



# EMPLOYMENT TRIBUNALS

**SITTING AT:** LONDON CENTRAL

**BEFORE:** EMPLOYMENT JUDGE F SPENCER

**MEMBERS** MS K CHURCH  
MS E ALI

**BETWEEN:** MS P KENSINGTON CLAIMANT

AND

GENESIS RESEARCH TRUST RESPONDENT

**ON:** 16<sup>TH</sup> and 17<sup>TH</sup> April 2109

## **Appearances**

**For the Claimant:** In person

**For the Respondent:** Mr England, counsel

## REASONS

*These written reasons for the Judgment sent to the parties on 10<sup>th</sup> May 2019 are given at the request of the Claimant.*

### **Background and issues**

1. In this case the Claimant, Ms P Kensington, brings a claim of wrongful dismissal and direct race discrimination.
2. The Claimant worked for the Respondent from 16<sup>th</sup> April to 24<sup>th</sup> August 2018 when she was dismissed without notice. It is common ground that she has insufficient service to bring a complaint of ordinary unfair dismissal. In her claim the Claimant submits that her dismissal was an act

of direct race discrimination. She submits that other staff at the Respondent had “done the same” and had not been dismissed.

3. The Tribunal heard evidence from the Claimant and from Ms Sterling, who took the decision to dismiss the Claimant. We had a bundle of documents.

### **Findings of fact**

4. The Respondent is a charity limited by guarantee employing some 9-10 staff, some of whom work part time. The Claimant was employed full time as Corporate Fundraising Manager on a salary of £47,000 p.a. She reported directly to the Chief Executive Officer. When the Claimant began her employment the CEO was Julia Margo. Ms Sterling took over as CEO on 15<sup>th</sup> August 2018. On 16<sup>th</sup> August (Ms Sterling’s second day at work) the Claimant arrived late and left early. She told Ms Sterling when asked that she had been in a meeting but was unable to say who she had met or the name of the company they were from.
5. On 17<sup>th</sup> August, Ms Sterling’s third day, the Claimant did not attend work. She did not contact the Respondent to explain why she was not at work. The Claimant’s written contract of employment (Clause 9.1) provides that if an employee is unable to attend work for any reason she, or someone on their behalf, should notify the employer by telephone within half an hour of the start of the working day, or as soon as is reasonably practicable.
6. As a result of staff overhearing the Claimant on the telephone the day before, there was some concern for the Claimant’s safety/well-being. About an hour after the Claimant’s start time some of the Claimant’s team tried to contact her by phone. Both Ms Burns, the Challenge Events Officer and Ms French the office manager sent her texts. It appears that another employee called Martin also sent her a text. There was no response. In the early afternoon, Ms Sterling telephoned the Claimant’s sister, as her emergency contact. However, the Claimant’s sister did not know where she was.
7. Shortly after 5 p.m. the Claimant texted Ms Burns.(55a) In the text the Claimant thanks Ms Burns for calling and says that she had “a shit phone and had a bit of an emergency today” – though notably there is no specific explanation of the emergency that caused her to be away from the office.
8. During cross examination the Claimant asserted that she had informed Christabel, Hannah and Martin of her absence. She said that she had texted Hannah (Ms French) at about 9.30, just after she had been informed of a plumbing emergency at home and just before her battery died. She had texted Christabel (Ms Burns) at about 12.30 and had told Martin in the evening.

9. We do not accept that evidence. It is not an explanation that she gave at her disciplinary hearing. It was not referred to in her a letter of appeal, or in her letter to Lord Winston, one of the Trustees. It does not appear in her (short) witness statement. (In her ET1 the Claimant says that once she finally found a phone, she immediately called the office, but she does not say when she had done so.) The Claimant said she no longer had the texts. We do not accept that they existed. (It would appear that the Claimant has taken these timings from a screen shot of texts that appears in the bundle, but this is the time on the recipients phone, not of the message.)
10. On Monday, 20 August Ms Sterling met the Claimant and asked the Claimant about her absence on Friday and why she had not contacted the office. She did not receive a clear answer. She was also unable to provide Ms Sterling with information about what she was working on or who she had been meeting. She said she could not recall the names of clients.
11. On 24 August the Claimant was about an hour late for work. Ms Sterling asked the Claimant to attend a meeting about her absence on 17<sup>th</sup> August and her failure to follow the correct reporting procedure. The Claimant was warned that she could be dismissed as an outcome of the meeting.
12. At that meeting the Claimant explained that she was on her way to work and had almost arrived when her flatmate called to inform her that her fridge was flooding, the boiler had broken down and that her flatmate could not get hold of the landlord. The Claimant then returned home in order to sort it out. Her phone was “not good” and her battery ran out shortly after she spoke with her flatmate. She used her flatmate’s phone to call a plumber. She said she was not in the right frame of mind to speak to Ms Sterling because she was new in post. The Claimant accepted that she had a computer at home but, when asked if she could have emailed the office, she said that it “wasn’t the right day” and it was “one of those days”. She said she had 6 mobile phones but none of them worked very well. The Claimant said that it had taken her an hour and a half to get back home and her priority was to sort out the problems with her flat which had taken a number of hours. We accept Ms Sterling’s evidence that the Claimant gave the impression that she thought it was not a big deal and did not apologise or offer to make up the time.
13. Ms Sterling told the Claimant that the previous CEO had given her a verbal warning about being late and not being contactable during office hours and the Claimant responded that it was not a warning but a conversation about a particular incident. In cross examination the Claimant accepted that she had been told it was an “informal warning”, but that nothing had been put in writing. We accept that.

14. At the end of the meeting Ms Sterling told the Claimant that her contract would be terminated without notice. Ms Sterling took the view that the Claimant's failure to get in contact with the office while at the same time sorting out problems with her flat indicated that her consideration for the job was of low priority. She had found and contacted and paid for a plumber and contacted her landlord but had not contacted her employer. She had not offered to make up the time.
15. A letter confirming her dismissal was sent to her the same day. It states that the reason for the Claimant's dismissal was that "on 17<sup>th</sup> August 2018 you failed to follow company absence reporting procedure. Your unauthorised absence is therefore classed as absence without leave". She was advised of her right to appeal within 5 days.
16. On 29<sup>th</sup> August the Claimant wrote to Lord Winston informing him of her dismissal and stating that she believed this was race discrimination and she found it necessary to sue GRT.
17. The Claimant appealed by letter dated 3<sup>rd</sup> September 2018. In her appeal the Claimant accepted that she could have handled the situation differently but that her being unavailable did not warrant dismissal. The decision was too harsh. There was no appeal hearing, but a letter was subsequently sent to the Claimant dismissing the appeal.
18. In her claim the Claimant says that "several staff have done the same and even have longer periods of being late and had not been warned". Despite being ordered to provide particulars of this, no names were provided until the Claimant's witness statement (and provided to the Respondent at 4.30pm the evening before the hearing).
19. In her witness statement the Claimant names 5 members of staff and "most of the symposium staff" who she said were being constantly tardy and or leaving early. The Claimant said she was often at work by 8.30 and could see them arriving late or leaving early. Nonetheless she accepted that did not know their patterns of work or their work commitments. She had no idea if they were at meetings or had late start times. The evidence as to who was late and why was very vague; it was too vague for the tribunal to accept as reliable evidence.

## **Relevant law**

### Wrongful dismissal

20. Where an employee is contractually entitled to a period of notice, an employer who dismisses an employee without giving him or her notice will be in breach of contract. An employer is entitled to dismiss an employee

without any notice, where there has been repudiatory conduct by the employee justifying summary dismissal. If an employee shows that she is not going to honour her contract, an employer is not bound to its side of the employment bargain to give notice.

18. The degree of misconduct necessary for the employee's conduct to amount to a repudiatory breach is a question of fact for the Tribunal to decide.
19. In *Briscoe v Lubrizol Ltd* 2002 IRLR 607 the Court of Appeal approved the test in *Neary v Dean of Westminster* where the Special Commissioner asserted that the conduct "must so undermine the trust and confidence which is inherent in that particular contract that the employer should no longer be required to retain the employee in his employment".

### Race Discrimination

20. Section 39 of the Equality Act 2010 prohibits an employer discriminating against or victimising its employees by dismissing them or subjecting them to any other detriment.
21. Section 13 defines direct discrimination as follows:-  
"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

Race is a protected characteristic.

22. Proving and finding discrimination is always difficult because it involves making a finding about a person's state of mind and why she has acted in a certain way towards another, in circumstances where she may not even be conscious of the underlying reason and will in any event be determined to explain his motives or reasons for what she has done in a way which does not involve discrimination.
23. The burden of proof is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.
24. This approach to the burden of proof has recently been confirmed by the Court of appeal in *Ayodele v Citylink and another* 2107 EWCA Civ 1913.

### **Conclusions**

Direct race discrimination

25. The Tribunal considered whether there were facts from which the tribunal could infer that Claimant's dismissal was influenced by her race.
26. The Claimant says, in support of her case that the Respondent treated her less favourably than others because of her race, that 5 members of staff and "most of the symposium staff" who she said were being constantly tardy and or leaving early. However, as we have said that evidence is simply too vague to be reliable. In any event the Claimant was not dismissed for being late. She was dismissed because she had been absent from work without informing the Respondent of the reasons for her absence. There was no actual comparator in materially similar circumstances. The tribunal had to consider if there was any evidence which might indicate that a hypothetical white employee in materially similar circumstances would have been treated differently.
27. The Claimant considered that this was an act of race discrimination because "There were no black people at the trust". She also says that in her introductory meeting Ms Sterling had asked the Claimant "Are you the one with all the law degrees". It was the Claimant's belief that this question was asked because she did not expect a person from her background to be educated.
28. The Respondent states that Rachel Harris who works for the Respondent is black; though the Claimant said she was mixed race. In addition, there were staff of Asian and Chinese origin.
29. Ms Sterling accepts that she did ask the Claimant if she was the one with the law degrees, but explained that she had just started in the office, had reviewed a number of CVs and that she asked the question about the Claimant's law degrees by way of making conversation and getting to know her staff when she had just joined. She considers that having a number of degrees was of value when an important element of the Respondent's work was fundraising for research.
30. It is not in dispute that the Claimant failed to notify her workplace that she would not be in to work on the 17<sup>th</sup> August. The Claimant does not dispute the notes taken by the Respondent as to what explanation she gave herself at the meeting on 24<sup>th</sup> August. The Claimant was aware of her obligation to inform the employer of her whereabouts but had given it no priority. There was no good explanation for Claimant being able to deal with plumbers but not to speak or email the Respondent. We accept Ms Sterling's evidence that the Claimant gave the impression at the disciplinary hearing that she did not think it was a big deal and did not indicate remorse for her actions or any understanding of the issues caused by her absence.

27. It is not in dispute that the Claimant was dismissed, but there was no evidence from which we could infer that Ms Sterling was influenced by the Claimant's race when she dismissed her. Although this was perhaps a harsh reaction to the Claimant's misconduct, we cannot conclude from that alone that it was race discrimination. Nor can we draw any inference from the comments made by Ms Sterling about the Claimant's law degrees. It was an innocuous comment made in conversation in an effort to engage with staff. The Claimant may have been one of only two black or mixed-race employees at the Respondent, (or the only black employee) but the Respondent is a small employer and Ms Sterling had not been involved in recruiting the staff.
28. In short there was no material before us which would indicate that Ms Sterling was influenced by the Claimant's race when she was dismissed, and the claim of direct race discrimination therefore fails.

Wrongful dismissal

28. We had more difficulty with the Claimant's claim for wrongful dismissal. There was no doubt that in failing to inform her employer of her absence the Claimant was in breach of contract.
29. However, the issue for this tribunal was whether that conduct alone was sufficiently serious to amount to a repudiatory breach of contract entitling the Respondent to dismiss the Claimant without notice. That is a question of fact for this tribunal.
30. After some deliberation we have concluded that the Claimant's conduct was a repudiatory breach of contract. She was in a senior post at the Respondent, reporting directly to the chief executive officer. She was aware that she was required and paid to be in work. Emergencies do happen but if so, it was important that the Claimant let the Respondent know where she was. The Claimant was aware of the importance of notifying the Respondent that she would not to be a work and of her contractual obligation to do so. She said she had been within minutes of the office when she got the call from her flatmate, but she did not consider that she should have attended the office to explain matters. She told Ms Sterling that her priority was to sort out her emergency. It would have taken very little time to email the office an explanation of her circumstances.
31. While many other employers may have been much lenient with the Claimant in the circumstances, we have concluded that nonetheless Ms Sterling was within her contractual rights to dismiss the Claimant without notice.

32. Finally, though not relevant to the issues we have had to decide, we note that the Respondent did not comply with the ACAS code of practice before dismissing the Claimant. The Respondent may have been under the impression that it did not apply as she did not have 2 years' service and had no right to claim unfair dismissal, but that is not correct. While the failure to comply is regrettable it is not relevant to the issue of whether the Claimant was dismissed in breach of contract, though it may have been relevant to remedy had she been successful.
33. For those reasons the claim is dismissed.

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Employment Judge Spencer  
18<sup>th</sup> June 2019

REASONS SENT TO THE PARTIES ON

02/07/2019

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FOR THE TRIBUNAL OFFICE