EMPLOYMENT TRIBUNALS

Claimant: Mrs V Mahenthran

Respondent: Open Reach Limited

Heard at: Watford **On:** 20-21 April 2022

Before: Employment Judge Hoyle (sitting alone)

Representation:

Claimant: Miss Gilbert, Counsel

Respondent: Mr Ward, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim of unfair dismissal fails and is dismissed.

REASONS

Introduction

1. The claimant, Mrs Mahenthran, was employed by the respondent, Open Reach Limited, as a jeopardy controller from 19 June 1989 until her dismissal on 12 June 2019.

2. The claimant claims that her dismissal was unfair within section 98 of the Employment Rights Act 1996 (ERA 1996).

3. The respondent contests the claim. It says that the claimant was fairly dismissed for a failure to maintain an acceptable level of attendance and that such a failure was reason within section 98(1)(b) ERA 1996, some other substantial reason of a kind to justify the dismissal of an employee holding the position which the employee held; or in the alternative, was a reason within section 98(2)(a) ERA 1996, that being a reason relating to the capability of the employee for performing work of the kind she was employed to do

4. The claimant was represented by Miss Gilbert, Counsel, and gave sworn evidence. The respondent was represented by Mr Ward, Solicitor, who called sworn evidence from Mr D Thompson, the claimant's second line manager at the time of the claimant's dismissal, and from Mr J Freeman, Senior Manager who heard the claimant's appeal. I considered the documents from an agreed 188-page Bundle of Documents which the parties introduced in evidence and from an agreed 84-page Bundle of Witness Statements.

Preliminary issue

5. At the beginning of the hearing, before I heard any evidence, I had to deal with a preliminary issue. An unsigned witness statement from a Ms B Thompson, the claimant's immediate line manager, was in the Bundle but Ms Thompson was unable to attend the Tribunal as she had left the respondent's employment and was unreachable, despite the respondent having tried to contact her for the last two weeks or so. Mr Ward applied for the statement to remain in evidence submitting it would be putting the parties on an equal footing. Mr Ward recognised the claimant would not be able to put any questions to the witness but instead submitted the claimant had had the opportunity to consider the statement and comment upon it. Miss Gilbert submitted that as the statement was unsigned there was nothing to prove Ms Johnson wrote it or gave instructions to the respondent, and as there was no evidence of an email trail or similar as to where the statement might have come from, the Tribunal could not be confident that it was her evidence and therefore it should not be allowed.

6. I decided the respondent's application be refused and the statement should not be admitted in evidence. The statement was unsigned and the witness was not available to be questioned. The unavailability had been known to the respondent for some time and to Mr Ward for at least two weeks, which had provided ample opportunity to obtain supporting evidence for the statement being that of Ms Thompson. In the absence of any evidence as to the authenticity or veracity of the statement, I decided it would be unfair to the claimant to allow the statement to remain in evidence yet a fair hearing could continue in its absence especially given that even if the statement had been signed, in the absence of the witness at the hearing, I would, in any event, have attached reduced weight to it.

Issues for the Tribunal to decide

7. The Bundle of Documents contained an agreed list of issues for the Tribunal to decide (p. 26D – 26F), which had been agreed at a preliminary hearing on 26 June 2020 before Employment Judge Postle and which I confirmed remained agreed.

8. Although the **Polkey** and contributory conduct issues concerned remedy and would only arise if the claimant's complaint of unfair dismissal succeeded, I initially agreed with Miss Gilbert and Mr Ward that I would consider them at this stage.

9. However, on the second day of the hearing, both parties agreed a position on remedy, should it become necessary. Mr Ward stated he would not be pursuing any arguments on contributory fault. The agreed awards were a basic award of £15,225, an award for loss of statutory rights of £500, and a past loss of earnings of £37,275.

10. Therefore, some of the agreed issues in the bundle fell away and the main issues were:

    a. What was the principal reason for the claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of ERA 1996? The respondent asserted the claimant was dismissed for a failure to maintain an acceptable level of attendance and that such a failure constituted some other substantial reason of a kind to justify the dismissal of an employee holding the position of a claimant, or alternatively, was related to her capability to perform the work of the kind she was employed to do.

    b. If the reason was a potentially fair one, was the dismissal fair or unfair within section 98(4) ERA 1996, and in particular, did the respondent in all respects act within the band of reasonable responses? The claimant contended that the dismissal was unfair because the respondent failed to follow a fair process in that it did not apply its own guidelines properly; the process that was followed was tainted from the outset by the incorrect application of the guidelines which was not corrected at a later stage (including at the appeal stage); it did not offer appropriate support to the claimant to improve her attendance and in particular did not take adequate steps to ensure the claimant was reviewed by occupational health practitioners; it did not make proper investigations into the claimant's medical condition; it did not take account of the claimant's improving absences; it did not extend the monitoring period of the final formal warning; it did not take account the claimant's long service; and on appeal it took into account an incorrect assessment of the number of days of absence. The respondent asserts it acted reasonably in all the circumstances.

    c. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed in accordance with the principles in **Polkey v**

AE Dayton Service Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and **Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**. The respondent said that any procedural defects would not have changed the outcome as the claimant would nonetheless have incurred the same sickness absence, so the claimant would have been dismissed in any event, therefore any award should be reduced. The claimant contended that had the correct procedure been followed, the final formal warning stage would never have been arrived at, and the claimant would not have been dismissed.

The hearing

11. The hearing was originally listed for three days but because of judicial availability was instead held over two days, meaning judgment was reserved. On day two, both Mr Ward and Miss Gilbert suggested they could avoid returning at a later date for a remedy hearing, if that were to become necessary, by addressing all the remedy facts and issues in their submissions. I reminded them both that I could not make a judgment on submissions alone, only on evidence and/or concessions. Miss Gilbert stated the claimant had been fully counselled and had decided not to seek reengagement or reinstatement but to instead seek compensation only and figures for both the basic and compensatory awards were agreed by both sides (above), pending any submissions on reductions.

Findings of fact

12. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed Bundle of Documents.

13. The claimant, Mrs Mahenthran, was employed by the respondent, Open Reach Limited, as a jeopardy controller for just under 30 years, from 19 June 1989 until her dismissal on 12 June 2019. The respondent operates a large company.

14. The respondent accepted that all the claimant's absences for sickness were genuine.

Attendance procedures

15. I was directed to two attendance policies at pages 52 – 64 and pages 65 – 77 of the Bundle, the first dated 1 October 2018 and the second dated January 2019 but which seems to have been updated up to 22 November 2019. Both policies were essentially the same, save the policy dated 1 October 2018 listed some 'guiding principles' which included: managing attendance in a sensitively and timely way; being consistent and fair throughout the process; and being supportive of individuals in securing a return to work and improved attendance as a primary objective.

16. Whenever an employee fails to meet the required attendance, the policy permits an Initial Formal Warning to be issued, followed by a monitoring period (the respondent chose six months), during which time any further absence will lead to a Final Formal Warning with a further monitoring period, leading ultimately to the option of dismissal of the employee.

17. Where, following a Formal Warning, there is only a partial improvement in attendance, the warning period may be extended if the manager decides not to proceed to the next stage. In cases of repeated absence, and where the decision has been taken not to dismiss the employee, consideration should be given to extending the final formal warning period (p. 61).

18. The respondent's attendance policy imposes duties on the first, second and third line managers as to how they are to manage employee attendance. In particular, first line managers must conduct return to work discussions and keep appropriate records; seek advice from an HR case advisor and occupational health services as required in support of achieving a successful return to work; and refer individuals to the occupational health service for advice where there are health questions relating to an individual's absence (p. 56).

19. Second line managers are to investigate, review and decide on cases where termination is being recommended by first line managers; carefully consider every aspect of the case and review all opportunities for reasonable adjustments or redeployment; and ensure any decision to terminate is made fairly and is supported by a robust business rationale. The letter, which includes the robust business rationale, must include the reason for the decision, the notice period and arrangements, the last date of employment and the right to appeal the decision (p. 56 – 57).

20. Third line managers are to consider any appeal against a second line manager's decision to terminate the employee; carefully consider every aspect of the case and review all opportunities for reasonable adjustments or redeployment; and ensure the appeal decision is made fairly and is supported by a robust business rationale if taking the decision not to uphold the appeal (p. 57).

21. The attendance procedure states that occupational health services will, amongst other things, identify any long term health problems that despite suitable and sufficient treatment is likely to result in future spells of absence which are beyond the control of the individual; and provide advice to help individuals manage their own health better in order to improve their overall attendance (p. 57).

Historic episode of absence

22. On 15 July 2008, the claimant had an initial formal warning interview with Jane Smith (p. 91), an employee of the respondent, to discuss a series of unrelated sickness absences in the previous twelve months, which Mrs Mahenthran recalled in her oral evidence included a wrist injury. The interview was followed by an initial formal warning letter dated 17 July 2008 (p. 92) which detailed three

absences for unrelated reasons totalling more than 40 days and which informed the claimant that her attendance would be monitored for six months and that a further two spells of absence during that period may result in a final formal warning. In the event, no further action was taken as a result of the initial formal warning of 2008.

Initial Formal Warning

23. From 20 Mar 2013 until 30 Dec 2017, the claimant had 57 days off sick (p.78) for a range of unrelated reasons such as cold/flu, musculoskeletal issues and nausea and vomiting. On, or around, 26 February 2018, the claimant had an informal discussion with her line manager, Ms Johnson, about her level of attendance but there was no contemporaneous record of the meeting. The claimant subsequently had 43 days' sick leave from 5 April 2018 to 17 May 2018 (p. 78) for a stomach problem which involved her being investigated in hospital. Mrs Mahenthran stated in her witness statement and oral evidence, which I accepted, that at some time between 5 April and 17 May 2018, Ms Johnson visited the claimant at home. Mrs Mahenthran also stated she showed all her medical records to Ms Johnson during that visit and that Ms Johnson took them away so they were in the respondent's possession. In my view, it is unlikely a line manager would take an entire bundle of medical records in these circumstances, as they would know the contents were confidential and would instead need to be requested by an occupational health team. I therefore find the respondent did not have in its possession the claimant's medical records although Ms Johnson was told about the claimant's health problems.

24. Ms Johnson wrote to the claimant on 4 June 2018 (p.96) inviting her to a meeting to discuss whether or not an Initial Formal Warning should be issued. The letter advised the claimant she could bring a union representative or another employee with her and the final paragraph detailed how to access the Employee Assistance Programme and that it provided counselling services and an information service on welfare rights, finance, debt management and some legal matters.

25. The meeting took place on 11 June 2018 and unsigned notes of the meeting (p. 97-98) stated three episodes of sickness absences were discussed: two days from 18–19 July 2017 (stomach problem), four days from 27-30 December 2017 (cold/flu) and the 43 days' absence detailed above. At the meeting, Mrs Mahenthran told Ms Johnson she was feeling better and was no longer on medication. The notes also stated 'OHS [occupational health services] not required at this stage. EAP details given.' In her witness statement (p. 3, para. 24), Mrs Mahenthran stated that in a meeting with Ms Johnson (which I find was either 11 June 2018 or when she received her Initial Formal Warning letter on 3 July 2018), occupational health services were offered to the claimant which she rejected as she was under the care of her GP. In her oral evidence, Mrs Mahenthran stated that it was not offered. I find, given the contemporaneous notes of the meeting on 11 June 2018 and that Mrs Mahenthran's witness statement was made in April 2020, that occupational health services were offered to the claimant on either 11 June 2018 or 3 July 2018.

26. On 3 July 2018, Ms Johnson wrote to the claimant issuing an Initial Formal Warning (p. 99-100) and attaching her rationale for arriving at her decision (p. 101), both of which were received by the claimant. The letter detailed the claimant's attendance would be monitored for the next six months and if any further absence in that period was to occur, consideration would be given to move to a Final Formal Warning. The letter warned the claimant that if her attendance did not reach a satisfactory level, it could ultimately result in the termination of her employment (p.99). The letter also detailed, as above, the Employee Assistance Programme for counselling, welfare rights, finance, debt management and legal assistance. Details of the appeal process were also included. The claimant told Ms Johnson that she was feeling better, that she was not on any medication and that no further support was needed. The rationale for the Initial Formal Warning stated the reasons for the decision were to "highlight the impact that this level of unplanned absence has on the business and colleagues". The reasons also stated "If you feel you still have an underlying condition I will be pleased to support you with a referral to the OHS. With continued support I would hope to see an improved level of attendance during the 6 month monitoring period".

27. Mrs Mahenthran gave evidence that Ms Johnson told her the Initial Formal Warning letter was standard procedure that was being followed on the advice of the respondent's HR department and consequently, Mrs Mahenthran stated that she did not take the letter seriously. She also stated that she trusted her line manager and despite the contents of the letter, which she accepted included a warning her employment could be terminated and included her right to appeal, she nonetheless did not appeal because of the trust she placed in her line manager and that her line manager had seen that she was unwell.

Final Formal Warning

28. Between 18 July 2018 and 3 August 2018, the claimant had a further period of sickness absence of 17 days for what she stated was a virus causing laryngitis, returning to work on 6 August 2018.

29. On 24 August 2018, the respondent wrote to Mrs Mahenthran advising her that because of her further absence which occurred during the six months monitoring period, consideration would be given to progressing to a Final Formal Warning (p. 102). The claimant was invited to a meeting on 30 August 2018 and the letter again detailed the right to be accompanied to the meeting by a union representative or another employee, and it also detailed, as above, the various benefits of the Employee Assistance Programme.

30. On 30 Aug 2018, the claimant met with Ms Johnson. The respondent's notes of the meeting (p. 103) state that the claimant was informed there were four possible outcomes of the meeting: the issuing of a Final Formal Warning monitoring period; accommodating an attendance level where mitigating factors have been identified; a postponed decision pending advice from OHS; and no decision made in the meeting. The absences that were discussed included those from the Initial Formal Warning period and the latest, 17 days of absence. In her witness statement, the claimant stated (para. 28) "nothing of note" was

raised in this meeting but in her oral evidence, Mrs Mahenthra accepted she attended the meeting and accepted that she was given the opportunity to put forward her reasons why a Final Formal Warning should not be issued.

31. On 31 August 2018, the respondent wrote to the claimant issuing a Final Formal Warning (p. 104–105), attaching the rationale for reaching the decision (p. 106-107). The letter stated the issue was serious, that a further six months monitoring period would be instigated and that any further absence in that period might lead to termination of employment. Mrs Mahenthran accepted that she had received the letter, albeit she stated it was given to her in a corridor, but she stated that she took it seriously because of having received the Initial Formal Warning letter. The letter contained an offer of reasonable support to meet the required level of attendance and it detailed again the benefits of the Employee Assistance Programme, and included a route for self-referral to physiotherapy services. The letter gave details on how to appeal the Final Formal Warning decision but Mrs Mahenthran said in her oral evidence that she did not appeal because, once again, she trusted her line manager.

32. The rationale for the Final Formal Warning stated the reasons for the decision were to "highlight the impact that this level of unplanned absence has on the business and colleagues and also the ability to provide regular and effective service". The reasons also stated "If you feel you have an underlying condition I will be pleased to support you with a referral to the OHS. With continued support I would hope to see an improved level of attendance during the 6 month monitoring period". Mrs Mahenthran accepted in oral evidence that she had seen the rationale and she also accepted she had been offered occupational health support but that she did not feel she needed it at that stage.

Termination of employment

33. From 14 January 2019 to 24 January 2019, the claimant had a period of sickness absence lasting eleven days (p. 78) for flu and a cough. The claimant asserts the cause of this period of illness was because of inadequate heating in her work environment, an issue her union was addressing on behalf of a number of the respondent's employees.

34. On 20 February 2019, the claimant's second line manager, Mr Thompson, wrote to the claimant to invite her to a meeting to discuss her absences and to tell her that her future employment was being considered in line with the respondent's Attendance Procedure, on grounds of unsatisfactory attendance (p. 112 – 113). The letter explained the claimant could be accompanied by a union representative or another employee and it detailed the benefits of the Employment Assistance Programme.

35. The meeting took place on 11 March 2019 and the claimant was accompanied by her union representative. The notes of the meeting (p. 128 – 133) state the purpose was to discuss the claimant's level of non-attendance and the respondent's future ability to provide regular and effective service. The possible outcomes were listed as extending the Final Formal Warning and the monitoring period and accommodating the attendance level *"as evidence has*

been supplied of an underlying health condition"; termination on the grounds of inefficiency arising from unsatisfactory attendance; or postponement of a decision pending occupational health service advice or other specialist sources.

36. The respondent's notes of the meeting, show the claimant's union representative stated the claimant's latest absence was not due to an underlying health condition (which Mrs Mahenthra confirmed in her oral evidence) but there was instead a discussion about how the claimant might reduce the risk of any future absence by taking vitamin tablets and obtaining an influenza vaccination. In her oral evidence, Mrs Mahenthra accepted she understood the meeting could lead to the termination of her employment and she accepted that she was given an opportunity to put forward her case, but she stated she did not want to mention the temperature at work as she did not want to upset her employer as she wanted to keep her job, nor did her union representative mention the issue. No medical evidence was put before me that taking vitamin tablets or having an influenza vaccination was recommended by the claimant's doctor and that it would positively impact on any future sickness absences.

37. Mr Thompson explained in his oral evidence, which I accepted, that when he spoke on 11 March 2019 of extending the monitoring period because of evidence of an underlying health condition, what he meant was that he was trying to establish if the claimant had an underlying health condition that might explain her absences, not that evidence had already been supplied of such.

38. On 19 March 2019, the claimant's second line manager, Mr Thompson, wrote to the claimant informing her that her employment was being terminated and giving her twelve weeks' notice, commencing on 20 March 2019. The letter informed the claimant of her right to appeal, her right to be accompanied to her appeal and it also informed her of the Employee Assistance Programme. Attached to the letter was the 'resolution rationale' which Mrs Mahenthran stated she did not receive with the letter but instead her solicitor received it prior to her appeal.

39. Mr Thompson's rationale stated that the claimant's prior absences for sickness *"does not lead me to believe that she is able to provide regular and effective service in the future"*. It went on to state the claimant's 30 years of work for the respondent had been taken into account but that there was no evidence of the claimant trying to better her attendance at work. The rationale concluded that the impact of the claimant's non-attendance *"is an increased amount of work for her colleagues who are covering her work. This can then impact their health and well-being…it also costs the business in the form of overtime payments to cover her work so that we can ensure we deliver the level of service we need for our customers."*

40. Miss Gilbert asserted, on behalf of the claimant, that one episode of 43 days' sick leave, which was due to a stomach ulcer, and which, in part, prompted the Initial Formal Warning, was an underlying health condition and Miss Gilbert suggested to Mr Thompson that this absence period should have been

discounted. Mr Thompson stated he was not aware at the time of an underlying health condition and that he did not discount the 43 days but instead looked at the claimant's history of sickness absences in the round.

41. Mr Thompson stated that he considered the claimant's 30 years of service and whilst he could not say exactly how it influenced his decision, he did state he considered it alongside the length and number of the claimant's absences and that although he did not want to dismiss anyone with 30 years of service, he felt it was an untenable situation.

Internal appeal

42. On 21 March 2019, the claimant, via a solicitor, wrote to the respondent informing them of her intention to appeal the decision to terminate her employment.

43. A 'fact finding appeal meeting' was held on 28 May 2019, attended by the claimant, her union representative, a note taker and Mr Freeman, the claimant's third line manager. The notes of the meeting (p. 164) record Mr Freeman considered ten different incidents of sickness absence, and that he discounted one incident of 48 days' duration, leaving a total of 58 days' absence for him to consider (which seems to be an error and should have been 43 days and 59 days, respectively). He was asked by the union representative to consider the claimant's experience and potential value to the business, which Mr Freeman agreed to do.

44. On 6 June 2019, Mr Freeman wrote to the claimant dismissing her appeal and upholding Mr Thompson's decision to terminate her employment (p. 165 – 168). Mr Freeman attached his rationale to the letter in which he recorded that even when discounting the claimant's episode of 43 days of absence, her *"absence for the year still totalled 59 days over 9 individual spells of absence and is still very concerning."*

45. The rationale also stated that Mr Freeman recognised the claimant's 30 years of service, but that her attendance *"would be a risk going forward if she was reinstated and would impact the business with excess overtime, the people who would be required to cover and the business in the service we provide to the engineering workforce."*

46. In oral evidence, Mr Freeman accepted that the respondent's attendance policy (p. 57) required him to carefully consider every aspect of the case, including satisfying himself that the first and second line managers had met their duties, which he explained he did by simply accepting that the claimant had not appealed her formal warnings which he took as proof the correct processes had been followed. Mr Freeman went on to explain he did not discuss the case with the other line managers so that he could maintain an independent view of events during the appeal, and instead relied solely on their documentary evidence.

47. Miss Gilbert questioned Mr Freeman about his rationale for upholding the appeal and in particular about the claimant's 43 days of absence for a stomach problem. In his witness statement (p. 82 witness bundle), Mr Freeman had stated that even if he discounted the 43 days, there remained nine periods of absence (totalling 59 days) since 2015 which he felt was unacceptable. In his written rationale (p. 167), Mr Freeman wrote that even without the 43 days' absence, there remained 59 days' absence over a one year period but that he was not aware of an underlying health condition. However, when questioned by Miss Gilbert, Mr Freeman stated he had discounted the 43 days because of an underlying health condition and when Miss Gilbert correctly pointed out to Mr Freeman that the remaining 59 days of absence occurred over a four year period, not over a single year, as Mr Freeman had mistakenly thought, when asked if that would have changed his decision on the outcome of the appeal, he replied "possibly". However, Mr Freeman went on to say that even in hindsight his decision not to uphold the appeal was correct because he remained concerned by the level of absence.

48. Mr Freeman stated that he considered the claimant's 30 years of service in that he balanced an employee's loyalty against their skill set, ability to do their role and fairness to other employees, but that in this case the length of service did not alter his view of dismissal because of his concern about the claimant's ability to give regular and effective service in the future.

The law – unfair dismissal

49. Section 94 ERA 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the respondent under section 95, but in this case the respondent admits that it dismissed the claimant (within section 95(1)(a) ERA 1996) on 12 June 2019.

50. Section 98 of the ERA 1996 deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had one of the five potentially fair reason for dismissal within section 98 (1) and (2) of the Act.

Reason for dismissal

51. The task for identifying the real reason for dismissal rests with the Tribunal, notwithstanding the burden rests on the employer to prove that it was one of the five potentially fair reasons.

52. In this case, the respondent asserts the reason for the dismissal was the claimant's failure to maintain an acceptable level of attendance and that such a failure was reason within section 98(1)(b) ERA 1996, some other substantial reason of a kind to justify the dismissal of an employee holding the position which the employee held. In the alternative, the respondent asserts the reason was within section 98(2)(a) ERA 1996 that being a reason relating to the

capability of the employee for performing work of the kind she was employed to do.

53. This is significant because the Tribunal can only properly consider the question of fairness in the context of the reason found for the dismissal.

54. In **Wilson v The Post Office [2000] EWCA Civ 3036**, an employee with a poor attendance record was dismissed for failure to meet the employer's attendance policy. A tribunal found the reason for dismissal was that of capability on the grounds of health but the Court of Appeal held that the reason was the employee's failure to meet the requirements of the attendance policy which was some other substantial reason.

Fairness

55. If the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

56. Section 98(4) deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

57. In deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited v Jones 1982 IRLR 439**, **Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23**, and **London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

58. In **Lynock v Cereal Packaging Limited [1998] IRLR 510**, a case where the reason for dismissal was one of capability, the Employment Appeal Tribunal ("EAT") considered the role of medical evidence when dealing with intermittent periods of illness each of which is unconnected and found it to be impossible to give a reasonable prognosis or projection of the possibility of what will happen in the future. The EAT stated that whilst an employer may make inquiries, it is in no way an obligation on the employer to do so as the results may produce nothing of assistance to them.

59. The claimant referred me to a number of cases including:

a. **Lynock** (above), and in particular the EAT's description of an employer's approach when faced with a series of intermittent absences:

"The approach of an employer in this situation is, in our view, one to be based on those three words which we used earlier in our judgment – sympathy, understanding and compassion. There is no principle that the mere fact that an employee is fit at the time of dismissal makes his dismissal unfair; one has to look at the whole history and the whole picture. Secondly, every case must depend upon its own fact, and provided that the approach is right, the factors which may prove important to an employer in reaching what must inevitably have been a difficult decision, include perhaps some of the following – the nature of the illness; the likelihood of recurring or some other illness arising; the length of the various absences and the spaces of good health between them; the need of the employer for the work done by the particular employee; the impact of the absences on others who work with the employee; the adoption and the exercise carrying out of the policy; the important emphasis on a personal assessment in the ultimate decision and of course, the extent to which the difficulty of the situation and the position of the employer has been made clear to the employee so that the employee realises that the point of no return, the moment when the decision was ultimately being made may be approaching";

b. **BS v Dundee City Council 2014 IRLR 131** as authority that in a capability dismissal, the critical question is whether in all the circumstances of the case any reasonable employer would have waited longer before dismissing the employee; and that in an appropriate case, length of service and the manner in which the employee worked may yield inferences that indicate that the employee is likely to return to work as soon as they can; and

c. **RBS v McAdie 2008 ICR 2087** as authority for the proposition that, in the case of work-related ill health, the respondent should 'go the extra mile' or put up with a longer period of sickness absence than would otherwise be reasonable.

60. The respondent referred me to **Wilson** and **Lynock**, above and to **International Sports Co Limited v Thomson [1980] IRLR 340**, as authority for the guidelines the EAT set out on the correct procedure to be adopted by employers when facing excessive levels of intermittent absences. These include a full review of the attendance records and reasons for the absences; an opportunity for the employee to make representations and appropriate prior warnings of disciplinary measures, including dismissal, if no improvement is made.

Remedy

61. If the dismissal is found to be unfair but a tribunal is of the opinion that there is a chance the claimant would have been dismissed in any event, a deduction

can be made to the compensation under **Polkey v A E Dayton Servcies Limited [1987] UKHL 8, Software 2000 Limited c Andrews [2007] ICR 825, W Devis & Sons Limited v Atkins [1977] 3 All ER 40,** and **Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604**.

62. Miss Gilbert and Mr Ward provided me with oral submissions on fairness within section 98(4) which I have considered and refer to where necessary in reaching my conclusions.

Conclusions

Reason for dismissal

63. The reason for the claimant's dismissal was a failure to maintain an acceptable level of attendance, arising from the claimant's multiple episodes of sickness absence. Those absences were for many different health reasons including laryngitis, stomach pains and colds but there was no medical evidence before me of an underlying health condition and indeed, the claimant accepted in her oral evidence that she had no underlying condition, so I therefore find there was no underlying health issue that accounted for all, or the majority of, the absences.

64. I now turn to consider whether the reason for the dismissal was one of capability or whether it was for some other substantial reason. In doing so, I have had regard to the letter and rationale from Mr Thompson (p. 140 -145) which states the decision was *"Termination on grounds of inefficiency arising from unsatisfactory attendance"*. Mr Thompson expressed concern that the claimant would not provide regular and effective service in the future and about the impact any future absence would have on the business. Mr Freeman repeated Mr Thompson's decision and concerns in his letter to the claimant about the outcome of her appeal (p. 165 – 168). Further, the Initial Formal Warning letter raised by the claimant's first line manager, Ms Johnson, which formed the basis of the subsequent Final Formal Warning and eventual dismissal, made clear the reason for the warning was unsatisfactory attendance in breach of the respondent's attendance procedures.

65. I have also considered the notes made of the meetings for each of the formal warnings and whilst it is apparent the respondent looked to the claimant's past absences as an indicator of the likelihood of future absence, it is very evident that at every stage the respondent applied the attendance policy, it did so because of the claimant's failure to maintain a satisfactory attendance level.

66. I therefore find the reason the claimant was dismissed was that she failed to comply with the respondent's attendance procedures, notwithstanding the poor attendance was caused by the claimant's ill health. I apply **Wilson** (above), and therefore, in my view, the reason for the claimant's dismissal falls within section 98(1)(b) ERA 1996, some other substantial reason of a kind to justify the dismissal of an employee holding the position which the employee held, which

is a potentially fair reason for dismissal. In any event, the definition of capability is such that this could also be a dismissal under section 98(2)(a) ERA 1996.

Fairness

67. I must now consider whether the respondent acted fairly or unfairly for dismissing for that reason.

68. The respondent followed its attendance policy and process. Whilst the policy is, at times, written in rather generic terms, its clear aim is to maintain the adequate attendance of employees, and where that attendance is not met, to give employees an opportunity to discuss with their managers why this may be so, to be given opportunities to improve their attendance, whilst at the same time making it clear to the employee what sanctions might be applied should their attendance not improve, including that of termination of their employment. These aims were clearly explained to the claimant by the letters she received as part of the attendance process, and by her line managers in the Formal Warning meetings.

69. In the attendance policy, there are options available to managers for extending monitoring periods but the decision whether to extend or not is at the discretion of the manager, even where the employee's attendance has partially improved. There was no requirement for any extension to be offered in the circumstances of this case.

70. The policy also refers to the availability of occupational health services but when dealing with repeated absences, the policy states that managers may seek occupational health guidance *"where appropriate"*.

71. Miss Gilbert made several submissions about the claimant's 43 days of absence for a stomach problem and that it should have been discounted by each of the line managers, and had it been so, the attendance policy would not have progressed to termination. Miss Gilbert also submitted that as Mr Freeman agreed in his oral evidence to discount the 43 days, and as he subsequently made an error in the remaining 59 days' absence being over one year and not four years, it was not reasonable for the claimant to have been dismissed.

72. In my view, there was no requirement within the attendance policy for the 43 days of sickness absence to have been discounted whether it was thought at the time or not that the cause may have been an underlying medical condition, which in fact, it was not. Even if it was discounted by Mr Thompson, he explained that he viewed the claimant's absences in the round and still concluded that dismissal for her other absences was appropriate. Whilst Mr Freeman accepted that had the 43 days been discounted, there would have remained 59 days of absence over a four year period, he stated that the claimant's subsequent absences, including 11 days of sick leave after the Final Forming Warning was issued, nonetheless caused him concern and dismissal was reasonable.

73. Although I have sympathy with the claimant, I consider the respondent's decision to dismiss the claimant was fair and fell within the band of reasonable responses open to a reasonable employer in all the circumstances of the case for the reasons I set out below:

    a. Having concluded there was no underlying health condition, in my view there was no obligation on the respondent to arrange an occupational health assessment of the claimant as the value of any assessment with regard to determining the likelihood of future attendance would have been very limited. Additionally, the claimant accepted that at various stages of the attendance process she had been offered occupational health services by her managers, which she had refused for her own reasons, and therefore I conclude the respondent met its obligations under the attendance policy to both support the claimant in improving her attendance and to refer to occupational health appropriately. It is also worth noting that on occasions when the claimant refused the occupational health services, it was because she was already under the care of her own doctor, so it is unlikely that occupational health services would have been able to offer her any greater assistance than she was already receiving.

    b. The respondent never doubted that the claimant was genuinely sick when she was absent but the respondent dismissed the claimant because the claimant did not meet the required attendance level following the application of a policy designed to deal with employees who did not meet the required attendance level.

    c. The letters sent to the claimant at each stage of the attendance process made it abundantly clear that the situation was serious; that it was being followed because of the claimant's poor attendance; that her poor attendance was impacting on the business; that her attendance was expected to meet the required standard and that a failure to do so would result in the attendance process progressing from one stage to the next; and that the process may end in her dismissal. The letters also explained the actions the claimant could take if she disagreed with the findings or the process. It was within a range of reasonable responses for the respondent to expect the claimant to understand the contents of those letters and to raise any arguments or present any evidence they wished to rely on during the various meetings with her line managers, notwithstanding the claimant stated she had been reassured by her first line manager telling her that the process was only being followed on the advice of human resources.

    d. The attendance process required the second and third line managers to carefully consider every aspect of the case but in my view that did not require them to re-investigate the case from the beginning; it was instead acceptable for them to have relied on the findings of other line managers involved earlier in the process. It was also within the band of reasonable

responses for the second and third line managers to consider every aspect of the case by holding a meeting with the claimant before arriving at their decisions and by giving the claimant the opportunity to present her case either herself or through her union representative.

e. The claimant was represented in both the Final Formal Warning meeting and the internal appeal meeting by her union representative but at no time was any argument advanced that the attendance policy had been improperly applied, nor that improper conclusions about the absences had been drawn.

f. The claimant suggested one absence was work related and as such, the respondent should 'go the extra mile' in relation to that absence (**RBS v McAdie**, above) but no medical evidence was presented to me which indicated the absence was work related, it was simply that the claimant herself believed them to be so.

g. It was within a range of reasonable responses for the respondent not to have extended the claimant's monitoring period beyond that which was implemented at the various stages of the attendance process, as the attendance policy did not require the respondent to do so.

h. It was also within a band of reasonable responses for the respondent to conclude, given the claimant's multiple absences for different reasons during the various monitoring periods, that there was a likelihood of further absences, even if the claimant's attendance had improved and notwithstanding her length of service.

i. The claimant argued that because she was dismissed with payment in lieu of notice and the respondent therefore had to manage the business with her having been removed her from the workplace immediately at the point of termination, that the impact of her sickness absence on the business could not have been so great as to warrant her dismissal and that instead her final monitoring period should have been extended, which the respondent could easily have managed given they had to manage her dismissal. It was within the band of reasonable responses for the respondent, with its knowledge of its business needs and risks, to conclude that it preferred to 'draw a line' under the claimant's repeated absences and to instead tolerate the impact it faced on the business by dismissing her, rather than manage the impact of unpredictable future absences.

74. In all the circumstances of the case, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer.

Employment Judge Hoyle

26 May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNALS