EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111111/2019

Held in Glasgow on 2 and 3 March 2022

Employment Judge: Mrs M Kearns
Tribunal Member: Mr W Muir

Mr P Costello	**Claimant** **Represented by:** **Mr C Mitchell** **GMB Representative**
Glasgow City Council	**Respondent** **Represented by:** **Ms G O'Neil** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal was to dismiss the claim.

REASONS

1. The claimant, who is aged 44 years was employed by the respondent as an LED3 driver until his dismissal for a reason relating to capability (health) which took effect on 4 September 2019. On 17 and 29 October 2019, having (after some initial difficulty) complied with the early conciliation requirements he presented an application to the Employment Tribunal in which he claimed unfair dismissal and

disability discrimination. In a Judgment dated 5 August 2021 the latter claim was struck out for non-compliance by the claimant with orders of the Tribunal.

Preliminary Matters

2. The present Tribunal initially had three members. Mr R McPherson was included as the [employer] member. However, he indicated at the outset of the hearing that he had worked for the respondent some years ago and also that he plays football with some people who work at the respondent's cleansing department. He accordingly recused himself from the case and left. The Employment Judge outlined the following options to the parties: (a) they could await the arrival of a replacement employer member who could be available from around 12 noon and then continue with a full tribunal; (b) the Employment Judge could hear the case sitting alone; or (c) the hearing could continue with the remaining two member panel. The Tribunal adjourned to enable parties to consider the options. When the hearing resumed following the adjournment the claimant and his representative said that they wished to continue with the remaining two member panel. Ms O'Neil agreed with this and indicated that the respondent was keen to proceed and not to lose time. The Tribunal concluded that it would be in line with the over-riding objective of dealing with cases justly for matters to proceed quickly as the parties had agreed. Written consent forms were signed by both parties.

Issues

3. The issues for the Tribunal were:-

    (i) Whether or not the respondent's dismissal of the claimant was fair;

    (ii) If it was unfair:

        a. the percentage or other chance that a fair procedure would have reached the same result;

        b. Whether the claimant took appropriate steps to mitigate his loss; and

        c. Remedy if appropriate.

The respondent admitted dismissal.

Evidence

4. The parties lodged a joint bundle of documents ("J") and referred to them by page number. The respondent called the following witnesses: Mr Gerard McAvennie, deputy manager of the respondent's Dawsholm cleansing depot; Mr Edward Scanlon, Assistant Group Manager, who took the decision to dismiss the claimant; and Councillor Michelle Ferns, who chaired the appeal panel. The claimant gave evidence on his own behalf and called his trade union representative, Mr Christopher Mitchell.

Findings in Fact

5. The following facts were admitted or found to be proved:-

6. The respondent is Glasgow City Council. The claimant was employed by the respondent as an LED (level 3) heavy goods vehicle driver from 28 October 2010 until his dismissal for a reason related to capability (ill health) which took place on 11 July 2019 on eight weeks' notice. His notice expired on 4 September 2019, which was the effective date of termination of employment.

7. The claimant was absent from work from 10 November 2017 to 7 February 2018; from 1 to 9 July 2018; and from 25 to 28 August 2018. By letter dated 6 November 2018 the claimant was invited to an absence review meeting ("ARM") in relation to his most recent absence (J45). The meeting was scheduled for 13 November 2018. The letter advised the claimant that a possible outcome of the meeting could be the termination of his employment. On 13 November 2018 the claimant reported absent due to stress. He remained absent until 17 June 2019.

8. On 30 November 2018, the claimant attended an 'early intervention' ARM with Mr Gerard McAvennie, deputy manager of the respondent's Dawsholm cleansing depot and Andrew Ralston of human resources. During this meeting, the claimant provided an update on his health and stated that he was experiencing personal and work related stress. The options of redeployment and ill health retiral were discussed with him. The claimant was advised that he was not eligible for ill health retiral because he was not a member of the respondent's pension scheme.

9. On 17 January 2019 the claimant attended an occupational health appointment with the respondent's occupational health provider, PAM. A report by PAM (J57) stated that the claimant was absent with "*perceived work related stress and anxiety*" and that he had reiterated on several occasions that he felt he was fit for work. The report stated that the claimant would benefit from CBT and should discuss this with his GP.

10. On 29 January 2019 the claimant attended an ARM with Mr McAvennie and Mr Ralston of HR. The claimant was accompanied by his trade union representative, Mr Christopher Mitchell (J59). During this meeting the claimant stated that he would always suffer from personal stress due to his personal circumstances. He said that he had not spoken to his GP about CBT. The claimant was offered a transfer to a different work location to assist him to return to work. The claimant declined this offer. The claimant was also told that he could have use of the PC at the respondent's Dawsholm depot to register online for redeployment and that Mr McAvennie would assist him if required.

11. On 5 April 2019, the claimant attended a further ARM with Mr McAvennie and Mr Ralston (J63). He declined representation. The claimant indicated that he had now discussed CBT with his GP and was waiting for an NHS appointment. The claimant was again offered to work in a different work location. He refused. The claimant said he felt fit to return to work in some capacity and whilst he felt fit to drive, he was unsure if he would be able to go out with a crew. Mr McAvennie advised the claimant that he could only provide restricted driving duties for a maximum of four weeks, after which time the claimant would be expected to be fit for his full range of duties. Those present discussed the length of the claimant's absence and Mr McAvennie explained that it was a cause for concern. He told the claimant that every assistance would be provided to facilitate his return to work. Mr McAvennie told the claimant that unless he could achieve a sustained improvement in his attendance at work, a decision would have to be made regarding his continued employment. Following this ARM, the claimant was assisted in registering for the respondents redeployment register.

12. On 24 April 2019 the claimant attended a further appointment with the respondent's occupational health advisor in relation to his continued absence. The report produced following that appointment (J67) stated that the claimant was suffering from mild anxiety and was fit for work. The report said that the claimant was prescribed appropriate medication and had completed therapy with a drop-in service available if required. A phased return to work was recommended. The claimant did not return at that time.

13. On 10 June 2019 the claimant attended an ARM with Mr McAvennie and Mr Ralston (J69). The claimant's trade union representative was unavailable but the claimant declined the opportunity to reschedule. During this meeting The claimant stated that his GP had referred him for CBT but that he had previously had this treatment and he could access it at the drop-in clinic if he wished to. The claimant stated that he was keen to return to work but could only return in a role that was suitable. It was noted that his previous request to return solely on shunting duties had been rejected. (This was because the respondent already had someone employed on those duties whom it was not contractually possible to move to accommodate the claimant). The claimant asked if it would be possible for him to drive the food waste vehicle rather than an RCV as he would feel more comfortable driving a smaller vehicle with only one operative. He explained that he found it difficult being around a lot of people. Mr McAvennie explained that on a number of occasions recently the food waste vehicle had not gone out due to a shortage of RCV drivers and he could not guarantee to accommodate the claimant only on these duties. Mr McAvennie explained that it would not always be possible for him to accommodate the claimant's request to drive particular vehicles or undertake specific duties on a permanent basis as he had to respond to operational demands.

14. By letter dated 5 July 2019 (J75) the claimant was invited to attend an ARM on 11 July 2019. He was informed that a possible outcome of the meeting was the termination of his employment. (Indeed, every ARM invitation letter sent to the claimant had stated in bold type that a possible outcome of the meeting was

termination of the claimant's contract.) Enclosed with the letter was a 'presenting officer's report' by Mr McAvennie (J77).

15. On 11 July 2019 the claimant attended the ARM with Mr Edward Scanlon, assistant group manager, Mr McAvennie and Ms Mary Ann Walsh, HR Adviser. The claimant was accompanied by his trade union representative Mr Mitchell. Mr McAvennie stated that the claimant's attendance had deteriorated significantly with 11 spells of absence totalling 295.5 days since 2016. It was accepted by the respondent that these were as a result of the claimant's ill health due to his personal circumstances. Mr McAvennie set out the claimant's absence percentages which were as follows:

2014	2015	2016	2017	2018	2019
18.83%	15.58%	62.99%	39.94%	34.10%	86.02%

Mr McAvennie said that he noted the reasons for the claimant's absences and his personal circumstances. However, the claimant's absence had now reached an unsustainable level. Mr McAvennie expressed significant doubt about the claimant's ability to provide a good attendance level in future.

16. On behalf of the claimant, Mr Mitchell queried why the claimant had not received any disciplinary warnings associated with absence since 2012. Mr McAvennie said that this was because the claimant's attendance had been dealt with as a capability issue since that time due to underlying health conditions being confirmed. Mr McAvennie said that the options of redeployment, ill health retiral and termination on the grounds of capability had been explained to the claimant and confirmed to him in writing on a number of occasions, including being told that ultimately a time would come when the claimant's continued employment would have to be considered. Mr McAvennie confirmed that the claimant had been provided with information and contact details for the 'Workplace Options' and 'Breathing Space' support services. Mr McAvennie stated that the impact of

the claimant's level of attendance was a reduction in drivers resulting in frontline vehicles not going out.

17. Mr Mitchell queried whether Mr McAvennie had provided the claimant with a workplace Stress Risk Assessment to complete. Mr McAvennie confirmed that he had not because the reasons for the claimant's absence related primarily to his personal circumstances. In his summing up, Mr Mitchell confirmed that the main factors contributing to the claimant's attendance level were his personal circumstances. The claimant also confirmed this and said that there were no work related issues with him being at the Dawsholm depot.

18. Following an adjournment at the end of the meeting, Mr Scanlon reached the conclusion that the claimant had not been able to provide regular attendance at work over the course of a lengthy period despite management expressing their concern on a number of occasions. Mr Scanlon was aware of general advice from the respondent's Occupational Health advisers that an employee's previous attendance levels are the best indication of future attendance. Having considered the claimant's and Mr Mitchell's representations, Mr Scanlon had no confidence that there would be a sustained improvement in the claimant's attendance or that he would reach an acceptable level of attendance in future. He therefore concluded that the claimant was not capable of providing regular attendance at work going forward. For this reason, he dismissed the claimant for a reason related to capability due to ill health. In accordance with the respondent's conditions of service, the claimant was required to serve an eight week notice period. His effective date of termination of employment was accordingly 4 September 2019. The claimant was paid weekly in lieu of notice during the notice period.

19. The claimant appealed against his dismissal (J95). An appeal hearing took place on 8 October 2019 before the respondent's Personnel Appeals Committee. The chair of the committee was Cllr Michelle Ferns. So far as relevant, the Procedure to be followed by the Personnel Appeals Committee (J135) states as follows:

1 INTRODUCTION	1.1Both Management and Appellant/Representative will identify themselves.
2 MANAGEMENT'S PRESENTATION	2.1 Management will present their case. 2.2 Management will call witnesses. 2.3 Appellant's representative will question witnesses. 2.4 Members will question witnesses. 2.5 Witnesses will retire… 2.6 Management will call other witnesses (repeat 2.2 -5). 2.7 Management will complete presentation of case. 2.8 Appellant's representative will question management 2.9 Members will question management…
3 APPELLANT'S PRESENTATION	3.1 Appellant's Representative will present their case. 3.2 Appellant's Representative will call witnesses. 3.3 Management will question witnesses. 3.4 Members will question witnesses. 3.5 Witnesses will retire… 3.6 Appellant's Representative will call any other witnesses… 3.7 Appellant's Representative will complete presentation of case. 3.8 Management will question Appellant and/or Representative. 3.9 Members will question Appellant and/or Representative…

20. During the management presentation section of the claimant's appeal hearing, Cllr Ferns allowed both the claimant and his representative Mr. Mitchell to put questions to management witness Gerry McAvennie. During the course of these questions, Cllr Ferns required to interrupt the proceedings on three occasions to remind the claimant and Mr. Mitchell of the procedure. After Cllr Ferns had allowed first Mr. Mitchell and then the claimant to put questions to Mr McAvennie,

Mr. Mitchell (having previously said he had finished his questions) then requested a further opportunity to ask Mr McAvennie some more questions. Cllr Ferns agreed to this request by stating: "*Yes, but make it quick*". Cllr Ferns immediately apologised for the wording she had used and clarified that she had intended to ask Mr. Mitchell to ensure that his questions were relevant rather than quick. However, the claimant became upset and after conferring with Mr Mitchell, he and Mr Mitchell left the room. A recess was called during which Jackie McCormack of Corporate HR went to speak to the claimant and Mr Mitchell to try and find a resolution so the hearing could resume. The conversation lasted around ten minutes during which Ms McCormack asked the claimant and Mr Mitchell whether they were prepared to come back into the hearing and try to resolve the matter with an apology. However, they took the view that it was 'far too late'; that they had 'no faith in taking part'; and that the proceedings were over and they were leaving. The claimant chose not to continue with the appeal hearing. The appeal had reached stage 2.3 of the Procedure at the point when the recess was called.

Observations on the Evidence

21. One of the main arguments of alleged unfairness made by the claimant and Mr Mitchell related to the remark by the Chair of the Appeal Panel, Cllr Ferns during the claimant's appeal against dismissal. From the outset, the respondent has accepted that Cllr Ferns used the phrase "*be quick*" or "*make it quick".* However, there was a conflict in the evidence concerning the stage of the hearing at which the phrase was used. The claimant's position was that the phrase was used at the point when management had completed their case and the claimant had just begun his own case. His position was that management had been given 45 to 50 minutes to present their case uninterrupted and that he had been given less than 30 seconds. The respondent's position was that the hearing had in fact only got to stage 2.3 of the 'Management's Presentation' section of the Procedure. At that stage, the Appellant's Representative questions the management witnesses. Furthermore, management were still on their first witness, Mr McAvennie and had yet to call Mr Scanlon.

22. We considered the evidence carefully. The claimant's and Mr Mitchell's evidence in chief about the stage at which the phrase was used did not stand up to either cross examination or scrutiny with the assistance of the appeal minutes. Mr Mitchell testified in his examination in chief that management had presented their case which took 45 to 50 minutes and: "*At that point it was over to myself and the claimant to speak and we got 15 – 20 seconds into it. I was trying to speak. I happened to look up. I heard Cllr Ferns say*: "*Hurry up" and "Make it quick".* Mr Mitchell accepted that Cllr Ferns had immediately apologised. However, Mr Mitchell described this as an attempt to "*downplay it*" and *"backtrack"* and he appeared to take the view that Cllr Ferns' apology made matters worse. Mr Mitchell stated that the claimant had looked at him and that he (Mr Mitchell) had told the claimant he did not think they were going to get a fair hearing after Cllr Ferns' comment. He and the claimant had therefore agreed they had no faith in taking part and left. Mr Mitchell testified (and we accepted) that after he and the claimant left the room, they were followed by Jackie McCormack of Corporate HR, who asked them whether they were prepared to come back into the hearing and try to resolve the matter with an apology. Mr Mitchell said they had told her they had no faith in taking part when the decision maker could make that comment. Ms McCormack sat with the claimant and Mr Mitchell for ten minutes trying to find a resolution. However, they took the view that it was 'far too late' that they had 'no faith in taking part' and that the proceedings were over and they were leaving.

23. Clearly, if it had genuinely been the case that Cllr Ferns had listened to the management case for 45 to 50 minutes and had then told the claimant to make his case quick, that would have been unfair and could have suggested a lack of impartiality. However, it was clear from the evidence that the remark had not been made in those circumstances. The claimant accepted that whilst not verbatim, the minutes of the appeal hearing (J109) were broadly accurate. The minutes show that at the point the hearing terminated, the claimant had just finished questioning management's first witness, Mr McAvennie. The panel members had not yet questioned Mr McAvennie. The respondent's second witness, Mr Scanlon had not yet given his evidence. The parties had lodged the Procedure to be followed by

the Personnel Appeals Committee (J135) and the relevant section is set out in the findings in fact above. During her excellent cross examination of Mr Mitchell, Ms O'Neil put to him that the stage the hearing had reached when the comment was made was in fact stage 2.3 of Management's Presentation where the appellant's representative questions management witnesses. Mr Mitchell conceded that this was potentially correct. The claimant also made this concession. It was clear that this was indeed the stage at which the remark was made. We accepted Cllr Ferns' evidence that Mr Mitchell had already stated he was finished with the witness; that she had allowed the claimant to ask questions as well as his representative and that she made the remark because, having confirmed he was finished, Mr Mitchell then wanted to ask more questions. Cllr Ferns' evidence was consistent with the documentary and other evidence in the case. The Tribunal made findings in fact accordingly as set out above. It appeared to the Tribunal that set in its actual context, the remark was entirely innocuous and that the reaction of the claimant and his representative was disproportionate.

Applicable Law

Reason for dismissal

24. Section 98 of the Employment Rights Act 1996 indicates how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason (s.98(1)). A reason relating to the capability of the employee for performing the work he was employed to do is a potentially fair reason under s.98(2). In terms of s.98(3)(a) "capability" is assessed by reference to "*Skill, aptitude, health or any other physical or mental quality*".

25. Ms O'Neil cited the case of DB Schenker Rail (UK) Ltd v Doolan UKEATS/0053/09 in support of the proposition that BHS v Burchell [1978] IRLR 379 applies to ill health capability cases. Consequently, to establish that a dismissal was on the grounds of capability, the employer must show that the person who made the decision to dismiss the claimant, (in this case, Mr Scanlon) genuinely believed that the claimant was not capable of providing regular

attendance at work. Thereafter, the Employment Tribunal must be satisfied that there were reasonable grounds for that belief and that at the time the dismissing officer reached that belief on those grounds the respondent had conducted an investigation that was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances. The onus is neutral in relation to the grounds for the respondent's belief and the sufficiency of the investigation. In passing we note that the Schenker case has received "no substantial judicial treatment" either way, although as a decision of the EAT it is binding on this Tribunal. The Tribunal have therefore approached the case below both in the usual way but additionally applying Burchell. Both approaches lead to the same result.

26. If the employer is successful in establishing the reason, the tribunal must then move on to the second stage and apply Section 98(4) which provides:

> *"…where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) 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*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case."*

27. The test is an objective one. The tribunal has to decide whether, in the circumstances, the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer might have adopted in those circumstances (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439).

28. The range of reasonable responses test applies both to the decision to dismiss and to all aspects of the procedure by which that decision is reached.

Discussion and Decision

Reason for dismissal

29. We concluded that the respondent had shown that it dismissed the claimant by reason of his capability (assessed by reference to health) of performing the work he was employed to do. We accepted Mr Scanlon's evidence that he had reached the belief that the claimant had not been able to provide regular attendance at work over the course of a lengthy period despite management expressing their concern on a number of occasions and that the claimant was not capable of providing regular attendance at work going forward. There were ample grounds for that belief as set out in the findings in fact above, particularly at paragraph 15. The respondent had investigated the matter very thoroughly as described below. The Tribunal concluded that their investigation was well within the band of reasonable investigations a reasonable employer might have conducted in the circumstances (see Burchell). Under s. 98(3)(a) ERA capability may be assessed by reference to health. Capability is a potentially fair reason for dismissal under s 98(2). We therefore find that the respondent has shown the reason for dismissal and that it is a potentially fair reason as required by section 98(1) ERA.

Reasonableness

30. We considered whether the procedure used by the respondent in reaching the decision to dismiss the claimant was within the range of reasonable procedures that a reasonable employer might have used.

31. A fair procedure is particularly important in ill health cases. In East Lindsey District Council v Daubney [1977] IRLR 181 the EAT said this:

"*Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill health it is necessary that he should be consulted and the matter discussed with him and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detailed principles to be applied in such cases for what will be necessary in one case may not be appropriate in another. But if in every case*

employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him and to inform themselves upon the true medical position, it will be found in practice that all that is necessary has been done."

32. It appeared to the Tribunal that the claimant had been very fully consulted and the matter discussed with him in this case and that steps had been taken by the respondent to establish the true medical position. Every ARM invitation letter sent to the claimant stated in bold type that a possible outcome of the meeting was termination of his contract.

33. The claimant's most recent absence had begun on 13 November 2018. An 'early intervention' absence review meeting had been held with him on 30 November 2018 at which his medical condition was discussed. The claimant was referred to the respondent's Occupational Heath consultants on 17 January 2019. He reiterated to them on several occasions that he felt he was fit for work. On 29 January 2019 the claimant attended an ARM with Mr McAvennie and Mr Ralston. He was offered a transfer to a different work location to assist him to return to work. He declined.

34. On 5 April 2019, the claimant attended a further ARM with Mr McAvennie and Mr Ralston. He was again offered to work in a different work location and again he declined. The claimant said he felt fit to return to work in some capacity and whilst he felt fit to drive, he was unsure if he would be able to go out with a crew. Mr McAvennie explained that he could only provide restricted driving duties for a maximum of four weeks, after which time the claimant would be expected to be fit for his full range of duties. Those present discussed the length of the claimant's absence and Mr McAvennie explained that it was a cause for concern. He told the claimant that every assistance would be provided to facilitate his return to work. Following this ARM, the claimant was assisted in registering for the respondents redeployment register.

35. On 24 April 2019 the claimant attended a further appointment with the respondent's occupational health advisor, whose report (J67) stated that the

claimant was suffering from mild anxiety and was fit for work. On 10 June 2019 the claimant attended an ARM with Mr McAvennie and Mr Ralston (J69). The claimant said that he was keen to return to work but could only return in a role that was suitable. Mr McAvennie told him that it would not always be possible to accommodate his request to drive particular vehicles or undertake specific duties on a permanent basis as he (Mr McAvennie) had to respond to operational demands.

36. By letter dated 5 July 2019 (J75) the claimant was invited to attend an ARM on 11 July 2019. He was again informed that a possible outcome of the meeting was the termination of his employment. The claimant was assisted at the ARM on 11 July by his trade union representative. He was given in advance the report prepared by Mr McAvennie to enable him to prepare his case. His case was put forward to Mr Scanlon and he was listened to. He was accorded a right of appeal which he exercised.

37. On behalf of the claimant Mr Mitchell submitted that the respondent had adopted a new sickness policy in terms of which they no longer issue warnings. He was very critical of the respondent's witnesses in relation to the sickness policy but we were not really clear what the nub of his criticism was. Although he submitted that they '*could not tell you what the new sickness policy was*' the main questions he asked them in cross examination concerned the date the policy had changed. In his submissions for the claimant, Mr Mitchell stated: "*On two occasions today I had to remind Michelle Ferns that I was present when the new Robust policy was put in place."* However, he did not develop the point further. The respondent's sickness policy appeared to be in the bundle of documents but Mr Mitchell did not refer to it when he questioned the respondent's witnesses. He asked Mr Scanlon why the claimant had not been given warnings for sickness absence under the previous policy. Mr Scanlon said the respondent had not taken disciplinary action over the claimant's absence because they accepted that the claimant had an underlying health condition. The Tribunal concluded on this point that although, as Mr Mitchell stated, the claimant was not given disciplinary warnings for his sickness absence, he was clearly told on many occasions, both in writing and in

person that unless he could achieve a sustained improvement in his attendance at work his employment was at risk. Indeed, as observed above, every ARM invitation letter sent to the claimant stated in bold type that a possible outcome of the meeting was termination of his contract.

38. Mr Mitchell also argued that the respondent should have waited until the claimant had undergone the CBT recommended by his GP before they considered dismissing him. We did not accept this argument because in his letter of 24 June to the claimant confirming what had been discussed at the ARM on 10 June 2019 (J69), Mr McAvennie had recorded that the claimant told him that his GP had referred him for CBT but that he had previously had this treatment and that he could access it at the drop-in clinic if he wished to.

39. Mr Mitchell submitted that the respondent ought to have done a workplace Stress Risk Assessment on the claimant. In his evidence, Mr McAvennie confirmed that he had not carried out such a risk assessment because the reasons for the claimant's absence related primarily to his personal circumstances. (A fact which both the claimant and Mr Mitchell had confirmed). We did not conclude that the failure to carry out such a risk assessment in the circumstances rendered the claimant's dismissal or the procedure leading up to it outside the band of reasonable responses/procedures a reasonable employer might have adopted.

40. Mr Mitchell also submitted that at the point when the claimant had been invited to the ARM on 11 July 2019, he had been back at work for three weeks and had passed his HGV driving refresher assessment. He submitted: "*All of a sudden he is given a letter to attend an ARM under the new policy. What is the trigger point of that? I have still not been given an answer."* This point had not been explored in that way with the respondent's witnesses in cross examination or covered in the claimant's or his own evidence in chief. On the basis of the evidence that was before us, we understood that the trigger was the claimant's most recent period of absence which had lasted seven months and ended on 12 June 2019. Mr Mitchell concluded his submissions by asking: "*Were policies followed correctly by the department and should a more robust policy be put in place?"* In order to explore the first question it would have been necessary for Mr Mitchell to take the

witnesses to the policy in the bundle of documents, establish its terms and state the ways in which he considered it had not been followed. He did not do so and the issue was not before us for determination. The second question would not be a matter for this Tribunal unless the respondent's policy was unlawful or one which no reasonable employer would have adopted.

41. The claimant asked to make a submission once Mr Mitchell had finished. Much of it was of a personal nature. With regard to his remarks about the case, he said that the respondent only used PAM Occupational Health advisories that were beneficial to them and not to him. He said that if they had taken an advisory which was beneficial to him they could have put him out with a smaller crew, given him shunting duties or put him onto food waste vehicles. He said that the PAM reports had also said he could be subject to relapse if he perceived stress and that he had been subjected to numerous investigations. The Employment Judge explained to the claimant that his submissions could only refer to facts that were supported by the evidence led. With regard to the requests the claimant had made about a smaller crew, the food waste vehicle and shunting duties, he had raised and discussed these with the respondent. However, the Tribunal concluded that in the absence of agreed variations to his contract or reasonable adjustments under the Equality Act 2010, the respondent was entitled to approach the matter on the basis of the claimant's capability for performing work of the kind which he was employed by the employer to do ((Section 98(2)(a) Employment Rights Act 1996) and that included his full range of duties.

42. Finally, we considered whether the respondent's decision to dismiss the claimant was within the band of reasonable responses a reasonable employer might have adopted in the circumstances. The test is an objective one. The tribunal has to decide whether, in the circumstances (including the size and administrative resources of the employer's undertaking) the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer might have adopted in those circumstances (Iceland Frozen Foods Ltd v Jones [1982] IRLR 439). If the Tribunal concludes that a reasonable employer

might have acted as the respondent did then dismissal is within the range. The Tribunal must not substitute its own view for that of the employer.

43. This case was a little unusual in that although the claimant had most recently been absent from 13 November 2018 until 12 June 2019, a period of some seven months and 86.02% of the year to date, as Mr Mitchell submitted, the claimant had in fact returned to work at the point when he was dismissed. The case was a 'hybrid' of long term and intermittent sickness absence. The respondent had looked at the claimant's employment history and the likelihood that the claimant's absences would continue and had decided that the claimant's absence levels were unsustainable. We accepted Mr Scanlon's evidence that he had no confidence that there would be a sustained improvement in the claimant's attendance or that he would reach an acceptable level of attendance in future. The general advice from the respondent's OH advisers was that an employee's previous attendance levels are the best indication of future attendance. The claimant had informed Mr McAvennie on 29 January 2019 that he would always suffer from personal stress due to his personal circumstances. Alternatives to dismissal had been explored with the claimant. In all these circumstances, we concluded that dismissal was within the band of reasonable responses a reasonable employer might have adopted. It follows that the claim of unfair dismissal does not succeed and is dismissed.

44. It remains for us to thank Ms O'Neil and Mr Mitchell for their assistance and representation.

Employment Judge: **M Kearns**
Date of Judgment: **08 March 2022**
Entered in register: **14 March 2022**
and copied to parties

I confirm that this is the Judgment of the Employment Tribunal in the case of Mr P Costello v Glasgow City Council 4111111/2019 and that I have it by electronic signature.