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## EMPLOYMENT TRIBUNALS

*Claimant*

*Respondent*

Mr S K Shah

AND

The Royal Bank of Scotland Plc

**HELD AT:** London Central                      **ON:** 21 August 2019

**BEFORE:** Employment Judge Russell (Sitting Alone)

***Representation:***

**S**

**For Claimant:** In person

**For Respondent:** Ms L Usher, Solicitor

### JUDGMENT

1. The correct name of the Respondent is National Westminster Bank Plc.
2. The Claimant's claim for unfair (and wrongful) dismissal fails and is dismissed.

### REASONS

This is an unfair dismissal case but came to me without a case management discussion so it might be helpful to make it clear what the agreed facts are .I do so below as part of a narrative of events.

1. The Claimant only had one day of holiday remaining for the 2018 calendar year (which was also the Respondent bank's holiday year) which he chose to take on Tuesday 28 August 2018 allowing him to take advantage of the full August bank holiday weekend. It meant he was required to return to work on Wednesday 29 August.

2. The Claimant travelled to India , being of Indian ethnicity , where some of his family were , on Saturday 25 August 2018 but his return flight was only booked for 18 September .The Claimant states he intended to change this flight and/or get a one-way ticket back from India to arrive back in time for

work on 29 August because it was cheaper to proceed this way rather than book a return flight immediately for 28 August at the same time as his outward-bound flight. The Respondent believes he never intended to come back before 18 September and certainly not in time to return to work on 28 August.

3. The Claimant actually came back on 20 October after an alleged period of illness whilst in India ( back pain ) and returned to work on 28 October. He had a return to work interview on 8 November. That interview is wholly separate from the Respondent's investigation into the Claimant's alleged misconduct which started on 29 October and ultimately led to his dismissal.

4. After the investigatory meeting (the objectivity of which the Claimant has questioned) and suspension on 20 November 2018 a disciplinary meeting took place on 13 December 2018 following an invite by Mr Bhudia of 5 December 2018. The Claimant also had an appeal on 7 March 2019 before Mrs Newby both of whom gave evidence for the Respondent.

5. The outcome of the disciplinary hearing was communicated to the Claimant on the day of the disciplinary meeting on 13 December. It was summary dismissal. This dismissal was upheld on appeal. The Respondent stated reason was dishonesty in the context of unauthorised absence. The Claimant disputed the reasonableness of this and indeed the whole process. He claims that he had been truthful and the unfairness of the dismissal after 14 years' service leads him to claim unfair dismissal and wrongful dismissal because , of course , he did not receive any notice pay.

6. The appeal took place on 7 March and as with the disciplinary the Claimant was accompanied by his union representative (although the Claimant is again concerned as to the fairness of the process). The appeal was rejected and the original decision to dismiss was upheld leading to this two-day claim.

### Issues

7. Although there was not an agreed list of issues the Respondent helpfully provided a draft list. This is perhaps unnecessarily detailed but in essence the issues are clear. What was the reason for dismissal in accordance with s.98(1) ERA 1996, in particular did it relate to the conduct of the employee under s.98(2)(b) and to the extent it is a potentially fair reason for dismissal or was it fair in accordance with s.98(4) of the Employment Rights Act 1996. The issue in respect of wrongful dismissal is straightforward to deal with having determined the statutory position in respect of the unfair dismissal.

### Findings

8. Whilst I cannot make any finding as to the accuracy of the investigatory meeting minutes, I am satisfied that the Respondent's and Claimant's amended versions were taken into account by the disciplinary officer Mr Bhudia. As one would expect the investigatory process was not part of the

disciplinary proceedings and was simply a forerunner to the disciplinary hearing. I am satisfied that neither of the investigating officers Sarah Baker or Michael Chinyere determined, or were in a position to determine, that the Claimant was to be dismissed, Mr Bhudia was the sole decision maker on that issue and neither did he predetermine the dismissal. He properly set out the potential options in respect of the disciplinary hearing including the possibility of dismissal and he decided on the sanction of summary dismissal on 13 December after an adjournment with written reasons being provided on 7 January which I find detailed and clear. He had actually communicated the decision to the Claimant on 13 December and so that is the EDT.

9. I accept that Mr Bhudia was an independent person to hear the disciplinary, he had not knowingly worked with the Claimant before, nor been involved or influenced by the narrative prior to being asked to take the disciplinary hearing. The Claimant accepted that he did not question his independence at the time or on appeal. Mr Bhudia is clearly experienced, his evidence was given competently and I found him a reliable witness. I accept that he took account of all the relevant evidence when setting out his findings in a letter of 7 January 2019 and whilst I sympathise with the Claimant's submission that there was an unreasonable delay in receiving the written decision, given the importance of the matter to the Claimant after some fourteen years' service and now losing his job from the allegation of gross misconduct, I accept the legitimacy of the delay. Bearing in mind that the letter had to be typed up, the factual nexus had to be agreed with HR as well as the accuracy of Mr Bhudia's own thoughts and determinations and there was the Christmas holiday in the intervening period. Plus the Claimant knew of the decision at the time of the disciplinary and I note that Mr Bhudia gave the Claimant extra time for the appeal, so the Claimant was not prejudiced by this delay albeit, as I say, I understand why it was upsetting for him. I might add that the Claimant may have on many occasions questioned whether Mr Bhudia had considered all the relevant documents but he could at no stage in this hearing point to any relevant document that was not taken into account by Mr Bhudia.

10. Mr Bhudia only knew the fact that the Claimant was a union member during the disciplinary process but whatever the exact time or date that he was or became aware of this there is no evidence before me that the Claimant's union membership was relevant to the Respondent's decision or taken into account inappropriately in the decision making, and I find in both cases it was not.

11. The Claimant did provide medical certificates covering much of his absence whilst he was in India with what he says was extremely bad back pain. There were two certificates, the first dated 5 September 2018 referring to severe back ache, it does not cover the period 27 August – 5 September however. The second on 21 September 2018 does not quite cover the whole period of absence but essentially explains him being away from work from when he arrived in India to when he flew back on 20 October when the doctor stated he was finally fit to travel. The Respondent questioned the fact that the Claimant booked his 20 October flight before he knew what the doctor's

advice would be but I believe little turns on that if the medical certificates are genuine. By which I mean in respect of their content that they are accurate as well as being given by an independent medical practitioner without influence from the Claimant and with the Claimant's medical interests obviously in his mind and acting in good faith. If so it is legitimate that the Claimant was found unfit to work until he returned to the UK. But there remains an ongoing doubt over the legitimacy of the GP evidence which I need to go into more detail about.

12. The reason for these doubts held by the Respondent but also shared by me , although my findings are directed to the Respondent's view rather than my own and I am not substituting my opinion for theirs , are as follows. These findings are based on the evidence in this Tribunal and also through omission as to the evidence not given. My findings are based on the cumulative points below which together I believe show why the Respondent was sceptical and reasonable in that scepticism :-

- (1) Although the Claimant had had backache absence previously this was , on his own evidence which I accept , about four months before the trip to India. It is quite convenient to his case that it should have inflicted him the day he landed in India as he undertook the road trip back to his house in Mumbai on the weekend of 25-26 August 2018. Not before a short vacation, not during it or towards the end of it but as he arrived and not because of a particular incident other than the travelling.
- (2) He had no ticket to return two days later. He did have a ticket but to return on 18 September even though his holiday ran out on 29 August. So, unless he went back to the UK on 28 August or gave good reasons for not doing so this would have been unauthorised absence . So he needed to show that he was ill until at least 18 September when he did have a ticket to come back. I will deal with the return ticket issue below but suffice to say here that the lack of a return ticket on 28 August has only added to the suspicion of the Respondent that the Claimant has acted dishonestly.
- (3) The doctor's certificate did not deal with the period 26 August to 5 September. Perhaps this could not have happened because the Claimant did not see the doctor until 5 September but it has not been explained as to why there was a short delay and although I appreciate it was the weekend a few days before that I would have expected the Claimant to go and see him sooner . And, once he had , for the doctor's certificate to be more detailed and forthcoming as to the Claimant's physical ailments. I bear in mind here that the Claimant says , supported by his Indian doctor, that he was unable to even travel for eight weeks and yet he does not seem to have been on any serious drugs in this time.
- (4) The Respondent tried to call Dr Shukla on more than one occasion ,the medical practitioner for the Claimant once he was in India. Once including in the Claimant's presence at the disciplinary hearing but

without success. Mrs Newbie also tried to call although that was less likely to be successful if she was using the bank's phone for an international number. I am satisfied though that Mr Budhia who was familiar with calling India himself, called the correct number, using the correct international dialling code and no one was able to get hold of Dr Shukla. I am not saying that this means that Dr Shukla was not a legitimate medical practitioner and clearly on investigation by the Respondents it was found that he was. But the Claimant did not question in any credible way the legitimacy of Mr Budhia's efforts to contact him and the Claimant himself did not provide any detailed medical information at all which he could have done. A reference has been made to patient confidentiality but as a result one wonders what information the bank could have got from the doctor whereas clearly the Claimant could have got a lot more information and, as is apparent from much of this case, he did not assist in a way that he might, and should have done, to assist in communicating sufficient evidence over to the bank to perhaps undermine their scepticism and at the same time to help the Claimant himself. He knew or ought to have known, however stressed he was through the whole process, that it was important to show that the illness was a genuine one given the Respondent's scepticism borne out in part by the fact that his illness coincided with the Claimant flying to India for only a few days without a return ticket for the day he was meant to have come back.

- (5) There is an issue surrounding the dates given by the doctor. The Claimant booked his ticket for 18 September. Subsequent to him doing that his doctor in India says that it was not ok for him to travel until around that date. This coincidence is followed by another because the Claimant then books his future ticket for 20 October and his doctor subsequently, after that ticket was booked, says that it is best for the Claimant to wait to travel until around 20 October. It is understandable these coincidental dates should cause suspicion.
- (6) I do find that the Respondent was open to be persuaded that the whole situation that they were faced with was legitimate and the Claimant was telling the truth. I do not find that the Respondent predetermined the Claimant's guilt but the Claimant failed to come up with the evidence to adequately show to the Respondent's satisfaction that he was being truthful and I find he has failed to do so again in this hearing. He could have done so much more as I explained below.
- (7) As far as the return ticket is concerned the steps that the Claimant took may have been genuine ones. It may be that it cost less money to set a late return date and then change it to one when he genuinely wants to come back or even get a cheaper single ticket from, in this case, Mumbai to London. But the examples that he gave were not convincing because the early return ticket example included the Christmas period when obviously flights are going to be more expensive. And as the bank says there is no guarantee that he would have got an almost immediate return at the end of August. More

relevantly there is no proof that he made an effort to seek one either before he left London or when he arrived in Mumbai. The only letter that tends to in his view to show that he made an effort was one undated letter from a holiday company addressed to NatWest bank which he said was supplied by an email (not that he had the email available to show us) which simply states *“this is to confirm that Mr Shalin Shah had enquire [ sic] for a ticket from Mumbai to London on 26 August 2018. There were many airlines and seats available for this journey”*. Which is at the best very ambiguous. I also find that he did not make this available to the disciplinary officer and because it is undated and vague in its terms it was of limited assistance anyway. Surely he would clearly have suffered a penalty and extra expense by booking a flight back only a couple of days after he arrived ? It seems a very strange thing to have done and it is not apparent why he did not try and do so notwithstanding his back injury because at that stage he had not seen a doctor so why not return to the UK and get his back treated here and have sick leave in the UK ? One can only speculate. But my finding is that the Claimant has through his actions done nothing to show the bank that his booking of the late return ticket was genuinely the innocent step that he claims. Obviously I accept that it is possible to prepone or postpone tickets but there is no substantive evidence that he intended to come back on 29 August and it is a very risky thing for him to have proceeded with in any event. Even though it is his choice it obviously led to speculation by the Respondent as to the true reasons for him doing that .Which they claim is because he knew he was never going to have to come back until 18 September because he knew in advance that he could have sick leave whilst away justifying his extended stay in India.

13. I have found the Claimant was evasive in the disciplinary proceedings and in the Employment Tribunal proceedings as well . He put this down to the stress that he was under and I can understand that it was a very stressful experience but I do find the Respondent’s investigation and procedures legitimate. There is no justification in the Claimant taking, for instance , three weeks to provide a receipted air ticket and why initially refused to explain his reasons for the trip given that it was simply to see his family and why not explain why he just wanted to go on a short trip without using too much holiday. And why continue to evasive under oath today ? As for the period that his conduct was being investigated this is what the Claimant might have said at the initial stages, perhaps even during the investigation itself but certainly at the disciplinary. Something like this

*“I went to India for a long weekend. I would rather go for short time than not at all as I haven’t any further holiday. It was not a special occasion but I do this regularly to see my family. Here are some of the examples of me doing it in previous visits. I booked a return flight for 18 September .Here is my ticket confirmation of that. The reason for this is that it is cheaper to do this than get a single or amended return date ticket. Here are the checks and enquiries I made before I left so that I would ensure I was still back for 29 August. I did also look into getting this return ticket and here are the emails and internet*

*searches that confirm that, not only before I left but also when I arrived. Unfortunately, due to my back problems which returned due to the horrible road journey to my house from the airport , I could not fly and be back to be in the office on 29 August but I confirm that I did intend to do so. I got my doctors' advice and he said I could not fly to come back to get treatment at home. Here is a statement from the doctor covering the whole period I was absent through illness and I have given permission for you to talk to him . I know that this might look a bit suspicious because I did not have a flight back for 28 August but I have explained why and it was only due to my chronic back pain which you know about because I have explained this to you before when I got into this situation. I followed all the sickness procedures and was genuinely seriously ill whilst in India and I apologise for any inconvenience”.*

14. In my view the Respondent would , if the Claimant had been up front using those kind of words and provided this assistance , looked at the position very differently. The Claimant says he feels alone against the might of the bank and it's HR department but some self-help here would have been of benefit. Instead he was evasive and argumentative and did not cooperate with the disciplinary process and was always too ready to go off on a tangent. Nor did he raise the concerns which he raises now. For instance he did not raise his grievance over his continuity of his employment with Mr Bhudia nor subject access complaint, nor I find did he raise Mr Bhudia's lack of independence which he now seeks to criticise on a number of levels .He says that he did not do that because the bank and the HR team should have already known about it but this is an unhelpful comment and he should have just have been clear. He did have union support and we see in ET cases hundreds of times a year a similar situation where the person being potentially disciplined is far more cooperative with the process. He is blaming the bank for unfairly conducting any disciplinary process when on the face of it, it was quite entitled to pursue such a pprocess and I find it did so fairly .

15. I note that he talks at length about old contracts of employment, he complains about historic grievances and inconsistencies as to his employment start date, he talks about stress and work, he claims unparticularised race discrimination during the disciplinary process , he makes complaints which he did not then follow up against the investigating officers and he writes a grievance to the CEO of the bank. He is suggesting the whole process was flawed and it was a conspiracy, he makes complaints about trivial matters such as having to wait too long in the corridor and not having a proper office in advance of the disciplinary hearing and he talks at length about his possible redundancy in 2017. All of this is either irrelevant or far less relevant then answering the central allegation of dishonesty against him. It is understandable that he is emotional especially given the allegation of dishonesty , but in the course of his defence he talks of many irrelevant matters , suggests without evidence that the Respondent tampered with documents, alleges bullying and harassment and that they have been discriminating against him because of his union membership. None of these claims are raised with any evidence against the Respondent and have not assisted his claim. He should have focused solely on the events leading to the disciplinary action and the dismissal, however genuine his concerns were as

to the bank's process. At the time of the disciplinary action had he consciously taken steps to show the genuine reason for booking a postponed flight and efforts to get a preponed flight and if he could have shown that he was genuinely too ill to fly back on 26 August 2018 and so on, none of which he did or incidentally has done now, I find that the Respondent would have been unlikely to have dismissed him and if they had it may well have been an unfair dismissal. As he did not do so and on the basis of the evidence before them at the time he legitimately exposed himself to the Respondent's criticism and was unable to convince them that he acted in good faith.

16. I apply the British Home Store v Burchell 1978 tests against my findings of fact.

- (1) Has the employer established the fact of that belief , and the answer is yes the employer did do so and did believe it.
- (2) Did the employer have in its mind reasonable grounds on to which to sustain that belief and again the answer is yes.
- (3) Did the employer carry out as much investigation as was reasonable before forming that belief. Yes ,in the circumstances of this case.

17. I know that the Claimant believes that some three hours of hearing was insufficient to end his career after being at the bank so long .But I have explained in these reasons why this was partly down to his own conduct so that even if he has been truthful in these proceedings I find that the bank's decision was within the range of reasonable responses and it was legitimate for the bank to find him guilty of dishonesty . In consequence whether he was or not truthful the dismissal was fair .and so the claim fails.

18. I am not without sympathy for the Claimant and I certainly accept that he has been very passionate in his bringing this claim and it might sometimes seem that it is overwhelmed by the banks procedures. But the legal position is that his claim of unfair dismissal must fail and consequence his claim of wrongful dismissal must fail as well because I find that the bank was contractually entitled to summary dismiss.

Employment Judge Russell

Dated: 17/09/2019

Judgment and Reasons sent to the parties on:

27/09/2019

For the Tribunal Office