



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

v

Miss D Sinnott

Royal Mail Group Limited

**Heard at:** Watford

**On:** 6 November 2019

**Before:** Employment Judge Loy

**Appearances**

**For the Claimant:** Mr Berry, CWU

**For the Respondent:** Miss Roberts, Weightmans LLP

## JUDGMENT

The judgment of the Employment Tribunal is that the Claimant's complaint that her dismissal was unfair is not well-founded.

## REASONS

### The Claim

1. This is a claim of unfair dismissal. The claimant was employed by the respondent between 10 August 2016 and 24 November 2018 as a postperson doing, amongst other things, the delivery and collection of mail.

### The Dispute

2. The claimant was dismissed because the frequency of her absences hit trigger points in the respondent's Attendance Policy. The Attendance Policy is collectively agreed between the respondent and CWU, its recognised trade union.
3. There is no dispute between the parties that the trigger points in the Attendance Policy were reached at each stage, specifically at Attendance Review 1, Attendance Review 2 and on Consideration of Dismissal. The claimant's complaint is about the application of the Attendance Policy to her personal situation. She makes the following specific criticisms in her claim form.
  - 3.1 There were no informal meetings;
  - 3.2 The Welcome Back meetings followed a "tick box" approach;

- 3.3 Attendance review 1 and Attendance Review 2 were formalities, approached mechanistically by the respondent and without regard for the general principles of the Attendance Policy;
- 3.4 Little or no guidance was given to her;
- 3.5 No reasonable employer could dismiss her given the mitigation she provided regarding certain of her absences.

### The Issues

- 4. The issues to be determined by the Tribunal are as follows:
  - 4.1 Was the claimant dismissed? The respondent accepted that she had been.
  - 4.2 Has the respondent shown what was the reason for the claimant's dismissal? The respondent asserted some other substantial reason.
  - 4.3 Was that reason a potentially fair reason within sections 98(1) or (2) of the 1996 Act? The claimant accepted both that this was the respondent's genuine reason of dismissal and that it was a potentially fair reason.
  - 4.4 If the reason was a potentially fair reason for dismissal, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for the dismissal of the claimant in accordance with section 98(4) of the 1996 Act remembering that neither party now has a burden of proof in that regard?

### The evidence and submissions

- 5. It was accepted by the respondent that in all respects other than her absence record, the claimant's performance in her job was entirely satisfactory. The respondent also made clear that it did not doubt that her absences were for anything other than genuine reasons. As Nicola McLelland, the manager responsible for the claimant, put it in evidence, "there was no issue whatsoever with the standard of the claimant's performance in her job."
- 6. The claimant focussed predominantly on the mitigation issue at the hearing.
- 7. The claimant gave evidence on her own behalf. Nicola McLelland, the dismissing officer, and Geoff Kyte, the appellate officer, gave evidence on behalf of the respondent. A bundle of documents running to 153 pages was referred to.
- 8. In support of the claimant, Mr Berry submitted that the respondent acted unreasonably by failing to discount three absences. Had these absences been discounted the claimant would not have been dismissed under the Attendance Policy. Mr Berry relied on the authority of the EAT decision in **Royal Mail Group Plc v Mr Smith, UKEAT/0715/03**. That was a case

which the employer lost for failing to take into account the employee's mitigating circumstances. Mr Berry says the current case falls into the same error.

9. The claimant identifies these three absences:
  - 9.1 Absence on 20 May 2017 related to toothache following an extraction. She says she took every effort to avoid having to take time off work but through circumstances out of her control she had to accept an emergency appointment. No reasonable employer, she says, would not have discounted this absence;
  - 9.2 Absence on 7 June 2018 related to sunstroke suffered while at work. She says this was an injury arising from her work and that no reasonable employer would have failed to discount it; and
  - 9.3 Absence on 17 August 2018 related to an underlying ear condition. No reasonable employer would have failed to discount this absence.
10. The respondent essentially says that it followed the collectively agreed policy. The policy reflects the fundamental need for the delivery of the service to meet the respondent's obligations. The trigger points in the policy were reached. The policy was properly followed. Every opportunity was provided to the claimant to explain her absences. All the claimant's explanations were considered, including points in relation to mitigation. The claimant was dismissed only after full consideration was given to all aspects of the case including the background to the material absences.
11. In summary, the respondent's case on the three absences in question is this:
  - 11.1 There were alternatives open to the claimant regarding her toothache. She could have asked for her hours to be re-arranged to avoid missing work; she could have taken annual leave; she could have arranged an appointment the same day after her 2pm finish time;
  - 11.2 The claimant's sunstroke is not work related in any meaningful sense. She could have worn appropriate clothing on the day in question to avoid the problem arising in the first place; and
  - 11.3 The claimant's earache can reasonably be treated as not being an underlying medical condition.
12. In overall terms, the respondent says it did consider all the mitigation in question but that it did not consider it enough to warrant a sanction other than dismissal.

## **The Law**

13. The principal statutory provisions that are relevant to the issues in this case are contained within the 1996 Act and are set out below:

14. Section 94(1) the right:

14.1 “An employee has the right not to be unfairly dismissed by his employer.”

15. Section 98 General:

*A fair reason*

15.1 Section 98(1): In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and

15.2 Section 98(1) (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

*Fair or unfair*

15.3 Section 98(4): Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)

15.3.1 Section 98(4)(a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

15.3.2 Section 98(4) (b) shall be determined in accordance with equity and the substantial merits of the case.

**Application of both the facts and the law to determine the issues**

*What was the reason for dismissal and was it a potentially fair one?*

16. As is set out above, the claimant accepts that the respondent has a fair reason for dismissal under section 98(1)(b), namely some other substantial reason of a kind such as to justify the claimant’s dismissal. The factual basis for this reason for dismissal, which was also agreed between the parties, was that the claimant’s short term but frequent absences triggered the three-stage process which can lead to dismissal in the collectively agreed Attendance Policy.

17. I now turn to consider the question of whether (there being no burden of proof on either party) the respondent acted reasonably as is required by section 98(4) of the 1996 Act. That is a convenient phrase but the section itself contains three overlapping elements, each of which the Tribunal must take into account:

18. First, whether, in the circumstances, the respondent acted reasonably or unreasonably;
19. Secondly, the size and administrative resources of the respondent;
20. Thirdly, the question “shall be determined in accordance with equity and the substantive merits of the case”.
21. In addressing ‘the section 98(4) question’, I am alert to two preliminary points:
  - 21.1 First, I must not substitute my own view for that of the respondent. In **UCATT v Brain [1981] IRLR 224** it was put thus: “Indeed this approach of Tribunals, putting themselves in the position of the employer, informing themselves of what the employer knew at the moment, imagining themselves in that position and then asking the question, “Would a reasonable employer in those circumstances dismiss”, seems to me a very sensible approach –subject to one qualification alone, that they must not fall into the error of asking themselves the question “Would we dismiss”, because you sometimes have a situation in which one reasonable employer would and one would not.” This approach has been maintained over the years in many decisions including **Iceland Frozen Foods** (re-confirmed in **Midland Bank v Madden [2000] IRLR 288**) and **Sainsburys v Hitt [2003] IRLR 23**.
  - 21.2 Secondly, I am to apply what has been referred to as the ‘band’ or ‘range’ of reasonable responses approach to my assessment of whether I consider that the respondent did act reasonably in all the circumstances: see **Iceland Frozen Foods Limited -v-Jones [1982]IRLR 439**, **Post Office v Foley[2000] IRLR 827**) and **Graham v The Secretary of State for Work and Pensions (Job Centre Plus)[2012] EWCA Civ 903**.
22. In terms of section 98(4), the role of the Employment Tribunal is to apply the “band of reasonable responses” test and to ask itself whether this respondent acted in a way that no reasonable employer would act when faced with the claimant’s mitigation and other complaints regarding her absence management.
23. Applying that test to this case, I conclude that, while a different employer may very well not have dismissed the claimant in these circumstances, it cannot fairly be said that “no reasonable employer” could have done so.

*Mitigation of reason for absences*

24. I do not consider that the respondent acted unreasonably in the way it approached the claimant’s mitigating circumstances for her absences. First, unlike **Royal Mail plc v Smith UKEAT/0715/03**, this is not a case of failure to take account of mitigation. Rather it is a case where mitigation was considered but in the judgment of both the dismissing and appellate officer thought to be insufficient to avoid dismissal.

25. I accept the evidence of both Nicola McLelland and Geoff Kyte on the question of mitigation. Both witnesses gave logical and coherent explanations for their decision-making, which cannot fairly be said to be unreasonable. Both managers considered the mitigation for the absences and both considered that that mitigation insufficient to depart from the terms of the collectively agreed Attendance Policy. The reasons of both tiers of management were essentially those referred to at paragraphs 8.1 to 8.3 above and those reasons were in the mind of management at the time of the decision to dismiss and of the decision not to uphold the appeal.
26. That is not to say that I do not have some sympathy for the claimant's position. I do. However, the duty on me is to apply the correct legal test to the respondent's decision-making. Having done so, I conclude that the grounds upon which the claimant's mitigation for her absence was considered insufficient to avoid dismissal were not unreasonable.

*Absence of informal meetings*

27. Turning to the other points that the claimant identified. I do not accept that the dismissal was unreasonable because of the absence of informal meetings. At virtually every stage of the process, the claimant was given an express opportunity to arrange such a meeting, an opportunity she declined on each occasion. This was evident both from the oral evidence of both respondent's witnesses and from the documents recording the meetings at the first two stages of the process and the Welcome back meetings.

*Welcome Back and Attendance Review meetings*

28. There is no evidence to support the contention at the Welcome Back meetings or the Attendance Review meetings were mechanistic or "tick box" exercises. The notes of those meetings reflect explanation and dialogue which belie the suggestion that the process was only "going through the motions." I reject the contention that no guidance was given. As I have mentioned already, the claimant was given ample opportunity for guidance but declined to engage with it.

*Procedural considerations*

29. Both respondent's witnesses gave evidence that the Attendance Policy was followed at each stage of the management process. The claimant accepted that to be so, but put her case on the basis that although the literal word of the policy had been complied with, the "the spirit of the agreement had not." On closer examination this argument was essentially the same as the argument that mitigation had not been properly considered. I therefore reject this argument for the reasons given at paragraphs 23 to 25 above. In my judgment, the respondent complied fully with collectively agreed Attendance Policy, engaged in meaningful discussion and dialogue at each stage of the process and gave the claimant a full opportunity to be heard and also gave conscientious consideration to the points raised by the claimant throughout the process both at review meetings and Welcome back meetings. I therefore find that the respondent complied with both the letter and the spirit of the Attendance Policy.

*The decision to dismiss*

30. Turning to the sufficiency of the reason for dismissing the claimant. I note that size and administrative resources of the respondent are significant. However, that needs to be balanced against the imperative for the respondent to maintain attendance levels that are necessary to discharge the respondent's publicly and privately important obligations to maintain a mail service commensurate with both its commercial obligations and public expectations. Indeed, I heard that it is in that context that the Attendance Policy was collectively agreed. In some cases, it might be appropriate for the Employment Tribunal to find a dismissal unfair even though the absence trigger points in the collective agreed policy had been reached. However, I do not find on the facts before me that this is such a case. I am satisfied that the respondent acted fairly in treating the reason for dismissal as sufficient to dismiss the claimant in accordance with equity and the substantial merits of the case. I note in this regard that the claimant candidly accepted in her evidence that she was fully aware that her continued employment was in jeopardy prior to the decision to dismiss her.
31. In these circumstances, the claimant's claim for unfair dismissal fails.

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Acting Regional Employment Judge  
Foxwell signed in Judge Loy's absence  
pursuant to Rule 63

Date: 29 January 2020.....

Sent to the parties on: .....

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For the Tribunal Office