EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107428/2019

Held in Glasgow on 21, 22 and 23 October 2019

Employment Judge S MacLean

Mr J Hawick	**Claimant Represented by: Mr R Clarke, Solicitor**
Student Loans Company	**Respondent Represented by: Ms L Penny, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the application for unfair dismissal is dismissed.

REASONS

Introduction

1. The claim before the Tribunal is of unfair dismissal. The claimant alleges that he was unfairly dismissed contrary to sections 94 and 98 of the Employment Rights Act 1996 (the ERA). The respondent admits that the claimant was dismissed but contends that followed a fair procedure and that the claimant was given every opportunity to state his case and having been afforded the opportunity to be accompanied by a companion, the claimant's dismissal was a fair reason under the ERA in terms of some other substantial reason (SOSR) under section 98(1)(b). Alternatively, if the dismissal was not for some other substantial reason the respondent reserved the right to advance the argument that the claimant's dismissal was for a fair reason of capability in

terms of section 98(2)(a) of the ERA. The respondent's position was that even though the claimant was fit for work, he was dismissed because he had failed to improve his attendance levels.

2. For the respondent the Tribunal heard evidence from Laura McCairn, HR Business Manager, Susan Munn, Operations Manager and Jamie Law, Verification Operations Service Manager. The claimant gave evidence on his own account. The parties prepared a joint set of productions to which the Tribunal was referred.

The relevant law

3. Section 94 of the ERA provides that an employee has the right not to be unfairly dismissed.

4. Section 98 sets out that for a dismissal to be fair, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in sections 98(1) or (2) of the ERA; and if so, the employer must have acted reasonably in treating the potentially fair reason as a sufficient reason for dismissing an employee in accordance with the equity and substantial merits of the case in terms of section 98(4).

5. It is for the respondent to show the reason (or the principle reason if more than one) for the dismissal. A failure to improve attendance levels is a potentially fair reason for dismissal (see *Wilson v Post Office* 2000 IRLR 834).

6. In applying section 98(4) of the ERA, the Tribunal must not substitute its own view of the matter for that of the employer but must apply an objective test of whether dismissal was in the circumstances within the range of reasonable responses open to a reasonable employer (see *Iceland Frozen Foods Limited v Jones* [1982] IRLR 439). The Tribunal must decide if the respondent acted in a way a reasonable employer might have acted. If the Tribunal determines that a reasonable employer might reasonably have dismissed the employee, then the dismissal was fair, regardless if any other reasonable employer might have taken a different view (see *Grundy (Teddington) Limited v Willis* [1976] ICR 323 QBD).

7. The Tribunal was also referred to the following cases: *Post Office v Jones* [1977] IRLR 422; *International Sports Company Limited v Thomson* [1980] IRLR 340, *Davis v Tibbett & Brittan Group pic EAT/460/99' Lynock v Cereal Packaging Limited* [1988] IRLR 510.

Issues to be determined

8. The Tribunal considered that it had to determine the following issues.
   a. What was the principle reason for dismissal?
   b. Was it a potentially fair reason in accordance with section 98(1) and (2) of the ERA?
   c. If so, was the dismissal fair or unfair in accordance with section 98(4) of the ERA?
   d. If the claimant was unfairly dismissed, should the claimant be reinstated or reengaged by the respondent?
   e. Alternatively, if reinstatement or reengagement is not suitable, what compensation should be awarded?

Findings In fact

9. The Tribunal made the following findings in fact

10. The respondent is a non-profit making, government owned organisation providing loans and grants to students in universities and colleges throughout the United Kingdom.

11. The respondent employed the claimant as a Verifications Operations Advisor from 8 January 2001 until he was dismissed with notice on 8 January 2019. The effective date of termination was 1 April 2019.

12. At the relevant time, the respondent operated an attendance management policy (the policy) and an attendance management procedure (the procedure) which provided a framework to manage employees absent from work due to ill health and to help them return to work.

13. The policy covers all absence from work including sickness and non sickness. It states that the respondent recognises that employees will on occasion need

time off work when they are ill or in situations when they are unable to attend work. When this happens, employees are expected to follow the steps and principles outlined in the procedure. The line managers are advised to consider their approach when dealing with sick absence within the team as there may be a requirement to vary the management of individual cases. The policy also provides a range of actions as part of the attendance management process.

14. The policy is read in conjunction with the procedure which includes reporting procedures. It also sets out the action to be taken when certain triggers are reached:

    a. Three instances of absence (sickness and non sickness) in the previous six months (on a rolling basis); or

    b. Eight days (60 hours prorate or more) (sickness and non sickness) in the previous 12 months (on a rolling basis) (the triggers).

15. The respondent recognises people will be absent from time to time. It sets out acceptable standards as two instances of absence in any six-month period not exceeding a total of seven days lost in any 12-month period (the acceptable standards).

16. There are circumstances where it is necessary to discount sick absence for trigger purposes such as illnesses arising from pregnancies. The absences which are exempt from the triggers are set out in the policy guide and includes time off for dependents.

17. There are three progressive stages during which employees are encouraged to improve their attendance to the acceptable standards.

18. Recorded discussions take place during the return to work interview where the focus is on the required attendance improvement and any supported measures that can be put in place such as referral to occupational health.

19. If attendance fails to improve after a recorded discussion, the formal attendance procedure will begin followed by, if appropriate, a final formal

attendance hearing. If a manager decides that dismissal is not an outcome, the employee will remain at this final formal stage of the procedure and attendance levels will be monitored over the next twelve months until they return to an acceptable standard or better. If at any point during this period, attendance continues to fall below the respondent's acceptable standards, a further final formal attendance hearing will be arranged where dismissal is a potential outcome.

20. Failure to achieve the acceptable standard or better will result in the final formal attendance hearing being reconvened and if the hearing panel is satisfied there has been no improvement and all relevant facts related to the case have been considered, dismissal will follow.

21. If during the 12-month review attendance levels return to acceptable company standards or better the employee will exit the formal attendance procedure at the end of the 12-month review.

22. At the final formal attendance hearing stage, a decision to monitor for a further 12 months can only be taken once in process. If, after the review period, attendance is still not satisfactory, the only option is dismissal. There is a right of appeal.

23. The policy and procedure has supplementary documentation: guidance on applying discretion and formal guidance on exempt leave arrangements and trigger flow charge. Applying discretion is interpreted to mean that an employee will not be progressed to the next stage of the policy at the time the discretion is granted. The absence will still be recorded. Absences subsequent to the application of discretion are managed in line with policy and are likely to have an impact on future application of discretion e.g. if discretion has already been applied and this has not resulted in an improvement to attendance, this may reduce future use of discretion.

24. In relation to sick absence, discretion should only be applied where the employee is absent due to chronic illness/condition and/or has had to undergo a surgical procedure or requires hospitalisation which has an unexpected date of recovery, line managers are advised to listen to the employee regarding

the reasons why they feel that discretion should be applied however; it is the line manager who makes the final decision.

25. From the beginning of 2017 to the date of his dismissal in January 2019, the claimant had multiple absences from work which were managed under the policy and procedure.

26. After each absence, he attended a return to work interview at which his absence was discussed and a return to work form completed and signed by the claimant and his manager. That form recorded the reasons for the absence, details of the support the respondent could provide, whether an occupational health referral was required, and whether the claimant would proceed to the next stage in the process.

27. On 21 March 2017, the claimant attended a recorded discussion to discuss his absences from work. He was warned that a failure to improve his absence may result in a move to the formal process. At this stage, the claimant's absences were managed under the previous absence management process. The claimant's manager met with him and explained the transition to the new policy and procedure.

28. The claimant had a further five instances of absence. He was progressed to a formal attendance hearing because his attendance failed to meet the acceptable standards under the procedure.

29. The claimant attended a formal attendance hearing on 21 September 2017 and was accompanied by a trade union representative. The claimant's absences were discussed, and he confirmed that there was nothing for the respondent could do to support his attendance moving forward. As the claimant's level of absence was higher than the respondent's acceptable standard, he was informed that his absences would be monitored under the procedure for the next 12 months. The claimant was advised that if the attendance level continued to be unsatisfactory, it may result in progression to the final stage of the formal attendance procedure. This was confirmed by letter dated 21 September 2017.

30. Following the formal attendance hearing, the claimant was absent from work as follows:

    a. from 26 January 2018 for 99 days for a hernia operation and recovery; and

    b. from 3 July 2018 for two days to look after his mother.

31. The claimant attended a final formal attendance hearing on 24 July 2018 (the July final formal attendance hearing). He was accompanied by a trade union representative. The claimant was told that the termination of his employment was a possible outcome. The claimant's absences were discussed as was the impact of those absences on the respondent's business. Isobel Gordon, Operations Manager, decided that the claimant's absence for looking after his mother would be amended to "time off for dependents" meaning that this absence was exempt from the triggers. Ms Gordon said that although dismissal was an option, she decided to start the monitoring process for the next 12 months until 13 June 2019 which she felt was a fair option and gave the claimant a chance to demonstrate a sustained improvement in his performance.

32. Ms Gordon wrote to the claimant on 24 July 2018 (the July outcome letter), advising that:

> "It is our expectation that there will be a sustained improvement in your level of attendance. If you are unable to sustain an improvement, it is likely that we will either meet during or at the end of the 12 months, which may result in dismissal."

33. The claimant knew that any further absences could lead to another formal final attendance hearing. The claimant was offered a right of appeal but did not exercise it.

34. It was also arranged for the claimant to attend occupational health and the report dated 26 July 2018 confirmed that the claimant was fit for work and no reasonable adjustments were required.

35. The claimant was absent from work on 6 September 2018 for one day to take care of a dependent child. This absence was classed as "leave for dependent"

and was exempt from the triggers. The claimant was also absent from work for one day due to childcare commitments on 23 October 2018. This absence was classed as "leave for dependent" and was exempt from absence triggers.

36. Between 2 November and 7 November 2018, the claimant was absent from work for four days due to an inflamed testicle. He attended a return to work meeting with his line manager Robert McMillan who exercised discretion and decided that a formal attendance hearing was not required.

37. Between 18 December and 21 December 2018, the claimant was absent from work for four days as he was admitted to Glasgow Royal Infirmary on 18 December and discharged on 20 December. The claimant was admitted as he was suffering from an inflamed oesophagus.

38. Since the July outcome letter, the claimant was absent for a further eight days in a two-month period.

39. On his return to work following the absence in December 2018, the claimant had a return to work meeting with Mr McMillan. On this occasion Mr McMillan decided that the claimant required to attend a final formal attendance hearing.

40. The claimant attended a second final formal attendance hearing on 8 January 2019 (the January final formal attendance hearing). It was conducted by Susan Munn, Operations Manager. The claimant was accompanied by his trade union representative. The claimant's absences were discussed as well as the impact on the respondent's business. The claimant confirmed that the respondent could not have provided anymore support which would have helped him improve his attendance record.

41. Ms Munn adjourned to consider the matter. Ms Munn's impression was that the claimant was withdrawn and appeared disinterested in the process. She reviewed the previous 12-month attendance. She noted that discretion had been applied at the July final formal attendance hearing. Since then there had been two non-recurring absences in two months. One involved the claimant being admitted to hospital. Mr McMillan had not applied his discretion for that absence which was for an ongoing condition with no expected date of

recovery. Ms Munn concluded that the claimant's level of absence was unacceptable. She considered that there had been no commitment from the claimant since the July final formal attendance hearing to improve attendance and no steps were recommended by occupational health to improve the levels of attendance. From the levels of absence; the reasons for these; the lack of preparation for the final formal attend hearing; and the impact of the absences on the business, she decided that the respondent could no longer apply discretion with the claimant's level of absence and that he should be dismissed subject to a right of appeal. She considered that no other sanction apart from dismissal was appropriate.

42. A letter confirming that decision was sent to the claimant on 10 January 2019 (the dismissal letter) which stated the reason for dismissal as follows:

> "I have reviewed the evidence and taken into account the point raised with regard to the use of discretion due to your most recent absence involving being hospitalised. However, you were advised at the final formal attendance hearing on 24 July 2018 that a sustained improvement in your level of attendance was required. Since July 2018, you have had a further 60 hours of absence therefore I do not believe there has been a commitment from yourself to improve your attendance at work."

43. The claimant appealed against his dismissal by letter dated 11 January 2019.

44. The claimant, accompanied by his trade union representative, attended an appeal hearing conducted by Jamie Law, Verification Operation Service Manager and Laura McCairn, HR Business Partner.

45. Mr Law reviewed all the information available including all materials from the meetings, return to work documents, occupational health report and the claimant's written appeal. During the appeal Mr Law felt that the claimant had not reviewed the policy and had not followed the procedure in relation to absence reporting. Me Law listened to the claimant and then adjourned the appeal hearing.

46. Having considered the claimant's appeal, Mr Law agreed with Mr McMillan's decision not to exercise discretion and schedule a final formal attendance. Mr Law also noted the number of occasions when management had previously exercised discretion, which had not resulted in improved attendance and therefore Mr Law could understand why Mr McMillan did not feel that further discretion was warranted. Mr Law also agreed with the decision to dismiss as the attendance standards were not met nor was there any improvement during the 12-month monitoring period. Mr Law accepted that the claimant wanted to keep his job but was not convinced that the claimant was taking the process seriously.

47. Mr Law upheld the decision to dismiss considering the number of absences, lack of any improvement in the claimant's level of absence, the discretion that had already been applied to the claimant on the procedure, the claimant's apparent lack of effort to engage with the procedure and the impact of the continued absence on the respondent. Mr Law knew that he had the power to overturn the decision and impose an alternative sanction. However, he considered all the sanctions that could have been imposed, Mr Law concluded that they would not make any difference to the improvement of the claimant's attendance level.

48. On 28 January 2019, Mr Law wrote to the claimant explaining that he had agreed with the decision to dismiss as attendance standards were not met nor was there any improvement during the 12-month monitoring period set out in the July final formal attendance hearing (the appeal outcome letter).

49. At the date of termination, the claimant was 51 years of age. He had been employed by the respondent for 18 years. His average weekly wage was £300. He has not found alternative employment.

Observations on Witnesses and Conflict of Evidence

50. The Tribunal considered that the respondent's witnesses gave their evidence honestly based on their recollection of events which was consistent with contemporaneous documents. The Tribunal considered that Mr Law was a

convincing witness who gave the impression that he took the appeal hearing seriously and consider his decision carefully.

51. The claimant gave his evidence honestly and candidly. The Tribunal had no doubt that the claimant had had significant health issues that necessitated his absence from work. That was not in issue.

52. There was little material factual dispute in relation to the issues to be determined. There was no dispute about the number of or frequency of absences. The dispute was over the period of review in which a sustained improvement was to be considered.

53. The claimant's position was that he was absent for 62 days up to 21 September 2017 and 99 days in the first six months of 2018 and only eight days in the second six months of 2018. There was a marked improvement in attendance following the July outcome letter. The respondent's position was that there was not a sustained improvement between 2017 and 2018. The claimant's absence in 2018 was 107 days.

54. The Tribunal considered that the policy informs all employees about the acceptable levels of attendance and trigger points that apply. At the July final formal attendance hearing the claimant's attendance had declined significantly from his attendance level in 2017. A decision was reached not to terminate his employment in July 2018 but to monitor the absence for a further 12 months for a sustained improvement in the claimant's attendance. The claimant accepted under the policy the respondent could have terminated his employment in July 2018. There was no suggestion by the respondent at the July final formal attendance hearing or in the July outcome letter that it was acceptable for the claimant to have absences of less than 99 days and that would be considered a sustained improvement. The acceptable standard stated in the policy is two absences (not exceeding 7 days) in any six-month period. The claimant knew that any further absence could lead to a further final formal attendance hearing. The claimant had a four-day absence in November 2018. Mr McMillan exercised his discretion and did not request a final formal attendance hearing. In December 2018 the claimant had a further

four-day absence. He exceed the acceptable standard. The Tribunal considered that failing to achieve the acceptable standard in the first six months of the monitoring period demonstrated a failure to improve the claimant's attendance.

Submissions for the respondent

55. The claimant was dismissed for a potentially fair reason. He had persistent absences from work from 2017 until his dismissal in January 2019. The Tribunal heard contradicting evidence about the review period in which to consider a sustained improvement. The respondent's position is that there was not a sustained improved in the claimant's level of attendance between 2017 and 2018. The number of days absent in 2017 was 58 days and the number of days absent in 2018 was 107 days.

56. The dismissal letter confirms that the reason for dismissal was the claimant's absence record. The respondent reasonably concluded that it could not sustain and accommodate the claimant's excessive absences any longer.

57. It is for the Tribunal to determine the reason for dismissal. The respondent's primary submission is that the potentially fair reason for dismissal was some other substantial reason of a kind such as to justify the dismissal of the claimant based on his persistent absences. Alternatively, it was capability. Whichever reason is relied upon does not change the facts and the fairness of the dismissal.

58. The decision to dismiss the claimant was fair under section 98(4) of the ERA.

59. There was a fair review of the attendance record and the reasons for absence. The procedure involved a return to work form being completed each time the claimant was absent confirming the reason for each absence. Each absence was then discussed in detail at all formal attendance hearings. At the formal hearings, the claimant confirmed that: absences were not for work related reasons; there was nothing more the respondent could to improve his attendance; and he understood the detrimental impact of his absences on his colleagues. The respondent sought medical evidence to verify if there were

any adjustments that could be made to support an improvement in the claimant's attendance. The occupational health report from July 2018 reported that no reasonable adjustments needed to be implemented by the respondent and that the claimant was fit for work at that time.

60. The claimant was given an opportunity to make representations. He was invited to attend a meeting to discuss his attendance at each stage of the procedure. The claimant was afforded the right to be accompanied to each meeting. He was given the opportunity to make representations at each meeting regarding his absences.

61. At each stage of the process, the claimant was warned that a failure to improve his attendance could result in the next stage of the procedure being implemented (up to and including dismissal). The claimant was warned in unequivocal terms of the consequences of a failure to improve his attendance levels. Despite that, his attendance levels did not improve.

62. At the July final formal attendance hearing it was highlighted to the claimant that dismissal was an option open to the respondent. It was decided to monitor the claimant for 12 months to allow him to demonstrate improved attendance. The claimant was given written notice of all formal meetings. He had access to the relevant documents before the meetings.

63. The respondent took account of the various other relevant factors when making the decision to dismiss the claimant and uphold the decision in the appeal: the claimant's absence levels, which were at an unacceptable level for the respondent; the reasons for the absence levels and their differing nature; the previous cautions issued to the claimant and his failure to improve, despite being warned on several occasions that a possible outcome could be dismissal; the support offered to the claimant and consideration of adjustments to his working practices; the access the claimant had to a trade union representative for independent advice and guidance throughout the entire process the advice from the occupational health report, which confirmed that the claimant was fit to work and no suggestions or adjustments were required by the respondent; the adjustments made to absences

regarding duration and reasons for absences, meaning that some periods of absences were reduced or exempt from the triggers under the procedure; the lenient approach to the operation of the procedure; the discretion already applied to the claimant throughout the process; whether further discretion could be applied to the claimant, and whether it was appropriate to do so in the circumstances; the claimant's inability to suggest anything the respondent could do to support him; the claimant's lack of commitment or willingness to show he wished to improve his attendance; the claimant's failure to follow the correct absence reporting procedure on three out of the four instances in the 12 months prior to dismissal; the impact that the claimant's absences were having on the effective operation of the business.

64. The decision to dismiss the claimant fell within the band of reasonable responses open to the respondent in the circumstances. The triggers when an individual should move to the next stage of the procedure reflected the absence levels unacceptable in respondent's business. At every stage of the procedure, the claimant had reached a trigger. The respondent had reached the point where it was entitled to say, 'enough was enough'. The respondent could no longer sustain the claimant's level of absences. From 2017 onwards, the claimant did not have a period of continuous attendance at work for longer than 21 weeks at any one time. The respondent considered that there was nothing more that it could do to effect, an improvement in the claimant's attendance, based on the information he provided to them. The decision to dismiss the claimant was also procedurally fair.

65. The reason for the claimant's dismissal was due to persistent short-term absences, and that the decision to dismiss was, in the circumstances, within the reasonable band of responses open to the respondent having warned the claimant about his attendance levels, made clear what improvements were required, allowed reasonable time for improvements, consulted with the claimant regarding his absences and having sought medical advice. Having followed a fair procedure, the decision to dismiss the claimant was both substantively and procedurally fair. The claim should accordingly be dismissed.

66. If the Tribunal finds the dismissal was unfair, it will require to consider remedy. The claimant has confirmed that he is seeking reinstatement, reengagement or alternatively compensation.

67. The parties agree that the loss of pension is to be later quantified, either by agreement or at a separate hearing. They agree the loss of statutory rights is £350. The agreed gross weekly pay figure for the claimant is £396.87 and net weekly pay figure is £338.71 . The claimant would be entitled to a basic award of £9,128.01 and financial loss to the date of the hearing of £9,822.59.

68. The claimant's future loss from the hearing using the agreed weekly figures is £8,806.50. However, this is based on the claimant being out of work for at least six months. It is unrealistic for the claimant to be out of work for longer than one year since the effective date of termination, therefore the future loss should, at most, be calculated based on five months.

69. The claimant confirmed that whilst he has looked online at employment opportunities, he has failed to make any job applications or taken other steps to mitigate his loss since his employment ended. As a result, to fail to take reasonable steps to mitigate his loss, any compensatory award should be reduced accordingly.

70. The claimant is seeking reinstatement/reengagement. The respondent's position is that it would not be practicable for the claimant to be reinstated to his former role because the claimant's role within the organisation was filled in April 2019. Separately, in terms of re-engagement, there are currently no other vacancies, which would be suitable for the claimant. There are no roles in Glasgow at a similar grade level. The respondent is unable to confirm if, or when, a suitable vacancy would become available.

71. If any compensation is due to the claimant, this should be reduced based on the principles laid down in *Polkey v A E Dayton Services Limited [1987] ICR 142,* if it is found to be a procedural failing only.

Submissions for the claimant

72. The respondent cannot show that it had a fair reason to dismiss and therefore the dismissal was unfair. The dismissal was procedurally unfair in that Mr McMillan did not exercise his discretion in accordance with the Guidance and had he done so the claimant would not have been referred to the final formal attendance hearing and would not have been dismissed). The procedure leading to the final formal attendance hearing and the dismissal was in any event outside the band of reasonable responses.

73. The claimant was absent from work for 62 days up to 21 September 2017 and 99 days in the first six months of 2018. In contrast, the claimant was only absent from work for eight days in the second six months of 2018 and therefore comparing the claimant's absence record before the warning on 24 July 2018 and after there was in fact a marked improvement in his attendance following the warning on 24 July 2018.

74. Also of the two absences after 24 July 2018 one was due to the claimant's hospitalisation over which he had no control. On any proper reading of the claimant's record therefore he only had one non-hospitalised period of absence following the letter dated 24 July 2018 which compared with his previous history was an enormous improvement.

75. The respondent did not have a fair reason to dismiss the claimant: SOSR, because there had been a sustained improvement in the claimant's level of attendance and it cannot properly be said that the reason for dismissal was the failure to improve attendance levels.

76. The respondent cannot show that the claimant was dismissed because his attendance record had not improved. To the contrary the claimant's attendance record had improved by 92 per cent.

77. If the respondent can show that it had a fair reason to dismiss the dismissal was nevertheless both procedurally unfair. The respondent should have followed the guidance but failed to do so. On plain reading of the guidance it was mandatory for discretion to be exercised in circumstances where an employee has been hospitalised.

78. Mr Law gave evidence that the list of factors in the guidance is not exhaustive and that other factors will be considered when considering discretion, an example of which is the discretion, which was exercised by Mr McMillan in November 2018. The factors set out in the guidance make it clear that discretion must be applied in circumstances where an employee has been hospitalised.

79. If the Tribunal finds that there has been no procedural unfairness, the dismissal was in any event substantively unfair in that the process leading to dismissal and the dismissal itself was outside the band of reasonable responses open to a reasonable employer and that the decision to dismiss was grossly disproportionate.

80. The process leading to dismissal and the dismissal was outside the band of reasonable responses for the following reasons.

81. A reasonable employer would have:

a. Applied discretion in the application of the policy and the procedure.

b. Had regard to the fact that the claimant had over 18 years of unblemished service.

c. Conducted a fair review of the claimant's record and concluded that on any proper reading of the claimant's record his attendance had in fact improved (and not failed to improve as contended by the respondent).

d. Would not have treated genuine illness as a reason to dismiss.

e. Would not have dismissed in circumstances where the claimant's illnesses were unlikely to recur.

f. Would have continued to monitor the claimant up to 13 June 2019 (or set a new monitoring period) and not moved to dismiss following the period of sickness in December 2018.

g. Would have provided "performance Indicators" in the Improvement Letter rather than use the nebulous term "sustained improvement" so that the claimant knew exactly what was required/expected of him.

82. The claimant's evidence was that his dismissal from a job of 18 years that, he very much enjoyed has "knocked him for six" and made him depressed. He has therefore not been able to look for work. His mood will be greatly improved if he is reinstated and can return to work for the respondent. The claimant contends that he has not failed to mitigate his loss.

83. The claimant seeks an order that the respondent reinstate him and do pay to him his arrears of net pay for the period between the date of termination of employment and the date of reinstatement and that the respondent restore to the claimant all rights and privileges including seniority and pension rights.

84. It would be practicable for a reinstatement/re-engagement order to be made and that in the circumstances of this case there has been no breakdown in trust and confidence. Ms Munn and Mr Law said that the claimant had good working relations with his fellow employees and could reintegrate into the respondent's business without any real difficulty.

85. It would be practicable to reinstate/re-engage the claimant because he had a good relationship with his colleagues and there is no reason to suppose that on return to work the claimant would not continue to enjoy good relations; the respondent would benefit from the claimant's long experience; there has been no breakdown in trust and confidence either before or during the litigation; the claimant has made a full recovery from the medical problems which afflicted him during 2018 and there is no real prospect of the problems recurring; the claimant's evidence was that he will be able to return to work immediately.

86. If the Tribunal is minded to order reinstatement or re-engagement the Tribunal is invited to list a further hearing to enable the respondent to give further evidence in relation to the practicability of an order for reinstatement or re-engagement.

87. Alternatively, if the Tribunal does consider that a reinstatement/re-engagement order should be made the claimant submits that the Tribunal should award the claimant a basic award and compensation.

88. The claimant calculates the basic award at £8,983.57. The parties have agreed that the claimant's loss of earnings from the date of dismissal is £338.71 per week; the statutory cap is £20,31 1; any award for loss of statutory rights should be £350 and that the claimant was a member of the respondent's Defined Benefit Pension Scheme and therefore any loss of pension should be assessed on the "complex basis" and that assessment of any pension loss should be assessed at a subsequent remedy hearing.

89. The parties agree that the Tribunal should issue a judgment on non-pension compensation.

Deliberations

90. Section 98(1) of the ERA provides that the respondent must show the reason for the dismissal and that it was for a potentially fair reason as set out in Section 98(2). At this stage the Tribunal noted that it was not considering the question of reasonableness.

91. The Tribunal then asked whether the respondent had shown the reason for the claimant's dismissal. The respondent's position was that at the time of his dismissal the claimant was fit to carry out his duties and the reason for his dismissal was the failed to improve his attendance at work. There was no issue that his absences were genuine or that he was at fault because of his absences. The claimant had been cautioned in July 2018 that his absences had reached a stage where his continued employment may be impossible. The claimant's disputes that his attendance record had not improved but not that he was absent or the timing and duration.

92. At the final hearing Ms Munn gave evidence that she was asked to conduct the January final formal attendance hearing with support from HR. She was not involved in the decision to progress to a further final formal attendance hearing. The Tribunal noted that the letter inviting the claimant explained that the purpose was to discuss all absences and re-cap on previous actions taken under the policy. The letter referred to a possible outcome being termination of employment. In the January outcome letter Ms Munn states that the

claimant's absence levels have remained below the expected standard and she did not believe that there was a commitment for the claimant to improve his attendance at work. The Tribunal was satisfied that the respondent had shown that the reason for dismissal was some other substantial reason. The Tribunal therefore concluded that the respondent was successful in establishing the dismissal was for a potentially fair reason.

93. The Tribunal then referred to section 98(4) of the ERA. It noted that it had to determine whether the dismissal was fair or unfair having regard to the reasons shown by the employer and the answer to that question depended on whether in the circumstances (including the size and the administrative resources of the employer's undertaking) the employer acted reasonably in treating the reason, the sufficient reason for dismissing the employee; and that this should be determined in accordance with the equity and the substantial merits of the case.

94. In applying section 98(4) the Tribunal must consider the reasonableness of the respondent's conduct, not simply whether the Tribunal considered the dismissal to be fair. In judging the reasonableness of the respondent's conduct the Tribunal must not substitute its own view as to what the right course to adopt for that of the respondent. In many (although not all) cases there is a band of reasonable responses to the employee's capability within which one employer might reasonably take one view and others quite reasonably take another. The function of the Tribunal is to determine whether in the particular circumstances of this case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If a dismissal falls within the band, the dismissal is fair if it falls outwith the band the dismissal is unfair. A failure to carry out a reasonable procedure at each stage the dismissal process is relevant to the reasonableness of the dismissal.

95. The Tribunal was satisfied that the claimant attended return to work meetings following each absence at which his absences were discussed. The respondent also had formal attendance hearings with the claimant, who was accompanied, at which there was discussion about the absences, any support

to be provided by the respondent, and the impact of the absences on colleagues. The claimant was given notice of the formal attendance hearings; he had access to the absence information being considered by the respondent and was given an opportunity to make representations. The respondent obtained an occupational health report in July 2018 in which no adjustments were necessary. There was no suggestion that in January 2019 that the claimant was not fit to work or that any additional medical information was required.

96. The claimant was aware of the policy, procedure and guidance. He understood the various stages and the consequences if his attendance level did not improve. In the Tribunal's view the claimant knew that at the July final formal attendance hearing the respondent could have terminated his employment. He also understood that his absences were being monitored and what the respondent considered to be acceptable attendance.

97. Before taking the decision to terminate the claimant's employment the Tribunal was satisfied that Ms Munn considered the claimant's absence levels; the reasons for them and the support provided by the respondent.

98. The claimant raised with Ms Munn the use of discretion as his absence in December 2018 involved being hospitalised. The Tribunal was satisfied that Ms Munn was aware of the guidance and how managers exercise discretion. She understood that if management discretion had been exercised previously that should be taken account. It did not mean that discretion could not be exercised again. The Tribunal considered that while the decision not to exercise discretion was taken by Mr McMillan, Ms Munn did consider whether further discretion should have been applied and if it was appropriate to do so. She concluded Mr McMillan was entitled to exercise his discretion in the way he did.

99. The Tribunal appreciated that had Mr McMillan exercised his discretion in December 2018 the January final formal attendance hearing would not have taken place. The Tribunal noted that Mr McMillan exercised his discretion at the return to work meeting in November 2018. He did not do so December

2018. The Tribunal felt that this along with his approach to the claimant's absences for other reasons in this period demonstrated that Mr McMillan was listening to the claimant and was mindful of the consequences of his decision. The Tribunal considered that while the claimant felt that Mr McMillan should have exercised his discretion because the claimant had been admitted to hospital it was Mr McMillan's decision whether to exercise discretion. The Tribunal considered that where management discretion was available under the policy it was not mandatory to grant it as that would not make it discretionary and there was a category of absences which were expressly exempt from the policy.

100. The Tribunal's impression was that Ms Munn did not approach the January final formal attendance hearing with a closed mind. She had had no previous involvement. Ms Munn knew that termination of employment was a possible outcome, but she was able to take other matters into consideration particularly the claimant's representations. She listened to what he had to say and considered it. The claimant's behaviour at the January final formal attendance hearing appeared to have a bearing on her conclusion.

101. At the appeal stage the claimant was accompanied and had an opportunity to make representations He did not present new information. The claimant reiterated that the hospitalisation in December 2018 deserved more leniency. He felt that the penalty of dismissal was severe.

102. The Tribunal considered that Mr Law sincerely approached the appeal hearing understanding why in terms of the policy Ms Munn had reached the decision she had but hoping to be persuaded by the claimant at the appeal hearing to give the him another chance. In the Tribunal's view the outcome of the appeal hearing was not pre-determined.

103. The Tribunal was satisfied that Mr Law carefully considered the claimant's attendance level, the reasons for his absences and his representations. Since the July final formal attendance hearing the claimant had failed to meet the required level of attendance. Mr Law agreed with Mr McMillan's decision not to exercise discretion and schedule a final formal attendance. Mr Law also

noted the number of occasions when management had previously exercised discretion, which had not resulted in improved attendance and therefore Mr Law could understand why Mr McMillan did not feel that further discretion was warranted. Mr Law also agreed with the decision to dismiss as the attendance s standards were not met nor was there any improvement during the 12-month monitoring period. Mr Law accepted that the claimant wanted to keep his job but was not convinced that the claimant was taking the process seriously. Mr Law felt that the claimant had not reviewed the policy and had not followed the procedure in relation to absence reporting.

to 104. The Tribunal then turned to consider if the decision to dismiss the claimant was within the band of reasonable responses. The Tribunal again reminded itself that it should no substitute its own decision but rather consider whether objectively speaking the respondent was entitled to say that enough was enough.

js 105. The Tribunal found that from the beginning of 2017 until January 2019, the claimant had multiple absences from work which were managed under the policy and procedure. He attended a formal attendance hearing on 21 September 2017 because his attendance failed to meet the acceptable standards under the policy. He was informed that his absences would be 20 monitored under the procedure for the next 12 months. The claimant was for 99 days in early 2018. At the July final formal attendance hearing the claimant was not dismissed but told that for the next 12 months until 13 June 2019 the claimant's attendance would be monitored to give him a chance to demonstrate a sustained improvement in his performance. The claimant knew 25 that any further absences could lead to another formal final attendance hearing. The claimant was absent for four days in November 2018. Management discretion was exercised, and no final formal attend hearing arranged. The claimant was absent for four days in December 2018. At the January final formal attendance hearing the claimant's absences were 30 discussed as well as the impact on the respondent's business. The claimant confirmed that the respondent could not have provided anymore support which would have helped him improve his attendance record.

106. The Tribunal considered that the respondent applied its policy, considered the absences and gave the claimant an opportunity to make representations. The respondent communicated to the claimant the consequences of failing to comply. While the July outcome letter could have been better expressed that Tribunal had no doubt that the claimant understood that any absence after the July final formal attendance hearing could lead to a further final formal attendance hearing.

107. The respondent did not in the Tribunal's view adhere too rigidly to its policy; discretion as applied on several occasions. The Tribunal was satisfied that before deciding to dismiss the claimant Ms Munn knew the claimant's length of service, that there were alternatives to dismissal; and the effect of past and future absence on the business. The Tribunal was also satisfied that Mr Law also considered these factors at appeal along with the claimant's compliance with the policy and the likely effect of future absences.

108. The Tribunal concluded that in the circumstances of the case dismissal fell within the range of reasonable responses.

109. The dismissal was fair in accordance with section 98(4) of the ERA. It was therefore not necessary for the Tribunal to move on and consider the issue of remedy.

110. The application for unfair dismissal was dismissed.

Employment Judge: S MacLean
Date of Judgment: 16 December 2019
Entered in register: 8 January 2020
and copied to parties