Case No: 2300230/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS sitting alone**

BETWEEN:

Mr J Allen

Claimant

and

Department for Work and Pensions

Respondent

ON: **16 October & 20 November 2019**

Appearances:
For the Claimant: **In person**
For the Respondent: **Ms I Shrivastava, Counsel (16 October) & Ms K Balmer, Counsel (20 November)**

RESERVED JUDGMENT ON LIABILITY

The claimant was unfairly dismissed.

A remedy hearing will be listed.

REASONS

1. In this matter the claimant complains that he was unfairly dismissed by the respondent from his employment as a Work Coach. The respondent admits the dismissal and says it was due to the claimant's persistent short-term absences.

Evidence & Submissions

2. For the respondent I heard evidence from Ms G Featherstone (Universal Credit Manager), Ms D Seymour (Front of House Manager) and Mr M Ibiayo (Operational Leader). I also heard evidence from the claimant and had an

agreed bundle of documents. The claimant's evidence on day two of the hearing lasted most of the day and at the claimant's request it was agreed that the parties could submit their closing arguments in writing within 14 days which in due course were received. Judgment was reserved.

3. The statements of Ms Featherstone and Ms Seymour were supplied by the respondent to the claimant two weeks prior to the Hearing. The respondent said this was because in the claimant's witness statement he had referred to matters outside the scope of his pleaded case. The claimant objected to these additional statements but I allowed them in for the reasons given orally to the parties.

4. At the outset of the hearing the claimant submitted a letter dated 31 July 2019 from his GP summarising his then current medical situation as well as a short view on events over the previous two years. Appropriate adjustments were made to the Hearing in light of the claimant's mental health needs in particular taking regular and more frequent breaks than is usual. The claimant was also encouraged to ask for breaks if he needed them.

5. Even taking into account those needs, I did form the view that the claimant at times took an overly cautious approach in his replies to cross-examination to the point of - on occasion - being unhelpful and unnecessarily disagreeing with straightforward propositions being put to him. However overall I concluded he was trying his best to give accurate evidence. Mr Ibaiyo struck me as an open and candid witness who was careful to be accurate and acknowledged when he could not remember details.

Relevant Law

6. The dismissal was admitted by the respondent and accordingly it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the Employment Rights Act 1996. Those potentially fair reasons include 'some other substantial reason of a kind such as to justify the dismissal' (section 98(1)(b)) which is appropriate for dismissals due to persistent short-term absences (Garner v South Tyneside Health Care Trust [2000] All ER 1451).

7. If the respondent establishes a potentially fair reason then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test, the burden of proof is neutral.

8. In considering whether the respondent has acted reasonably, the Tribunal assesses whether the respondent's decision fell within the band of reasonable responses to the claimant's level of absence in all the circumstances of the case, both substantive and procedural. When considering the procedure used by the respondent, the Tribunal will take account of the ACAS Code of Practice on Disciplinary and Grievance procedures. It is noted that in that Code there is no requirement that any

outstanding grievances must be concluded before a decision on dismissal may be made.

9. In International Sports Co Ltd v Thomson ([1980] IRLR 340) and Lynock v Cereal Packaging Ltd ([1988] IRLR 510), the EAT set out guidelines on the correct procedure to be adopted by employers when facing an excessive level of intermittent absence. These include a full review of the attendance records and reasons for absence, an opportunity for the employee to make representations and appropriate prior warnings of disciplinary measures, including dismissal, if no improvement is made. In Lynock, the fact sensitive nature of these cases was emphasised.

10. In coming to its decision the Tribunal must not substitute its own view for that of the respondent.

Findings of Fact

11. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

12. The respondent's attendance management procedure sets standards of attendance for its employees with a series of escalating steps if those standards are not met which ultimately can result in dismissal or demotion.

13. The trigger points for short term absences are eight working days cumulatively in any rolling 12-month period or four spells of absence of any duration in a rolling 12-month period. When a trigger point is reached, a health and attendance improvement meeting takes place to discuss the employee's welfare and how attendance might be improved. A possible outcome of the meeting is a first written warning which, if issued, is followed by a six-month review period during which absence must be below 50% of the normal trigger point for cumulative days absence (and below four spells of absence) to be considered satisfactory. If that review period passes with satisfactory attendance, it is followed by a 12-month sustained improvement period during which the usual trigger points apply.

14. If attendance is unsatisfactory in either period, a final written warning may be issued. That final written warning is also followed by a six-month review period subject to the same attendance requirements. If attendance is unsatisfactory during that further review period, or where a continuing sickness absence can no longer be supported, consideration may be given to dismissal or demotion in appropriate circumstances.

15. The procedure states that dismissal must be a last resort but may be considered if the individual circumstances justify it and up to date (i.e. within the last three months) occupational health (OH) advice has been received and there were no further reasonable adjustments that could be made to help the employee return to satisfactory attendance. Further, that dismissal is not an option if there is an outstanding OH report unless there are reasonable grounds for believing that the employee is using this as a

delaying tactic. Should the employee not attend a meeting and no representations are received, the decision-maker is permitted to proceed and make a decision on the basis of the available evidence. The procedure expressly states that the decision-maker must also consider any mitigating circumstances, e.g. domestic, personal, work problems, as well as whether the employee has been given every opportunity to state their views and how well the employee has engaged and cooperated during their absence and their attitude to return to work. Employees have the right of appeal against any dismissal.

16. There is a separate procedure for dealing with long-term absences.

17. The respondent also has an OH Services Employee Q&A document with which claimant was familiar. This is clear that referrals to OH can only be made with the consent of the employee (which can be given verbally if the employee is away from work but will be followed up in writing) and employees can expect to be given a copy of their referral and report on request. In the corresponding OH Service Manager Q&A document it states that face-to-face consultations are not provided on request though they may be considered appropriate if a case is contentious and has a high probability of going to appeal or there is a high risk that the case will be going to Court or Tribunal.

18. The claimant commenced work with the respondent on 11 April 2016. He was not willing to accept that the respondent's record of his sickness absences throughout his employment was accurate as he was not sure if the records had been kept correctly. He did not offer any positive evidence, however, to contradict that record and there is no evidence of him disputing any of the absences when they were set out in correspondence with him. He did not appeal any of the warnings issued despite being told of his right to do so. Accordingly, I accept the respondent's record as correct. In any event, the thrust of the claimant's argument that his dismissal was unfair was not about whether trigger points had been reached, but rather that it was unfair in all the circumstances. In particular that he had in fact engaged with the respondent and OH and what he said was ongoing bullying and harassment which led to his absences for stress which triggered his consideration under the procedure.

19. It is notable that the claimant appears to have had a large number of different line managers over a relatively short period of time. He says seven within two years which seems quite possible. It must be right that such a turnover in line management cannot have helped the claimant manage his absence given his particular health difficulties. The only manager that he was complimentary about was Ms M Sharma.

20. The claimant also says that he was the victim of workplace bullying and harassment. Whether that is correct or not is outside the scope of the issues in this case. I will not be making any finding of fact on that allegation though it is relevant to ask whether the respondent gave it proper consideration when the decision to dismiss was made.

21. The relevant chronology of the claimant's attendance record and the respondent's management of it is as follows:

22. **2017:** On 23 March 2017 following 4 spells of absence he received a first written warning from Ms Y Fitch with a review period of 23 March to 22 September. He did not agree to be referred to OH and was advised of the services of the employee assistance programme (EAP).

23. In May/June a 30-day absence triggered consideration of the long-term sickness provisions. A meeting was held on 30 June but no further action taken. He was again advised of the EAP and did not agree to be referred to OH. He was informed his absence would be reviewed regularly.

24. Between May and July the claimant was offered considerable support from his line management on a number of occasions and he did not always fully engage with what was offered.

25. On 21 August following further significant absences he was issued with a final written warning by Ms H Baidoo. He again did not agree to be referred to OH and was reminded of the EAP.

26. Following a further 10-day absence, the claimant was invited to a review meeting with Ms Baidoo. He requested an alternative date so that he could be accompanied and it was rearranged but he then requested a further date for the same reason. Ms Baidoo (having taken HR advice) referred his case to Ms R Lawrence as decision maker and informed the claimant. In his reply, the claimant said he was surprised the meeting was going ahead as he had raised a grievance regarding matters that had led to his sickness leave. (A copy of this grievance was apparently not in the bundle but the claimant acknowledged in his evidence that it was regarding Ms Baidoo.)

27. The claimant also consented to an OH referral and a telephone appointment was booked for 23 December. He did not attend that appointment. There was no apparent reason for that non-attendance.

28. **2018:** Another OH appointment was booked for 12 February 2018. There is no evidence in the documents that this appointment was effective but it is unclear why not. It seems likely that this was due to a change in provider of the OH service that led to there being no provider at all for a period around this time.

29. On 15 February the claimant's manager Ms Sharma completed a stress management plan with him and agreed actions to be taken to mitigate his stress. That plan was subsequently reviewed with him on a number of occasions by Ms Sharma and then two different managers.

30. On 12 March the claimant provided consent for a referral to OH.

31. On 23 April Ms Lawrence advised the claimant that she had decided to take no further action regarding his attendance (her meeting with him having been put on hold due to his grievance). He was given separate confirmation

that he had entered a sustained improvement period to run from 11 February 2018 to 10 February 2019 and was warned that further absences during this period could lead to his dismissal.

32. By 14 May Ms Seymour had become the claimant's manager.

33. On 19 June the claimant informed Ms Seymour that he would be absent from work due to stress. He also stated:

    '… I am extremely upset because as I have previously stated several times, the way in which things are conveyed to me at work, is basically psychological bullying and working in an environment like this for me is almost unbearable.'

    He was absent from 20 June to 19 July.

34. Ms Seymour referred the claimant to OH on 22 June - this was further to the claimant's consent provided in March. This delay seems likely due to the change in OH provider and changes in line management. A telephone appointment was arranged for 25 June. The claimant started the appointment but was unable to complete it due his current state of mental health and asked to see his GP first. He emailed Ms Seymour the following day asking for an in person referral and also stating:

    'I am hoping that this can be completed as soon as possible as I do not want to be away from work for any longer, but feel it is necessary that OHS is completed prior to my return so that any recommendations etc. if any can be implemented immediately, I do not want to return to work and then this is completed as it did not happen before.'

35. Ms Seymour arranged the in person appointment - by reference to possible Tribunal proceedings - for 11 July but was cancelled the day before by OH. It was rearranged for 20 July but the claimant could not do that date as he was on pre-booked leave (he had advised Ms Seymour on 13 July that he thought he was away that day). It was rearranged for 31 July originally as a telephone appointment but then converted to face to face on 1 August at Ms Seymour's request.

36. On 11 July Ms Seymour wrote to the claimant inviting him to a review meeting due to 22 days of absence during the sustained improvement period. This meeting was rearranged twice at the claimant's request and took place on 2 August.

37. On 19 July the claimant returned to work for 4 hours per day increasing to 5 in the second week.

38. In about early August Ms Featherstone became the claimant's line manager though Ms Seymour retained management of his attendance process. There was no evidence that this division of responsibilities or any reason for it was clearly explained to the claimant.

39. The claimant attended the OH appointment on 1 August but did not complete it because he exercised his right to withdraw consent after reading the contents of the referral letter. He told the doctor that the contents of the referral had not been discussed with him and he had significant concerns

with one of the paragraphs. In her report to Ms Seymour, the doctor indicated that a future referral should happen after discussing the contents of the new referral with him.

40. The attendance management meeting took place as planned on 2 August (albeit with a late start due to the claimant) between the claimant and Ms Seymour. A Ms Walton was present as notetaker and her notes were in the bundle. The claimant said in his evidence they were completely inaccurate however he did not specify in what way. This is consistent with his challenge to their accuracy at the time (see below). The notes are clearly not verbatim but I accept that they are more likely than not to be a broadly accurate summary of the meeting. It is clear from the notes that the meeting was at times tense, the claimant was not always cooperative and there remained many areas of disagreement between the parties as to recent events.

41. On 3 August Ms Seymour wrote to the claimant advising him that she had decided his case would be referred to Ms Charles (later changed to Mr Ibiayo to ensure impartiality) who would decide whether he should be dismissed or demoted or whether his sickness absence level could continue to be supported. She enclosed a copy of the notes taken by Ms Walton and asked him to sign and date them and indicate if they were agreed. The claimant replied on 9 August that he felt the notes were 'extremely inaccurate' and 'do not reflect the meeting that took place and what was said at all' and that the meeting needed to happen with 'unbiased parties conducting it'. There was no evidence that Ms Seymour replied in any way or took any action in response to that allegation other than referring to the decision maker.

42. On 6 August the claimant emailed Ms Featherstone requesting an OH referral stating that a consent form was attached. He said the request was not signed but it would be once he had had a conversation with her to understand the reasons for the referral. He stated that his appointment the previous week could not be completed because of the referral not being completed properly. Ms Featherstone replied saying 'not a problem' and to let her know when he was free to discuss. On the following day she passed some notes to the claimant from Ms Seymour but did not take that opportunity to have the promised discussion. Her evidence was that had the claimant not gone sick on the 8th she would have discussed the OH referral with him then (although she did not actually put that time into his diary as would have been required).

43. On 8 August at 8.34 am, the claimant emailed Ms Featherstone advising her that he was extremely [un]well and that he would be attending the doctors that morning and would contact work again with an update. Ms Featherstone replied by email thanking him for letting her know, hoping he would get on okay and feel better soon and also asking him in future to please let her know before his start time of 8:30 am. In all the circumstances, although strictly in accordance with the respondent's rules, this seemed an unnecessarily officious point to make.

44. The following day the claimant advised Ms Featherstone that he had been signed off work for two weeks. She replied asking for his telephone number so that they could arrange a keeping in touch agreement, attached a stress assessment for him to be complete and a wellness at work action plan. She also gave him the employee support number. Finally she asked him to complete and sign his OH consent form so that she could complete the referral. She said she would explain the process when they spoke later.

45. On 13 August Ms Featherstone wrote to the claimant formally asking him to contact her and provide her with a telephone number as the telephone number on his record was not working. Her evidence was that that letter was sent by recorded delivery and that the letter had been received but the claimant failed to make contact and she emailed him on the 15 August reminding him of his obligations in this regard. The claimant's evidence was that he did not receive that letter.

46. On 22 August the claimant submitted three grievances - one in respect of each of Ms Patel, Ms Featherstone and Ms Seymour. Those in respect of Ms Featherstone and Ms Seymour were clearly potentially very relevant to matters relating to his health and attendance. In that email the claimant said that he had also requested an OH referral but that could not be completed due to one of his grievances being against his current line manager and he asked what should happen in that instance. He received no substantive reply to that query.

47. On 23 August Ms Seymour sent a report to Mr Ibiayo summarising the action taken as a result of the claimant's unsatisfactory attendance. There were nine appendices to the report ; it was not apparent from the oral or written evidence what each was a reference to. Appendix 6 was described as OHS referrals and it seems more likely than not that this was a document elsewhere in the bundle with the same title. That document specifically said in relation to the 25 June appointment that the claimant 'refused' to do it as wanted a face to face referral. It also said that the claimant cancelled the appointment on 20 July 2018 as he said he could not make [it] and that he refused to do an interview on 1 August 2018 as he was not happy with what was in the report (referral). This short summary does not fairly reflect the reality of those circumstances. It does not make it clear that the claimant did engage with the appointment on 25 June and that at least part of his reason for ending it was his wish to see his GP first. Further, it does not explain that the claimant had already booked leave for 20 July 2018 and had previously advised Ms Seymour of that. It also does not accurately report what OH had said to Ms Seymour about the termination of the appointment on 1 August 2018 and their implied criticism of management for not discussing the referral with the claimant first. Finally it did not include the fact that on 6 August the claimant had formally requested a referral to OH and indicated he would sign the consent form once they had discussed the contents of the referral.

48. Ms Featherstone, Ms Seymour and Ms Patel were interviewed on 28 August in connection with the claimant's grievances.

49. On 29 August Mr Ibiayo wrote to the claimant inviting him to a meeting on 12 September to discuss his sickness absence and circumstances of his case. He was informed that if he was unable to attend on that date he should advise as soon as possible, of his right to be accompanied at that meeting and that he would have the opportunity to put forward any additional or new information which he wished Mr Ibiayo to consider. It was clear from this letter that the possible outcome of the meeting could be dismissal or demotion. The claimant was again given details of the EAP and it was recommended that he read the attendance management policy and procedure a copy of which were enclosed.

50. Concurrent with the events above the claimant had been subject to disciplinary proceedings. In connection with those he had written to Mr Newcombe, the disciplinary manager, on 29 August advising that he was currently off work and asking for a meeting to be rescheduled upon his return to work and when he was well enough to attend. Mr Newcombe replied saying that the meeting could not be deferred indefinitely but that he understood there were some outstanding grievances that might impact his decision so they could review 'then'.

51. The claimant did not attend the meeting on 12 September and did not contact Mr Ibaiyo beforehand despite having received the invite letter.

52. On 17 September the claimant was invited by letter to attend a grievance meeting on 25 September. On 19 September the claimant replied to the invitation declining to attend a grievance meeting until he met his union representative. It was clear that he did not feel well enough at the time to meet either his union representative or attend a grievance meeting.

53. In the meantime Mr Taylor, team leader, had been asked to contact the claimant so that 'keeping in touch' arrangements could be met during his absence. Mr Taylor and the claimant had an exchange of emails on 17 to 19 September agreeing that they would speak on the following Monday at 12 noon.

54. A letter from Mr Ibiayo was sent to the claimant on 13 September by recorded delivery. On 18 September Mr Taylor and Ms Waldron also hand delivered a copy to this home address. The letter noted that the claimant had failed to attend on the previous day and invited him to provide a written response to three questions which he would then consider when making a decision. He was advised that if no response was received by 21 September a decision would be made on the evidence available. Also that upon receipt of a response consideration would be given to his comments and all relevant information and a decision would be sent to him within five working days. The three questions posed were:

   '1. Can you put forward any additional or new information which you wish me to consider.

   2. Would you accept a job at a lower grade (demotion) as an alternative to dismissal if this option were offered to you?

   3. Do you have any outstanding grievance?'

55. Mr Taylor prepared a note of the visit to deliver the letter and Ms Featherstone gave evidence, based on when Mr Taylor left and returned to the office, that the visit lasted 20 minutes. Mr Taylor's note however does not state how long he was there but gives a description of what happened which would not logically seem to have taken 20 minutes. The claimant's (unchallenged) oral evidence was that they were outside his property for a maximum of 5 minutes. That they had woken him up (he was off sick), he looked out to see who was there but after he had been to the toilet and returned to the window, they had left. The claimant was also, he says, confused why Mr Taylor had attended his property when they had agreed that they would next be communicating on the following Monday. It is apparent, however, from their exchange of emails that the visit to the house was on the morning of 18 September and the agreement to communicate the following Monday was not made until the evening of the same day. I do not understand the claimant's confusion therefore in that regard however on the evidence before me I prefer his account that they were present for a maximum of 5 minutes and he did not 'refuse' them entry.

56. On 21 September the claimant emailed Mr Ibiayo and said:

> 'As you should be aware, I am currently off work sick at the moment. This has been the case since 26th June 2018. When I am well enough and able to return to work I will formally contact you in regard to this matter. I have forwarded your details to my union rep who may be in contact with yourself in due course.'

57. Mr Ibiayo took advice from HR on 24 September. It is noted in the summary of the discussion that he had informed HR the claimant had 'refused to answer the door', 'had not engaged in the process' and had 'refused to attend any OH appointment'. This is perhaps not a surprising view of Mr Ibiayo's given the contents of the 'OHS referral time line' document he had from Ms Seymour but for the reasons already given that was not the accurate position. In particular it was incorrect that the claimant had refused to attend <u>any</u> OH appointments - he had attended two, one on the telephone and one face to face, albeit they had not completed.

58. Mr Ibiayo completed a decision-maker's checklist in which he repeated that the claimant had not engaged with the OH process.

59. When asked about OH in his evidence, Mr Ibiayo said that on looking at the papers he formed the view that the claimant had not taken up the opportunity to engage with them but could not recall the specifics. He also said this was not the overriding factor in his decision to dismiss. In re-examination he confirmed that in accordance with the procedure he would normally look for an OH report but that if the employee was avoiding that, he could go ahead and dismiss.

60. On 25 September Mr Ibiayo wrote to the claimant advising him of his decision to dismiss on the grounds of unsatisfactory attendance. He referred to the claimant's failure to attend the meeting on 12 September and his subsequent failure to provide a response to the written questions. Mr Ibiayo specifically noted that the claimant had failed to engage with OH and that he did not participate in the OH process. He also referred to the

claimant not giving access to the colleagues who had visited his home on 18 September. He noted that he had an ongoing grievance which was being progressed but that that did not affect his decision. The claimant was entitled to 5 weeks' notice which he was not required to work and was also awarded 25% compensation under the civil service compensation scheme to reflect the efforts made to improve his level of attendance. The claimant was advised of his right to appeal against the decision and the level of compensation awarded.

61. The claimant's employment ended on 25 September. The claimant did not appeal against his dismissal. He did however commence early conciliation very shortly thereafter.

62. On 14 November the claimant was advised that his three grievances had not been upheld. He was advised of his right to appeal but he did not.

Conclusions

63. I am satisfied that the respondent's reason for dismissing the claimant was his unsatisfactory attendance due to persistent short-term sickness absence and thus 'some other substantial reason'.

64. As to whether that dismissal was fair in all the circumstances I have considered the overall process followed by the respondent which closely followed that set out in the attendance management procedure which itself is ACAS compliant. This is not a case where procedural irregularities on the part of the respondent are significantly in issue although in his submissions the claimant does refer to the failure to process his grievances prior to dismissal and the absence of an up to date OH report.

65. Mr Ibiayo's evidence on the grievances was confused. In his witness statement he said that he had not been aware of any outstanding at the time of his decision and that is why he had directly asked the question in his letter dated 13 September. He said that had he been aware of the grievances he would probably have postponed his decision until he knew the outcome. In the dismissal letter however he expressly stated that he understood the claimant did have an ongoing grievance which was being progressed but that did not affect his decision. The existence of grievances or otherwise was not expressly addressed in either the OH summary of discussion or the decision maker's checklist.

66. In his oral evidence, Mr Ibiayo stated that under the attendance policy he could not dismiss if there were any outstanding grievances and that is why he asked. In fact he is wrong it does not state that, but his evidence was such that he clearly believes grievances should be resolved prior to dismissal. He also said that he had no knowledge of the claimant's circumstances and relied upon what he was told - probably by Ms Patel. He could not explain his statement in the dismissal letter that there were outstanding grievances.

67. As far as OH is concerned, there was no recent report available to Mr Ibiayo when he dismissed, as the procedure anticipates there will be, despite the claimant expressly requesting a referral on 6 August 2018 saying that he would provide consent once it was discussed and chasing for that on 22 August 2018 (albeit to a different manager). In those circumstances it could not reasonably be said that the claimant at that point was avoiding seeing the OH as a delaying tactic (the claimant having arguably unreasonably turned down earlier offers of OH support does not change that position).

68. I do not conclude however that the procedure adopted by the respondent was fatally flawed by those matters.

69. The substantive issue is whether, in all the circumstances, the decision to dismiss fell within the band of reasonable responses to the claimant's absences. Having expressly reminded myself not to substitute my own view for that of the respondent, a number of those circumstances militate against the decision being within that band:

    a. Mr Ibiayo's evidence was that he considered the file of papers referred to him but he was unable to remember any of the details when questioned about that. I asked him how detailed his knowledge was of events leading up to the claimant's dismissal and his reply was that he was focussed on looking at process and the spells of absence and that any other matters could and should have been looked at in the grievances (which of course were still pending). When I asked him if he in fact should have waited for the claimant to be able to attend a meeting with him, he again referred to the process and warnings having been triggered and that his decision was in accordance with the process. He added that had the claimant given a specific return to work date he would have been more inclined to wait but the situation was open ended and the process had been exhausted. He also acknowledged that he had not known about the keeping in touch arrangements put in place with the claimant. These answers led me to form the impression that whilst Mr Ibiayo was open minded, he was formulaic in his approach and process driven. He took what was presented to him by management very much at face value;

    b. those outstanding grievances at the time of the decision to dismiss were potentially relevant to the underlying reasons for the claimant's absences. Mr Ibiayo's confusion as to the position regarding them certainly suggests that he did not properly understand that position and that if he had done, it might have changed or at the very least delayed his decision;

    c. the undoubted negative impact on the claimant of the high number of line managers he had in a relatively short period. Given his mental health issues and absences for stress and the obvious difficulties he felt he was having with his team (regardless of whether he was right about that), this frequent change in line management cannot have

helped. This was compounded by him then being managed by both Ms Featherstone and Ms Seymour from early August 2018;

d. the information given to Mr Ibiayo with regard to the claimant's engagement or otherwise with OH was inaccurate and painted him in a poorer light than was actually the case. Although Mr Ibiayo said in his oral evidence that this was not the 'overriding factor' in his decision, it clearly was a significant factor as it is the first matter referred to in the dismissal letter. Although, as described above, this did not amount to a fatal procedural flaw, it does beg the question of whether Mr Ibiayo had all the relevant information before him that he reasonably should have had;

e. a further factor that Mr Ibiayo relied upon in his dismissal letter was what he described as the claimant refusing to give access to Mr Taylor and Ms Waldron when they attended at his house to give him the letter of 13 September. Mr Ibiayo did not have the claimant's version of events - which I have found to be the more accurate - before him;

f. the claimant had expressly said that the notes of the meeting on 2 August, further to which the referral to Mr Ibiayo was made and upon which he relied, were extremely inaccurate and biased. Although Mr Ibiayo was himself undoubtedly independent, there was no evidence that he appreciated that this is what the claimant had said; and

g. when the claimant emailed Mr Ibiayo on 21 September, admittedly in vague terms, he could have been given more time to respond either directly or through his union given that the respondent was fully aware of claimant's mental health issues (and specifically the stress risk assessment was in the pack of papers before Mr Ibiayo). The claimant compares this to the arguably more sympathetic response he received from Mr Newcombe to a very similar request.

70. All those matters, of course, have to be set against the claimant's very high record of absence (223 days in less than 3 years' employment), his failure to attend the first dismissal meeting and to provide the requested information to Mr Ibiayo, the fact that Mr Ibiayo was independent, the number of chances the claimant had been given, the prior leniency shown to him including on at least one occasion when he was at risk of dismissal, sufficiently correct application of the procedure, repeated warnings, line management support and the effect of his absence on the provision of service to the public and his colleagues.

71. This is a balancing exercise. On this occasion I find that the decision to dismiss was outside the band of reasonable responses because Mr Ibiayo's formulaic approach contributed to him not fully appreciating all of the relevant circumstances as set out above and the history to the claimant's pattern of absence, and critically his engagement or otherwise with OH.

72. A remedy hearing will therefore be listed. It is noted that when he submitted his claim the claimant indicated he is seeking compensation only. In assessing any compensation, a number of further matters will need to be addressed including:

    a. what would have happened if Mr Ibiayo had given the claimant a reasonable opportunity to recover after his email dated 21 September and potentially for an OH appt to take place and for the grievances to be concluded, before he made his decision? Would the claimant have eventually been fairly dismissed in any event and if so, when?

    b. any reduction due to the claimant's failure to attend the first dismissal meeting and to exercise his right to appeal?

    c. did the claimant contribute to his dismissal by his own culpable conduct?

    d. did the claimant properly mitigate his loss?.

73. Although both parties have addressed some of these issues in their submissions, I wish to hear further and full argument. A separate Order setting out the steps for the parties to take to prepare for that remedy hearing has been issued.

Employment Judge K Andrews
Date: 24 January 2020