EMPLOYMENT TRIBUNALS

Claimant: Mr D Burns

Respondent: MyCSP Ltd

Heard at: Liverpool **On:** 5 June 2018

Before: Employment Judge Wardle

Representation
Claimant: In Person
Respondent: Mr Thorne - Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that this claim is struck out, on the application of the respondent, pursuant to Rule 37(1)(a) of the Employment Tribunals Rules of Procedure on the ground that it has no reasonable prospect of success.

REASONS

1. This matter was listed for a Preliminary Hearing in order to determine whether the claimant's complaint of unfair dismissal should be struck out under Rule 37 of the ET Rules of Procedure on the basis that it has no reasonable prospect of success or whether, if such threshold is considered not to have been met, a deposit order should be made under Rule 39 of the ET Rules on the basis that it has little reasonable prospect of success and, if so, in what amount.

2. In addressing these issues the Tribunal had the benefit of the ET1 and ET3 and written and oral submissions from the parties. In so far as the pleadings were concerned the claimant's grounds of complaint were brief referring to a conflict at work, including attempts to change his contractual terms, and suggesting that these had resulted in a breakdown of his relationship with his employer and in his suffering mental health problems, which in turn had contributed to his absence from work before adding that after his contract dispute was settled in his favour following a successful tribunal claim resulting in a COT3 agreement the respondent caused

further conflict by threatening to withhold SSP and defaulting on the COT3, at a time when attendance review procedures were being undertaken, which resulted in his dismissal for unsatisfactory attendance. The respondent's grounds of resistance were much fuller setting out the history of the claimant's absences from July 2015 to August 2017 and how its Absence Management Policy was applied to him leading up to his dismissal, with notice, on 10 August 2017 on grounds of capability and denying that his dismissal was linked in any way to his tribunal claim.

3. In so far as the submissions were concerned the claimant's written submissions were contained in two documents, the first of which had been prepared for the purposes of a Case Management Discussion held on 14 March 2018, which had resulted in the convening of this hearing and the second filed and served on 29 May 2018 in accordance with a direction given in the Case Management Order made on 15 March 2018. In regard to the respondent it had filed and served its written submission beyond the ordered date on 4 June 2018, in respect of which late compliance there were extenuating circumstances.

4. Having reserved judgment in order to deal with an unallocated case the Tribunal was able later in the day having taken into account the pleadings, the submissions and the applicable law to reach conclusions on the issues requiring determination by it.

5. In so doing it noted the factual background, which was essentially not in dispute, to be as follows.

6. The claimant's employment was subject to the respondent's Absence Management Policy, which states that if an employee is absent for 8 days in a rolling 12 months period, a staged warning process may begin and may result, as a last resort, in dismissal on the grounds of capability. By reason of 4 periods of absence for various reasons including vomiting, mental health, respiratory issues and viral infection totalling 54 days in the period between 6 July 2015 to 23 March 2016 the claimant triggered the application of the policy to him and he was issued after a hearing with an oral warning for a 6 month period, which he did not appeal.

7. During the oral warning's life he had a further period of absence of 15 days between 31 May and 20 June 2016, which saw him being issued with a written warning for a 6 month period, which he again did not appeal. Having been told by him that he believed his absences were related to issues he had with drug and alcohol addiction the respondent gave him to understand that they wanted to refer him to Occupational Health (OH), but this was refused by him.

8. During the life of this written warning the claimant was off sick for two days on 1 and 2 August 2016 and due to his triggering the next stage in the policy he was invited to a formal hearing on 10 August 2016, which was adjourned for a report from OH, following which he had two further days absence on 15 and 16 August 2016. The OH report advised that the claimant was experiencing health problems due to his addiction issues and that these could not be addressed until he dealt with his drug problems adding that he had not received professional help with his

addictions and that he had been referred to an addiction support service and encouraged to self-refer. It further advised that if his addiction issues were not resolved his absences were likely to continue. Following the report's receipt the hearing, adjourned from 10 August 2016, was reconvened on 26 August 2016 and the claimant was issued with a final written warning for a 6 month period, which he did not appeal.

9. Running alongside this progressive application of the respondent's Absence Management Policy to the claimant, he was in dispute with them regarding his contractual position in relation to changes to his access to flexible working arrangements. According to his submissions the respondent was saying that he had signed a new contract in May 2015 and that one of the differences related to this entitlement but that they denied his requests for them to provide proof that he had consented to the changes and to provide his original contract. In addition he says that from some time in 2016 his entitlement to sick pay was calculated and paid with reference to the new, less beneficial and disputed terms rather than the terms of his original contract. In this connection he says that he raised a grievance in July 2016 over the change in contractual terms and a disagreement that he had had with senior managers in May 2015, as a consequence of which he claimed to have been issued with a written warning for returning late from a period of annual leave. He says that his grievance was subsequently heard in or around August 2016 but was decided in the company's favour and that his appeal heard in October 2016 was similarly decided.

10. Whilst the claimant's final written warning remained live he had a further period of absence by reason of stress commencing on 27 October 2016 and extending to 31 January 2017. During this period he commenced the ACAS Conciliation Process on 1 November 2016 in relation to a claim for unlawful deduction of wages relating to his entitlement to company sick pay and requesting a statement of his contractual terms. The conciliation period closed without a settlement being facilitated and the claimant presented an ET1 on 5 December 2016. On 9 March 2017 his claim was heard and succeeded with judgment being issued on 27 March 2017 and settlement by way of a COT3 being reached on 19 June 2017.

11. In the meantime informal welfare meetings were held with him. One such meeting was on 14 December 2016 when his referral to OH was recommended. Although the claimant verbally consented to this he had to be chased to obtain the relevant consent form, which was not received until 9 January 2017 with the referral being made the next day.

12. On 31 January 2017 on his phased return to work the claimant was advised that an Attendance Review hearing would take place but that it would be delayed to allow for a settling in period as he had had a substantial time away from the business. On this same date the OH report was received, which confirmed that the claimant's depressed mood and anxiety may have been directly affected by substance and alcohol abuse adding that difficulties in workplace relationships and the pending tribunal hearing is likely to have impacted his moods. Before the proposed Attendance Review hearing could be convened, the claimant went off sick

again on 17 February 2017 by reason of stress, which absence continued to 5 May 2017 comprising 56 working days.

13. During this absence the respondent informed him of his rights under the Access to Medical Reports Act 1998 and on more than one occasion made known its wish to obtain a medical report from his GP, with which the claimant failed to co-operate.

14. On 6 May 2017 the claimant returned to work and at a return to work meeting was told that an Attendance Review hearing would be held but delayed. He was also reminded of the respondent's wish to obtain a report from his GP and although he verbally advised that he would provide his written consent this was never forthcoming. Subsequently on 15 May 2017 he went off sick with stress until 30 May 2017. He returned on 21 June 2017 but went off sick the next day until 6 July 2017 by reason of stress. During this absence he was reminded in writing of the respondent's wish to approach his GP, which he ignored. He began a phased return on 7 July 2017 before a further absence for stress between 17 and 20 July 2017.

15. At a return to work meeting on 21 July 2017 the claimant was informed orally and in writing that as he had not provided his consent to the obtaining of a medical report an Attendance Review meeting would be held on 3 August 2017, a potential outcome of which was the termination of his employment due to persistent absence. In the interval before the meeting the claimant was continuously absent because of stress.

16. On 3 August 2017 the Attendance Review meeting, at which the claimant was present, having returned to work that day was adjourned to allow the claimant a further opportunity to provide his consent for the respondent to obtain both GP and OH reports and he was given until 5.00 p.m. on 7 August 2017 for this purpose. He failed to respond despite a reminder and on 8 August 2017 he was invited to a reconvened review meeting on 10 August 2017.

17. At this meeting it was noted that his absence levels were very high with his having had 175 out of 254 days off since he had been issued with a final written warning on 26 August 2016. In mitigation the claimant stated that the reason for his absences was because of stress brought on by ongoing issues with his employment, including his tribunal claim. It was further noted that the OH reports had advised that he had a longstanding issue with substance abuse which had contributed significantly to his absences and mental health and that he had been self-managing his condition and had not followed medical advice to medicate to manage his mental health issues.

18. Having regard to these matters and the claimant's unwillingness to provide his consent for the obtaining of further up to date medical evidence from his treating practitioner the respondent in the person of Mrs Burns, Service Delivery Manager, concluded that his unacceptably high absence levels were unsustainable and were having a harmful effect on his team, as a result of which she decided to terminate his employment with notice on the grounds of capability. This decision was communicated

verbally to the claimant and subsequently confirmed in writing on 15 August 2017.

19. The claimant appealed the decision on 28 August 2017 but did not provide any grounds of appeal. His appeal was scheduled to be heard on 12 September 2017 by Mrs Laura Best, Head of Cheadle Operations but was adjourned as the claimant wanted to submit a document from his GP. He was advised that a decision would be taken following the document's receipt.

20. On 25 September 2017 the claimant provided a further appeal statement enclosing two letters from his GP dated 28 December 2016 and 15 September 2017, which confirmed the dates the claimant had referred to his GP with mental health symptoms and confirmed that he had begun counselling on 16 August 2017 and had received some treatment with addiction support services. On this date Mrs Best reviewed all the evidence and noting the claimant's refusal to engage with the respondent's attempts to obtain medical advice via his GP and OH and his unacceptably high absence levels she concluded that the decision to dismiss him was the appropriate one in all the circumstances, of which outcome the claimant was advised in writing on 2 October 2017.

Conclusions

21. In considering the application to strike out this complaint of unfair dismissal on the basis that it has no reasonable prospect of success the Tribunal took note of the guidance given by Lady Smith in Balls v Downham Market High School and College [2011] IRLR 217, in which she stated that with such an application the tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospect of success. The test is not whether the claim is likely to fail; nor is it a matter of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is therefore a high test, which stems from the proposition that it is unfair to strike out a claim where there are crucial facts in dispute and there has been no opportunity for the evidence in relation to those facts to be considered.

22. That having been said however this is a case where the material facts in relation to dates of absence, reasons for absence and issuing of warnings etc. are not in dispute and where the claimant has acknowledged in the Preliminary Hearing on 14 March 2017 giving rise to this hearing that his levels of absence were unsustainable to the business and stated that he could understand why he was dismissed.

23. According to the claimant's ET1 his case appeared to be that his dismissal on grounds of ill-health capability came about as a result of his taking the respondent to tribunal and successfully recovering monies that were unlawfully withheld stating that 'on my return to work after tribunal, management/HR caused further conflict, threatening to withhold SSP and

defaulting on (the) terms of (the) settlement agreement (and that) during this time attendance review procedures were undertaken which resulted in my dismissal for unsatisfactory attendance, all whilst (my) employer was in default of (the) COT3 settlement'. Such suggestion, however, is not supported by the evidence in that the respondent first began to address the claimant's poor attendance in April 2016 by issuing him with an oral warning which as a result of further absences progressively built up to his receiving a final warning on 26 August 2016, significantly before his tribunal claim was presented in December 2016.

24. In his submissions though he apologised if his pleadings had given the impression that he was claiming that he had been dismissed because of his tribunal claim and clarified that he was not saying this and that the point he had been trying to make was that the issues behind his tribunal claim were relevant in terms of the reasons behind his absences and that the role that the respondent's senior management played in the conflicts pre-dating his claim made him less able to carry out his role and by reason of the employer's duty of care regard ought to have been had to this in the application of the respondent's absence management policy to him. That having been said the claimant did not help himself by his unwillingness to engage with the respondent's attempts to obtain up to date medical evidence as to the cause of the stress that was given by his GP as the reason for his series of absences from 27 October 2016 onwards by refusing to provide his consent for his GP to be contacted or to attend for a further consultation with Occupational Health for the purposes of establishing the true medical position.

25. This lack of co-operation, which was not satisfactorily explained by the claimant, ultimately led to the respondent having to deal with six intermittent periods of absence adding up to 175 out of 254 working days since he was issued with his final written warning on 26 August 2016 by the time of the Attendance Review meeting with him on 10 August 2017 in circumstances where it was not challenged that the absences were impacting on its business in that the claimant worked in a small team and it had no medical opinion as to the extent and likely duration of his stress condition underlying his absences, in respect of which he was self managing and had failed to follow medical advice to take medication to manage it, which situation was made no clearer by the information that the claimant supplied in the form of the two letters from his GP in support of his appeal against his dismissal, which contained no prognosis or prospect of an improving medical position.

26. Having regard to these matters the Tribunal was satisfied that it could properly conclude that this was a case which has no reasonable prospect of success in that the respondent had a potentially fair reason for dismissal in the form of capability or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held for failing to maintain an acceptable level of attendance as evidenced by the sheer volume of his absences despite warnings to this effect delivered in accordance with its absence management policy and that having followed a fair procedure in handling these absences dismissal fell within the range of reasonable responses open to it.

27. Accordingly pursuant to the Tribunal's power under Rule 37(1)(a) of the Rules of Procedure the claim is struck out on this ground.

Employment Judge Wardle

Date 12 June 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

21 June 2018

FOR EMPLOYMENT TRIBUNALS