



EMPLOYMENT TRIBUNALS

Claimant: Mr Amanuel Ghebrehiwt

Respondent: Wilson James Limited

Heard at: East London Hearing Centre

Before: Employment Judge Peter Wilkinson

On: 12 January 2022 and 26 January 2022

Representation

Claimant: In person

Respondent: Piers Chadwick, KLC Employment Law Consultants LLP

JUDGMENT

1. The Claimant's claim for unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.
2. The Claimant's claim for wrongful dismissal in breach of contract is not well founded and is dismissed.
3. The Judge apologises to the parties for the delay in promulgating this Judgment, which has arisen as a result of illness.

REASONS

1. The Claimant was employed by the Respondent from 21st June 2013 to 11th March 2021, when his employment ended following his summary dismissal. At the time of his dismissal the Claimant was working as a Customer Service Security Officer. Following a period of ACAS Early Conciliation, the Claimant presented an ET1 on 24th July 2021. He has brought the following claims:

- 1.1. A claim of unfair dismissal under Part X of the Employment Rights Act 1996; and
- 1.2. A claim for wrongful dismissal in breach of contract, it being the Claimant's case that if his dismissal was not unfair it was nonetheless wrongful in that he was not paid for his contractual notice period.
- 1.3. A claim for accrued but unpaid holiday pay, which was resolved by agreement, the respondent having accepted that the Claimant had been underpaid his holiday entitlement and agreeing to pay it forthwith.

2. The case was listed for one day via CVP. The matter over-ran and was listed for another day. There was insufficient time at the conclusion of the hearing to give judgment and reasons which were formally reserved.

The Issues

3. The issues in the case were not in dispute and were as follows:

3.1. Unfair dismissal

3.1.1. It was admitted that:

3.1.1.1. The Claimant had sufficient continuity of service to present a claim of unfair dismissal without needing to show any automatically unfair reason for the dismissal; and

3.1.1.2. There was no dispute that the Claimant had been expressly dismissed by the Respondent; so

3.1.1.3. The first contentious issue was whether the Respondent could show that the dismissal was for a potentially fair reason. The Respondent says that the reason for the dismissal was conduct namely;

3.1.1.3.1. That the Claimant had failed to attend at his place of work without authorization from 27th January to 4th March 2021.

- 3.1.1.4. The Tribunal needed to decide whether:
- 3.1.1.5. There were reasonable grounds for the Respondent's conclusions which were;
- 3.1.1.6. formed following a reasonable investigation; and
- 3.1.1.7. whether the Respondent followed a reasonable procedure; and
- 3.1.1.8. taking these matters into account whether the dismissal was fair or unfair applying the test in sub section 98(4) of the Employment Rights Act 1996?
- 3.1.1.9. If the dismissal was unfair should any compensatory award be reduced to reflect any possibility that, had the Respondent acted fairly, the Claimant could or would have been dismissed in any event? and/or
- 3.1.1.10. Whether any basic award and/or compensatory award should be reduced under sections 122(2) and/or 123(6) of the Employment Rights Act 1996 because of any conduct by the Claimant.

The hearing

4. In advance of the hearing the respondent had prepared a bundle of documents for the Tribunal running to some 379 pages. The Respondent asserted that this bundle was sent to the Claimant and the Tribunal on 20/12/2021. The Claimant says he received it on 28/12/2021 and sent a suggested revised bundle with an additional 21 pages on 05/01/22. The additional pages were sent to the Respondent at the beginning of this hearing and were not objected to. The Tribunal thus continued with the 400 page bundle. The parties had also prepared and exchanged witness statements from the following people:

- 4.1. the Claimant; and
- 4.2. Aliue Ceesay, the Security Manager of the Respondent; and
- 4.3. Joseph Gallagher, a Senior Team Leader with the Respondent, appointed to carry out the preliminary investigation in respect of allegations of breach of GDPR and of being absent without authority, details of which were set out in the letter to the Claimant dated 29th January 2021, sent by post and by email on 1st February 2021.

5. In the course of the hearing, the Claimant made previously unheralded accusations that the Respondent had fraudulently altered records in the bundle so as to create a false impression of what had been communicated to him and when. The Respondent requested permission to adduce fuller versions of the contact records to rebut the allegation of fraud. Permission was granted and the Tribunal considered the records of communications in the bundle alongside the fuller records, which showed the numbers from which communications were sent and the number of the recipient.

6. During the course of this hearing, the Claimant asserted that the reason for his non-attendance at work from 5th March 2021 onward was that he was taking time off to look after his elderly mother, who was on the 'exceptionally vulnerable' list during the Covid 19 lock down in force at the time. It was his position that he had a right to time off to look after his mother and that he had been advised that he did not need permission from the Respondent to take such time off. The Claimant asserted that he had been told and that he believed that he was entitled to take time off work to care for a vulnerable dependent and that accordingly, he did not need to notify the Respondent, who he asserted was aware that he was the unpaid carer for his mother.

7. He has not made any claim for automatic unfair dismissal under s99 ERA 1996, but I intend in any event to deal briefly with the law relating to time off for dependents, provided for in s57A ERA 1996.

8. The Tribunal heard oral evidence from the Claimant, Mr Ceesay and Mr Gallagher and considered the documents in the bundle to which it was referred during the hearing.

Findings of fact

9. In this section I set out my primary finding of fact, drawn from the evidence I have heard and read. I do not intend to deal here with all the evidence, but I have considered it all in reaching my conclusions.

10. The Claimant gave evidence in a manner which I considered was unreliable and evasive. On a number of occasions, he gave an account of events which he accepted he had never given before the hearing. When taken to inconsistencies between his oral evidence and the documents in the bundle he gave accounts which were frankly not credible.

11. An example of the above arose when the Claimant asserted that he had been absent without authorization because his mother was exceptionally vulnerable and he needed to care for her. He was taken to an email which he said he sent to Mr Ceesay on 4th February 2021 at 23:39. In that email, he gave his responses to a number of allegations which were under investigation. In the course of those response, he wrote "*Moreover, as I am caring for vulnerable family members in my household who have been forced to shield, I am unable to neglect my personal responsibilities and return to work before the end of lockdown*". He was challenged on the use of the plural 'family member. Who have been forced...' given that his evidence before the Tribunal was that it was his mother to whom he was providing care. He was asked who the other family members were. His response was that this was a 'typo' 'spellchecker changed it' It also changed "who has" to "who have". It appeared to me to be entirely unbelievable that the spell check function in the Claimant's word processing software would remove the 'a' before "vulnerable family member", insert an 's' on the end of "member" and change "has been forced" to "*have been forced*". I was reinforced in my view that this was unlikely to be a true account for the use of the plural by the fact that, in an email on 12th February, the Claimant said "*As I have since been caring for vulnerable family members who have been forced to shield...*". This was by no means the only occasion in the Claimant's evidence when he appeared to be "making it up as he went along" as it was put to him in cross examination.

12. I have carefully considered the contact records provided by the Respondent, which the Claimant now alleges to have been fraudulently altered. I have considered them against fuller records provided during the hearing. I do not consider there is any evidence whatsoever of fraud and I find the records relied on by the Respondent to be entirely consistent with both the fuller records provided and with the other documentary evidence.

Facts

13. The Claimant was absent from work from 27/01/2021 to 4th March 2021.

14. The Claimant was referred to a copy of the company absence policy. He agreed that it formed part of his contract. He also agreed that the company absence procedure required him to contact his line manager not less than two hours before he was due to report for work, in the event that he was going to be unable to attend. He accepted that he had not contacted his line manager nor had he attempted to contact his line manager, despite having his phone number. He gave various reasons for this, none of which I found persuasive.

15. The Claimant also accepted that his contract required him to keep the company regularly updated and to respond to requests for further information within a reasonable time.

16. It was the Claimant's position that he was absent from work from 27/01/2021 to 05/02/2021 because he was self isolating with Covid. He said that he had not contacted his manager but had contacted the company operations centre by telephone. He was unable to say who he spoke to. It was further his case that he did not attend at work from 5th February 2021 to the date of his dismissal on 11th March 2021 because he was caring for a vulnerable relative who was shielding due to being at high risk of catching Covid.

17. The Claimant admitted that he had not sought permission to take time off work to look after his mother and averred that he did not have to, as he had a statutory right to time of work to care for a vulnerable dependent, without needing leave from his employer. He said that he had been told he had this right by multiple sources. His oral evidence on this included "I did not request time off work to look after my family member", "I was her unpaid carer", "authorization is not required for an employee to take time off to look after your mother" and "I did not seek authorization. I did not see that I needed authorization".

18. The Claimant was taken to phone records which appeared to show that his line manager had messaged him and called him repeatedly from 25/02/2021 onward to ask when he would be returning to work. He denied receiving any of those communications. He expressly said that he did not receive any of the text messages between 22nd January and 27th January. Despite this, the records clearly indicate that he replied to one of the messages, at 08:10 on 23rd January. His response to this was to say that the message history had been fraudulently altered. I find as a fact that the Claimant was well aware that his line manager was trying to contact him to see when he would be returning to work and that he deliberately did not respond.

19. The Claimant was invited to an investigation meeting scheduled to be held on 5th February. He produced a written statement of his defense but failed to attend the meeting. The meeting was thus re-timetabled for 8th February and the Claimant was invited to attend on that date. He again failed to attend.

20. The Claimant was warned by email that his absence had not been authorized and that a failure to attend at work on 22nd February may result in disciplinary action.

21. The Claimant was sent a letter on 19th February inviting him to attend a disciplinary hearing on 25th February in relation to another matter, which in the event was not pursued. He requested the meeting be rescheduled for 4th March 2021, as his chosen representative was not available.

22. In his evidence to the Tribunal, the Claimant He stated that in fact he never had any intention of attending in person on 25th February, despite having said in his email that he wanted to reschedule because “my chosen companion is not available”, and was hoping to have someone attend for him. He accepted that he had never given that account before. The hearing was rescheduled for 4th March 2021, to be held remotely over MS Teams.

23. The Claimant did not attend the hearing on 4th March and did not provide any reason for not doing so. The hearing proceeded in his absence. In his evidence to the Tribunal, he said that he had not attended because he had no internet access. He said his phone hotspot was not working. He said “by the time my phone was fixed it was after 4:00 o’clock. I saw no point trying to communicate with the Respondent”. He also said “I did not even fix it that day”. He said his phone was fixed some days after. He said his chosen companion did not attend because he did not send them the details in time. Then he said he was not represented because he had not renewed his union membership in time and in the event the union could not represent him. He accepted that this was all new evidence.

24. The Claimant was informed of his dismissal by email on 11th March 2021 and was notified of his right to appeal. He did not appeal.

25. At the close of his evidence, the Claimant said that he agreed he was absent from work without authorization but that he did not need authorization as he was providing care for his mother and the law provides that unpaid carers can take time off in emergency cases.

Unfair dismissal

26. The right not to be unfairly dismissed is conferred by Section 94 of the Employment Rights Act 1996. Where, as here, there is no dispute that an employee was dismissed the question of whether any such dismissal was unfair turns upon the application of the test in Section 98 of the Employment Rights Act 1996. The material parts of that section are as follows:

98 General.

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) *the reason (or, if more than one, the principal reason) for the dismissal, and*

(b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*

(2) *A reason falls within this subsection if it—*

(a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*

(b) *relates to the conduct of the employee*

(c) *is that the employee was redundant, or*

(d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

(3) *.....*

(4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

(a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

(b) *shall be determined in accordance with equity and the substantial merits of the case.*

27. For the purposes of Section 98(2) ERA 1996 'conduct' means actions 'of such a nature whether done in the course of employment or outwith it that reflect in some way upon the employer/employee relationship': **Thomson v Alloa Motor Co Ltd [1983] IRLR 403**, EAT. It is not necessary that the conduct is culpable **JP Morgan Securities plc v Ktorza UKEAT/0311/16**.

28. Where the reason, or principal reason, for the dismissal is established as conduct then it will usually, but not invariably, be necessary to have regard for the guidance set out in **British Home Stores Ltd v Burchell [1978] IRLR 379**, which lays down a three-stage test: (i) the employer must establish that he genuinely did believe that the employee was guilty of the misconduct; (ii) that belief must have been formed on reasonable grounds; and (iii) the employer must have investigated the matter reasonably. Following amendments to the statutory scheme the burden of proof is on the employer on point (i) (which goes to the reason for the dismissal) but it is neutral on the other two points **Boys and Girls Welfare Society v McDonald [1996] IRLR 129**.

29. The correct test is whether the employer acted reasonably, not whether the tribunal would have come to the same decision itself. In many cases there will be a 'range of reasonable responses', so that, provided that the employer acted as a reasonable employer could have acted, the dismissal will be fair: **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**. That test recognises that two employers faced with the same circumstances may arrive at different decisions but both of those decisions might be reasonable.

30. The range of reasonable responses test applies as much to any investigation and the procedure followed as it does to the substantive decision to impose dismissal as a penalty **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.

31. In terms of the reasonableness of the investigation and the procedure that was followed, the "relevant circumstances" referred to in Section 98(4) include the gravity of the charge and their potential effect upon the employee **A v B [2003] IRLR 405**. **A v B** also provides authority for the proposition that a fair investigation requires that the investigator examines not only the evidence that leads to a conclusion that the employee is guilty of misconduct but also that which tends to show that they are not. However, where during any disciplinary process an employee makes admissions a reasonable employer might normally be expected to proceed on the basis of those admissions **CRO Ports London Ltd v Mr P Wiltshire UKEAT/0344/14/DM**.

Potentially fair reason for dismissal

32. I am satisfied that the reason for the Claimant's dismissal was the Respondent's belief that the Claimant had failed to attend work without having permission from the Respondent to not attend.

33. I am entirely unconvinced by the Claimant's suggestion that there was some conspiracy to get rid of him to save money nor that the senior management in some manner had it in for him because of previous complaints. The Claimant could point to no evidence in support of these contentions, whilst the evidence of the Claimant's unauthorized absence was not only clear, it was not in dispute. As the Claimant himself put it "*I did not seek authorization. I did not see that I needed authorization*".

Reasonable grounds for belief

34. As noted above, the Claimant himself accepts that he was absent from work without authority. He accepts that he failed to seek permission from the Respondent to be absent from work and does not consider that he needed such permission.

35. In the circumstances, I conclude that the Respondent had reasonable grounds for believing that the Claimant was absent from work without authority, in breach of his contract.

Reasonable investigation

36. The Claimant chose not to take more than a token part in the investigative and disciplinary process. He was invited to investigative meetings and disciplinary meetings and chose not to attend.

37. The Respondent asked for evidence from the Claimant that he had sought authorization or even provided notification of a need for him to shield. The Respondent asked for evidence that he personally was required to shield. He did not provide it.

38. I have seen the notes of the investigative and disciplinary hearings and heard evidence from those responsible for those processes.

39. In the circumstances, I am satisfied that the Respondent carried out a reasonable investigation.

Procedure

40. Having considered the steps taken to deal with this matter, from the first investigation to the letter confirming dismissal and conveying the information that the Claimant had a right to appeal, I am satisfied that the Respondent followed an entirely appropriate procedure, which was fair.

A right to time off for dependents

41. Although the Claimant has at no time sought to bring a claim for dismissal as a result of exercising the right to time off for dependents, provided for in s57A of the Employment Rights Act 1996, during the course of the final hearing, he asserted that he had a right to take time off without authorization by his employer because he was caring for a vulnerable family member. He mentioned having a right to time off to deal with emergencies.

42. ERA 1996 s57A provides as follows:

Time off for dependants.

- (1) 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 or is injured or assaulted,
 - (b) to make arrangements for the provision of care for a dependant who is ill or injured,
 - (c) in consequence of the death of a dependant,
 - (d) because of the unexpected disruption or termination of arrangements for the care of a dependant, or
 - (e) to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.
- (2) Subsection (1) does not apply unless the employee—
 - (a) tells his employer the reason for his absence as soon as reasonably practicable, and
 - (b) except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.
- (3) Subject to subsections (4) and (5), for the purposes of this section " dependant " means, in relation to an employee—

- (a) a spouse [**F3**or civil partner] ,
 - (b) a child,
 - (c) a parent,
 - (d) a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder.
- (4) For the purposes of subsection (1)(a) or (b) “ dependant ” includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee—
- (a) for assistance on an occasion when the person falls ill or is injured or assaulted, or
 - (b) to make arrangements for the provision of care in the event of illness or injury.
- (5) For the purposes of subsection (1)(d) “ dependant ” includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee to make arrangements for the provision of care.
- (6) A reference in this section to illness or injury includes a reference to mental illness or injury.]

43. The interpretation of these provisions was considered at some length by the Employment Appeal Tribunal in the case of **Qua v John Ford Morrison Solicitors [2003] UKEAT 884_01_1401**.

44. The EAT considered the origins of the legislation in a European Union Directive, providing for time off on grounds of *Force Majeure* for urgent family reasons. They further considered the relevant passages in Hansard, relating to the intended effect of the provisions. The Tribunal concluded that the provisions were intended to provide for reasonable time off during working hours to deal with ‘a variety of unexpected or sudden events affecting their dependents, as defined and to make arrangements for their long term care.

45. On the Claimant’s own evidence, he knew that his mother was being advised to shield as at around 1st February 2021. He *may*, subject to notifying his employer in accordance with s57A(2)(a) have had a right to take sufficient time off work to *arrange for* her care. That is not at all the same as taking time off work to provide care for her himself, which is not what is provided for in s57A.

46. Of particular note in the instant case is the citation from Hansard relied on by the EAT at paragraph 20 in *Qua*:

“This right is to help people deal with emergencies. A limit would not make sense and could be seen as a minimum, which employees might well consider an entitlement to be added to their annual leave. In all cases, the right will be limited to the amount of time which is reasonable in the circumstances of a particular case. For example, if a child falls ill with chickenpox the leave must be sufficient to enable the employee to cope with the crisis – to deal with the immediate care of the child and to make alternative longer-term care arrangements. The right will not enable a mother to take a fortnight off while her child is in quarantine. In most cases, whatever the problem, 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.”

47. The Claimant was not dealing with an emergency. It was not his case that he needed this time off to arrange care for his mother, who had suddenly become ill. It was his case that he was entitled to take unauthorized time off work in order to provide ongoing care to his mother.

48. I do not consider that s57A is capable of being interpreted in the manner contended for by the Claimant. Specifically, I do not consider that the Claimant was entitled to take time off without authorization to provide care for his mother in the circumstances of this case.

49. In any event, in the light of the construction of s57A and the guidance given in *Qua*, I do not consider that the period from 1st February 2021, when the Claimant says he first became aware that his mother was being advised to shield, to the end of April 2021, when the Claimant says he would be able to return to work, could be considered to be “a reasonable amount of time off” for the purposes of the 1996 Act.

50. As a consequence of the above, I find that the Claimant was not entitled to take the relevant period off work without authority from his employer and that the Respondent was fully entitled to treat his unauthorized absence as gross misconduct.

Conclusion

51. Given all of the above, I find that the decision of the Respondent to dismiss the Claimant fell within the band of reasonable responses and that it followed from a belief in the Claimant’s misconduct, reasonably held after a proper investigation, and that the dismissal was fair in all the circumstances of the case.

**Employment Peter Wilkinson
Dated: 26th July 2022**