at Work Policy operated by the respondent until 30 June 2019
SAP	Sickness Absence Policy operated by the respondent from 1 July 2019
RTW	Return to Work Meeting conducted after an absence under either policy
ARM	Absence Review Meeting – a formal meeting conducted under either policy
WW	Written Warning
FWW	Final Written Warning
BIG	Business Involvement Group, an employee representative body at the respondent
PPS	People Policy Specialists – a centralised group of specialists who provide remote support to the respondent's managers on the application of its people policies

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Background

8. The respondent is a national retailer which trades as a public limited company and has stores throughout the United Kingdom. It employs approximately 80,000 people in Great Britain. At its Byres Road store, where the claimant worked throughout her employment, it employs 37 people.

9. The respondent employed the claimant from 30 November 2014. She was initially employed as a Customer Assistant. She was issued with Terms and Conditions of employment on or about 12 January 2015. Latterly, she was contracted to work 37.5 hours per week. She latterly undertook the role of head baker in the respondent's in-store bakery.

10. At the Byres Road store, the respondent employed one store manager and four section managers. The claimant's line manager was Patrick Smith. Absence was managed by all these managers. RTWs and ARMs were not exclusively handled by the line manager of the affected employee.

11. There was no dedicated HR specialist based at the store, but the managers had access to a centralized team, known as PPS, who could be contacted by telephone to provide advice and support on the application of the respondent's 'people policies'. The respondent consults on issues affecting staff with an employee representatives body known as BIG (the Business Involvement Group). There were three or four BIG representatives at the Byres Road store.

12. Before 1 July 2019, the respondent operated a policy on absence called the AWP. This was expressly non-contractual and was amended and updated by the respondent from time to time. It was published on the staff intranet and could be accessed by employees using computers in-store or remotely on their own devices.

13. The AWP set out a framework for managing absence. Following each absence, a manager would hold an RTW with the employee, the purpose of which, according to the policy, was to "discuss the absence in more detail to ensure any recommendations made by a GP for their return to work have been considered and to ensure they are clear about the company's expected

standards of attendance and absence triggers." When an employee met certain prescribed absence levels, known as 'triggers', the manager should consider whether to invite the individual to an ARM. At this formal meeting, the policy provided that the manager should consider whether formal action was appropriate. This might include a WW, a FWW, or dismissal.

14. Although the AWP did not preclude this, the respondent's practice, at least at the Byres Road store, was not to issue a FWW unless an employee had hit a trigger during the currency of a live WW. Likewise, although not precluded under the AWP, the practice at the store was not to dismiss unless an employee hit a trigger during the currency of a live FWW.

15. The triggers under the AWP were:

> *"3 or more occurrences of absence in a 12 (working) week rolling period; or*
>
> *8 or more shifts, in a rolling 26 (working) week period*
>
> *However, if an employee already has a written warning or final written warning of dismissal for absence, then the triggers [were]:*
>
> *3 or more occurrences in a 12 (working) week rolling period, or*
>
> *6 or more shifts in a rolling 26 (working) week period."*

16. The AWP did not expressly provide for this, but the respondent's practice at the Byres Road store was that when a WW or FWW was issued, the employee's absence tally was notionally reset to zero and only absences after the warning date were counted in determining if a further trigger had been met. WWs and FWWs remained live for 12 months from the date of issue.

17. Under the AWP, where a manager identified that an employee's pattern of absence was due to an "underlying ill health condition", a separate procedure

was prescribed to manage this which included consideration of reasonable adjustments.

18. With effect from 1 July 2019, the respondent replaced the AWP with the SAP. The new policy was prepared and implemented following consultation between the respondent and BIG. There were no documented transitional arrangements.

19. In practice, however, the respondent treated live WWs and FWWs issued under the AWP as valid warnings for the purposes of applying the SAP. Such warnings continued to be relied upon to determine the next appropriate stage of procedure.

20. The triggers to be applied under the SAP were different to those under the AWP. They were:

"3% or more of your contracted hours in a 26-week rolling period; and / or

3 or more occurrences of absence in a 26-week rolling period. (For the purpose of this policy, an occurrence is any number of shifts where a colleague is continually off in one period. This could include a part shift, which would still be counted as one occurrence.)"

21. These triggers, with effect from 1 July 2019, applied to all employees regardless of whether they were subject to any warnings. Under the SAP, unlike the AWP, there is no reduction in the trigger thresholds for those who have extant warnings.

22. Because the trigger thresholds were lower under the SAP, there was the scope that some employees might, on the date it came into effect, find themselves immediately in breach of a trigger. There were no transitional provisions in the SAP to deal with this, but the respondent's practice in the Byres Road store to mitigate the potentially harsh impact for affected individuals was not to initiate any formal action, even if a trigger had been met, until a further instance of absence occurred after 1 July 2019.

23. The respondent's reasons for introducing the tightened trigger points in the SAP were twofold: Firstly, the tightening was to bring the respondent into line with the rest of the retail industry. Secondly, the move from counting missed shifts to measuring absence as a percentage of working hours addressed a concern that the shift counting approach under the AWP put full time employees at a disadvantage compared with those contracted to work fewer hours per week.

24. The SAP also spelled out types of absences which would not be counted for the purposes of the new triggers, including disability and pregnancy related absences as well as absences lasting over 4 weeks. It established a different process for dealing with long term absence.

25. The SAP included in its introduction the respondent's business case for the management of absence (which was not identified in the AWP). It states: "*in order to provide good service to our customers and to meet the operational needs of our business, a good level of attendance is required from all colleagues*." In the Byres Road store, the respondent operated a tight staffing model. Unplanned absences put a strain on the store's operation. It created pressure on remaining employees at work and adversely affected the levels of customer service the respondent was able to provide in the store.

26. One way in which the policy operated to achieve the respondent's business aims was by deterring absence levels which breached the policy triggers. Ms McArthur's evidence was that it was rare to issue a FWW under the AWP or the SAP and rarer still to dismiss. She attributed this to the deterrent effect the policy had on absence. Her experience was that the issue of a first WW was usually sufficient to bring about an improvement in an employee's absence so that further sanctions were unnecessary.

The claimant's absence and the application of the AWP and SAP to her

27. Around 6 months into her employment, the AWP was discussed with the claimant at an RTW. This prompted her to read the policy online.

28. In the two-year period from 23 July 2017 to her dismissal on 23 July 2019, the claimant had the following absences:

Absence commenced	Absence ended	Reason	Shifts missed
2 Sep 2017	2 Sep 2017	Cold / Flu	1
10 Nov 2017	17 Nov 2017	Kidney infection	6
28 Jan 2018	4 Feb 2018	Cold / cough/ throat infection	5
12 May 2018	12 May 2018	Sickness	1
16 Sep 2018	23 Sep 2018	Chest Infection	4
9 Nov 2018	17 Nov 2018	Stress	6
5 Mar 2019	5 Mar 2019	Cold / cough / throat infection	1
12 Apr 2019	13 Apr 2019	Urine infection / allergic reaction	2
15 Jul 2019	15 Jul 2019	Migraine	1

29. All these absences were attributable to genuine illness experienced by the claimant.

30. After each absence, an RTW was conducted by one of the managers at the store. At each such meeting, the reasons for the absence were discussed and the claimant was informed of how her absence tally measured against the triggers in the AWP (or, in the case of the RTW following the absence in July 2019, against the SAP triggers). A brief typewritten note was prepared by the manager conducting the RTW which summarised the discussion. These notes were not routinely provided to the claimant following each RTW. Relevant notes, were, however supplied to her when she hit a trigger, resulting in an invite to an ARM.

Written Warning

31. Following the claimant's 5-shift absence ending on 4 February 2018, it was identified at her RTW that she had hit a trigger under the AWP and that she would, therefore, be invited to an ARM. She had been absent for 12 shifts in a rolling 26-week period. The trigger under the AWP for someone not subject to a warning was 8 or more shifts.

32. At the ARM, the claimant had the opportunity to discuss her absences and to make representations. She had the opportunity to be accompanied but chose not to.

33. Following the ARM, on or about 7 February 2018, the respondent issued a WW to the claimant under the AWP. It specified it would remain live for 12 months. During the ensuing period the relevant triggers were 3 or more occurrences in a 12-week period or 6 or more shifts in a 26-week period. The claimant was offered the opportunity to appeal the WW but declined to do so.

34. The claimant experienced a degree of confusion about the trigger system. Her progress against that system was explained to her at each RTW but nonetheless she did not fully understand the procedure. She did not seek clarification, however, from the managers who conducted her RTWs. Nor did she access the AWP online to familiarise herself with its requirements. She did not look at the AWP even when invited to an ARM.

Final Written Warning

35. Following the claimant's 6-shift absence which ended on 17 November 2018, it was identified at her RTW that she had hit a trigger under the AWP and that she would, therefore, be invited to an ARM to discuss this. She had been absent for 11 shifts in a rolling 26-week period. The trigger under the AWP for someone subject to a written warning was 6 shifts or more in a rolling 26-week period.

36. The ARM took place on 19 December 2018 and was conducted by Ms McArthur (Section Manager). The claimant was given the opportunity to be accompanied but chose not to be so. She was given an opportunity to discuss her absences and make representations. Ms McArthur adjourned the meeting to consider whether the claimant's November stress related absence might be attributable to an underlying ill health condition for the purposes of the AWP. She considered the claimant's comments and took advice from PPS. She concluded that it did not fall within this category; the stress was, in her view, 'situational' and was attributed by the claimant to another process which she was undergoing with the respondent.

37. On 11 December 2018, Ms McArthur reconvened the meeting and issued a FWW under the AWP. It specified it would remain live for 12 months. It stated: "If your attendance falls below the expected level in future this may lead to dismissal". During the ensuing period the relevant triggers under the AWP were 3 or more occurrences in a 12-week period or 6 or more shifts in a 26-week period.

38. The claimant had the opportunity to appeal the FWW, but declined to do so. When Ms McArthur outlined the right of appeal to the claimant, the claimant

said that the appeal was 'no use' and advised she had previously raised an appeal and obtained no response. That appeal referred to a separate process.

39. Ms McArthur assured her that she ought to receive a response and that she or any of the managers in the store or the BIG representatives could assist the claimant with the appeal process should she wish to progress an appeal. Although the claimant indicated during the meeting that she would like to do so, she did not in the event submit an appeal.

Introduction of SAP and dismissal

40. The AWP was replaced by the SAP from 1 July 2019. Ms McArthur informed some employees in the Byres Road store at a team briefing but the claimant was not among them. She was neither informed of the change of policy nor, specifically, the change to the triggers before they took effect. The new policy was available to view online on the staff intranet, but the claimant did not access it, its existence not having been flagged to her by the respondent.

41. Following the claimant's 1-shift absence on 15 July 2019, it was identified at her RTW that she had hit a trigger under the SAP and that she would, therefore, be invited to an ARM to discuss this. She had hit three occurrences of absence in a 26-week period and her absence had reached 3.85% of her contracted hours within a 26-week rolling period so that both triggers in the SAP had been hit. Had the AWP continued to apply, the claimant would not have hit the relevant triggers. She had not had three occurrences of absence in a 12-week rolling period counting back from the 15th July absence, nor had she been absent for 6 shifts or more in the rolling 26-week period counting back from that date.

42. If the claimant had known of the change to the triggers from the date they took effect on 1 July 2019, she would still have been absent on 15 July 2019 with a migraine.

43. Ms McArthur conducted an RTW with the claimant on 19 July 2019 at which she informed the claimant that she had hit the SAP triggers and that she would

be invited to an ARM. When Ms McArthur discussed the triggers with the claimant, the claimant did not mention that she had been unaware of the new tighter triggers under the SAP. Ms McArthur, therefore, was under the impression that the claimant was aware of the altered triggers.

44. The claimant was invited to the ARM and given the opportunity to be accompanied. Prior to the ARM, she was provided with copies of the RTW notes which confirmed her relevant absence history. She was accompanied at the meeting which took place on 23 July 2019 by her colleague, N McCairns. The meeting was conducted by Ms McArthur who explained that Ms McCairns could address the meeting to put and sum up the claimant's case and ask questions but that she could not answer questions on the claimant's behalf. Ms McArthur took notes throughout the meeting which the claimant agreed were accurate.

45. The claimant was given the opportunity to discuss her absences and make representations.

46. There was discussion about the claimant's recent absence for a migraine headache. The claimant attributed this to a side effect of painkillers she had been prescribed following a diagnosis of wear and tear on her spine. The absences in April and March 219 were also discussed. Regarding the claimant's urine infection in April 2019, the claimant noted she had been advised to seek immediate treatment for infections of this type as she had previously ended up with a nasty kidney infection for which she had been hospitalised. The claimant was asked about possible disabilities and she indicated this might be one. However, earlier in the meeting she had said she didn't know how often they were; she had had them in the past but not regularly.

47. The claimant was asked whether she thought her absence might improve in the next six months, but she pointed out that 'you can't help when you are ill'.

48. The claimant was given the opportunity to make any other comments before Ms McArthur adjourned to consider her decision. She did not mention she had not been aware of the altered triggers under the new SAP. She mentioned she had an underactive thyroid for which she was prescribed medication. She said it caused her to become tired and that she needed it checked annually. She had not, however, had any absences attributable to this condition.

49. Ms McArthur adjourned the meeting for over an hour to consider the matter. She called PPS to discuss the case and use them as a sounding board. The meeting was reconvened at 1pm when Ms McArthur confirmed her decision was to dismiss the claimant.

50. She confirmed her reasoning which included that, as a business the respondent needed all colleagues to maintain a good level of attendance to meet their customer and operational needs and that the respondent could no longer sustain the claimant's level of attendance. She dismissed the claimant because her levels of absence were unacceptable, and the claimant had failed to comply with the requirements of the respondent's SAP.

51. Ms McArthur considered the claimant's absence history over the past two years which had consistently breached the 3% threshold prescribed by the SAP. She reviewed this history to help her decide whether she believed an improvement in the future and compliance with the SAP was likely. Based on the history and on the claimant's response when she asked her about the chances of improvement at the meeting, Ms McArthur considered it was not.

52. The claimant was dismissed with immediate effect on 23 July 2019 and paid in lieu of 4 weeks' notice. She was informed of her right to appeal both at the meeting and in a letter issued the following day, confirming the dismissal. The claimant did not appeal.

The claimant's post-termination losses

53. Following the termination of her employment, the claimant briefly claimed Universal Credit in late July / August 2019.

54. She has not applied for or undertaken any paid employment since her dismissal by the respondent.

55. She did not wish to continue in the retail sector so she decided to undertake a course at Anniesland College in medical administration which she believed might equip her to apply for a receptionist role in a hospital. She undertook two consecutive courses in the subject at the College between September 2019 and June 2020. The courses entailed a commitment of 3 days per week, and she received a bursary from 13 September 2019 until June 2020 in the amount of £103.65 per week.

56. By the time the claimant completed her courses, the Covid pandemic had taken hold. She chose not to apply for employment in the NHS. She was concerned about the risk to her health that may be posed by working in a hospital environment while the pandemic continued. From August 2020, she began voluntary work with the British Heart Foundation two days per week. She had by then become eligible to draw down her pension.

Observations on the Evidence

57. Relatively little of any materiality was disputed. The claimant accepted that her absences and the reasons for them were correctly characterised in the respondent's documentation and agreed with the respondent's narration of the procedure followed.

58. The claimant was an honest witness who did not intend to give misleading evidence. However, there were lapses in her recollection and at times she became confused. On one or two occasions, owing to such lapses and / or confusion, the evidence she gave was not accurate. To her credit, when contrary evidence was put to her, she accepted her account had been

erroneous and corrected herself. An example is that, during her evidence on 18 October, at one point she suggested she had appealed the WW dated February 2018 without receiving a response. Later in evidence that day she said it was the FWW dated December 2018 which she had appealed. Overnight she located the appeal document to which she was referring and on being asked to review its contents, she appreciated that it, in fact, related to a different process entirely. She then accepted she had neither appealed the WW nor the FWW issued under the AWP.

59. Ms McArthur was a credible witness. She gave her evidence in a concise and straightforward manner. I found her to be more reliable on the whole. She had a solid recollection of her involvement in the claimant's RTWs, ARMs and the dismissal procedure.

60. One disputed matter was the claimant's state of knowledge about the respondent's adoption of the new SAP and its triggers before it was introduced. Mr Kerfoot invited me to prefer Ms McArthur's evidence over the claimant's. I considered the evidence of both witnesses carefully.

61. The claimant was adamant that she was not told of the changeover in the policy. This was consistently her position.

62. Ms McArthur said in her evidence in chief that employees at the store "would have been updated in huddles (or weekly briefs)". She said that a colleague communication comes out every week which "would have been printed and put up in the staff canteen". She said that the BIG group was also consulted and that they "would have cascaded the information about the policy change to the staff". I asked Ms McArthur if she was saying that she herself had communicated the policy change to the claimant at a huddle, but she said she couldn't remember specifics. Nor did she give evidence that she was specifically aware of a different manager having done so. She explained there was no written briefing prepared by PPS or senior management which managers were instructed to cascade down to the teams on the issue. She couldn't recall whether any staff briefing she had given around this time

provided detail about the change to trigger points. She said: "*I imagine it would have been an overview, but I can't recall*".

63. No copy of any colleague communication exhibited in the canteen was produced, nor any documentation of any sort showing or tending to show that the change of policy had been communicated to the claimant or the respondent's employees as a group. Ms McArthur could not recall with certainty the content of any communication pinned to the notice board, or that the SAP was covered. Though Ms McArthur's evidence was generally robust and detailed, it was notably less clear on this question.

64. I do not consider that the evidence supports a finding, on the balance of probabilities, that the claimant had been informed of the change before the new policy took effect. It is not a question of disbelieving Ms McArthur. Ms McArthur did not say she had done so or that she was specifically aware some other individual had done so. She was honest about her lack of recollection on the issue. Being unable to remember, her evidence was in the nature of speculation about what may have happened.

65. I do accept that the new SAP was available for the claimant and others to view online but, without the change being flagged to her, she did not do so.

Relevant Law

Unfair Dismissal

66. Section 94 of ERA provides that an employee has the right not to be unfairly dismissed. It is for the employer to show the reason or the principal reason (if more than one) for the dismissal (s98(1)(a) ERA). The employer may either show that it is one of the prescribed reasons falling within subsection (2) of section 98 or that it is 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position with the employee held (referred to as an 'SOSR reason') (s.98(1)(b)). Subsection (2) includes a reason that relates to the capability of the employee for performing work of the kind the employee was employed to do (s.98(2)(a)).

67. It is a question of legal analysis to determine under which part of section 98 a reason advanced by an employer for dismissal falls. An error of characterization of the reason for dismissal is an error of law. In **Wilson v Post Office** [2000] IRLR 834, the Court of Appeal upheld the Employment Appeal Tribunal's ruling that in that case, where the employers had dismissed because the employee had not met the requirements of the employer's attendance procedure, the first instance tribunal had erred in holding that the reason for dismissal was one related to capability for the purposes of section 98(2)(a). The reason, it agreed on the facts of that case, was, rather, 'some other substantial reason' for the purposes of section 98(1)(b).

68. In **Ridge v HM Land Registry** UKEAT 0485/12/DM, the EAT observed it can be difficult to decide the correct classification of a dismissal following repeated absences. Quoting from the definition of 'capability in ERA, it said that if considerations of "skill, aptitude, health, or any other physical or mental quality" were forefront in the employer's mind when dismissing the employee, then the reason for the dismissal would relate to capability. If, however, the recurring absences themselves were the reason for the dismissal, the operation of an attendance policy having been triggered, then the better label may be "some other substantial reason".

69. At this stage, the burden on the respondent is not a heavy one. A "reason for dismissal" has been described as a "*set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee*." (**Abernethy v Mott Hay and Anderson** [1974] ICR 323).

70. Once a potentially fair reason for dismissal is shown, the Tribunal must be satisfied that in all the circumstances the employer acted fairly in dismissing for that reason (Section 98(4) of ERA). There is no burden of proof on either party when it comes to the application of section 98(4).

71. A Tribunal must not substitute its own decision for that of the employer in this respect. Rather, it must decide whether the respondent's response fell within the range of reasonable responses open to a reasonable employer in the

circumstances of the case (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439). The test of reasonableness is an objective one.

72. In **International Sports Co Ltd v Thomson** [1980] IRLR 340, the EAT considered the position in cases involving absence. It stated:

"*What is required, in our judgment, is, firstly, that there should be a fair review by the employer of the attendance record and the reasons for it; and, secondly, appropriate warnings, after the employee has been given the opportunity to make representations. If then there is no adequate improvement in the attendance record, it is likely that in most cases the employer will be justified in treating the persistent absences as a sufficient reason for dismissing the employee*." (para 15)

Compensation

55. An award of compensation for unfair dismissal consists of a basic award and /or a compensatory award.

56. The formula for calculating the basic award is prescribed by legislation. However, where the Tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, the Tribunal shall reduce that amount accordingly (s.122(2) of ERA). In contrast to the compensatory award, a basic award may be reduced for conduct which was not causative of the dismissal. The Tribunal has a wide discretion as to whether to make any such reduction (**Optikinetics Ltd v Whooley** UKEAT/1275/97.)

57. The compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the employee as a result of dismissal insofar as attributable to actions of the employer. It is to be assessed so as to compensate the employee, not penalise the employer.

58. An unfairly dismissed employee is subject to a duty to make reasonable efforts to obtain alternative employment to mitigate his losses and sums

earned will generally be set off against losses claimed (**Babcock FATA v Addison** [1987] IRLR 173). The duty is to act as a reasonable person would do if he or she had no hope of receiving compensation from his or her employer (per **Donaldson J in Archibold Freightage Ltd v Wilson** [1974] IRLR 10). It may not be unreasonable for an employee to take himself out of the job market to pursue training or study. However, it will be appropriate for the Tribunal to consider whether that is a matter of personal choice and whether the loss may be considered to be too remote a consequence of the dismissal (**Simrad Ltd v Scott** [1997] IRLR 147, EAT, **Hibiscus Housing Association Ltd v McIntosh** UKEAT/0534/08).

59. A qualification to the principle of mitigation is that it will not usually apply fully to payments earned elsewhere during the notice period. In **Norton Tool Co Ltd v Tewson** [1972] IRLR 86, it was held that the employee was entitled to full wages in respect of the notice period without mitigation on the basis that this was good industrial relations practice. However, the rule as to the *duty* to mitigate remains to be applied, even though it may not be appropriate, applying the **Norton Tool** principle, to offset any sums earned (**Babcock FATA Ltd v Addison** [1987] IRLR 177, CA per Ralph Gibson LJ).

60. Where a Tribunal concludes a dismissal was unfair, it may find that the employee would have been dismissed fairly in any event, had the employer acted fairly, either at the time of the dismissal or at some later date. The Tribunal must assess the chance that the employee would have been dismissed fairly in any event then the reduce the losses accordingly. Such reduction may range from 0% to 100% (**Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL).

61. If the Tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). If the Tribunal determines that there is culpable or blameworthy conduct of the kind outlined, then it is bound to make a

reduction by such amount as it considers just and equitable (which might range from 0 to 100%).

Submissions

Respondent's submissions

62. Mr Kerfoot spoke to a skeletal written submission on behalf of the respondent. For brevity, the skeletal is incorporated by reference, and the following is a short summary only.

63. Mr Kerfoot provided a helpful summary of the relevant law. He said that no procedural flaws had been asserted with the procedure and focused on the question of whether the dismissal was within the range of reasonable responses. He reminded me that it is not for me to substitute my view of whether I would have dismissed the claimant in the respondent's shoes.

64. Dismissal did fall within the range of reasonable responses, he said. There was a legitimate business reason for the approach in the SAP. BIG had been consulted about the changes to the SAP and (seemingly) approved these. BIG (seemingly) had not insisted transitional arrangements were necessary. The respondent correctly applied the policy in force at the time.

65. I invited Mr Kerfoot's submissions on whether his analysis would be affected were I to make a finding in fact that the claimant had not been informed of the change of policy before its implementation on 1 July 2019. He invited me not to make such a finding, but said that such a finding would not undermine his analysis. If the claimant had been told of the policy change, it would have made no difference to whether she would have been absent on 15th July and hit the trigger. She'd had ample opportunity to make representations that she wasn't aware of the change but hadn't done so. She's been given the opportunity to discover the policy on the intranet and from at least the point of the ARM she was aware of the change.

73. Mr Kerfoot also addressed me on remedy. The claimant had failed, he said, to discharge her duty to take reasonable steps to mitigate her losses. Although retraining might be reasonable in certain circumstances, in the present situation it was not in keeping with the mitigation requirement. Irrespective of her dismissal, he hypothesized the claimant would have learned of the courses at Anniesland College and would have chosen to change career direction to attend them.

74. It was also highly likely, in his submission, that – had she not been dismissed – she would have had further recurrent absences and would have hit the triggers in due course.

75. The claimant was given the opportunity, but elected not to make any submission.

Discussion and Decision

Unfair Dismissal – liability

76. Returning to the list of issues, the first question to de determined is:

    (i) Was the claimant's failure to meet the attendance requirements prescribed by the respondent's SAP a substantial reason of a kind such as to justify the dismissal of the claimant holding the position of head baker in the Byres Road store for the purposes of section 98(1)(b) of ERA?

77. I accept that Ms McArthur dismissed the claimant because the claimant's absences had triggered the respondent's policy on attendance management at a point when she was already subject to a live FWW. There was no dispute that this was Ms McArthur's reason for dismissal and no other reason was put forward by the claimant.

78. I agree that Mr Kerfoot is correct to characterise the respondent's reason for dismissing the claimant as 'some other substantial reason' for the purposes of section 98(1)(b) as opposed to a reason related to capability under section

98(2)(a). Ms McArthur took this decision because of the recurring absences and the operation of the policy triggers, not because she believed the claimant's health undermined her capability to perform the role.

79. In principle, and subject to the requirements of section 98(4) of ERA, I also accept this could be a substantial reason of a kind such as to justify the claimant's dismissal. Assuming a fair procedure was followed, the requirements of the SAP were not so intrinsically strict or excessive that dismissal in response to an employee's persistent failure to meet them would inevitably fall outwith the range of reasonable responses open to an employer of the respondent's type and scale.

80. The next question which, therefore, falls to be determined is:

> (ii) … did the respondent act reasonably in all the circumstances in treating this as a sufficient reason to dismiss the claimant in applying section 98(4) of ERA?

81. I remind myself that the burden of proof is neutral at this stage of the analysis and that I require to avoid substituting my own view of the matter for that of the respondent.

Reasonableness of the Warnings

82. The respondent applied the AWP fairly and accurately in issuing the first WW in February 2018 and the FWW in December of that year. In issuing these sanctions, the policy was not applied in an unreasonable manner. The FWW would remain live for 12 months during which, under the AWP, reduced triggers applied of 3 or more occurrences in a 12-week rolling period or 6 or more shifts in a 26-week period.

83. Being subject to a live FWW under the AWP had two consequences. Firstly, it meant the claimant would be measured against a reduced trigger compared with employees not subject to a WW or FWW. Secondly, it meant that if a trigger was met or exceeded, she was liable to potential dismissal as opposed to some lesser sanction.

Reasonableness of the SAP Triggers

84. The respondent introduced the SAP with effect from the 1st July 2019 with its reduced triggers. The material changes were that (i) three or more occurrences would be measured under the SAP across a 26-week rolling period under the SAP instead of under a 12-week rolling period under the AWP; and (ii) instead of counting missed shifts in a 26- week rolling period as had been the case under the AWP, the other SAP trigger measured absence as a percentage of the employee's contracted working hours across that period with the trigger set at 3%.

85. The claimant had not exceeded the triggers under the old AWP and did not exceed them, even when she had her final absence on 15 July 2019. She did, however, exceed both the new triggers under the recently introduced SAP. The fact that the new triggers were stricter did not mean the change was necessarily unreasonable. The respondent had legitimate business reasons for altering the triggers to align with the sector and avoid unfairness to full time staff. Although tighter, the new triggers were not so excessively strict as to be objectively unreasonable. There were safeguards built into the SAP for those with absences related to a disability, pregnancy or long-term illness.

Reasonableness of the way in which transition from AWP to SAP was managed

86. The SAP did not expressly provide for this, but the respondent's approach was to treat warnings issued under the previous AWP as valid for the purposes of the SAP.

87. The triggers under the SAP applied equally to all employees; there was no two-tier approach whereby those with warnings were subject to tighter triggers than those without. Everyone was subject to the new tighter triggers. The claimant did not, therefore, suffer any particular hardship compared with other employees who didn't have a live warning under the AWP when it came to the level of trigger applied under the SAP.

88. The respondent's continued reliance on warnings issued under the previous policy meant that, as would have been the case if the AWP had still applied, the claimant was liable to dismissal if she met the new triggers. I consider that this approach may have fallen within the range of reasonable responses, but would do so if and only if the revised attendance requirements (defined by reference to the new triggers) were brought to the claimant's attention.

89. When the claimant was told in her FWW that if her attendance fell below the "expected levels" in future, it was reasonable for her to assume, unless told otherwise, that those levels were defined by reference to the AWP triggers which had been explained to her at numerous RTWs. I acknowledge that the SAP was available online from July 2019 but in the absence of any communication flagging the change of policy it was not objectively reasonable to expect or assume the claimant had accessed it. Imposing the ultimate sanction of dismissal for a failure to comply with sickness absence trigger thresholds which had not been communicated and which varied from the previous arrangements applicable at the time of the FWW relied upon did not fall within the range of reasonable responses open to a large-scale employer possessing the administrative resources of the respondent. On applying the test in section 98(4) of ERA, I find that the claimant's dismissal was unfair.

90. I considered Mr Kerfoot's argument that informing the claimant timeously (before 1 July 2019) would have made no difference to the ultimate outcome in that she would still have gone off sick and hit the trigger thereafter. I don't consider this argument brings the dismissal within the range of reasonable responses. The fact that this particular employee in her particular circumstances may not, it transpires, have responded to a warning about what

was required of her does not render the respondent's omission to provide that notification objectively reasonable. Ms McArthur's own evidence was that the respondent considered the policy triggers generally had a deterrent effect on absence. I accept, however, that the "no difference" argument is relevant to remedy. It is considered below in that context.

Reasonableness of omission to obtain medical evidence

91. The ET1 asserts that the respondent should have obtained a medical report from an Occupational Health Advisor before dismissing her. However, the claimant accepted during the hearing that Ms McArthur ought not to have been expected to have obtained such a report in the circumstances. The respondent was not disputing the genuineness of her illnesses and she acknowledged a report would not have disclosed anything material.

Remedy

92. The third issue to be determined is:

(iii) If the claimant was unfairly dismissed, is she entitled to compensation, and if so, what compensation should be awarded?

Alternative Events and Polkey

93. As discussed above, Mr Kerfoot says dismissal would have been certain to have occurred even if the alleged failure to inform the claimant of the new policy and altered triggers had been addressed at the appropriate time, before the SAP took effect. This was put to the claimant in cross-examination, and she agreed it was so. Had she been aware of the tighter triggers beforehand, she would still have been absent on 15 July 2019 and hit the trigger. It was not characterised as such, but I consider this argument goes to the **Polkey** principle. A Tribunal requires to assess the chance that a claimant would have been dismissed fairly in any event, had a fair procedure been followed, and (if applicable) reduce her losses accordingly.

94. Had the respondent adequately communicated the change in policy and triggers to the claimant before the change was implemented, she would still have been dismissed when she was. If she had been given adequate prior notice of changed triggers, I accept that such a dismissal would have fallen within the range of reasonable responses in response to those triggers being hit during the currency of a live FWW (even though issued under the AWP). Standing my finding of fact in this particular case that notification of the trigger would not have deterred the July absence, I assess that there is a 100% chance that the claimant would have been dismissed in any event on 23 July 2019, had the this procedural failing been addressed.

95. Any compensatory award is, therefore, reduced to nil.

Contributory conduct

96. Given the 100% Polkey reduction to be applied, it is not necessary to consider whether the claimant has, by any action, caused or contributed to her dismissal for the purposes of section 123(6) in relation to a prospective compensatory award.

97. I do require, however, to consider whether any conduct of the claimant before her dismissal was such that it would be just and equitable to reduce the basic award for the purposes of section 122(2) of ERA.

98. The claimant's absences themselves were due to genuine ill health and were not blameworthy in nature. They are not relevant 'conduct' for the purposes of section 122(2).

99. The claimant's omission, however, to raise with Ms McArthur her lack of awareness of the SAP or the new triggers which had been applied to her carried an element of culpability. The claimant had ample opportunity to do so. She could have raised this during the RTW or at the ARM itself, but she did not. In contrast, it was the first issue she raised when cross examining Ms McArthur at the Tribunal hearing. It is unnecessary for the purposes of section

122(2) that the claimant's conduct in this regard caused or contributed to the dismissal.

100. The claimant's conduct in failing to raise the issue of her unawareness of the new policy and triggers was such that it would be just and equitable to reduce the amount of the basic award by 15%. Responsibility to act reasonably by ensuring significant policy changes were adequately notified to its employees and checking this was so before penalising breaches of the altered policy sat with the respondent. The SAP had been introduced recently and, on the evidence before the Tribunal, robust measures were not in place to ensure consistent storewide communications about the changes. Nevertheless, I consider that a 15% deduction is just and equitable in circumstances where the claimant offered no explanation for her failure to raise her lack of awareness at the RTW when she was told of the new triggers after her July absence. The claimant's silence during the meetings before her dismissal unhelpfully contributed to the state of affairs whereby Ms McArthur did not factor the communication failure into her deliberations.

Calculation: Basic Award

101. The claimant had 4 complete years' service when she was dismissed (not five as asserted in her schedule of loss). Her basic award before adjustment is 4 x 1.5 x £274 = £1,644.

102. I have found there should be a reduction to the basic award of 15% under section 122(2). It is thereby reduced to £1,397.40.

Compensatory Award

103. As set out above, I have assessed that there is a 100% chance that the claimant would have been dismissed in any event on the same date she was dismissed, had a fair procedure been followed. The consequent **Polkey** reduction which reduces the claimant's losses to zero.

104. It is not necessary to consider her losses further, but had it been relevant to do so, I would have found that the claimant failed to discharge the obligation to take reasonable steps to mitigate them. Although this duty is not onerous, her decision to take herself out of the job market to pursue study was a matter of personal choice. Any loss suffered as a result was too remote a consequence of the dismissal.

105. As no award is made to compensate any period of loss, the Recoupment regulations have no application.

Conclusion

106. I declare for the reasons given that the claimant was unfairly dismissed and order the respondent to pay her an adjusted basic award in the sum of £1,397.40.

Employment Judge: Lesley Murphy
Date of Judgment: 26 October 2021
Entered in register: 29 October 2021
and copied to parties