



EMPLOYMENT TRIBUNALS

Claimant: Ms V Oguzie
Respondent: London Borough of Newham
Heard at: East London Hearing Centre
On: 14 and 15 July 2022
Before: Employment Judge Park

Representation

Claimant: Mr Solomon Airhuoyo-Obazee (representative)
Respondent: Mr Daniel Moher (counsel)

JUDGMENT having been sent to the parties on 26 July 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1. The Claimant brought a claim for unfair dismissal following her dismissal without notice by the Respondent.
2. During the course of the hearing the Claimant made an application to amend her claim to include a claim for wrongful dismissal. This application was allowed.

Procedure, documents and evidence heard

3. At the hearing both parties were represented.
4. The Claimant submitted her claim for unfair dismissal on 16 December 2021. In the ET1 she initially only included a claim for unfair dismissal. At the time she was unrepresented. On 27 December 2021 a further ET1 was sent directly to the Tribunal by the Claimant's new representative. This included more detailed grounds of claim but again just indicated that the Claimant was pursuing a claim for unfair dismissal.

5. At the outset I clarified the claims the Claimant was pursuing. The Respondent indicated that they had understood that there was also a wrongful dismissal claim. Initially the Claimant confirmed that she was only pursuing a claim for unfair dismissal. Later during the course of the hearing, the Claimant's representative advised that the Claimant did wish to pursue a claim for wrongful dismissal. I treated this as a late application to amend and heard representations from both parties. I decided to allow the amendment. The possibility of a wrongful dismissal claim had initially been raised by the Respondent who had indicated that they had prepared submissions on this point in any event. On this basis I concluded there would be minimal prejudice to the Respondent to allow the additional claim.

6. I noted that in the ET3 the Respondent had raised an issue about whether the second claim had been submitted within the time limit for doing so. The Respondent confirmed this point was not being pursued.

7. I was provided with a bundle of documents that had been prepared by the parties. The Claimant had also provided some additional document the day before.

8. I evidence from the Claimant and on behalf of the Respondent I heard evidence from Joanna Simmons and Tony Bennett. Witness statements were prepared on behalf of all witnesses and taken as read. All witnesses were cross examined.

Findings of Fact

9. The Claimant was employed by the Respondent, the London Borough of Newham. Her employment commenced in 2001. She was dismissed without notice with effect from 5 August 2021.

10. There were a number of key facts to the case that were not disputed. These are as follows:

- a. The Claimant's employment with the Respondent commenced in 2001.
- b. In November 2020 the Claimant took a period of extended leave. She left on 23 November 2020 and was due to return on 5 January 2021.
- c. On 5 January 2021 the Claimant sent her manager a text message to advise that her husband had died and she would be in a period of mourning for 40 days.
- d. The Claimant remained absent from work and did not return to the UK until 14 August 2021.

- e. The Respondent had already held a disciplinary hearing in the Claimant's absence on 27 July 2021. The Claimant had been dismissed with immediate effect on 5 August 2021.

11. The Claimant's husband had in fact died on 28 September 2020 but she had not informed the Respondent of this at the time. Instead, she continued to work until her period of leave began in November. The purpose of the leave was to enable the Claimant to go to Nigeria for her husband's funeral.

12. The Claimant was due to return to the UK on 3 January 2021. She was feeling unwell so unable to fly. She contacted the Respondent on 5 January and in a short text message informed them about her husband's death. She did not state at this point that she was unwell.

13. With regard to the events that occurred between then and the end of July 2021, I limit my findings of fact to those that are relevant to the issues that I must consider. It is undisputed that the Claimant was absent from work from 5 January 2021, when she had been due to return. In fact, she did not return to work at all after that date. It is also undisputed that during this time she was in Nigeria until she returned on 14 August 2021, which was after the Respondent had terminated her contract of employment.

14. I find that the Respondent made repeated attempts to contact the Claimant to find out why she was absent. I am not going to list these in detail as it is not contested that the Respondent did try and contact the Claimant. The findings I make in relation to the Respondent's actions are as follows:

- a. Initially the Claimant's line manager was Joanne Simmons. She sent the Claimant a number of text messages and tried to call the Claimant. She also sent emails to the Claimant's personal email address.
- b. At some point Angela Clark took over as the Claimant's line manager. She also tried to contact the Claimant. The Respondent was concerned about the lack of contact from the Claimant so a visit to her home was arranged.
- c. On 16 February 2021 the Respondent sent the Claimant a letter advising her that her pay would be stopped if she did not get in contact. This was followed up by email on 18 February 2021. The Respondent sent a further letter on 3 March 2021 advising that her absence was unauthorised and her pay would stop. The Claimant's pay ceased on 4 March 2021. This was also followed up by email.

15. The Respondent's position was that they heard nothing from the Claimant after 5 January 2021, when she sent a text advising that her husband had died. The Claimant provided evidence of a few text messages she said that she sent to Ms Simmons. She provided screen shots of one text dated 7 March 2021 and one dated 26 April 2021. In the text dated 7 March 2021 the Claimant stated she had

been hospitalised. In the text dated 26 April 2021 she stated she had been hospitalised again.

16. Ms Simmons' evidence was that she did not receive these text messages. While I see no reason to doubt that the Claimant did send these texts, I am equally satisfied that Ms Simmons did not actually receive them. Had she done so it is likely she would have responded, given that she had been trying to get in contact with the Claimant repeatedly.

17. In terms of the substance of the Claimant's texts, I find that had they been received by the Respondent they would have provided very little additional information about her whereabouts. The text of 7 March 2021 was the first possible contact in over two months. It was also the first time the Claimant had tried to inform the Respondent she was unwell. Neither text gives any indication of when she may be able to return to work.

18. In early April 2021 the Respondent started an investigation into the Claimant's absence. By this point the Claimant's whereabouts had been unknown for over three months. The Respondent tried to contact the Claimant about the investigation by post and email. A meeting was arranged for 23 April 2021 which the Claimant did not attend. Angela Clark also texted the Claimant on 23 April 2021 following up on this.

19. On 29 April 2021 the Claimant responded to Ms Clark's text. The Claimant stated she was overseas; she was unwell and she was in hospital. The Claimant provided no other evidence of attempts to contact the Respondent after 29 April 2021.

20. The Respondent continued to try and make contact with the Claimant by text, letter and email. At the end of May 2021, the Respondent wrote to the Claimant and advised that she was being treated as absent without leave. The Respondent informed the Claimant that if she did not make contact by 10 June 2021 disciplinary proceedings would commence.

21. The Claimant did not make contact so the Respondent commenced disciplinary proceedings. Angela Clarke prepared an investigation report setting out a chronology of events since January 2021. She concluded that a disciplinary hearing should be convened to consider allegations relating to the Claimant's unauthorised absence.

22. A hearing was initially convened for 12 July 2021 to consider an allegation that the Claimant had been on an unauthorised absence from work since 5 January 2021. The Claimant did not attend and the hearing was reconvened to 20 July and then again to 27 July 2021. The Claimant did not attend and the hearing went ahead in her absence.

23. Tony Bennett chaired the disciplinary hearing. I heard evidence from Mr Bennett on how he approached the decision he had to make. He explained that the evidence he had was that the Claimant had only made contact once since she had informed the Respondent of her husband's death in January. In the text

he had the Claimant had indicated she was unwell but she had not provided any further information. Mr Bennett felt that he had no option but to dismiss the Claimant, as the evidence showed she had been absent since January, she remained absent, and despite the Respondent's attempts to communicate the Claimant had only been in contact once.

24. Mr Bennett decided to summarily dismiss the Claimant. The decision was sent to the Claimant by email and recorded delivery on 6 August 2021.

25. The Claimant returned to the UK on 14 August. On 23 August she sent to the Respondent an appeal against dismissal. She was assisted with the appeal process by her trade union.

26. As part of the appeal process the Claimant provided some evidence about her absence. This included two medical reports from Nigeria and additional medical documents from after her return to the UK.

27. The Respondent arranged an appeal hearing for 26 October 2021. The Claimant attended and she was accompanied by her trade union representative. At the hearing the Claimant provided some explanation about why she had not been in contact with the Respondent during her absence. She said that she could not call due to roaming charges and that it was difficult to respond to messages. She also explained that her mother-in-law could not speak English and communicate on her behalf. Her union representative put forward some submissions that the Claimant was aware of her mistakes.

28. Following the appeal, the Respondent upheld the decision to dismiss. The Respondent explained the reasons for this in a letter dated 1 November 2021. The Respondent accepted that the Claimant had provided some information about her absence, such as the medical notes. The evidence the Claimant provided during the appeal, which I have seen, indicated she was unwell at times but not for the entire period. The Respondent's conclusion was that the Claimant there were periods when the Claimant was not in hospital and she could have made contact and she had not "*exhausted every possible means of communicating*" with them.

29. Much of the Claimant's evidence that I heard during this hearing related the reasons why she did not make contact with the Respondent between January 2021 and August 2021. I do not intend to make detailed findings on this as I consider it of limited relevance to the issues I have to consider. The key finding of fact is that the contact the Claimant made with the Respondent was very limited during the first half of 2021. At most she sent four text messages in the period between 5 January 2021 and 29 April 2021 and the information within those was also limited. She did not make any further attempt to contact the Respondent until she returned to the UK in August 2021 which was after the Respondent had made its decision to dismiss her.

30. For completeness I will briefly summarise the Claimant's evidence and set out any findings that are relevant to the issues in the case:

- a. The Claimant's argument overall was that she was very unwell and in hospital at times. She also gave evidence that when she was not in hospital, she was still really unwell. She further explained that it was very difficult to contact from Nigeria due to roaming charges and difficulty accessing the internet and her email.
- b. I accept that the Claimant was unwell which would have affected her ability to contact the Respondent. I also accept that due to her location there would have been some difficulties with communication. However, I do not accept that these difficulties were so extensive that the Claimant was completely unable to provide the Claimant with more information about the reason for extended absence.
- c. During the hearing the Claimant gave evidence suggesting that she effectively had no capacity to do anything due to her health. She said she was in excruciating pain and drifting in and out of consciousness for prolonged period of time. This account was not supported by the medical evidence the Claimant provided to the Respondent during the appeal. The reports from Nigeria just stated that the Claimant had fatigue, weakness and high blood pressure. During the appeal hearing the Claimant did not argue that her health was worse and she was completely incapable of communicating.

31. My finding of fact on this issue is that while the Claimant faced barriers with communication it was not impossible for her to communicate. I find that it is likely that there was more she could have done to keep the Respondent informed about her circumstances. However, she did not do so and was absent for a period over six months during which time she at most contacted the Respondent four times.

Law

32. 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 Case Number: 3202301/2019 26 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.”

33. 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**.

34. 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**.

35. 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.

36. 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**.

37. 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 Case Number: 3202301/2019 27 [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**.

38. When considering a complaint of unfair dismissal under s.98(4) of the 1996 Act, where the employee has exercised a right of appeal in disciplinary proceedings the tribunal must consider the overall process **Taylor v OCS Group Ltd 2006 ICR 1602, CA** and **West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192**.

39. Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that:

"any Code of Practice issued under this Chapter by ACAS shall be admissible in evidence, and any provision of the Code which appears to the tribunal or Committee to be relevant to any question arising in the proceedings shall be taken into account in determining that question."

The relevant code for present purposes is the ACAS Code of Practice on Disciplinary and Grievance Procedures 2009.

40. A claim for wrongful dismissal is a claim that the Claimant was dismissed in breach of her contract of employment by being dismissed without notice. The Claimant's entitlement to notice will be determined by her contract of employment or the statutory minimum notice set out in the Employment Rights Act 1996. If an employee is otherwise entitled to notice an employer may have a defence to a wrongful dismissal claim if it can show that the employee was in repudiatory breach of their contract of employment, due to their conduct.

41. The test which the Tribunal must apply in a claim for wrongful dismissal is different from that to be applied to the claim for unfair dismissal. The issue is not whether or not the employer acted reasonably. In a claim for wrongful dismissal the Tribunal must make its own findings of fact on whether or not the Claimant had acted in such a way that there was a repudiatory breach of contract.

Discussion and Conclusions

Unfair Dismissal

42. I am satisfied that the Respondent established a potentially fair reason for dismissal, namely conduct. It is an undisputed fact that the Claimant was absent from work for over six months. It is also undisputed that the Claimant made very little contact with the Respondent and did not make any contact after 29 April 2021. I am satisfied that the Respondent viewed this prolonged absence as unauthorised and this triggered its decision to hold disciplinary proceedings.

43. The question then is whether it was fair in the circumstances to dismiss the Claimant for that reason. On this issue I must not substitute my own findings for that of the Respondent. The question for me to determine is whether Mr Bennett had a genuine belief that the Claimant had been guilty of the alleged misconduct and it was reasonable to reach that conclusion based on the evidence he had at the time.

44. The allegation that was being considered by Mr Bennett was that the Claimant had been absent without authorization since 5 January 2021. He had a detailed report setting out the attempts various employees of the Respondent had made to contact the Claimant. Mr Bennett decided the allegations were substantiated. I am satisfied that Mr Bennett's conclusion was genuine. I am also satisfied that it was reasonable for him to come to that conclusion based on the evidence he had at the time. It was an incontrovertible fact that the Claimant had been absent for over six months and Mr Bennett only had evidence of two attempts by the Claimant to make contact during that time. Mr Bennett had none of the evidence the Claimant later provided about her ill-health, so he could not take this into account. Based on this evidence I do not believe any other conclusion on the allegation could reasonably be reached.

45. The question for me to next consider whether dismissal was reasonable in the circumstances. Again, I must remind myself that I am not making my own decision on whether the Claimant should have been dismissed. I am only considering whether dismissal fell within the band of reasonable responses available to Mr Bennett.

46. Again, I am satisfied that by the end of July 2021 dismissal was within the band of reasonable responses. By that point the Respondent had made numerous attempts to contact the Claimant over a period of six months. This included trying to warn her in May she faced disciplinary action if she did not get in contact. It is possible to speculate that Mr Bennett could have decided on a different course of action, such as giving a warning or the Claimant a further chance to contact the Respondent. These hypothetical options do not in themselves make the decision to dismiss unreasonable. In my view, by the time Mr Bennett was making his decision dismissal was clearly also a reasonable option. The Claimant had not been in contact since the end of April 2021 and her whereabouts remained

unknown. The situation could not continue indefinitely and I find that it was reasonable for Mr Bennet to dismiss.

47. I then turn to the appeal. As the case law referred to above confirms, when there is a right of appeal then that appeal process must be considered as part of the dismissal. It is possible that new information provided during the appeal can make a dismissal unfair even if it was potentially fair at the time of the original decision. It was argued on behalf of the Claimant this is of particular pertinence in this case because the Claimant was not present at the original disciplinary hearing, so unable to provide evidence in support of her position.

48. I have found that at the appeal the Claimant provided some medical evidence relating to her absence. She also gave evidence during the hearing about the difficulties with communication while she was in Nigeria. I carefully considered the extent to which this additional evidence may impact the fairness of the Respondent's decision. Ultimately though the tests that are applied are the same. The questions to be considered are:

- a. in light of that additional evidence, was it still reasonable for the Respondent to conclude that the Claimant had been absent without authorisation for six months dismissal; and
- b. if so, was dismissal still within the band of reasonable responses.

49. I have concluded that it was reasonable for the Respondent to still uphold the allegation relating to the Claimant's unauthorised absence. It remained a fact that the Claimant had been absent for over six months and during that time her contact with the Respondent had been minimal. The Claimant had provided some new evidence that showed she tried to contact the Respondent an additional two times in early 2021. This did not change the fact that she had not contacted the Respondent at all after 29 April 2021.

50. The additional evidence provided by the Claimant at the appeal is of more relevance to the second issue, whether or not it was still reasonable to dismiss due to that unauthorised absence. The medical evidence went to the reason for the absence and lack of contact, so was mitigation.

51. Again, I will note that at the appeal Respondent had the option to rescind the dismissal and substitute a different sanction. However, the existence of other hypothetical options for the Respondent do not automatically lead to the conclusion that the dismissal was unfair. The question that remains is whether upholding the decision to dismiss was still within the band of reasonable responses, once the additional evidence the Claimant provided at the appeal is taken into account.

52. During evidence Mr Bennett indicated that had the information the Claimant provided during the appeal and Tribunal case been available to him at the disciplinary then he may have reached a different decision. I have not attached much weight to this. Mr Bennett's comments were essentially speculation with hindsight on what he may have done had he had different information before him at the disciplinary hearing in July 2021. The reality of the situation was that this

was new information provided some time after the date Mr Bennett made his decision.

53. The question for me to determine remains whether dismissal was still within the band of reasonable responses, taking into account the mitigating information that the Claimant provided at the appeal. I did not hear evidence from Piali Das Gupta, who chaired the appeal. I was provided with the appeal outcome letter setting out in some detail the reasons why the Respondent upheld the decision to dismiss the Claimant. This indicates that the Respondent had taken into account the new information the Claimant had provided about why at times she had been unable to get in contact. However, the Respondent was not satisfied the Claimant had exhausted all means of trying to make contact during her absence. Because of this the Respondent decided to uphold the original decision to dismiss.

54. Taking into account the information that the Claimant provided at the appeal I also find that dismissal remained within the reasonable band of responses at that time. On this point I note that the information provided at the appeal differed to some extent to the evidence given by the Claimant to me during this hearing. The evidence the Claimant provided to me was in essence that her circumstances were such that it was impossible to make any contact with the Respondent for the majority of time she was out of the contract. This is not the same as the explanation she gave the Respondent at the appeal. Taking into account the case the Claimant put forward at the appeal, I am satisfied that it was reasonable for the Respondent to conclude that the Claimant had not done all she could to try and contact them during her absence. Taking this into account, along with the length of the absence, I am also satisfied that it was reasonable for the Respondent to uphold the dismissal following the appeal.

55. For these reasons, I am satisfied that the decision to dismiss was fair and the claim for unfair dismissal is dismissed.

Wrongful Dismissal

56. The test I must apply in this case is different. I must make a finding on whether or not the Claimant actually had acted in such a way that entitled the respondent to dismiss without notice.

57. It is often suggested that for an employer to dismiss without notice the employee must have done something that amounted to gross misconduct. This suggests there must be a particular level of blameworthiness or culpability by the Claimant. While this may frequently be the case it is not always necessary. What must be shown is that the individual has acted in such a way that it is a repudiatory breach of the contract of employment.

58. It is key obligation under any contract of employment that the employee presents themselves for work in accordance with the terms of the contract in order to undertake their contractual duties. Generally, some absences are permitted under the contract of employment so long as certain processes are followed or permission is granted.

59. In the Claimant's case, she initially was absent with permission when she took a period of additional leave in late 2020. When the Claimant failed to return to work as expected in January 2021 she was in breach of her contract of employment. As a matter of fact, she then remained absent for over six months and she did not report her absence in accordance with the Respondent's policies. On the contrary, she made minimal contact with the Respondent during that time and did not contact the Respondent at all from the end of April 2021.

60. The Claimant was in breach of her contract by failing to attend work or otherwise comply with the relevant policies to report her ongoing absence. The issue for me to decide is whether or not the Claimant's conduct amounted to a repudiatory breach of contract.

61. I have accepted that there were reasons why the Claimant was absent, namely her ill health that meant she was unable to attend work for all or some of the time in 2021. On that basis, I do not find that the absence itself amounted to a repudiatory breach of contract as she was essentially unfit to work and could have been signed off work sick.

62. However, although the Claimant had a legitimate reason for her absence, she still failed to properly inform the Respondent of this or her whereabouts for over six months. In essence from early January 2021 the Claimant acted as if she was no longer an employee of the Respondent or bound by the terms of her contract of employment. I find this conduct was a repudiatory breach of contract and the Respondent was entitled to dismiss without notice.

63. For these reasons the wrongful dismissal claim does not succeed and is dismissed.

**Employment Judge Park
Date: 7 November 2022**