



EMPLOYMENT TRIBUNALS

Claimant: Mr F Quayum

Respondent: Firstsource Solutions (UK) Ltd

Heard at: Nottingham **On:** 29 November 2019

Before: Employment Judge Rachel Broughton (Sitting alone)

Representatives

Claimant: In Person

Respondent: Miss A Johns -Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that the claim of wrongful dismissal is well founded and succeeds. The Respondent is Ordered to pay the Claimant unpaid notice pay in the agreed net sum of £292.38. The Respondent to account to Her Majesty's Revenue and Customs for the appropriate deductions of tax.

RESERVED REASONS

The Background and Issues

1. The Claimant was employed by the Respondent from the 28 January 2019. His employment was terminated summarily by the Respondent with effect from 23 April 2019. The Claimant submitted his claim to the tribunal on 17 May 2019 after a period of Acas early conciliation which took place between the period 9 May 2019 to the 17 May 2019.
2. The Claim is one of wrongful dismissal.
3. The issue for the tribunal to determine is whether the dismissal of the Claimant without notice was justified because of the Claimant's alleged repudiatory breach of the employment contract.

The Hearing

4. The Claimant attended the hearing unrepresented and without a witness statement albeit he had set out in writing bullet points and asked if he could give

oral evidence supported by reference to this document, which was permitted. The Claimant was cross examined by counsel for the Respondent.

5. The Respondent called one witness; Mrs Amy Foat Smith, employed by the Respondent since 30 July 2012 as a HR Manager. A witness statement had been prepared for Mrs Foat Smith. Mrs Foat Smith was cross examined by the Claimant.

6. The Respondent produced a bundle of documents which ran to 93 pages.

7. I heard submissions from both parties.

8. The case had been listed for one hour however, it took the entirety of the afternoon and due to a late finish, I reserved the decision in order that I could consider the evidence and revisit the relevant documentation.

The Law

9. Before dealing with the evidence I am required to consider the relevant legal principles.

10. It is for the employer to prove that the employee committed the misconduct (or other breach) in question. It is not enough to apply the unfair dismissal test of whether the employer reasonably believed that the employee had so acted. The burden of proof rests with the employer.

11. **British Heart Foundation v Roy UKEAT/0049/15 (16 July 2015 unreported) Langstaff J;**

“6. Whereas the focus in unfair dismissal is on the employer’s reasons for that dismissal and it does not matter what the Employment Tribunal think subjectively probably occurred, or whether, in fact, the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred.”

12. It is not enough for an employer to prove that it had a reasonable belief that the employee was guilty of gross misconduct/ gross negligence, the Tribunal must be satisfied that the employee committed the misconduct /gross negligence and that it was sufficiently serious to amount to a repudiation: **Shaw v B and W Group Ltd EAT 0583/11**

13. The employee’s behaviour must disclose a deliberate intention to disregard the essential requirements of the contract to amount to a repudiatory breach: **Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698 CA.**

14. The question of whether the employee is in repudiatory breach is a question of fact.

Findings of Fact

15. The Claimant commenced his employment with the Respondent 28 January 2019. The Claimant describes his role as that of a sales adviser. The offer letter

which is dated 28 January 2019 (page 29 of the bundle) describes the role as a customer experience adviser.

16. The Respondent is a business process operator providing contact centre solutions to its clients which includes Sky, the media company.

Contract of Employment and Policies

17. Enclosed with the Claimant's offer letter was a contract of employment Part A (Contract of Employment) and B (General terms and conditions). The offer letter states that; "*This letter along with Parts A and B will form your contract of employment.*"

18. It is agreed between the parties that the Claimant's employment was subject to a probationary period of three months from the commencement date. The Contract of Employment provides for a notice period from the Respondent to the Claimant of; "*one week in the first two years of service, rising by one week every year a service, to a maximum of 12 weeks.*" (Page 33 of the bundle). Having less than one year's service, it is agreed between the parties that the Claimant's entitlement to notice under this clause, was one week.

19. Clause 10 of the Contract of Employment deals with sickness and injury and provides as follows (page 38 of the bundle);

*"if you are ill, or have another reason for not been able to attend work, you (or someone on your behalf if you are very ill) should notify the Operations Manager by telephone **on the first day of absence** one hour before the time you are due to start work **and continue to call on a daily basis while you are absent.**"*

20. Clause 17 of the Contract of Employment (page 40) deals with termination of employment and provides as follows; "*The company may terminate your employment by giving you the period of notice are specified in Part A. In all cases, notice must be in writing. The company has the right to terminate your employment without notice if you are in serious breach of your contract, you are grossly negligent or commit an act of gross misconduct. The company may also terminate your employment the grounds of poor performance in accordance with the performance management process.*"

21. The Respondent's disciplinary procedure (page 78) sets out what is referred to as a non-exhaustive list of examples of offences that the Respondent will normally regard as misconduct and provides with respect to these offences as follows; "*Following a recorded discussion any further offences of misconduct will lead to a disciplinary hearing and will warrant formal warning; further instances of misconduct will result in progression through the disciplinary stages*". Three types of offences listed are; 1) Absence, 2) timekeeping and 3) Any conduct that leads to under or poor performance.

22. The disciplinary policy (page 79) of the bundle refers to gross misconduct and provides that; "*the company may issue a formal sanction as appropriate. The company may also terminate your contract of employment without notice or compensation equivalent to pay in lieu of notice.*" It goes on to set out a non-exhaustive list of examples of offences that the Respondent normally regard as gross misconduct, the relevant offences mentioned include the following;

- *Unauthorised absence (see Attendance Management and AWOL policies)*
- **AWOL (Absence without Leave-** see policy for further information).
- *Any activity that would or could jeopardised Firstsource client relationship-cutting of calls, inappropriate call transfers, mis-selling of client products to its customers an inappropriate use of the phone system*
- *Call conduct/red flags/customer escalations*
- *inappropriate behaviour towards customers, colleagues or clients*

23. The AWOL policy (page 74 and 75) provides that; “*an instance of a AWOL is a serious disciplinary offence, potentially amounted gross misconduct and will be managed in line with the Company’s Disciplinary Policy.* The policy also sets out the process that will be followed if an employee is AWOL;

- *Managers will make a welfare call to the employee to try make contact.*
- *If no contact is made by end of day, the manager should inform the HR team.*
- *HR team will write to employee requesting them to make contact within 48 hours reminding them that their absence is unauthorised, could lead to disciplinary action (this will be reduced to 24 hours for employees in probation period).*
- **If no contact is received**, the HR team will send a letter to the employee inviting them to disciplinary hearing for AWOL under the disciplinary procedures.

24. The AWOL policy states; “*This Policy is not contractual and may be changed in line with business needs.*”

Coaching

25. The Claimant on first joining the Respondent spent some time in a classroom setting receiving training for the call centre work. Once the Claimant started working on the telephones he dealt with Sky customers, renewing their contracts and making them aware of the offers which are available. The calls were recorded and he received coaching and feedback.

February 2019 - feedback

26. At page 44 of the bundle is a coaching form dated 27 February 2019, this records a coaching session with the Claimant carried out by one of the managers, Adam Dicken. The accuracy of the record is not contested.

27. The feedback includes that the Claimant asked a client unnecessary questions and he was advised to; “*Concentrate on the aspect of the customers package rather than push questions on reasoning for not being able to afford.*” The Claimant was also instructed to; “*stay away from controversial questions*”.

28. There is no reference in this coaching feedback to any issue around mis-selling however the Claimant in his oral evidence during the tribunal hearing, alleges that in or around the end of February 2019, about 5 weeks into his employment there was a customer complaint about his behaviour on the telephone. This was not contested by the Respondent and Mrs Foat Smith referred

in her statement to reports of him having mis-quoted customers. The Claimant alleges that this complaint was more serious than the subsequent complaint which followed on 1 April 2019. During this call in February, his evidence is that he was trying to sell an offer/package to a customer that did not exist, although he denies knowing this at the time, he maintains that he been told about the offer by his line manager. Counsel for the Respondent referred the Claimant to a coaching form at page 45 of the bundle recording a coaching session with the Claimant which took place later on 6 March 2019 and asked him whether this was a reference to the incident in February to which he was referring; *“Misquoted customer, gave him offer but then wasn’t able to apply that offer as it wasn’t available”*. The Claimant was not sure whether this was a reference to the complaint in February or another incident however his evidence was that it was unreasonable to treat the 1 April complaint as gross misconduct when no disciplinary action had been taken in connection with this earlier and to his mind, more serious customer complaint.

6 March 2019 - coaching

29. A further coaching session took place on 6 March 2019 with the Claimant and a manager, Sanam Arhtar and the feedback forms are in the bundle at page 45. The Claimant did not dispute the accuracy of the content of the feedback forms.

30. The feedback on this occasion includes not only the comment about misquoting a customer, but the Claimant yawning and sighing during calls. The Claimant in his oral evidence before the tribunal, does not deny that he yawned, but in cross examination his evidence was that he was tired and he referred to the large volume of calls he had to deal with while colleagues were absent on sick leave.

29 March – coaching

31. There was then a further coaching session on 29 March 2019 (page 46 of the bundle). This coaching session was carried out by another manager, named Stephen Robbins who notes that he has been observing the Claimant over the last week. The feedback is largely positive however although the Claimant is noted to be a confident seller Mr Robbins cautions that;

“[Claimant] is a confident seller however he must be careful not to come across as a hard seller, we are not classed as cold call selling... conversations must be delicate when it comes to selling ... I have heard conversations around the customers job when they cannot afford the price or even asking them how long they plan to be out of work for when again they cannot afford the price. This can lead to difficult conversations and is best avoided, ...”

32. The overall conclusion of Mr Robbins however on the 29 March 2019 is that he is pleased with the progress the Claimant is making. There is certainly no indication that any previous concerns or complaints have put his continued employment at risk or that any disciplinary action is being considered;

“He has all the markings of being a top seller however he just needs to work on the other KPI areas to be class as that. Following the above will support him on his

Telephone call on 1 April 2019

33. It is common ground between the parties that the Claimant conducted a call with a customer on 1 April 2019 which led to the customer escalating a complaint. A transcript of the call appears at page 47 of the bundle. The Claimant does not refute the accuracy of the transcript of the call.

34. The Claimant was called to an investigation meeting on the 2 April 2019 with a Mr Dicken. A record of the meeting is at page 48 to 58 of the bundle. The Claimant does not dispute the accuracy of the written record of the meeting.

35. The customer had cancelled her contract and the Claimant asked if he could make her aware of other offers but she declined, the Claimant does not deny that he insisted on telling her what the offers were despite the customer repeating that she did not want to hear them. The customer herself worked in a call centre and the Claimant questioned her about the number of people who worked there and whether her calls were scripted or not. The Claimant informed the customer that he had to read the offers to her because they were scripted however he accepted in the investigation meeting that this was not true and that he had said it because he thought she may then allow him to tell her about the offers. The Claimant explained to Mr Dicken that he had asked the customer about her own work in a call centre because he thought she was lying to him on the call, it is to be noted that the transcript does not record him as accusing her of lying during the call and nor was this what he said in the investigation meeting.

AD: you asked how many people are in her call centre?

FQ: [Claimant]: thought she was lying

AD: what does that have to do with you?

FG: it doesn't. I just wanted to know she was lying stop wanted to know for myself

36. Mr Dicken refers to the Claimant having been told to try and ask the customer 2 or 3 times about offers but that; *"you tried 6/7 times. Very pushy."* The Claimant does not dispute in the meeting having repeatedly tried to explain the offers but does not accept he did anything wrong, he explains his conduct by trying to do his job and refers to the customer as difficult.

37. During cross examination it was put to the Claimant that he had been arguing with the customer and although his initial response what that there was nothing in the transcript to suggest that he had argued back, he was taken to the transcript which clearly records the customer as saying; *"you shouldn't be arguing with me."* The Claimant then sought to explain his behaviour by the fact that he has targets on converting calls and being; *"perhaps more pushed or forced into reacting in a certain way."*

38. Mr Dicken refers in the meeting notes to a previous escalated complaint which supports the Claimant's account regarding the earlier complaint in February at page 54; *"You had an escalated complaint about your coaching."* Mr Dicken then makes the comment; *"we keep telling you but it's not changing."*

39. Near the conclusion of the meeting Mr Dicken informs the Claimant of what

will happen next;

“we are here to help you. If your probation is brought forward then it isn’t saying you’re being dismissed. Covered outcomes of probation meeting. We just need the facts. This is an investigation. What would you do differently?” Mr Dicken advises the Claimant on how to deal with situations differently; *“...just focus on customer service, not hard selling.”*

40. The meeting is adjourned for 20 minutes, when the Claimant returns to the meeting he makes the following comment; *“Don’t feel well, not in the right frame of mind. But to be fucked up by this bitch, has pissed me off.”*

41. To which Mr Dicken replies; *“It’s not just this call. A lot that have been listened to have needed improvements. Do you understand that?”*

42. The Claimant in his oral evidence before the tribunal, did not accept that the way he conducted himself on that call amounts to gross misconduct and he referred to the absence of any swearing or bad language used with the customer. He also denies ever having received a copy of the disciplinary policy setting out what amounts to gross misconduct and that a copy was only disclosed to him a week or two before this hearing and at his request.

43. The Claimant was not however suspended after the investigation meeting on the 2 April 2019 but was permitted to return to work and continue dealing with customers on the telephone pending his probation review. There is no mention in the meeting of this conduct amounting to gross misconduct.

Sickness Absence – 2 April– 11 April 2019

44. The Claimant was then absent from work from 2nd April until 11 April 2019 with neck pain. It is not in dispute that the Claimant submitted a sickness certificate from his GP and complied with the sickness policy in that he contacted the Respondent during his absence and provided his certificate. Mrs Foat Smith accepted in her evidence that she had no reason to believe that he had not complied with the sickness policy during this period.

45. The Claimant was then asked to attend a probation hearing on Friday 19th April 2019. The letter inviting him to the meeting is dated 16 April 2019 and appears at page 59 of the bundle. The reason given for the probation review is to; *“Discuss absence levels, timekeeping, behaviours and performance during probation.”*

46. The letter of the 16 April 2019 does **not** state that the Claimant has potentially committed gross misconduct and may be summarily dismissed, it states;

“As this is a probation hearing, the outcome may result in a probation extension or ultimately dismissal from the company.”

Sickness Absence 17 April – 19 April 2019

47. On 17 April the claimant was then absent again on sick leave and did not

return to work.

48. The Respondent's case is that the Claimant failed to make contact during his absence from 17th and that he was AWOL.

49. The policy which appears at 74 defines AWOL as follows;

"An employee that is rostered to work and fails to attend their rostered shift without prior authorisation or who fails to contact their manager/duty manager in line with the company's [Absence policy] will be considered to be absent without leave. The period of AWOL commences as soon as the employee fails to attend their rostered shift"

50. The Claimant denies that he was AWOL, his evidence is that he made repeated phone calls to the Respondent from 17th April to report his sickness absence, that he tried several times a day but that no one answered the phone. The Claimant accepts that he never in the event spoke with anyone at the Respondent to report his ongoing absence. His evidence is that he called the mobile telephone numbers provided by Adam Dicken but that there was no answer and that he also called a landline number which he understood was the telephone number for the HR team in Derby which he had stored on his mobile phone when he had first started employment with the Respondent.

51. In cross-examination the Claimant accepted that during his first period of absence he had experienced no difficulties making contact while absent on sick leave, however alleged that there were certain customer experience leaders who had charge of the mobile phone who *"were not fond of"* him and may have *"had it in for him"*, he referred to the possibility of a conspiracy or in the alternative the failure to answer the phone may have been due to *"negligence"*.

52. It was put to the Claimant in cross examination that within his letter to the Respondent which is dated 9 May 2019 (page 67 of the bundle) when he wrote responding to the decision to dismiss and asking for his notice pay, he failed to make any reference in this letter to having attempted to make contact with the Respondent during his absence. The Claimant's explanation for that omission is that he did not *"really read too much into AWOL as the reason"*, he had thought the real reason for his dismissal was that he had been rude to a customer. This is consistent with what he says in the letter; *"I understand the reasons including gross misconduct of which it is alleged I was rude to a customer."*

53. The Claimant was also asked in cross examination whether he could provide screenshots off his mobile telephone to prove that he made the calls reporting his sickness absence however in response his evidence was that he had purchased a new phone and therefore could not provide screenshots from his previous phone.

54. The burden of proving there has been a breach is on the Respondent in a claim for wrongful dismissal, however the Claimant does not deny that he failed to report his ongoing absence and that he was required under the Contract of Employment to so on a daily basis. The Claimant's case is that he was unable to comply however, I do not accept the evidence of the Claimant. During the previous period of absence from the 2nd to 11th April he had scanned in his sickness

certificate and he confirmed that he had had no difficulty making contact with the Respondent. There were other means to contact the Respondent if the Claimant was unable to make contact by telephone, he could have sent a letter or an email as he did on 9 May 2019. I do not find it credible that he called repeatedly and the phone was not answered and that he took no further steps to make contact.

55. The Claimant gives a number of explanations as to why the calls may not have been received from negligence through to a conspiracy however if he felt there was negligence or a conspiracy that would have given him even greater cause to ensure that there was some record of the attempts that he had made to make contact, whether by writing in or keeping a record of the calls he. He did not produce a telephone bill/log of the call or screenshots of his phone. When he wrote asking for his notice pay 9th May 2019 after receiving the outcome letter of the 23 April 2019 which referred to him as having been AWOL, he does not reference any attempts he made to call or any alleged conspiracy against him. The letter was an articulate and well put together letter setting out his claim for notice pay and while he clearly considered the gross misconduct to relate to his attitude to a customer, had he tried so many times unsuccessfully to make contact, it is surprising he did not make some reference to it.

56. Mrs Foat Smith was asked by the tribunal during her oral evidence about the welfare calls which the AWOL policy provides the line manager will make, she stated that this is the Respondent's policy and that this is what would have happened however she could provide no details to substantiate her claim that a welfare call had been made. Mrs Foat Smith was unable to confirm who had made the call and when and confirmed that before attending the tribunal hearing she had not taken any steps to check whether a call had in fact been made to the Claimant. Further, the email to the 9th and 10 May from Zoe Kendall to the Claimant at page 68 and 69, which responds to his request for notice pay, make no reference to any attempts to call him prior to the 24th April when he was informed of the decision to dismiss.

57. Mrs Foat Smith was also asked about the requirement within the AWOL policy that HR will write to an employee who is AWOL requesting them to make contact within 48 hours or 24 hours in the case of those within the probation period, and reminding them that their absence is unauthorised and could lead to disciplinary action, her response was; *"I don't know if it did happen, not sure if it did, I do not have evidence of it today"*.

58. Mrs Foat Smith also confirmed that no disciplinary hearing took place specifically in relation to the period of AWOL in accordance with the AWOL policy, because; *"he was up AWOL for three days so that didn't happen, there was no time"*.

59. I find on the evidence presented to the tribunal and the balance of probabilities that the Respondent took no steps to make contact with the Claimant during his sickness absence from the 17th to the 19th April and thus failed to comply with its own AWOL policy.

Probation Review Hearing -19 April 2019

60. The probation review document at page 61 and uses a traffic light system to indicate the seriousness of the concerns with red being the most serious. Two areas are identified as red; the first is the Claimant's attendance record which records him as having been absent without leave during the second period of absence and the second is in terms of his behaviour with customers or "*doing the right thing*" and refers to **two complaints** from customers that have led to escalations.

61. The Claimant did not attend the probation hearing which proceeded in his absence on 19 April 2019. He accepts that he received the letter of the 16 April making him aware that it would proceed in his absence.

62. With regards to the issues regarding timekeeping and performance which were given an amber rating, the Claimant did not dispute the issues as identified by the Respondent.

63. The decision was made not to confirm the probation based on a number of factors which are listed;

Attendance -red - absence and AWOL

Timekeeping- amber- one lateness

Performance-amber- zero

Doing the right thing -red-rude to customers.

64. The notes of the probation meeting of the 19th of April 2019 with reference to being AWOL refer to him having been AWOL; "*during the second and third day of his second absence.*" He was therefore treated as AWOL at this hearing for a period of 2 days.

65. With regards to the customer complaints, the notes of the review refer to him being a hard seller and reference is made to two customer complaints; with regards to what is described as the first complaint he is alleged to have called the customer a liar during their conversation, however the Respondent produced no evidence at this hearing to support that accusation. If it is a reference to the call on the 1 April, the Claimant's evidence as supported by the documents produced by the Respondent, is that he believed the customer to be a liar and not that he directly accused her of that. There is also reference to a second call however this appears to relate to the same call on the 1 April, reference is made to him asking the customer who ran a call centre questions about how many staff work there and whether their calls are scripted. This reference to two calls appears to be a reference to the same call.

66. It is common ground that the Respondent then wrote to the Claimant on 23 April 2019 informing him of the decision to terminate his employment with immediate effect. The letter is at page 65 of the bundle. With regards to his behaviour toward customers the letter does not refer just to the call on 1 April 2019 but to inappropriate and rude behaviour displayed whilst on calls to customers which is deemed as gross misconduct. It does not set out which calls or specifically what behaviours by the Claimant were deemed to be gross misconduct. Mrs Foat Smith in her witness statement with reference to the 1 April call commented at paragraph 9 follows;

*“He said “I’m thinking of going home. I don’t feel well. I am not in the right frame of mind”. He then said “But to be fucked up by this bitch has pissed me off”...The panel was shocked by this comment as this is not the language and behaviour expected of a Firstsourcer. In fact, this conduct **could have been deemed as gross misconduct** as per our disciplinary policy: ‘Inappropriate behaviour towards customers, colleagues or clients....**As the panel believed the Claimant was frustrated as the situation and a formal investigation, they did not question this further.**”*

67. Mrs Foat Smith in her witness statement paragraph 13, 14 and 15 described the Respondent’s position regarding the reason behind the decision to dismiss, as follows;

*“The Claimant was rated Red for both Attendance and Doing the Right Thing **which led to his probation failure.**” (Para 13)*

*“The Claimant then stayed away from work. Our AWOL policy was instigated and despite writing to The Claimant and making efforts to contact him, he did not respond. **The Claimant was dismissed for reason of gross misconduct on 29 April 2019. He did not attend work or contact us between 16th and 29th April**”.* (Para 14)

*“The Claimant was dismissed for reason of gross misconduct. **He was in breach of his contract of employment in that he did not attend for work.** In the absence of a sick note or details of the reason for his absence, we considered The Claimant to be AWOL.” (Para 15)*

68. The references to the 29 April 2019 in Mrs Foat Smith’s witness statement, the tribunal are informed, is an error and should read the 19 April.

69. The reference in Mrs Foat Smith’s witness statement to the Claimant being AWOL on the 16th April is inconsistent with the Respondent’s documents which record him in the probation review documents as being at work on the 16th April (page 62) albeit late back from lunch and his attendance record showing his absence as only starting on the 17th April. Mrs Foat Smith in her oral evidence when asked by the tribunal, confirmed that the Claimant had only been AWOL from 17th April.

70. When Mrs Foat Smith was asked by the tribunal whether the Claimant would have been dismissed but for the period of AWOL, she referred to his probation possibly having been extended but that AWOL “*gave him two reds rather than one*”.

71. The Respondent in its grounds of resistance at paragraph 16 states as follows; “*The Respondent was entitled to dismiss the claimant for reason of gross misconduct in light of the claimant failing to attend work or contact the respondent regarding his absence from 17 April to 29 April 2019*”.

72. The letter of 23 April 2019 dismissing the Claimant refers to gross misconduct only in the context of his; “*inappropriate behaviour displayed whilst on calls to customers*”. The letter does not identify that being AWOL is an act of gross misconduct and further with reference to being AWOL, refers to the period of

AWOL as; “17.04.19 -to present day.” The AWOL period is not therefore the period up to the 19th April which was the period discussed at the probation review meeting. Any AWOL past the 19th April could not have formed part of the decision-making process at the 19th April meeting.

73. Mrs Foat Smith in her witness statement clearly identifies the period of AWOL after the probation review as the reason why the Claimant’s employment was terminated summarily although the customer calls were part of the reason why the probation failed. “*The Claimant then stayed away from work*” could only mean that the Claimant was expected to return to work after the probation hearing on 19th April.

74. It is not in dispute that the Respondent notified the Claimant by telephone on the 23 April 2019 of the decision to terminate his employment and that he received the letter dated 23 April confirming this, on the 24 April 2019. It appears that the decision was taken between the 19th April and the letter of the 23 April to terminate the Claimant’s employment summarily because he remained AWOL. The notes from the probation review on the 19th April do not make any reference to a decision to terminate summarily only to the decision to ‘non-confirm’ the probation period.

Counsel’s submission

75. Both parties were given the opportunity to make submissions. The Claimant merely made the point that nothing he had done amounted to gross misconduct.

76. Counsel for the Respondent made brief submissions, she argued that there had been a series of breaches of contract which justified the Respondent terminating summarily; that there were two reasons, the period of his unauthorised absence and his conduct on the telephone. The tribunal were invited to find that the period of AWOL and his conduct on the telephone amounted separately and cumulatively to acts of gross misconduct.

Conclusions

77. The Respondent decided that the Claimant had not passed his probationary period and this was for two principal reasons; his conduct on the telephone and his unauthorised absence, both of which were classed as serious or red. The Claimant failed to attend the probation review and the Respondent’s case is that if he had and had not been AWOL, they may have agreed to an extension.

78. The evidence of Mrs Foat Smith was that the decision was taken after the probation review to terminate for gross misconduct because the Claimant continued to be absent and in breach of its AWOL policy. That is the Respondent’s evidence and this is the conduct which the Respondent accepted as repudiatory, the failure to comply with the AWOL and sickness absence policy. The behaviour on the telephone may have been treated as repudiatory but the evidence suggests that the Respondent did not treat it as such; the Claimant was allowed to continue with his work and calls with customers, he was not suspended and Mrs Foat Smith referred to it the comments he made at the close of the investigation meeting (

rather than his conduct on the call with the customer), as being capable of gross misconduct but that ; *“panel believed the Claimant was frustrated with the situation and a formal investigation, **they did not question this further.**”* This was not treated as a repudiation of the contract.

79. The Claimant may well have failed his probationary period but I do not accept that the Respondent treated his conduct up to the 19 April as a repudiatory breach but rather would have dismissed with notice, hence the expectation that he would return to work.

80. The Claimant denies that he was AWOL and in breach of the AWOL and sickness policies as a matter of fact, regardless of whether the Respondent reasonably believed this or not.

81. The Claimant's evidence is that he made numerous attempts to make contact by telephone. He understood that he was required to make contact when he was off sick, there is no dispute that he knew he had to make contact. The requirement to make contact is clearly set out in the Contract of Employment. The Contract of Employment however does not address the seriousness of a failure to make contact in that it does not state that failure to do so is a serious offence which may result in dismissal.

82. I have found however on the evidence that on a balance of probabilities as a matter of fact, the Claimant was absent, the Respondent does not allege that his illness was not genuine but I find that he did not attempt to contact the Respondent in accordance with the contract of employment and was therefore in breach of contract. I set out my findings in this regard above.

Was the breach committed a repudiatory breach?

83. The Respondent refers to the disciplinary policy which lists being AWOL as an act normally regarded as gross misconduct. The Claimant denies having received a copy of the policy before he was dismissed. Within the bundle is a document at page 43 which lists the policies including the AWOL and disciplinary policy. The Respondent's evidence is that the policies were provided to the Claimant during his induction, Mrs Foat Smith alleges that the Claimant; *“had a copy of all policies and contractual documentation...”* and that he signed the document at page 42 to 43 to confirm receipt. However, the document at page 43 specifically requires the employee to sign to confirm that they understand that the policies are on the intranet site, not that they had been given copies and this document is unsigned. However, document 42 which the Claimant did sign refers to its Privacy Policy being on the intranet site and I find on the balance of probabilities that the Claimant would have understood that the intranet site is whether the Respondent policies are located although there is no evidence that he was specifically aware of the disciplinary and AWOL policy or its terms or that the Respondent during his absence from 17th April reminded him of it or sent him a copy or indeed gave him a physical copy at any stage of his employment.

84. Further, in terms of his absence during the three days and whether this amounts to a repudiatory breach in itself; the Respondent's own AWOL policy provides that it will follow a process **before taking disciplinary action** which it failed without any explanation to follow in this case. Mrs Foat Smith tried to assert in her evidence that the Respondent followed its policy and made efforts to contact

him. I find that the Respondent made no attempt to contact the Claimant during his absence from 17th April until the communication of his dismissal. There is no evidence from the Respondent that any of its own AWOL process was followed. A letter was not sent to the Claimant requesting him to make contact and warning him that a failure to do so may lead to disciplinary action, which the Respondent own policy provides that it will before taking disciplinary action.

85. I do not find that the Claimant's failure to contact the Respondent over a period from 17th to either 19th or 23th April, while absent on undisputed sick leave, amounted to a repudiatory breach justifying dismissal without notice.

86. I do not find that the conduct amounted to a repudiation of the employment contract. The Respondent itself provides in its own policy that it will not treat it as a disciplinary matter before carrying out the steps as set out in its own policy document which includes warning the employee of the consequences of not making contact. The Respondent's case is that it took those steps, I find that it did not.

87. The Contract of Employment at paragraph 17 provides that notice must be in writing. In evidence the Claimant accepted that he received written notice on the 24 April 2019. He has not made any allegation nor issued a claim in relation to any unpaid wages or sick pay up to the 24 April, his claim is limited to a claim for one week's unpaid notice and I find he is entitled to that.

Remedy

88. The parties agreed that the correct amount of notice pay due to the Claimant if his claim succeeds, is a net sum of £292.38. The claim is well founded and the Claimant is entitled to this agreed sum as damages for wrongful dismissal.

Employment Judge Rachel Broughton

Date: 30 March 2020

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE