EMPLOYMENT TRIBUNALS

Claimant: **Mr L Morton-Buwerimwe**

Respondent: **Plusnet Plc**

HELD in Leeds **ON: 20th, 21st and 22 February 2022**

BEFORE: **Employment Judge Lancaster**
Members: **H Brown**
J Howarth

REPRESENTATION:

Claimant: **Mr P Ward, counsel**
Respondent: **Mr S Proffitt, counsel**

JUDGMENT having been sent to the parties on 22 February 2023 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, from the oral decision delivered immediately upon the conclusion of the hearing :

REASONS

Issues

1. The remaining issues in this case were succinctly identified at the preliminary hearing before Employment Judge Drake on 17th March 2022.
2. They are:
    1) Was the Claimant dismissed for a fair reason under section 98 Employment Rights At 1996, namely (i) capability or (ii) some other substantial reason (SOSR)?

2) Did the Respondent act reasonably in all the circumstances in treating the Claimant's capability/SOSR as a sufficient reason for dismissal (section 98 (4) and was it within the range of reasonable responses?

3) Did the dismissal of the Claimant on 1 October 2021 amount to less favourable treatment because of race (section 13 Equality Act 2010), that is did the Respondent treat the Claimant less favourably than it treated or would have treated others in not materially different circumstances?

   The Claimant relies on an actual comparator named Roheel Mohammed.

4) Did the Respondent dismiss the Claimant because he had brought Employment Tribunal proceedings under claim numbers 1810867/2018 and 1810868/2018 (victimisation under section 27 Equality Act 2010)?

Background facts

3. The claimant was dismissed under the respondent's attendance management policy. At that point he had been absent continuously from 3 December 2019 to 3 October 2020. He also had a very poor sickness absence level prior to that, though of course we bear in mind that the claimant does suffer from a mental incapacity which is admitted to be a disability: that was held to be the case at an earlier Tribunal hearing in previous proceedings.

4. Prior to that final continuous length of absence which totalled some 10 months, and where it was to continue for at least another three weeks under the existing sick note, the claimant had also been absent for a substantial period at the end of 2018. That ran from November into January 2019 with a very brief attendance in the middle. He then had a period of attendance throughout April and then early May 2019 but was absent again for a significant period from 18 to 30 May 2019. That then resulted in him being issued with a six month warning on 13 June 2019.That warning therefore was still in force when he commenced the continuous period of absence from 3 December. He had also been absent for a week at the end of November shortly before that.

5. Although the dismissing officer Mr Wood did not expressly take into account the effect of that earlier warning and therefore dismiss for a further absence during its currency, he was obviously well aware of the previous absences. He indeed records as a fact, in his resolution rationale, that he was aware of the six month warning and therefore necessarily also aware of the absence that had preceded that and led to it being an issue.

6. The respondent's triggers for taking action under their absence management policy had long been exceeded before any formal steps were in this instance taken in the case of the claimant. At the point he was invited to the resolution meeting, which was expressly stated to be a meeting that may have considered termination of employment, he had been absent for a total of 695 hours. The trigger is 75 hours. By the time matters actually progressed to a series of meetings his period of absence had been further extended. The meeting was originally scheduled for 28 July but was then put back to 4 August. It was again postponed on the non-attendance of the claimant to start on the 6th It was then adjourned and proceeded, after a further postponement on the 13th when the claimant objected to the note taker, to a final hearing over two days on 17 and

25 August. Of course the claimant had remained continuously off work so that by the time these matters came to be considered by Mr Wood he was over ten times the trigger of 75 hours absence.

7. In the course of that period of absence the claimant had been difficult to contact by managers who sought to maintain welfare meetings or catch-ups with him. We accept that in part there were reasons for that in that the claimant having been off sick for so long was then not in receipt of income. He therefore had difficulties paying his mobile phone bills or his internet provider - even though he had a discounted rate from the respondent employer. And so at times he was unable to access his voicemail messages or he was not always able to obtain access to the internet from home. He did, though, always have an extant email account with Yahoo throughout this period, which he could access remotely wherever he could get the internet.

8. The respondent had also specifically sought for him to be referred to "rehab work", through his then line manager Miss Simpson. He did not respond to those invitations. He then objected to Miss Simpson continuing as his point of contact. That was on the basis of an allegation that she had committed a discriminatory act against him at the end of the previous year. Though we note that at the earlier proceedings it was a finding of fact of that Tribunal that that did not in fact take place.

9. His line manager was then changed to Mr Horner, and it was he who was managing him throughout the whole of this process so far as it is material. And indeed at the point Mr Horner took over he then effectively started the clock running again, and looked only at further absences from that time onwards, before deciding to escalate the matter to a meeting with the more senior manager, Mr Hussain, and then ultimately to the process that led to termination.

10. Under the attendance management policy, for somebody who was on long term sick the normal trigger process of going through a series of warnings upon their return to work to see if they can maintain a continual level of attendance is not appropriate. There is therefore provision to go straight to the Stage 3 meeting, the potential termination meeting, if the employee "remains off work for an unforeseeable amount of time or is unable to return to their role". The continuing rolling absence, even though backed up by a series of doctor's notes, was deemed - appropriately so in our view - to be for "an unforeseeable amount of time". It certainly exceeded what we have been told would be the normal expectation of how long the respondent employer would allow somebody to remain off sick before taking action.

11. When Mr Wood was assigned to deal with that resolution Stage 3 meeting, he was able to meet with the claimant and his union representative over a number of occasions and then to adjourn to ascertain material factual information. From that he ascertained the history of difficulties with contacting the claimant, the fact that he not responded to the invitation to take assistance from "rehab work" and, most specifically the context of this case, that after the second manager review meeting in April when he had been referred to occupational health he had not in fact kept those appointments.

12. Occupational Health had tried to phone the claimant on three occasions, the 26th, 27th and 28th May to arrange for him to attend. On each occasion it is recorded on the system that those calls went straight to voicemail. We accept

that that may well be because his mobile phone provider Tesco had cut him off. But having failed to make contact with him (and we note that the recorded contact number on the system - as of May -was in fact the same telephone number that the claimant had informed Mr Horner that he should use for a welfare meeting in April and where Mr Horner had in fact been able to speak to him), Mr Horner then on 3 June sent a follow up email. That informed the claimant of the difficulty reported by occupational health, asked if he wished to accept the withdrawal of the referral. There was no response whatsoever to that request. That is in circumstances where, despite his intermittent problems with access to the internet, it is noted that on that same date, 3 June the claimant was able to correspondent with the manager who was dealing with an internal grievance appeal. We are satisfied therefore that he did receive that email on 3rd June, but did not then reply to it when he would have been able to do so. Nor at any stage thereafter did the claimant or anyone on his behalf ever get back to the respondent and chase up what was happening with the occupational health referral. If the claimant, as he says, was not contacted by occupational he did nothing to follow up that matter. So even if he had not received the email from Mr Horner on 3 June, which we find as a fact he will have received, it would still have been perfectly sensible and reasonable for him to have made enquiries. He never ever raised the possibility of his being referred back to occupational health until his union representative mentioned it again on his behalf in the resolution meetings at the end of August.

13. Mr Wood had that history of an apparent failure to respond to attempts to help the claimant, difficulties in managing regular contact with him. He also had his knowledge of the sustained period of absence, where it had been explained to him that the underlying reason for that was understood to be the claimant's perception that he was the innocent victim of unwarranted racial discrimination and that it was this which was causing his continuing absence. Mr Wood was, however, able to ascertain that those matters had been addressed in the course of internal grievances and had been concluded.

14. So he had an employee, the claimant, who was signed off all work by his doctor with no indication of when and if he would be able to return to work, who on the face of it not engaged with attempts by the respondent to assist him throughout that process, and where the rationale for his ongoing failure to return to work was his perception that he was the victim of discrimination and that he did not want to return to an environment he described there as "unsafe". This was rather than it being specifically related to any mental health issues or anything that might properly be addressed by occupational making suggestions as to how his ill health could be accommodated on any actual return.

The Attendance Management Procedure: **the reason for dismissal**

15. So we take particular notice of the rationale given by Mr Wood for his decision which focuses on his judgment that the claimant would not be able to maintain an appropriate level of attendance in the future that was acceptable to the business and which could be sustained by him. In his summary he repeats "the business has tried on numerous occasions to engage with you including occupational health and "rehab work" referrals to assist your return to work. However you have failed to engage and it is my view there is no trust or confidence that you will be able to maintain an acceptable attendance record at this stage." And again, "based on my findings our meeting and the above

summary of the history I found no reason to believe you'll be able to maintain a reliable attendance record. I do not believe you are willing to engage with the business or maintain a reliable attendance."

16. We therefore conclude that this is properly categorised as a dismissal for some other substantial reason. That is the finding that there was no confidence that the claimant, given his previous history and given the reasons for this sustained illness, would be able to sustain acceptable attendance in the future. There is of course a large overlap between some other substantial reason to dismiss him on that basis and a capability dismissal. But on balance we conclude that that is the proper categorisation of this dismissal.

The fairness of the dismissal

17. For those reasons although ordinarily, and certainly on a capability dismissal for long term sickness, we would expect an employer to have up to date medical information as to when the situation may improve that is not the position here. We do not consider that that failure to follow up the suggestion of a further occupational health report in these circumstances, given the failure to attend in May or to address the issues after 3 June at all until the resolution meeting, renders it unfair.

18. We also note that we find that the claimant never in fact put forward any positive proposals or suggestions that he would be able and fit to return to work at any foreseeable date. We find that he did not mention that in the meetings with Mr Wood. Nor did he mention it in his written appeal. And in actual fact he accepted in his evidence that he would still certainly have been unfit to return until after delivery of the earlier Tribunal Judgment, which was in February.

19. So far as the appeal is concerned, although the claimant had raised that in writing, it was never heard and the reason for that is quite clear on the papers. Mr Carter was dealing with that matter and was also dealing firstly with the appeal against the grievance outcome from earlier in the year. When he concluded that first process on Christmas Eve, although we do not have the emails, it is clear he then sought to make contact again with the claimant to invite him to the dismissal appeal meeting under the second process. We certainly note on 7 January he sent an email inviting him to a meeting on the 21st and was waiting to hear that appeal on that date. Again he sought to contact the claimant by email on the 21st, he did not reply nor did he attend, and therefore at the end of the day Mr Carter sent a further email indicating that having not attended that appeal meeting as scheduled by him he was treating this as a withdrawal of the appeal against dismissal. It was therefore the decision that no further action would be taken. It is fanciful to suggest that it was nonetheless unfair for Mr Carter not to have carried out a further attempt at fact-finding in these circumstances, absent any participation from the claimant..

20. We know that the claimant again, whatever his previous difficulties regarding internet access, would and should have be able to access his emails on 21 January because that is the day when he submitted electronically his ET1 claim in these proceedings. We consider it significant that at no point did the claimant, nor indeed his union representative who was assisting at this stage, ever come back to the respondent following those 21 January emails and state that he still did wish to pursue an appeal. And most importantly nor did he ever even at

that stage say the situation had now changed, asserting for instance that "we are now some three months further on, I am in a position where I could consider a return to work and therefore an occupational health referral would be a meaningful exercise whereas it may not have been previously".

21. On that basis we conclude that this is a fair dismissal for some other substantial reason. The respondent, even though Mr Wood took the decision not to request a further occupational health report, was acting in these particular circumstances within the band of reasonable responses open to a reasonable employer.

Direct discrimination; the "reason why" and the appropriate comparator

22. That dismissal was not an act of discrimination. The rationale for the dismissal is clearly related to the capability/ attendance/absence record procedures. There is no factual basis on which we could conclude that the decision to take the claimant down that road was anything to do with his race.

23. It suggested that the failure to monitor these proceedings under any equality procedures, that is to record the fact that the claimant had been dismissed and that he was of Afro-Caribbean origin, is alone a matter from which we could draw that inference. We cannot do so in these circumstances, that is nowhere near sufficient to shift the burden of proof under section 136 of the Equality Act 2010.

24. Nor is the alleged comparator Mr Mohammed in fact appropriate applying section 23 of the Equality Ac 2010. He too had been absent and following a lengthy period had been issued with a first warning. In that respect he appears to be in exactly the same situation as the claimant when he was issued a warning in June 2019. That warning was delivered by hand to Mr Mohammed, because he was at that stage back at work, and in apposition to receive it in this way. A similar notification was given in an appropriate manner which brought it to the attention of to the claimant following his receipt of a warning. It is not less favourable treatment for the claimant to have received entirely different types of communication on other occasions by methods other than hand-delivery simply because Mr Mohammed was given his written warning in person. There is no suggestion that Mr Mohammed was or was not taken down any further attendance management route, and ultimately he left the business some 18 months before the claimant was dismissed. There is no material point of comparison in those circumstances whatsoever.

25. And as we have said there is no reason whatsoever from these facts to suppose that a hypothetical white, or any other race, comparator who was not Afro-Caribbean with the same level of continuous absence from work, the same level of a failure to maintain contact or pursue matters that may have assisted a return and who was equally unable to give any assurance of future attendance would not similarly have been dismissed.

Victimisation

26. Finally we turn to the complaint of victimisation. The bringing of the earlier Tribunal complaints to which we have alluded is certainly the doing of a protected act. The claim is put on the basis that because the claimant had brought those proceedings, which were incidentally still ongoing at the point of termination (the hearing was in December and the decision given in February

the following year) somebody in HR, presumably Mr Stanniforth who is named on the papers, took a decision deliberately to appoint Mr Wood to conduct the resolution meeting because Mr Wood would then dismiss having been told to do so,. Alternatively it was because, as the claimant would have it, Mr Wood had a reputation of being harsh in such circumstances so that HR in the person of Mr Stanniforth thought that by appointing him to that role there was a good chance that he would terminate the claimant's employment, and that would therefore achieve the supposed end of dismissing him because he had brought Tribunal proceedings earlier. That is wildly speculative.

27. What actually happened in this case is that having re-assigned the manager from Miss Simpson to Mr Horner, and Mr Horner having then referred it -as appropriately under the practice if not actually in the written procedures - to his superior manager, he was then still concerned about the continued level of absence. He therefore took advice again from HR and was then given authority to proceed to the resolution meeting. That involved Mr Horner formally placing the matter on the system to be followed up. The reason he did that was clearly because of sickness absence and nothing to do with the earlier proceedings. The process then is that HR review - in conjunction with the manager of the Leeds site, Miss Harrison- who amongst the appropriate level of business managers is available and there is then a decision who to allocate. And it is under that process that Mr Wood was appointed to hear these matters. That is a perfectly proper application of the normal procedures with no basis whatsoever on which we could conclude that there is in fact any underlying manipulative purpose being orchestrated by HR to achieve the desired effect. And of course Mr Wood has given evidence, which we accept, that he was unaware of the details of the early Tribunal complaints, although he knew the generality and explored the matter only in so far as to establish that they had already been dealt with within internal grievances. He expressly stated, which again we accept, that he was not instructed to dismiss. He also denied that he had any reputation for harshness and gave evidence that of those disciplinary or quasi-disciplinary matters that he conducted for this respondent only some 20% of the total had led to dismissal: his answers on these matters which are essentially questions of credit only are to be taken as final.

28. So on that basis having found this to be a fair dismissal for some other substantial reason and discounted any suggestion that the dismissal would also be discriminatory or any act of victimisation all complaints are dismissed.

Employment Judge Lancaster
Date 6th March 2023