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EMPLOYMENT TRIBUNALS

Claimant

AND

Respondent

Mr C Bennett

British Telecommunications

Heard at: London Central

On:

3-5 April 2019

Before: Employment Judge Russell

Members: Mr Ferry

Ms Gillman

Representation

For the Claimant: In person, accompanied by Mrs K Bennett, Mother

For the Respondent: Mr P Livingston, of Counsel

REASONS

1. This three day case of claim of disability and discrimination and unfair dismissal came before us on 3 April 2019 following a Case Management Directions Hearing of 13 December 2018 before Employment Judge Henderson attended by the Claimant and the Respondent and the same representatives as appeared before us for the Full Merits Hearing.

2. The Claimant was employed from 1 April 2007 until 3 June 2018 as a Service Engineer. He was dismissed with notice on 6 April 2018 and paid until 12 June. He should have been paid notice pay until 27 June 2018 so there is an underpayment but this will be made to him and the Respondent accepts liability for repayment of £1,343.87 basic pay and London Waiting on top of £72.76 less statutory deductions on the aggregate amount and they will ensure that he is paid this along with the corrected P45 to the extent that it is needed.

3. The principal reason for the dismissal was stated to be that on 30 November 2017 the Claimant made an unauthorised stop at the Miller and Carter Restaurant and Public House where he remained for an additional forty five minutes resulting in a parking fine being received. He did so for emergency medical reasons but this incident resulted in a Disciplinary Hearing (and an appeal) with the Respondent's

indicating that a major factor in the subsequent decision to dismiss was the existence of two final and live written warnings on his file explaining that further misconduct could result in dismissal. The Claimant highlights his medical condition as a disability being severe hemorrhoids which caused his unauthorised stop at the Miller and Carter. He highlights the hostility of his line manager, the unreasonableness of the sanction and the unfairness generally as well as inconsistency of the process. He believes the decision was predetermined and/or that he did not get a fair hearing.

4. The Respondents deny the Claimant was disabled and consideration was given to dealing with that issue was a preliminary one, but after review of the documents on day one at the Tribunal Hearing, the Employment Tribunal determined to deal with this in the round because the issue of the Claimant's disability (or not) is/was inextricably linked to the disciplinary process (and events leading up to this) including the appeal.

5. We heard evidence from the Claimant and the Claimant's father as well as Mr Belchambers from the Respondent to whom the Claimant used to report, Mr Karim the Claimant's line manager at the time the alleged incident who also recommended disciplinary action and Mr Hodgkins the appeals manager. We did not hear from the employee who held the Disciplinary Hearing but we did receive submissions from both parties including a comprehensive written submission from the Respondent's Counsel, Mr Livingston. On the back of this evidence these are our findings.

Disability

6. Disability is defined in s.6 of the Equality Act 2010 and it includes someone who has a "physical" impairment which "has a substantial and long term adverse effect [on] that person's ability to carry out normal day to day activities". We do not find that the Claimant is or was at material time (which is primarily around 6 April 2018 when the decision was taken to dismiss him) a "disabled" person for the purposes of s.6 of the Equality Act and these are the reasons for that.

- (a) The Claimant's condition of hemorrhoids understandably caused him pain and discomfort and we recognise that, but there is no evidence of a significant adverse impact on his ability to do normal day to day activities. In his evidence he confirmed he needed regular and perhaps unexpected breaks. We accept that too but there are no other examples given of how his day to day activities were adversely affected and many conditions require breaks few of which amount to a disability.
- (b) There is no medical evidence provided that he had a disability. The Claimant only visited his GP once or twice about his hemorrhoids, he made other GPs visits but we do not accept the Claimant's evidence that a visit dealing with stress is the same thing as one concerned about his hemorrhoids. He used over the counter medicine to alleviate his symptoms. The fact is he chose not to have an operation to sort out what would have been and maybe still is an obvious way of resolving this medical condition.

(c) There is no evidence either that the condition did last or was capable of lasting twelve months and indeed he said that he felt a lot better in the April period prior to his dismissal due to finally being able to achieve a transfer within work. This improvement does not mean there was no disability but we also observe that he claimed a number of times that he was not disabled (albeit perhaps misunderstanding the label of disability). He said that he had no underlying medical condition when asked about this, he failed to complete the offered Respondent disability passport, he declined to take the opportunity offered to him to see medical experts including Occupation Health as well further visits to his GP and he advised his line manager that there were no health issues that concerned him.

(d) Whilst taking account of the fact that the Claimant did not wish to publicise the fact of his condition due to understandable social embarrassment, the fact is that his Managers did know of this condition in the Autumn of 2017 and there is no reason why he could not have asked (subsequent to this) for reasonable adjustments and/or otherwise being upfront with them as to his concerns and obviously this includes the incident in November 2017 which led to his dismissal. It seems evident to us that his illness (we do not dispute that he had this condition) was very distressing but (was not a disability as defined in the legislation). His communication in respect of it was at best underwhelming and we also highlight that he did not take any significant time off work for that reason ie hemorrhoids. This contentiousness is to his credit but it again undermines his suggestion that he could not cope.

7. In any event he did not ask for any reasonable adjustments and we find that to the extent that he did so the Respondent would not have refused them. The Respondent has been sympathetic to his condition and we make a further finding that if he had honestly explained his emergency stop at the Miller and Carter on 30 November 2017 the incident which has led to his dismissal that is now before us would not have been taken further as a disciplinary matter. The Respondent's main concern was the unauthorised nature of his stop albeit they had some outstanding questions as to his conduct. In addition, we find that even if he had been disabled there is no evidence that they would have treated him less favourably because of that protected characteristic. The Respondent's criticism was not that Mr Bennett took time off from the working day but his failure to communicate on this and have his enforced absence from work duties authorised by a manager. The Claimant makes the point through their submissions that there are many engineers and they often take some time off and they cannot all ring in during the day but this is missing the point in our opinion. In our findings the point being that anyone with a problem needs to advise a manager of this for a number of reasons including some identified by the Respondent in their submissions but principally to ensure that the employer knows where its staff are. Not just geographically by virtue of a tracker device that may or may not have been on the vehicle at the time but through open communication with their employee, particularly where they have to take time out of the working day as here.

8. The reason for the dismissal was the Claimant's conduct and not his illness nor is there any evidence of a conspiracy or predetermination of the decision. The Respondent followed a full procedure and a fair one in that there was an investigation disciplinary hearing and appeal and all conducted fairly and fully. Given the Claimant's reluctance to tell Mr Karim his line manager and the investigating officer of the real reason for stopping at the restaurant, it is understandable the matter went to a disciplinary hearing. It was wrongly labelled as a gross misconduct charge and the Respondent's know that this is erroneous but we accept the fact that in reality it was only a misconduct hearing, ie not gross misconduct and that dismissal was only an option because it came on the back of two final formal conduct warnings. The Claimant confirmed he was content with the procedure at both the disciplinary hearing and the appeal and he was represented on both occasions. He may have thought the disciplinary hearing was unnecessary and the appeal should have been successful but that does not justify his claim now. He claims that the procedure was flawed and we find it was not.

9. At both the disciplinary and appeal, the Claimant was finally upfront as to his health problems. His belated openness on this was diluted by the fact he also complained about the VPN problem with his phone but both Mr Steer and Mr Hodgkins in the appeal knew that the principal reason why the Claimant stopped at the Miller and Carter was because of his medical condition and we find that this stop was wholly legitimate. There was no evidence to find that he went in to the restaurant for a drink and he cannot be criticised for the fact that it was also a public house (in that at one point the Respondent does say it was concerned as to brand image). We accept that even in his hurry to get to the bathroom he parked at the back of the premises (and we find that a considerate step to take) and we accept also Mr Bennett's evidence that the pub was the most convenient place for him to stop. We use the word pub and restaurant in an interchangeable way. We find that the Miller and Carter was perhaps formally known as The Harvester and was a restaurant with a license and that, whether it is primarily a restaurant or pub, 5 is not relevant. It is fair enough that he stopped where he did and that he did not have to go to the Respondent's exchange. This was down to road conditions and the Claimant reacting to an emergency which dictated where he stopped and we also find that its natural that he should avoid going back to HQ given the embarrassment he would no doubt have felt. Forty five minutes was a perfectly reasonable time for him to be there in the circumstances and he was conscientious in subsequently going out for further jobs rather than going home ill after what must have been a traumatic experience.

10. However, we also find that the Respondent would not have dismissed him on the back of his unauthorised stop if it had not been for the final warnings on file nor would they have dismissed him at all if he had informed the manager or, recognising that communication with Mr Karim was difficult for whatever reason, Mr Painter or HR or anyone authorised at the Respondent company of the fact that he had stopped and why. Notwithstanding the location or the parking ticket he got. The relevance of the parking ticket which the Claimant eventually paid himself anyway, is that it alerted the Respondent to the fact of the stop, otherwise he would no doubt have got away with it, if we could put it that way as the Claimant had in his own evidence had such similar time off on previous occasions. And it

may well be as he claims that other engineers have done the same but we also accept the Respondent's evidence that they do not condone any unauthorised stops and there is no evidence before us that they would have treated any known unauthorised stops as anything other than serious matters to investigate and discipline if necessary. Treating anyone else in the Claimant's position consistently with the way they treated him.

11. So, what it boils down to here is the Claimant's failure to inform his or another manager as to his stop during the working day and the circumstances. Even if he did not go in to great detail for reasons of possible personal embarrassment why he did not do so it still remains unclear to us why he did not come clear and why he initially claimed he might have phoned through after the event when his final evidence today was to accept that he had not and this was an error. This oversight or intentional decision (and we find it was the latter) is exacerbated by the fact that he was on two final written warnings both relating to conduct and in each case he was advised, that any repeat of misconduct may well lead to his dismissal. We accept that he wishes now he had appealed against the second warning in particular but the fact is he did not. He accepted both, he knew that both of them were live and on file lasting for eighteen months each and he accepted he knew the impact of future offences in these circumstances. We are particularly surprised he did not explain his need to stop at the time or immediately after the event and given the importance of this to the Respondents and given the relevance to us in our decision making he will no doubt be very disappointed. That with hindsight he did not do so. We do understand his wish to privacy but his managers had known for over two months by 30 November 2018 of his condition so why not keep them in the loop.

12. The Claimant said in justification of his reluctance to tell his line manager that he had not even told his girlfriend so why would he discuss matters of this nature with his manager and someone he did not respect and trust? If he had spoken to Mr Karim he would not have been pushed for details he did not want to give. We did not find Mr Karim anything other than a considerate manager through his evidence that he gave before us and there has been no evidence from the Claimant as to why (as opposed to the fact of) his annoyance with Mr Karim. Mr Karim knew by the end of September (Mr Painter telling him after the final written warning that Mr Painter gave on 28 September) of the Claimant's condition so why not simply tell him during the time and in the lead up to the disciplinary and then the Claimant would not have been criticised. We accept that Mr Karim would have listened and we highlight that in a six page note made at the investigation hearing on 15 January 2019 the Claimant did not once tell the truth as to the reason why he stopped. This inconsistency is a feature of the evidence that he gave to the company at the time and we have seen no substantive justification for it in these proceedings.

13. The Claimant said that he did not think that the disciplinary hearing was needed and/or "a big deal" but he should have realised it was, given his clear failure to follow procedures when on final written warnings before reminding him of the importance of doing exactly that for the future. It is perhaps unfortunate that the parking restrictions at the Carter and Miller led to his absence without leave (as it were) being discovered but he should have been very aware of the need to avoid

any conduct which could possibly have led to criticism given that he was on the final written warnings.

14. The Respondent should have had a more speedy process in respect of its disciplinary. The delay between the investigation and the disciplinary hearing and in particular the two months delay in giving the appeal decision was poor, but we do not find the process flawed as a result because it was otherwise transparent and fair and by way of example we observe that the disciplinary minutes take up some twenty four pages and with six pages of reasons and the Claimant specifically asked at the end of these if he was content that he had the chance for his full say and he said that he was, with his representative present.

15. We make no findings as to whether there was a VPN problem or not though the timesheet suggests not but it is clearly a regular occurrence. Nor do we make findings of the extent to which it affected the work day other than it clearly it took at least forty five minutes out of it and he was not being disciplined for missing his last appointment on 30 November. But we do not find the conduct of Mr Karim unprofessional or inappropriate. The Claimant may have had his reason for not trusting Mr Karim but if so it is not clear to us what it was. There is no evidence of this or that Mr Karim would have reacted unfairly and/or harshly to the Claimant's genuine and truthful explanation of his medical difficulties. The Claimant's criticism of him was unreasonable and his father's criticism of Mr Karim was intemperate and inappropriate.

16. We understand the Claimant's disappointment at losing his job, of course we do, however he only has himself to blame and nothing to do with the fact of his hemorrhoid condition as opposed to his unwillingness to communicate with the Respondent company when he needed to make an emergency stop and go to the toilet. We understand that it was embarrassing but he was ill advised not to call the company as he knew he could and knew he should it is in within the range of reasonable responses for the employer to have dismissed him for failure to do so particular given the existence of the final written warnings and the wordings of these and instruction not to comply with management procedure in the future which he accepted but then defied.

17. We have applied the Burchell test and through these findings of facts it is clear that not only was the dismissal for the potentially fair reason of conduct under s.98(2) of the ERA 1996 but it is also reasonable in all circumstances under s.98(4). As far as his other claims are concerned the paternity pay was paid during his notice period and he was not working at the time so this covers his claims for paternity pay. The balance of his notice pay is to come and that also deals with his wrongful dismissal/unauthorised deductions claim in respect of two to three weeks of notice pay still owing. And to the extent he is proceeding with the claim at direct discrimination relating to his disability we find no less favourable treatment and in any event he was not disabled and to the extent he is claiming for harassment, again we find there is no disability as explained above and in any event no evidence has been put forward of harassment and on the contrary the Respondent has demonstrated a genuine caring attitude and stoical conduct in the face of unfair criticism of their management.

18. The Claimant is clearly now in better mental state he is a father and he says he enjoys his new job and is less stressed all of which is very positive. Unfortunately, his claim against the dismissal from the Respondent fails for the reasons given and his claims including unfair dismissal are dismissed other than the one relating to outstanding notice pay which is upheld.

Employment Judge Russell

Dated: 18 April 2019

Judgment and Reasons sent to the parties on:

23 April 2019

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For the Tribunal Office