EMPLOYMENT TRIBUNALS

Claimant: Mr S R Hashemi

Respondent: WM Morrison Supermarkets Limited

Heard at: Manchester **On:** 7, 8 and 9 March 2022

Before: Employment Judge KM Ross
(sitting alone)

REPRESENTATION:

Claimant: In person (assisted by an interpreter, Mr Kojidi)
Respondent: Mr Salter, Counsel

JUDGMENT having been given to the parties orally on 9 March 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed by the respondent from 2005 until he was dismissed for gross misconduct with effect from 24 October 2019 due to a pattern of absences from work. The claimant worked as a Warehouse Operative at a distribution centre. The respondent is a supermarket chain, a multinational retailer of groceries and other goods. The distribution centres are large stock warehouses where products are stored until they are required in the respondent's retail stores.

2. The claimant speaks limited English, as a second language. We were assisted throughout the hearing by a Farsi interpreter, appointed by the court.

1. The claimant presented his claim to the Employment Tribunal on 9 March 2020. A telephone case management hearing took place before Employment Judge Howard on 12 October 2020. An interpreter was in attendance to assist. It was confirmed that the claimant's claim was unfair dismissal only.

2. The case was listed for a final hearing and came before Employment Judge Ainscough on 7 June 2021, but the hearing was unable to proceed on that occasion. The claimant had attended without having prepared any questions to ask the respondent and had difficulty understanding the documents in the joint bundle. Following that hearing enquiries were made about the court service translating documents for the claimant's benefit, but unfortunately that was not possible.

3. At the final hearing the claimant and the Tribunal were ably assisted by a court appointed interpreter Mr Kojidi, who interpreted any documents for the claimant and all that was said in the Tribunal. On this occasion, the claimant had come prepared with written questions in Farsi for the respondent's witnesses-he read them out and the interpreter interpreted them into English.

Evidence

4. I heard from the claimant, Mr Akeroyd, the dismissing officer; Mr Vescio, the first appeal officer; and Mr John Passman, the second appeal officer.

5. I heard from the claimant; from Mr Hijati, a witness for the claimant who had also been dismissed by the respondent in similar circumstances and had brought a claim in the Employment Tribunal. Two other witnesses for the claimant provided statements and attended the Tribunal: Mr Wafash and Mr Wafa. (Neither the Judge nor the respondent had any questions for Mr Wafash and Mr Wafa).

6. All these witnesses provided written statements. The claimant had provided two statements, although the second statement comprised largely photographs.

7. There was an extensive joint bundle of documents of 496 pages. There was both a paper copy of the bundle and an electronic copy.

8. The claimant said his statements had been prepared in English by a friend.

The Facts

9. I find the following facts.

10. I find that in the earlier documents the claimant is known as Said Miraghie but in August 2018 the claimant notified the respondent he had changed his name (see page 265) and he is now known as Sayed Hashemi.

11. The claimant had a series of lengthy absences over a number of years. In 2013 the claimant was absent with permission for an extended holiday, also using unpaid leave, from 16 September 2013 to 1 December 2013 (page 110). The claimant was absent on sick leave from 8 September 2014 to 25 November 2014 (11 weeks, page 134). The claimant was absent on sick leave in 2015 from 30 August 2015 until 13 December 2015 (15 weeks, page 153-4,). The claimant was absent

from 8 August 2017 to 19 November 2017 (14 weeks, page 192). The claimant was further absent in 2019 from 12 June until 7 October 2019 (page 314). This final absence culminated in the disciplinary process with two appeals under the respondent's disciplinary procedure which led to the claimant's dismissal.

12. The respondent has an absence management policy (see pages 73-76). However, I rely on the evidence of Mr Akeroyd that when the genuine nature of the absence is called into question, it is common practice for the business to deal with the absence as a conduct issue. I find the Morrisons attendance management policy at pages 77-100 of the bundle specifically states:

> "If there is an issue with a colleague's conduct relating to absence e.g. failure to follow the absence reporting procedure or repeated patterns of absence, then this should be pursued separately via the disciplinary process."

13. The respondent's disciplinary process is at pages 103-107. Examples of gross misconduct include offences of dishonesty.

14. There is no dispute from the claimant that he was absent from work on the dates relied upon by the respondent. I find the claimant's absences on sick leave were covered by a fit note from his GP, but the fit notes refer to "back pain" or "low back pain". They do not give any medical diagnosis of the condition from which the claimant was suffering which caused the back pain (pages 376-377, page 417 and page 441).

15. I find that despite enquiries by the respondent there has never been a medical reason for the seasonal pattern of absence. The claimant could not give an explanation, neither could Occupational Health (page 312), and neither could the respondent's physiotherapist who was asked in relation to the previous pattern of absence in 2017.Page 210.

16. I find a lengthy absence of many weeks occurred every year from 2013 to 2019, apart from 2016 and 2018, which were the years in which the claimant had active warnings for this sort of conduct. (The absence in 2013 was an agreed holiday absence). The claimant contended in the disciplinary process that the respondent was "lucky" that he was not absent during those years (see page 289).

17. I find that in 2016 the claimant was issued with a warning about his attendance (see page 179) and in 2018 he was dismissed for the pattern of absences, but this was reduced to a final written warning at the second appeal stage to last 12 months (pages 260-261). The reason the sanction was commuted from dismissal to a final written warning was that other colleagues had received a warning rather than dismissal for similar behaviour.

18. As stated above, the claimant's 2013 absence was for an extended holiday with permission, but the other absences were for sick leave and are broadly at the same time of year.

19. I find that the claimant suffered from just one flare-up of his pain each year, causing an absence to be in a block of time rather than intermittent absence.

20. I find that the claimant was absent for substantial parts of the working year, each time in one continuous absence:

(i) 2014 – 25% (page 134);

(ii) 2015 – 32.33% (page 152);

(iii) 2017 – 31.46% (page 192); and

(iv) 2019 – 35.34% (page 314).

21. I find that each period of absence ended around the time the claimant's contractual sick pay entitlement was exhausted. I rely on the evidence of Mr Akeroyd that Morrisons had a scheme whereby employees were entitled the benefit of contractual sick pay up to 80% of their wage after a sufficient period of service, and that entitlement increased with length of service.

22. I heard evidence from the claimant in the course of the hearing complaining about general working conditions in the distribution centre, allegations of racism which he said he heard about other workers, a complaint that Eastern European workers were treated more favourably than workers from his country, Afghanistan, and general complaints about workplace managers.

23. I reminded myself that this was not a case where the claimant had brought a claim for race discrimination. There had been two case management hearings in this case – one by Employment Judge Howard and one when the case was unable to proceed on the last occasion before Employment Judge Ainscough. The claimant had said his claim was unfair dismissal only.

24. In these circumstances I find the allegations had limited relevance to the issues I had to decide. The claimant did not make any allegations of discriminatory behaviour by Mr Akeroyd, Mr Vescio and Mr Passman.

The Issues

25. The issues are set out in the Case Management Order of Employment Judge Howard (pages 72(d)-(f)) and are as follows:

(1) Was there a potentially fair reason for the claimant’s dismissal pursuant to Section 98(2)(b) of the ERA?

(2) As the reason for dismissal was conduct, did the respondent hold a genuine belief in the claimant’s misconduct?

(3) If the respondent did hold a genuine belief in the claimant’s misconduct, was it based on reasonable grounds?

(4) Did the respondent follow a reasonable investigation?

(5) Was dismissal within the band of reasonable responses?

(6) Was the dismissal fair in all the circumstances pursuant to section 98(4) ERA?

(7) If the respondent is found to have unfairly dismissed the claimant what compensation should be awarded?

(8) If the respondent is found to have unfairly dismissed the claimant should any award made by the Tribunal be reduced for contributory fault?

(9) If the respondent is found to have unfairly dismissed the claimant on procedural grounds, should any award made by the Tribunal be reduced in light of the fact that any such procedural flaws would not have made any difference to the eventual outcome and that the claimant, would, therefore, have been dismissed in any event?

(10) If the respondent is found to have unfairly dismissed the claimant, should any financial award be reduced by virtue of the claimant's failure to mitigate his loss?

The Law

26. The relevant law is section 95 and section 98 Employment Rights Act 1996.

27. In terms of case law, I had regard to the well-known principles in **British Home Stores v Burchell [1980] ICR 303 EAT**, namely whether the Tribunal can be satisfied that the employer held a genuine belief based on reasonable grounds following a reasonable investigation of the claimant's conduct.

28. I reminded myself of **Iceland Frozen Foods v Jones [1983] ICR 17 EAT**, that it is not for me to substitute my own view as to whether I would have dismissed the claimant but instead consider whether the decision to dismiss was within the band of reasonable responses of a reasonable employer.

29. I also had regard to **Sainsbury's Supermarkets v Hitt [2003] ICR 111**, that it is not for me to substitute my view of the investigation conducted by the employer, rather it is whether a reasonable employer of this size and undertaking could have conducted such an investigation.

30. I had regard to **Diosynth Limited v Thomson [2006] IRLR 284** and **Airbus UK Limited v Webb [2008] IRLR 309** in relation to the claimant's expired final written warning.

Discussion and Conclusion

(1) Was there a potentially fair reason for the claimant's dismissal pursuant to section 98(2)(b) Employment Rights Act 1996?"

31. I find the reason relied upon by the respondent was the claimant's conduct, namely the claimant's pattern of absence from work relying in particular on the absence in the period June 2019 to September 2019. Conduct is a potentially fair reason under the Employment Rights Act 1996.

(2) As the reason for dismissal was conduct, did the respondent hold a genuine belief in the claimant's misconduct? and

(3) If the respondent did hold a genuine belief in the claimant's misconduct, was it based on reasonable grounds?

32. I found Mr Akeroyd, Mr Vescio and Mr Passman to be clear, straightforward, honest and conscientious witnesses. They made concessions when necessary. Mr Vescio candidly admitted that he had taken notes of meetings with managers which he had not disclosed.

33. All three men were crystal clear that the reason the claimant was dismissed was because of the pattern of absences and other behaviours which caused them to be suspicious of the pattern.

34. It was not in dispute that the claimant had been absent on a seasonal basis every year from 2014 to 2019 for an extensive continuous period of time, up to his full paid sickness entitlement. The only years this did not happen were the two years, 2016 and 2018, when the claimant was in receipt of a warning in relation to his attendance.

35. The claimant sought to persuade me that it was relevant he had attended work on occasions when he was taking allergy medication or when he had suffered a burnt shoulder in 2017. Unfortunately, I find this was not directly relevant. It did not show why the claimant was absent for one lengthy absence at a similar time each year.

36. I am satisfied the respondent was concerned that there was a seasonable pattern to the absences. The periods of absence were not identical, but they all began in the summer and ended either in the autumn or early part of the winter. I find the respondent was concerned that there was no medical explanation for the seasonal pattern of absence, together with the fact that each absence reflected the length of the claimant's sickness absence entitlement at the relevant time.

37. I find that the respondent's witnesses also relied on the fact that the claimant did not take up the offer of work-related physiotherapy (he said it was too far to travel whilst he was off work sick) as a factor which raised suspicion in 2019. Mr Akeroyd, Mr Vescio and Mr Passman all stated that they did not disbelieve the fit notes supplied by the claimant's GP and accepted that the fit notes were genuine. However, they observed that the fit notes did not give a diagnosis of the claimant's condition, they simply reported that the claimant was suffering from back pain. The respondent's witnesses said they were suspicious of the fact that the claimant did not appear to be undergoing any significant medical investigations or potentially curative treatment as relevant factors. The respondent also relied on the fact that although on the claimant's return to work in 2019 he underwent restricted duties for a two week period, he declined reduced hours saying he would like to do full hours. Once again the respondent considered that to be inconsistent with someone who had been absent from work continuously with back pain for a period of many weeks.

38. In conclusion, the grounds for the respondent's genuine belief that it was suspicious of the pattern of the claimant's absences were:

(i) the absences themselves which are not disputed;

(ii) the lack of a medical diagnosis for the reason for the seasonal nature of the absences;

(iii) other factors as described above which raised suspicion.

39. During the Tribunal hearing and during the disciplinary process the claimant continued to reject the suggestion that there was any pattern of absence despite the objective fact of the dates of his absence and time of occurrence and duration.

40. I am therefore satisfied that the respondent had a genuine belief based on reasonable grounds based on the pattern of absence.

41. At this point I considered the relevance if any, of the fact that the claimant was one of 3 individuals with a similar pattern of absence at a similar time of year who were all dismissed.(All 3 had previously been subject to dismissal for a previous pattern of absence, all 3 had their dismissal overturned and commuted to a final written warning.)

42. Mr Passman informed the Tribunal in cross examination that the claimant was one of three individuals with a similar pattern of absence. He said he had been the second appeal officer in one of those cases, as well as in the claimant's case.

43. Mr Hajati, a witness for the claimant who gave evidence to this Tribunal, stated that he had had a similar claim and had been successful in the Tribunal. It was evident from Mr Hijati's evidence that there were factual distinctions between the claimant's case and Mr Hajati's case, not least because Mr Hajati told the Tribunal that he had had accidents at work at the relevant times which had caused his absence. There was no dispute that Mr Hajati was a close colleague of the claimant and they had for many years travelled together to work in a car share arrangement.

44. The cases of the three affected employees were not heard together by the respondent, according to Mr Passman, and they have not been combined by the Tribunal Service. There was no evidence relating to Mr Hijati's case or the other employees' cases before this Tribunal save what Mr Passman and Mr Hijati told the Tribunal in cross examination. Given that there was no information before the dismissing officer or the appeal officer at the relevant time, that Mr Akeroyd was not the dismissing officer in the other cases, that Mr Vescio told me he was only drafted in as the appeal officer at short notice when the original officer fell sick, and that Mr Passman and Mr Vescio said they dealt with each case separately, I am not satisfied that there is any matter of relevance which was relied upon by the respondent in relation to the claimant's claim being one of three similar cases.

(4) Did the respondent follow a reasonable investigation?

45. I find the respondent obtained a medical report from their Occupational Health department which stated there was no medical reason for the claimant's seasonal absences (page 311). I find that the respondent conducted a thorough disciplinary procedure according to their own processes which allowed two appeals. I find that

the claimant was given the opportunity at each stage, as was his union representative, to address the respondent. The claimant confirmed in cross examination he had no objection to any of the managers who dealt with his disciplinary and appeal hearings.

46. I find that the respondent followed their own procedures. With regard to page 85, the absence procedure, this states:

> "Absence related conduct issues
>
> If there is an issue with a colleague's conduct relating to absence e.g. failure to follow the absence reporting procedure or repeated patterns of absence, then this should be pursued separately via the disciplinary process."

47. I am therefore satisfied that the respondent conducted a reasonable investigation in accordance with **Sainsbury's Supermarkets v Hitt**.

(5) Was dismissal within the band of reasonable responses?

(6) Was the dismissal fair in all the circumstances pursuant to section 98(4) ERA?

48. At this stage I reminded myself it is not what I would have done that counts. I am not permitted to consider whether or not I would have dismissed the claimant in these circumstances. That is not the test. Instead I must consider whether a reasonable employer of this size and undertaking in all the circumstances of the case, including the size and administrative resources of the employer, acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. I must take into account equity and the substantial merits of the case.

49. The claimant had offences on his disciplinary record. He had a warning about his attendance in 2016. He had a final written warning about his attendance and the pattern of absence in 2018.

50. The respondent's disciplinary policy states that if an employee's conduct fails to show any improvement and a further act of misconduct is committed then dismissal is a possible outcome (page 105).

51. The claimant argued in this case that there was no pattern of absence. I find the employer was entitled to find there was a pattern of absence. When viewed objectively, the absences were at a similar time of year seasonally, all for one continuous block of time for between 25-33% of the working year, on each occasion for the extent of his contractual sick pay entitlement, for a similar reason namely back pain.

52. The claimant appeared to suggest because he had an expired final written warning for his absences prior to 2019, those absences were behaviour the respondent should not have taken into account. Although he did not argue this explicitly, he seemed to suggest that his absence in 2019 could not be part of a pattern because it was only one absence.

53. The claimant also said his absence was legitimate because it was supported by a fit note from his GP so he should not be dismissed. He suggested his absence was legitimate because he considered his back pain was related to his work.

54. I reminded myself of the case law, particularly **Diosynth Limited v Thomson [2006] IRLR 284** and **Airbus UK Limited v Webb [2008] IRLR 309**.

55. In **Diosynth** it was decided it was unfair to use a lapsed warning to tip the balance in favour of dismissal and it should have been disregarded.

56. This was distinguished by the Court of Appeal in **Airbus UK Limited v Webb**. The Court of Appeal held that there was nothing in section 98(4) of the Employment Rights Act 1996 that laid down a rule for Tribunals to say that the circumstances of the employee's previous misconduct must in all circumstances be ignored by the employer.

57. I rely on the words of Lord Justice Mummery at paragraph 56:

> "The language of section 98(4) is wide enough to cover the employee's earlier misconduct as a relevant circumstance of the employer's later decision to dismiss the employee, whose later misconduct is shown by the employer to the Employment Tribunal to be the reason or principal reason for the dismissal."

58. In this case the evidence of all the respondent's witnesses was very clear. They did not dismiss the claimant or reject the claimant's appeals because of his absences that predated the final written warning. Rather they dismissed the claimant because once his final written warning had expired, he recommenced a pattern of absence.

59. The claimant's own trade union representative stated, "Sayed learnt a lesson again" at the first appeal hearing (page 356). The respondent was not satisfied that the claimant had learnt his lesson.

60. All three of the respondent's witnesses looked back at the claimant's disciplinary record. They were aware he had a warning in relation to his absence in 2016 and a final written warning in 2018 also for his pattern of absence.

61. I find, in accordance with **Airbus UK Limited v Webb**, that they were entitled to look back at the claimant's whole disciplinary record in the particular circumstances of this case when considering whether or not there was a pattern of absence and whether or not dismissal was within the band of reasonable responses of a reasonable employer.

62. Having found they were entitled to see a concerning pattern of absence I find they were entitled to dismiss the claimant.

63. Although each of them had regard to the claimant's long service record with the respondent, they were entitled to consider that given his past behaviour a warning was not an appropriate sanction this time because of their concern that the behaviour would be repeated.

64. The claimant himself accepted the respondent was entitled to manage absence and that there was a cost to the business of covering absent colleagues. The respondent was entitled to see the claimant's absence in 2019 as part of a previous pattern and, given that pattern and his previous disciplinary record, to dismiss him.

65. I am satisfied that the respondent has shown dismissal was within the band of reasonable responses of a reasonable employer.

66. When the claimant was making his submissions, he sought to suggest that the sanction of dismissal was too harsh because a motorist who goes through a red light is not banned from driving. That is usually true. However in some circumstances, if a motorist has had previous motoring offences for which he has collected points on his licence, going through a red light may mean that he does end up being banned from driving. That is not the same as the situation in which the claimant found himself, which is more nuanced, but I hope it helps him to understand.

67. Finally, I had regard to the procedure in the context of the fairness of the dismissal and I am satisfied that the respondent has shown it followed a fair and thorough procedure. The only element of concern was that Mr Vescio interviewed the claimant's managers and admitted he had not provided his notes of those discussions to the claimant. Neither were those notes in the bundle. However, if there was any prejudice to the claimant in that regard, I am satisfied it was corrected because the claimant had an opportunity of a further appeal under the respondent's process with Mr Passman.

68. Finally, I turn to deal with some of the points raised by the claimant in this case. The claimant suggested there was a conspiracy between the union and the respondent and that was relevant to his dismissal. I have heard no evidence of a conspiracy apart from the assertion from the claimant which appears to relate to the fact that he is critical of the union not supporting him at the Employment Tribunal.

69. The claimant, who was a poor historian on some matters, said he was not represented by the union in the disciplinary process. I find that he was represented throughout the disciplinary process by trade union representative Mr Phil Murray, both at the dismissal meetings, even when the claimant himself failed to attend, and at the first appeal meeting so I find that is incorrect. I rely on the notes of the meeting and the evidence of the dismissing officer and the first appeal officer. I find that the claimant had the benefit of being represented by a full-time officer of the union, Mr Ian McCluskey, at the final appeal hearing. I rely on the notes of the meeting and the evidence of the 2nd appeal officer.

70. The claimant made generalised criticisms of some of his shift managers in the workplace. There is no suggestion that these related directly to his dismissal. The claimant at no time suggested that the behaviour of any of the respondent's three witnesses was offensive or discriminatory in any way.

71. The claimant suggested his dismissal was unfair because he considered his back pain to be work related.I find he did not produce any evidence to the respondent during the disciplinary process to suggest his back pain was work

related. In any event, am not satisfied the matter is relevant to the issues the respondent had to decide. The claimant was not dismissed for capability, he was dismissed for conduct.

72. For the reasons I have given, the claimant's claim fails.

73. If I am wrong about that and the claimant's dismissal was unfair in the context of the expired final written warning and the respondent having regard to the fact that the claimant had a lengthy absence in 2019 which was part of a pattern, established by looking back at previous absences in earlier years, I have gone on to consider the principle of **Polkey v A E Dayton Services Limited [1998] ICR 142** in the context of section 123(1) Employment Rights Act 1996.

74. I remind myself that I must not "duck" the **Polkey** issue and must have regard to any material and reliable evidence that might assist me, even if there are limits to the extent I can confidently predict what might have been.

75. I remind myself that Employment Tribunals are expected to consider making a **Polkey** reduction whenever there is evidence to support the view that the employee might have been dismissed if the employer had acted fairly. In reaching that conclusion the Tribunal needs to consider both whether the employer could have dismissed fairly and whether it would have done so. The enquiry should be directed at what this particular employer would have done not what a hypothetical fair employer would have done (**Hill v Governing Body of Great Tey Primary School [2013] ICR 691**).

76. I rely on the evidence of Mr Passman, the final appeal officer, that he considered the behaviour of the claimant in being further absent from work between June and October 2019 in the context of his previous disciplinary record, and the other circumstances which raised suspicion in relation to his absence,as being a breach of the implied duty of trust and confidence and incompatible with ongoing employment.

77. I am therefore satisfied that the respondent would have fairly dismissed the claimant for the reason of "some other substantial reason" because of that breach of duty of trust and confidence on the same facts, on the same date. I find that was 100% inevitable and therefore there would be a nil award.

78. The claimant's claim having failed and having found in the alternative that if I am wrong about that there is a 100% **Polkey** reduction, there is no need for me to go on to consider the other issues.

Employment Judge KM Ross
Date: 14 March 2022

REASONS SENT TO THE PARTIES ON
24 March 2022

FOR THE TRIBUNAL OFFICE

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