



EMPLOYMENT TRIBUNALS

Claimant: Mr C Jewell

Respondent: Stax Converting Limited

Heard at: Manchester

On: 12 November 2019

Before: Employment Judge Aspinall

REPRESENTATION:

Claimant: In person

Respondent: Mr A Famutimi, Consultant

JUDGMENT for the claimant having been given orally on 12 November 2019 and prepared on 21 November 2019 to be sent to the parties, and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. By a claim form presented on 4 June 2019 the claimant brought a claim for automatically unfair dismissal and a claim for breach of contract. The claimant withdrew his breach of contract claim. He claimed he was dismissed for the automatically unfair reason that he took time off for dependants. The respondent says the reason for dismissal was his own misconduct in that he failed to follow company procedures for requesting leave, took unauthorised absence and was insubordinate.

2. I had to decide what was the reason or principal reason for his dismissal. Was it for asserting his statutory right to take time off for dependants, or was it for misconduct, in which case he did not have the two years' continuous service he needed to bring the claim?

Evidence

3. I heard evidence today from the claimant and from witnesses for the respondent, Mr Garren Lowndes and Mr Damian Hunt. They all confirmed the truth of written statements they had made and answered questions

4. The claimant gave his evidence in a believable and straightforward way. He was careful about dates and times and his recollection matched the dates of the documents in the bundle. He remembered phoning in to work on Monday 8 October 2018 and that it was a very short phone call. The phone records showed a 12 second phone call. The documents also corroborated his oral evidence that he had made efforts from Friday 5 October to Monday 8 October online, in person and on the telephone to get approval to take time off on Monday 8 October. The claimant's evidence and corroborating documentation from the respondent's HR online system showed him to be someone who was trying his best to notify the employer and trying his best to comply with the employer's procedures for requesting leave.

5. The claimant did not avoid answering questions about things that might not support his case. He admitted smoking at the factory gates from time to time and admitted using his phone on the factory floor. He admitted there was friction between him and Mr Lowndes and that the relationship between them was breaking down from November 2018 through to his dismissal in March 2019. He was adamant that he had not been spoken to in a disciplinary sense about those matters and had not had disciplinary sanctions imposed on him until his letter of dismissal. I found him to be a credible witness.

6. Mr Lowndes gave his evidence in a defensive way. When asked (by the claimant who was representing himself) why he moved to discipline the claimant straight away on 10 October after his absence on 8th October he said "No one knew where you were". He said this even though he had admitted having a conversation with the claimant on Friday 5 October 2018 in which the claimant had asked to have Monday off to sort out childcare and to go to hospital with his pregnant partner. Mr Lowndes gave very short responses to questions and before answering some questions he looked across to his representative and to Mr Hunt as though seeking guidance as to what to say. At one point in cross examination when Mr Lowndes said that the claimant had been taken aside for disciplinary matters on numerous occasions before 5 October 2018 the respondent's representative interrupted his own witness to say that this was not the respondent's case and that he had not heard this before. This gave me reason to believe that Mr Lowndes was extending his responses to make the disciplinary reason for dismissal more plausible. Mr Lowndes admitted that there was no record of any disciplinary matter on paper and he said that it was all verbal. He was challenged about the involvement of Mr Hunt in the decision making in this case and he said that the decision to abandon disciplinary proceedings in October 2018 was his own decision yet he had written a letter dated 23 October which said "following on from Damian's intervention....I will not be pursuing this further". The claimant challenged Mr Lowndes about the extent to which he worked with Mr Hunt by establishing that the chronology of events in preparation of minutes of a meeting coincided with a holiday absence for Mr Hunt. When this was put to him Mr Lowndes did not have a plausible reason, other than the absence of Mr Hunt, for the delay.

7. Mr Hunt gave evidence. He admitted that the policy document required staff to contact him as MD to request time off and that the staff had no way of doing that out of hours. He suggested both that it was Mr Lowndes decision as to whether to grant leave or not and that the claimant “made no attempt at all to contact me” and that if he had “this could easily have been avoided”. He said that he both leaves it to Mr Lowndes to make the right decisions and that he intervenes after the event to put things right. He accepted that there were things he needed to check on the new HR online system and that as a business they had things to learn. Mr Hunt tried to persuade the tribunal that the documents in the bundle did not mean what they said; when the claimant said that his unauthorised absence had been part of the reason for dismissal Mr Hunt said. “the way it is written is not representative of what it is meant to say”. He was trying to pull back from the position in the documentation. He used the same language as Mr Lowndes when he said the claimant had a complete disregard for following rules and procedures which suggested to me that they had agreed to try to focus on disciplinary reasons for the dismissal. Mr Hunt said that the reason for the absence of disciplinary paperwork was because as the claimant had less than two years’ service there was no need for it. He was forthright in revealing that he did intervene in Mr Lowndes decisions in relation to the disciplinary process in October 2018 and that he did take external advice before dismissal.

Documents

8. I saw a joint indexed and paginated bundle of documents of 132 pages.

9. I saw a signed statement of main terms and conditions which included a declaration:

“I have read and understood the current Employee Handbook. I accept that it forms part of my Contract of Employment” and “the disciplinary rules that form part of your contract of employment and the procedures that will apply when dealing with them arein the Employee Handbook”

10. The bundle included an extract from the Employee Handbook. In its general terms and procedures, it provides the procedure for applying for time off for dependents. It says at paragraph F within its General Terms and Procedures section:

“You may be entitled to take a reasonable amount of unpaid time off during working hours to take action that is necessary to provide help to your dependents. Should this be necessary you should discuss your situation with the Managing Director who, if appropriate, will agree the necessary time off.”

It also included provisions relating to Holiday Entitlement and Conditions at section A Annual Holidays:

“3) we operate an online system for booking holidays via hr online. You will be given the rights to request absence online. You will also be able to view your holiday entitlement online at any time. This is to give you the facility to easily plan your holidays throughout the year.

- 4) *Once you have registered your holiday request online you will receive an email authorising or declining your request. If you feel that your request has been unreasonably refused for any reason then you should refer the matter to the Managing Director...*
- 5) *Holiday dates will normally be allocated on a first come first served basis..*
- 6) *...*
- 7) *You should give at least one week of your intention to take holidays."*

I think that it is supposed to read "at least one week's notice" but the word "notice" is missing from the procedure document.

11. The Employee Handbook also contains a Disciplinary Procedure. It categorises misconduct as; unsatisfactory conduct, misconduct, serious misconduct and gross misconduct. It provides an escalation of sanction for each on first, second, third and fourth occasion, except for gross misconduct which might lead to dismissal on the first occasion.

12. For unsatisfactory conduct the first occasion will be a formal verbal warning which will last for three months, the second occasion will result in a written warning which will last for six months, the third a final written warning which will last for twelve months, and finally dismissal. Any of the sanctions may be imposed by the Managing Director or Production Manager.

Facts

13. The claimant was employed by the respondent from 9 February 2018 until 27 April 2019. He was employed as a Machine Operator. His line manager was Mr Garren Lowndes and the Managing Director was Mr Damian Hunt.

14. The respondent is a small company. It had never had anyone take dependants leave before the claimant's request. It has an employee handbook which is available electronically and it has an online system for requesting leave. It has the support of an external HR and employment law advisory service. The claimant signed a contract on 12 February 2018 and part of the declaration he signed was to say that he had read and understood the Employee Handbook. He signed this document as he wanted the job and didn't think the terms of the declaration were negotiable. He had not seen the Employee Handbook and he did not see it until after his dismissal.

15. In October 2018 the claimant's partner was pregnant and had had some health issues with the pregnancy. The claimant found out on Friday 5 October 2018 following her routine ante natal appointment that his partner had to attend an emergency hospital appointment on Monday 8 October in relation to the pregnancy. She had been booked to attend an appointment on Wednesday 10 October and the claimant had pre-booked his leave for 10 October 2018 to be able to support her in that attendance but the situation at her check up on Friday 5 October 2018 was classed as an emergency and the appointment was brought forward. This presented a child care problem for the claimant as his partner ordinarily took the 6 year old

child of the family to school. He also wanted to be able to support his partner at the appointment. This was their baby and an emergency scan.

16. On Friday 5 October 2018 the claimant made a request using the respondent's online HR system to take holiday on 8 October 2018. That request was sent through the online system at 11.27am and in the subject line it said "holiday".

17. Later that day the claimant approached his line manager Mr Garren Lowndes for leave on 8 October 2018. Before the claimant could ask Mr Lowndes, who had seen the online request, Mr Lowndes refused the leave. He swore at the claimant. He said, "Can you fuck have Monday off". Mr Lowndes knew that the claimant's partner was pregnant. Mr Lowndes told the claimant he could not have the day off as he had not given one week's notice. The claimant asked could he swap the pre-booked holiday which he had for 10 October for 8 October. The claimant told Mr Lowndes it was for an emergency scan and again Mr Lowndes refused.

18. The claimant used the online system again at 13:15 that day to request leave, and this time he included in the subject line, "No childcare as hospital for partner been put forward as she is unwell".

19. On Saturday 6 October the claimant, at 9:16, repeated his efforts to use the online HR system to get approval for the absence which he required on Monday 8 October. His request repeated "no child care as hospital appointment for partner been put forward as she is unwell". He looked for an option within the online system for dependants leave or emergency leave but could not find one. He cancelled the holiday request and instead, at 10:22, sent another request this time for unpaid leave, and this time in the subject line he entered, "Won't be in for childcare reasons. Will take unpaid day for childcare". The claimant got no response to this request. The respondent had not looked at the online system as it was the weekend.

20. On the morning of Monday 8 October at 8:26am the claimant telephoned in on the respondent's business line. This was the only phone number he had for the Production Manager or Managing Director. He spoke to Garren Lowndes that morning and he told Mr Lowndes that he would not be coming in and that he had to take make arrangements to get a six year old child to school and to support his partner in an emergency hospital appointment that day. He was seeking approval but he did not get it. Mr Lowndes' response was a cursory response and the call was ended promptly. I saw the telephone records that show it was timed at 12 seconds.

21. From this point on the relationship between the claimant and his line manager deteriorated. The claimant went to work on 9 October 2018 and on 10 October 2018 he was invited to a disciplinary hearing by his line manager, Mr Garren Lowndes. The disciplinary letter says:

"Craig,

I invite you to a disciplinary meeting on Thursday 11 October 2018 at 10.00am in the meeting room to investigate the following disciplinary offences:

- Failure to follow procedure with regards to holiday request;

- Unauthorised absence;
- Insubordination.”

The letter continues

“If these allegations are substantiated, we will regard them as a disciplinary offence.”

22. The disciplinary hearing took place on 11 October 2018 and the disciplinary notes reveal that Mr Garren Lowndes said, “A copy of the company handbook would be given to Craig”. The claimant had not, up to the point of the disciplinary hearing, had sight of the content of the employee handbook.

23. Some time was taken in the preparation of the notes of the disciplinary hearing. The delay was because Mr Hunt was on holiday. The minutes were agreed and signed by claimant and respondent around the end of October 2018. In a letter dated 23 October 2018 Mr Garren Lowndes wrote to the claimant to confirm disciplinary action would not be pursued. The letter states:

“Dear Craig,

Following on from Damian’s intervention regarding this matter I can confirm that due to the fact that we can put this down to a lack of clarity on both sides and a misunderstanding between us I will not be pursuing this matter further. Going forwards please ensure that all procedures are followed regarding any need for time off. Please remember that both myself and Damian are available at all times and the company will also support you where possible when help is required.”

24. On 15 November a further request was made by the claimant using the online HR system for antenatal leave, and this time it was granted

25. The claimant worked through from October to March 2019. During this time he sometimes smoked at the factory gate; he sometimes used his mobile phone on the factory floor. He was spoken to by the respondent in the same way as other employees about those activities but this did not constitute a verbal warning under the disciplinary procedure. The claimant had two further ante natal related absences. One on 28 November 2018 for which he had requested permission on 15 November 2018 and one which he requested on 3 March 2019 but in the event did not need to take as leave as he was off sick on 11 March when the ante natal appointment took place.

26. On 1 February 2019 a notice was put up in the respondent’s factory to remind all employees about returning to work promptly from their breaks. It said, “lateness of absence may result in disciplinary action” and “an employee that doesn’t stick to authorised breaks may result in disciplinary action and or loss (lose) appropriate payment”.

27. In early March 2019 the claimant made a request to take antenatal leave on 8 March 2019. On 6 March 2019 there was an altercation between the claimant and

the respondent following which the claimant went off sick. He saw his GP on 14 March 2019 and was prescribed medication for a headache.

28. On 25 March 2019, from home having not yet returned to work, the claimant requested leave to support his partner in her antenatal appointment, again using the online HR system. He asked for 1.08 working days leave for 8 April 2019. He also requested one month's paternity leave, again using the online HR system. The request said, "paternity leave" 27 May 2019 – 10 June 2019" The claimant returned to work on 26 March 2019. He met with Mr Lowndes and they completed a return to work form. On that same day, unbeknown to the claimant, Mr Garren Lowndes was writing a letter dismissing the claimant.

29. On 27 March 2019 the claimant was invited into a meeting room with Mr Lowndes and a Mr Schofield and was given a letter terminating his employment. The letter stated:

"Dear Craig,

I am writing in relation to your employment with Stax Converting Limited t/a Paper Trading UK Limited. Over the past six months there have been the following issues, not following company rules in relation to holiday procedures where you did not give sufficient notice and when refused the time off did not attend work. Abusing break times by returning to work late from breaks and ignoring your manager's request to return to work. Persistent use of mobile phone and drinks on the factory floor, moving away from your work area during work time to smoke and use your mobile phone. Despite being informed on multiple occasions about these issues you continued to ignore company rules and procedures.

This type of attitude is not acceptable because employees are expected to follow company rules and procedures at all times to ensure a healthy and safe working environment for everybody.

Having carefully considered the above, the needs of the business, including the fact that you have a short amount of service I have decided that your employment should be terminated."

30. At the end of the letter it contains notification of the right to appeal against the decision of Garren Lowndes to terminate employment.

31. On 27 March 2019 the claimant emailed Damian Hunt asking for a copy of the employee handbook. He said, "I wish to refer to it over the unfair dismissal which has arisen". The handbook was sent to the claimant by email attachment later that same morning by Mr Hunt.

32. The claimant appealed against his dismissal. His email dated 29 March 2019 said,

"I have had no prior verbal or written warnings about the issues raised until I attended work on 27 March 2019.... I have the same break times as everybody else, use of mobile phones the same as everybody else, drinks on the shop floor the same as some other employees including managing

director, supervisor and got told of supervisor when started its OK to have a cig as other employees do, I have always followed company procedure when booking holidays and had to take a day off as emergency for dependent leave(legal) to abide by company procedure as a maternity scan appointment got brought forward, I feel the trust with the employee/employer has broken down and wish for relevant notice pay compensation for the unfair dismissal and the stresses that this has put on me and my family”

33. The appeal was acknowledged by Mr Hunt on 2 April 2019 in a letter convening an appeal hearing for 8th April 2019.

34. The appeal was heard on 8th April 2019 by Mr Hunt. The claimant prepared a written two page statement for his appeal. Mr Lowndes prepared a written statement for the appeal too. Mr Lowndes said in his statement

“In October 2018 there was an incident involving Craig whereby he did not follow company procedure resulting in unauthorised absence and insubordination.....he has still continued to insist that he can take time away from work against company procedures. This has resulted in a lack of trust on my part that he will reliably attend work”

It also deals with mobile phone use, food and drink on the factory floor, break times and “constant undermining of my authority in my capacity as Production Manager”

Mr Lowndes says “As a result in not following company rules and ..doing what he liked when he liked this has resulted in his dismissal”

35. There were notes that appear to have been made by Mr Hunt in preparation for the appeal meeting, on 8 April 2019 in the bundle. Paragraph 4 (d) of the notes shows a plan to go through evidence including “minutes from a dispute regarding paternity leave. I myself was involved with an aggressive meeting with Craig when attempting to handle the matter”. This referred to the October 2018 request for dependants leave.

36. Minutes of the meeting were prepared and entitled “Summary of Appeal Meeting” They state the reason for dismissal as “not following company procedures including not following holiday procedures”. Later in those minutes it is recorded, “Craig’s absence – the previous incident from the earlier disciplinary 11/10/18”.

37. The claimant protested that the matter which ought to have been “put to bed” by reason of Mr Lowndes’ letter of 23 October 2018 had not been put to bed. The minutes record:

“Damian said the letter issued after the previous disciplinary incident did not state the company was wrong. He said Damian had intervened so that they [the company and Craig] could move on despite the abuse from Craig. Craig replied he doesn’t recall any abuse. Damian then said the letter regarding the absence for parental leave didn’t follow company procedure.”

and

“Damian replied the previous incident (disciplinary meeting 11/10/18) was not a medical emergency and was an unauthorised absence”

38. The appeal outcome letter was sent to the claimant on 18 April 2019, and it records:

“Having given the matter full consideration I am now writing to confirm that the original decision taken by Garren Lowndes stands for the following reasons...I cannot find any evidence that you have followed the correct procedures when requesting holidays and there is no formal request made for any parental leave or leave for dependents...”

The claimant’s appeal was dismissed.

The Law

39. Section 99 of the Employment Rights Act 1996 which deals with leave for family reasons and to section 57A of the Employment Rights Act 1996 which deals with time off for dependants are relevant in this case when considering the reason for dismissal.

40. Section 57A provides that an employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee’s working hours in order to take action which is necessary

- (a) to provide assistance on an occasion when a dependant falls ill, gives birth, is injured or assaulted.
- (b) to make arrangements for the provision of care for a dependent who is ill or injured.

41 “Dependant” for the purposes of the section 57A means a spouse or civil partner, a child, and in relation to the right to provide assistance and make arrangements also includes any person who reasonably relies on the employee.

41. In Qua v John Ford Morrison Solicitors 2003 EAT/884/01 the Employment Appeal Tribunal considered what was then the new section 57A and 57B Employment Rights Act 1996 which was introduced to give effect to the Parental Leave Directive 96/34/EC. The EAT considered that the right to time off to provide assistance does not enable employees to have time off in order to provide care themselves beyond the reasonable amount necessary to enable them to deal with the immediate crisis. The right is to a “reasonable” amount of time off to take action which is “necessary”. In Qua the EAT quoted the debate in the House of Lords when the statutory right was being discussed. At para 20 of the Qua judgment Lord Sainsbury is quoted in the House of Lords on 8th July 1999 as saying “the statutory right will be limited to urgent cases of real need...this right is to help people deal with emergencies.....one or two days will be the most that are needed to deal with the immediate issues and sort out longer term arrangements if necessary”.

42. The Qua case goes on to say that disruption or inconvenience caused to the employer's business are irrelevant factors that should not be taken into account. The operational needs of the employer cannot be relevant to a consideration of the amount of time an employee reasonably needs to deal with emergency circumstances. Mrs Recorder Cox QC said:

"To take the needs of the employer into account would frustrate the clear purpose of the legislation which is to ensure that employees are permitted time off to deal with such an event whenever it occurs, without fear of reprisals, so long as they comply with the requirements of section 57A2"

43. Section 57A2 requires the employee to tell his employer the reason for his absence as soon as reasonably practicable and tell his employer for how long he expects to be absent.

44. Section 47C (2)(d) of the Employment Rights Act 1996 deals with leave for family and domestic reasons. It provides that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason. A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to, in this case, the right under Section 57A to take time off.

45. Section 99 of the Employment Rights Act provides that an employee who is dismissed shall be regarded for the purposes of this part of the Act as unfairly dismissed if the reason or principal reason for the dismissal is of a prescribed kind, and one of the prescribed reasons at section 99(3)(d) relates to time off under section 57A.

46. In a claim for automatically unfair dismissal it is for the employee to show that on the balance of probabilities the principal reason for dismissal was an automatically unfair reason. *Smith v Hayle Town Council 1978 ICR 996 CA*

47. If the claimant establishes an automatically unfair reason for dismissal then the respondent employer has not met the requirements of subsection (1) of section 98 of the Employment Rights Act 1996; it has not shown a fair reason for dismissal, and so the tribunal need not go on to consider whether or not the dismissal was fair within section 98(4). It is automatically unfair.

48. Section 122 of the Employment Rights Act provides that where the tribunal considers that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce the basic award to any extent then the tribunal shall reduce the award accordingly.

49. Section 123(6) Employment Rights Act 1996 deals with the compensatory award. Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant then shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

50. In deciding upon a contributory fault reduction, a tribunal must consider only the conduct of the employee and not that of the employer. The amount of a reduction is a matter for the tribunal's discretion. Guidance as to the exercise of such discretion was given in *Hollier v. Plysu Ltd* [1983] IRLR 260. Contribution

should be assessed broadly. Without fettering the tribunal's discretion, the EAT suggested the following categories: wholly to blame (100%), largely to blame (75%), equally to blame (50%) and slightly to blame (25%).

Conclusions

What was the reason for dismissal?

51. The principal reason for the claimant's dismissal was the time he took off on Monday 8 October 2018 for dependants leave. This is a prescribed reason and makes his dismissal automatically unfair.

52. The respondent submitted that the reason for dismissal was the claimant's conduct in failing to follow what it called an "amalgamation" of company procedures. This was not plausible for the following reasons:

52.1 The letter of dismissal said, amongst other things, "not following company rules in relation to holiday procedures where you did not give sufficient notice and when refused the time off did not attend work". This related to the request for time off on Monday 8 October 2018. By the respondent's own documentary evidence the statutory right to time off for dependants was part of the reason for dismissal.

52.2 The first reason given at appeal hearing for dismissal was "not following company procedures including not following holiday procedures" and later in the notes of the appeal meeting on 8 April 2019 reference was made to "Craig's absence – the previous incident from the earlier disciplinary 11/10/18 ..these incidents of Craig not following Company policies and procedures were the reasons for his dismissal". Here is the statutory right to take time off for dependants being referred to as part of the reason for dismissal and being considered at appeal. In the appeal meeting Mr Hunt said, "the previous incident (disciplinary meeting 11/10/18) was not a medical emergency and was an unauthorised absence". This showed me that the right to take time off for dependants was still being disputed at appeal in April 2019. The letter confirming that the appeal was dismissed said "I cannot find any evidence that you have followed the correct procedures when requesting holidays and there is no formal request made for any parental leave or leave for dependants". The HR online system entries show that requests were made.

52.3 There was no corroborating documentary evidence whatsoever of any disciplinary action. There was no note of a verbal warning having been given. The respondent had an Employee Handbook which set out the procedure, as a term of the contract which the claimant was entitled to expect would be followed, for handling unsatisfactory conduct. It provided that there would be a written warning on the second occasion of an unsatisfactory conduct. The respondent did not provide any evidence of any written warning. The respondent had an online HR system. It was able to provide accurate absence data on the claimant. It had an online Employee Handbook. I do not accept that if warnings

were given they would not have been recorded in either the online HR system or a paper based file or in an email to the claimant.

- 52.4 Mr Lowndes was not a credible witness on the issue of the timing of any warnings which he says were given. He said that the reason for the claimant's dismissal was his conduct. Mr Lowndes said he spoke to the claimant and issued warnings on numerous occasions between October 2018 and March 2019 and under cross examination he said he had given verbal warnings *before* October 2018 only to be reminded by his representative that that was not his case.
- 52.5 I accept the claimant's submission that Mr Lowndes had not liked the fact that he had started disciplinary proceedings against the claimant in October 2018 and they had been halted by Mr Hunt. The claimant submitted that this had motivated Mr Lowndes to hold this absence against him and to discipline and dismiss him. I reject the respondent's submission that the respondent did not dismiss for reasons related to dependants leave because if it had wanted to do so it could have done so in October 2018. Mr Lowndes had wanted to dismiss in October 2018 but he was called off by the intervention of Mr Hunt.
- 52.6 I draw an inference from the timing of the dismissal, which came following a period of sickness absence and within 48 hours of the claimant's request for time off for an ante natal appointment and the booking of his paternity leave on 25 March 2019. I infer that allowing the claimant his statutory rights to time off was a problem for Mr Lowndes.
- 52.7 Mr Lowndes dismissed the claimant on the spot. When asked why he did not follow the same process in March 2019 as in 2018 Mr Lowndes said that he did not need to as the claimant did not have two years' service. Mr Lowndes had shown that he could follow procedure in inviting the claimant to a disciplinary meeting in October 2018 when the claimant had less service than at the date of dismissal in March 2019. I infer that he did not take time to follow a procedure to which the claimant was contractually entitled irrespective of his length of service under the respondent's own contractual disciplinary procedure in March 2019, because he Mr Lowndes did not want the claimant accruing two years' service and did not want the claimant having more time off and, at 52.8
- 52.8 Mr Lowndes dismissed the claimant on the spot for having asserted his statutory right because he did not want to risk Mr Hunt intervening to halt any process, as he had done in October 2018. He acted quickly because he wanted to be sure of dismissing the claimant this time. If the reason for dismissal had been the claimant's misconduct then Mr Lowndes could have taken time to investigate and to comply with the disciplinary procedure by giving a verbal warning, then a first written warning, then a final written warning before moving to dismissal.

Had the claimant complied with Section 57A

53. The section required the claimant to request the time off “As soon as reasonably practicable”. The claimant had requested leave on Friday 5 October 2018. He had acted immediately he found out about the emergency scan appointment. He satisfied the requirement in section 57A(2) to act “as soon as reasonably practicable” when he requested leave online and then at 13.15 on 5 October 2018 recorded online that the leave was needed because “No childcare as hospital for partner been put forward as she is unwell”. He also told Mr Lowndes in their brief conversation on Friday 5 October that the time off was needed because of an emergency scan for his pregnant partner.

54. The section provides that time off is “(a), to provide assistance on an occasion when a dependent falls ill, gives birth, is injured or assaulted (b), to make arrangements for the provision of care for a dependent who is ill or injured”. The circumstances on Friday 5 October 2018 fell within section 57(1)(a) in that the claimant’s partner’s pregnancy was at risk and within (b) in that he had to make arrangements to care for both her, to accompany her to the scan, and for care for the child of the family and getting the child to and from school.

55. The section provides and the case law confirms that the claimant should take only “a reasonable amount of time off”. The claimant had indicated in the online request earlier that he needed one day off. Mr Lowndes had seen that request (at that point a request for holiday leave) as he referred to it in their conversation when he said “Can you fuck have Monday off”. The conversation developed so that during the conversation Mr Lowndes knew that what was being requested was time to deal with an emergency pregnancy related scan and child care issues. The law provides that the amount of time off will be a couple of hours or a maximum of one to two days. The claimant’s request for one day fell within the reasonable amount of time under the statute.

56. The section provides that the time off be “necessary”. The claimant told Mr Lowndes on 5 October 2018, on 6 and 7 October 2018 in the HR online requests and on the telephone on 8 October 2018 the purpose of the time off. The online HR request at 13.15 on 5 October 2018 said “no child care as hospital appointment for partner been put forward as she is unwell”. This met the requirements of section as being necessary that he should have time off to deal with the emergency. The *Qua* case quoted the parliamentary debate on this area of the law and described “urgent cases of real need”. This was an urgent case of real need.

57. The section offers leave for a “dependant”. The claimant’s partner was carrying their child and had an emergency medical scan. The claimant also had to make arrangements to care for the six year old child of the family. The partner and the child were dependants of the claimant within Section 57A(3).

58. At 13.15 on Friday 5 October 2018 the claimant had done enough to meet the requirements of section 57A to assert his statutory right. He continued to try to get permission to take time off for dependants in his online requests over the weekend of 6 and 7 October 2018 and again on the morning of Monday 8 October by telephone to Mr Lowndes.

59. The respondent submitted that the claimant had not properly requested time off for dependants as he had not complied with its operational requirements for making his requests by giving one week's notice and/or requesting the leave from the Managing Director Mr Hunt. I do not accept that submission:

59.1 Mr Lowndes objection to granting leave was that the claimant had not given one week's notice. This provision related, in its Handbook, to annual leave and not to dependants leave. Although it was not put to me explicitly the respondent's argument seemed to be that the requirement of a week's notice was for any leave and was required so that the respondent can manage its service effectively, the Qua case set out that to take into account the operational requirements of the respondent when considering whether or not to grant time off for dependants would be to frustrate the purpose of the statute. I don't doubt that he believed he was acting in the best interests of the business but in refusing the leave Mr Lowndes put the operational requirements of the business above the statutory right of the claimant. He did that on both Friday 5 October 2018 and again in the twelve second telephone call on Monday 8 October 2018.

59.2 It was put to the claimant in cross examination that he ought to have sought permission from Mr Hunt direct. I was taken to the provision to this effect in the Employee Handbook. The claimant's response was compelling. He had not seen the Employee Handbook. If he had known he was supposed to ask Mr Hunt he would have attempted to do so. He wondered why Mr Lowndes hadn't told him to do that on Friday when they spoke or on Monday morning when he rang in. The claimant did not have a telephone number for Mr Hunt. Even if he had seen the Handbook he would have had only the same means available to him to seek Mr Hunt's permission which he had used with Mr Lowndes, HR online, face to face request, more HR online and a telephone call. Again, I refer to the Qua case. The operational requirements of the respondent for contact through the managing director ought not to be allowed to frustrate the purpose of the statute.

What detriments did the claimant suffer

60. The refusal to grant leave in response to the claimant's verbal request for leave on 5 October 2018 was a detriment. (Mr Lowndes swearing at the claimant was not a detriment as at that point Mr Lowndes may have only seen the first HR online request which was a request for holiday absence and may not have seen the 13.15 request). As the conversation progressed the claimant made Mr Lowndes aware of the reason and so, by the end of that conversation, the refusal was a detriment.

61. The decision to discipline the claimant for unauthorised absence on 8 October 2018 was a detriment.

62. The inclusion of unauthorised absence/dependent's leave as part of the disciplinary process in March 2019 was a detriment. Failure to follow the contractual procedure for disciplinary action in March 2019 was a detriment. The dismissal was

a detriment. The inclusion of the unauthorised absence in the appeal was also a detriment.

63. The dismissal, the principal reason for which was the claimant's absence for time off for dependants, was automatically unfair.

64. This matter will now be listed for a remedy hearing.

Employment Judge Aspinall

Date: 7 January 2020

JUDGMENT AND REASONS SENT TO THE PARTIES ON
10 January 2020

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