



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs D Daisy

**Respondent:** Marks and Spencer Plc

**Heard at:** Leeds (by video)                      **On:** 16 & 17 May 2022

**Before:** Employment Judge Knowles

## Representation

Claimant: Mr Daisy (Claimant's son)

Respondent: Ms B Davies, Counsel

# RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim of unfair dismissal is well-founded.
2. Any compensatory award shall be reduced by 25% under the principles set out in *Polkey v A E Dayton Services Ltd* [1987] IRLR 503.

# RESERVED REASONS

## Issues

1. The Claimant's only claim is a claim of unfair dismissal. The Respondent concedes that the Claimant was dismissed. The Respondent asserts that the dismissal was fair for reasons of capability.
2. The issues for me to determine are:
  - a. What was the reason or principal reason for dismissal?
  - b. If the reason was capability, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
    - i. The respondent genuinely believed the claimant was no longer capable of performing their duties;
    - ii. The respondent adequately consulted the claimant;
    - iii. The respondent carried out a reasonable investigation, including

- finding out about the up-to-date medical position;
- iv. Whether the respondent could reasonably be expected to wait longer before dismissing the claimant;
  - v. Dismissal was within the range of reasonable responses.

### **Evidence**

3. This hearing was undertaken by video using HMCTS's Cloud Video Platform.
4. I heard evidence from Ms Eustace-Forrest, Team Manager of the Respondent's Oatlands Harrogate Simply Food store at which the Claimant was formerly employed. Ms Eustace-Forrest dismissed the Claimant.
5. I heard evidence from Ms Robson, Foods Deputy Store Manager at the Respondent's Teesside Park store. Ms Robson was the appeals officer in the internal proceedings.
6. I heard evidence from the Claimant.
7. Each witness produced a written witness statement.
8. The parties produced a joint bundle of documents (224 pages).
9. References in this reserved judgment to number in brackets are to page numbers in the bundle of documents.

### **Findings of fact**

10. I made the following findings of fact on the balance of probabilities. This is not intended to record all of the evidence which I heard and took into account, it is a summary of the core facts which I found material to the issues.
11. The Claimant began her employment with the Respondent 19 April 2015 and at the time of her dismissal on 24 June 2022 was employed as a Customer Assistant. She worked part-time, 25.5 hours per week. She received a contract of employment upon commencement of employment (59). The Claimant signed the contract 19 April 2015.
12. The Respondent described the Claimant as loyal and hardworking.
13. The Claimant began a period of absence from work due to anxiety and depression on or around 28 January 2021. The Claimant submitted a fit note for 2 weeks (62), followed by another for 1 month (63).
14. On 22 February 2021 the Claimant was invited by letter (64) to a first ill-health meeting with Ms Eustace-Forrest on 25 February 2021. The meeting was undertaken by telephone. At the meeting, the Claimant expressed that her anxiety and depression were caused by the pandemic in general but referred to a specific incident where a customer had been aggressive towards her when she confronted them because they were not wearing a mask in store. Adjustments were discussed to facilitate a return to work. Specifically, they discuss the Claimant not working on the door of the store as a store host which involved controlling the numbers of people entering the store and reminding them to wear a mask. The Claimant was asked whether or not she could think of any other adjustments and replied that she could not. Other health issues were discussed but these were not relevant to the reason the Claimant was absent from work. The Claimant stated that she would feel more comfortable about returning to work once she was vaccinated and did not plan to return in the near future and would get another fit note. The Claimant consented to a referral to occupational health. Weekly telephone check-ins were agreed. Notes of the meeting were taken (65-69).

15. An occupational health report was obtained dated 5 March 2021 (70). The Claimant is recorded as having informed the OH physician of not feeling protected in the workplace, referring to the incident with the customer who was aggressive towards her and to an armed robbery some time ago. Concerns over COVID-19 were also relayed. The OH report gives the following opinion and advice:

*“OH Opinion*

*Deborah engaged well with the consultation process and provided a clear history of the issues she perceives are preventing her from returning to work. When describing her safety concerns at work there was a noticeable change in her voice and tone. She raised her voice and spoke more quickly. This resulted in her raising questions which were not relevant to the OH reason for her call. Using a well validated mental health evaluation tool, Deborah is exhibiting symptoms associated with severe depression and anxiety. She is on clinically appropriate treatment for these conditions but are not fully effective. During the assessment today, her history would suggest that she could be revisiting distressing thoughts and feelings from the armed robbery or other incidents where she felt under threat. This is likely to be impacting on why she doesn't currently feel safe in work despite strict covid preventions measures in place. It is likely the anxiety around covid safety is exacerbated by some unresolved issues from the past and could include the armed robbery and issues she alluded to in the past. She has been encouraged to re-engage with PAM assist to support her exploring these further. I have arranged for the results of her mental health evaluation test to be forwarded to her GP for their information. Deborah appears to be exhibiting unusually high levels of anxiety working in store and it is my opinion these are not just related to the current covid pandemic.*

*Management Advice*

*Based on the assessment and information provided in the telephone consultation today if operationally feasible the following advice has been given in response to the questions on the referral. It is my advice that Deborah remains unfit for work and I am unable to advise on any additional modifications which could expedite a return to work in the foreseeable future. I understand you have offered reasonable adjustments such as no covid host duties where she would be placed at the door. My understanding is there are screens face coverings and access to hand sanitising gel. One-way systems and monitoring customer numbers in store to reduce the risk of exposure to covid. She appears to be exhibiting abnormally high anxiety levels and is due to engage with EAP services to help her deal with the cause of her symptoms. This employee is not fit for work in any capacity at present and timescales for recovery are unclear, therefore it is unlikely that a return will be feasible in the reasonably foreseeable future. Should the business have exhausted all reasonable support and all reasonable adjustments have proven unsuccessful, I would recommend formal consideration for ill health retirement with submission of the relevant pension scheme documentation. You may wish to allow her 4-6 weeks to engage with support services before making a decision on how to manage this absence should she still not return to work in some capacity.”*

16. On 11 March 2021 a second ill-health meeting took place by telephone. Notes of the meeting were taken (72-75). The discussion began with an update on the Claimant's other health conditions for which she had received some treatment (these are not relevant to the Claimant's reasons for absence from work). The Claimant referred to engaging with the Respondent's well-being support line PAM Assist over her mental health. She confirmed that she had read the OH report and described it as very fair. The Claimant stated, in line with the OH report's record, that she did not feel supported to come back to work. They agreed to continue the weekly check-in calls and to meet again in 2 weeks.

17. The third ill-health meeting took place on 8 April 2021 after a brief delay due to Ms Eustace-Forrest being absent due to illness. Notes were taken (78-80). The conversation again began with a general update on the Claimant's other health issues. The Claimant confirmed that she had been referred to 6 counselling sessions by PAM Assist. The

Claimant advised that she would be obtaining another fit note and was too anxious to think about returning to work. The Claimant referred to a third in-store incident involving her confronting a shoplifter.

18. The Respondent wrote to the Claimant on 19 April 2021 (82-83). In the letter the Respondent stated the following:

***“Outcome of Ill Health Meeting***

*Thank you for meeting with me to discuss your health condition on Thursday 8th April . You declined to be accompanied at the meeting.*

*At the meeting we discussed the following:*

- *You updated me on your other ongoing health issues.*
- *That you are waiting for an appointment to see the neck surgeon and are also waiting for an MRI all linked to this.*
- *After your camera down your throat you are being referred for another procedure to see further down into the stomach. This is due to your recent weight loss.*
- *You have also had a scan on your chest, pelvis and stomach.*
- *After speaking to the OHA on the 5th March. Her recommendations were you engage with support services. You have spoken to PAM and they have advised counselling of 6 sessions. However this won't happen for a few weeks.*
- *The OHA report says you are not fit for work in any capacity and there are no adjustments we can make to get you back to work.*
- *I have discussed making adjustments to working hours and jobs you do in the shop to support your return to work but all of these have been declined.*

*In the meeting, I explained that I would like to support you to return to work and will consider providing any reasonable additional support that you feel is required to complete your role effectively.*

*However, we also discussed that if your absence continues at the current level and/or worsens then one of the possible outcomes of this process could be that I decide to dismiss you on the grounds of your incapability to return to work in the future due to ill health.*

*You can speak in confidence to our wellbeing specialists called PAM Assist. They can provide confidential guidance about wellbeing including your mental, physical, emotional and financial health.*

*For more information;*

- *Call PAM Assist on 0808 196 8196*
- *Live Chat at [www.pamassist.co.uk](http://www.pamassist.co.uk)\**
- *Download PAM Assist App from your App Store*
- *Visit the PAM Assist website\* for lots of wellbeing resources.*
- *Username: M&S Password: M&S!*

*Also, the Unmind wellbeing app is full of easy to use expert tools including sleep and stress resources. You can share access with a family member or friend too. Download it from your App Store or visit [marksandspencer.unmind.com](http://marksandspencer.unmind.com).*

*I will be in contact to arrange our next meeting. If you have any questions in the meantime, please contact me on 07813143537, or contact me directly on Teams.”*

19. A fourth ill-health meeting was arranged for 6 May 2021 (86-90) and again took place by telephone. Adjustments were again discussed but the Claimant declined any attempt to return to work at this stage. At this meeting, Ms Eustace-Forrest appears to suggest that the Claimant did not want to be contacted about the incidents at work owing to the advice from PAM Assist but the Claimant makes it clear that she does want to know what has happened to the customer who was aggressive towards her when she confronted him over not wearing a mask. The Claimant also recites all three incidents at work she has previously brought up concerning her safety. A further occupational health referral is agreed.

20. The second occupational health consultation did not take place as planned on 19 May 2021 because the Claimant was in a public place when the call took place.

21. On 20 May 2021 the Respondent wrote to the Claimant (92-93) concerning the fourth ill-health meeting as follows:

***“Outcome of Ill Health Meeting***

*Thank you for the meeting with me via the telephone to discuss your health condition on Friday 14th May 2021. In your invite letter you were given the option to have an accompanying person, you declined to be accompanied at this meeting.*

*At the meeting we discussed the following:*

- You have been off sick since the 21st January 2021 and we have received another sick note which is until the 12th June 2021.*
- You gave me update on your current condition and confirmed you have had to increase the dosage to the highest amount (200mg) for this type of (Anti-Depressant?) medication.*
- You made me aware the medication is making you feel dizzy, have less energy and is causing you not to sleep well.*
- We discussed your upcoming appointments. You have a telephone appointment with a sociologist on the 19th May 2021 and that you are waiting to get an appointment with PAM.*
- You will have six weeks of therapy with PAM and feel positive from this.*
- You are seeing the doctor face to face on the 24th May 2021 to discuss the pain in your ankles and lumps on your legs, these are caused by the gastric inflammation tablets. You also have an MRI scheduled for Monday 17th May 2021 to investigate the lump on your lower back.*
- The Berum meal procedure has been cancelled 4 times now and you are trying to book it back in next week.*
- I asked you if you have had your covid vaccine yet and you confirmed to me you had the first dose, but not the second one yet.*
- You discussed that you are at the skin clinic on Tuesday 18th May 2021 due to the Basal cell problems. The clinic will investigate and there is a possibility they may need to cut them out.*

- **You are trying not to think about work as it causes your anxiety to go through the roof. You feel vulnerable being in the store and feel that we have not acted and dealt with abusive customers appropriately.**
- *I asked you if we could support or adjustments in place to help you return to work and you advised there isn't. You want to come back to work but are unable to give any timescales for a return.*
- *We have agreed I will re-refer you back to Occupational Health for further support.*

*In the meeting, I explained that I would like to support you to return to work/remain in work and will consider providing any reasonable additional support that you feel is required to complete your role effectively.*

*However, we also discussed that if your absence continues at the current level and/or worsens then one of the possible outcomes of this process could be that I decide to dismiss you on the grounds of your incapability to return to work/fulfil your role in the future due to ill health.*

*You can speak in confidence to our wellbeing specialists called PAM Assist. They can provide confidential guidance about wellbeing including your mental, physical, emotional and financial health.*

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- *Download PAM Assist App from your App Store*
- *Visit the PAM Assist website\* for lots of wellbeing resources.*

*\* Username: M&S Password: M&S!*

*Also, the Unmind wellbeing app is full of easy to use expert tools including sleep and stress resources. You can share access with a family member or friend too. Download it from your App Store or visit [marksandspencer.unmind.com](http://marksandspencer.unmind.com).*

*I will be in contact to arrange our next meeting. If you have any questions in the meantime, please contact me on [PHONE NUMBER], or contact me directly on Teams.”*

22. I have emboldened a paragraph above because I note that a brief mention is made to the Claimant feeling vulnerable. However, most of the fourth consultation was taken up by the Claimant complaining about the lack of action over the incidents she had referred to previously as happening to her at the store and making her feel vulnerable. Ms Eustace-Forrest omits any reference to what she is proposing to do about these matters although it is clear from the content of the discussion at the fourth consultation that these are the matters that the Claimant is stating are preventing her from returning to work.

23. The second occupational health consultation takes place 14 June 2021 and a report delivered. The report says the following about current issues:

**“Current Issues**

*Deborah reports that the referral is not correct in stating she has stress as she has anxiety and depression. She states that she is taking medications for the past year and she increased the medications 2 months ago and they are not effective. She states that she is having lapp which is an online course, and her GP has given her other therapies via work but this has not started as she is already accessing IP she will not have two. She states that she found the session helpful and she has her second one tomorrow and this is*

*ongoing for 6 to 8 weeks. She states that she will see how she feels when that has finished before returning to work. She states that she feels that her mental health has been affected by a customer coming into the store and verbally abused her and she feels that management have not addressed it and this affected her mental health and has brought back and past incident in the store.”*

24. However, the report does not envisage a return to work and that further interventions and that no further adjustments would expedite a return to work.

25. The Claimant is invited to a fifth ill-health meeting on 24 June 2021 (96). Notes were taken (97-102).

26. The Claimant states that she does not have a copy of the latest report from occupational health. The conversation begins by discussing some of the Claimant's other health conditions.

27. The Claimant repeats that she would feel nervous about returning to work. Ms Eustace-Forrest tells the Claimant *“I have been able to understand and get clarity from Dan and Sam about what happened with the customer. I wanted to update you as you have mentioned it in every meeting. I am not able to disclose the outcome of this incident due to GDPR. In meeting 3 on the 8<sup>th</sup> April PAM told you not to think about work and completely switch off to aid your recovery. I therefore haven't discussed this incident and the outcome as I was adhering to what you wanted and what PAM suggested. I didn't speak want to speak to you about it and cause more upset – that's not my role. My role as a line manager is to support you”*.

28. The Claimant states that this feels “shady” and a discussion ensues about how the Claimant originally reported concerns about the customer. However, Ms Eustace-Forrest states that *“It is difficult to disclose any more apart from I have followed up the incident”*.

29. The Claimant refers to the robbery and shoplifter incident. Ms Eustace-Forrest say nothing about these incidents other than “There is not really much else I can add to the what I have said about the incident” and “all of this info is in the previous meetings”.

30. After an adjournment, the Claimant is dismissed on the grounds of her incapacity to return to work in the foreseeable future due to ill-health. The Claimant is asked if she has any questions at this point and replies *“The reason I am off is due to the situation at work”*.

31. There is a dispute about whether or not the Claimant had receive the second occupational health report. I find that she had not, but that it was read to her at the final meeting and she did not disagree with the contents.

32. The Claimant receives a letter of dismissal dated 25 June 2021 (103-104). The letter records the Claimant's absence levels, being unable to provide a return date and there being no adjustments that could be made at this time to support the Claimant in returning to work.

33. The Claimant is then sent a second letter dated 25 June 2021 (105-107) which states the following:

*“We discussed your mental health and you told me you had sessions every Tuesday with IAPT and have three sessions remaining. You made me aware that no change had been made to your medication and it is currently the highest dose they can give you. You explained that on some days you struggle to get out of bed and on a good day you will bake, but you feel you are surviving most days. I asked how you felt about returning to work, you told me you'd been signed off until the 10th July 2021 and wasn't sure, as it made you nervous.*

*In your past meetings you raised the incident with a customer that happened in store, that*

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*PAM had suggested you not think about work and switch off to aid your recovery. I had followed this advice to try and support you with your recovery, but I had followed up with the incident. You explained to me you'd raised this as a verbal complaint and Dan had discussed that we could give the customer a warning and if the behaviour continued, we would ban him. I explained to you there wasn't anything further I could disclose to you.*

*We discussed your recent Occupational Health report (OH) and you confirmed you agreed with the contents of the report. I talked through the adjustments I could offer you such as a change of hours and adjusted duties. Your recent OH report confirmed there was no adjustments we could currently make to support you in a return to work. I made you aware that you have been absent now for 565.75 hours which is an absence percentage of 86%.*

*To make my decision, I considered:*

- You have been absent from work since 21st January due to anxiety and depression which totals 565.75 hours which is 24.48 weeks.*
- Your company sick pay entitlement of 13 weeks has now exhausted due to the length of absence*
- This level of continued absence from work is not sustainable for the business to continue to support. The operational needs of our store means we need all colleagues to attend work regularly or it has an effect on the service we provide to our customers.*
- Your absence impacts the customer service that the business is able to offer our customers and adds additional pressure to your colleagues in the store/team.*
- We discussed the detail from both OH reports. The first report was conducted on the 5th March 2021 and stated you remained unfit for work and confirms that all reasonable adjustments had been offered to support you back to work. It confirmed that it was unlikely that you would return in the foreseeable future.*
- The 2nd OH report conducted on the 14th June 2021 concurred with the first one, that you are unfit to return to work in any capacity and it was not possible to predict a return date. It also advised that your current mental health will impact on your ability to carry out duties at work.*
- We discussed that there were no further adjustments that could be made at this time to support you return to work.*

*We have previously discussed what adjustments could be put in place to support you, or whether a transfer or alternative role might enable you to return to work in any capacity within the near future. We discussed these again at this meeting and confirmed that we have exhausted all reasonable options to enable you to return to work in any capacity."*

34. Ms Eustace-Forrest does not specify what follow up she had undertaken during the internal proceedings in terms of looking into the three incidents what the Claimant had referred to in their meeting (the abusive customer, the robbery and the shoplifting incident). In March 2022 she states that she found notes of conversations with Sam Haigh (Store Manager) and Dan which are 2 pages entitled "additional disclosure". The documents are undated and Ms Eustace-Forrest stated that they would have been records of conversations in or around March or April 2021. Both refer to the Claimant not having raised a formal complaint at the time of the incident with the aggressive customer. The statement from Sam contains more detail and refer to the matter being raised with him 6 weeks after the event and by this time they would not have any CCTV evidence.

35.



36. On 7 July 2021 the Claimant emails an appeal against her dismissal (108-109). The appeal is in summary suggesting that the Respondent has treated the Claimant unfairly through not protecting her at work.

37. Ms Robson met with the Claimant by telephone call on 30 July 2021. Notes of the meeting were taken (114-117). They discussed the Claimant's health and the Claimant explained that although she had a number of health conditions none of those were stopping her returning to work. They discussed the customer incidents.

38. Ms Robson interviewed the Store Manager Sam Haigh on 17 August 2021 and notes of the interview were taken (110-113). Mr Haigh stated that the robbery occurred 5 years ago, the Claimant had not witnessed the robbery and that no-one had ever said the intruder was armed. Mr Haigh confirmed that he was aware of the incident in November 2020 involving an aggressive customer because the Claimant raised it during an absence call that he had with the Claimant in January 2021. He states that he followed the issue up with Mr Dan Tonks who confirmed that the Claimant had raised the issue later in the day and that he had confirmed to the Claimant that they could follow it up if the customer returned to the store and continued to be disruptive. Mr Haigh said he had spoke to the Claimant at the time of the other incident involving a shoplifter at which time he told the Claimant that she should not have chased him from the store to the bus.

39. Ms Robson upheld the decision to dismiss by letter on 18 August 2021 (118-121).

40. In terms of the Claimant's appeal that the decision to dismiss was unfair Ms Robson recites the Claimant's health issues at the time of dismissal and the occupational health reports and concludes that *"I believe from all the evidence that it was a fair dismissal, and the appeal point is not upheld as you confirmed you were not fit to work with no return date soon and no reasonable adjustments could be made. You can reapply for a role at M&S in future when you are fit and well to return to work."*

41. In relation to the aggressive customer and earlier robbery Ms Robson recites the information provided to her by Mr Haigh and concludes *"I sympathise with the way these incidents have affected you however I am satisfied that these incidents were dealt with appropriately so therefore this appeal point is not upheld."*

42. In relation to the Claimant's appeal on the grounds that it is not her job to deal with shoplifters and M&S should employ security guards Ms Robson recites Mr Haigh's information concerning his discussions with the Claimant over handling customer thefts and noted that the Claimant had swapped her door host duties with her son because she disliked doing that role. Ms Robson concluded *"I have listened to what you have said relating to security issues, but I cannot see the relevance of this to your appeal."*

43. Ms Robson finally confirms that she believes the Claimant has been listened to and heard during the internal processes.

44. There were no further internal process stages and the appeal outcome concluded the Claimant's dismissal.

45. Although the Respondent has produced a standard operating procedure for dealing with external crime, there was no evidence of specific training in this, or in handling abusive customers, in the Claimant's case. There is no evidence before of recording threats to staff or any specific processes for reporting abuse to staff.

## **Submissions**

46. The Claimant submitted that the reason for dismissal was capability but that the Respondent had conflated the Claimant's other medical conditions with the illness for which she was absent, which was anxiety and depression and that this had contaminated

their decision.

47. The Claimant submitted that various lines of investigation were not taken. No report had been prepared which is required under their SOP for dealing with external crime. The Claimant had received no training in handling external crime. Neither the dismissing or appeals officers check if the Claimant had received training.

48. The Respondent asserted that the Claimant did not make an official complaint. There is no evidence of whether she had been trained on making an official complaint. On 2 incidents the Claimant complained to the store manager. The Respondent has not explained why they were not taken to be official complaints. The Respondent only investigated after the Claimant was dismissed.

49. Although the number of meetings is indicative of the Claimant being adequately consulted from the interview notes it can be seen that they did not discuss the investigations due to vague reasoning concerning GDPR. Throughout the process, the Claimant raises incidents, workplace violence, and the Respondent clearly failed to establish the facts and investigate those incidents which led to the absence and perpetuate the absence. This was not even close to a reasonable investigation.

50. The Respondent failed to consider reasonable adjustments, stopping shoplifters, locking the doors after hours, investigating her complaints, and there could have been a return to work. These should have been in place according to their SOP. The Respondent showed no interest in the Claimant's welfare or her return to work.

51. The Respondent failed to provide the second occupational health report to the Claimant before the dismissal and appeal meetings. If the Respondent had given the Claimant the opportunity, she would have disagreed with the report at least in so far as reasonable adjustments were concerned.

52. The Respondent has not given evidence as to the scope of the OH referrals. These were contaminated by false narrative concerning COVID-19 and there was no consideration of issues relating to work related violence.

53. The Claimant submitted that the Respondent did not act reasonably, the Claimant was not treated fairly. The Respondent has failed on each issue in the list of issues. They should have waited longer, dismissal was not within range of reasonable responses. This has taken a toll on the Claimant, her anxiety and depression deteriorated. The Claimant hopes the Respondent takes lessons from this, implements health and safety improvements and trains staff on violent customers and crime.

54. The Respondent produced written submissions and supplemented those verbally during the hearing.

55. The Respondent submitted that it does not matter whether or not the Respondent caused the absence, that is not the question. It is relevant. But if the Respondent did cause it, that is not the end of the analysis.

56. A finding that an employer was in any way responsible for the employee's illness, is not determinative of fairness, as per *Royal Bank of Scotland v McAdie* 2008 ICR 1087, CA.

57. There is genuine belief and the Claimant has not put forward an alternative. She accepted there was no alternative reason. The dismissing officer clearly understood that the Claimant was saying she was not able to work due to mental health. COVID-19 did form part of it. It was part of the reason for her anxiety.

58. There were 5 consultation meetings. Policy allows dismissal after 3. There were 2 OH reports. 9 telephone calls. There was a lot of contact. The meetings were in depth,

Ms Eustace-Forrest was attempting to get information about her conditions and adjustments.

59. The occupational health reports raise no reasonable adjustments concerning workplace violence. Occupational health experts could not find a reasonable adjustment. This is consistent with Claimant's evidence at page 88, the damage already been done.

60. It is incorrect to suggest that the occupational health reports contain no information about customer violence; see page 70, flashbacks, "not related to COVID pandemic". The second report also has specific reference to a customer being abusive. Yet there was no customer violence tailored advice given; occupational health could not find any.

61. The impact of the second occupational health report not being sent to the Claimant by the Respondent is minimal. There is a record of the Claimant having requested an amendment to the report.

62. The Claimant did not challenge the record of the report having been read to her.

63. What is the Respondent investigating? It is not a grievance. They speak to the managers and looked at the support given. Going and looking at CCTV; there is nothing to be gained from this. Nothing gained from speaking to an individual about the abusive customer, Dan was the manager she had been speaking to about it.

64. At no point does the Respondent challenge what she says. Ms Robson accepts that this was traumatic.

65. Investigations did take place before dismissal, see additional disclosure documents 1 and 2.

66. PAM Assist advised that the Claimant shouldn't discuss the incidents involving customers. That was Ms Eustace-Forrest's understanding. See page 87.

67. At the penultimate ill-health meeting, Ms Eustace-Forrest seeks to follow that up when the Claimant permits. Her ability to communicate the outcome was curtailed, because she received advice that would be a breach of GDPR. There is no suggestion of any ulterior motive. It was not unreasonable to follow the advice received.

68. Any issues at dismissal stage could be and were resolved at appeal stage.

69. The question is was this reasonable, did it fall within the band of reasonable responses. The Claimant had 21 weeks absence. There are clear occupational health reports suggesting no reasonable adjustments. The Claimant was saying she was not fit. She said there was no foreseeable end to her absence. She had exhausted company sick pay. There is a clear policy on absences. The Claimant had 86% absence. There were difficulties covering her absence. This was a 5 month absence. Supermarkets were at the time busy and had staffing problems. In that circumstance this was a reasonable dismissal.

70. In relation to Polkey, it remains the case the C would have been dismissed. Clear occupational health evidence, the Claimant's own comments, on page 88, "nothing you can do, damage is done". Without the abusive customer being banned, she could not return to work. Deduction, time to do a better inv, 2 weeks to a month.

## **The Law**

71. Section 98 of the Employment Rights Act 1996 sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages.

72. First, the employer must show the reason for the dismissal and that it is one of the five potentially fair reasons set out in sections 98(1) and 98(2).

73. Second, provided the respondent is successful at the first stage we must then consider whether the employer acted reasonably in dismissing the employee for that reason under section 98(4).

74. A reason for dismissal is a set of facts known to the employer or belief held by him which caused him to dismiss the employee (**Abernethy v Mott Hey & Anderson [1974] IRLR 213 CA**).

75. It is sufficient that the employer genuinely believed on reasonable grounds that the employee was incapable of work. The employer does not have to prove that the employee was in fact incapable of work (**Alidair Limited v Taylor [1978] ICR 445 CA, DB Schenker Rail (UK) Limited v Doolan (2010) UKEAT-0053-09**).

76. Where an employee has been absent long term, the Tribunal must also consider whether the employer can be expected to wait longer for the employee to return (**Spencer v Paragon Wallpapers Limited (1977) ICR301**). In the case of **BS v Dundee City Council (2013) CSIH91** as applied in **Monmouthshire County Council v Harris (2015) UKEAT/0010/15** it was indicated that the following factors may be relevant in how long an employer may be expected to wait:-The likely length of absence; The fact that the employee has exhausted sick pay; The cost of continuing to employ the employee, the size of the employee and the size of the employing organisation.

77. A fair procedure is essential. This requires consultation with the employee; a thorough medical investigation (to establish the nature of the illness or injury and its prognosis); and consideration of other options; in particular, alternative employment within the employer's business.

78. If an employer is in any way responsible for the employee's illness, this is a matter which may be taken into account and whilst the employer may be expected to "go the extra mile" it is not the case that dismissal will always in such circumstances be unfair (**Royal Bank of Scotland v McAdie 2008 ICR 1087, CA**).

79. Fairness is to be judged at the end of internal processes and as per **Khan v Stripestar Ltd UKEATS/0022/15**, there are no limitations on the nature and extent of the deficiencies in a first stage dismissal process that can be cured by a thorough and effective appeal

80. If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd [1987] IRLR 503, HL**. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event. The question for the Tribunal is whether this particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the Claimant in any event had the unfairness not occurred.

## **Conclusions**

*What was the reason or principal reason for dismissal?*

81. I note that in this matter, in evidence, the Claimant has not suggested that the reason for her dismissal was anything other than her capability.

82. The Respondent has consistently asserted that the Claimant's capability was their reason for dismissal.

83. I am satisfied that there was no other reason for dismissal and that capability was

the only reason for the Claimant's dismissal. I find that there were no other matters in the Respondent's mind at the time the decision to dismiss was taken.

*Did the respondent genuinely believe the claimant was no longer capable of performing their duties?*

84. I am satisfied from hearing the evidence of the dismissing and appeals officers that their belief that the Claimant was no longer capable of work was genuine. They both reached that conclusion taking into account the Claimant's length of absence, her comments that she could not say when she could return to work and the occupational health advice that there were no reasonable adjustments that could facilitate a return to work.

*Did the respondent adequately consult the claimant?*

85. There were frequent and regular telephone contacts made with the Claimant throughout her absence and five formal ill-health meetings in this matter. Several meetings were set out in writing to the Claimant and she was provided with the notes. The consultation was in my conclusion adequate.

*Did the respondent carry out a reasonable investigation, including finding out about the up-to-date medical position?*

86. Whilst the Respondent took occupational health advice twice and discussed the employee's health with her at length, the Claimant's main complaint about her dismissal (both during the internal proceedings and at this tribunal hearing) is that they did not do anything to protect her from harm at work.

87. The Respondent's investigation into the matters concerning personal safety which the Claimant had raised was to speak to the Store Manager and Team Manager. Ms Eustace-Forrest did not share that fact with the Claimant.

88. The letter of dismissal makes no mention of the discussions having taken place. The letter of dismissal merely recites what the Claimant had said about the aggressive customer.

89. It is unclear when the interviews, noted in the additional disclosure, took place and when the notes of them were recorded.

90. What is clear is that Ms Robson interviewed the Store Manager about the personal matters that the Claimant was saying had caused her illness.

91. Whilst I am satisfied that a reasonable investigation had taken place, what I note about it at this stage and will deal with further below is that the Claimant is not aware of the outcome of the investigation into the personal safety issues until she receives the appeal outcome letter from Ms Robson.

92. Ms Eustace-Forrest had hidden behind GDPR issues as meaning she could not tell the Claimant anything else. Whilst it has been submitted to me that it was reasonable for Ms Eustace-Forrest to follow the advice she had received, there has been no suggestion that the advice she received was correct. Certainly, Ms Robson did not feel so constrained and did engage with the outcome of the investigation into the personal safety matters in the appeal outcome letter.

*Could the Respondent reasonably be expected to wait longer before dismissing the claimant?*

93. In my conclusion the Respondent could, in these particular circumstances reasonably be expected to wait longer before dismissing the Claimant.

94. There had, even at the point the conclusion of the appeal, been no engagement with the Claimant about the outcome of the investigation into the personal safety issues she had raised or what might be done in future to ensure that she might feel safer in returning to work.

95. The investigation outcome is only shared with her, for the first time, by letter at the point the internal proceedings were closed.

96. In this case, the Respondent faced a claimant who was absent from work for 5 months due to anxiety and depression and on any reading of the information before the Respondent was clearly stating that the cause of her anxiety and depression was her safety fears at work.

97. These matters were put beyond any reasonable doubt by the Claimant when she made it clear she wanted to know what had been done about the aggressive customer at her fourth ill-health meeting.

98. These were specific and direct reasons for ill-health which were being cited by the Claimant as being the factors causing her absence from work. Her comments made directly to the Respondent were in line with what she had told the occupational health physicians.

99. It appears to me inevitable that the Respondent could reasonably have been expected to wait longer before dismissing the Claimant because it could have reasonably been expected to engage with the Claimant over the outcome of the investigation and explored with her what steps might have been taken to overcome her safety fears in that light of the outcome of that investigation.

*Was dismissal within the range of reasonable responses?*

100. In my conclusion, no reasonable employer would have chosen to dismiss the Claimant in these particular circumstances.

101. The ultimate conclusion that the Claimant receives from the Respondent is that the appeals officer felt that the instances of the aggressive customer and robbery were dealt with appropriately and the shoplifting incident was not considered relevant to her appeal. These conclusions were entirely looking backwards.

102. The Respondent has not disputed that the Claimant is unwell or suggested in any way that her asserted reasons for becoming unwell (fears for her personal safety at work) are untrue.

103. It was in my conclusion outside of the band of reasonable responses which might have been adopted by an employer acting reasonably to dismiss without sharing the findings about the issues she had raised in relation to her personal safety and engaging with the Claimant about how her personal safety fears may be addressed in future.

104. In those circumstances, the Respondent did not act reasonably in all the circumstances in treating capability as a sufficient reason to dismiss the claimant.

105. It is not for me to comment upon how the Respondent might have taken steps to address the Claimant's safety concerns. I am surprised that those matters were not explored with the Claimant given that the Respondent is a well-resourced retailer in the UK and given that the plight of shopworkers and the abuse they suffer at work is generally well known.

106. For the purposes of Polkey, I accept that the Respondent might have dismissed the Claimant in any event after exploring with the Claimant what might have been done in future to address her anxiety over her personal safety caused by the events that had

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occurred in the past. I do not consider that prospect high, given that all that was required was earlier investigation into the matters she stated caused her ill-health, sharing with her the outcome of the investigation into the matters in the past and exploring with her how her fears for her personal safety may be overcome in future. I assess the likelihood of dismissal in any event as 25% and therefore any compensatory award should be reduced by that percentage.

Employment Judge Knowles

27 June 2022