Case Number: 3331017/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr J Punnolil	v	Metroline Travel Limited

Heard at: Watford **On**: 11 and 12 November 2019

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: Mr M Sahu, of counsel
For the respondent: Ms H Norris, solicitor

RESERVED JUDGMENT

The claim of unfair dismissal does not succeed. The claimant was not dismissed unfairly.

REASONS

Introduction

(1) The claim and its procedural history

1 The claimant was dismissed by the respondent on 4 April 2018. He had been employed by the respondent for nearly 10 years by then. He was dismissed summarily. In these proceedings, the claimant originally claimed that (1) his dismissal was wrongful in that he had not been guilty of such conduct as justified his summary dismissal, (2) he had been dismissed unfairly, contrary to sections 94 and 98 of the Employment Rights Act 1996 ("ERA 1996"), and (3) he had been discriminated against because of his race. The latter claim was withdrawn

and a judgment dismissing it on its withdrawal was signed by Employment Judge McNeill QC on 16 April 2019.

(2) The evidence and the issues which I determined

2 I heard oral evidence from the claimant on his own behalf and, on behalf of the respondent, from Mr Stylianos Kavalikas, who at the material time was employed by the respondent as an Operations Manager at the respondent's Holloway Garage, and Ms Folahan Olawo-Jerome, who was at the material time employed by the respondent as that garage's Garage Manager. I was referred to relevant documents in a bundle which contained 202 pages of documents and a separate section for correspondence between the parties.

3 The respondent's claimed reason for dismissing the claimant was his conduct. There was a preliminary hearing before Employment Judge McNeill QC on 27 February 2019, and in the record of the hearing (at page 17 of the hearing bundle; any reference below to a page is, unless otherwise stated, to that bundle) it was recorded that the claimant accepted that the reason or principal reason for his dismissal was a reason relating to his conduct within the meaning of section 98(2) of the ERA 1996 and that the respondent genuinely believed that he was guilty of misconduct. However, at lunchtime on the first day of the hearing before me, Mr Sahu applied for permission to resile from that concession. Ms Norris opposed that application, but realistically accepted that if I granted the application, then the hearing would not be lengthened very much, and that there would be little real prejudice to the respondent, since it merely involved Mr Sahu being able to cross-examine the respondent's witnesses on a broader basis than if I did not grant the application. I considered that it was in the circumstances in the interests of justice to grant that application, and I therefore granted it.

4 At the outset of the hearing, I agreed with the parties that I would decide the question of liability first. The evidence and submissions ended up taking all of the two days allocated to the case, and I therefore had to reserve my judgment on liability. Accordingly, the issues which I determined (as described below) were these:

4.1 What was the reason for the claimant's dismissal? Was it (as the respondent claimed) the claimant's conduct?

4.2 Did the person or persons responsible for deciding that the claimant should be dismissed genuinely believe that the claimant had committed the misconduct for which he was dismissed?

4.3 Did the respondent conduct a reasonable investigation into the alleged misconduct of the claimant before deciding that he should be dismissed for that conduct, i.e. was that investigation one which it was within the range of reasonable responses of a reasonable employer to conduct?

4.4 Were there reasonable grounds for the belief of whoever decided that the claimant should be dismissed that the claimant had committed the misconduct for which he was in fact dismissed?

4.5 Was the claimant's dismissal within the range of reasonable responses of a reasonable employer? In this regard the claimant claimed (among other things) that his dismissal was outside that range of reasonable responses because other employees who had been accused of conduct which was worse than (or at last as culpable as) that for which he was dismissed had not been dismissed.

4.6 Was dismissing the claimant without notice justified at common law? In that regard, if the claimant's conduct was a breach of the implied term of trust and confidence, then it was so justified. Thus, the question was whether or not the claimant had, without reasonable and proper cause, done something which was likely seriously to damage or to destroy the relationship of trust and confidence that exists, or should exist, between employer and employee as employer and employee.

The facts

(1) The parties

5 The claimant was employed as a bus driver by the respondent from 6 May 2008 until he was dismissed summarily on 4 April 2018. The respondent is a public transport service provider, providing services under contracts with Transport for London ("TfL"). Both of the respondent's witnesses were employed at the material time by the parent company of the respondent, but nothing turns on that fact: the claimant was managed by supervisors who were employed by the parent company, which arranged for the drivers employed by wholly-owned subsidiaries of the parent company to be managed by supervisors and managers employed by the parent company.

6 At the time of the claimant's dismissal, he was based at the respondent's Holloway Garage.

(2) The circumstances which led to the dismissal of the claimant

7 The claimant went to India to visit (primarily) his elderly parents on 1 March 2018. It was his evidence in his witness statement that he had on 2 March 2018, shortly after arriving at his parents' house, slipped on entering the bathroom. The claimant's witness statement was plainly a partial adaptation of the details of his claim, as it referred to him in the third person singular as well as in the first person singular. However, the witness statement went considerably further than the details of the claim. Paragraphs 5-7 of the witness statement are material and need to be quoted in their entirety (complete with textual errors; all textual

errors in the quotations below in these reasons are original).

> "5. I was then taken to the local hospital and was admitted in the hospital. It was diagnosed that his disk was prolapsed. My local doctor advised me to take bed rest at least for 3 or 4 weeks. The doctor has also strictly advised me not to travel at all for 3 to 4 weeks. On 15th March 2018, two days before my return to work, I notified the matter to the Respondent from my Indian mobile number "hi Tony this is Jospeh Punnolil, I am in India I fell down in the bathroom and in hospital now. IVDP (Intervertebral Disc Prolapse. It needs 5 to 6 weeks' time for recuperation". I will inform counter as soon as someone top up my phone, I have only wifi only". The Respondent's staff, wrote back to me that "actually speak to manager, rather than counter today please. Today please manager 02075307425" at 12.54 on the same day [page ...]
>
> 6. Therefore, I immediately contacted the Manager Mr Stylinos Kavalikas on 02075307425 and notified him that he had an accident in India, and it has been admitted by the Respondent. Then I asked my friend to email all relevant documents to the Respondent [page 83-87]. It was acknowledged by the Respondent. Therefore, I notified the matter to the allocation manager Mr Tony and the Operation Manager that I had an accident in India. So, I complied with usual practice at the Respondent, procedure for Sickness and Impact on Holidays [page35]. Detailed dates of my stay in the hospital has been included in the bundle, which was sent to the Respondent on 25 June 2019 [page--]
>
> 7. Since, I booked my ticket on 11th January 2018, return ticket was booked for 8th March 2018. The ticket was then changed on 2nd March 2018 to 19th April 2018 on 2 March 2018 [page 107]. I had another valid reason to fix my return ticket on 19th April 2018. My travel agent explained that to me that since it's was Easter holidays, the Airline did not have a date prior to 19th April 2019. Usually they charge extra penalty to such changes, but if I were to book the ticket, they offered me no additional charges. Considering my physical condition, I had decided to fix my return ticket for 19th April 2018."

8 The document referred to in paragraph 5 of that extract was at page 80A. It was, I was told during the hearing, addressed to Tony of the respondent's "Allocations" team.

9 There was in the bundle a file note which Mr Kavalikas said (and I accepted) he had made on 15 March 2018 of a conversation that he had with the claimant on that day. It was at page 81 and was in these terms:

> "Mr. Punnolil is currently in India, on AH. He called me at 12:07 from telephone number 919961349125. He stated that he could not return to work

on 17/3/18 because he fell down in the bathroom and injured his back. He stated that he is currently in the hospital and he is going to be discharged today. The doctors advised him to have at least 3 week rest before travel. Mr Punnolil gave me his Email address (joemonpunnolil@yahoo.co.uk). I asked Mr Punnolil to call me back again on Monday with an update about his medical condition. Email sent."

10 The email sent by Mr Kavalikas was on the following page (82), was sent to the email address of the claimant mentioned in the text set out in the preceding paragraph above, and was in these terms:

> "Good afternoon Mr. Punnolil,
>
> Thank you for your contact and I hope you will be soon well with regards your health issue.
>
> I would like from you the follow information:
>
> What is the problem and When and how this happened.
> Copy or picture of the medical letters and reports from the hospital,
> Any medications you have been prescribed
> Any tests, scans or appointment arranged for the future.
> Also please let me know what is the treatment plan for your problem.
> Last but not least copy of your original ticket booking confirmation.
>
> Please replay to me with the above information no later than Sunday 18/3/18".

11 By way of reply, the claimant sent the email at page 83, enclosing the documents at pages 85-87. The email was dated 17 March 2018 and had no text. The document at pages 85-86 was the original booking for the claimant's flights to and from India. The outward flights (there were two) were on 1 and 2 March and the return flights were both on 8 March 2018. The document at page 87 was a scanned copy of a document which appeared to have been written by a Dr George Mathew. It bore an address which appeared to be that of a doctor's surgery (as opposed to that of a hospital) and it referred to medication, apparently in the form of a prescription, but it also had some words at the bottom. Mr Kavalikas referred to the documents in paragraph 20 of his witness statement. As far as page 87 was concerned, he said this:

> 'The prescription was largely illegible, but it appears (at point 2) to include pyrodex which an internet search suggests is used to treat pain and inflammation in arthritis patients and (at point 3) to include gabapentin (which the NHS website says is used to treat epilepsy and occasionally migraines). I believe the word "traction" also appears at the bottom of the page but I cannot read the rest.'

12 During his cross-examination of Mr Kavalikas, Mr Sahu put it to him that the words at the bottom of the page were “Strict Bed Rest with Traction”, followed by two words which even Mr Sahu could not decipher. Mr Kavalikas’ evidence was that he had not recognised the first four of those words until they were put to him in cross-examination. I accepted that evidence, because (1) the words were not at all clear (so that it took a bit of a leap of imagination, or guesswork, to decipher them initially), (2) English was not Mr Kavalikas’ first language, (3) while he was plainly well able to understand English, his spoken English was far from that of a native English speaker, and (4) I found him to be an honest witness, plainly doing his best to tell the truth.

13 Mr Kavalikas then, on 19 March 2018, sent the claimant the email at page 88. It was in the following terms:

> “Dear Mr. Punnolil,
>
> Thank you for the email and the attached letters.
>
> However you did not answer to any of my questions and you did not submitted any official letters from the hospital.
>
> You stated during our phone conversation that you admitted at the hospital after you fell down in your bathroom.
>
> I would like a full report from the hospital showing the admission day, discharge day and any X-Rays results or other tests you have done along with the treatment plan.
>
> Please provide these documents along with your answers to my questions as soon as possible and not later than Tuesday 20/3/18.”

14 The claimant did not reply to that email. Mr Kavalikas then sent the email dated 21 March 2018 at page 90. After describing the situation in the first two paragraphs, the email concluded:

> “As you are aware, during any period of sickness you must contact your line manager on a regular basis and provide an update about your situation. However you failed to do so and I would like to inform you that you are currently in breach of our Attendance at Work Policy.
>
> I would ask, therefore, that you contact the garage to discuss your situation on 0207 530 7425 or if you prefer to send me an email with all the requested information no later than Friday 23/03/18 at 16:00”.

15 The claimant did not respond to that email, and as a result Mr Kavalikas on 26 March 2018 sent him the email at page 92 enclosing the letter at page 93. They both stated that the claimant was now in breach of the respondent’s Absence

Reporting Procedure and the letter asked the claimant to contact the respondent to discuss his return to work or in the alternative to contact a named member of the respondent's Human Resources team. The claimant did not reply to that letter, so Mr Kavalikas on 29 March 2018 sent him the email at page 94 enclosing the letter at pages 95-96, inviting him to a disciplinary hearing to respond to a charge of gross misconduct for being absent without leave, informing him that if he did not attend the hearing then it would be held in his absence, and warning him that the sanction could be his summary dismissal. The hearing was to take place on 4 April 2018.

16 The claimant did not attend the hearing. Mr Kavalikas arranged for the claimant's trade union representative, Mr L Jackson, to attend at the hearing (standing him down from duty for the purpose). The notes of the hearing were at pages 97-99. They were typed during the hearing by Mr Kavalikas and his evidence was consistent with them. The notes recorded that Mr Kavalikas concluded at the hearing that the claimant was guilty of gross misconduct and that the claimant should be dismissed summarily for that misconduct. I accepted that the notes recorded the real reasons of Mr Kavalikas for dismissing the claimant. The first two paragraphs were in these terms:

> "As you failed to attend today's hearing I can only go on with the little evidence I have before me and having reviewed the paperwork, it is clear to see that you failed to return back from your Annual Holiday or to contact the garage since 17th March 2018. You have failed to follow the non-attendance procedure resulting in your absence being deemed unauthorised.
>
> The company relies on its staff acting responsibly and with integrity and your conduct surrounding this whole debacle falls short of what is expected of you as a Metroline employee. The company does not have an infinite amount of spare staff to cover duties and in the current staffing establishment there is little option other than to cover duties with drivers willing to do overtime. This results in additional operating costs making the business less efficient."

17 Mr Kavalikas then sent the claimant the letter dated 4 April 2018 at page 100, informing him of his dismissal. It wrongly referred to the claimant's last day of employment as being 4 March 2018, but nothing turns on that. The letter ended with the following paragraphs:

> "If you have any company property, including your uniform and Passes, this must be returned to Holloway Garage. Failure to return this property within the next 14 days will result your details being handed over to our Fraud and Investigation Department who will take steps to recover these items.
>
> You have the right to appeal against this decision, by writing to Mrs Fola Olawo Jerome, Garage Manager, at Holloway Garage, 37a. Pemberton Gardens, London, N19 5RR, within 7 days of receiving this letter."

18 It was the claimant's evidence that he first saw that letter only on 19 April 2018, when he returned home from India. It was also his evidence that his wife did not accompany him when he travelled to India.

19 At page 28, there was an extract from the respondent's Employee Handbook, which included, under the heading "Absence without contact", the following passage:

> "Should employees for any reason take a period of unauthorised absence without contacting the relevant personnel (in accordance with the sickness and absence procedure) the matter may be dealt with through the disciplinary process.
>
> If you do not make contact within a period of three working days of unauthorised absence you will be deemed as being absent, no contact. Efforts will be made to contact you using the contact details last provided. The consequences of not making contact will be outlined in writing to you and sent by special postal delivery to your last known address in the UK. Where this proves unsuccessful after reasonable steps have been taken, (i.e. after two letters being sent to the employee's UK home address over a period of 10 working days) the matter will be dealt with in line with the Company disciplinary procedure.
>
> Employees returning from a period of unauthorised absence without contact are required to make arrangements to see their manager prior to commencing work, or at the earliest possible opportunity."

20 Mr Kavalikas wrote in his notes of the hearing of 4 April 2018 that he had called the claimant on a mobile telephone number which was (it was both parties' evidence) that of the claimant, and that he had (1) received no answer and (2) been unable to leave a voicemail message. The claimant said that he did not take that telephone to India with him, and that Mr Kavalikas had not called him on any of the numbers in India via which he could have been contacted. The claimant said that the number recorded by Mr Kavalikas in the file note of 17 March 2018 at page 81 was that of his parents' mobile telephone. Mr Kavalikas said in oral evidence (for the first time) that he had called the claimant on that number before deciding that the claimant should be dismissed. I concluded that if Mr Kavalikas did call the claimant on that number, then he did not in doing so make contact with, or leave a message for, the claimant.

21 The claimant said that he did not have internet access via his mobile telephone when he was in India at his parents's house, as the signal there was only a 2G signal. However, the claimant said that his parents' house had a land line telephone.

22 During his oral evidence, for the first time, the claimant said that the email at page 83, enclosing the documents at pages 85-87, was sent only as a result of

(1) him giving his father his email address and password, (2) his father taking the two documents in hard copy to an internet café, and (3) a woman employee at the café scanning and sending them to Mr Kavalikas.

23 Also for the first time during the giving of oral evidence, the claimant said that he had, rather than simply fixing his return ticket for 19 April 2018 as stated in paragraph 7 of his witness statement, sought on a number of occasions to obtain a ticket for an earlier return flight. Given my conclusions stated below, I did not need to decide whether or not to accept that oral evidence or whether I should, instead, conclude that the final sentence of paragraph 7 of the claimant's witness statement was the most reliable evidence of what had occurred and that he had simply fixed his return flight for 19 April 2018 and assumed that what he had done by way of informing Mr Kavalikas and therefore the respondent was sufficient to avoid putting his continued employment with the respondent at risk.

24 Mr Kavalikas' evidence was that he had dismissed the claimant because of his (the claimant's) failure to comply with the respondent's absence notification procedure, set out in paragraph 19 above. Mr Kavalikas said that even though the worst impact that there might be on the respondent's interests in the short term was that the respondent would have to pay another driver at the overtime rate to cover the absent employee's route, the respondent had to be able to provide the bus services which it was contracted to provide to TfL, and that failing to do so could, and did in practice, lead to the loss of the contract to provide the services on that route. Thus, there was a critical business need to ensure as far as possible that employees attended on time to provide the services required by the respondent's contracts with TfL. I accepted that evidence of Mr Kavalikas.

25 It was both parties' evidence, and I accepted, that the respondent had an ongoing difficulty in recruiting sufficient drivers, so that the dismissal of the clamant would not necessarily lead to the recruitment of a replacement, so that on one view, dismissing the claimant was not going to avoid any reduction in costs for the respondent.

(3) Events after the claimant's dismissal

26 It was the claimant's evidence that he and his wife had gone to his workplace on 20 April 2018 and given a member of staff at the respondent's staff counter the documents at pages 103-105. The document at page 103 was a handwritten letter, dated 20 April 2018 and addressed by the claimant to Mr Kavalikas, in the following terms:

> "Sir,
> I return back to England. Yesterday. 19th April 2018: 21:15. I received your letter just yesterday. Neither me or my wife did not use company pass over the past one month. Both of our staff pass, modoule, old uniform, my wife will (Beena Joseph Punnolil) hand over today. Please do not hand over this

> matter to METROLINE FRAUD AND INVESTIGATION DEPARTMENT. I am unable to come today personally today, due to long journey from India to London. [unclear word] I am trying to see G.P. or CHASE FARM WALK-IN HOSPITAL today due to pain on my back."

27 At page 104 there was a further document purporting to have been written by Dr George Mathew; it was dated by hand "16/4/18", it had at its top the words "Nedumchalil Trust Hospital", and it had a stamp with the same words in it. The document at page 105 was a Statement of Fitness for Work dated 20 April 2018. It was signed by the claimant's United Kingdom ("UK") General Practitioner ("GP"), and it was stated to cover the period from 11 March 2018 to 29 April 2018. It stated that the claimant was not fit for work because of "Intervertebral Disc Prolapse".

28 It was the claimant's oral evidence that when he got home on 19 April 2018 he found the three letters that had been sent to him by Mr Kavalikas by post and email (at pages 93, 95-96 and 100-101), but he did not open them before he called the garage to arrange to work on the next day. He was then told by the person to whom he spoke that he had been dismissed and that he should arrange to see a manager. He then, on the next day, wrote the letter at page 103 (set out in paragraph 26 above).

29 In paragraph 9 of his witness statement, the claimant said this about what happened on that day:

> "As I was very tired and weak because of the journey and the accident and its impact on my health, I decide to see my GP on 20th April 2018. After having examined me together with my medical records brought from India, My GP advised me that I was very weak and signed off work for another week till 29th April 2018[page. no]. On the same day, despite my physical state, approached the Respondent in person and to consider an appeal against my dismissal. The dismissal letter precisely mentioned that I can appeal 7 days of receiving letter. I along with my wife approached the front desk staff and explained my situation and requested an appeal against the decision and provided my medical reports [pages103-105]. The front desk staff asked me to wait in the reception and went inside to see the manger. On his return, he said to me that I cannot appeal against the decision as it was run out of time."

30 In oral evidence, for the first time, the claimant said that he had seen Ms Olawo-Jerome (1) come out of her office behind the counter when he was standing at the counter with his wife, (2) look their way and apparently see them, and then (3) go back into her office without saying anything. Ms Olawo-Jerome did not remember doing that, and she said that she did not recall being asked by anyone on that day whether or not the claimant could appeal. What she said about that situation was in paragraph 4 of her witness statement, which was in these terms:

> "Mr Kavalikas deals in his witness statement with the circumstances giving rise to Mr Punnolil's dismissal. I only have a vague recollection of what happened as it was so long ago, but I believe Mr Jackson approached me and asked if an appeal could be conducted. I confirm that I did not receive an appeal letter from Mr Punnolil and I did not meet him in person over this issue, although I seem to remember hearing that he came to the garage and spoke to the counter staff more than once; but they would not have been able to help him because they do not handle appeals. I believe when Mr Jackson came to see me, he also told me that Mr Punnolil had been dismissed more than seven days earlier. In the circumstances, as I believe he did not give me any more details (such as an explanation for the delay in submitting an appeal), I said that time would not be extended. As far as I am aware, Mr Jackson did not put in an appeal letter on Mr Punnolil's behalf at any stage. I believe all the Respondent received was the letter at page 103 addressed to Mr Kavalikas, which did not suggest that Mr Punnolil wanted to appeal; I took no further action and heard nothing more. Again, as far as I am aware, Mr Jackson did not approach the Chief Operating Officer (now Chief Executive) Mr O'Shea for a Director's Review, which he could have done if he had believed there had been a serious breach of the disciplinary process (paragraph 3.17 page 50 of the bundle)."

31 The claimant's evidence in paragraph 11 of his witness statement was in these terms:

> "However, I was deeply saddened about what had happened. Therefore, I contacted my union representative on 27th April 2018, Mr L. Jackson seeking help and support for an appeal against his [sic] dismissal. Mr L Jackson, after consultation with the Respondent confirmed that the Respondent would not consider his [sic] appeal."

32 At page 108A there was a document entitled "Medical certificate". It was written from the Nedumchalil Trust Hospital, it bore Dr George Mathew's stamp and apparently his signature, it was dated 26 July 2019 (i.e. it was written more than 15 months after the claimant's dismissal), and it was in these terms:

> "This is the certify that Mr. Joseph John Punnolil Patent [sic] No: 0450957 aged 44 years (DOB 27/08/1974). Was admitted on the 2nd of March 2018 and discharged on the 4th of march 2018 afternoon. He was again hospitalised on the 13th of March 2018 and discharged on the 19th of march 2018 due to Intervertebral disc prolapsed (IVDP). Then he was shifted to home managed conservatory traction bilateral 7kg wt. and medication be a period of four weeks. This record is taken from our hospital records Op.No.0450957."

(4) Some relevant background facts

33 On pages 66I-66N there were documents relating to the claimant's absence from work in July 2013. They showed that the claimant was on holiday during July 2013 but then failed to return to the UK at such time as he could resume work when he was rostered and therefore expected to do so. The last day of his holiday was 19 July 2013, or at least the first day when he was rostered to work after his annual holiday was 20 July 2013. At page 66I there was a "Return to Work Document" completed by hand by Ms Olawo-Jerome. It was recorded on it that the claimant had been admitted to hospital with "Flu ... in India on 17 July 2013 and discharged on 23 July 2013". The claimant returned to the UK on 25 July 2013. In answer to the question whether the "employee follow[ed] correct reporting procedure?", neither "Yes" nor "No" was circled, and instead there was this wording by hand written next to those two potential answers: "Reported sick from India after AH", i.e. after annual holiday.

34 In answer to the question whether the employee was going to receive company sick pay, the word "No" was circled, and the reason for that was stated by hand to be "Certificate not received". In answer to the question whether any action was to be taken at this time, and what was the reason for the decision in that regard, the word "Yes" was circled, and the reason given was "To discuss sickness after AH. Driver will provide further information about his condition this evening when he reports for work." The claimant had himself signed that document.

35 Ms Olawo-Jerome was cross-examined closely on the document, but understandably (given the length of time since she completed it) she was not able to remember precisely what had caused her to write the words "Reported sick from India after AH", i.e. what they meant. Mr Sahu submitted that it meant that the claimant had reported sick only when he had returned to the UK and that the sequence of events at that time showed, clearly, that the claimant had not been disciplined at all for not keeping the respondent informed about his absence. I did not accept that the sequence of events was clear, but I did accept that the claimant had not, before 20 July 2013, informed the respondent about his expected absence from work on that date.

36 At page 66N, there was a copy of a document entitled "Private Medical Certificate", made by a doctor based at the claimant's GP's surgery, dated 29 July 2013, and certifying that the claimant was "under Hospital care from 17/7/13 to 23/7/13 as a result of Dengue fever", and concluding: "Please excuse his absence".

37 At pages 66R to 66T there was a copy of a flexible working application form completed by the claimant on 17 December 2015. It was to work part-time, three days a week, on the basis that the claimant's wife was critically ill and awaiting a kidney transplant. The application was graded "red", as shown by the document

at page 66Q. That was in fact in line with what the claimant had stated (on page 66S) he thought was appropriate, and the effect of being so graded was stated in the letter dated 18 February 2016 at page 66AA. That letter was written by Ms Olawo-Jerome. The first two paragraphs of the letter were in these terms:

> "Following receipt of your flexible working request of 17th December 2015, I write to confirm that your request has been categorised as RED. You have been placed on the Company waiting list in order of priority according to category and then the date your application was made. Once a suitable slot becomes available, it will be offered to you on a fixed-term basis unless your application has been withdrawn.
>
> A suitable working pattern may become available at a different location. You will be informed of this and given the opportunity to move there if you are at the top of the Company waiting list for that particular working pattern. If you choose not to move to that location, you will remain on the Company waiting list until a suitable pattern becomes available at your current (or an acceptable alternative) location."

38 Mr Kavalikas was (he said in oral evidence, which I accepted) not aware that the claimant's wife was, or had been, critically ill. He firmly denied speaking to Ms Olawo-Jerome before making the decision that the claimant should be dismissed. I accepted that evidence of Mr Kavalikas.

39 There were in the bundle two sets of documents relating to the situations of two other employees of the respondent, one of whom, Mr J, was not dismissed despite being absent from work for a considerable period of time without him regularly reporting to the respondent. However, throughout that period, there was, it appeared, a medical certificate of Mr J's unfitness to work in place: as stated in the first typed letter to Mr J following the start of his absence (the letter was dated 1 August 2011 and was at page 132), this was said:

> "I note from my records that you are still unfit to carry out your duties due to your medical condition which commenced on 22 July 2011."

40 In addition, Mr J had (it could be seen from the record at page 131) on 21 July 2011 notified the respondent of his inability to work, i.e. on the day before his absence from work because of that inability commenced.

41 Mr M was dismissed while he was absent from work having become ill with malaria in circumstances which were on their face comparable to those of the claimant. He claimed that he had been dismissed unfairly, and in the response to that claim, this was said (page 154):

> 'On 15 March, the Respondent received a letter dated 13 March from the Claimant, purporting to appeal against the decision to dismiss him. He stated

that he had fallen ill with "malaria and typhoid" and had not returned home until 11 March, when he was surprised to find he had been dismissed. He asked the Respondent to treat the letter as a formal appeal against that decision. Notwithstanding the very considerable delay in submitting the appeal, the Respondent agreed to hear it in any event.'

The claimant's case as advanced by Mr Sahu

42 It was the claimant's case that Mr Kavalikas had not carried out a reasonable investigation into the claimant's situation before deciding that he should be dismissed. Mr Sahu also submitted that the claimant informed the respondent in his telephone call to Mr Kavalikas of 15 March 2018 noted in the file note at page 81, that he (the claimant) was not going to be able to return to the UK for 3-4 weeks, so that taking disciplinary action against him by calling him to, and then dismissing him at, a meeting on 4 April 2018 was plainly unfair, i.e. it was outside the range of reasonable responses of a reasonable employer. By way of amplification of that submission, or as a separate submission, Mr Sahu submitted that the dismissal of the claimant by Mr Kavalikas after Mr Kavalikas' failure to make contact with the claimant by telephone after 17 March 2018 was outside the range of reasonable responses of a reasonable employer.

43 In addition, Mr Sahu submitted that the claimant had been lulled into a false sense of security by the manner in which he had been treated in 2013, as described in paragraphs 33-36 above, in that he had then come back from India and not been disciplined in any way for failing to keep the respondent informed about his absence and the reasons for it.

44 Mr Sahu also submitted that the claimant had, in his telephone conversation with Mr Kavalikas of 15 March 2018, noted in the latter's file note at page 81, informed the respondent sufficiently of the fact and reasons for his inability to return to work for the following three to four weeks. As a result, dismissing the claimant for failing subsequently to do more than send the email and its enclosures at pages 83-87 was outside the range of reasonable responses of a reasonable employer.

45 It was submitted by Mr Sahu also that I should conclude that the claimant's dismissal had occurred because he had made a flexible working application and that the dismissal was for that reason alone outside the range of reasonable responses of a reasonable employer.

46 Mr Sahu also submitted that it was outside the range of reasonable responses of a reasonable employer to refuse to permit the claimant to appeal outside the 7-day time limit for doing so.

Relevant law

47 The issues stated in paragraph 4 above reflect the main issues arising in a claim of unfair dismissal where the dismissal was express (i.e. and therefore not "constructive") and the employer's claimed reason for the dismissal was the employee's conduct.

48 In *Abernethy v Mott, Hay and Anderson* [1973] ICR 323, Cairns LJ said this about the reason for the dismissal:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness or because he might have difficulty in proving the facts that actually led him to dismiss; or he may describe his reasons wrongly through some mistake of language or of law."

49 *Paul v East Surrey District Health Authority* [1995] IRLR 305 is relevant when, in a claim of unfair dismissal, it is claimed that a disparity in treatment was unfair. That case shows that the claimed comparable case must be truly comparable with that of the claimant before reliance can properly be placed on an apparent disparity in treatment. The importance of bearing in mind that there may be different individual circumstances justifying a different approach was emphasised in that case.

My conclusions

(1) The claim of unfair dismissal

The reason for the claimant's dismissal

50 As indicated in paragraph 24 above, I concluded that the real reason for the claimant's dismissal was his conduct in the form of his failure to comply with the respondent's requirements in regard to reporting his absence. As a result, but in any event, having heard and seen Mr Kavalikas give evidence, I concluded that the claimant's dismissal had nothing to do with the fact that he had, in 2015, made an application to work flexibly. For the avoidance of doubt, I also concluded that the reason for the claimant's dismissal was not his absence from work on account of sickness as such.

The reasonableness of the investigation into that conduct

51 In my judgment, it was not outside the range of reasonable responses of a reasonable employer to fail to make contact with the claimant by telephone

before deciding that he should be dismissed. That is because the facts spoke for themselves: the claimant had failed to comply with Mr Kavalikas' requirement to keep the respondent informed about his (the claimant's) absence and the likely date of his return to work.

Was the procedure followed in deciding that the claimant should be dismissed otherwise outside the range of reasonable responses of a reasonable employer?

52 The claimant at no time put a written set of grounds of appeal before the respondent. He could have done so on 20 April 2018, or within the next six days, but he failed to do so. If he had put a written letter of appeal before Ms Olawo-Jerome within seven days of reading the letter dated 4 April 2018 at page 100 to which I refer in paragraph 17 above, assuming that I accepted (which I did not need to decide) that he had first read it only on 19 April 2018, then he would have had a credible complaint that he had been unfairly refused permission to press an appeal against his dismissal. However, in the circumstances as I found them to be, in my judgment it was not outside the range of reasonable responses of a reasonable employer to fail to permit the claimant to advance an appeal out of time.

53 As a result of that finding, I did not need to decide whether the claimant had in fact indicated a desire to appeal to the counter staff on 20 April 2018 and Ms Olawo-Jerome had been made aware of that fact on that day (as asserted by the claimant in the evidence which I record in paragraphs 29 and 30 above). However, in my judgment, if those things had happened as claimed by the claimant, then it would not have been outside the range of reasonable responses of a reasonable employer to consider an appeal only if the claimant stated his reasons in writing to Ms Olawo-Jerome as she required at the end of the extract from her letter set out in paragraph 16 above. The situation of Mr M was markedly different, in that (as can be seen from what is said in paragraph 41 above) he had stated his reasons for appealing in writing within two days of the date when he said that he had received his letter of dismissal.

The reasonableness of the grounds for concluding that the claimant had committed that conduct

54 In the circumstances as I found them to be (as summarised in the second sentence of paragraph 51 above), there were in my judgment reasonable grounds for concluding that the claimant had committed the misconduct for which he was dismissed. The nub of the case was the issue to which I now turn.

The reasonableness of the sanction of dismissal for that conduct: was it outside the range of reasonable responses of a reasonable employer to dismiss the claimant for that conduct?

55 In my judgment, it was not outside the range of reasonable responses of a

reasonable employer to dismiss the claimant for that conduct. That is for the following reasons.

55.1 The aim of seeking to ensure that employees attended work, and did so on time, as described in paragraph 24 above, was entirely reasonable and involved protecting an objectively justifiable business need, irrespective of whether or not dismissing the claimant avoided financial loss for the respondent.

55.2 The circumstances in 2013, as described in paragraphs 33-36 above, were very different from those which led to the claimant's dismissal in 2018. That is because the claimant then returned to work only five days after he was rostered to do so, and because the illness which he was said to have suffered from (whether it was influenza or Dengue fever) would probably have affected his ability to concentrate, and might well have made it very difficult in practice to communicate with the respondent. In contrast, the only thing that the claimant suffered from in 2018 that might have affected his ability to concentrate was pain, but he was able to give (on his second account: see paragraph 22 above) his father or (on his first account: see paragraph 7 above) a friend instructions which were sufficient to enable that person to send the email to which I refer in paragraph 11 above.

55.3 In any event, the mere fact that an employer does not do what it could have done by way of the taking of disciplinary action on one occasion does not mean that it cannot fairly (i.e. within the band of reasonable responses of a reasonable employer) take such action on a later occasion for conduct of the same sort. Whether it will be unfair to take action on the later occasion will fall to be determined in the light of the circumstances as they stand on that later occasion.

55.4 What the claimant was dismissed for was failing to make any contact with the respondent after 17 March 2018 until 19 April 2018, when he returned to the UK from India. The onus was on him to make contact, and not the respondent to contact him to ask him why he had not made contact.

55.5 What the claimant did was to send an email (pages 85-87) which enclosed only some of the information sought by Mr Kavalikas, and then nothing more. The respondent was entitled (i.e. it was well within the range of reasonable responses of a reasonable employer) to assume that the claimant's message to Tony in Allocations at page 80A (referred to in paragraph 5 of the claimant's witness statement, which I have set out in paragraph 7 above) showed that the claimant was able to access the internet or make a telephone call from wherever he was in India.

55.6 In any event, whether or not Mr Kavalikas saw the message at page 80A before deciding that the claimant should be dismissed, in my judgment it was within the range of reasonable responses of a reasonable employer to assume that the claimant would be able to, and would, check his emails to see whether or not the documents at pages 83-87 were a sufficient answer to Mr Kavalikas' queries in his email at page 82 (set out in paragraph 10 above).

55.7 In addition, in part given the absence reporting procedure set out in paragraph 19 above, but also in any event, it was not outside the range of reasonable responses of a reasonable employer for Mr Kavalikas to require the claimant to do more than (1) verbally inform him of his back pain and (2) send the almost-illegible document at page 87 by way of documentary evidence supporting the proposition that the claimant was too unwell to return to the UK for the next month.

55.8 As can be seen from what I say in paragraphs 39 and 40 above, the circumstances of Mr J were materially different from those of the claimant in 2018.

55.9 For the avoidance of doubt, it was in my view not outside the range of reasonable responses of a reasonable employer to initiate disciplinary proceedings immediately after the end of the 10-day working period referred to in the handbook extract set out in paragraph 19 above. The respondent was not in the circumstances obliged to wait until the period of three to four weeks that the claimant had said he had been advised to rest in bed before returning to the UK had expired, i.e. it was not outside the range of reasonable responses to act before that period had expired in the circumstance that the claimant had put before the respondent by way of documentary evidence of his medical condition only the document at page 87.

56 For all of the above reasons, the claim of unfair dismissal does not succeed.

(2) The claim of wrongful dismissal

57 In my judgment, the claim of wrongful dismissal was also not well-founded. That is because the claimant's conduct was in my view a breach of the implied term of trust and confidence in that

57.1 failing to respond to Mr Kavalikas' communications from 19 March 2018 onwards as described in paragraphs 13-16 above was conduct which was likely seriously to damage the relationship of trust and confidence which exists, or should exist between employer and employee, and

57.2 there was not reasonable and proper cause for that conduct, not least

because the claimant, having caused the email at pages 83-87 to be sent, could reasonably have been expected either to check, or to cause someone else to check, his email inbox subsequently, and then to respond to Mr Kavalikas' subsequent emailed communications.

In conclusion

58 In conclusion, neither of the claimant's claims succeeds.

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Employment Judge Hyams

Date: 26 November 2019

JUDGMENT SENT TO THE PARTIES ON

.......28.11.19...

....

FOR THE TRIBUNAL OFFICE