Claim no: 2301387/ 2019

EMPLOYMENT TRIBUNALS

Claimant. **Sally Clark**

Respondents: **Iceland foods Ltd**

Heard at: **Croydon remotely** **On 23rd and 24th November 2020**

Before: **Employment Judge Hargrove**

Representation
Claimant: **In person**
Respondents: **Mr Hignett.**

JUDGMENT AND REASONS.

The Judgment of the Tribunal is as follows:

The claimant's claim of unfair dismissal is not wellfounded.

REASONS.

1. The claimant was employed at the respondent's Erith store from 24th of April 2012 as a part-time sales assistant. Her contract of employment at pages 63 to 66 of the bundle guaranteed her minimum working hours of 7.5 per week "with additional hours as required from time to time for the better performance of your duties". Under clause 1 it stated "the nature of our business requires flexibility in its operation and we reserve the right to amend your role from time to time on a temporary or permanent basis".
2. There were provisions in the respondent's handbook set out at page 44 for termination on the grounds of ill-health. "If you are unable to be able to return to work in any capacity in the foreseeable future, then we may take the decision to terminate your employment. The deck will only be taken after appropriate consultation". There was also was also an attendance policy document at page 61.
3. The claimant went off sick on the 9th of March 2018 and never returned to work until her dismissal, allegedly for incapability, by Dominic Edwards at a fourth attendance meeting on 17th of January 2019. She appealed, but her appeal was rejected by Paul Austin by letter of 27th of March 2019

following an appeal hearing on the 19th of March (notes pages 253 to 262). Her entitlement to company sick pay expired after 6 weeks and thereafter she was entitled to SSP.

4. The claimant presented a claim of unfair dismissal to the Employment Tribunal on 22nd of April 2019 having commenced early conciliation on the 3rd of April and obtained a certificate. A full hearing was originally listed in November 2019 but postponed on the respondent's application. A further hearing listed in March 2020 was postponed due to Covid.
5. **Issues identified at the start of this hearing.**
   (1). Does the respondent prove that the reason or principal reason for the claimants dismissal was either a reason for capability arising from ill-health, or some other substantial reason namely the claimant's refusal to return to work except on terms unacceptable to the respondent, including that she return on 27 hours per week in her previous job as it till operator and dates check her, and that her line manager should be moved to another store?
   (2). Was the dismissal for that reason fair or unfair applying section 98 (4) of ERA 1996?: " 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 sufficient reason for dismissing the employee, and (b) and shall be determined in accordance with equity and a substantial merits of the case". In this respect the burden of proof is neutral. The employer is not required to prove on the balance of probabilities that the dismissal was fair, and the employee is not required to prove that it was unfair.
   (3). If dismissal was unfair, what are the chances that if a fair procedure had been carried out, the claimant would have been dismissed in any event, and if so, when. Here the burden of proof lies on the respondent employer? See Polkey v AE Dayton Services Ltd.

6. **Chronology.** This is compiled from the witness statements and documentary evidence. Only the dismissers, Dominic Edwards and Paul Austin gave live evidence to the tribunal for the respondent, although the respondent also relied upon the witness statements of managers who investigated the claimant's grievances, Burness, and, at the appeal stage, Morris. The claimant gave evidence and relied upon a witness statement.

6.1.It is not in dispute that up to the date of her going off sick on 9th of March 2018, the claimant habitually worked 27 hours per week, 21 hours on the till and 6 hours on date checking of products on display .

6.2. As from January 2018 Miss DA took over the management of the Erith store from her predecessor. The claimant describes that various difficulties arose in her employment after that date from the actions of DA.

6.3. On the 17th of January 2018 the claimant has called in to DA's office and notified that her hours were to be reduced. (Notes of the meeting at page 114 are illegible).

6.4. On 2nd of February 2018 It is alleged that a complaint was raised from a customer by email that the claimant had made rude comments about Iceland on the 2nd of February. See page 69. The claimant was invited to an investigatory meeting with Bushira Islam (BI), another store manager, where the claimant denied it. DA and others were also interviewed. The claimant has stated a belief that this was a false complaint instigated by DA to undermine the claimant. BI recommended that it should go to a disciplinary hearing.

6.5.the claimant subsequently raised grievances against DA concerning this and other matters including the threatened reduction in hours and refusal of time off for

holiday. There are a series of emails in the bundle raising these grievances dated 16th of February 2018 (pages 115 to 116), the 21st of February 2018 (page 118), 26th of February 2018 (page 126) and first of March 2018 (page 127).
6.6.the claimant went off sick on ninth of March 2018 and never returned to work. The sick-notes thereafter record "stress at work" up to 6th of July 2018, and from 6th of July to the 22nd of July 2018, "recuperation from recent abdominal surgery" (which had taken place on the 27th of June 2018). Thereafter, up to the 31st of January 2018 the sick notes record stress at work (see pages 293-305) .
6.7.in the meantime, on 26th of March 2018 a grievance hearing took place before Richard Burness where the claimant was attended by a friend, Moya Alexander. See notes pages 129–137. RB's outcome letter dated 6th of April 2018 is at pages 138–143, partially upholding 3 out of 7 grievances in this detailed response. The first related to the records of the investigatory interview with IB; the second related to a return to work interview; the third related to the claimant's reduction in hours from 27 hours per week, without proper notice. He recommended she be reimbursed her reduction in pay for this period up to the time she had gone off sick; and that it to be discussed with DA upon her return from her sickness absence.
6.8. On 17th of April 2018 the claimant submitted a grievance appeal at pages 144–150. The grievance appeal was heard by Joanne Morris on 17 May 2018 – pages 161–167. The claimant was again attended by Moyer Alexander. Joanne Morris interviewed Richard Burness. There were a number of points raised, including an accusation that DA had been untruthful in relation to a return to work interview; and DA's reduction in her hours. These were not upheld, as was a complaint that the claimant's holiday request had been rejected – they were eventually agreed – by DA .She excepted however that the investigation into the customer complaint had been handled poorly and requested that an independent person undertake a review. Subsequently the claimant was notified that the disciplinary matter would not be taken further.
6.9. In the meantime, Mr Edwards had started undertaking meetings with the claimant to discuss her sickness absence. The first such meeting took place on the 25th of June 2018, the day before the claimant's abdominal operation. The notes of this at page 179. On 8 August 2018 the claimant was invited to a second such a meeting which eventually took place on 19 of September 2018, see page 186-190. On 31st o October 2018 he invited her to a third meeting to take place on the 20th of November. In that letter he made the claimant aware that if she was not able to return to her substantive role, or Iceland was not able to identify reasonable adjustments, or suitable alternative roles, then one possible outcome of the meeting may be dismissal on the grounds of capability. Mr Edwards made a mistake in that letter in that he used a template which contained a statement to the effect that he had obtained a medical report from the claimants GP. In fact he did not obtain any medical report during the process. The claimant emailed Mr Edwards on the 16th of November querying what report had been received. Before that meeting a letter was circulated to all staff at Erith notifying the introduction of a new 16 hour contract. See page 191. In the claimant's case it was stated that it did not apply, apparently because she was off on the sick. It was later clarified to the claimant by Mr Edwards that it would apply to her as well, since she had been working up to 27 hours per week, by letter of 10 December at page 215. The notes of the third meeting on the 20th of November are at pages 195–211. The claimant was accompanied by her sister, Kirsten Old. At this meeting the claimant disclosed that she had a hernia problem which would not be resolved until the new year and that she had a consultant appointment in December and that it would be some time before it got sorted. The fourth and final meeting took place on the 17th of January 2019, the claimant having been invited to it by Mr Edwards on the 7th of January. See page 221. The claimant was accompanied by her friend Joanne

Butler. The notes of that meeting are at pages 223- 239. Mr Edwards notified the claimant that she was to be dismissed and confirmed it by letter of 17 January at page 240. The claimant appealed by letter of 22 January 2019 at page 244. The appeal hearing took place on the 18th of March 2019 and the notes of the meeting, chaired by Mr Austin., are at pages 253-262. The claimant was not accompanied at the appeal meeting. The appeal outcome was notified to the claimant by letter of 27 March. She was unsuccessful. That concludes the chronology of main events.

7. **Conclusions.** Having heard and considered the parties' submissions overnight, I have concluded that the respondent has succeeded in proving that the principal ground for the claimant's dismissal was the length of the claimant's sickness absence, and not some other substantial reason. I so conclude accepting the evidence of Mr Edwards and Mr Austin that they took the view that the claimant having been absent on the sick, confirmed by sick notes, continuously from 9th of March 2018 to the 17th of January 2019 (over nine months), and there being no prospect of a return date within a reasonable time limit thereafter, that was indeed the reason, and not, as suggested by the claimant, that the actions or influences of DA were in someway the root cause of her dismissal.

In assessing the fairness of the decision to dismiss under section 98 (4), I have taken into account the well-known passage in the judgement of Mr Justice Phillips in East Lindsey district Council v Daubney 1977 ICR page 566: – "unless there are wholly exceptional circumstances, before an employee is dismissed on the grounds of ill-health it is necessary that she should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position. We do not propose to lay down detail principles to applied in such cases, for what will be necessary in one case may not be appropriate in another. But if in every case employers take such steps as are sensible according to the circumstances to consult the employee and to discuss the matter with him, and to inform themselves upon the true medical position, it will be found in practice that all this is necessary has been done. Discussions and consultation will often bring to light facts and circumstances of which the employers were unaware, and which will throw new light on the problem. Or the employee may wish to seek medical advice on his own account, which, brought to the notice of the employer medical advisors, will cause them to change their opinion.There are many possibilities. Only one thing is certain, and that is that if the employee is not consulted, and given an opportunity to state his case, an injustice may be done."

I recognise that the respondent did not obtain any medical evidence as to a prognosis or likelihood of a return to work, but I do not consider it necessary for that to have been done in this case because they had the claimant's sick notes, which they accepted at face value, and accepted what the claimant was saying about the prospect of a return. It is noteworthy that the claimant was, I conclude from the notes of the meetings, not only unable to give a firm return date but was also requiring a return to work on her original 27 hours and doing essentially what was her old job with a mix of till work and date checking, and possibly some short periods of cleaning. She was not entitled as a contractual right to be offered 27 hours per week. They offered her a minimum of 16 hours per week and she was offered those hours plus, on one version, 19 hours per week. The claimants further objections were based upon the nature of the tasks she was offered and the hours and days upon which she was offered them. The flexibility clause in the claimant's contract justified the offer of different work, including cleaning work. I do not accept that the hours and times offered were radically different from those which she had worked previously, and included two days off per week consecutively on a Tuesday and Wednesday, albeit on a version resulting in only 16 hours been offered rather

than 19. In addition, the claimant was not willing to engage in the respondent's reasonable suggestion of mediation with DA, but expressed the wish almost in terms of a demand, that DA be moved to another store, rejecting the respondent's alternative suggestion that she agree to move to another nearby store (within reasonable travel distance although not, I accept, as convenient) where work more to her liking could have bound . I find that the root cause of the claimant's position was her refusal to accept the outcome of her grievance, which I find was dealt with reasonably and in good faith. In the circumstances I conclude that it was reasonable for the dismissers to conclude that there was no reasonable prospect of the claimant returning to work within any reasonable period in the future, accepting the probability that sick notes would have continued to cite "Stress at work". In this respect, the respondent accepted the sick notes at face value, as they were entitled to do. I accept therefore that capability due to long-term sickness absence was at least the principal reason for dismissal, although it was also influenced by the claimant's unshakeable conviction that she would not be able to work under DA as her store manager. It was not reasonable, having regard to the outcome of the grievance process, to move DA.

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Employment Judge Hargrove

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Date 24 November 2020