THE EMPLOYMENT TRIBUNALS

Claimant **Respondent**

GW **v** **PC**

Heard at: London Central **On**: 1 and 2 February 2022

Before: Employment Judge Glennie

Representation:
Claimant: In person, assisted by Mrs GW
Respondent: Mr M Green, Counsel

JUDGMENT

The judgment of the Tribunal is that the complaints of unfair dismissal and breach of contract are dismissed.

REASONS

1. By his claim to the Tribunal the Claimant, Mr GW, made complaints of unfair dismissal and breach of contract (non-payment of notice pay). The Respondent, PC, resists those complaints.

2. By an order made under rule 94 of the Rules of Procedure, I have ordered that the Claimant and the Respondent be anonymised on grounds of national security.

The issues

3. The liability issues in the unfair dismissal complaint were:

   3.1 What was the reason for the dismissal.

   3.2 Was this a potentially fair reason within section 98(1)(b) of the Employment Rights Act 1996.

3.3 Did the Respondent act reasonably or unreasonably as treating this as a reason for dismissing the Claimant.

3.4 If any failings in the process are identified, what would have been the outcome if they had been rectified.

4. The liability issues in the breach of contract complaint were:

4.1 What was the Claimant's entitlement to notice pay.

4.2 Was the Claimant paid that to which he was entitled.

Evidence and findings of fact

5. I heard evidence from GW on his own behalf and from JN, Deputy Director of HR Strategy and policy, on behalf of the Respondent. There was an agreed bundle of documents and page numbers in these reasons refer to that bundle.

6. The Claimant began employment with the Respondent as an analyst on 17 September 2007. He was provided with a written statement of particulars of employment, clause 20 of which made the following provision about sickness absence

You will be entitled to sick leave on full pay, less any National Insurance benefit received, for up to 6 months in any period of 12 months, and after that on half pay, though in some cases National Insurance benefit may be deducted. This is subject to a limit of 12 months sick leave in any period of 4 years. When this is exceeded, sick pay at pensionable rate (SPPR) may be applicable.

7. Clause 21 provided for a customary notice period, which in the Claimant's case was of one week for each year of continuous service plus one week, to a maximum of 13 weeks.

8. There is no dispute that the Claimant was good at the job, and I accept his evidence that, at least until he ran into problems in his later years with the Respondent, he loved the job. When problems arose these did not relate to the work itself, but to what he perceived as hostility that he encountered at work.

9. In June 2017 the Claimant attended an occupational health review, which he found very troubling. He considered that he was questioned about personal matters in an intrusive way and one which was indicative of an agenda to get him out of the business. Although this was not an issue as such in this case, the Claimant had raised a grievance which included reference to the occupational health issue. That grievance process was concluded in a way that the Claimant found wholly unsatisfactory.

10. Returning to the matters in issue, by 9 May 2019 the Claimant had accrued since the start of his employment 563 days of sickness absence over 44 separate periods. He had been absent from work because of ill health since 16 April 2018, the cause being work related stress, anxiety and depression. During the lengthy period from April 2018 the Claimant attended welfare ("FARMS") meetings on a number of occasions.

11. A departmental review panel (DRP) was convened to consider the situation. On 14 May 2019 the DRP made the following recommendation at page 76

    "dismissal on the grounds of inefficiency due to a continuing unsatisfactory level of attendance"

    The DRP also recommended compensation at 15% under the Civil Service Compensation Scheme.

12. It is necessary for me to say something about the use of the word "inefficiency" since in many respects this is at the heart of the Claimant's complaint. In the context of work, inefficiency usually means something like unsatisfactory performance, not working very well, or not making good use of ones time, etc. JN's evidence, which is supported by a Cabinet Office document dated 9th November 2016 at page 43 referring to reforms to inefficiency compensation, is that this is a term of art under the Civil Service Compensation Scheme. I accept JN's evidence on this point.

13. At page 44 the document explains that a payment of compensation known as inefficiency compensation can be made only in cases of underlying ill health.

14. The Claimant's case was then referred from the DRP to JN for decision. The Claimant and his wife met JN on 24 May 2019 and there are notes of that meeting at page 86 onwards. JN asked the Claimant whether he was still feeling unwell and he replied that he was. He continued that he had a hell of an experience of occupational health before and could not go back to them. JN said that there had been changes to the occupational health contract and offered a referral but the Claimant replied "no, I had a complete breakdown, I can go through it but it would extend the meeting." A little later JN asked for confirmation that the Claimant did not want to be referred to occupational health and he replied "they would lead me down the garden path, don't trust them".

15. JN then asked the Claimant how a return to work could be facilitated for him. She said that she knew that he was not well and was waiting on treatment. The Claimant replied that he did not know what to say and that he loved the job.

16. Towards the end of the meeting JN asked what would be the Claimant's preferred outcome. He replied "get better and come back and do analysis and can't think how I can do it. Do analysis, meet my mates". Mrs GW then added "he can't say when that will be, if ever."

17. JN's evidence, which I accept, was that at this stage she wished to have two questions answered. One was whether there had been any recent change in the Claimant's condition. The other, and the main one from her point of view, was whether there was any realistic prospect of the Claimant returning to work in the foreseeable future. It seemed to me that these were indeed the questions that would arise in these circumstances.

18. JN was aware that the Claimant was not prepared to attend an occupational health assessment, although not of the details of why this was. JN stated that the possibility of referral to a third party occupational health provider was raised, but that she considered that the best way of obtaining the necessary information would be to approach the Claimant's GP. There followed a document at pages 274 to 275 containing 16 questions addressed to the GP. A response to that was received on 9 September 2019 at page 100. This stated that the request could not be processed because it fell within the remit of occupational health, and the doctors concerned did not have the specialist qualification required for this. A patient summary was however included.

19. The patient summary was then referred, with the Claimant's consent, to the Respondent's occupational health advisers, who replied addressing the 16 questions on 5 November 2019. The input from occupational health included the following. There was an indication that the Claimant's depression had had a substantial impact on his day to day life, and that he continued to be treated with medication and talking therapy for his mental health issues, and physiotherapy for his neck pain. There was not enough information to comment on how long the mental health issues in particular were likely to last. There was insufficient information to comment on adjustments to help facilitate a return to work.

20. JN decided that the Claimant should be dismissed and awarded compensation under the Civil Service scheme at 80%. JN sent a letter confirming this on 25 November 2019 at pages 123-126. The letter acknowledged and explained the delay in reaching a decision, in particular the delay in getting a response from the GP and then the need to send the patient summary to occupational health. The letter summarised the input from occupational health set out above.

21. At paragraph 7 of the letter JN stated that her decision was that the Claimant's employment would be terminated on grounds of inefficiency due to a continuing unsatisfactory level of attendance. JN stated that she had taken into account the length and nature of the absence; established departmental practice for sickness absence management; a review of the sickness absence data available; and the likelihood of the Claimant's return to work and a reduction in the volume and frequency of his absences.

22. JN also stated that she had taken into account recent steps taken by the Claimant to improve his health and lifestyle, that he had been a successful performer throughout his career, and his passion for the work of the

Respondent. I accepted that JN took all these matters into account; indeed, there was no suggestion to the contrary.

23. The letter stated that the Claimant would receive 13 weeks' notice and that his last day of service would be 21 February 2020. The letter continued that any annual banked or long service leave accrued would be used during the notice period; stated that there would be an award of 80% compensation under the Civil Service scheme; and referred to the right to appeal. (In the event, the Claimant did not appeal).

24. So far as payments are concerned, as at 25 November 2019 the Claimant was receiving SPPR sickness pay at the pensionable rate of £6,452.56 per annum. The Claimant's evidence, which I accept, is that he had received full pay until April 2018, then sick pay until October 2018, and thereafter SPPR at the right stated during his notice period. The Claimant was paid 6 weeks and 4 days at the full salary rate, reflecting the 34 days accrued leave untaken up to that point, and 6 weeks and 1 day at the SPPR rate, with some adjustments being made subsequently for a period when he was receiving both payments.

The applicable law and conclusions

25. Section 98 of the Employment Rights Act 1996 includes the following provisions:

(1) In determining…..whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) The reason (or, if more than one, the principal reason) for the dismissal, and
(b) That it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it –

(a) Relates to the capability…..of the employee for performing work of the kind which he was employed by the employer to do.

(3) In subsection (2)(a) –

(a) "capability", in relation to an employee, means his capability assessed by reference to…….health……

(4) 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.

26. The first question is, what was the reason for the dismissal? This question takes me to what the Claimant says is the reason why he is claiming unfair dismissal. He says that the reason given is incorrect, and should have stated that he was being dismissed due to long term sickness. The Claimant is troubled by, and objects to, the term "inefficiency". This is not just a matter of disliking the word: the Claimant says that if he is asked by potential employers he will have to say that he was dismissed and if asked for the reason he will have to use the word inefficiency, which is likely to cause his application to go no further.

27. I have some sympathy for the Claimant on this point. "Inefficiency" has unpleasant connotations, which the Claimant finds insulting when there was no criticism of his standard of work or performance. I can see the danger of putting off potential employers in the way that the Claimant has described. As I have already indicated, I accept that "inefficiency" is used as a term of art. Apparently it is used generally in the Civil Service and I can see that it was not open to JN, nor is it open for that matter to me, to change that.

28. I will say, however, that it seems to me that some other word without the pejorative overtones of "inefficiency" might be better in the circumstances. Additionally, although it is not for me to advise or direct the Claimant in relation to how he answers questions regarding the termination of his employment, I observe that neither JN nor I would criticise him were he to say that he was dismissed because of long term ill health, or something similar, without reference to that particular word "inefficiency".

29. I nonetheless have to determine what was the reason for the dismissal. It was not inefficiency in the ordinary sense. I find that the Respondent has shown that it was unsatisfactory attendance caused by sickness where there was not likely to be a return to work within the foreseeable future.

30. That is a reason related to capability within section 98(2)(a) and is therefore a potentially fair reason.

31. Turning to whether the Respondent acted reasonably or unreasonably in dismissing the Claimant, I reminded myself that the standard is that of the range of reasonable responses at all stages: see, for example **Sainsbury's Supermarkets Limited v Hitt [2002] EWCA Civ 1588**.

32. Ultimately, the Claimant's only express criticism of the decision or process was the use of the word "inefficiency". That does not, in my judgement, render the decision to dismiss him unreasonable. Indeed, the Claimant recognised that the Respondent could not have continued to sustain his long term sickness absence.

33. Mr. Green has addressed some wider issues and I have considered these. I found that before the DRP met there were meetings about the Claimant's absence, and that these amounted to reasonable efforts to monitor and assist him.

34. I also found that JN's approach to the medical information was reasonable. I have not been told of anything that absolutely prevented the instruction of external occupational health advisors, but in my judgement it was not unreasonable to take the approach that she did. The Claimant's objection to the established occupational health advisers was (as he accepted) not perhaps entirely rational, but JN considered that she could obtain the relevant information from the GP, taking into account what the Claimant himself was saying. To some extent this proved to be the case, because although the GP did not address the questions that had been asked, the information provided enabled at least some answers to be obtained from occupational health.

35. I have considered whether dismissal was within the range of reasonable responses to the situation. I find that it was. The Claimant had been absent sick for 19 months with no immediate prospects of a return to work.

36. I was not addressed directly on the question of the principle in **Polkey**, which requires the Tribunal to consider what would have been the effect of remedying any failings that may have been identified. One point here is the use of the word "inefficiency". Had that been replaced by some other term, the outcome would inevitably have been the same and the Claimant would have been dismissed.

37. I also find that, if the Respondent had gone to external HR providers, there was no real prospect of any different picture emerging. There was nothing in the evidence to suggest that as at November 2019 the Claimant was other than quite seriously unwell and likely to remain so for some time.

38. I therefore find that the complaint of unfair dismissal fails.

39. Turning to the complaint of breach of contract, the Claimant's position evolved somewhat in the course of the case. The claim in the claim form read as follows:

> It was claimed that I was not eligible for a fully pay notice. Because I was under their sick pay scheme. However this sick pay payment scheme had expired over 12 months earlier and I was receiving nothing from it. I was told that the policy stating this was only available internally online, which of course I could not access.

40. This formulation of the complaint was reflected in the issues identified at a preliminary hearing held on 21 May 2021 where it was recorded that the Claimant had received no pay during his notice, as he was by then receiving nil pay under the sick pay provisions and that he contended that he should have been paid during the notice period at the full contractual

rate. As I have recorded above, the Claimant was in fact receiving SPPR pay, and so on the basis of the pleaded case the claim would be for the difference between 13 weeks' full salary and what the Claimant was actually paid, being six weeks four days full salary and six weeks one day SPPR.

41. I found that, put in this way, the claim could not succeed. The effect of section 87(4) of the Employment Rights Act is that entitlement to notice pay is governed by the contract. The contract provides for 13 weeks' notice but is silent as to the rate of pay. It seems to me that it must mean the rate of pay in force at the time notice is given and during the notice period. By the time of the notice period, the Claimant was no longer entitled to his "ordinary" salary and had exhausted his contractual sick pay entitlement. His contractual entitlement during the period was to nil pay. Separately from this, he was being paid SPPR. The latter might, or might not, be regarded as contractual pay but I find that ultimately nothing turns on that in the result. It is what the Claimant was being paid at the date notice was given. Over the 13 weeks the Claimant was paid more than that because he was credited with the outstanding holiday pay as indicated earlier.

42. By the conclusion of the hearing, the claim was being put in terms that holiday pay should not have been paid during the notice period, but instead paid separately and in addition to SPPR for the whole 13 weeks. I indicated that putting the claim in that way would require an amendment and that I was taking it that the Claimant was applying to amend the claim in that respect. Mr. Green on behalf of the Respondent opposed the application.

43. I did not allow the application because of prejudice to the Respondent. There was no evidence on this point in the course of the hearing. This had been referred to in the dismissal letter and so there would be potential arguments as to whether anything was agreed, impliedly or expressly. It would also be necessary to look at the operation of the policy and whether that was lawful. These considerations would have led to an adjournment, further evidence and submissions. It would not be proportionate to allow the application at this stage, and given the modest sums involved, which would have been measured in hundreds, rather than thousands, of pounds.

44. The complaint of breach of contract is therefore not made out and is dismissed.

Employment Judge Glennie

Dated: ……7 April 2022……..……..

Judgment sent to the parties on:

08/04/2022..

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For the Tribunal Office