



EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

“This has been a remote hearing not objected to by the parties. The form of remote hearing was by CVP. A face to face hearing was not held because it was not practicable and no-one requested the same.”

Claimant

Respondent

Mr D Burke

v

Royal Mail Group Ltd

Heard at: Watford (by CVP)

On: 24 & 25 August 2021

Before: Employment Judge Alliott (sitting alone)

Appearances

For the Claimant: Mr Khurram Khan (Trade Union Representative)

For the Respondent: Mr Ian Hartley (Solicitor)

JUDGMENT

1. The claimant was unfairly dismissed.
2. The respondent has failed to pay the claimant's accrued holiday entitlement and is ordered to pay him the gross sum of £2,729.14.

REASONS

1. The claimant was employed by the respondent on 20 June 1987 as a postal worker. He was dismissed on notice with effect on 4 December 2017. By a claim form presented on 13 February 2018 the claimant presents claims for unfair dismissal and a claim for accrued holiday entitlement not taken at the date of dismissal. The claimant's claim of disability discrimination was struck out following a finding on 3 July 2020 that he was not a disabled person within the meaning of the Equality Act 2010

The issues

2. The issues were recorded by Employment Judge Bedeau on 17 September 2018 as follows:-

“Unfair dismissal

- 2.1 Was the claimant dismissed by reason of capability?
- 2.2 If so, was the dismissal fair having regard to s.98(4) Employment Rights Act 1996 and, in particular, did the respondent, in all respects, act within a band of reasonable responses?
- 2.3 The respondent will assert that it followed its procedure which was fairly applied.
- 2.4 The claimant will assert that the respondent failed to:
 - 2.4.1 Warn him of the dismissal hearing five days in advance. Instead he was told three days in advance of it;
 - 2.4.2 The amendments he made to the notes of the hearing on 24 August 2017 were not taken into account; and
 - 2.4.3 The respondent failed to discount some of his sickness absence due to his depression.”

3. In addition, the claimant has made a claim for holiday pay, namely accrued holiday entitlement not taken at the time of dismissal.
4. This hearing was ordered to be liability only.

The law

5. Despite the issues referring to capability, the respondent relies on some other substantial reason, namely the claimant’s failure to comply with attendance requirements.
6. Obviously enough, I have s.98 of the Employment Rights Act 1996 which I do not set out here.
7. As per the IDS Employment Law Handbook “Unfair Dismissal” at 9.94:-

“Persistent absences

Although dismissal for ill health is generally treated as a capability dismissal under s.98(2)(a) of the Employment Rights Act 1996... dismissal for persistent absences and/or failure to comply with the employer’s absence management procedure may be dealt with under s.98(1)(b) ERA as “some other substantial reason” for dismissal. For example, in *Wilson v Post Office* 2000 IRLR 845, CA, the Court of Appeal held that the dismissal of an employee for his persistent absences was for SOSR. Although ill health had caused the absences, the employer’s reason for dismissal was that W’s attendance record did not meet the requirements of the agreed attendance procedure.”

8. Further, at 9.95:

“Where the employer relies on persistent absences as a substantial reason for dismissal under s.98(1)(b), the focus will usually be on the employee’s failure to comply with attendance requirements as set out under an attendance or absence management policy. In such cases, when the Tribunal comes to consider reasonableness under s.98(4), both the employer’s and the employee’s compliance with the policy will be relevant.”

Two cases are then set out, both involving Royal Mail Group Ltd.

9. Section 98(4) ERA Provides:

“Thereafter the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and, shall be determined in accordance with equity and the substantial merits of the case.”

The evidence

10. I had witness statements and heard oral evidence from the following:-

- 10.1 Mr Uma Chelvan, late shift manager based at the Jubilee Mail Centre, the dismissing manager;
- 10.2 Mr Stephen Phillips, independent casework manager, who heard the appeal;
- 10.3 The claimant;
- 10.4 Mr Khurram Khan, trade union representative.

11. In addition, I was provided with a hearing bundle of 400 pages.

The facts

- 12. The claimant began work for the respondent on 20 June 1987. He worked at various locations before ending up at the Jubilee Mail Centre, Hounslow. He was working there at the material time for this case. He was a postal worker but worked a 2-10 shift on a sorting machine. As such, he had an enhancement to his pay of a shift allowance and a TPM allowance.
- 13. The respondent is subject to a Universal Service Obligation. This imposed a legal requirement to deliver mail every day of the week save Sundays. Failure to achieve targets could result in a report to the Regulator, fines or indeed the loss of the licence.

14. In order to meet its legal requirements, the respondent had a requirement for reliable attendance by its workforce. Accordingly, an attendance policy had been agreed with the CWU Trade Union. This was referred to by the respondent as being a strict attendance policy for operational reasons.
15. As one might expect, there was provision for informal review discussions to take place prior to the formal process being invoked.
16. The formal process consists of two reviews and then consideration of dismissal.
17. Attendance Review 1 would be prompted by four absences or 14 days in a 12 month period. Attendance Review 2 would be prompted by two absences or 10 days in the next six months following an Attendance Review 1 Formal Notification. Consideration of dismissal would be prompted by two absences or 10 days in the next six months following an Attendance Review 2 Formal Notification.
18. The attendance policy has a number of guiding principles which include:-
 - All sickness absences are assumed to be genuine
 - Where an employee's attendance is becoming a cause of concern, an informal discussion should normally take place to identify and address any issues
 - Managers will consider whether job modifications are possible and appropriate in order to secure an earlier return to work
 - Where an employee's capability is impacted by their health to the extent that they can no longer undertake their normal role, Royal Mail Group will work with the employee to identify a suitable alternative role wherever possible.
19. As recited, informal review discussions are contemplated prior to the formal process. Mr Khan referred to a document (which I did not actually see but have no reason to doubt) that sets out that informal reviews did not necessarily need to be minuted but the happening and outcome needed to be recorded.
20. As regards Attendance Reviews 1 and 2, the manager has a number of options as follows:-

“

 - The manager may refer the employee to the occupational health service if an underlying health condition is affecting the employee's ability to do their job.
 - Following the review meeting, the manager will reflect before making a decision whether to issue a formal notification or not.
 - Each case must be treated on its merits; the manager must consider everything, including what the employee discussed.
 - The employee will be advised in writing of the decision and the standard expected in future.”

21. As regards consideration of dismissal the following is set out:-

“After an Attendance Review 2, if the attendance standards are again not met, the employee will normally be invited to a meeting with their second line manager to discuss consideration of their dismissal.

Before the meeting

- Employees will be given a minimum of five working days’ written notice of the meeting, details of their attendance record, any up to date occupational health service reports and any other documents that will be considered as part of the decision making process.

Outcome

- At the end of the meeting the manager will reflect on what has been discussed including all the issues and factors the employee has raised, any further investigation made, together with the employee’s overall absence record including whether the employee is disabled or has an underlying medical condition.
- In deciding whether or not to dismiss, the manager will assess the likelihood of an improvement in attendance in the future.”

22. The Attendance – Consideration of Dismissal Guide for Employees is slightly at variance with the attendance policy in terms of what should be provided to the employee in advance. This states:-

“The employee’s manager should ensure that the manager hearing the consideration of dismissal is provided with all relevant papers prior to the meeting.

This will include:

- Details of the employee’s attendance record up until the day of the meeting this should include at least the last four years plus current year
- Notes of any welcome back meetings
- Notes of any informal review discussions
- Notes of any attendance review meetings
- All records of Review Meetings 1 and 2
- The report from the consideration of dismissal appointment from the Occupational Health Service.

Copies of all documentation should be provided to the employee in advance of the hearing.”

23. That document reiterates that in terms of outcome “in deciding whether or not to dismiss, the manager will assess the likelihood of an improvement in attendance.”

24. As regards the Right to Appeal, the following is set out:-

“A hearing with an independent appeal manager from HR services will be arranged within four weeks, and the employee will be given a minimum of five days written notice of the time and place.

...

The employee has the right to be accompanied to the appeal hearing.”

The claimant’s absence record

25. The claimant’s absence record from April 2005 until May 2017 indicates that he had 47 absences totalling 314 days. That is an average of 24 days absence per year for 13 years. Reasons for his absences are very varied. 17 seemingly different medical reasons are given for his absence (although there may be some duplications as gout could be recorded as limb pain for example). However, the following causes appear: stomach upset; migraine; flu; gout; knee injury; wrist injury; foot injury; virus; anxiety; malaria; fainting; diarrhoea/vomiting; chest infection; back pain; reaction to medication; limb pain; stress; and ‘unknown’ x 2.
26. It was put to the claimant that as a whole he had a poor attendance record to which he agreed. He stated: “It is what it is”. It was put to him that he had a constant level of absence over a long period and he agreed. In my judgment he could not say anything else.
27. The record of his involvement in the attendance process begins in April 2011 at which point the claimant was on an Attendance Review (AR) Stage 2. He left that after a year on 31 March 2012.
28. On 21 February 2013 the claimant was issued an AR1. This was following 14 days’ absence over three occasions for fainting/gout/foot injury. (This disregards 16 days’ absence for ‘unknown’).
29. The claimant then had an AR2 on 7 August 2013 following two further absences of eight days for diarrhoea/vomiting and gout.
30. On 4 January 2014 consideration of dismissal was prompted following two absences for six days for gout. The consideration of dismissal was undertaken by Mr Chelvan on 25 March 2014. The decision was not to dismiss the claimant. It would appear that he was disputing his AR2 and in an interview in 2017 Mr Chelvan states that he decided to give the claimant the benefit of the doubt. Mr Chelvan also stated that he took into account that the claimant’s parents were ill although the claimant indicated that at that stage he had not informed anyone of his parents’ illness.
31. As the claimant had not been dismissed so he continued on an AR2. On 6 February 2014 he reverted to AR1. However, on 25 June 2014 he moved on to AR2 following two absences of 11 days due to chest infection and gout. On 24 September 2014 he moved down to AR1 but then moved back on to AR2 on 25 February 2015 due to one episode of back pain for 26

days. On 27 August 2015 the claimant dropped off the attendance process and was no longer subject to it.

32. I have gone into some detail of the claimant's attendance record in 2013, 2014, 2015 and how he was dealt with under the attendance policy. This is because, as will become apparent, the claimant and Mr Khan were requesting all the documentation relevant to it for the appeal and Mr Phillips did not consider it relevant and so did not provide it. The documents concerned would have been the meeting notes for the various attendance reviews, the welcome back notes from the return to work and the consideration of dismissal document. Whilst these documents may well have been irrelevant, in my judgment, given the size and administrative resources of the respondent, I have concluded that they should have been provided if readily available and that the failure to provide them or make enquiries at the very least to their availability, was procedurally unfair. Nevertheless, I have concluded that in all probability they were irrelevant and would not have made any difference to the appeal. The reason I have come to this conclusion is that all the absences were due to a range of physical ailments that are ascertainable and were not related to the stress and anxiety the claimant later experienced in having to cope with his ill parents. Issues such as flexible working and a change in workplace and shift time simply would not have arisen as they were irrelevant to the physical ailments that were causing the claimant's absences.
33. The absence history that led to the claimant's dismissal is as follows. From 18-21 August 2015 the claimant had four days' absence due to reaction to medication. From 22-25 September 2015 he had four days' absence for flu. From 29-31 December 2015 he had three days' absence for 'unknown'. From 29 June- 1 July 2016 the claimant had three days' absence for limb pain. The claimant therefore had four periods of absence totalling 14 days and qualified for an AR1. This was prompted by the system. The claimant's line manager decided to invite him to an Attendance Review meeting. A letter was sent on 11 July 2016 inviting him to a meeting. The claimant signed to acknowledge receiving that letter.
34. On 15 July 2016 the attendance process meeting took place with the claimant. His sickness record was outlined and the notes record that the line manager emphasised that a persistent failure to achieve the standards may ultimately result in dismissal. The claimant signed the notes as a true record of the interview. The claimant was sent the outcome letter on 18 July 2015 and this sets out that any further absences which exceed the attendance standards could result in further action which could lead to his dismissal. The claimant signed to acknowledge receipt of that attendance review.
35. Thereafter, the absence record suggests absence for five days from 26-30 September 2016 for a foot injury (although a separate document puts this as five days from 26 October 2016). From 12-16 December 2016 the claimant

had five days' absence for flu. Consequently, the system prompted an AR2 and the claimant was invited to a meeting on 17 January 2017.

36. The meeting was actually held on 19 January 2017. The foot injury was actually identified as gout. The claimant refers to problems caring for his parents but in my judgment that was not relevant as the issue concerned his gout and flu. The claimant was sent an outcome letter on 19 January 2017 confirming that he had been issued an Attendance Review 2 warning that further absences which exceeded the attendance standards could result in further action being taken which could lead to his dismissal. Once again the claimant signed to acknowledge receipt of that document.
37. On 15 May 2017 the claimant had what he refers to as a mental breakdown. He went on sick leave from 15 May with stress/depression.
38. On 15 June 2017, the claimant met Ms Gurpreet Jagpal, an absence manager, at a coffee shop in Putney. This meeting was in part to sort out the deduction of pay that the claimant had been subjected to. This issue was sorted out. They also discussed alternatives to working at the Mail Centre. A change in shift/hours of work was discussed but Ms Jagpal could not see how that would help as he generally needed to be free after 11am to care for his parents. In addition, it is recorded that the claimant was concerned about a drop in his finances with no TPM and late shift allowances.
39. On 6 July 2017, the claimant had a further face-to-face meeting with Ms Jagpal. He was scheduled to resume work on 17 July 2017. Ms Jagpal's record of the meeting states as follows:-

“At the meeting David explains his situation with his parents has still not changed, and I asked did he manage to contact The Mental Health Foundation/Citizens Advice for further support? David has not managed to access further material, and his parents are still receiving three carers per day at the private cost of £20 p/h. The breakdown of his parent's health impacted on mental his wellbeing.
40. On 17 July 2017, the claimant had a welcome back meeting with Mr Sullivan. To the question how he was feeling the answer given was “Dave is feeling his way not feeling 100 per cent.” Unfortunately, some of the questions are missing from the bundle but one of the answers recorded is as follows:-

“Dave states that the stress could come back, however Dave has had seven counselling sessions, which he is in a better place, he states he needs to get back to normality.”
41. The claimant returned to work on modified hours.
42. The claimant was referred to OH on 9 August 2017 and a report was produced on that day. It was a telephone consultation. At that point the

claimant was undertaking his full duties. The report constitutes a series of answers to questions posed. It states as follows:-

- “ • Is there any underlying health condition which could account for the attendance pattern?

Mr Burke recently had a period off work due to depression and stress. He says this is related to ongoing personal issues due to the ill-health of his parents. He says he is doing his best to cope with this situation.

While off sick Mr Burke says his mood was low and his sleep was poor. His concentration was also affected. He had counselling arranged by his GP and he found this of benefit.

Mr Burke says he also had a metabolic medical condition which occasionally has troubled him. He has prescribed medication to take when symptoms occur. He thinks the last time he had experienced symptoms related to this was about 18 months ago or longer.

In my opinion he is not covered by the Equality Act at the present time.

- What is the likely impact upon attendance and is this likely to continue?

There is no indication that the metabolic condition should cause recurring time off work.

With regard to his depression, much depends on the ongoing situation with his parent's health, which is an ongoing worry to Mr Burke.

- Are there any treatment interventions which might alter that prognosis?

I am not aware of any treatment interventions that are required at this stage that would alter the prognosis.

I would recommend regular management contact with Mr Burke to ensure he is coping and offering ongoing support.

- Which absences over the past year should be attributed to this health condition?

The absence 15.5.17 to 14.7.17 was due to his depression and stress as referred to above.

His absence in December 2016 is stated as due to flu. Mr Burke says he felt low at the time and feels he was also depressed at the time of this absence.

- Are there any specific work activities which may make the condition worse?

There are no specific work activities that make the condition worse.

- Are there any modifications to the work which could be considered, which might improve attendance?

Mr Burke says he would like to be considered for a move to delivery, short term and possibly long term. He feels a move to a local delivery office working earlier would better suit his personal circumstances. I suggest management discuss with Mr Burke if this is possible.”

43. On 15 August 2017, the claimant was sent an invitation to a consideration of dismissal interview. This set out the AR1 and 2s that he had previously received and indicated that he had triggered the consideration of dismissal prompt by virtue of having a further absence of 61 days in the past six months. The OH report was sent to the claimant along with the attendance reviews 1 and 2 and the claimant’s absence record. Initially the claimant was invited to a meeting on 17 August but this was subsequently delayed to the 24th. Hence, the claimant did actually receive the five-day notice required by the procedure.
44. On 24 August 2017 the consideration for dismissal meeting took place. It was conducted by Mr Uma Chelvan, late shift manager, at the Jubilee Mail Centre, and attended by the claimant and Mr Khan, his Trade Union representative. The claimant agreed in evidence that at that meeting he had an opportunity to put his case. Mr Chelvan’s evidence was that at all stages of the process the claimant had exceeded the attendance standards and, in the circumstances, he considered the claimant’s attendance record unacceptable and believed that it was unlikely to have improved in the foreseeable future. He stated that the level of absence was not sustainable and that he approached the issue on the basis that past attendance is a good indicator of future attendance. It is clear from the notes of the meeting that a move to delivery jobs was discussed. However, the claimant was at this stage being dealt with under the attendance policy.
45. The claimant made amendments to the dismissal meeting notes in handwriting and returned them on 24 August 2017. In addition, he submitted a handwritten document after the meeting. Mr Chelvan said that he made the decision to dismiss after receiving these documents. I find that he did take them into consideration.
46. The claimant was sent the consideration of dismissal outcome in a letter dated 11 September 2017. Mr Chelvan recited the claimant’s absence record and stated:-

“Having carefully considered your circumstances and the points made by you at the meeting, I have concluded that your current attendance record is unacceptable and is unlikely to improve in the foreseeable future.

My decision is that you will be dismissed on the grounds of unsatisfactory attendance.”
47. Mr Chelvan then sets out, quite extensively, his reasons. These included a review of the absence records since April 2005 and concludes:-

“There is no indication that your attendance pattern will improve in the foreseeable future.”

48. On 13 September 2017 the claimant appealed.
49. The appeal was heard by Mr Steven Phillips, Independent casework manager. The first hearing was scheduled for 6 October 2017. Complaint was made by Mr Khan on behalf of the claimant that he did not have all the relevant documents. He was stating that he required some return to work discussion notes, amended notes of the consideration of dismissal meeting and earlier attendance review meeting notes. The appeal hearing was therefore adjourned.
50. In due course the appeal hearing was reconvened on 18 October 2017. Mr Khan confirmed that he now had all the documents that he requested at the previous appeal hearing but made a new request for documents relating back to the attendance reviews in 2013/14 and 15. Mr Phillips is recorded as saying he did not know if they still existed. It would appear that the parties were at loggerheads with Mr Khan asserting that the appeal hearing was unfair. Mr Phillips concluded by indicating he thought there was little point in going ahead with a meeting that Mr Khan believed would be unfair. As Mr Phillips puts it, "We had reached an impasse and I therefore closed the meeting."
51. Thereafter the parties disagreed as to the accuracy of the appeal hearing notes.
52. On 30 October 2017, Mr Phillips wrote to the claimant enclosing various notes of interview and stating:-

"I believe the content of the current appeal file provides sufficient information in order to reach my decision in your case. Before doing so, I would like to afford you the opportunity to submit, in writing, any new evidence and mitigation that you would like me to consider. Your reply should be received here no later than 6 November 2017.
53. On 1 November 2017, Mr Khan emailed Mr Phillips requesting an appeal hearing. I assume that the written appeal submission dated 1 November 2017 was also submitted to Mr Phillips at that time.
54. On 20 November Mr Phillips emailed Mr Khan. This concludes:-

"I have already afforded David Burke three opportunities to present his appeal and I have little confidence that the outcome of a fourth meeting would be any different given your position on the paperwork for David's historical absences and warnings/reviews.

David has provided me his appeal submissions, which I see you assisted him with. I will be considering them later this week and I will then make any further enquiries that are considered necessary."
55. Mr Khan replied maintaining his complaints about the lack of relevant documentation, complaining about the fairness of the process and concludes:-

“I would kindly request that you offer us the opportunity of an appeal hearing so that we can put our case forward and have a two-way communication in order to address any misunderstandings of clarifications.”

56. On 5 December 2017, Mr Phillips conducted the appeal without convening a hearing. He produced a 12 page document titled “Appeal decision document”. This is a comprehensive review of the entire process. Mr Phillips recites that the appeal is by way of re-hearing and recites his findings and conclusions. At paragraph 4.8 he concludes as follows:-

“I have found no reasons not to apply the RMAP standards and talking everything into consideration, regrettably I have little confidence in Mr Burke’s ability to achieve and sustain an acceptable level of attendance in the future.”

57. The appeal was dismissed.
58. In a letter dated 5 December 2017, the claimant was informed by Mr Phillips that his appeal was rejected.

Conclusions

59. I find that the reason for the claimant’s dismissal was some other substantial reason, namely the claimant’s failure to comply with attendance requirements as set out in the Attendance Policy.
60. I find that the respondent genuinely believed in that reason and that the decision was based on reasonable grounds following a reasonable investigation.
61. I find that the claimant was given five days’ notice of both the dismissal consideration meeting and the appeal hearings.
62. I find that Mr Chelvan did take into account the documentation submitted to him and, obviously, took into account the claimant’s sickness absence due to his depression. I do not find that that was a failure to discount it.
63. I have considered whether the decision to dismiss the claimant was fair in all the circumstances, including taking into account the size and administrative resources of the respondent. In particular, whether the decision to dismiss falls within the range of reasonable responses of a reasonable employer. In this context I have taken into account the fact that the claimant was a very long-serving employee and that his latest episode of sickness absence was prompted by concern for and care commitments to his aging parents.
64. I have also considered the extent to which the respondent was under a duty to seek to redeploy the claimant in order to try and achieve an improvement in his attendance record. However, in this context, the claimant was being dealt with under the attendance policy and not under the sickness absence policy.

65. Taking into account the Universal Service Obligation, the fact that the attendance policy had been agreed with the union and the claimant's overall attendance record, I cannot conclude that the decision to dismissal was outside the range of reasonable responses.
66. Consequently, I find that the dismissal was both procedurally and substantively fair.
67. I have taken into account the Acas Guide on Discipline and Grievances at Work. Whilst the guide is just that, it does contemplate an appeal hearing. Furthermore, the respondent's own documents refer to an appeal hearing. Whilst Mr Phillips may have been frustrated by the approach taken in the first two appeal hearings seeking further documentation, I find that his refusal to have an appeal hearing was unfair procedurally. If the documentation from 2014-2015 was still available, then it should have been supplied to the claimant. In my judgment, there should have been an appeal hearing.
68. Having found that the appeal was procedurally unfair, I find that the dismissal was unfair on procedural grounds.
69. Having found the dismissal to be unfair, I have gone on to consider issues relating to Polkey, namely whether had there been a fair procedure what were the chances that the claimant would have been dismissed in any event.
70. Given my conclusions as to the fairness of the original decision to dismiss, I find that had an appeal hearing been held it was inevitable that the appeal would be rejected and that the claimant would remain dismissed. I find that the chances that the claimant's appeal would have failed are 100% and, consequently, no compensatory award is to be made.
71. For the avoidance of doubt, the claimant is entitled to a basic award.

Employment Judge Alliot

Date: 4/11/2021

Sent to the parties on: 26/11/2021

N Gotecha

For the Tribunal Office