Case Number: 2201677/2022

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondent**
Miss A E Parkitna		**Burger & Lobster Restaurant Group Ltd**

REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 12 JANUARY 2023

Introduction

1 The Respondent runs a chain of six restaurants.

2 The Claimant, Miss Anna Parkitna, was employed by the Respondent as a waitress at its Leicester Square branch between October 2016 and 17 December 2021, with a short interval (which broke continuity) in early 2018. The employment ended with summary dismissal on the stated ground of unauthorised absence from work.

3 By a claim form presented on 7 April 2022 the Claimant brought complaints of unfair dismissal and direct disability discrimination. Both claims were resisted.

4 In the course of case management the disability discrimination was clarified as a complaint of 'associative' discrimination based on the stated disability of her father. Her case was that he was, at the relevant time, disabled by a stroke and that her dismissal for absenting herself from work to look after him amounted to direct discrimination because of his disability.

5 The case came before us on 11 January 2023 in the form of a final 'in-person' hearing with three sitting days allocated. Mr R Russell appeared for the Claimant as a MacKenzie friend. He is an experienced legal practitioner but does not profess to have any expertise in the field of employment law. Mr M Foster, a solicitor, represented the Respondent. We are grateful to both for their measured and concise advocacy.

6 We heard evidence from the Claimant and her supporting witness, Ms Katarzyna Malinowska, who had worked for the Respondent as a waitress up to October 2021, and, on behalf of the Respondent, Ms Ewelina Liniewska, at all relevant times General Manager of the Leicester Square restaurant and the Claimant's line manager. In addition, we read a statement tendered on behalf of the Respondent in the name of Ms Agnieszka Zawadka, Head of Operations.[1]

[1] She attended the hearing but was not called because Mr Russell said that he had no questions to put to her in cross-examination.

7 A bundle of documents running to some 330 pages was handed up.

8 Mr Russell's opening skeleton argument and Mr Foster's closing written submissions completed the paperwork put before us.

9 On day two, having heard evidence and submissions on liability, we delivered an oral judgment dismissing both claims.

10 These reasons are given in written form pursuant to a request made by the Claimant in writing shortly after the hearing.

The legal framework

11 The unfair dismissal claim is governed by the 1996 Act, s98. It is convenient to set out the following subsections:

> **(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 – …**
>
> **…**
> **(b) relates to the conduct of the employee,**
> **…**
>
> **(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.**

12 Our central function is to apply the clear language of the legislation, but we are also mindful of the guidance provided by the familiar authorities such as *British Home Stores Ltd v Burchell* [1978] IRLR 379 EAT (although that case must be read subject to the caveat that it reflects the law as it stood when the burden was on the employer to prove not only the reason for dismissal but also its reasonableness). From *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT and *Post Office v Foley; HSBC Bank v Madden* [2000] IRLR 827 CA, we derive the cardinal principle that, when considering reasonableness under s98(4), the Tribunal's task is not to substitute its view for that of the employer but rather to determine whether the employer's decision to dismiss fell within a band of reasonable responses open to him or her in the circumstances. That rule applies as much to the procedural management of the disciplinary exercise as to the

substance of the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 CA).

13 The Equality Act 2010 ('the 2010 Act') protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics'. These include disability, which is defined as a physical or mental impairment which has a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities (s6).

14 Chapter 2 of the 2010 Act lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator.

15 It is not in question that the wide wording of s13 of the Act admits claims based on protected characteristics of third parties as well as those of the claimant. These are often referred to as complaints of 'associative' discrimination.[2]

16 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

It is not in question that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.[3]

The issues

17 For the purposes of unfair dismissal, the issues were:

(1) Could the Respondent demonstrate the reason for dismissal on which they relied, namely a reason relating to the Claimant's conduct?
(2) Subject to (1) did the Respondent act reasonably or unreasonably in treating the reason as sufficient (that question to be addressed by application of the 'band of reasonable responses' approach)?

18 The disability discrimination claim posed these questions:

[2] By contrast, an 'associative' claim under cannot be brought under s15 (for discrimination arising from disability) because s15(1) stipulates that the protection attaches only to treatment because of a consequence of *the complainant's* disability.)
[3] See *eg Onu v Akwiwu* [2014] EWCA Civ 279 CA.

(1) Was the Claimant's father disabled at the relevant time?
(2) Did the Respondent treat the Claimant less favourably than it treated any (valid) 'actual' comparator? Alternatively, if no valid actual comparator is identified, did it treat her less favourably that it would have treated an hypothetical comparator?
(3) Was such treatment 'because of' her father's disability?

The facts

19 The facts which it is necessary for us to recite are as follows.

20 On 8 November 2021 the Claimant learned that her father had suffered a stroke. He was elderly and a widower and lived in Poland.

21 The Claimant contacted Ms Liniewska without delay and asked for permission to take two weeks off. At that point she had only five days' annual leave remaining (the annual leave year ran from January to December). After discussion it was agreed that she could take five days' annual leave (paid) and two further days unpaid leave. It was also agreed that her leave would be treated as commencing on 15 November since it was anticipated that her father would be receiving hospital care up to that date. Accordingly, it was understood that she would be returning to work on 22 November 2021.

22 On 23 November 2021 the Claimant emailed Ms Liniewska from Poland. She reported that her father had just been discharged from hospital but that his condition remained serious and she needed to make arrangements for his long-term care. She said that she was the closest relative her father had and that she was mentally and physically exhausted. Acknowledging that she had used up all her annual leave for the year, she requested six weeks of unpaid leave and asked for understanding and compassion in responding to circumstances entirely beyond her control.

23 Ms Liniewska replied on 25 November 2021. She expressed sympathy for the Claimant and offered good wishes for her father's speedy recovery but explained that the request for six weeks' leave could not be granted given the pressures which the business was facing. In the circumstances she was prepared to offer one further week of unpaid leave, which would entail the Claimant's return to work on Monday, 6 December. She added that the absence after that date would automatically be categorised as unauthorised and lead to disciplinary action. She requested a response to the offer no later than 28 November.

24 In further emails of 27 November, 1 December and 5 December 2021 the Claimant renewed her request for six weeks' unpaid leave. She explained that her father required 24-hour care. Ms Liniewska responded with expressions of sympathy but firmly declined each request, save for pointing out, in an email of 6 December, that the Claimant's first shift following her absence was now scheduled for 8 December. She also pointed out that other employees had faced difficulties similar to the Claimant's and that a similar approach had been taken in each case.

25 The Claimant responded to Ms Liniewska's last message the same day, stating that she would not be able to return to work at any point in December.

26 The Claimant did not return to work, on 8 December 2021 or on any date thereafter.

27 On 14 December 2021 the Claimant was invited to attend a disciplinary meeting to be held remotely on 17 December to consider the charge that she had absented herself from work without authorisation. She was made aware of her right to be accompanied and that possible sanctions included dismissal. Relevant documents consisting of the recent email correspondence were attached.

28 The disciplinary hearing duly proceeded on 17 December 2021. It was chaired by Ms Liniewska and Mr Fabio Sarterio, an Assistant Manager at the Leicester Square restaurant, was also present to take a note. The Claimant attended remotely (from Poland) and did not exercise her right to be accompanied. Her absence from work was discussed and her observations and those of Ms Liniewska did not add significantly to what had passed between them in their correspondence between 23 November and 6 December. In summary, the Claimant said that she had been requesting "compassionate leave" in order to look after her father, who required 24-hour assistance, and that, as his closest relative, she saw it was her responsibility to help him. She also said that her difficulties were compounded by the effects of the Covid-19 pandemic in Poland. She complained that she was being treated unfairly and being punished for circumstances beyond her control. She pointed out that she had worked for the company for a substantial period and had never asked for any favours or help.

29 Following a short adjournment Ms Liniewska announced her decision. She stated that, while the Claimant's representations had been taken into account, unauthorised absence was classified under the Respondent's procedures as gross misconduct, for which the proper sanction was summary dismissal. Accordingly, the Claimant was dismissed with immediate effect.

30 By a letter dated 20 December 2021 Ms Liniewska confirmed the outcome of the disciplinary hearing and advised the Claimant of her right of appeal.

31 By letter of 27 December 2021 of the Claimant exercised her right of appeal. She contended that the circumstances of her absence from work were exceptional and entailed no misconduct on her part. She prayed in aid her strong work record over nearly four years of service. She argued that her dismissal was unfair and unreasonable and that she had been discriminated against because of her father's disability.

32 The appeal was heard on 13 January 2022 by Ms Zawadka. Ms Francesca Cociancich, a General Manager, was present to take a note. The Claimant attended remotely and did not exercise her right to be accompanied. Her arguments were consistent with her letter of appeal. Ms Zawadka reserved her decision.

33 By a letter dated 17 January 2022 Ms Zawadka dismissed the appeal. She pointed out that the request for compassionate leave had been made at a particularly challenging time for the business (owing to staff shortages and sickness absences) and that it had been necessary to ensure that all staff

requesting extra time to care for family or dependents were treated the same.

34 As the Claimant rightly acknowledged in the course of the disciplinary process, her request for special leave was made at a very busy time in the Respondent's calendar. The Christmas and New Year season is by far its busiest trading period. And we accept that, owing to the effects of the Covid-19 pandemic, it was facing extra and exceptionally severe staffing shortages, which compelled it to close two of its six restaurants entirely for some two or three weeks.

35 Ms Liniewska told us without challenge, and we accept, that other members of staff faced difficulties similar to the Claimant's. One requested extra leave after using up pre-booked annual leave, in order to care for his father in Italy, who was extremely ill. He was granted one week, after which he resigned. Another exhausted her accrued leave entitlement in order to care for her sick father, who had Covid-19 and required a ventilator, after which she resigned.

36 We also accept that, at the time of the Claimant's request for special leave, Ms Liniewska was aware that there was every prospect of other staff members making equally legitimate requests for time off to look after family members and dependents affected by ill-health (resulting from Covid-19 or other conditions).

37 We further accept that Ms Liniewska was mindful that a consequence of granting the Claimant's request for six weeks' leave would have been to face the Respondent with the uncertainty inherent in seeking to source agency staff for the Christmas and New Year season at very short notice and the certainty that such staff, if found, would (a) require proper induction and training, (b) (even with such induction and training) lack familiarity with its premises, practices and ethos, and (c) represent a materially greater financial cost than employed staff.

38 The Respondent's (non-contractual) leave policy stipulates that unpaid leave is only granted in exceptional circumstances, where business commitments allow (cl 2.1d). It further provides (cl 2.3) for a general entitlement to reasonable time off to deal with emergencies. What constitutes "reasonable time off" is for the responsible line manager to determine. Relevant factors will include the circumstances which precipitate the request, whether the employee's presence is critical, the needs of the business, the consequences of any absence, and the amount of time off already granted.

39 The Respondent's disciplinary procedure includes unauthorised absence within a list of offences which can be treated as gross misconduct.

40 For the purposes of her discrimination claim, the Claimant cited as her comparators two employees or former employees of the Respondent: a sous chef who took an extended period of certificated sick leave because of a back problem and a waitress who took an extended period of certificated sick leave because of a mental health problem. It seems that both absences occurred quite close in time to the Claimant's.

41 It was not in dispute before us that the Claimant had an entirely satisfactory work record and no disciplinary history.

42 Very sadly, the Claimant's father died on 14 July 2022.

Secondary findings and conclusions

43 It is convenient to take the claims in reverse order.

Disability discrimination

44 Although there is scant independent evidence before us, we unhesitatingly accept the evidence which the Claimant herself has given concerning her father's condition and are prepared to proceed on the basis that, given a confirmed diagnosis of stroke and her evidence as to the level of care necessitated by that condition, he was at all times disabled within the meaning of the 2010 Act.

45 Understandably, the Claimant argues that she lost her job because of her father's medical condition. In one sense, she is obviously right: had he not fallen ill, she would not have needed to take time off and the situation which culminated in dismissal would not have arisen. But this reasoning misunderstands the law. It posits a 'but for' cause, whereas the 'because of' test under the 2010 Act, s13 is directed to the mental processes of the decision-maker: *why* did Ms Liniewska dismiss the Claimant and did she in doing so treat her less favourably than she treated the comparators?

46 The named comparators are plainly not valid comparators. Their circumstances were not the same, or even similar, to the Claimant's, as the 2010 Act, s23 requires. They did not request permission to take extra leave (whether to care for a dependent relative or for any other reason). They did not remain away from work without authorisation. They were permissibly and lawfully absent from work on account of their own ill-health. The claim based on the named comparators cited inevitably fails at once.

47 The next question is whether the complaint can be made out on the strength of a comparison with an imaginary or hypothetical comparator. Again, the circumstances of the comparator must be the same or not materially different to those of the Claimant, save, of course, for the absence of the protected characteristic in the comparator case. Accordingly, the comparison is between the treatment applied to the Claimant and that which would have been applied to a waitress at the Leicester Square restaurant who absented herself from the workplace in the same way and for the same reasons as the Claimant except for the fact that her (the comparator's) father was, for one reason or another, not disabled within the meaning of the 2010 Act. Once the proper comparison is understood it becomes obvious that the complaint of direct discrimination is unsustainable. Had the Claimant's father suffered, say, a serious lower limb injury requiring some months of recovery and so, for want of the 'long-term' requirement,[4] not been disabled as a matter of law, it is plain and obvious that she would have been treated exactly as she in fact was. The treatment complained of (dismissal) was not 'because of' the disability, but because of a *consequence* of the disability. This illustrates the inherent difficulty of making out claims for direct discrimination in most disability cases and explains why Parliament has enacted separate forms of protection (in particular against discrimination arising from

[4] See the 2010 Act, schedule 1, para 2.

disability (s15) and under the duty to make reasonable adjustments (ss20-21)) for the purposes of which no comparison is required. But the only claim before us under the 2010 Act is that under s13.[5]

48 For these reasons, we are satisfied that the direct disability discrimination claim must be rejected.

Unfair dismissal

49 What was the reason or principal reason for the Claimant's dismissal? We are quite satisfied that it was the belief of Ms Liniewska, shared by Ms Zawadka, that she had absented herself from work without authorisation. That was a reason relating to conduct and, as such, a potentially fair reason for dismissal.

50 Did the Respondent act reasonably in treating the reason as sufficient? We remind ourselves that the statutory question must be addressed by applying the 'band of reasonable responses' approach.

51 As to the procedure followed, no complaint was made. Rightly, in our opinion, Mr Russell accepted that a fair process had been applied at all stages of the disciplinary exercise.

52 As to substance, it is not for us to stand in the shoes of the Respondent, but only to review the decisions taken and assess whether, in the circumstances, they were permissible. On that footing, we find that the dismissal was not outside the range of reasonable options. It was certainly right for Ms Liniewska and Ms Zawadka to have regard to the sad and troubling family circumstances with which the Claimant was confronted. But it was also right for them to have regard to business needs and the importance of staff being treated in a uniform and even-handed way. They were faced with a challenging task of balancing competing interests.

53 In our judgment Ms Liniewska did not act unreasonably in limiting the period of special leave allowed to the Claimant as she did. She had regard to the main considerations identified in the leave policy and those were the key factors which needed to be balanced in the Claimant's case. She legitimately judged that she could not afford to sanction her absence until the New Year. She was not in a position to grant an exceptional amount of time off given the staffing difficulties which the Respondent faced over its busiest trading period. It was also proper for her to have regard to the importance of treating staff in an even-handed way. She was entitled to judge that granting the leave requested would be liable to set a damaging precedent. In all the circumstances we cannot say that the refusal to extend the leave beyond 8 December 2021 was unreasonable.

54 Once it is accepted that it was open to Ms Liniewska to resolve the Claimant's request for special leave in the way in which she did, it seems to us that it was also permissible to discipline her for her failure to return within the time allowed. It was not in question that the Claimant was absent without

[5] We should not be taken as suggesting that any other claim was even theoretically possible. We have already pointed out that a claim under s15 would have been impossible.

authorisation. Failing to enforce the obligation to attend work would have entirely undermined the decision on the leave request, set another troublesome precedent and attracted justifiable charges of weakness and/or double standards on the part of the management.

55 If it was proper to set the limit on unpaid leave at 8 December 2021 and to discipline the Claimant for failing to return to work by that date we are also satisfied that it was legitimate to find the charge against her proved. Indeed, there was no other conclusion open to the decision-makers.

56 Was a permissible sanction applied? In our judgment, it was. We can well understand why the Claimant feels aggrieved and offended at being accused and convicted of "gross misconduct". The expression seems to carry with it a moral reproach which she reasonably regards as unfair. We are sympathetic to that view. But the question for us is whether, having permissibly found her to have breached a workplace rule prohibiting unauthorised absence, Ms Liniewska could properly punish her conduct with dismissal. The 1996 Act, s98 does not refer to "gross misconduct", but only to "conduct". Plainly, absenting oneself from work amounts to "conduct". The lawfulness of the dismissal does not depend on the precise label which the employer attaches to the act in question. And the fact that, in moral terms, the offence may be seen as justifiable, does not negate the undisputable fact that the conduct involved a clear breach of an important workplace rule. In the ordinary case, it is open to an employer to dismiss an employee for unauthorised absence. Given the moral mitigation here, was that sanction impermissible? In our judgment it is not possible to say so. Once it is accepted that it was proper to set the limit at 8 December 2021 and to enforce that decision by disciplinary action, we consider that dismissal was also permissible. There was a need for a clear line to be taken on leave requests, especially given the staffing difficulties which the business faced and the importance of all employees being treated equally. It was open to Ms Liniewska to judge that allowing the Claimant to remain in her employment despite her unequivocally signalling an intention to stay away for at least three more weeks would severely undermine her authority and prejudice her ability to manage similar cases effectively in the future. The fact that another employer might have taken a more lenient course is nothing to the point. The issue of liability turns on the reasonableness of the employer's action and not on fairness to the employee. That is why, under our law of unfair dismissal, it has long been recognised that a harsh or even unfair outcome from the employee's perspective will not necessarily translate into a finding that the employer has acted unlawfully. (By the same token, it has also long been recognised that circumstances may arise in which a wholly undeserving employee may rightly succeed in his or her claim for unfair dismissal.)[6]

57 It follows that the dismissal was not unfair.

Outcome

58 For the reasons stated, all claims fail and the proceedings are dismissed.

59 We would not wish to leave this very sad case without stressing that our

[6] Although such a claimant may legitimately be denied any or any substantial remedy.

conclusions neither contain nor imply any criticism whatsoever of the Claimant. We have no doubt that she was a considerable asset as an employee. As a witness before us, she was dignified, moderate and scrupulously honest. And in her actions in support of her father she followed her conscience and did what she judged to be the right thing. On a moral level, her behaviour was, we think, beyond reproach. As we observed in our oral judgment, had she brought a wrongful dismissal claim, the Respondent might have been hard pressed to persuade us that she had repudiated her contract of employment and thereby forfeited her right to notice of dismissal. In such a claim (unlike an unfair dismissal claim) the focus is not on the reasonableness of the *employer's* actions (measured by applying the 'band of reasonable responses approach) but on the Tribunal's objective assessment of the *employee's* conduct. But since no wrongful dismissal claim is before us, it would not be helpful to take this speculation, which contributes nothing to our analysis of the unfair dismissal complaint, any further.

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EMPLOYMENT JUDGE – Snelson

03/03/2023

Reasons entered in the Register and copies sent to the parties on: 06/03/2023

for Office of the Tribunals