mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr I Ahmed**

Respondent: **Abbey Medical Centre**

Heard at: **East London Hearing Centre**

On: **25 & 26 June 2019**

Before: **Employment Judge Russell**

Members: **Mrs B Saund**
Mr P Quinn

Representation
Claimant: **In person**
Respondent: **Mr S Hoyle (Consultant)**

JUDGMENT having been sent to the parties on 5 July 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Respondent is a small general practitioner surgery. It is publicly funded by the NHS. The Claimant was a part-time employee working 15 hours per week from 6 July 2010. He was responsible for summarising medical notes, outpatient department letters, coding test results and had primary responsibility for reviewing and assessing patient data as it came into the practice and then referring it for consideration by a doctor if appropriate. The Claimant describes his religion as Muslim and his race as of Pakistani origin.

2 The history of this practice is unfortunate. There were significant problems with its previous management, so much so that the CQC had deemed it inadequate and it was facing closure. We accept that the documents and the management of the practice were in considerable disarray at the point at which Dr Anju Gupta took over its running and saved it from closure. This was no simple task and required a lot of effort on Dr Gupta's part.

3 The staff of the practice TUPE transferred in April 2016. Due to the inadequate record keeping by the previous practice management, Dr Gupta was forced to ask the

employees to provide information about their own terms and conditions. The Claimant was asked how much he was currently paid per hour. The Claimant responded by letter in April 2016, indicating current pay of £12 per hour. It was factually correct for the Claimant to say that he was currently being paid £12 per hour, although in fact he had signed a contract of employment on 24 October 2011 which specified basic salary of £13 per hour. The Claimant was alerted to the underpayment in January 2016 by his accountant. We find that it is a demonstration of the Claimant's honesty that he provided the actual figure upon request rather than seeking to use the opportunity of the transfer to press his claim for the full contractual payment to which he was due.

4 The Claimant's evidence is that, around the time of the transfer, he spoke to Dr Gupta about his entitlement to £13 per hour and that it had not been paid. Dr Gupta could not recall any such conversation. On the balance of probabilities, we find that the conversation did take place as the Claimant described. We found the Claimant to be a credible witness, he was candid in other parts of his evidence even when ultimately harmful to his own case. Dr Gupta was also a credible and honest witness but we find that the pressure of turning around the practice in April 2016 was at the forefront of her mind. The Claimant's terms and conditions were simply not a priority for her at that time and, as a result, she does not recollect the conversation.

5 From April 2016, the Claimant continued to press his claim for the full contractual payment with the former practice manager and once more with Dr Gupta. He did not, however, raise the issue formally until December 2017.

6 The Claimant was contractually entitled pro rata to 12 days holiday per annum. The contract of employment provided that ideally two weeks' holiday should be taken in the period between April and August of any given year. Many employees at the practice had family overseas. Under the previous management, employees were permitted to take their leave in extended periods of time, often the full four weeks and possibly with additional unpaid leave added. The contract also provided that the employee should not book holiday without the agreement of the practice manager or deputy practice manager. Under the previous management, it had become common practice for employees to book flights before formal approval was given. The contract provided that unpaid or compassionate leave was at the absolute discretion of the employer. Again, and having regard to the immigration letter sent previously, we find that a practice had developed where employees were allowed to take unpaid or compassionate leave at the end of a period of ordinary holiday.

7 Whilst this practice continued in the early stages of Dr Gupta's management, we find that she was keen to tighten up standards and ensure better performance. With effect from 1 July 2017, Dr Gupta introduced a new holiday policy which provided that employees would only be allowed a maximum of two weeks holiday at any given time. Additional holiday was entirely within the discretion of the employer, to be granted only in exceptional circumstances and where the needs of the practice allowed. The new holiday policy was published on the practice shared drive but was not expressly communicated to employees or subject to discussion with them. Given that the new policy changed established custom and practice, it would have been preferable to bring the change explicitly to the attention of affected employees not least as so many had previously relied upon extended leave to visit family overseas.

8 On 19 May 2017, Ms Dimple Patel (the Assistant Practice Manager) requested four weeks' holiday to be taken between 6 November and 1 December 2017. Her request was approved on 19 May 2017. In other words, it was agreed before the introduction of the new holiday policy. Ms Patel's religion is described as Hindu and her race as of Indian background. At a date closer to her holiday, the Respondent asked Ms Patel not to take the full four weeks' leave. She refused as permission had already been given.

9 On 10 November 2017, the Claimant applied for leave from 2 January 2018 to 9 February 2018. His request was refused on 13 November 2017 by Mr Hoque, the Practice Manager, on grounds that the new policy permitted only two weeks' holiday. Mr Hoque expressly directed the Claimant to the staff handbook for the provisions of the holiday policy. The Claimant was in a difficult position: he had already booked his flight in order to benefit from discounted rates and the ticket was not refundable. The Tribunal does not criticise the Claimant in this respect as he acted in line with previous practice and had no reason in November 2017 to think that this year would be any different to previous years.

10 The Claimant had asked for extended holiday as he was travelling to Pakistan where he anticipated marrying in line with his family's wishes. This was important to the Claimant given the loss of his father and his previous wife and the ill-health of his mother who naturally wished to see her son happy and settled in his life. Despite this, he did not object in writing or formally challenge the refusal of his leave request. As far as the Respondent was aware, the Claimant would take two weeks holiday and would return on or around 16 January 2018.

11 On 27 December 2017, the Claimant sent an email to Dr Gupta referring to an earlier verbal conversation with the previous practice manager about his concern that he was being underpaid despite having raised the issue previously (including with Dr Gupta in April 2016). The Claimant also complained that his workload was too much and he needed a further session a week to fulfil his duties. We find that this was due to the increased workload caused by additional patients on the Respondent's roll and not due to concerns about the Claimant's performance (none having previously been raised by the Respondent).

12 Mr Hoque responded promptly on 28 December 2017. The workload issues are not relevant to this case. With regard to pay, Mr Hoque proposed a salary increase from January 2018 based upon the current 15 hours per week with any additional time that may be agreed. It is of note that Mr Hoque did not dispute the Claimant's contractual entitlement to £13 per hour.

13 The Claimant started his annual leave as planned in January 2018. The proposed marriage plans went well in Pakistan and as a result the Claimant decided that he was not able to return on the due date of 16 January 2018. On 12 January 2018, he emailed the Respondent to say that he intended to extend his stay in Pakistan for an additional four weeks in order to complete his marriage. He proposed that two of the weeks be taken as holiday and two as unpaid or special leave. As the Claimant candidly accepted in evidence, the last two weeks was for the purposes of a honeymoon. This was a short notice request. Anticipating only a two-week absence, Dr Gupta had covered the Claimant's work. The Tribunal accepts that a further four-

week absence would place an undue burden upon Dr Gupta, who had her own clinical duties to discharge. The Claimant's request was refused by Mr Hoque on 14 January 2018 as the request for an extended leave of absence did not fit into any of the criteria for allowable emergencies.

14 Despite the refusal, the Claimant remained in Pakistan and did not return to work. He was suspended and a disciplinary hearing took place on 20 February 2018. It was chaired by Dr Gupta, with Mr Hoque present as investigating officer. In fact, there had been no real investigation. Mr Hoque did not even speak with the Claimant in advance of the hearing. Ordinarily this would be problematic, but on there was no dispute as to the facts of this case and the Claimant did not deny his misconduct. In the disciplinary hearing he apologised but explained that the reason for absence was his marriage. The Claimant did not raise any allegation of discrimination nor refer to Ms Patel by name.

15 Dr Gupta considered the Claimant's representations but decided that the appropriate sanction in this case was dismissal. This decision was conveyed to the Claimant in writing on 26 February 2018. Dr Gupta understood the Claimant's desire for his family to see him settled in marriage but found that this should have been done in his own time. She believed that discharging personal responsibilities cannot be done to the detriment of the practice's requirements in providing a safe effective service to patients. Dr Gupta noted the Claimant's admission that this was an act of misconduct and she concluded that it was sufficiently serious to fall within the definition of gross misconduct as set out within the disciplinary policy, an action which may harm the wellbeing of a patient. Dr Gupta considered the Claimant's length of service but she considered that it was appropriate to reflect this by exercising her discretion to pay four weeks in lieu of notice rather than by imposing any lesser sanction.

16 The Claimant appealed against his dismissal and that appeal meeting took place on 13 March 2018. Again, it was chaired by Dr Gupta and Mr Hoque was present. At the appeal hearing, Dr Gupta considered the additional points which the Claimant had raised but upon further consideration decided to maintain her original decision and rejected the appeal by letter of 21 March 2018. Dr Gupta did not consider relevant the Claimant's reference to previous use of extended sickness leave, the issue was the lack of approval for leave on this occasion.

17 In her witness statement, Dr Gupta says that in considering the Claimant's personnel file for mitigating factors, she discovered that he had previously taken extended leave which had not been approved in advance and that this had confirmed to her that the decision was right. At face value, it appeared that Dr Gupta had taken account of earlier conduct despite not knowing whether it amounted to misconduct. However, the Tribunal accepted Dr Gupta's oral evidence that she had reached her decision on the facts of the 2018 absence only and regarded the earlier absence as confirmation of her decision rather than part of the reason for that decision. In the circumstances, we accept that earlier absences were not part of the reason for dismissal on this occasion.

Law

18 In a case of unfair dismissal for conduct, it is for the Respondent to show a

genuine reason for the Tribunal to consider whether they had a reasonable belief based upon a reasonable investigation. The extent of a reasonable investigation will depend upon the circumstances of the case; here there was admission of misconduct.

19 It is not for the Tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

20 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

21 As for discrimination, we reminded ourselves that it is for the Claimant to prove the primary facts from which the Tribunal could conclude that there has been discrimination. If he does so, then the burden will pass to the Respondent. It is not enough for the Claimant to identify a difference in treatment and a difference in protected characteristic. There must be something more. The Equality Act 2010 requires that a comparator be in the same or not materially different circumstances.

22 Section 13 of the Employment Rights Act 1996 says that there will be an unauthorised deduction from wages where an employee is paid less on any given occasion than that to which he is contractually due. Where there is a series of deductions, time will run from the last of the deductions. The Tribunal must consider what amount the Claimant was contractually entitled to receive, whether he did receive that amount and the date of the last deduction.

Conclusions

Unfair Dismissal

23 The Claimant admitted that he had committed an act of misconduct. No other reason for dismissal was advanced. The Tribunal concludes that in the circumstances, Dr Gupta had a genuine and reasonable belief in misconduct.

24 We considered section 98(4) and whether the misconduct was sufficient to warrant dismissal. In favour of the Claimant's case are our findings of fact that at the time of booking the holiday and making the request he had no reason to believe that the policy had changed. There were important reasons for him to remain in Pakistan at least for the first two weeks in order to conclude his marriage. He had asked for an extension before he was due to return in accordance with permitted previous practice and he had a long and clean service record. In favour of the Respondent's case are our findings of fact that in November 2017 the Claimant had received a clear and unambiguous refusal of permission for extended leave. He had not challenged this formally and had left the Respondent anticipating his return to work on 16 January 2018. The notification that he would not return on the due date was at short notice and

meant that it was not easy to arrange cover. The Claimant's work was important, it had to be covered by Dr Gupta who was already very busy. This created a risk that patients may not have their records properly coded. There was no inconsistency in treatment of Ms Patel whose leave had been agreed before the policy change, she was entitled to refuse the Respondent's request not to take her full month's holiday and permission was not revoked.

25 On balance, the Tribunal concluded that some employers may have been more lenient than the Respondent but that the decision of this employer fell within the range of reasonable responses. The Tribunal was sympathetic to the Claimant's desire to remain in Pakistan to marry, however this was not simply a couple of days of additional absence but a further four weeks. Part of it was for a honeymoon which could have been postponed to accommodate the needs of the employer. Given the clear and unambiguous prior refusal of permission, the importance of the Claimant's role, the needs of the practice, previously deemed inadequate by the CQC and which Dr Gupta had worked hard to turn around we conclude that in all of the circumstances of the case, the Claimant's misconduct was sufficient to warrant dismissal.

26 In the list of issues, the Claimant raised no specific challenge to the fairness of the procedure. Nevertheless, in considering fairness within s.98(4) the Tribunal thought it appropriate consider the procedure followed by the Respondent. There was no investigation but there was no dispute as to the facts of this case. Mr Hoyle sought to attack the Claimant's credibility and portray him as a less than honest witness. The Tribunal did not consider this either necessary or appropriate. At no stage has the Claimant sought to deny that he was guilty of misconduct, simply put his case was that he should not have been dismissed for it.

27 Dr Gupta chaired both the disciplinary and appeal hearings. The ACAS Code of Practice paragraphs 26 to 29 recognise that it is generally preferable for a different person of greater seniority to hear an appeal. However, it is not an absolute requirement and much depends upon the size and administrative resources of the Respondent. This is a small practice. Whilst there are a couple of salaried GPs, Dr Gupta is the only partner. Dr Gupta considered whether or not other arrangements could be made but decided that it was not practical. The Tribunal accepted her evidence that that was a fair and appropriate way to approach this case. Dr Gupta carefully considered what she was told on each occasion and we find overall that the procedure adopted by the Respondent was not unfair in all of the circumstances. For those reasons the unfair dismissal claim is dismissed.

Discrimination because of race and/or religious belief

28 The Claimant asserts that the refusal of his request for extended leave in November 2017 was an act of less favourable treatment because of race and/or religion and belief. He relies upon the actual comparator of Ms Dimple Patel, who was not dismissed when she took four weeks' holiday in November 2017, at a time when the new holiday policy was in force. As well as relying upon Ms Patel, believed to be Hindu and of Indian origin, the Claimant also relied upon the perceived religion or belief of Dr Gupta. Dr Gupta and Mr Hoque are both Muslim.

29 The Tribunal does not consider Ms Patel to be an appropriate comparator. Her

circumstances were materially different by reason of the fact that she had asked for, and received, permission to take her four-week holiday at a time before the new holiday policy came into force. By contrast, the Claimant had asked for, and been refused, permission after the new policy was in force. What is relevant is not when the holiday was taken but when the requested was approved or refused. Although not a statutory comparator, we considered whether the treatment of Ms Patel could assist evidentially in deciding whether the Claimant had been discriminated against as he alleged. The Respondent's attempt to reduce Ms Patel's already approved holiday is consistent with a genuine desire to avoid long periods of absence and permits us to infer that the new policy was of general application.

30 Beyond relying upon Ms Patel as a comparator, the Claimant's case was that he thought it possible that his race or religion were part of the reason his holiday request was refused. He advanced no evidence to support that case beyond the assertion that Dr Gupta is Hindu. The Claimant was wrong about the religion of Dr Gupta, this was a genuine error and not an act of unreasonable conduct as Mr Hoyle sought forcefully to suggest. Nor were we assisted by the Respondent's reliance on the fact that the Claimant, Dr Gupta and Mr Hoque shared the same faith. There is no principle of law that one person cannot discriminate against another merely because they share the same protected characteristic.

31 Overall, the Claimant has not proved primary facts from which the Tribunal could conclude that the refusal of his leave request was in any way because of his race or his region and belief. We have accepted the Respondent's reasons as to why Ms Patel was treated differently. The discrimination claims all fail and are dismissed.

Wages

32 As the Tribunal has found above, from 24 October 2011 the Claimant was contractually entitled to be paid £13 per hour. There was no challenge or dispute in the evidence to that figure. The underpayment continued for a long period but the Claimant was only aware of it when brought to his attention by his accountant in January 2016. At the time of the TUPE transfer, the Claimant provided factually accurate information that he was currently being paid £12 per hour but also informed Dr Gupta verbally that his contract entitled him to £13 per hour. The Claimant believed that Dr Gupta would resolve this. He continued to press his claim for the full contractual payment with the former practice manager and once more with Dr Gupta. In the circumstances, the Tribunal conclude that the Claimant did not waive any breach or affirm any variation to the contractual rate of pay. Whilst we appreciate the difficulty faced by Dr Gupta in taking over a practice in such disarray, it is the Respondent's responsibility to honour its contractual obligations in respect of pay to an employee providing diligent service over a long period of time.

33 To be fair to the Respondent, when the matter came to Mr Hoque's attention in December 2017, he acted promptly. He agreed to pay the Claimant at £13 per hour from January 2018 but there was no consideration of the retrospective underpayment which was a part of the Claimant's complaint. The increased salary was not actually paid in January 2018 or February 2018 because of the disciplinary proceedings.

34 ACAS conciliation was initiated on 24 March 2018, within three months of the last deduction. The claim for unauthorised deduction from wages was brought in time.

35 We considered the period for which back pay should be ordered. Should it be from the date of TUPE transfer when the Respondent took over essentially the running of the practice in April 2016 or should it, as the Claimant contends, go back to the very start of his employment? The effect of TUPE is to transfer liabilities from transferor to transferee. The Tribunal appreciates that Dr Gupta was not personally responsible for any earlier underpayment but conclude that the effect of TUPE was to transfer liability for the earlier underpayment to this Respondent.

36 The Claimant has not, however, shown that he was entitled to £13 per hour from the very outset of his employment in 2010 but only from the date of the written contract, namely 24 October 2011. The Tribunal concludes that on the evidence before us, the period of deductions was from 24 October 2011 to 28 February 2018, a period of six years and two months (328 weeks). The rate of underpayment was £15 per week. The total amount of the unauthorised deduction from wages is £4,920 gross. The amount is to be paid gross. The Claimant agrees and understands that he is responsible for any tax liability that arises on this sum, it will not fall to the Respondent.

Matters arising following oral Judgment and Reasons were given

37 The written Judgment was sent to the parties on 5 July 2019. On 9 July 2019, the Respondent applied for a reconsideration on grounds that the Deduction from Wages (Limitation) Regulations 2014 limit the remedy in a wages claim to two years before the date of presentation of the complaint. This was not an argument raised at the hearing by Mr Hoyle. Nevertheless, it appears that there is a real prospect of the Judgment being varied as a result and it may be in the interests of justice to reconsider the Judgment to take this limit into account. The Claimant may wish to take advice about the implications of this limit and about any cause of action for breach of contract. The parties may provide written submissions within 14 days. If they do not request a hearing of the application, it will be considered on the papers.

38 The Claimant has also indicated an intention to apply for reconsideration although the grounds are not known to the Tribunal. The time limit for such an application runs from the date that these Reasons are sent to the parties. The time limit for presenting an appeal also runs from the date that these Reasons are sent to the parties.

Employment Judge Russell

8 October 2019