EMPLOYMENT TRIBUNALS

Claimant: **Mr D Withell**

Respondent: **Greencore Food To Go Limited**

Heard at: **Nottingham**

On: **5 and 6 October 2020**

Before: **Employment Judge Ahmed (sitting alone)**

Representation
Claimant: **In person**
Respondent: **Mr N Bidnell-Edwards of Counsel**

JUDGMENT

1. The Claimant was unfairly dismissed.

2. The Respondent's application for a reconsideration is refused.

3. The issue of remedy is adjourned to Thursday 21 January 2021 at 10:00 am at the Nottingham Hearing Centre.

4. Case management orders as to the remedy hearing are given separately.

REASONS

1. This case was a complaint of unfair dismissal by Mr Daniel Withell who was employed by the Respondent as a Picker/Auditor from 2 February 2016 to 6 March 2020 (the 'effective date of termination'). Mr Withell was dismissed for incapability (ill-heath absence) in accordance with the Respondent's Sickness Absence Policy.

2. The Respondent is a large employer whose main business is the production of convenience foods. It has good administrative resources.

3. The Respondent's Sickness Absence Policy (the latest version of which was issued in September 2019 and which was incorporated into the Claimant's contract of employment) distinguishes between 'unauthorised' absences and all other absences, which by implication are referred to as authorised absences although they are not referred to in the policy as such. An unauthorised absence is one where absence from work by an employee has not been notified in accordance with the reporting procedures. It is essentially where an employee has not reported for work or has failed to communicate the reason for their

absence to their line manager or the business. All other absences are authorised absences whether they are self-certified or supported by a medical certificate.

4. The Policy also deals with long-term and sporadic absences. There is a 4 Stage process. Stage 4 is usually the stage of dismissal. If an employee has three occasions of authorised absence or one unauthorised absence in a rolling six-month period then the Absence Procedure is triggered. The employee is initially invited to a Stage 1 sickness absence meeting. Further absences of the same type will result in the employee being called to a Stage 2 meeting and so on. An employee has the right or appeal at each stage.

5. Paragraph 11.3 of the Absence Procedure is headed "Stage Four: Final Sickness Absence Meeting" and states:

"Where the employee has been warned that they are at risk of dismissal, the Company may invite the employee to a meeting.

The purposes of the meeting will be:

· to review the meetings that have taken place and matters discussed with the employee;

· where the employee remains on long-term sickness absence, to consider whether there have been any changes since the last meeting under Stage 3 of the procedure, either as regards to their possible return to work or opportunities for return or redeployment;

· to consider any further matters that they wish to raise;

· to consider whether there is a reasonable likelihood of return to work or achieving the desired level of attendance in a reasonable time; and

. to consider terminating the employee's employment.

Termination will normally be with full notice or payment in lieu of notice.

Employees in their probationary period will escalate straight to Stage 4 of the process if they trigger an absence review meeting."

6. The Claimant was absent on 30 January 2019 for a sore throat. He was then absent again on 12 and 13 September 2019 for reasons which are not clear. He was then absent from 22 - 30 September 2019 with flu/stomach problems and from 7 - 15 October with gastroenteritis. All those absences triggered a Stage 1 meeting which took place on 22 October 2019. The Claimant was placed on Stage 1 of the absence procedure. Mr Withell did not appeal against the decision.

7. The Claimant was further absent on 31 October - 3 November for a stomach bug and from 10 - 13 November for back and shoulder pain which he attributed to moving furniture.

8. As a consequence of the above absences the Claimant was placed on Stage 2 of the Absence Procedure.

9. Further absences occurred on 1 December 2019 and 8 – 10 December both for back pain. The Claimant was then placed into Stage 3.

10. The Claimant appealed the Stage 3 decision but the appeal was dismissed.

11. Further absences occurred on 10 - 24 January 2020 and 12 - 25 February 2020 (both for back issues) and resulted in the Claimant being invited to a Stage 4 meeting. This took place on 6 March 2020 and was

conducted by Mr Vinter, a Transport Manager.

12. It is now known that the Claimant covertly recorded these absence meetings. His transcripts are included in the bundle. No particular issue arises out of the covert recordings, or the difference in the notes of the Respondent and the transcripts save that the former are much shorter. The Claimant's file for the crucial Stage 4 meeting appears to have either gone missing or been corrupted with the result that the only notes which are available for the Stage 4 absence meeting are those of the Respondent.

13. The notes of the Stage 4 meeting deal principally with the issue of whether the Claimant was told by his Supervisor that he could not take medication at work prescribed for his back pain. The Claimant suggested at one point that he believed he had been told that he could not as it might make him drowsy. The notes on this issue are not wholly clear but there is a reference to the Claimant accepting that he might have got mixed up between the advice given to him by a Pharmacist and his discussions with his Supervisor.

14. At the conclusion of the Stage 4 meeting Mr Vinter took the decision to dismiss the Claimant. He told the Claimant of his decision orally after a short adjournment. The notes record the Claimant being told of a right of appeal but not the time limit in which to do so. Mr Vinter wrote to the Claimant on 6 March 2020 to confirm the dismissal. The letter was addressed and sent to 3 Waverley Place. The Claimant's address at that time was 3 Waverley *Way*. The Claimant states that he did not receive the letter and only became aware of its existence subsequently when he chased the Respondents for formal confirmation. The Respondent sent him an e-mail on 23 March attaching the outcome letter.

15. Mr Withell replied by sending an email to the Respondent's HR office on 26 March in order to lodge his appeal. The Respondent replied to say that an appeal could not be entertained as he was out of time for doing so - any appeal had to be done within 5 days and that period had now passed. The Claimant made it clear that he did not receive the written outcome letter in the post. He did not receive a reply to that email.

16. Accordingly, no appeal hearing of the decision to dismiss took place. Mr Withell began early conciliation on 4 April 2020. The ACAS early conciliation certificate was issued on 4 May 2020. The ET1 claim form was presented (in time) on 20 May 2020.

THE LAW

17. Sections 98(1)(2) and (4) of the Employment Rights Act 1996 ("ERA 1996"), so far as they are relevant, state:

"(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 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.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications 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 skill, aptitude, health or any other physical or mental quality…..

(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."

18. In **HSBC Bank plc v Madden** [2000] ICR 1283, the Court of Appeal re-affirmed the appropriate approach to applying what is now section 98 (4) of the Employment Rights Act 1996. That approach, originally set out in **Iceland Frozen Foods v Jones** [1982] IRLR 439, is as follows:

"(1) The starting point should always be the words of section [98(4) ERA 1996] themselves.

(2) In applying the above section the Tribunal must consider the reasonableness of the employer's conduct, not simply whether the Tribunal would have done the same thing.

(3) The Tribunal must not substitute its decision as to what was the right course to adopt.

(4) In many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view another employer quite reasonably take another.

The function of the Employment Tribunal [as an industrial jury] is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; if the dismissal falls outside the band it is unfair."

19. The Court of Appeal in **London Ambulance Service NHS Trust v Small** [2009] EWCA Civ 220 reminded tribunals of the importance of not substituting their views for that of the employer. I have been conscious of the importance of not doing so.

20. The only case cited to me in closing submissions was that of **Taylor v Alidair Ltd** (1978) IRLR 82, where the Court of Appeal set out the test to be applied in capability cases. Lord Denning MR set out the relevant test (at paragraph 20) which is that:

"whenever an employee is dismissed for incapacity or incompetence it is sufficient that the employer honestly believes on reasonable grounds that the employee is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent."

The issues

21. The issues in this case are as follows: -

21.1 What was the principal reason for the dismissal and was it a potentially fair one under sections 98(1) and (2) ERA 1996? The Respondent asserts it was a reason relating to the Claimant's capability.

21.2 If the dismissal was for a potentially fair reason, was it unfair in accordance with the provisions of section 98(4) ERA 1996? In particular, did the decision fall within the band or range of reasonable responses?

21.3 Did the Respondent follow its own procedure in relation to the dismissal?

21.4 Was the Claimant unfairly denied an appeal?

21.5 Was the Respondent's Sickness Absence Policy inherently unfair?

21.6 Was the Claimant told by the Respondent not to take medication whilst at work?

CONCLUSIONS

22. I will deal with the last of the issues first. There is no evidence that the Claimant was told not to take medication (specifically codeine or a codeine-based product) whilst at work. He accepts both in his evidence and according to the notes of the Stage 4 meeting that he may have "got a bit mixed up". It may be inferred from the notes of that meeting that the Claimant had conflicting advice from a Pharmacist, as opposed to his GP, which caused the Claimant not to take the prescribed medication initially. However, there is no evidence of the Claimant being given any advice as to whether or not he should take any medication from the Respondent's employees.

23. In relation to the reason for the dismissal I am satisfied that the Respondent has discharged its burden in establishing that the dismissal was for 'capability', which is a potentially fair reason for dismissal under section 98(2)(a) ERA 1996.

24. The crucial issue is of course whether the dismissal was unfair having regard to the provisions of section 98(4) ERA 1996. In that respect I have taken into consideration the guidance set out in the cases cited above.

25. Whilst there was some criticism of the Policy from the Claimant I am satisfied that the Respondent's Sickness Absence Policy fell within the range of reasonable responses. It is not inherently unfair. The Claimant refers to a number of (unnamed) colleagues who have been absent for longer but not dismissed. Each case has to be judged on its own merits by the Respondent. They are entitled to manage absences with appropriate trigger points. It is a common experience with employers that frequent short absences can be more difficult to manage than long-term absences.

26. The Claimant appears to have had a good attendance record until June 2019 when he was absent on several occasions were for a variety of reasons. In the latter stages he appears to have hurt his back moving furniture. All of the absences for the crucial third and fourth Stages were for back pain. However, his back pain was not a long-term condition and it appears he had recovered by the time of the Stage 4 meeting as the notes record him saying: "I'm OK now". He was certainly at back at work when he was dismissed and there was no indication of a continuing problem.

27. I find the dismissal unfair for two reasons. The first is largely procedural and the second substantive.

28. I am satisfied that the Claimant was unfairly denied an appeal. The opportunity to appeal, as well as the appeal process, is an essential element of

fairness in any dismissal. The Claimant gave evidence, which I accept, that he notified his employer of his change of address on several occasions from 2019 when he moved home. Unfortunately, the Respondent does not appear to have corrected its records properly with the result the dismissal letter was sent to the wrong address. I am satisfied that the Claimant did not receive the letter in the post. There was no reason for him to be untruthful about this as he had certainly intended to appeal as he had done on an earlier Stage warning. It is clear that the dismissal letter was sent to the wrong address. In those circumstances it was unfair of the Respondent to deny the Claimant an appeal out of time. It would be understandable if the delay was wholly down to the Claimant but the reason for the delay was the failure of the Respondent to send the letter of dismissal to the correct address. It is also difficult to see why the Respondent refused an extension of time. There would have been no hardship or prejudice to the Respondent in allowing an appeal out of time given the relatively short delay and the fact that it was the fault of the Respondent in the first place. In refusing to entertain an appeal out of time in those circumstances the Respondent acted unfairly.

29. I have gone on to consider whether the failure to allow an appeal made any difference to the outcome and whether the end result would have been the same. I have considered whether an appeal officer is likely to have come to the same conclusion as Mr Vinter. It is possible that the appeal officer may have concluded that the Claimant, having now returned to work was deemed worthy of continuing his employment and so allowed the appeal. He may also have taken the same approach as Mr Vinter that the relevant triggers had been met and so dismissal was justifiable.

30. On balance I consider that unlikely that the Claimant would have succeeded on appeal. It seems to me that the way in which Stage 4 is approached by the Respondent is that once the trigger points have passed it is all very much cut and dried and dismissal is inevitable. An appeal officer is likely to have received the same (though possibly erroneous) advice from HR that the Claimant should be dismissed because he has passed all the four Stages of the policy. I therefore conclude applying the **Polkey** principle (see **Polkey v AE Dayton Services Ltd** [1987] IRLR 503) that whilst the failure to allow the Claimant an appeal makes the dismissal procedurally unfair, the outcome in all probability would have been the same.

31. There is however a fundamental error in the Respondent's approach. That relates to the failure to its own Sickness Absence Policy.

32. It is clear from paragraph 11.3 of the Sickness Absence Policy that the purpose of the Stage 4 meeting is not just to dismiss but to review the meetings that have taken place and to consider "*whether there is a reasonable likelihood of return to work or achieving the desired level of attendance in a reasonable time*" (emphasis added).

33. I am satisfied that there was a failure to consider this important part of the Respondent's own policy and procedures. The Policy does in fact no more than state the general legal position that prior to a dismissal on capability the likelihood of future absences should be taken into consideration in deciding whether to dismiss. In failing to undertake the necessary enquiry the Respondent therefore not only acted contrary to what is required generally in capability dismissals but also failed to follow its own policy and procedures. An employer who does not follow its own procedures can be said to be acting outside the band or range of reasonable responses and here I find that was indeed the case. The

Claimant was back at work and had recovered from his back problems as the notes make clear. The cause of his absences was now no longer relevant. There is nothing to suggest he was going to be anything other than an employee with an acceptable absence record given his previous period of 4 years of employment.

Reconsideration application

34. After I announced the decision orally, Mr Bidnell-Edwards on behalf of the Respondent applied for a reconsideration. He argued that the point as to non-compliance with the policy had not been argued by the Claimant nor was it one which was addressed in the course of evidence. In particular he refers me to and relies upon the case of **Trimble v Supertravel Limited** [1982] IRLR 451, EAT. That case involved a decision by a tribunal on compensation without hearing evidence on failure to mitigate. The Employment Appeal Tribunal held that to do so was the wrong approach.

35. I refused the application for a reconsideration for the following reasons: -

35.1 I do not consider that **Trimble v Supertravel** lays down a hard and fast rule that a matter which is not the subject of discussion or evidence during a hearing cannot be used in determining the fairness or otherwise of a dismissal. I agree that the Claimant has not raised the point. It only occurred to me in deliberations otherwise I would have raised it myself. The Sickness Absence Policy is clearly part of the evidence in this case and I am entitled to take it into consideration.

35.2 I also take into account the respective position of the parties. The Claimant is a litigant in person and, with all due respect to him, it is clear that he has found it difficult to understand some aspects of the policy. For example, he struggled with the distinction between authorised and unauthorised absences. Furthermore, he is disabled in that he is Autistic. The Respondents deny knowledge of his Autism, and that has not been relevant to the issues, but given his disability he is clearly at a further disadvantage. He cannot be expected to cover all the points in his favour in the manner of a lawyer. I appreciate his partner has attended the hearing but she has taken no active part.

35.3 Mr Bidnell-Edwards invited me to allow him to recall Mr Vinter so that he could give evidence on this point. I did not consider that would be an appropriate course. Either Mr Vinter was simply going to confirm that this particular issue was never addressed in which case my decision would necessarily be the same. Or, he was now going to tell the Tribunal about something which had not been mentioned in the Stage 4 meeting (according to the Respondent's own notes), not referred to in the dismissal letter, not pleaded in the ET3 and not mentioned in his otherwise fairly comprehensive witness statement. If he did I would have very serious concerns about the credibility of such evidence.

36. There is no reasonable prospect of the decision being varied or revoked. The reconsideration application is therefore refused and the decision is confirmed.

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Employment Judge Ahmed

Date: 22 October 2020

JUDGMENT SENT TO THE PARTIES ON

23 October 2020

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FOR THE TRIBUNAL OFFICE

Notes
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

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