



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr C Roberts

**Respondent:** Sellafield Limited

**Heard at:** Manchester

**On:** 24 January to 27 January  
25 February and 3 May  
2022  
(In Chambers)

**Before:** Employment Judge Feeney  
Mr C Cunningham  
Ms J Byrne

## REPRESENTATION:

**Claimant:** Mr P Quinn, Solicitor

**Respondent:** Ms J Connolly, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claims of disability discrimination under section 15 Equality Act 2010 succeed in part in relation to the final written warning and his dismissal. The claim in respect of the disciplinary process fails and is dismissed
2. The claimant's claim of unfair dismissal succeeds.
3. The Tribunal applies a Polkey/Chagger limitation on the claimant's final loss of six months.

## REASONS FOR RESERVED DECISION

1. The claimant brings a claim of disability discrimination, unfair dismissal and wrongful dismissal following the decision of the respondents to dismiss him in December 2019, a decision he only became aware of in February 2020.

**Claimant's submissions**

2. The claimant submits that the respondents dismissed him in breach of Section 15 in that he was dismissed for something arising from his disability, namely the inability to text his line manager when he was going to be absent and his failure to provide sick notes at all or in a timely fashion. The claimant also relies on this for his unfair dismissal claim.

**Respondent's submissions**

3. The respondent submits that the claimant has not established that his failures were something arising out of his disability and that they were objectively justified in dismissing him due to the many occasions on which he had failed to contact his line manager and failed to submit sick notes. In addition, the claimant had a final written warning for the same matter and failed to improve. The respondent believes that they were entitled not to pay the claimant notice as the matter was misconduct which contractually they were not obliged to pay notice pay in the dismissal for misconduct. In addition, if it were gross misconduct no notice is payable.

**Issues**

4. The issues for the Tribunal to determine are as follows:

Section 15 claim

- (1) Did the following arise as a consequence of C's accepted disability of PTSD, depression, anxiety:-
  - (a) A failure to comply with the attendance support procedure, namely:-
    - (i) His failure to text his line manager before the start of his shift to inform him that he was unable to attend work, why and when he expected to be back at work;
    - (ii) His failure to obtain and submit sicknotes from his GP to the respondent in respect of sickness absence of more than seven calendar days;
    - (iii) His failure to keep his manager informed throughout the duration of any absence;
- (2) Did the respondent treat the claimant less favourably by:
  - (i) Giving the claimant a Final written warning in July 2020;
  - (ii) Instituting the disciplinary procedure against him subsequently;
  - (iii) Dismissing the claimant?
- (3) Did the respondent treat the claimant as alleged because of "something arising" in consequence of the claimant's disability?

- (4) Can the respondent show that the treatment was of proportionate means of achieving a legitimate aim? The legitimate aim being notifying the respondent of any absences so that the respondent provides any necessary support and ensure that it has the necessary information for workforce planning.

#### Time Limits

- (5) Whether discrimination complaints at paragraphs 1 and b above made within time limits Section 123 of the Equality Act 2010. The Tribunal will decide:-
- (a) Was the claim made within three months of the act to which the complaint relates?
  - (b) If not, was there conduct extending over a period?
  - (c) If so, was the claimant's claim made within three months of the end of that period?
  - (d) If not, were the claims made within a further period that the Tribunal thinks is just and equitable?
- (6) In deciding this, the Tribunal will consider:-
- (a) Why were the complaints not made to the Tribunal in time?
  - (b) Is it just and equitable in all the circumstances to extend time?

#### Unfair Dismissal

- (7) The dismissal is not in dispute.
- (8) What was the reason for the claimant's dismissal? The respondent contends that the reason for dismissal was gross misconduct and/or for some other substantial reason, namely the claimant's repeated unauthorised absences, failure to make contact with his line manager and failure to comply with the respondent's attendance support procedure.
- (9) Was the dismissal fair or unfair having regard to the reasons shown by the respondent whether in the circumstances (including the size and administrative sources of the respondent's undertaking)? Did the respondent act reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant?
- (10) Was the dismissal within the band of reasonable responses?

#### Wrongful Dismissal

- (11) Is the claimant entitled to notice pay? The respondent contends that the claimant did something so serious that it was entitled to dismiss without notice.

Remedy (whether for unfair dismissal or discrimination)

- (12) Did the claimant cause or contribute to his dismissal by conduct in failing to submit sick/fit notes in a timely fashion or at all, failing to inform his line manager when he would not be attending work in accordance with the attendance support procedure and/or failing to keep his manager informed throughout the period of absence?
- (13) Is there a chance the claimant would have been fairly dismissed anyway if a fair procedure had been followed or for some other reason such as attendance/capability? If so, should the claimant's compensation be reduced to reflect this, by how much, and from what date?
- (14) If the Tribunal finds the claims are well-founded, how much compensation should be awarded?

**Witnesses and evidence**

5. From the claimant the claimant himself and from the respondent Ben Wren, Line Manager, Matt Makin, Senior Projects Control Manager and Investigation Manager and Kevin Slater, who is Head of Operations, Security and Resilience, and Decision Maker in respect of the final written warning and the dismissal.
6. There was an agreed bundle.

**Findings of Fact**

7. The Tribunal's findings of facts are as follows.
8. The claimant had served in the Armed Forces for a number of years and saw action in Afghanistan, as a result of his experiences in Afghanistan the claimant was eventually diagnosed with PTSD and Co Morbid Depressive Illness in April 2017. This diagnosis was made by a doctor at Combat Stress, a charity assisting War Veterans, the claimant attended assessments at Combat Stress and, at a later point, treatment sessions.
9. The claimant started work at Sellafeld on 16 September 2013 as an Emergency Management Planner and became a Training Instructor a couple of years later. The claimant felt he was doing well and easily managing the work and the Instructor role but for some reason in early 2017 he started to become unwell mentally and his sister arranged for him to attend a programme run by Combat Stress.
10. The claimant attended a Combat Stress programme and psychiatric assessment on Monday 24 April 2017 to Wednesday 26 April 2017. On 18 May 2017 Combat Stress wrote to his GP at the time and stated that "I understand

you have received a letter from our Consultant Psychiatrist Dr Prestwich confirming a diagnosis of PTSD with Co-Morbid Depressive Disorder” and informing his GP that he would be offered a place on their trans-diagnostic programme preparing for attendance at the intensive treatment programme for PTSD and he was on a waiting list for both. The assessment stated that “his well adaptative behavioural strategies were to socially isolate, stopping his interests, will not answer door/telephone calls or texts/pulls hair out from eyebrows and beard”.

11. His second programme was Sunday 2 July to Saturday 8 July 2017. The respondents gave the claimant paid time off to attend these sessions and he did not have to take sickness days, and also on 5 August 2017 to 15 September 2017, a further letter went from a CBT Therapist at Combat Stress to another doctor at the claimant’s surgery on 14 September 2017 recommending he had time off to allow his mind to process the depth of what he went through in Afghanistan and asked the GP to sign him off work for the next four weeks to help the healing work begin at Combat Stress.

## 2018

12. In 2018 the claimant’s then manager AF kept a log of what happened with the claimant and in January she recorded a number of occasions when the claimant disappeared during his working day and a number of occasions when he appeared to have left to go to another building and never returned to work. In addition, IL helped him as a mentor and some of the exchanges were with IL.
13. In February AF recorded as follows:

13<sup>th</sup> February a no show, text at 7.30pm to say he wouldn’t be in on 14<sup>th</sup> and maybe the 15<sup>th</sup>; the 15<sup>th</sup> a no show and the 16<sup>th</sup> a no show when there was a planned training event. On 19<sup>th</sup> the claimant emailed to say he was off and would be ‘back in tomorrow’, on 20<sup>th</sup> he was not seen after 10 o’clock, he came in on 21<sup>st</sup> but was not seen after 10 o’clock, there was a question mark against 22<sup>nd</sup> and 23<sup>rd</sup> February was a no show. On 26<sup>th</sup> February there was a no show.
14. AF recorded further absences from February into March - 27 February no show, 28 February no show, 1<sup>st</sup> March no show, 2<sup>nd</sup> March no show. Texted him at 9.45 asking how things, the claimant text back on 5<sup>th</sup> March saying things getting better.
15. Claimant emailed AF stating that ‘when I decided to stay off I emailed with an update but got no reply, had my medication adjusted and things are starting to settle down now which is helping me feel better, I have a doctor’s note which covers me until the end of the week, I got confused on who I report to, AF told me to report to IL but last time I was off I let you know’
16. On 19<sup>th</sup>, 20<sup>th</sup> and 21<sup>st</sup> March the claimant had texted to say he was ill eventually advising he would be on sick leave, he said he would be on annual leave on Thursday and Friday although this had not been agreed. The claimant then did not turn up the next week and when he was texted to ask if he was ok he replied

that he had crashed into deer on the way into work so was at home sorting the insurance out.

17. On 27<sup>th</sup> March however he did not arrive at all, and he was texted at 9.30 to ask if he was coming in but there was no reply. On 28<sup>th</sup> March he arrived late at 9 am and stated he had damaged his car on the way to see his mam in Kendal at the weekend and not as he was driving into work on Monday as he had previously said. However his mother did not live in Kendal although no questions were asked about this at the time.
18. On 3<sup>rd</sup> April the claimant had a meeting with AF to reconfirm working times, standards and expectations. On 10<sup>th</sup> and 11<sup>th</sup> April he was late, on 12<sup>th</sup> April he texted to say he would be off for two days due to injured ribs from Tuesday night. On 19<sup>th</sup> April he came in but left for a non-approved half day and on 20<sup>th</sup> April he did not arrive and made no contact.
19. On 23<sup>rd</sup> April the claimant emailed AF to say he was waiting for a doctor's appointment and would be in the next day however the next day he did not arrive and there was no contact. Likewise, on 25<sup>th</sup> he was texted by AF but got no reply. On 26<sup>th</sup> April she texted again and got a reply at 13.50 saying he would be back in on Monday "apologies if I have been a little slow since my last update for you I will be back first thing Monday due to a few medical reasons". He was informed he would need a sicknote, on 30<sup>th</sup> April he emailed to say that he would now be back on Wednesday at the earliest due to a medical appointment the next day which he needed to attend.
20. On 2<sup>nd</sup> May he did not turn in to work but emailed at 8.20 pm "just so you are aware I will be back Tuesday 8<sup>th</sup> May; I have a doctor's note to cover me till then I can hand into medical or email across to them if needed sooner". AF recorded: 8<sup>th</sup> May and 9<sup>th</sup> May was no show and no contact, on 10<sup>th</sup> May he emailed to apologise saying he had been backwards and forwards to the doctors and the hospital, saying "this is quite serious for me and unrelated to my PTSD I am back with my GP today so hopefully to get some results and get back to work asap I shall update you later".
21. On 14<sup>th</sup> May he emailed "quick update, I have another appointment tomorrow where I will be requesting a return to work, the appointment is in the morning so I shall let you know by lunchtime. On 16<sup>th</sup> May he said, "things are improving I had some good news yesterday and will be returning to work next Monday all being well, I will let you know of any change, I will be there first thing Monday".
22. On 24<sup>th</sup> May as the claimant did not arrive at work AF emailed him "hope you are ok; you were intending to return to work this week I assume that is not going to happen an update would be helpful". There was no reply.
23. On 31<sup>st</sup> May AF emailed CR again "I sent you an email on 24<sup>th</sup> May in an effort to make contact with you as per site procedure, I haven't received a response from you so will write to you now, hope you are ok".
24. On 25 July HR enquired about the claimant as the person dealing with him in HR had been sick for two months. It appears that nothing had happened in the

interim, the claimant remaining off work. Again a message was left with the claimant saying that AF needed to speak to him, and she also texted him. On 27<sup>th</sup> July AF tried the claimant again and when she had no reply rang his dad under the emergency number, he was unaware of the situation and said he would be visiting the claimant at Keswick over the weekend and get the claimant to ring her on Monday.

25. On 30 July again AF emailed the claimant, who rang later said he hoped to return in a couple of weeks, it was explained to him that he had to keep in contact, provide doctor's notes and that his sick pay had run out. HR emailed that if AF had not contacted his dad this would have dragged on.
26. On 13 August AF rang the claimant and left a message to contact her as he was required to attend a doctor's referral on 15<sup>th</sup> August, this was acknowledged. CR attended the medical on 15<sup>th</sup> August and was told he could return to work. However, on 16<sup>th</sup> August he did not attend work and there was no contact, on 17<sup>th</sup> August AF recorded: CR was rung again, but no answer, left a message, rang his father again, left a message for CR to contact him.
27. On 20<sup>th</sup> August the claimant arrived at work at 8.50 but said he had leave, explaining his absence for 16<sup>th</sup> and 17<sup>th</sup> August. It was noted on 21<sup>st</sup> August he arrived late around 10.20, on 22<sup>nd</sup> August arrived at 8.20, left at 11.15, on 23<sup>rd</sup> August he was a no show.
28. AF rang him at 8.41, no answer. Another colleague IL rang his dad at 8.47 as concerned for his welfare, his dad replied saying he was unable to get in touch with him, the claimant then text ed at 10.39pm saying "Ian I now realise it's a little late letting you know but I won't be in today for medical reasons, I'll be back in tomorrow when I get to site I'll be calling at medical before I come into the office".
29. IL/AF noted: On 3<sup>rd</sup> September Chris came to see me and ask where he would be sitting next week, I explained he would eventually move into Elspeth's desk, he then asked when he would be starting Instructing again, I told him my immediate focus was training Dave and Michelle up and that we did not want to rope Chris with too much pressure with him just returning for LTS.
30. AF/IL noted: On 17<sup>th</sup> September I received a text of Chris at 7.18 "I've got today booked off, at least I think I have, I am sure I have but just covering my arse, I have an appointment to go to so that's why I booked it off, I'm sure I booked it off when I did for last Friday but am doubting myself so thought it best to text you.' The reply was there was nothing in the calendar regarding so he replied, "sorry mate could have sworn I did, I'll just have to backdate it tomorrow when I return".
31. The notes continue: "On 18 September text at 7.32 "not going to be in today went for a meal last night and I have been up most of the night and can't be far from a toilet put it that way, had a go at driving for coach this morning but did not get far and had to turn back, it's sods law, hopefully will be ok for tomorrow". On 21 September text at 8.26 saying "upside down a bit here sorry, tried to see

doctor today so can't make work as was not best thing for me, can you please let Andrea know too, cheers".

32. Again: 27 September text at 8.09, "just so you are aware I will not be in today still not well I'll keep you updated", text at 7.40 "just updating you still not 100% I'll be trying to make it in tomorrow but if not hopefully I will be alright for Monday". The entries carried on in this way.
33. On 29 October he said he had sent his fit notes to Occupational Health, said he would be in the next day but was not and on 31 October he texted at 7.55pm, "Ian I still can't make it hopefully tomorrow will be different I'll be ok can't get control of my anxiety at the moment". The claimant did not go in on the next day and on 2 November a letter was sent to the claimant in relation to unauthorised absence. '
34. On 6 November the claimant's sister rang the respondent she said she was concerned regarding Chris's health and job position, he was very distressed by recent fireworks and she felt he was having a breakdown. IL rang his sister back and spoke at length, she reiterated she was concerned for his health and the security of his job. She felt he was not being honest with his family around the situation with his job "I stated that Chris needed to maintain regular contact with work and provide fit notes to medical to cover all absences". On 7 November she texted IL "just to keep you in the loop I have driven up to Keswick and I am sat with Chris now waiting to go to the docs, the aim is to sort a sick note and find a way forward, I'll call you when we are out, will be around 12 o'clock, thank you". He replied, "thanks Kate, hope he is ok". There was then a telephone discussion where it was stated that he was keen to get back to work but he was signed off work until December and there was a discussion about a secondment to another team. On 14<sup>th</sup> December the claimant did email AF to say he had been to the doctors and was trying to maintain contact. There was no contact on 21<sup>st</sup>, on 23<sup>rd</sup> there was a management referral with a doctor's appointment for 10 December.
35. On 29 November the claimant replied to a text of 28 November saying "I have only just seen this my appointment was only at 4pm today, I was going to email Andrea in the morning like last week, doctor has extended my sick note by a week to December 11<sup>th</sup> just to be safe as the private therapy has got a bit intense, feeling much better though it's just taking it out of me. Shall I take a picture of my note and email it", IL texted back saying he had to send the original fit note to medical and to make contact via text or email by 11am on Wednesday 6 December. The claimant emailed AF "to say that the updated sick note he emailed last week went straight to his drafts but he hoped that she would find both sick notes attached, he had been extended by another week in connection with his medication being reduced and he had just seen the emails regarding the occupational health appointment which he had missed, he was not sure how he had missed the email". He did not attend the medical referral on 10 December.
36. On 12 December he was advised that Occupational Health had rejected his fit note as they needed the original. By 15 December the claimant was saying that he had missed the appointment due to problems with his email although



Ian noted that a letter was also sent out, he was due to return to work on 3 January and it was suggested that he had a doctor's referral via telephone.

**2019**

37. On 3 January the claimant emailed AF at 8.33 saying "I have a final doctor's appointment on 9<sup>th</sup> of this month and all being well I will be returning next Thursday 10<sup>th</sup>," However, he did not arrive on 10<sup>th</sup> January and he was texted again saying "Chris, I thought you were meant to be in today". On 11<sup>th</sup> January he was texted again but no reply.
38. As per a previous agreement the claimant had agreed the respondent could contact his family and that the claimant could text rather than ring his manager if he was going to be absent. AF texted the claimant's sister to say that he was due to return to work but did not show and needed to make contact; he had missed two appointments with the Site Doctor. He texted at 13.27 "just seen your message as my sister phoned, I sent an email with an update of the doctors on Wednesday, not sure what has happened again with my email, I'm returning Monday with my fit for work note from my doctor as after assessment he is happy for me to return". No email or sicknote was ever received
39. On 13<sup>th</sup> January occupational health emailed AF to say, "can you confirm whether you are in receipt of fit notes for Chris for September 2018 until the present date". There was no recorded reply, but AF did not have any.
40. The next day the claimant emailed to say that he had been vomiting a lot and not slept, he had got an appointment with a Psychologist in Penrith at midday for two hours so that he would have to return on Wednesday.
41. He did return on 16 January on a phased return, three half shifts and five half shifts the week of 21 January.
42. On 17 January the claimant failed to attend work, texted at 8.32am saying he had a restless night, had not slept but he would be back the next day which he was. The claimant's sister contacted the respondent as the claimant had not attended work and said she thought he had got mixed up with times. and said "I believe Chris is back in today, he seems a lot better in himself which hopefully you can see too, I have told him to just take it a day at a time and if he is really unhappy to do the honourable thing and resign, hopefully this is the start of him coming back and getting into a proper routine. Please let me know if you think otherwise, I honestly can't thank you and Andrea enough for your support and what you've done in all this"
43. On 21 January he said there had been a crash at the bottom of Cold Fell so he was going to be slightly late. On 22 January he took leave to attend a medical appointment. On 23 January he failed to attend or make contact with anyone, he was phoned twice. On 24 January he did not show for work or make contact so was rung at 11.07, he said he was on leave as he had a doctor's appointment, he was asked where he was yesterday, he said he had leave in and he said he had leave to attend a doctor's appointment on Tuesday but nobody knew where he was yesterday or today. He said he had put three days

leave in on OPMS to cover Tuesday, Wednesday and Thursday. However he only had Tuesday booked as leave.

44. On 25 January the claimant texted at 8.26am to say he was waiting to see a nurse in occupational health, he arrived at 9.50 and left at 11.25 although the half day should be 8.10 to 11.45. On 29 January he did not attend, AF texted, he replied but did not state why he was not at work. On 30 January he texted to say he was not 100% and was having balance issues. On 31 January he said he was still poorly.
45. On 1 February he attended work but requested half day leave, on 4 February he was on annual leave, attended on 5 February, on 6 February he texted to say he could not attend due to a personal issue and could he have leave, he was granted retrospective leave and it was agreed he would move to Ben Wren's team on Monday 11 February. He asked for leave for 7 and 8 April which was agreed.

### **Move to Ben Wren's team**

46. On 11 February he asked for a further leave due to a death and said he did not have a contact number for Ben Wren. This was supplied and he asked Ben Wren for this extra day's leave and said he would be in the next day. On 12 February he said he had had a bad night's sleep; the last few days had been hectic and stressful, and he would like one day's final leave then to come into work tomorrow fresh. In fact a colleague of the claimants from his army days had died.
47. On 13 February he sent a text explaining that he was not in the right headspace and wanted the remainder of the week as annual leave. BW replied asking if there was anything they could do or help, no response. On 15 February he said he would be back in work on Monday, no need for anymore leave.
48. On 18 February it was recorded that he attended work, had a chat regarding his previous absence, replied he was in a bad place due to the death of his former Forces colleague but is fine now, no issues, no concern just needed the time off. On 19<sup>th</sup> February he attended work but signed out at lunchtime to go to a different building, however he hadn't actually signed into the other building and there was no immediate business requirement to go there. On 20<sup>th</sup> February he asked if he could turn half a day's medical leave into a full day's leave to visit the family of his former colleague. On 21<sup>st</sup> he did not arrive or contact BW. BW texted him but he got no response. On 22<sup>nd</sup> he did not turn into work, BW was on annual leave and the covering manager informed him that he had not attended so at lunchtime BW phoned the claimant's dad and then the claimant's dad contacted the claimant and said that the claimant's mother was travelling up from St Helens to see him. At 4 o'clock the claimant phoned him oblivious to the fact he hadn't attended work or contacted BW or that his mother had driven to his house to check on him as he stated he would be in work on Monday. On 25<sup>th</sup> February he asked for leave that day and said he would attend work the next day, but he did not. On 27<sup>th</sup> he said things were improving and he will be back in work tomorrow, on 28<sup>th</sup> he did not attend.

49. On 1<sup>st</sup> March the claimant texted at 8.51 saying his friend's funeral is today he had attended his funeral in Glasgow, he said in evidence he had not really been capable of going but was dragged there by other colleagues who knocked on his door and got him dressed ., He did say he was in Glasgow and would be in work on Monday, he did not arrive on Monday, but sent a text at 8.41 "not had a good weekend, feeling very anxious, should be in work in the morning". He did not attend on 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> or 8<sup>th</sup> March. Mr Wren spoke to Dr Newlove from OH on 8 March who advised all they could do from a medical point of view was offer support. Mr Wren passed this back to HR/case management and sent a couple of texts to the claimant asking if he was ok and if there was anything they could do but there was no reply.
50. The claimant continued not to attend, he contacted the respondents on 12<sup>th</sup> March, he sounded bemused that Mr Wren was concerned for him and said he had sent him emails but Mr Wren hadn't received any, BW said he had tried calling him and sent numerous texts but he said he had not been picking up because he can't cope. He asked if it was ok to come into work tomorrow. The next day arrived and he said he had had a storm which had damaged his roof and he had to wait for somebody to come out so he wouldn't be in work but would be in tomorrow. However he did not attend work on 14<sup>th</sup> or the 15<sup>th</sup>. He had been invited in on 15<sup>th</sup> March for a chat with HR and BW but he did not attend. The claimant had received a letter from the respondent on 15<sup>th</sup> March 2019 stating "I am writing to you because I am concerned you have been absent from work since 19<sup>th</sup> February, you have made contact via text and stated in a number of texts and calls that you will be returning to work on specified days but have failed to do so. Additionally, no sick notes have been received by occupational health to cover your current sickness absence, as you are aware once your absence has exceeded seven calendar days you must submit GP sicknotes to occupational health on an ongoing basis, failure to follow the attendance support process means your absence may be recorded as unauthorised" and he was invited for a discussion on 21 March
51. He texted at 9.34 saying he had a doctor's appointment on 20<sup>th</sup> March and would return to work on 21<sup>st</sup> but again he did not attend from 20<sup>th</sup> through to 27<sup>th</sup> March.
52. On 28 March he was again written to as follows "I am writing to you again because you remain absent from work without contact and did not attend the meeting, I am also writing to request fit notes to cover your absences of 21 and 22 February, 26 February 2019 to 12 March 2019 and 14 March 2019 to present. His fit notes were requested by 4 April and he was told that failure to follow the attendance support process means his absence will be regarded as unauthorised and may be subject to investigation". They re-arranged the meeting to discuss his ongoing absence on 3 April 2019 at Albion Square.
53. There was then attendance from the claimant on 28<sup>th</sup> and 29<sup>th</sup> March and 1<sup>st</sup> to 3<sup>rd</sup> April, the claimant did not attend the meeting on 3 April. On 4<sup>th</sup> April BW tried to ring the claimant, he established contact with his father but no response was received from the claimant, again the claimant did not attend on 5<sup>th</sup> April.

54. On 8 April he was written to again, the heading was “unauthorised absence and no contact”. “Further to the letters from your line manager dated 15 March and 28 March regarding your missing GP fit notes and unauthorised absence I am writing to inform you that a formal disciplinary investigation will now take place to look into the following dates, 14<sup>th</sup> to 15<sup>th</sup> January 2019, 17<sup>th</sup> January 2019, 23<sup>rd</sup> January 2019 to 31<sup>st</sup> January 2019, 21<sup>st</sup> February 2019 to 12<sup>th</sup> March 2019, 14<sup>th</sup> March 2019 to present”.
55. It was pointed out that he had been invited twice to meetings to discuss his absence due to being no contact or fit notes and the claimant had failed to attend these and he had not contacted his line manager since 13 March when he had advised he would be returning to work the following day but failed to do so. If you do not make contact by 16 April your company pay will cease”. It was pointed out the claimant had failed to submit his sick notes by 4 April and the time was extended to 16 April and the company rules were again pointed out. He was advised that Tracy Riley was the Investigating Officer and an interview had been arranged for Albion Square at 1pm on 24 April 2019 and an appointment had been made with occupational health for 17<sup>th</sup> April 2019. The terms of reference were updated subsequently to include absence of 14 March to 14 April and 16 April 2019. He was advised that the outcome could be a formal disciplinary hearing.
56. A meeting with the investigatory officer Tracy Riley was arranged for 24 April 2019 and with OH on 17 April 2020.
57. On 8<sup>th</sup> April a text was received from the claimant at 14.30 saying “just making you aware I am returning tomorrow morning if that’s ok, I feel up to returning and need to come and sort and try out right this mess I have created for myself”. However, the claimant did not attend on 9<sup>th</sup> or 10<sup>th</sup>, there was a phone call from his father to BW 10<sup>th</sup> April saying they hadn’t had any contact with him since 4<sup>th</sup> April and his mother had driven up to see him on 6<sup>th</sup> April but couldn’t find him. His dad had gone today and found him in bed, they went for a walk and his dad expressed concerns he hadn’t been to work and that SL had sent him letters, ‘his dad informed me BW that Chris will ring me later today which the claimant did saying that his dad had “given him a kick up the backside”. He said he was phoning because his dad had concerns about his lack of attendance and he is going to go the post office to collect the letters I have sent him. He asked if it was ok to come into work tomorrow to sort this mess out, I said if he felt fit enough to attend,’ however he did not attend the next day and he said “not going to make it today hardly slept I will be coming in tomorrow all being well”. On 12<sup>th</sup> April he texted to say, “decided it would be best if I return on Monday, will give me all weekend to prepare and get my stuff in order, I’ll be there for 8.10 on Monday”.
58. He then did return to work on 15<sup>th</sup> April and there was a chat regarding all the no shows etc. He said he had been to collect the letters but the sorting office couldn’t locate them so BW gave him a copy of all of them and he explained all the ins and outs “he did not seem too bothered in fact I think it went over his head, he said he only went for them because his dad made them”.

59. He was advised of his interview with Tracy (this is in relation to the disciplinary action and he was told about an appointment with Dr Newlove of Occupational Health. In respect of returning to work the claimant said he was bouncing now and he “just went into a hole (death of a former colleague) and shut himself away from the outside world”. He was sent to medical to discuss his return and any phasing they deemed necessary. Regarding fit notes the claimant said he hadn’t got any and he said the GP wouldn’t backdate them, he said that previously the medical department had sent a letter to his GP and requested backdated sick notes so the claimant was asked to mention this to the medical department when he saw them that morning.
60. Regarding his attendance BW said “I expressed concern with the lack of attendance he just did not seem bothered and repeatedly said he locked himself away and that is what he does. I mentioned it is imperative he contacts us when he is not coming into work again I don’t think he understands the context, I have told him it will be going to a second stage review (he was on first stage with Andrea), again, he did not seem overly concerned”.
61. They agreed the following working times. First week half days each day for two weeks, third and fourth week three full days and two half days and then fifth week return to normal hours. The claimant did not attend work the next day and there was no contact, he came in on 17<sup>th</sup> April but he had to attend a medical appointment in the afternoon, 18<sup>th</sup> April was leave and 19<sup>th</sup> and 22<sup>nd</sup> were bank holidays. He attended work on 23<sup>rd</sup> April, on 24<sup>th</sup> April he did not attend work but did attend his case management investigation meeting with Tracy Riley although he was 15 minutes late
62. Tracy Riley investigated by interviewing Mr Wren and the claimant and reviewing the documentation, she also met with AF, the claimant’s previous line manager. She summarised what the claimant had told her, “I then met with Chris who said he suffered from anxiety, depression and post traumatic stress disorder, he said when he was having an episode he basically shut himself in and did not speak to anyone and it was not a good place to be, I struggled to get Chris to discuss any specific details or dates and he said his non-attendance was for the same reason on all the dates as detailed on the terms of reference he stated he did not even speak to his mum so was not going to be able to speak to his boss when he was feeling this way. He said he had given his doctor permission to speak to Dr Newlove if necessary, he was getting better and starting to reduce his medication and paying to see a private counsellor”.
63. The notes from AF and BW quoted above were provided from 14<sup>th</sup> January 2019, for the relevant dates up to 23<sup>rd</sup> April.
64. In relation to the claimant’s interview the claimant’s explanation was as said before “I am locked in a room in the dark, I don’t speak to anyone, I don’t even speak to my mother so I am not going to speak to my boss, I am not in a normal frame of mind, I don’t know what I am doing and it is not a good place to be, it is the same for all of the dates, I live here, my family are down in Merseyside, I can put on a good show for them when they are checking on me or when they phone my dad comes up to sort me out”. He was asked “is this a result of your PTSD, he said “yes I was in the Forces for ten years before coming here”. She

said “so if you can’t come in for any reason have you got a method of contacting Ben to let him know what is happening, reply “yes I’ve got his phone number I can text but when I’m not thinking straight I am not thinking straight so the same for all the dates”. She said there were quite a few dates, he said “it’s the same for all the dates but I am getting better I am starting to reduce my medication, I am paying to see someone privately, trying to do something about it, I want to work, I want to keep my job”. He continued “when I am in one I can’t even go to the doctor and the doctor said legally he can’t backdate sicknotes, I have given my doctor permission to speak to Dr Newlove and vice versa, my doctor says he could put it in writing as its special circumstances if Dr Newlove asks but I don’t know if that’s happened, I have no idea, saw my doctor last week and he said the same still stands they just have to speak to him and if needed he will put something in writing, I can’t remember the doctor’s name, its Daniel its Castle Head Surgery in Keswick, it’s the same for the whole month I just fell completely off the wagon, I did not even get the letters, I kept the cards the postman put through the door but when I tried to collect them they weren’t there, maybe they get returned to sender after a while but I went within the first week so I don’t know why they weren’t there”.

65. She confirmed he had got them now and asked him if he wanted to add anything, she asked him “are you going back to work now”, he said “no it’s not really worth going to site I live in Keswick”, she asked him “have you been in this morning”, he said “no”, she said “it might be worth speaking to Ben and asking for retrospective leave, maybe half a day thanks again for your time”.
66. A disciplinary hearing was then arranged as she said there was a case to answer and he was advised it would be chaired by Kevin Slater, Operations manager and he was told as the above allegation falls into the gross misconduct category the disciplinary hearing could result in the termination of his employment.
67. In relation to the respondent’s procedure the claimant said “I do not disagree with the dates stated but these dates were all around the time in which I was coming off hard core medication so was totally off the grid. I did speak to Dr Newlove around February and after an agreement with my doctor Mr John Daniels I could not get fit notes as I was not right to do this, I couldn’t even contact my mother let alone get to my doctors so Dr Newlove agreed I did not need to do this as legally my doctor cannot backdate sick notes. My anxiety caused me so much stress that I couldn’t deal with the thought of ringing in and it was a long and hard journey to come off the high level of antidepressants”. He carried on “I was going from one hole to another and I did not know how to get out of it, I was aware of the procedure being explained to me by AF but was very hazy and fuzzy, sometimes I felt I was not in the room, I just zoned out and wanted to get out of the room due to how I was feeling. I am not making excuses, it’s hard to explain, there was no malice. I am now off medications, so I am going through a chemical re-adjustment. I was waiting for this meeting to say I wanted to come back as soon as possible to get some more normality back in my life I just want to get normality back in my life”. He went on “I had spoken to Dr Newlove and was under the impression that he had spoken to my GP and I did not need to have fit notes, that my GP would do a letter, if I can’t get out of the house or get a doctor to come to me how could I get them, I gave

full authorisation for Dr Newlove to contact my GP they can give them any information, I even went to see the GP the other day to reiterate this because I have a new doctor”.

68. No specific medical or OH advice was obtained for this hearing.
69. The meeting was adjourned for roughly twenty five minutes and Mr Slater stated that he had found the case proven, he said ‘the evidence shows that you did not attend work on a significant number of dates over a number of periods and did not make contact to explain your absence, you also failed to follow the attendance support procedure on a number of dates, I have already taken into account a strong mitigation in regards to your PTSD, depression and anxiety. Before I give my decision I must also inform you that there may also be some dates of unauthorised absence during the period of the investigation ending at today’s hearing, but I have decided we will not investigate those. My decision is that you will receive action short of dismissal, this consists of a final written warning and a disciplinary transfer.’ He confirmed it would be sent to his home address and it would last for twelve months.
70. The claimant ended up by saying “I have nothing else to add, I hold my hands up and admit I got it wrong I just need to get back to normality now”. They agreed he could wait until he received the letter to return to work. The letter went out on 26 July 2019, he was advised any further disciplinary breaches could result in the termination of his employment. It was also emailed to him on 30 July.
71. On 27 August a further letter was sent to the claimant for his failure to make contact with his line manager or submit any GP fit notes which were described as further episodes of unauthorised absence, 12 August 2019, 15 August to the present day. Another disciplinary investigation would now take place and any further episodes would be added on to the terms of reference. Matt Makin had been appointed as the Investigating Officer, an interview had been arranged for 5 September 2019 and he was advised again that a formal disciplinary hearing may be instigated as a result of the investigation.
72. The claimant did not attend his interview on 5 September and he was offered an alternative date of 17 September . He was advised if he failed to attend or did not provide written representation the investigation would be concluded in his absence. He did not attend on 17 September. Mr Makin proceeded to interview the other witnesses and proceeded to make a recommendation that the application was proven and that there was a case to answer. This was then sent to the claimant by email and a letter of 1 October 2019 stated that the disciplinary hearing would be chaired by Kevin Slater. He was provided with an investigation report and it was stated that the allegation falls into the gross misconduct category and the disciplinary hearing could result in the termination of your employment. He was given the contact details of occupational health and the employee assistance programme as he had been done before.
73. Excerpts from the manager’s log were provided, it was noted that he attended work and went to occupational health on 7<sup>th</sup> August and was given the all clear to return to full duties with no restrictions or a phased return. On 8<sup>th</sup> he had

then said he had received some bad news; he was not going to relapse, but he was not going to be in that day, but he would be tomorrow. However, he texted at 9.02 saying he was still down south at a hospital and would be back on 12<sup>th</sup> August, whilst it was recorded as absence without leave it was not included in the terms of reference of the investigation. The claimant in evidence said his cousin was ill with cancer and he had travelled to see him. On 12<sup>th</sup> he did not attend and he did not make contact, on 13<sup>th</sup> he attended and advised that he hadn't been in because his cousin had been in hospital, on 14<sup>th</sup> August he asked for a day's leave as he was "struggling to get motivated as he felt he had no purpose or workload and would be back in the following day". It was recorded as annual leave, since the 15<sup>th</sup> August the claimant had not attended work nor made any contact with Mr Wren or HR. It was noted he hadn't attended the two investigation meetings.

74. On 16<sup>th</sup> October Mr Wren reported to HR that he had received a call from the claimant at 9.41 saying "he's at his mams and back on his medication, the GP is going to wean him off it over a longer period but he says he is doing a lot better and has got his head sorted". I asked Chris if he meant St Helens (this is where his mam lives) he laughed and replied, "it's complicated". He then went on to say his mam has holiday houses at Windermere but lives in St Helens and he has been flitting between both locations, despite asking again if he was in St Helens or Windermere I couldn't get a straight answer from him".
75. Mr Wren was then made aware it was the claimant's hearing that afternoon so he rang him back, there was no option to leave a voice message so he texted him to tell him "I have just found out you have a disciplinary hearing at 13.30 today, have you forgotten about it". He also recorded in previous calls the claimant has said he has been kept busy cutting grass at his mother's holiday homes and doing odd jobs. However in cross examination the claimant said this was complete fantasy and his mother owned no properties in the Lake District. Later on Mr Wren advised HR that he had received a response from the claimant which said "Ben, I was under the impression I would be having that when fit for work, I am not in a fit state for the stress and anxiety that would create, is my sick note not enough for this hearing to be rescheduled for when I am fit for work". He advised him he would pass this message on.
76. On 23<sup>rd</sup> October a management referral was put together for occupational health and the claimant was asked to approve it. He wanted to discuss it before it was sent.
77. Fit notes were then provided on 24 October 2019 for the period 15 August to 3 November 2019
78. The respondent rescheduled the claimant's 16<sup>th</sup> October hearing to 17<sup>th</sup> December 2019 and advised him of the terms of reference etc on 4<sup>th</sup> November 2019.
79. On 26<sup>th</sup> November Dr Newlove advised that he had reviewed the claimant that day 26<sup>th</sup> November, and he commented "as you are aware he has been on sickness absence for approximately three months and hopes to return to work next week. I see no medical reason why he shouldn't return, he does not



require or wish for a phased return, additionally I have no restrictions to place on him at this time”.

80. On 27<sup>th</sup> November he was advised of a management referral appointment with Dr Newlove on 6<sup>th</sup> December. The outcome of this was communicated on 19 December (see below).
81. On 10 December 219 HR records that the claimant presented a fit note for the period 30 October to 30 November 2019.
82. The disciplinary hearing took place on 17<sup>th</sup> December, two union conveners attended on behalf of the claimant in effect. A JW from HR and confirmed that the claimant had said he wouldn't attend the disciplinary hearing. Mr Slater stated he would still be going ahead, the members of the conveners stated they weren't the claimant's union representatives, but they were happy to represent him. JW confirmed that retrospective fit notes had been submitted and were now on the system covering 15<sup>th</sup> August to 3<sup>rd</sup> November which was submitted on 24<sup>th</sup> October 2019 and the 30<sup>th</sup> October to 30<sup>th</sup> November submitted on 10<sup>th</sup> December 2019. She advised that although they had been retrospectively provided the claimant had again failed to comply with the attendance support procedure, he has not submitted fit notes in a timely manner and has failed to maintain contact when on sick leave.
83. The union representative stated the claimant's case “screamed poor mental health”, KS outlined that the case does relate to CR's mental health and that CR has been fully supported by the organisation throughout the last couple of years, it is acknowledged he has PTSD and that he was advised previously the medication he was taking made him weary, therefore the company had arranged for him to attend a residential care facility to support him, (this was incorrect however). During the last meeting the claimant had confirmed that this had helped, and he was now off his medication ready to return to work. KS said that he believed the company had been lenient with CR's absence as there had been other periods of absence between the previous investigation and the hearing which could have been investigated but KS said he had taken the decision to wipe these to enable a sustained return to work and the claimant had stated he was thankful for the support.
84. It was confirmed that he had moved roles to an Emergency Planner's role but he hadn't been there enough to achieve any momentum, when the claimant did not attend the original hearing on 16<sup>th</sup> an occupational health referral was made and the claimant did attend and saw Dr Newlove on 26 November and it was advised no restrictions or a phased return were needed, he was also assessed on 6<sup>th</sup> December but there was no consent presently to share the outcome of this with the panel and HR were awaiting confirmation by email, it was confirmed there were no issues between BW and the claimant but there hadn't been sufficient opportunity engage and manage him.
85. Mr Slater said due to the nature of PTSD the claimant had struggled to control emotions such as prolonged staring when thinking about things which can be uncomfortable for others, an outburst and slamming things on desk when he is frustrated. Mr Slater offered that this predominantly happens when people are

on medication, it's made people uncomfortable in the office, but they understand why. It was confirmed he was in work at the end of last week but again he had confirmed he was not going to attend today. It was agreed that the meeting would be adjourned whilst the advice from occupational health was received subject to the claimant giving consent and he said he would not make a decision until he had received this.

86. The advice from occupational health on 19 December was as follows.

“Thank you for your referral of Mr Christopher Roberts who I have reviewed on 6 December 2019, as mentioned in your document Chris has PTSD, this is a chronic condition and is likely to be present for the rest of his life, he is constantly learning to manage it, the nature of PTSD is it often unpredictable in its symptoms, therefore the symptoms of alteration, mood and mental health can fluctuate, often without warning. With this in mind it is very difficult to predict what his attendance record may be however the best predictor of future sickness absence is his past sickness absence. Within the workplace there may be times when Chris finds it hard to concentrate for long periods of time, particularly when reading and writing, I would therefore encourage and suggest regular short breaks, since I reviewed Chris in August 2018 he has various alterations to his medications, these can have exacerbated his symptoms. Using those to control his illness is not an exact science and can take some time to carefully manage. Mr Roberts should be able to text his manager during a bout of illness and also provide Fit Notes, Chris himself has asked that he gets a steady stream of meaningful work and goals that are useful to him, appreciating that he has only just returned back into the workplace”

87. On 19 December the claimant was sent a letter confirming the outcome of the disciplinary hearing after Mr Slater had considered that information. Mr Slater said “I find the allegations proven and my decision is that your employment with Sellafeld Limited will be terminated with immediate effect and your final day of service is today, 19 December, this decision reflects the seriousness with which the company views this offence and takes into account that your attendance has become both unpredictable and unsustainable”. He was given the right to appeal against this decision but as with the final written warning the claimant did not appeal against the decision.
88. On 20 December HR sent an email to the claimant asking that if he wanted a copy of the letter by email could he confirm by Monday 23 December.
89. On 6 January HR confirmed to the claimant by email that the letter that was sent to him was signed for by somebody called Bentham on 21 December and he did not reply regarding not having a copy. She understood he had sent a text to his line manager stating his intention to return to work but was asked to refer to the contents of the letter and requested a safe return of his pass as soon as possible. He was advised he had access to the Employee Assistance Programme should he require it.
90. On 26 February the claimant texted Mr Wren “Chris here, as you can probably see I'm beyond frustrated, I get zero correspondence from work whether phone

call or mail, I'm really starting to doubt myself as to what I have done as it feels like I'm just being ignored, this whole thing is going to make me ill if I don't return soon, I have not been paid for months and have lived off my savings, do I have a job, sorry to put all this on you but who do I speak to if not you".

91. Mr Wren replied saying that HR were going to ring him the next day, they then confirmed the telephone call in an email of 27 February, "as per the conversation we had today please find attached letter detailing the outcome of your disciplinary hearing, for the record I have summarised our conversation below. We called you today in response to a text message you sent to Ben Wren where you questioned your employment with the company and stated you received no correspondence from the company, I informed you that we had sent you the outcome of your disciplinary hearing via email and post on 19 December. I offered you the opportunity to attend Albion to sit down and discuss this with me or we could do it over the phone, you said you want to be told today, I explained that your disciplinary hearing had been held on 17 December followed a re-schedule from 16 October because you informed the company that you were not well enough to attend. You did not attend the disciplinary hearing on 17 December either, due to feeling unwell therefore it was held in your absence. Dave Chisnall and Nick Jeffrey from GMB attended (as you had informed them of your situation) and KS was the chair. Kevin explained the allegations and informed Dave and Nick of how the company has supported you in your employment, he also stated he would not make a decision that day, he wanted to have sight of the management referral report from Dr Newlove. We received the report on 19 December following your consent to share it, Dr Newlove had stated that there was no reason why your illness should prevent you from texting in (one of your adjustments) while off sick or submitting fit notes. Following this information due to the fact you previously received a sanction of action just short of dismissal Kevin made the decision to terminate your employment as of 19 December. I informed you that FW had then sent you confirmation of this decision via post which she confirmed was by recorded delivery and then also by email to this email address on 19 December 2020. She asked you if you had any questions or anything you wanted to add, you stated that you just did not understand why you do not seem to receive any letters from Sellafield, I then confirmed that we did also send you the information by email and said we would re-confirm the decision via email and via post." FW urged you to check your junk mail too. He was asked again to return his pass.

92. The claimant subsequently brought this Tribunal claim.

### **The respondent's policies**

#### Disciplinary policy

93. This procedure addresses and identifies a procedure for dealing with misconduct (unsatisfactory performance and sickness absence management are dealt with by separate procedures) ... The outcomes from a disciplinary hearing include a written warning but also "final written warning if the misconduct is too serious for a written warning but not serious enough to warrant dismissal or there is further misconduct during the period that a written

warning remains in force then a final written warning will be issued, a final written warning will remain in force for twelve calendar months, dismissal with notice. If, while a final written warning is still in force the employee's conduct is still unsatisfactory as determined by an investigation and a disciplinary hearing this disciplinary authority may dismiss the employee with notice.

94. Dismissal without notice. If following an investigation and disciplinary hearing the disciplinary authority is satisfied that the employee is guilty of gross misconduct and in the absence of mitigation the employee will be dismissed without notice.
95. In action short of dismissal in certain cases the disciplinary authority may wish to consider penalties known as "actions short of dismissal". Penalties available will include:
  - Unpaid suspension
  - Downgrading/demotion
  - Disciplinary transfer
96. There were two levels of appeal however in this case the claimant did not appeal either of his disciplinary sanctions.

#### "Disciplinary Rules"

97. The disciplinary rules are not intended to cover all the possible incidents which may arise. The omission of a particular type of conduct from the rules does not mean that disciplinary action is thereby excluded. The rules give examples only and any breach of normal good standards of conduct may be subject to disciplinary action. The rules fall into two categories, examples of gross misconduct which are so serious that a single occurrence could result in summary dismissal or misconduct, which were repeated incidents either related or unrelated could result in dismissal following adequate warning. There were examples given of gross misconduct, examples of misconduct included unsatisfactory time keeping, absence without permission, failure to follow recognised procedures e.g. holiday and sickness notifications ...

#### Attendance Support Procedure

98. Sellafield Limited recognises that employees will from time to time become ill and may require time off work, it is the company's intention that each case will be treated sensitively and on an individual basis as support offered as appropriate to assist a return to work. This procedure therefore aims to support regular attendance, minimise sickness absence and encourage a proactive and flexible approach to removing barriers to both continued working and a prompt return to work and to do so within a fair and consistent framework .... In accordance with the company's equal opportunities policy absences for disabled employees will be recorded as either an absence related to disability or an absence not related to disability, absences which is related to an

employee's disability will not be taken into account when determining whether the Attendance Support Review process should be initiated.

### Roles and Responsibilities

99. Employees have a responsibility to attend work, perform their work competently and meet company standards. Employees have specific responsibilities under the Attendance Support Procedure for notifying their absence providing sickness certificates, maintaining regular contact with their line managers and insofar as they are incapacity allows undertaking appropriate alternative duties.

### Notification of absence

100. Employees must contact their line manager by telephone as soon as they know they will be unable to attend for work. Where possible this should be before the start of their next rostered attendance to ensure that cover may be provided where necessary. Where line managers cannot be contacted before the start of the work period then contact must be made within the first two hours of the start of work. If contact is not made the line manager should consider the need to contact the employee. In all cases employees should tell their line manager why they cannot attend work and when they expect to be back. If employees cannot contact their line manager they should endeavour to leave a message with the more senior department manager or another agreed contact. In exceptional circumstances an employee cannot telephone they should ensure that a relative or friend telephones on their behalf in an appropriate timescale ... any incidents of unauthorised absence will lead to further management action. Employees must continue to keep their managers informed throughout the period of absence, in particular changes in circumstances for example change in prognosis, extensions of absence period, expected return to work should be notified to the line manager.

### Return to work

101. After every occasion of sickness absence all employees must be seen by their line manager on the first day of return to work. Additionally, where employees returned to work from certified sickness absence they should attend the Occupational Health Department ... all sickness absence from work must be covered by a certificate, absences of up to seven consecutive calendar days can be covered by a self-certified sick form completed by the employee, this can be obtained from the companies intranet, the employee will complete a self-certified sick form giving the dates and cause of the absence at the conclusion of the return to work interview. Sickness absence lasting more than seven consecutive calendar days must be covered by doctor's fit note/sick note obtained from a GP/hospital or clinic. Dr's fit note/sick notes must be sent to occupational health department immediately.

### Long Term Absence

102. Once the absence extends to four weeks or however the line manager has cause for concern over the absence a home visit will be arranged by the line

manager at a mutually convenient time, when consulting with individuals on the visit the involvement of an Employee Representative will be offered.

#### Attendance Review Process

103. Where an employee has been unable to attend work due to sickness and has had two episodes of absence in any six months or three episodes of absence in any twelve months or a pattern of sickness absence which is a cause for concern this must be discussed and reviewed with the employee concerned during the return to work interview. The line manager will be required to take out previous records and pattern of attendance and the personal circumstances of the employee before deciding that the following stages of the review process should be initiated.

First stage: Attendance Review. In reviewing an employee's attendance record the line manager will offer assistance and guidance to help improve attendance. A manager will also clearly inform the employee of the need to improve their attendance and this will be monitored over a six-month period.

Second stage Attendance Review. If the employee's attendance continues to be unsatisfactory then a review meeting will be arranged by the line manager, an employee may invite their employee representative or colleague and guidance or advice may be sought from the human resources department. At this and subsequent review stages the employee may be requested to consent to a medical report from OH to establish any underlying medical conditions ...

Final review of attendance. Where no demonstrable improvement is observed in the employee's attendance record a further review meeting will be arranged to consider the issue of a final review ... a final review of attendance will normally be of twelve months duration with regular reviews of attendance which will be detailed in a letter to the employee ... if the attendance fails to improve sufficiently during this final review of attendance a final attendance review hearing will be arranged. The employee will be given written notice of this ...

#### **The Law**

104. Section 15 of the Equality Act 2010 provides that:-

- (i) a person (A) discriminates against a disabled person (B) if –
  - (a) A treats B unfavourably because of something arising in consequence of B's disability and
  - (b) A cannot show the treatment is proportionate means of achieving a legitimate aim.

105. The first issue therefore is whether the claimant can establish that his conduct arises in consequence of his disability or PTSD, depression and anxiety. This should not be confused with whether the respondents knew it arose from these conditions which is a separate matter and in fact not required for a Section 15

claim. **City of York Council -v- Grosset EAT 2016** and approved in the subsequent Court of Appeal decision in 2018, it was said that “having thus defined the something – in this case as is common ground the misconduct in terms of the inappropriate showing of the film Halloween – the ET has to ask whether that “something arose as a consequence of the claimant’s disability, that as the parties accept gives rise to a question to be answered by the ET on an objective basis, on the evidence before it did the “something” arise in consequence of the employee’s disability. The respondent submitted that this was an objective test and referred to the EHRC’s employment code 5.9 which says “the consequences of a disability include that which is the result effect or outcome of a disabled person’s disability”.

106. In relation to objective justification this was considered in the Chief Constable of **West Yorkshire Police -v- Homer 2012 Supreme Court 2012** relying on **Hardy and Hanson Plc -v- Lack 2005 Court of Appeal** which established that:-

- (i) the burden of proof is on the respondent;
- (ii) the first task is to identify the respondent’s aim and determine if they are legitimate. A legitimate aim can encompass a real need on the part of the business.
- (iii) the second issue is whether the treatment complained of is capable of achieving the aims.
- (iv) the third and final issue is whether the treatment is reasonably necessary to achieve the aims, this requires the ET to balance the discriminatory effect on the claimant against the respondent’s aims and means.
- (v) this is an objective assessment to be undertaken by the ET and is not an assessment of the reasonableness of the respondent’s decision making at the time.
- (vi) the respondent does not have to demonstrate that no other means of achieving their aim is possible, they simply have to show that the means used are objective, justified and notwithstanding their discriminatory effect”. The presence of the word “reasonably reflects the presence and applicability of the principle of proportionality, the employer does not have to demonstrate that no other proposes is possible, the employer has to show that the proposal in this case for a full-time appointment is justified objectively, notwithstanding its discriminatory effect (Hardy and Hanson).

### Unfair Dismissal

107. Section 98(4), Section 1 of the Employment Rights Act 1996 states that “in determining whether dismissal of an employee is fair or unfair it is for the employee 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 holds”.
108. Conduct is one of those categories.
109. Subsection 4 states “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 reasons shown by the employer) – 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) shall be determined in accordance with equity and the substantial merits of the case”.
110. The respondent relied on conduct or some other substantial reason. In relation to conduct the respondent cited **Hope -v- British Medical Association 2021 EAT**, which said ‘it is notable that Section 98(2) refers to “conduct” as being a permissible reason for dismissal while the misconduct, gross or otherwise, it is well established that conduct for these purposes need not be “reprehensible” or “culpable” in order for it to be a potentially fair reason for dismissal. ‘ **Royal Bank of Scotland -v- Donaghe EAT 2010** and **JP Morgan Securities Plc -v- Ktorza EAT 2016**. ???
111. In a conduct case the Tribunal should follow the guidance in **BHS -v- Burchell EAT 1980** and **Iceland Frozen Foods Limited -v- Jones EAT 1983**. Therefore it has to be established that:-
- (i) the respondent genuinely believed the conduct complained of had taken place;
  - (ii) the respondent had in mind reasonable grounds on which to sustain the belief;
  - (iii) the respondent had carried out as much investigation into the matter as was reasonable in the circumstances;
  - (iv) whether dismissal was in the range of reasonable sanctions.
112. We remind ourselves it is not for the Tribunal to substitute its judgment as to what it would have done in this situation. It is also relevant in this case to consider the law in relation to final written warnings being taken into account in making the decision to dismiss. The leading cases here are **Wincanton Group Plc -v- Stone 2013 EAT** and **Davis -v- Sandwell Metropolitan Borough 2013 Court of Appeal**. The relevant principles are:-
- (i) the Tribunal should consider whether the warning was issued in good faith and with prima facie grounds and was not manifestly inappropriate.



- (ii) if it was issued in good faith and with prima facie grounds it is potentially fair for the decision maker to have regard to it in coming to the decision to dismiss.
- (iii) where the Tribunal finds the warning was issued in good faith and with prima facie grounds it is not the function of the Tribunal to re-open the final warning and rule on whether it should or should not have been issued.
- (iv) where there has been no appeal against the final written warning there would need to be exceptional circumstances for the Tribunal to go behind that earlier disciplinary process.
- (v) the Tribunal should keep in mind that any subsequent misconduct of whatever nature will often usually be met with dismissal and is likely to be by way of exception that that will not occur.

### Time Limits

113. Section 123(1)(a) provides the relevant time limits for discrimination cases under the Equality Act 2010, Section 133(a) provides that in respect of conduct extending over a period time in effect runs from the end of that period. There is a difference between acts which are part of continuing discriminatory state of affairs and the succession of unconnected or isolated specific acts, in **Lifefare -v- Brighton and Sussex University Hospitals Trust 2006** allegations were divided into four categories of which ultimately decided on the third and the fourth category were relevant in time.
114. The relation to conduct extending over a period a distinction has to be made between a one off act and something continuing to decide whether there has been a series of acts extending over the period the Tribunal must hear evidence and make findings of fact not simply deciding on the pleadings although the granting of an extension should be the exception rather than the rule, **Robertson -v- Bexley Community Centre 2003 Court of Appeal**. The leading case on continuing acts is **Hendrix -v- The Metropolitan Police Commission 2002** where the Court of Appeal stated that proof of a rule, policy, practice or scheme is not necessary in order to come within this section providing a continuing effect can be shown.
115. The Tribunal can allow a claim to go forward which is out of time on the just and equitable basis. In respect of the Tribunal's discretion to extend time in this manner the Tribunal should not take a prescriptive approach although the list of factors in the Limitation Act 1980, Section 33 approved in **British Coal Corporation -v- Keeble 1997 EAT** are not to be slavishly followed.

### Conclusions

#### Time Limits

116. The Tribunal finds that in this case there was continuing conduct up to the claimant's dismissal. There was a series of actions all taken in respect of the claimant's failure to comply with the respondent's ASP. Accordingly, there was

an underlying cause throughout and in addition the same decision maker was involved in two of the three actions. Accordingly, we do not find that the final written warning and the decision to issue disciplinary proceedings and the dismissal were separate actions.

### Disability Discrimination

117. Under Section 15 of the Equality Act 2010 we have to decide whether the claimant's failure to comply with the ASP procedure which resulted in unauthorised absence was a function of the claimant's disability/disabilities, in particular, the three actions under consideration are the failure to text regarding the fact he was going to be absent, the failure to provide fit notes in a timely fashion or at all and the failure generally to keep in touch with his line managers.
118. We have considered factors in favour and against as this was not a straightforward case.

### **Factors in favour of a connection**

119. The claimant's description of his mental condition and his linking of his failures to his mental condition, the dark hole, a locked dark room, no contact with anyone including my mother, re: the OH report that they say that he should be able to maintain contact, not that he actually can.
120. In addition, there were many other extracts from comments from the managers timeline which described how he felt and is inability to function normal – for e.g. that he could not contact his family so was unlikely to be able to text his manager..

121.

The description of his behaviour at work where he would stare into space suggests a disconnect. The analysis of combat stress who described his coping stratagem as being to social isolate himself which mirrored his actions during the period in question

### **In favour of finding there was no connection:-**

122.

- (i) he could attend the Tracy Riley interview;
- (ii) that he had said to the respondent that he was keeping busy in respect of the cutting grass, doing odd jobs etc although he denied this in cross examination and said it was a fantasy, this had never been commented on in his witness statement.
- (iii) his attendance at a funeral and his subsequent absence after the funeral where he stayed in Glasgow to meet with the deceased colleague's family.
- (iv) The fact he drove south to see his cousin who was in hospital with cancer.

- (v) there were many many examples in the timeline, particularly from 2018 where the claimant did contact the respondent and he did provide fit notes.
- (vi) the OH report which says that he should be able to maintain contact in the ways required by the respondent.
- (vii) no medical evidence from the claimant submitted to the respondent,

### **Conclusion**

On balance we have decided that the claimant's reporting/fit note failures were something arising from his disability in the light particularly of the description of his condition he gave Tracy Riley and the analysis of Combat stress.. Although quantitatively there were more factors in favour of there not being a connection qualitatively the factors in favour were greater.

### Objective Justification

123. Can the respondent objectively justify their decision to give a final written warning to the claimant, instigate the disciplinary process and dismiss the claimant.

### Real need and legitimate aim

124. We agree there was a real need and a legitimate aim to secure regular attendance and be able to provide support and a need to have notice of absence as soon as possible in advance to organise work.

### **Proportionality**

125.

- (a) the final written warning we find that the respondent was not justified because no medical investigation was undertaken, the respondent did not get OH's opinion in general about the claimant as they did prior to his dismissal and they did not explore what was said between OH and the GP if anything as described by the claimant.
- (b) Disciplinary process. We all agree that the disciplinary process in the circumstances was a proportionate way of addressing their need in relation to the claimant's non-compliance. Whilst the capability procedure could have also been used it was unlikely to result in a significantly different outcome and therefore we do not view it as a more proportionate means of achieving the legitimate aim.
- (c) Dismissal – we find because it was disproportionate to dismiss at this juncture as it had been disproportionate to give the claimant a final written warning at the earlier point without exploring further medical evidence. Whilst whether he could comply with the requirements was

canvassed with OH the earlier error meant that the respondent in effect was a stage 'ahead'.

- (d) Whilst by the time of the hearing there was an accumulation of two years non-compliance, the claimant had before the final decision provided fit notes covering the whole of his absences save two days, therefore we find it disproportionate for that reason also.

## Unfair Dismissal

### Final written warning

126. (i) Can the Tribunal look behind the final written warning? The Wincanton and the Davis case both counsel against the Tribunal becoming involved in reassessing a final written warning where there was a prime facie case and the final written warning was given in good faith. We accept that both these elements are present here, the question here is whether or not it was manifestly inappropriate for other reasons, we were hampered in this analysis by the failure of the claimant to strongly put forward any matters which indicated that it was manifestly inappropriate, save that in another context the claimant did raise the fact that the respondent had failed to explore the issue of whether there was an agreement between the GP and Occupational Health, there was a failure to get an occupational health report in general before the decision to issue the final written warning.
127. In our view, these two things do make the giving of the final written warning manifestly inappropriate, we have taken into consideration the other matters as we have said we accept the respondent and Mr Slater in particular acted in good faith, that there was a prima facie case as can be seen from Tracy Riley's issue, that the respondents were fair to the claimant by drawing a line in the sand and not including other non-compliance which had arisen since the terms of reference had been finalised. That they had made other adjustments to try and enable the claimant to maintain a presence at work, if it was inappropriate to issue the final written warning could there still be a fair dismissal.
- (ii) However, we find it was not a fair dismissal procedurally because without the final written warning it was outside the range of reasonable responses to dismiss and there should have been further medical exploration between the claimant's GP and the respondent. In addition, the fact that the claimant did produce backdated notes covering his absence from August save for 2 days is also relied on to find that it was outside the range of reasonable responses to dismiss.
- (iii) We recognise that in respect of the claimant's absences and failure to communicate the respondent was remarkably tolerant, however that cannot outweigh the factors above which have led us to decide there was an unfair dismissal.

### Polkey/Chagger

128. In respect of the respondent's argument that the claimant could have been fairly dismissed for absence per-se we agree that given the claimant's absence record that it was unlikely that the claimant was going to be able to provide a reasonable level of attendance in the foreseeable future, nor was he likely to comply with giving sufficient notice for the respondent to plan.
129. Accordingly, we find that the claimant would have been fairly dismissed within six months of his actual dismissal in December 2019. We have considered the respondent's absence policy which is very flexible and taken into account our own knowledge of the time these processes take in order to arrive at the 6 months estimate. It is recognised that such findings will always include an element of speculation however we have taken we believe concrete factors into account.

**Wrongful Dismissal**

130. Usually a dismissal without notice can only be justified at common law if it is for gross misconduct. The respondent here had a contractual right to dismiss for misconduct. However we find dismissal without notice was not justified here as the claimant was not in charge of his actions due to his disability and consequently we find there was no gross misconduct.
131. The matter will now be listed for remedy to consider financial losses and injury to feelings

Employment Judge Feeney  
Date: 16 June 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON  
16 June 2022

FOR THE TRIBUNAL OFFICE

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