EMPLOYMENT TRIBUNALS

Claimant: Miss J Fisher

Respondent: Department for Work and Pensions

Heard at: Liverpool

On: 23 October 2020

Before: Employment Judge Horne

REPRESENTATION:

Claimant: In person
Respondent: Ms E Smith, solicitor

JUDGMENT

The claimant was not unfairly dismissed.

REASONS

Introduction

1. The heading to this judgment is marked, "Code V". This means that the hearing took place on a remote video platform. Neither party objected to the format of the hearing.

Complaints and Issues

2. In a claim form presented on 23 January 2020, the claimant ticked a box to raise a claim that she had been unfairly dismissed. In the free text field underneath, she added, "I am bringing a case for both constructive dismissal and unfair dismissal."
3. Box 15 of the claim form contained the narrative detail. In that box she stated that she had been dismissed on 28 October 2019. There were numerous generalised allegations that the respondent had acted in "total disregard" of

various procedures, norms and legal obligations. The factual background appeared to be that the claimant had been on long-term sick leave following a "false and malicious grievance from a colleague influenced by incompetent bullying management", which the respondent had not handled correctly. Whilst the claimant was on sick leave, "poorly written procedures" were then allegedly used as a "harassment tool" to secure the claimant's departure. In contrast to a colleague who had resigned, the claimant's "sheer determination" had not allowed the respondent to "bully and harass me out of my employment".

4. She attached an appeal letter in which she had appealed against her dismissal.

5. The claim was treated as one of unfair dismissal contrary to section 94 of the Employment Rights Act 1996 ("ERA"), with dismissal having occurred under section 95(1)(a) of that act; the dismissal being alleged to be unfair within the meaning of section 98. There was nothing in the claim form or the accompanying appeal letter to suggest that any other legally-recognisable complaint was being raised.

6. The respondent presented a response form with accompanying Grounds of Resistance. There was no dispute that the claimant had been dismissed on 28 October 2019. It was the respondent's contention that the decision to dismiss her had been made by Ms Jane Regan and that the reason had been one that related to the claimant's capability.

7. I set about clarifying the issues at the start of the hearing.

8. Despite it apparently being common ground that the respondent had terminated the contract, the claimant informed me that her claim was for "constructive and unfair dismissal".

9. We discussed what the claimant meant by "constructive dismissal". I explained the relevant provisions of section 95 of the Employment Rights Act 1996. That section provides the statutory test for determining whether or not an employee has been dismissed for the purposes of protection against unfair dismissal. According to section 95(1)(c), one of the ways in which an employee can be dismissed is where "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. …"

10. I asked the claimant whether or not she had terminated the contract. She said that she had not resigned at any time. She was close to resigning, she told me, but she could not afford to resign and did not do so. I explained to her that, unless she had terminated the contract, she was not constructively dismissed. I also informed her that, unless she was going to argue that she had terminated the contract in response to a breach of contract, I would not consider her allegation of constructive dismissal. The claimant did not argue that she had terminated the contract.

11. What was left was the question of whether or not the claimant's actual dismissal was fair or unfair. The parties agreed that, in order to determine the fairness or otherwise of the dismissal, I should resolve the following issues:

    11.1. Can the respondent prove that the sole or principal reason for dismissal was the claimant's absence from work due to ill health and the

respondent's belief that there were poor prospects of reliable attendance in future?

11.2. Was that reason one which related to the claimant's capability?

11.3. If so, did the respondent act reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant?

12. Further issues would have arisen in relation to the claimant's remedy had the dismissal been found be unfair.

Evidence

13. I considered documents in an agreed electronic bundle consisting of 758 pages. In keeping with the warning that I gave to the parties at the start of the hearing, I did not read every page of the bundle. Rather, I concentrated on those pages to which the parties drew my attention in their witness statements and orally during the course of the hearing.

14. The respondent called Ms Regan and Ms Qureshi as witnesses, who both confirmed the truth of their written witness statements. The claimant gave oral evidence on her own behalf. She had not made a witness statement, but had set her version of events out in a written chronology which appeared in the bundle. She described that chronology as containing "the full story". She confirmed that the facts stated in the chronology were true. All three witnesses answered questions whilst under oath.

15. During the course of the oral evidence I had to make a disputed case management decision. The decision related to the admissibility or otherwise of questions to Ms Qureshi on one topic and the answers that she might give to those questions. I will briefly explain what that topic was. As will be seen in my account of the facts, the claimant had a colleague to whom I refer as "Ms B". This is the colleague who, according to the claim form, had raised a malicious grievance against the claimant. Before me, the claimant was keen to explore the question of whether Ms B had resigned or been dismissed. I asked the claimant to explain how that question was relevant to the issues I had to determine. The claimant told me that a senior manager, Mr Messitt, had written that Ms B had resigned and that, if I found that Ms B had actually been dismissed, it would mean that Mr Messitt had made a mistake. I did not think that a mistake of this kind on Mr Messitt's part could have any bearing on the reason for the claimant's dismissal or whether or not the respondent had acted reasonably or unreasonably in dismissing the claimant for that reason.

16. Many of the historical events described in the claimant's chronology appeared to have been prepared with a view to demonstrating that the respondent had constructively dismissed the claimant, rather than addressing the issues relevant to whether her dismissal was fair or unfair. Although the claimant's case was incompatible with the legal definition of constructive dismissal, I nevertheless considered the claimant's evidence of the historical events as part of the background. Where I thought it was of relevance to the issues I had to decide, I took it into account.

17. The claimant's evidence contained many generalised assertions of bullying, harassment and incompetence on the part of a number of different managers,

colleagues and trade union representatives. I was able to accept that the claimant believed that this was the case. What was much more difficult was to make any finding about whether or not the claimant's belief was well founded. In general terms, I was not able to rely on bare assertions of this kind as evidence of what had actually happened. Where there was more detail, I considered whether it would be proportionate to make findings as to whether or not the factual detail was correct. I generally found this exercise to be disproportionate unless there was a clear connection between the claimant's allegations and the issues I had to decide.

Facts

18. The respondent is a large government department responsible for administering various welfare benefits, including Disability Living Allowance (DLA) and Personal Independence Payments (PIP).

19. The claimant was employed by the respondent as a Decision Maker from 14 September 2016 until 28 October 2019.

20. The respondent had a written Attendance Management Procedure. Amongst its provisions were the following:

"**General obligations**

2. Managers must: … (d) consider and put in place temporary workplace adaptations or reasonable adjustments to help an employee stay at work … or return to work.

…

Formal action for short-term absences

When a trigger point is reached

21 The trigger point is either:

(a) Eight working days cumulatively in any rolling 12-months period…; or

(b) Four spells of any duration in a rolling 12-month period…

22 The employee may reach or exceed the trigger point by taking frequent, short sickness absences or a continuous spell of sickness absence.

…

Health & Attendance Improvement Meeting (H&AIM)

23 When a trigger point is reached the manager must issue the employee with an invitation to a formal meeting called the Health & Attendance Improvement Meeting (H&AIM)…

24 The H&AIM must be welfare focused. Its main purpose is the manager to understand more about the employee's absence(s) including more about their illness, treatment they are having all had what might be done to achieve a satisfactory level of attendance:

…

27 There are two levels of formal warning before dismissal is considered:

(a) *first written warning* - this is followed by a six-month review period when absence must be below 50% of the employee's normal trigger point for attendance to be considered satisfactory…

(b) *final written warning* - when attendance is unsatisfactory during a first written warning review period or sustained improvement period. This is also followed by a six-month review period when absence must be below 50% of the employee's normal trigger point for attendance to be considered satisfactory. …

(c) *Consideration of dismissal...* - when the employee reaches or exceeds the trigger point following a final written warning… or when a continuous sickness absence can no longer be supported.

Considering dismissal...

General considerations

58 …Dismissal may be considered if the individual circumstances justify it and:

(a) all the procedures have been followed correctly;

…

(d) up-to-date occupational health advice has been received…

(e) There are no further reasonable adjustments that can be made to help the employee return to satisfactory attendance;

….

59 the manager must be satisfied that there is nothing further that can reasonably be done to sustain an improvement in the employee's attendance and the dismissal must be a proportionate response given the individual circumstances…

…

Dismissal interview and decision

…

67 The Decision Maker is responsible for:

(a) checking that a fair process has been followed up to that point;

(b) deciding, on the balance of probability, whether the employee is capable of achieving satisfactory attendance levels within a reasonable period of time…;

(c) Being satisfied that there are no further reasonable steps that, if taken, would enable the employee to return to … good attendance within the reasonable timescale;

(d) being satisfied that dismissal… is a proportionate and appropriate response in the individual circumstances;

…

72 In reaching a decision, the Decision Maker must also consider:

(a) whether the case should have been referred to them or whether the manager should continue to support and manage the absence;

(b) the reasons, in detail, why the business can no longer sustain the absence;

(c) whether everything reasonable has been done to support the employee back to work

(d) whether there is a reasonable expectation of… Improved attendance

(e) any mitigating circumstances, eg domestic, personal, work problems, NHS delays

(f) the nature of any underlying medical condition…

(g) Any reasonable adjustments that have been considered, made, or not made to the working environment…

(h) Whether reasonable steps have been taken to understand the effects of the illness and what can be done to manage it at work;

(i) the employee's length of service and previous record of attendance, commitment and loyal service

(j) whether the employee has been given every opportunity to state their views and that those views had been properly considered

73 However, this is not a tick box decision. In the end the Decision Maker must stand back from the detail of the case to check that dismissal… Feels like a fair and reasonable outcome, based upon the individual circumstances, for all parties involved….

Appeal

…

Employee actions

79. Employees have 10 working days from the date of receipt of the written decision in which to send their written appeal to the Appeal Manager.

...

Appeals - Step 3 – Considering the appeal

86 The Appeal Manager should not reconsider the case in detail but should more broadly consider whether the original decision was one that a reasonable, fair-minded person could have reached based on the facts. They should focus on the reasons for the appeal set out in the employee's appeal form. If new evidence is made available, the appeal manager should consider the impact this may have on the final decision.

…

It may be the case that, even if the correct procedures had been followed, the same conclusion would have been reached. If the errors were minor it may

not have any impact on the final outcome, however more significant errors could have led to a fundamentally flawed decision and the wrong outcome.

21. At the time with which this claim is concerned, the claimant was based at the respondent's Chorlton office. For a time she worked in the PIP team, but in 2017 she moved to the DLA team. From the moment the claimant changed to the DLA team, she believed that she and her fellow team members were being bullied, harassed and set up to fail. She thought that internal procedures were being used as harassment tools. For example, in relation to a target of 20 cases without mistakes, it was her impression that colleagues whose "face fit" would "fly through" that target, whereas she was criticised for only achieving 19 accurate cases out of 20.

22. I did not find it necessary to determine whether this is what managers were in fact doing. This is because I believed Ms Regan and Ms Qureshi when they told me that they had had no involvement in managing the claimant or the teams in which she worked. Based on what was said at the meetings chaired by those two managers, it did not appear that the claimant was raising any issue about alleged bullying prior to April 2018.

23. On 20 April 2018 the claimant and a colleague (Ms B) became involved in an incident at work. The incident led Ms B to raise a grievance against the claimant on 3 May 2018. It is the claimant's case that the grievance was "false and malicious", but I did not find it necessary to make any finding about whether it was or not. Following an investigation, the respondent concluded that the claimant did not have a case to answer. On 18 May 2018, the claimant was informed of the outcome. A formal meeting took place on 21 May 2018, at which the claimant was accompanied by a trade union representative.

24. Ms B began a period of extended sick leave, following which her employment terminated.

25. Prior to the grievance, and during the time of the grievance itself, the claimant had a good record of attendance, with only two days' sick leave and two days' special leave between May 2017 and November 2018. She used flexi-time to help manage her stress, rather than taking sick leave.

26. Shortly after the grievance outcome, a new manager was appointed into the claimant's DLA team and the claimant moved to a different DLA team.

27. On 7 November 2018 the claimant experienced severe back pain and was unable to go to work. She self-certified with "stress and back pain" and remained absent on sick leave until 20 January 2019 – a period of 50 working days. During this time, she submitted fit notes from her general practitioner. These stated that she was unfit for work due to "work-relate stress".

28. A two-month absence review meeting took place on 7 January 2019. Present at the meeting were the claimant, Ms Gemma Shields (manager) and Mr Kieran Toulson, note taker. In advance of the meeting, the claimant had been sent a stress risk assessment, but the claimant had not completed it. She said, "the environment of the whole office needs to change". The claimant said that she was planning to return to work the following week.

29. The claimant asked to speak to a senior manager about what had occurred in relation to Ms B's grievance. On 14 January 2019, the claimant met with Mr Trevor Messitt, a senior manager, who was accompanied by Ms Jane Regan, Senior Operations Manager. The claimant asked for a personal apology for the way in which the claimant had been treated. They discussed Mr Messitt's decision to move another manager onto the claimant's DLA team. Mr Messitt gave an explanation, but did not apologise.

30. Following the meeting, Mr Messitt prepared a file note date 14 January 2019. The note was not shown to the claimant until much later, and did not feature in any decision-making in relation to the dismissal until the claimant referred to it in connection with her appeal. Describing the conversation about the change of manager, Mr Messitt wrote:

> "Shortly after the incident [involving Ms B's grievance] I moved another manager onto her team but this was purely to accommodate a new manager who I believed did have DLA experience. I think that [the claimant] thinks that this is a conspiracy to cover up poor management and that this was the reason her line manager was moved."

31. The file note also indicated that Ms B had resigned. For the reasons I have already given, I made no finding as to whether or not this statement was correct.

32. On 25 January 2019, the claimant attended a return to work meeting. She said that her absence had been caused by the bullying incident that had occurred earlier in 2018. The claimant was reminded of the Employee Assistance Programme, which she declined. She was offered a referral to Occupational Health, which she also declined on the ground that she did not feel that there would be any benefit. She was offered a stress reduction plan but, for the same reason, she declined that, too. This part of the discussion was recorded in the notes of the meeting. The claimant signed them to confirm that they were accurate.

33. By letter dated 22 January 2019, the claimant was invited to a H&AIM meeting which took place on 30 January 2019. The meeting was chaired by Mr Tomlinson. Again, the claimant referred to the earlier bullying incident and said that managers should have been alerted to the effect on her health by the amount of flexi time she was using. The claimant declined a stress risk assessment and a referral to Occupational Health and any Employee Services. What she did want, she said, was for "management to apologise" for the way in which the grievance had been handled. All this was noted in the minutes.

34. Following the meeting, the claimant was given a first warning for unsatisfactory attendance. The warning was notified to the claimant by letter dated 4 February 2020. The letter indicated a review period of 6 months.

35. The claimant appealed against the warning. She was invited to an appeal meeting which took place on 12 March 2019. During the appeal meeting, the claimant made generalised assertions of failure to follow Keeping In Touch (KIT) procedures, lack of support and poor organisation. The claimant was taken through specific occasions when managers had unsuccessfully attempted KIT conversations. From the minutes of the appeal, it is unclear what explanation she gave for other than to repeat general contentions of lack of support.

36. By letter dated 19 March 2019, the claimant was informed that her appeal was unsuccessful.

37. It is the claimant's case that the minutes of the 22 January 2019 H&AIM missed an important remark which Mr Tomlinson allegedly made, and which the claimant much later referred to as part of her appeal against dismissal. According to the claimant, when telling the claimant that he was giving the claimant an unsatisfactory attendance warning, Mr Tomlinson told the claimant, "My hands are tied." This remark, the claimant believes, suggests, at best, that Mr Tomlinson had imposed a warning mechanically on the claimant reaching a trigger point, without considering the claimant's individual circumstances and, at worst, that Mr Tomlinson had been instructed to issue the warning by unaccountable managers who had taken the decision for him. I did not make a finding as to whether or not Mr Tomlinson made this remark or the context in which any such remark was made. Significantly, in my view, there is nothing in the minutes of the appeal meeting to suggest that the claimant referred to this remark at all when appealing against her warning.

38. On 18 June 2019, the claimant began another period of sick leave amounting to 22 working days. She self-certified with "work related stress/back pain" and submitted a fit note stating that the reason was "work related stress". She returned on 17 July 2019. It was agreed that she should be given temporary part-time hours on medical grounds.

39. The following day, she had a return-to-work interview. Minutes were taken and signed by the claimant. According to the minutes, the claimant said that she did not see any benefit in Employee Assistance or Occupational Health. The manager investigated possible methods of stress reduction. The claimant suggested a reduction in the number of decisions she had to make; the manager indicated that she need not worry about the number of decisions. The claimant also requested a transfer to a different office, in relation to which the manager offered to take Human Resources advice.

40. By letter dated 19 July 2019, the claimant was invited to a further H&AIM, scheduled for 26 July 2019. The date of the meeting was re-arranged to 2 August 2019 in order to accommodate the claimant's trade union representative. As it happened, the claimant was unable to secure representation for that date either and the respondent was not prepared to postpone the meeting again. It accordingly proceeded on 2 August 2019. Ms Angela Gibson, manager, chaired the meeting. The claimant did not attend.

41. Following the meeting, Ms Gibson issued the claimant with a final attendance warning. The warning was communicated to her in a letter dated 6 August 2019. The letter stated:

> "I will monitor your attendance for six months from 6 August 2019 until 5 February 2020. This is called the Review Period. If your attendance is unsatisfactory during the review period, you may be dismissed or demoted. Your attendance will be unsatisfactory if your absences reach or exceed four days/2 spells days during the Review Period."

42. The claimant took annual leave from 5 August 2019 until 16 August 2019. She was due to return to work on 19 August 2019, but did not do so because she was

still on holiday. She requested additional annual leave for three days, but the request was not granted. Her absence on 19, 20 and 21 August 2019 was treated as unauthorised.

43. On 21 August 2019, the final written warning letter was delivered to her home. Someone there signed for it.

44. From 22 August 2019 until 1 September 2019, the claimant was again absent on sick leave. She informed the respondent that her absence was due to a virus.

45. On 1 September 2019, at a return to work meeting with Ms Gibson, the claimant said that she felt much improved. She was offered a referral to Occupational Health and a stress management plan, to which she replied that she would ask for one if she wanted one. She asked to reduce her hours on medical grounds. The claimant did not sign the notes of this meeting.

46. On 5 September 2019, the claimant's general practitioner wrote to the respondent. On the subject of the August absence, the doctor said that the claimant was suffering from a headache and "it is likely that this may have been triggered by a virus and possibly ongoing due to stress".

47. Ms Gibson, after taking advice, refused the claimant's request for part-time work on medical grounds. The claimant had already been given a temporary adjustment of working two shorter days.

48. On 12 September 2019, the claimant attempted to appeal against the final written attendance warning. Her appeal was not considered. This was because it was submitted after the expiry of the time limit of 10 working days. The warning letter was received on 21 August 2019. Making allowances for the August Bank Holiday, the last day for submitting the appeal had been 5 September 2019.

49. On 13 September 2019, following a separate investigation and disciplinary process, the claimant was given a misconduct warning.

50. The claimant's August sickness absence meant that she exceeded the trigger point for consideration of dismissal. Following a further H&AIM meeting on 10 September 2019, to which the claimant was invited but did not attend, Ms Gibson invited her to a further meeting on 20 September 2019. The claimant attended that meeting, this time accompanied by her trade union representative, Ms Sarah Hirsch.

51. According to the minutes of the meeting, Mrs Gibson asked the claimant if she could explain the reasons for her August absence. The claimant referred to her GP letter and added that she had nothing more to say. She was reminded of Occupational Health and the Employee Assistance Programme. The claimant's reply was, "Everything I have asked for you have declined so there is nothing else. Reduced hours are the only thing that would help." Mrs Gibson asked the claimant what steps she was taking to try to manage stress. The claimant replied, "It stems from work related issues so there is nothing I can do… I was the subject of a bullying and harassment case and it seems like the procedures do not end." When invited to make suggestions for how she could be supported, the claimant said, "No".

52. Mrs Gibson decided to that the claimant should be referred to a Decision Maker. In support of her decision, she prepared a template decision document in which she described the impact of the claimant's absences on the rest of the team and her own ability to manage the team. She stated that she had had to spend the majority of her time managing the claimant.

53. On 23 September 2019, Mr Stuart Burgoine, Senior Operations Manager, e-mailed Mrs Gibson on the subject of the claimant's referral to a Decision Maker. It is not entirely clear what if any line management responsibility Mr Burgoine had for Mrs Gibson, although he was clearly a more senior grade of manager and, like the claimant and Mrs Gibson, was based at the Chorlton office. The e-mail gave guidance to Mrs Gibson on the contents of a file to be created for the Decision Maker and how to complete the checklist at paragraph 58 of the Attendance Management Procedure. Mr Burgoine continued:

> "Jane Regan is going to be DM. Once all that is done ... hand over the file to Jane. We are both in Telford until Thursday."

54. By letter dated 25 September 2019, Mrs Gibson informed the claimant that her case was being referred to Ms Regan, for consideration of possible dismissal. The claimant given a letter dated 3 October 2019, inviting her to a formal meeting scheduled for 11 October 2019. The letter informed her that the meeting was for consideration of whether she should be dismissed.

55. Ms Regan, it will be remembered, had met with the claimant and Mr Messitt on 14 January 2019. That meeting had taken place outside the usual management structures. Ms Regan had no responsibility for managing the claimant or her sickness absence. She had been in Telford with Mr Burgoine and had agreed with him that she would be the Decision Maker. They did not have any informal conversation about the claimant's attendance management or what the outcome of the formal process should be. Ms Regan learned about the circumstances of the claimant's absence by reading a file of documents. These included the minutes of the return to work meetings and H&AIMs, and the contact notes detailing interactions with the claimant during her sickness absences.

56. One area of confusion that arose during the course of the hearing before me was which documents had, or had not, been the file that Ms Regan read. In particular, a question arose as to whether or not the file contained notes referring to Mr Tomlinson's "hands are tied" remark, allegedly made on 30 January 2019. When cross-examining Ms Regan, the claimant put it to her that, "It was in my notes". I invited the claimant to take me and Ms Regan to where the notes were in the bundle, or to describe the notes more precisely so that someone else could find them. The claimant replied that she would return to that topic, but she did not actually do so. My finding is that, if Ms Regan's file did contain any reference at all to Mr Tomlinson's alleged remark, that reference was not obvious and Ms Regan did not in fact notice it.

57. The meeting went ahead on 11 October 2019. Ms Sarah Sinclair, the claimant's trade union representative, attended and explained that the claimant herself would not be attending. Ms Sinclair told Ms Regan that she had briefly met the claimant and had not read everything, but that the claimant "did not want to be involved in the meeting and was not willing to engage." Ms Sinclair confirmed

that the claimant had refused offers of help and assistance, adding that the claimant's reason for turning it down was that colleagues of hers had found these interventions to have been of no benefit. Ms Sinclair did not describe these forms of support as "harassment tools". Ms Sinclair referred back to "an incident of bullying and harassment", Ms B's 2018 grievance and the claimant's dissatisfaction with the management response. Ms Sinclair described the claimant's criticism in general terms without giving any example of what managers had done wrong. There was no suggestion of any widespread workplace bullying prior to April 2018. Ms Sinclair told Ms Regan that the claimant's stress had been compounded during her sick leave by managers telephoning her for no reason. When asked for details, Ms Sinclair gave the example of an occasion on 26 June 2019 at 9.40am and 10.48am. Ms Regan checked the contact notes for this date. It appeared from those notes that 26 June 2019 had been the agreed date for a KIT call. The manager had telephoned twice because they had been unable to get through on the first occasion. At the end of the meeting, Ms Regan informed Ms Sinclair that she would not make a decision immediately, but would give the claimant a further opportunity to provide information and make representations.

58. Pausing there, the claimant told me that she had never informed Ms Sinclair that she did not want to engage with the respondent, and that Ms Sinclair spoke out of turn by suggesting as much to Ms Regan. I did not make any finding as to whether this had happened or not. I believed Ms Regan's evidence to me that she had no reason to doubt that Ms Sinclair was relaying what the claimant had told her.

59. Ms Sinclair e-mailed Ms Regan on 14 October 2019. Her email indicated that the claimant was aware of her opportunity to make further representations, but had nothing more to add.

60. Ms Regan then set about making her decision. She was satisfied that the appropriate procedural steps had been carried out. She felt hampered by the lack of information from the claimant, but tried to make the best decision she could based on the information available to her. Ms Regan had regard to the claimant's three substantial periods of absence in the past 12 months and the two previous warnings. In Ms Regan's view, there was no reasonable suggestion that the claimant's attendance would improve. She could not think of any reasonable adjustment that would help her attend. The claimant had repeatedly turned down offers of Occupational Health, Employee Assistance and stress reduction plans, which Ms Regan thought were reasonable measures to try and address the impact of workplace stress on her attendance. Ms Regan did not think that her lack of engagement was a reason for dismissal in itself, but she thought that it deprived the respondent of the opportunity to help her attend work more reliably. Nobody had suggested demotion, but in any event, Ms Regan could find no reason to think that this measure would result in improved attendance. Ms Regan had regard to the observations that Mrs Gibson had made about the impact of the claimant's absences on the team and Mrs Gibson's ability to carry out her management role. The most appropriate outcome, in Ms Regan's opinion, was dismissal with notice.

61. The claimant contends that the decision to dismiss her was not made by Ms Regan, but had already been "set up in advance" by Mr Burgoine in his 23 September 2019 email. I disagree. I believed Ms Regan when she told me that she had made the decision for herself. The limit of her discussions with Mr Burgoine about the claimant's attendance management was an agreement for her to be the Decision Maker.

62. The claimant was informed of her dismissal, and the reasons for it, by letter dated 24 October 2019. The letter informed the claimant of her right of appeal. Ms Regan waited until she could hand the letter to the claimant personally. This she did on 28 October 2019.

63. The claimant appealed against her dismissal on 6 November 2019. Her appeal letter stated her grounds of appeal:

    • The letter of dismissal was handed to me with my manager present on the 28/10/2019, however the letter is dated 24/10/2019.

    • Managements failure to follow DWP Attendance Management procedures and apply them correctly throughout my sickness absence.

    • No follow up with myself when my sick note clearly states 'work related stress' when refused all services offered by DWP, although I had repeatedly advised management of the reasoning for this decision. Evidence shows management had clearly shown a total disregard for my health and safety, having then repeatedly issuing me with written warnings.

    • Lack of continuity and consistency due to the implementation of 5 managers throughout my sickness absence and the lack of experience and knowledge of substantive management.

    • Jane Regan's failure to address concerns raised by my TU rep with regards to the misconduct issued against myself for unauthorised absence.

    • The total lack and disregard of managements knowledge and understanding of how to apply the reasonable person test written within DWP's procedures. When the implications can be catastrophic for the employee, especially having just returned from sickness absence having been off work with 'work related stress'.

    • Concerns with regards to the sentence written on 14/01/19 from a meeting between myself and Trevor Messitt which states 'I think that Joanne thinks that this is a conspiracy to cover up poor management and that was the reason her line manager was moved. How could Trevor possibly know what I am thinking? And why conspiracy?

    • When the first warning was issued to myself from Andy Tomlinson, I asked why? as he had clearly processed all my concerns when I returned from sickness absence as this is evident within the letter dated 30/01/2019, as I thought he was supporting me, however, he replied my 'hands are tied'. Why were his hands tied?"

64. The claimant was invited to an appeal meeting which took place on 28 November 2019. Between the date of dismissal and the date of the appeal meeting, the claimant had been working her notice. The claimant tells me that, during this

period, her performance levels fully met the respondent's requirements. I have no reason to doubt that this was the case.

65. The meeting was chaired by Ms Shahneela Qureshi, a Service Centre Cluster Manager based at the Bradford Service Centre. Ms Qureshi had had no prior dealings with the claimant.

66. Unlike the dismissal meeting, this meeting was attended by the claimant, who was accompanied by Ms Sinclair. A minute-taker was also present.

67. Ms Qureshi took the claimant through her grounds of appeal, one by one. Here is a summary of what was said:

    67.1. The claimant complained about the delay in receiving the dismissal letter, but did not suggest how this might have affected the fairness of the decision;

    67.2. They discussed the alleged failure to follow procedure. Mostly the claimant repeated generalised accusations, with the exception of the example relating to Mr Tomlinson

    67.3. The claimant re-iterated that Mr Tomlinson had told her that his "hands are tied" at the time of giving her the first written warning. There was a discussion of what procedures might have prompted him to say this. The claimant added that she had not taken up offers of a stress risk assessment because she had seen that in the past a stress risk assessment had made colleagues even more stressed. Occupational Health, the claimant said, was more for the benefit of management and staff.

    67.4. Ms Qureshi asked the claimant to explain how changes in managers would relate to her appeal against dismissal. The claimant's explanation was that managers had no experience in managing staff and there had been too many changes in one year.

    67.5. Ms Sinclair brought up the misconduct warning that the claimant had received in respect of her three days of unauthorised absence. When Ms Qureshi asked the claimant what this had to do with her dismissal, the claimant replied that it had made her more stressed as it was work-related. She asked Ms Qureshi to look at "the bigger picture" and take everything into account. There was a discussion about what evidence Ms Qureshi would consider. When asked whether she would consider "evidence prior to this appeal", Ms Qureshi answered "No, it's the appeal for dismissal." Ms Sinclair gave the impression that she agreed.

    67.6. The conversation moved on to Mr Messitt's file note of 14 January 2019. The claimant agreed that the 14 January 2019 meeting had not been "due to a managing attendance decision" and that it had already been raised and dealt with. Ms Sinclair said "it was the grievance made against [the claimant] that started all of this".

    67.7. The claimant returned to Ms B's grievance. She told Ms Qureshi that Ms B had been dismissed and she wanted a full investigation into what procedures had been followed. Ms Sinclair intervened and reminded the claimant that this was not within the scope of Ms Qureshi's decision.

68. Ms Qureshi decided that the dismissal decision had been a sound one. Ms Qureshi was satisfied that Ms Regan had adhered to the appropriate internal procedures. Just as Ms Regan had done, Ms Qureshi thought it was relevant that the claimant had been repeatedly offered assistance in the form of Occupational Health, Employee Assistance Programme and a stress reduction plan. Contrary to what the claimant had told her, Ms Qureshi considered these tools to be valuable and not just for the benefit of managers. In Ms Qureshi's view, the procedural matters that the claimant had raised on appeal did not affect the fairness of the dismissal. It made no difference, for example, that there had been a four-day delay in handing the claimant her dismissal letter. She did not think that the procedural fairness of the dismissal had been adversely affected by Mr Tomlinson's alleged "hands are tied" remark at the time of giving the first warning. In her view, the claimant had had the opportunity to raise this point when appealing against the first warning, and this was a sufficient procedural safeguard. Ms Qureshi considered the alleged comment by Mr Messitt about a "conspiracy". She could not see its relevance to the matters which she had to decide. In her opinion, if the claimant took exception to what Mr Messitt had written, the proper procedure would be for the claimant to make a complaint. It was not a ground for appealing against dismissal.

69. Ms Qureshi was not aware of the standard of the claimant's performance at work during the notice period. She did not take the claimant's performance into account. What Ms Qureshi was concerned with was the prospect of the claimant attending work reliably. Ms Qureshi agreed with Ms Regan that the prospect was so poor that the claimant should be dismissed.

70. By letter dated 5 December 2019, the claimant was informed that her appeal was unsuccessful.

Relevant law

71. Section 98 of ERA provides, so far as is relevant:

> (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-
> (a) the reason (or, if more than one, the principal reason) for the dismissal and
> (b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it…(a) relates to the capability.. of the employee for performing work of the kind which he was employed by the employer to do.
> (3) In subsection (2)(a) –
> (a) "capability", in relation to an employee, means his capability assessed by reference to …health…

> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
> (b) shall be determined in accordance with equity and the substantial merits of the case.

72. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson* [1974] ICR 323, CA.

73. When examining the reason for dismissal, the tribunal is ordinarily concerned with the motivation of the decision-maker, that is to say, the person deputed by the employer to exercise the functions of the employer in dismissing the employee. If, however, a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason, but hides it behind an invented reason which the decision-maker adopts, the reason for the dismissal is the hidden reason rather than the invented reason: *Royal Mail Group Ltd v. Jhuti* [2019] UKSC 55.

74. When it comes to the question of reasonableness, the tribunal must not substitute its own view for that of the employer. The tribunal may interfere with a decision only where it was so unreasonable that no reasonable employer could have come to it. This principle applies to the employer's procedures as well as to the decision itself: *Sainsbury Supermarkets Ltd v. Hitt* [2002] EWCA Civ 1588.

75. Save in exceptional circumstances, an employer will not act reasonably in treating ill health absence as a sufficient reason for dismissal unless he/she consults the employee: *East Lindsey District Council v. Daubney* [1977] ICR 566. It may also be necessary to obtain a medical opinion: *Patterson v. Bracketts* [1977] IRLR 137.

76. In *Spencer v. Paragon Wallpapers* [1976] IRLR 373, EAT, at paragraph 14, Phillips J observed:

> "The basic question which has to be determined in every case is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer? Every case will be different, depending on the circumstances."

77. Where an employee's ill health absence has been caused by the actions or omissions of the employer, an employee may still fairly dismiss the employee on capability grounds, but may be expected to "go the extra mile" in tolerating absences and carrying out investigations: *McAdie v. Royal Bank of Scotland* [2007] EWCA Civ 806.

78. Where the employee appeals against dismissal, the tribunal must examine the fairness of the procedure as a whole, including the appeal: *Taylor v. OCS Group Ltd* [2006] EWCA Civ 702.

Conclusions

Reason for dismissal

79. The decision to dismiss the claimant was taken by Ms Regan. It was not "set up" by anyone else, and nobody caused Ms Regan to dismiss the claimant for a hidden reason. Likewise, the decision to confirm the dismissal on appeal was Ms Qureshi's alone.

80. The respondent has proved that the sole or principal reason for dismissal was the fact that the claimant had had three substantial periods of sickness absence in 12 months, and there was a poor prospect of her being able to attend reliably in future. This was undoubtedly a reason that related to the claimant's capability, assessed by reference to her health. This reason fell within section 98(2)(a).

81. The claimant argues she was dismissed for her non-attendance at the formal meeting on 11 October 2019. This was not any part of the reason for dismissal. The significance of the claimant's non-attendance was that Ms Regan had less information available to her than she might have had if the claimant had attended the meeting. The claimant's absence meant that Ms Regan's decision was less well-informed, but it did not alter the reason why Ms Regan decided to dismiss her.

82. Another argument that the claimant put forward was that she was dismissed for declining a referral to Occupational Health, the Employee Assistance Programme and a stress reduction plan. This factor was undoubtedly *relevant* to the reason for dismissal, but it was not the reason itself. The reason was still the claimant's absences and poor prospect of reliable attendance. Those prospects were worsened by the fact that the claimant would not engage with measures that could have helped her attendance to improve.

Reasonableness

83. I must now decide whether the respondent acted reasonably or unreasonably in treating this reason as sufficient to dismiss the claimant.

84. My assessment of reasonableness must take into account the respondent's size. The respondent is a large government department that could have been expected to devote very considerable resources to managing absences, investigating reasons for absence, and carrying out fair procedures for deciding whether or not a person should be dismissed.

85. In my opinion the respondent followed a reasonable procedure, which included reasonable efforts to consult the claimant. Before the claimant's absence management had even reached Ms Regan, there had been three stages of decision-making: the first warning, the final warning and the referral to a Decision-Maker. Escalation from one stage of procedure to the next ended on the claimant reaching defined trigger points, which she in fact exceeded. At each stage of the process there had been a formal H&AIM. The claimant had appealed unsuccessfully against the first warning, and had had a fair opportunity to appeal against the final warning. Ms Regan's decision followed a meeting which the claimant had been entitled to attend had she chosen to do so, and which had been attended by a trade union representative on her behalf. She was given the opportunity to make further representations. Following Ms Regan's

decision, there was an appeal at which her grounds of appeal were explored in the presence of the claimant and a trade union representative. This was a procedure that was reasonably open to the respondent.

86. I do not consider that Ms Regan was going through the procedure mechanically. She made genuine efforts to try and understand the points that Ms Sinclair was making on the claimant's behalf. When Ms Sinclair passed on the claimant's concern about inappropriate contact during her sick leave, Ms Regan asked for an example, check it against the records and concluded, on reasonable grounds, that the manager had behaved appropriately.

87. Ms Regan's decision was essentially sound. The Attendance Management Procedure provided her with a helpful checklist of matters to be taken into account before reaching a decision. Ms Regan reached a reasonable conclusion in relation to each of them.

88. The respondent made reasonable efforts to investigate the causes of the claimant's absences and address them. The claimant was repeatedly offered Occupational Health, the Employee Assistance Programme and a stress reduction plan. These are appropriate measures to try and improve the attendance of an employee whose sickness absence is stated to be caused by stress at work. The claimant perceived that they would be used as "harassment tools". Although this phrase was not mentioned to Ms Regan or Ms Qureshi, the point was made to both managers that the reason why the claimant had declined a stress risk assessment was because the claimant believed it had caused additional stress based on the experience of colleagues. Both Ms Regan and Ms Qureshi were reasonably entitled to disagree.

89. This was not a case in which the respondent was required to "go the extra mile" for the claimant. Based on what Ms Sinclair said at the meetings, Ms Regan and Ms Qureshi could not reasonably have been expected to think that the claimant's absences were caused by anything that had happened prior to April 2018. There were reasonable grounds for thinking that the root cause of the claimant's ill health was the grievance that Ms B had raised against her. But it was not obvious to Ms Regan or Ms Qureshi what, if anything managers ought to have done at the time to make that experience any less stressful for the claimant. It was even less clear what could be done about it 18 months later. More fundamentally, there was no point in giving the claimant additional latitude unless she was prepared to engage with efforts to improve her attendance. Time and time again, the claimant made clear that she was not prepared to engage with those efforts.

90. In my view, by October 2019, the claimant's pattern of absences had reached the stage where it was reasonably open to Ms Regan and Ms Qureshi to conclude that the respondent could not wait any longer. She had had three long spells of absence in the previous 12 months. There was evidence that her absence was having a damaging impact, and there were no grounds for any optimism that her attendance would improve in future.

91. In my view the respondent acted reasonably in treating the claimant's absences, and poor prospect of reliable attendance, as a sufficient reason to dismiss her. The dismissal was therefore fair.

_____

Employment Judge Horne

14 January 2021

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

15 January 2021

FOR THE TRIBUNAL OFFICE

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