Appeal No. UKEAT/0212/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 31 January 2020

Before

NAOMI ELLENBOGEN QC, DEPUTY JUDGE OF THE HIGH COURT

(SITTING ALONE)

EAST COAST MAIN LINE COMPANY LIMITED — APPELLANT

MR J CAMERON — RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR MATTHEW LEAKE (a Solicitor) Kennedys Law LLP 25 Fenchurch Avenue London EC3M 5AD
For the Respondent	MR RICHARD COLBEY (of Counsel) INSTRUCTED BY: OJN Solicitors 12 London Road Enfield Middlesex EN2 6EB

SUMMARY

CONTRACT OF EMPLOYMENT

Two grounds of appeal (numbered 1 and 3) from the Tribunal's finding, on remission, that the Claimant had been wrongfully dismissed had been permitted to proceed to a full hearing. The EAT allowed both grounds of appeal. In accordance with the principles in **Jafri v Lincoln College** [2014] EWCA Civ 449, it substituted its own decision that the claim of wrongful dismissal failed and should be dismissed.

As to ground 1, an application of the applicable legal principles to the combined findings of fact made in the original 2017 judgment and in the 2019 judgment, following remission, rendered the Tribunal's conclusion that the dismissal had been wrongful perverse.

As to ground 3, in determining whether the Claimant had been wrongfully dismissed, the Tribunal had erred in taking into account his long service, which, as a matter of law, was not a relevant consideration. Further and in any event, the Tribunal's implicit conclusion that, in all the circumstances, the Claimant's length of service tended in his favour was perverse.

DEPUTY HIGH COURT JUDGE NAOMI ELLENBOGEN QC

1. This is the Full Hearing of an appeal from the Judgment of Employment Judge Bartlett at Watford Employment Tribunal, sitting alone, sent to the parties on 11 January 2019 ("the 2019 Judgment"). I refer to the parties as they appeared below. Before me, Mr Colbey of Counsel appeared for the Claimant and Mr Leake, a Solicitor, appeared for the Respondent.

2. The 2019 Judgment resulted from an Order by the Employment Appeal Tribunal (Her Honour Judge Stacey) that the case be remitted to the Tribunal to determine whether the claim for wrongful dismissal succeeded or failed, following the Claimant's appeal from Employment Judge Bartlett's earlier judgment, sent to the parties on 15 September 2017 ("the 2017 Judgment"). By the 2017 Judgment, the Tribunal had dismissed claims of unfair dismissal, race and age discrimination. Whilst it had also dismissed the claim for wrongful dismissal, Her Honour Judge Stacey held that it had done so without first having made the requisite findings of fact and directing itself as to the applicable legal principles. At paragraphs 16 to 18 of her Judgment, dated 17 May 2018, she held as follows:

> **"16. Accordingly, I order that the wrongful dismissal part only of the case be remitted back to the same Tribunal to decide - with further evidence only if it decides it necessary - whether the claim for wrongful dismissal succeeds or fails. I set aside that part of the Judgment in the last sentence of paragraph 1, to that extent only.**
>
> **17. The issues for the Tribunal to decide, bearing in mind that it is the Respondent's burden of proof to prove to the civil standard, are:**
>
> > **(1) In the incident alleged by Mr Munro of being brushed by the train, what was the Claimant's behaviour? It will be for the Tribunal to decide whether the behaviour or conduct of the Claimant around the incident can or should be categorised as misconduct or negligence by reference to the evidence and the facts found.**
> >
> > **(2) Did that behaviour, when viewed objectively, amount to a repudiatory breach of contract?**
> >
> > **(3) Was the Claimant wrongfully dismissed?**
>
> **18. It is a fact-finding exercise and a matter for the Tribunal's judgment based on those facts. The Tribunal is referred to Adesokan v Sainsbury's Supermarkets Ltd, Neary v Dean of Westminster, and Sinclair v Neighbour [1966] 3 All ER 988 and AII, paragraphs 520 and 522 in Harvey to assist the Tribunal in reaching its decision."**

3. In the event, the Tribunal did not consider it necessary to receive further evidence or to convene a further hearing, determining the wrongful dismissal claim on the basis of the evidence received at the Hearing in August 2017 and the parties' written submissions, respectively provided by Mr Colbey and Mr Leake. It found that the Claimant had been wrongfully dismissed and was entitled to notice pay. By the two grounds of appeal from that finding which Her Honour Judge Eady QC (as she then was) allowed to proceed (being grounds 1 and 3 in the Notice of Appeal), the Respondent challenges that finding. In short, it contends that:

a. (ground 1) Employment Judge Bartlett's finding that the Claimant's conduct had been insufficiently grave and weighty to warrant summary dismissal was perverse, in light of certain findings of fact which she had made; and

b. (ground 3) also perverse and/or a misapplication of the relevant law was her reliance upon the Claimant's length of service as a relevant factor.

4. On 25 January 2019, the Respondent sought a reconsideration by the Tribunal of the 2019 Judgment on bases substantially replicated in its grounds of appeal to the Employment Appeal Tribunal. The Rule 3(7) consideration of that appeal was stayed pending the outcome of that application. The application was refused, for reasons sent to the parties on 14 May 2019 ("the Reconsideration Reasons").

The Material Facts

5. From 1981 until his summary dismissal for gross misconduct on 11 April 2016, the Claimant had been employed by the Respondent; from 1990 onwards as a shunter. On 26 November 2015, he had been working a night-shift at the Respondent's Ferme Park depot. At

approximately 5.30 that morning, he had authorised the departure of a Grand Central train, at the request of its driver. At that time the driver of an adjacent (VTEC) train, Mr Munro, had been preparing his own train for departure and had been standing on the road between the two trains. He reported that, as the Grand Central train had moved away, it had brushed him; a significant safety incident. Following a disciplinary process, the Claimant was summarily dismissed; a decision upheld on appeal. The Respondent concluded that the Claimant should had been on notice that a driver was in the vicinity of the VTEC train and/or taken steps to have discovered who it was that had taken a 'DOO', (Driver Only Operation) slip and to have ensured that that person was not in the vicinity of the VTEC train. In short, adequate safety checks had not been undertaken.

6. In the 2017 Judgment, the Tribunal made certain findings of fact material to the appeal with which I am concerned, set out below:

a. (at paragraph 84.4) that there was no policy governing the incident on 26 November 2015. What was required of the Claimant was that he exercise his judgment in the circumstances and carry out adequate safety checks. Such a responsibility was inherent in his role as a shunter, who has ultimate responsibility for not permitting trains to [depart][1] unless it is safe for them to do so. It is unarguable that the Claimant would not have been aware of his responsibility;

b. (at paragraph 84.6) on the Claimant's own evidence, he had failed to conduct adequate safety checks;

c. (at paragraph 85.1) that the Respondent operates in a safety critical environment;

[1] In the 2017 Judgment, there is a typographical error omitting this word, which is clear from the context.

d. (at paragraph 85.3):

i. that the Claimant's conduct could not reasonably be termed wilful, *'as it had all the appearance of negligence or inattention'*; and

ii. the Claimant's role made him the person effectively responsible for the depot and all the persons in it;

e. (at paragraph 85.4) it is reasonable to expect that individuals who have carried out a role for a substantial period of time will have sufficient experience and expertise to carry out that role to the required standard;

f. (at paragraph 85.5) the Claimant was carrying out an important safety role and, as he had failed to accept that he had done something wrong and would or could do it better in the future, the Respondent had legitimate concerns that the Claimant would not act differently in the future and therefore may pose safety risk.

7. Further relevant findings of fact were made in the 2019 Judgment:

a. (at paragraph 14) that the Claimant's behaviour is correctly characterised as negligence, for the following reasons:

> **"14.1 the responsibilities of the claimant's role meant that he was the person responsible for the depot and all persons in it;**
>
> **14.2 by virtue of the claimant knowing that the DOO slip was with someone else he was at least on notice that somebody could have been in the vicinity of the train;**
>
> **14.3 this has the consequence that he needed to carry out adequate safety checks to ensure that a person was not in the vicinity of the Grand Central train or he was required to locate where the person was who had the DOO slip before allowing the Grand Central train to move off. He did neither of these things. Even taking the claimant's case at its highest all he did was look down the sides of the train from the front or bottom on a dark November morning before sunrise.";**

b. (at paragraph 15) that the safety check conducted by the Claimant was not adequate in the circumstances, despite the fact that no policy directly covered the events described above;

c. (at paragraph 17) that the Claimant's conduct was a one-off event and that the 2017 Judgment had made a finding[2] that the Claimant's conduct had not been wilful.

d. (at paragraph 19) that the Claimant's conduct had fallen short of what was required of him; '*he had responsibilities as the shunter. He was responsible for ensuring the safe movement of the trains. Safe in this context includes the safety of the personnel working on site. The depot was a safety critical environment and the consequences of the act could have been catastrophic in that they could have led to loss of life'*;

e. (at paragraph 20) the situation at the depot at the time of the incident had been 'confused'; *'The Claimant was not aware who had taken the DOO slip and it would seem that Mr Munro had behaved reprehensibly by not communicating with the Claimant. The Claimant made assumptions (which may well have been erroneous) which led to his conduct. It was a series of unfortunate events'*;

f. (at paragraph 21) *'The Appellant had an extremely long employment history with the Respondent. I consider that this is a fact relevant in assessing whether the Claimant's behaviour undermined the implied term of trust and confidence in the employment contract. I find the Claimant's conduct was a one-off decision made in confused*

[2] at paragraph 85.3

circumstances. In all the circumstances, I find that this was not such a grave act of misconduct or negligence justifying summary dismissal.'

At paragraph 8 of the Reconsideration Reasons, the Tribunal said this (sic):

> **"The 3rd ground for reconsideration is that the references in the January 2019 Judgement to the claimant's length of service amounted to a misdirection of the tribunal or a perverse finding by the tribunal. The references to length of service are made in the context of assessing whether or not the claimant's conduct was sufficient to justify summary dismissal. The events giving rise to the claimant's dismissal occurred on 26 November 2015. Paragraph 84.4 of the September 2017 Judgement sets out that what was required of the claimant on that date was an exercise of judgement. The tribunal considers when assessing the employees judgement and whether or not, as a result of an exercise of that judgement, the implied term of trust and confidence between the parties was destroyed previous exercises of judgement may be relevant. As can be seen from the judgement in Pepper v Wade [1969] 1 W.L.R. 514 the background circumstances may be considered: *"It is said on his behalf that one act of temper, one insolent outburst, does not merit so condign a punishment. But this, according to the defendant, his employer, and I think rightly on the evidence, was the last straw. He had been acting in a very unsatisfactory way ever since April. He had that morning refused to obey his mistress's quite reasonable instructions, and when he, in addition, behaved in this way to the remonstrances of his employer I think he brought his dismissal upon himself and cannot complain of it".* Therefore the Tribunal finds that there is no reasonable prospect of success of the original decision being varied or revoked on this ground."**

The Parties' Submissions

The Respondent

8. On behalf of the Respondent, Mr Leake relies upon his skeleton argument, supported by his admirably concise oral submissions, today. In relation to ground 1 of the appeal, relying on the principles respectively set out in **Neary v Dean of Westminster** [1999] IRLR 288; **Sinclair v Neighbour** [1966] 3 All ER 988, CA and **Adesokan v Sainsbury's Supermarkets** [2017] ICR 590, CA, he submits that:

a. whether an employee's conduct justifies summary dismissal is a question of fact and there is no fixed rule of law defining the requisite degree of misconduct. Conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment: **Neary**, at

paragraphs 20 to 22, per Lord Jauncey of Tullichettle, acting as a Special Commissioner;

b. if, in all the circumstances, the employer can regard what the employee did as being something which is seriously inconsistent — incompatible — with the employment in which he is engaged, that is sufficient: **Sinclair**, per Sellers LJ, at 989 C-D; and

c. (said to be of greatest relevance) the question is "*whether the negligent dereliction of duty in this case was 'so grave and weighty' as to amount to a justification for dismissal",* recognising that *"it ought not readily to be found that a failure to act where there was no intentional decision to act contrary to or undermine the employer's policies constitutes such a grave act of misconduct as to justify summary dismissal"*: **Adesokan**, per Elias LJ, at paragraph 24.

9. Mr Leake's short submission is that, for an employee employed in a safety-critical role, it is difficult to conceive of a more grave and weighty negligent act than one the consequences of which, on the Tribunal's findings, *"could have been catastrophic in that they could have led to loss of life."* The fact that those potential consequences did not eventuate is not the point, as is clear from Elias LJ's judgment, at paragraph 27, in **Adesokan**. *"As to the fact that there was in fact no harm caused, in my view the judge was right, for the reasons he gave at paragraph 64 (para.16 above) to say that this is not a mitigating factor."* Any contrary conclusion, submits Mr Leake, is perverse, notwithstanding the well-known high hurdle to be surmounted, if such a contention is to succeed, for which **Yeboah v Crofton** [2002] IRLR 634 provides, at paragraph 99.

10. As to ground 3, Mr Leake first submits that whilst, as a matter of principle, length of service can be a relevant factor in considering whether dismissal falls within the band of reasonable responses, for the purposes of an unfair dismissal claim, it is of no relevance to a claim for wrongful dismissal. That much is clear, he says, from paragraph 23 of **Adesokan**: "*The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence."* In such circumstances, says Mr Leake, length of service is irrelevant and there is no principled reason why a case involving an act of negligence should give rise to an approach different from that applicable to an act of dishonesty. The Tribunal has impermissibly conflated the principles respectively applicable to unfair and wrongful dismissal. At best, there may be a distinction to be drawn between those facts or circumstances which are causative of, or have a bearing upon, the relevant act of misconduct (for example, an employee's ill-health) and those which are merely background, such as length of service.

11. Alternatively, Mr Leake submits, if length of service is a relevant consideration, then it aggravates, rather than mitigates, the Claimant's position in this case: higher standards should be expected of a long-serving employee, in particular given the Tribunal's finding, at paragraph 85.4 of its 2017 Judgment. Any contrary finding is perverse. Mr Leake submits that it is noteworthy that Mr Adesokan himself had been a senior manager, having lengthy service comparable with that of the Claimant in this case.

12. I asked Mr Leake (and Mr Colbey) whether I was obliged, or entitled, to take into account the matters set out at paragraph 8 of the Reconsideration Reasons. Mr Leake's submission was that, whilst I would be making no error of law in considering them, I was not obliged to do so and that, in any event, they advanced matters no further.

The Claimant

13. For the Claimant, Mr Colbey submitted a skeleton argument which simply cross-referred to the Respondent's Answer. I summarise the contentions which he advanced, both in that latter document and orally, below:

a. Regarding ground 1: the Tribunal made a permissible finding of fact and the Respondent cannot surmount the perversity threshold, in particular given the qualifying findings made by the Tribunal, at paragraph 20 of the 2019 Judgment;

b. Whilst a finding of negligence was "inevitable" when the Claimant had allowed the train to depart knowing that the relevant DOO slip was missing, the findings in paragraph 20 entitled the Tribunal to reach its ultimate conclusion, in mitigating or contextualising the Claimant's conduct;

c. Whilst the risk of death is, self-evidently, serious, in order to establish a breakdown of trust and confidence in the employment relationship that risk has to be considered in a broader context. For example, stop boards are safety related, but a mistake relating to their use would not be treated as always constituting a ground for summary dismissal, as the Tribunal's findings at paragraph 85.2 of the 2017 Judgment illustrate. It is not for the Employment Appeal Tribunal to decide where the line is to be drawn — that is a matter for the Tribunal;

d. Whilst **Adesokan** is a modern authority, perhaps carrying greater for weight for that reason, **Jupiter General Insurance Company Ltd v Ardeshir Bomanji Shroff** [1937] 3 All ER 67, PC remains good law. Reliance is placed before me (though was not before the Tribunal) on the speech of Lord Maugham, at 73H, *"...it can be in*

exceptional circumstances only that an employer is acting properly in summarily dismissing an employee on his committing a single act of negligence…", in contending that this illustrates the difficulty faced by the Respondent in persuading me that the Tribunal's findings were perverse: the Respondent would have to demonstrate that the Tribunal's implicit finding that the circumstances of this case were unexceptional crossed the relevant threshold. This it cannot do;

e. At paragraphs 16 and 18 of the 2019 Judgment, the Tribunal had directed itself in accordance with the correct legal principles, including the test set out at paragraph 24 of **Adesokan**, the last sentence of which appeared to echo the **Jupiter** test, albeit perhaps setting the bar a little lower. Having found that there had been no wilful failure by the Claimant, the Tribunal's conclusion was one which it was entitled to reach. This Tribunal should not fall into the trap identified by Lord Russell of Killowen in **Retarded Children's Aid Society v Day** [1978] ICR 437, CA, of searching around the Tribunal's judgment with a fine tooth-comb for some point of law;

f. If and to the extent that the facts of **Adesokan** are considered to be of relevance (which, Mr Colbey submits, they are not), they are more serious, in many ways, than the situation here. The vast majority of employees make mistakes, from time to time. It is unfortunate if those mistakes are made in a safety-critical area, but the mistake in this case, *"shows nothing about* [the Claimant] *beyond the fact that he made that mistake"*;

g. As for ground 3, whilst neither party had supported its submissions by reference to authority on the specific point, the Respondent is contending for a novel and sweeping point of law. Length of service must be a relevant factor to which to have regard in appropriate circumstances because it is material to the level of trust and confidence held by the employer in the employee. Thirty-five years of service, during which the Claimant had committed no similar or otherwise relevant mistake must be a proper consideration to take into account and the Tribunal cannot be criticised for having done so. The submission by Leading Counsel for the Claimant in **Adesokan**, recorded at paragraph 19 of the report, that summary dismissal of an employee *"with such long and unblemished service… was too harsh"* had attracted no judicial criticism in that case as being an irrelevant consideration. Whilst the distinction between causative and background facts is acknowledged, there is no principled basis for distinguishing between the two — both categories of fact can be relevant to a consideration of whether summary dismissal is justified;

h. The Employment Appeal Tribunal is entitled to take account of paragraph 8 of the Reconsideration Reasons, but the Claimant does not rely on the authority to which that paragraph refers and can see features within it which are distinguishable from the instant case.

Discussion and conclusions

Ground 1

14. The Respondent does not contend that the Tribunal failed to direct itself in accordance with relevant authority — indeed, it had been directed to that authority by Her Honour Judge

Stacey. The narrow question is whether, on the findings of fact made in 2017 and 2019, its conclusion was perverse.

15. The well-known passage at paragraphs 21 and 23 to 24 of **Adesokan** sets out the applicable principles when considering whether misconduct is gross and justifies summary dismissal. As Mr Leake observes, **Jupiter** was not cited to the court in that case, but I am not persuaded that it adds anything to, or detracts from, the analysis in **Adesokan** and I note, in **Jupiter**, Lord Maugham's alternative construction of the appropriate test, at 74B-C, being, *"whether the misconduct of the Respondent was… such as to interfere with and to prejudice the safe and proper conduct of the business of the company and therefore to justify immediate dismissal"*, after which he noted that the test to be applied must vary with the nature of the business and the position held by the employee.

16. If I am wrong about that, such that the test in **Jupiter** is inconsistent with the approach set out in **Adesokan**, then, as **Jupiter** is a decision of the Privy Council, I am bound by **Adesokan**, in accordance with the Supreme Court's decision in **Willers v Joyce & Anor** [2018] AC 843.

17. In my judgment, applying the principles set out in **Adesokan**, the Tribunal's conclusion was, indeed, perverse, when viewed in the context of all relevant findings of fact and, in particular, those following:

a. It was unarguable that the Claimant would not have been aware that it was his responsibility to carry out adequate safety checks;

b. He had failed to conduct the relevant safety checks;

c. It was reasonable to expect that individuals who have carried out a role for a substantial period of time will have sufficient experience and expertise to carry out that role to the required standard;

d. The Claimant's behaviour is correctly categorised as negligence, for the reasons set out in paragraph 14 of the 2019 Judgment;

e. The consequences of the Claimant's act could have been catastrophic, in that they could have led to a loss of life; and

f. As the Claimant had failed to accept that he had done something wrong and would or could do it better in the future, the Respondent had legitimate concerns that the Claimant would not act differently in the future and, therefore, may pose a safety risk.

18. In so concluding, I do not lose sight of the Tribunal's further finding, to the effect that the Claimant's conduct had not been wilful, or of those findings made in paragraph 20 of the 2019 Judgment (although I confess to having some difficulty in understanding the source of the latter, given the findings of fact made in the 2017 Judgment, subsequent to which no further evidence had been received or relied upon by the Tribunal). I shall address the relevance of the Claimant's length of service separately, when considering ground 3, below, but, assuming that to be a relevant consideration for current purposes, in my judgment, the Respondent, nonetheless, has discharged the **Yeboah** test. Mr Leake is right to submit that it is difficult to conceive of a more grave or weighty action than one which puts the life of another person at risk. He is equally right to contend, for the reasons which he submitted, that the fact that the risk did not eventuate is immaterial. There was the Tribunal's further finding that the Claimant had not acknowledged his wrongdoing and the associated concerns on the part of the Respondent to which that had given

rise. Even as qualified by the "softer" findings on which Mr Colbey relies and the limitation on the parameters available to a judge, to which Elias LJ referred at paragraph 24 of **Adesokan**, I consider that the findings to which I have referred at paragraph 18 above rendered the Tribunal's conclusion perverse. I note, too, that the qualification set out in **Adesokan** was expressly related to *"a case of this kind"*, in which the facts were very different from, and I do not accept less serious than, those with which the Tribunal in this case was concerned. We are not, here, in fine tooth-comb territory.

19. It follows that I allow ground 1 of the appeal and will address its disposal having first considered ground 3.

Ground 3

20. I can deal with this ground of appeal shortly. The test is that set out in **Adesokan**. Taking Mr Colbey's point that the damage wrought by a single act to a longer employment relationship may differ from that wrought to a shorter one, the question remains *"was the negligent dereliction of duty in this case so grave and weighty as to justify summary dismissal."* For the reasons previously set out, I consider that it was and that, on the findings of fact made by the Tribunal in this case, read as a whole, its contrary conclusion was perverse. Length of service has no bearing on that question and I consider that the Tribunal erred in law by holding to the contrary. For the sake of completeness, I also consider that Mr Colbey places a weight on the absence of judicial criticism, in **Adesokan**, of the asserted relevance of length of service which it will not bear. Indeed, the submission's having been made, one would have expected the court to have indicated, had it been a relevant factor, when addressing the appropriate test.

21. Even if I am wrong about that, the Tribunal had found as a fact, at paragraph 85.4 of the 2017 Judgment, that:

> **"It is reasonable to expect that individuals who have carried out a role for a substantial period of time will have sufficient experience and expertise to carry out that role to the required standard."**

In particular in the context of its further finding that, *"the Respondent had legitimate concerns that the Claimant would not act differently in the future and therefore may pose a safety risk"*, but in any event, I consider that the Tribunal's implicit finding that the Claimant's long service tended in his favour, was itself perverse.

22. For the sake of completeness, this being an appeal from the 2019 Judgment, I am not convinced that it is proper for me to have regard to paragraph 8 of the Reconsideration Reasons, but, even if it is, I do not consider that that paragraph takes matters any further, given my conclusions above and regarding ground 1 of the appeal.

23. It follows that ground 3 of the appeal is also allowed.

Disposal

24. I turn to disposal. Both Counsel properly acknowledge that I must have regard to the well-known principles in **Jafri v Lincoln College** [2014] EWCA Civ 449 in considering whether I am obliged to remit the matter to the Tribunal (whether or not differently constituted), or can properly conclude what different result there must have been without the errors identified.

25. As will appear from my analysis and conclusions on ground 1, in my judgment, applying the correct legal principles to the facts as found, the only proper conclusion which the Tribunal could have reached was that the claim for wrongful dismissal was unfounded. Whilst, viewed in

A isolation, excluding length of service as a valid consideration might, in other circumstances, have warranted remission of the matter to the Tribunal, the effect of my conclusions on ground 1 is to render that course inappropriate.

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26. In those circumstances, I substitute for the Tribunal's conclusion a finding that the claim of wrongful dismissal fails and should be dismissed.

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