EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Mr G Parkash	**v**	British Airways Plc

Heard at: Reading **On:** 20 and 21 September 2018

Before: Employment Judge Hawksworth (sitting alone)

Appearances
For the Claimant: Ms S Gilani (Solicitor)
For the Respondent: Mr J Allsop (Counsel)

JUDGMENT

1. The Claimant's complaint of unfair dismissal succeeds.

2. The Claimant is awarded compensation in the sum of £17,465.98 made up of

   i. a basic award of £5,379.00; and
   ii. a compensatory award of £12,086.98

3. Recoupment applies to the unfair dismissal compensation. The prescribed element is £11,861.98. The excess over the prescribed element is £5,604.00.

REASONS

1. The Claimant worked as a cargo agent with the Respondent from 6 December 2004 to 28 November 2016. He presented his ET1 on 14 February 2017 having notified ACAS on the same day. The claim was brought in time. The Respondent submitted its ET3 in time on 16 March 2017.

2. The hearing took place over two days. There was an agreed bundle of 282 pages. I heard witness evidence from the following witnesses in this order:

   2.1. Mrs B. Dhaliwal, People Services Manager with the Respondent;
   2.2. Mr M Burton, General Manager, Operations Delivery with the Respondent; and
   2.3. the Claimant.

3. Prior to the hearing starting, an issue arose as to whether a judgment in another employment tribunal case heard in December 2017, Sangha v British Airways, could be included in the bundle. In that case, the dismissal was found to be unfair. The dismissing officer and the appeal manager were the same as in this case. I decided that the judgment could be referred to in submissions and that witnesses could be cross examined about the case, insofar as it was relevant to the issues in this case. I concluded that it would be helpful to have a copy of the judgment available to be referred to if needed during cross examination and on submissions.

Issues to be determined

4. The issues in the case have been agreed by the parties as follows:

   (a) Was the dismissal fair within the meaning of s.98(4) ERA 1996?

   (b) If the Claimant's dismissal was not fair:

      (i) Was the conduct of the Claimant prior to the dismissal such that it would not be just and equitable to award the basic award pursuant to s.122(2) ERA 1996?

      (ii) Was the conduct of the Claimant prior to the dismissal such that it would not be just and equitable to make any compensatory award pursuant to s.123(1) ERA 1996?

      *(iii) Should there be a **Polkey** deduction?*

      (iv) Has the Claimant mitigated his losses?

   (c) Subject to the above, what (if any) compensation is the Claimant entitled to recover?

Findings of fact

5. The Claimant started employment on 6 December 2004, initially as a PCV driver. He was redeployed to a cargo role in January 2008. At the time of his dismissal, his gross weekly pay was £581.47. His net weekly pay was £456.23.

6. In April 2015, after a back injury, the Claimant took a period of sick leave. He went through the attendance management process as a result of this injury including an absence review interview at stage 1 and a phased return to work in August 2015. There was a review meeting on 21 August 2015 under section 4 of the Respondent's attendance management policy. Section 4 applies in cases of long term absence. The outcome was that the Claimant was given notice of termination, such notice to expire on 11 November 2015.

7. The notice of termination did not however take effect because on 17 September 2015 the Claimant was certified as fit to return to normal duties and full hours and he did in fact return to work. The notice of termination was therefore rescinded on 23 October 2015.

8. On 15 November 2015, the Claimant became unfit for work due to problems with his shoulder and began a period of long term absence. The Respondent made referrals to its health service (BAHS) and received reports during this period. The Respondent began the section 4 attendance management process again.

9. On 18 March 2016, the Claimant returned to work on restricted duties of six hour shifts instead of 8.5 hour shifts. After his return to work the Claimant was asked to attend an absence review interview under section 3 of the Respondent's attendance management policy. Section 3 of the policy applies in cases of short term absence. On 11 April 2016, the Claimant was sent an outcome letter in relation to the section 3 absence review interview. He was set a six month improvement plan with absence to be monitored for 12 months. Further action would be triggered by two or more occasions of absence in a three month period.

10. On 13 April 2016, the Claimant was referred by Mrs Dhaliwal to BAHS; their response was received on 22 April. A further restricted duties period of one month was recommended; this was implemented by the Respondent. During this restricted duties' period, the Claimant took a number of days of annual leave, unpaid leave and lieu days. At least some of these absences were to attend hospital appointments.

11. On 1 June 2016, a further BAHS OH report was provided following a referral. It recommended a further period of restricted duties. However, Mrs Dhaliwal felt that the Claimant had not taken full advantage of the previous period of restricted duties because he had taken so many days of annual leave, unpaid leave and lieu days. At a meeting on 6 June 2016 Mrs Dhaliwal decided that the Respondent could not accommodate a further period of restricted duties.

12. On 8 June 2016, there was a further section 3 absence interview. The outcome was that the Claimant had failed to meet the expectations of the Respondent in the improvement plan and a further improvement plan was set to run from 31 May 2016 to 30 November 2016 with absence to be monitored for 12 months. This 12 month monitoring period was to run from 31 May 2016 to 30 May 2017.

13. On 12 August 2016, the Claimant had an MRI scan on his shoulder, he was to receive the results in his next consultant appointment. On 15 August 2016, the Claimant was absent from work due to his shoulder condition and he did not return to work prior to his dismissal.

14. On 23 August 2016, Mrs Dhaliwal made another BAHS referral. A week later on 30 August, the Respondent sent the Claimant a letter inviting him

to a section 4 review meeting. The invitation letter did not refer to the possibility of dismissal taking place at that meeting.

15. On 2 September 2016, BAHS provided their response to the 23 August referral. The response was that the Claimant was not at that time fit to return to work. He was due to be reviewed by his consultant. The BAHS response suggested: *"I will review his progress following this appointment"*.

16. The section 4 review meeting took place on 6 September 2016. The Claimant attended unaccompanied. He was given notice of termination to expire on 28 November 2016. On 13 September 2016, Mrs Dhaliwal wrote to the Claimant confirming the outcome of the section 4 review meeting. The letter confirmed that a decision to dismiss had been made because Mrs Dhaliwal was not convinced that the Claimant was able to sustain a level of attendance that was acceptable by British Airways. It stated: *"If any new information comes to light, I may revoke this decision or look to extend the termination date"*.

17. On the same day, 13 September 2016, the Claimant had the appointment with his consultant. On 14 September 2016, the Claimant appealed against his dismissal and the following day, he forwarded his MRI results and information about his ongoing treatment to Mrs Dhaliwal. He told her he was due to see another consultant, an upper limb specialist, on 29 September 2016, ie just over two weeks later.

18. On 29 September 2016, the Claimant telephoned the Respondent to say that he had seen the upper limb specialist; there was a tear in his arm muscle. The next week, a steroid injection would be tried, it was felt that may sort out the problem and if it did not, then surgery would be an option.

19. Mr Burton was appointed as appeal manager to hear the Claimant's appeal. The appeal meeting took place on 11 October 2016. The appeal was not upheld. This was confirmed in a letter the same day. The letter said: *"Your contract of employment will end on 28 November 2016 unless prior to the termination date there is a significant change in your medical circumstances which would enable you to return to your contractual role and sustain an acceptable level of attendance."*

20. On 21 November 2016, the Claimant wrote to Mrs Dhaliwal to send her a statement of fitness to work from the upper limb specialist. The statement said: *"Painful shoulder which has resolved. Pain now minimal. Range of movement very good. No need for treatment. Patient is fit to work."* The Claimant asked Mrs Dhaliwal to reconsider the decision to dismiss. Mrs Dhaliwal did not agree to withdraw the dismissal.

21. On 24 and 25 November 2016, the Claimant asked Mr Burton to reconsider his decision in the light of the new medical evidence. Mr Burton declined to do so as the appeal was concluded.

22. The Claimant's employment terminated on 28 November 2016. He had no further problems with his shoulder after that.

23. The Claimant had copies of around 30 job applications he had made in a 12-month period. He signed up to a number of online employment agencies as well as one physical agency. He obtained a period of temporary employment over Christmas. There was a gap of approximately six weeks before the Claimant started his job search after his dismissal.

The Respondent's attendance management policy

24. The Respondent's attendance management policy is expressed to be contractual. Section 4 of the policy deals with long term absence.

25. The policy provides as follows at section 4.3 under a heading "Medical incapacity and unable to do their job":

> *"Where BAHS advises that the employee is incapacitated and unable to do their job, British Airways will follow the procedure set out below.*
>
> *The line manager should consider all the following matters to determine the appropriate action to take:*
> - *the advice of BAHS including any recommendations or restrictions they suggest relating to the employee's current job;*
> - *the effect on the employee and the overall performance of the department if changes to the work environment are made; and*
> - *whether it is reasonable to make changes to the work environment.*
>
> *The actions that are taken are:*
>
> - *reasonable adjustments to the working environment of the employee's current job on a temporary or permanent basis,*
> - *appropriate rehabilitation plan,*
> - *suitable alternative job within British Airways, or*
> - *termination of employment on the grounds of medical incapacity."*

26. Section 4.6 of the policy provides:

> *"If reasonable adjustments cannot be made to the employee's working environment and the employee is capable of undertaking suitable alternative employment, the line manager will discuss with and assist the employee to identify and apply for suitable alternative employment."*

27. At section 4.7, the policy provides that:

> *"Line managers when considering terminating an employee's employment on the grounds of medical incapacity must:*
>
> - *write to the employee summarising their situation and explaining the reasons why the line manager is considering terminating the*

employee's contract of employment on the grounds of medical incapacity and invite the employee to a meeting to discuss the situation,

- *seek advice from policy and casework support,*
- *ensure that guidance has already been sought from BAHS with reference to reasonable adjustments, appropriate rehabilitation plan and suitable alternative jobs."*

The Law

28. It is agreed that the dismissal in this case was for capability, which is a potentially fair reason for dismissal.

29. Section 98(4) sets out the test for fairness in unfair dismissal claims:

> "The determination of the question of whether dismissal is fair or unfair having regard to the reasons 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 and the substantial merits of the case."

30. In long term ill health cases, fairness under section 98(4) needs to be considered in the context of whether the employer can be expected to wait longer for the employee to return.

31. That question is considered bearing in mind that fairness is still governed by British Homes Stores v Burchell and so consideration must be given to whether the employer had genuine belief in its stated reason for dismissal and had reasons grounds for that belief having conducted a reasonable investigation.

32. Fairness also requires a fair procedure to be followed and in long term ill health cases this particularly requires consultation with the employee, a thorough medical investigation, and consideration of alternatives to dismissal, in particular, alternative employment within the business.

Conclusions

33. It was agreed that the reason for the dismissal was capability which is a potentially fair reason for dismissal.

34. I have considered the test in section 98(4). I have concluded that in all the circumstances of the case, bearing in mind the size and the administrative resources of the Respondent, the Respondent did not act reasonably in treating this as a sufficient reason to dismiss the Claimant.

35. First of all, in relation to the decision to dismiss (as set out in the Respondent's letter of 13 September 2016 following the meeting on 6 September 2016), there were significant procedural failings. There was a

failure to consult properly with the Claimant. The letter of 30 August 2016 inviting the Claimant to the meeting did not warn the Claimant that dismissal would be considered. I do not consider that it was sufficient to rely on warnings given in earlier letters or to expect the Claimant to have understood that dismissal might follow because there had been a similar failing in the correspondence sent in a previous procedure in 2015.

36. Secondly, in relation to the decision of 13 September 2016, I have concluded that the Respondent did not undertake a sufficient medical investigation. The BAHS review of 2 September 2016 proceeded on the reasonable assumption that a further medical review was appropriate after the Claimant knew more about his medical position following his appointment with his consultant. It is significant that the appointment with the consultant was only a week after the dismissal meeting and took place on the actual day on which the dismissal letter was written. I have concluded that a reasonable employer would have waited, even given the very high levels of sickness absence in this case, because of the proximity of the appointment and the real possibility of this shedding light on the Claimant's medical position.

37. Thirdly, and importantly, when making the decision to dismiss the Claimant, Mrs Dhaliwal did not follow the Respondent's contractual policy in terms of the steps which must be taken by a line manager who is considering terminating employment. She did not take any advice from the Policy and Casework Support team as required by the policy. She also wholly failed to consider suitable alternative employment. The policy provides that suitable alternative employment should be considered across the whole of the Respondent and that the line manager should assist the employee to identify and apply for alternative roles. No such assistance was provided. It is not reasonable for the decision maker to wholly omit this stage of the process on the assumption that no suitable jobs will be available. A reasonable employer, especially an employer of the size of the Respondent, would conduct a meaningful search for alternative employment.

38. The appeal did not remedy these defects. In relation to the invitation letter, the Claimant had already lost the opportunity to put his strongest case at the earliest point before the dismissal decision was reached.

39. In relation to medical evidence, further medical evidence had been received after the dismissal and communicated to the Respondent by the Claimant on 29 September 2016, namely the evidence that a steroid injection was to be tried and this could remedy the problem. This evidence was known to the Respondent prior to the appeal and ought to have been taken into account in the appeal decision.

40. Mr Burton, like Mrs Dhaliwal, did not make any investigation into the possibility of suitable alternative employment. Although his evidence was that he would have spoken to the Policy and Casework Support Team, he could not specifically recall anything that was said and no note was taken

of the conversation. The breaches of the Respondent's policy therefore continued at the appeal stage.

41. Fourthly, the fit note which was sent by the Claimant on 21 November 2016, prior to the Claimant's dismissal taking effect, confirmed that his shoulder condition was resolved and he was fit for work. Mrs Dhaliwal did not seek any medical advice on this new medical evidence. Despite the indication she had given at the time of the decision to dismiss that new information could lead to the dismissal being reconsidered, and despite the clear medical evidence which said unequivocally that the injury had resolved and no further treatment would be required, she did not reconsider the dismissal decision. Mr Burton also declined to consider the additional evidence despite there being medical evidence of a significant change in the Claimant's medical circumstances, and despite Mr Burton having told the Claimant that his contract would end unless there was a significant change in his medical circumstances.

42. Therefore, although the Respondent had a genuine belief in the Claimant's incapacity, it failed to follow significant features of its own policy in relation to the dismissal meeting invitation letter and suitable alternative employment. Further, it failed to carry out a sufficient investigation into the medical position, particularly bearing in mind the short periods required for the medical position to become clearer, the unequivocal evidence of a complete change in the medical position being received on 21 November 2016 before the dismissal took effect and the previous indications that new medical evidence would be considered. These factors take the decision outside the range of reasonable responses. The Respondent did not follow a fair procedure or conduct a proper investigation and for these reasons, I conclude that the dismissal was unfair.

43. I need to consider whether the Claimant would have been dismissed in any event. I do not consider that he would have been dismissed under the section 4 procedure even if a fair procedure had been followed. His shoulder injury had resolved and no further treatment was necessary.

44. However, I do consider there to be a likelihood that the Claimant may have been dismissed under the section 3 procedure for reasons relating to capability because of other short term absence. At the time of his dismissal, he was at stage 2 of the section 3 process and had an improvement plan due to run from 31 May 2016 to 30 May 2017. Further action under this plan would have been triggered by two or more occasions of absence in a three month period.

45. I have concluded, given the Claimant's absence history, there was a likelihood of dismissal under the section 3 procedure even if he had not been dismissed under section 4. I have assessed the likelihood as 50%. I have taken this into account in the calculation of the compensatory award.

46. I do not consider that this is a case in which it would be appropriate to find that the Claimant contributed to his dismissal. He was following medical advice in relation to his shoulder, he kept his employer informed with

medical updates as quickly as possible and his absence during the restricted duties period cannot be regarded as culpable conduct.

47. As to mitigation, I do not agree with the submissions of the Respondent that the Claimant failed to mitigate his losses. He has produced evidence of around 30 job applications in a 12-month period and he signed up to a number of online employment agencies as well as one physical agency. He obtained a period of temporary employment. There was a gap of approximately six weeks before the Claimant started his job search after his dismissal but I do not consider this to be unreasonable. During his notice period, he was focused on getting better and on the hope of getting the Respondent's termination notice revoked.

Remedy

48. On remedy, the Claimant had 11 years' service at the time of dismissal and was aged 34. He is entitled to a basic award of £489 x 11 ie £5,379.00.

49. The losses sought by the Claimant were 52 weeks' loss of pay totalling £23,723.96 and loss of statutory rights in the sum of £450.00. I have applied a 50% reduction to these figures to account for the chance that the Claimant would have been dismissed in any event as set out above. That gives a total compensatory award of £12,086.98.

50. The total award (basic award plus compensatory award) is £17,465.98.

51. Recoupment applies to the unfair dismissal compensation as set out below.

Summary of assessment of unfair dismissal compensation

A. Basic award

Gross weekly pay (capped) - £489 x 11 = £5,379.00

Compensatory Award:

B. Prescribed element

Net average wages of £456.23 per week x 52 weeks = £23,723.96

Reduction of 50% = £11,861.98

Total prescribed element = £11,861.98

C: Non-prescribed element

Loss of statutory rights £450.00

Reduction of 50% = £225.00

Total non-prescribed element = £255.00

Compensatory award total (B + C) £12,086.98

Grand total (A+B+C) £17,465.98

Recoupment

a) Grand total £17,465.98

b) Prescribed element £11,861.98

c) Period of prescribed element: 29 November 2016 to 21 September 2018

d) Excess of grand total over prescribed element £5,604.00

_____
Employment Judge Hawksworth

Date: …22/10/2018……..

Judgment and Reasons

Sent to the parties on: .....

.....
For the Tribunal Office

Public access to employment tribunal decisions
All 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.