



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Ms Rebecca Christie

v

British Airways plc

Heard at: Reading **On:** 23, 24 November 2021, 28, and 29 September 2022

Before: Employment Judge Gumbiti-Zimuto

Appearances

For the Claimant: Mr Ben Jones, counsel

For the Respondent: Ms Elizabeth Grace, counsel

REASONS

[For judgment sent to the parties on 17 November 2022 provided at the request of the respondent]

1. In a claim form that was presented on 30 August 2019 the claimant brought a claim for unfair dismissal and wrongful dismissal against the respondent.
2. Unfortunately, this case has taken a significant amount of time for it to be heard by the Tribunal. It was many months after it was presented before there was a preliminary hearing on 26 May 2020 when the case was listed for a hearing between 23-26 November 2021, more than a year after the preliminary hearing. Unfortunately it was impossible to complete the case in the days that had been set aside and it was part heard for about ten months before the case came back before me this week to complete the hearing. Whilst the delay is nobody's fault the delay would have caused particular anxiety to the claimant and no doubt also caused anxiety to her former colleagues who were also interested in the outcome of this case. Hopefully one day cases like this will not take quite so long to progress to a conclusion.
3. The respondent denied the claimant's claims and contends that she was fairly dismissed and lawfully dismissed.
4. The case essentially was about whether the claimant's various absences from work were in breach of the sickness absence policy or the dependency leave policy of the respondent. If the absences were in breach of the policy the respondent says that there was repudiatory breach by the claimant to justify dismissal. In any event the respondent says the claimant's conduct was such that it was justified in dismissing the claimant.

5. There has lately arisen a question as to whether this is a case of unfair dismissal relating to conduct or in which consideration is being given to some other substantial reason justifying dismissal. I am satisfied from a consideration of the evidence and also the way that the case was pleaded that this is a case of misconduct. The claimant was subjected to a disciplinary process which arose because it was alleged that she had misused the respondent's dependency leave and sick leave policies and she was then disciplined under the respondent's EG901 policy which is concerned with misconduct.
6. I heard evidence in this case from the claimant. I also heard evidence from Mrs Caroline Gabriel nee Caroline Connor who dismissed the claimant. I also heard evidence from Mrs Sarah Martin who heard the first stage appeal and Mr Geoffrey Edward Ayres who dealt with the second stage appeal. I was also provided with a digital and a hard copy bundle of documents which I have considered in arriving at my conclusions in this case.
7. The respondent has a policy known as EG300. Section 5 of that policy states that an employee who behaves in such a way that it appears to the company that their absence is not legitimate, will be dealt with under EG901 disciplinary procedures. The respondent also has a policy which is known as EG406 and it is a policy that regulates the way that the respondent grants reasonable time off for dependants including compassionate leave.
8. On 3 January 2019 the claimant attended an informal meeting with her line manager who was at that time Daniel Ansell. It was to discuss her high level of absences and a recurring pattern of requesting unpaid leave or time off, then subsequently reporting sick or using dependency leave when the original request was not granted. Following that meeting Mr Ansell made the decision to initiate some preliminary investigations into the claimant's absences under the respondent's EG901 policy.
9. The investigation meeting under EG901 took place on 30 January and subsequently was passed to another manager to review and that manager decided that there should be a disciplinary hearing under the EG901 policy. Mrs Gabriel was appointed as the disciplinary hearing manager and she invited the claimant to a disciplinary hearing on 22 March.
10. The letter that set out the allegations against the claimant said that there was a continuous pattern of absence where she had either reported sick following a period of absence or reported sick or requested dependency leave when the requested time off had been denied. The letter sets out specific occasions where periods of absence had occurred. The claimant was told that the allegations were serious and if found may amount to gross misconduct for which the appropriate sanction may be dismissal. The hearing took place with the claimant's trade union representative, Mr Burgess, also present.
11. During the course of the hearing the claimant was asked about her absences and in relation to some of the absences she was able to provide explanations, in relation to others she was not able to recall what had happened. One particular occasion that she was questioned about was a festival in

September 2017. On that occasion the claimant admitted that she had attended the festival but denied that she had told her line manager at an earlier meeting that she had not attended the festival. The claimant says that she could not possibly have said that she did not attend the festival because her whole case in response to these allegations on that occasion was around the fact that she did attend the festival but only for a limited period of time.

12. The claimant also discussed a number of other incidents which involved her absence from work and it was put to her, essentially, that she was adopting a pattern whereby when an avenue or a means for her to obtain leave was refused she would be absent sick and it was said, it has been the respondent's case, that there is a pattern of this occurring. She asked for leave, dependency leave, unpaid leave, paid leave and when it is refused she reports sick. It was also said that there were occasions when the claimant was absent from work sick following periods of time when she had been off work. All this was said to form a pattern and that was the reason for the disciplinary process commencing against her.
13. After considering these matters Mrs Gabriel came to the conclusion that the allegations against the claimant were proved and she made the decision that the claimant should be dismissed. She set out her reasons for dismissing the claimant in a letter dated 3 May 2019.
14. The claimant appealed against the decision to dismiss her. Her first appeal was heard by Mrs Martin and the second appeal was heard by Mr Graham Ayres and the conclusion of both appeals was that the decision to dismiss the claimant should be upheld. It seems to me on considering this case that there is not anything in the appeals that significantly adds to the decision which was made by Mrs Gabriel and in analysing events I concentrate on the conclusions that were reached by Mrs Gabriel in this case.
15. The first incident that Mrs Gabriel was concerned with concerned the claimant's absence between 27 December 2016 and 29 December 2016. When the claimant was asked about this occasion she could not recall the period of absence and Mrs Gabriel states that the claimant appeared on occasions to give different answers about her absences during the preliminary investigation, during the disciplinary hearing and again on the reconvened hearing. This was an occasion of sickness absence occurring during the peak period for the respondent, that is the Christmas and New Year period and it was a period of absence in the middle of two periods of time off.
16. The respondent's staff are often keen to take time off at Christmas to spend with their families and that holiday time is at a premium. So for the respondent any absence at that time of year has a significant operational impact on the respondent's business and in this case the claimant's absence followed two days of annual leave on 25 and 26 December and she was absent between 27 to 29 December and on 30 and 31 December she had days off anyway so it is the case that the claimant had time off from 26 December until January without a break.

17. When she came to consider this period of absence Mrs Gabriel reached the conclusion that was set out in her decision letter. I do not think that the conclusion is entirely clearly expressed in that letter and she repeats the conclusion in her witness statement and what she concluded is that the claimant had sought to extend her time off to be with her family over the Christmas period by reporting sick. It is not explicitly stated but I think what Mrs Gabriel is saying there is that the claimant, while not sick, reported sick in order to extend time. It seems to me that she must be intending to convey that otherwise it is difficult to see what it is that the claimant has done wrong.
18. In cross-examination during the course of this hearing it was put to Mrs Gabriel that there was no proper basis for saying that the sickness absence of the claimant was not genuine. My note does not record an acceptance of this suggestion but my note does record that Mrs Gabriel stated that my role was to consider a pattern of absence. This was part of the pattern. I note that in his submissions Mr Jones says that Mrs Gabriel accepted that there was no evidence that this is not a genuine absence.
19. I stop to say that during the course of this judgment I am also going to express my own conclusions. It is important to emphasise that my own conclusions for the purposes of the wrongful dismissal claim I do not seek to place my conclusion over those of the respondent's witnesses in respect of their considerations in the unfair dismissal claim but I do have to make conclusions in order to deal with the wrongful dismissal claim.
20. I am of the view that objectively in assessing the evidence as it appears to me today that there was no reason to suppose that the claimant's absence was not genuine in December 2016. There was no reason to suppose that there was a breach of EG300 by the claimant. The fact that the claimant may not have been able to be precise or explicit may have given contradictory or even confusing accounts three years after events or after almost three years after events occurred seems to me is not a matter that one can attach tremendous significance by. Mundane absences from work through sickness would probably be for a limited variety of causes unless the person is unfortunate enough to be struck down with something particularly significant but it is likely that if your absences from work are for things like colds or diarrhoea, vomiting that you are not necessarily going to be in a position to say that on that occasion and on that occasion it was that.
21. I appreciate that there may be circumstances where that would be different, for instance if a person was sufficiently lucky as never to be sick it may be that the one time that you are sick will stand firmly in your memory or if you are unfortunate enough to be somebody who is afflicted by something particularly serious or particularly notable then that might be different.
22. The next period of time that was the subject of consideration by Mrs Gabriel was the absence between 10 June and 12 June. In relation to this absence what Mrs Gabriel found was because of the inconsistencies, in the claimant's responses to questions in relation to this period of events, and the differing answers given in the preliminary investigation, disciplinary hearing, and the fact that the claimant had said something to the operational support team on

9 June (that she would not be reporting for duty on her roster on 10 June), Mrs Gabriel concluded that the claimant's sickness was not genuine on this occasion.

23. During the course of the hearing when questioned Mrs Gabriel stated that she considered that the claimant could have been lying when she said that she had lost her purse. This was an occasion when whilst in France the claimant says that she mislaid her property for a period of time. This caused her to be particularly anxious. Mr Jones put to Mrs Gabriel that there was nothing to suggest that this was not a genuine sickness on the part of the claimant. What happened, as I understand it, was that the claimant had lost a bag and other property. At the time that the claimant had lost a number of items including her passport. She subsequently was able to get those back, but before that she suffered a migraine and reported sick. It was the report sick with the migraine that was being considered. Mr Jones put to Mrs Gabriel that there was nothing to suggest that the claimant's report of being sick due to migraine was anything other than true. Mrs Gabriel stated that she did not consider that the claimant was genuinely ill on this occasion.
24. In relation to this occasion and insofar as I am considering a wrongful dismissal complaint, I am unable to reach the same conclusion as Mrs Gabriel on this issue. I emphasise that I am not seeking to replace her views for mine in relation to her considerations for the complaint of unfair dismissal but for the wrongful dismissal claim it is necessary for me to consider whether the claimant was in repudiatory breach of her contract and it seems to me that in relation to this incident there really was not anything that shows that the claimant was lying. This is I think probably the first of a number of instances where because of the positioning of the claimant's request for sickness absence with a period of time off work, or some other form of leave meaning that she was off work, that the respondent has applied a presumption that it was not a genuine absence and has sought to put the onus on the claimant to prove that it was genuine in circumstances when there is absolutely nothing to suggest that it was anything other than genuine.
25. This places the claimant at a significant disadvantage in circumstances where she is just taking the odd day off work because she has got a cold or a migraine because she would not be expected to produce corroborating evidence by going to her GP or a doctor to confirm her condition on that day. The requirement to produce that sort of medical evidence only arises when the absence from work is for an extended period. So my conclusion is that there really is not any evidence from which the respondent is entitled to conclude that it was more likely than not that the claimant was not sick on that day unless that presumption is being applied.
26. The next period of time that is under consideration was the 30 August 2017 to 3 September 2017. In her witness statement Mrs Gabriel stated that there was no information which questioned the claimant's behaviour before or after the absence and she accepted that the claimant had not on this occasion previously requested time off which had been denied. However, she said that the period of sickness demonstrated the same pattern as previous and subsequent absences whereby the claimant's absence occurred following a

period of time off and on this occasion there were eight days that had been requested and achieved. So when the claimant reported sick on this occasion Mrs Gabriel states that she believed this period of sickness absence was not genuine and was premeditated and was used to extend the period of time off that the claimant had. The claimant says that conclusion was driven by base suspicion and a preference for the pattern over the evidence.

27. I agree with the criticism of the respondent's conclusions in this regard. It seems to me that Mrs Gabriel stated in answer to questions in cross-examination that it is doubted by me that it was genuine because it followed a period of absence. She is illustrating in her answer to questions in cross-examination the very problem that it appears to me exists in this case of where the respondent is effectively operating in making these decisions about the claimant's absences, operating from a starting point that the claimant's absences are not genuine, or are presumed not to be genuine and place the onus on her to prove that they are genuine. It seems to me that such an approach is as is criticised by Mr Jones not one that a reasonable employer could adopt in reaching the conclusion of the genuineness of the person's reasons for absence.
28. Moving on, my own conclusions for the purposes of the wrongful dismissal case is that the respondent has not shown that the claimant was in breach of EG300 in respect of this period of absence.
29. The claimant requested unpaid leave on 8 and 9 September 2017 and this was refused. This was at a time when the claimant went to a music festival. She was off work on 7 September and attended the music festival. It was then evidenced that the claimant went to stay at a B&B near Heathrow on 8 September. It was expected to be working on 9 September. The claimant's mother was however hospitalised on 9 September and evidence appears to show (and the respondent appears to have accepted) that the claimant was in Wales with her mother on that date. This was an occasion when the claimant was seeking dependency leave following three days off and a day of annual leave.
30. In respect of this period Mrs Gabriel concluded this was not a legitimate request for dependant leave. In respect of this particular issue Mrs Gabriel pointed out that the claimant did not prove that her mother was in hospital on the relevant dates and it was subsequently proved that the claimant's mother was in hospital on that date and that Mrs Gabriel was not provided with that information at the time and at the time she came to the conclusion that the claimant's mother was not in hospital and that the claimant was at the music festival as I understand it.
31. Subsequently Mrs Gabriel's suspicions have been allayed and it is accepted by the respondent that the claimant did in fact have to attend to her mother who was in hospital and, as I understand it, has in fact accepted that that was a genuine request for dependency leave.

32. My conclusions, for the purposes of the wrongful dismissal case, is that again there is no evidence that the claimant was in breach of the respondent's policy, in this case that dependency policy, EG406.
33. The next period of time is 17 and 18 March. This was a sickness absence which followed a period of four days off. The claimant had requested a change in her days off so that she would be off on 17 March 2018. She was advised by scheduling to apply for unpaid leave on this date and in the absence of her request at the time of it being granted Mrs Gabriel believed that the claimant had decided to report sick and that her absence was not genuine.
34. The conclusion that the claimant's absence was not genuine is reliant on the respondent's conclusion that the claimant's absences followed a pattern where the claimant had requested time off which was refused and then reported sick and it was the belief in the existence of that plan that drove the conclusion that the claimant's sickness absence was not genuine on the part of Mrs Gabriel.
35. My conclusion, for the purpose of the wrongful dismissal case only, is that there was no breach of EG300 by the claimant. The claimant followed the sickness absence reporting procedure and the absence of a sick note from her GP or other medical professional on this occasion is not instructive. The claimant says that on this occasion she had an eye problem and nothing points to this not being so. In fact, if anything the evidence suggests that on the contrary the claimant was having some sort of issue because a week or so later it was reported by her medical advisors that she had an atypical face pain and she was signed off work by her GP.
36. The 29 March to 6 April is the next period that we are concerned with and here Mrs Gabriel accepted that on this occasion the claimant's absence was genuine. The claimant provided her with a GP certificate for the period from 4-7 April and at the time of the absence and she also produced letters from Ashley Walk-In Centre on 28 March 2018 and Hillingdon Urgent Care Centre on 29 March confirming her attendance. However again Mrs Gabriel noted that the absence continued to follow a consistent pattern whereby the absences attach the time off and on this occasion followed a holiday. This period of sickness followed a period of eight days which included a day off in lieu, three days of annual leave and three days off during which time the claimant used her staff travel to fly to Ghana returning on 27 March and this absence preceded a further five days off and as a result of reporting sick the respondent says that the claimant achieved a total of 21 days away from the business. What Mrs Gabriel says is that she doubts that the claimant was genuinely sick but in the absence of evidence confirming this to be the case she made no findings about this and focused instead on the consistent pattern of absence which had been demonstrated. The existence of a pattern is not a breach of the respondent's policy
37. Mrs Gabriel accepted in cross-examination that it was not reasonable to doubt the legitimacy of the absence and when, as in this case it had been certified by the claimant's GP. I am of the view that there is no proper basis

for doubting it other than a reliance on the existence of a pattern and it seems to me and again I restrict this to my consideration of the wrongful dismissal claim and whether or not there is a breach of EG300, that the slavish reliance on the existence of the pattern does lead the decision maker to a conclusion that actually flies in the face of the evidence and is a decision that is contrary to where the evidence in fact points.

38. The next stage of this disciplinary involves consideration of absence on 22 August to 24 August and this was an occasion of sickness absence followed by two achieved off days preceding one day of annual leave and again the basis of the rejection of the claimant's explanation in relation to this period of the leave is the fact that the claimant's absences again attached to the claimant's time off and the fact that the claimant was unable to remember the reasons for her sickness absence which on this occasion would have been about eight months or so earlier. The claimant's absence on this occasion again was not particular.
39. In my view there is no reason for concern arising from the fact that she did not remember the exact cause of her absence. The fact that the claimant was struggling to remember the cause of a single day of sickness absence months after the event in my view is not a reasonable basis for upholding an allegation that the absence was not genuine. My conclusion for the purposes of the wrongful dismissal claim is that there was no breach of EG300 by the claimant and there was no evidence to gainsay the claimant's assertion that she was unwell. The fact that there is a period of absence from the business attached to it in my view is not in itself sufficient to give rise to an assumption of impropriety that the claimant has to disprove.
40. Approaching the consideration of the claimant's absences in such ways is in my view unreasonable. There must be some evidence in addition to the supposed assumption that justifies the conclusion that the claimant was in breach and in this instance there really was not any.
41. The next period relates to 5 September through to 15 September and in fact relates to two issues, one surrounding 5 September and the other surrounding 8 to 15 September. What the respondent says is that through a succession of days off from a combination of annual leave days, unpaid leave days, dependency leave days and a period of sickness absence, the claimant was away from the business for a total of 21 days. After a time off request was denied, having already been given the dependency leave day and three unpaid leave days the claimant contacted her line manager nine hours after her time off request was denied advising that she was sick. Mrs Gabriel noted that the claimant visited her GP in Wales where her mother lives on 7 September. The GP had issued a certificate advising the claimant was unfit to work due to a throat infection and signing her off from 7 to 14 September.
42. When the claimant's request for time off was denied, it was said that the claimant reported sick shortly afterwards. From this line up of facts Mrs Gabriel concluded that the allegation was found proved because she did not consider that the claimant's sickness was legitimate. Mrs Gabriel believed

that the claimant had misled the respondent and was again in breach of EG300.

43. What the claimant says is that there were a number of errors made in respect of the respondent's consideration of this issue. Firstly, it was not an example of the dependency leave obtained after some other kind of leave. In the course of her evidence Mrs Gabriel appeared to accept that it was incapable of making out the allegation as she had upheld it, when matters that were subsequently discovered were put to her. The claimant required dependency leave on 5 September because her mother was hospitalised, this was accepted in the appeal conducted by Mrs Martin as a genuine absence. The claimant was sick from 8 September onwards and this too was accepted as a genuine absence.
44. For the purposes of the wrongful dismissal case, my conclusion is that there was no breach of EG300 or EG406 by the claimant and that the claimant's alleged misconduct in breach of the policies in this period (5-15 September) is not made out. Where the claimant makes a request for sick absences when she is sick, or makes a request for dependency leave where she needs to take care of her mother there is no breach of the dependency policy.
45. Mrs Gabriel's finding was that all the allegations made against the claimant were found proved and she decided that the appropriate sanction was dismissal for gross misconduct. Mrs Gabriel considered whether she could impose the lesser sanction of such as by a written warning but she said because of the severity of the claimant's action she did not think that that was appropriate and she made the decision to dismiss the claimant.
46. Firstly, dealing with the unfair dismissal claim, it seems to me that there were three occasions where the evidence which was before Mrs Gabriel justified her concluding that there was a breach of the policy EG300. That is on 10 June, 17-18 March, 22-24 August, all 2018 apart from 10 June which was in 2017.
47. In relation to the other occasions whilst Mrs Gabriel came to the conclusion that the claimant was in breach, it seems to me that such a conclusion is not a permissible one because what Mrs Gabriel was doing was operating on the basis of a presumption. The presumption that because the claimant was making her leave requests in the way that aligned with other periods of time off from the business that the onus was on the claimant to show that those requests were genuine. In fact it was more than that because when the claimant did show that those requests were genuine, or produced evidence to show that she was unwell, doctors' statements showing that she was unfit to work or that the requirement for her to attend to her mother who had been hospitalised were genuine, all those matters were swept to one side in preference of the operation of the assumption that the claimant's requests were not genuine because they abutted or were attached to other periods of leave from the business. It seems to me that that is an unfair and unreasonable way to approach a situation where you have an employee who has what are clear and obvious problems arising from her personal circumstances at that time.

48. It cannot be fair to say to the employee on the one hand, “where’s your medical evidence for that period of absence” and then when medical evidence is produced to say: “well that medical evidence does not help you because this period of leave is attached to a period when you were away from the business so we are going to not consider that it is genuine”. It seems to me that that was the approach which was in fact adopted by the respondent, and I am satisfied that approaching matters in that way is unfair and that happened in relation to all the other incidences other than the three that I have referred to.
49. So do the three occasions that I have referred to where there is clearly some evidence which Mrs Gabriel is entitled to conclude that the claimant had been in breach of policy EG300 justify a conclusion that dismissal is an appropriate sanction within the range of responses of a reasonable employer. Those occasions should be considered fairly. They should be considered fairly and that means there should be no presumption against the claimant by assuming that the illusory pattern which the respondent was relying on existed. It seems to me that if those three occasions, that amount to three days of absence from work, had been fairly considered by the respondent the respondent would have considered that there was not necessarily any misconduct at all and to the extent that the claimant was shown to be in need of some kind of support or assistance, the respondent would have been able to deal with matters in a different way particularly bearing in mind that this is a respondent which has a proven track record of being supportive of its employees.
50. I am satisfied, taking all the circumstances into account, that in respect of the three occasions which the respondent would have been entitled to conclude that the claimant was in breach of EG300 a reasonable employer would not, without more, consider it justifying the claimant’s dismissal. If I am wrong about that I am satisfied that it would not be fair to dismiss the claimant whilst operating on the basis that the claimant’s absence was not genuine in circumstances where the respondent was applying a presumption against her.
51. I also have to consider whether there was a breach of the ACAS Code of Practice. To the extent that there was a breach I am not satisfied that it is just and equitable to award any increase in compensation to the claimant. This was not a case where an employer was disregarding the code, I think this was a case where an individual employee in a conscientious attempt to act fairly has made an error in their approach and that error in approach has poisoned the evidence in such a way as to make it unfair. I do not think it merits a punitive increase that is contemplated by s.207A.
52. I am not satisfied this is a case where the Polkey provisions apply and I am not satisfied that there is any basis of finding that the claimant was guilty of blameworthy conduct justifying a reduction of her award on the basis of any contributory fault.
53. Was the claimant wrongfully dismissed. I am satisfied that the claimant was wrongfully dismissed. I am not satisfied that the evidence that has been produced before me establishes that she was in repudiatory breach of

contract. There was no conduct by the claimant that would have justified her immediate dismissal by the respondent and so she succeeds on that claim also.

Employment Judge Gumbiti Zimuto

Date: 23 December 2022.

Sent to the parties on: 5/1/2023

N Gotecha

For the Tribunal Office