



EMPLOYMENT TRIBUNALS

Claimant: Miss Lynn Hulson

Respondent: University Hospitals of North Midlands NHS Trust

Heard at: Birmingham (by CVP)

On: 23 - 26 January 2023

Before: Employment Judge Meichen (sitting alone)

Appearances

For the claimant: Miss Gaskell, friend

For the respondent: Mr Gray, counsel

JUDGMENT was sent to the parties dated 26 January 2023. The Tribunal found that the claimant was not unfairly dismissed. Written reasons were subsequently requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. The following reasons are provided. Oral reasons were given at the end of hearing and so these written reasons are based on the recording of the reasons given orally.

REASONS

Introduction and the issues

1. This was the final hearing of the claimant's claim of unfair dismissal. It was agreed that the claimant was dismissed. The issues were identified and agreed with the parties at the start of the hearing. They are as follows:
 - a. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
 - b. If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The tribunal will decide, in particular, whether:
 - i. there were reasonable grounds for that belief;
 - ii. at the time the belief was formed the respondent had carried out a reasonable investigation;

- iii. the respondent otherwise acted in a procedurally fair manner;
- iv. dismissal was within the range of reasonable responses.

The law

2. The relevant parts of the Employment Rights Act 1996 are as follows:

94 The right

(1) An employee has the right not to be unfairly dismissed by his employer.

...

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—

...

(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.

- 3. It is for the respondent to show that the reason for dismissal was potentially fair. The potentially fair reasons for dismissal include conduct which is the reason relied on in this case.
- 4. Guidance as to what constitutes reasonableness in the context of a dismissal for conduct was given in the case of BHS Ltd v Burchell [1980] ICR 393. The tribunal should consider whether the employer had a genuine belief in the misconduct alleged and whether that belief was held on reasonable grounds formed after a reasonable investigation.
- 5. The ultimate question is whether the sanction of dismissal fell within the range of reasonable responses open to a reasonable employer. I remind myself that I must not substitute my own view for that of the respondent, but instead apply this range of reasonable responses test. The test applies to all aspects of the dismissal process including the procedure adopted and the investigation: Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23.

6. When considering whether there were any procedural flaws which caused unfairness the proper approach is for the tribunal to consider the fairness of the whole of the disciplinary process. The purpose is to determine whether, due to the fairness or unfairness of the procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at a particular stage. The tribunal should not consider the procedural process in isolation but should consider the procedural issues together with the reason for dismissal as it has found it to be and decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason it has found as a sufficient reason to dismiss (OCS v Taylor [2006] ICR 1602).

Findings of fact

7. The claimant was a long-standing employee of the respondent. Her employment started in 1980 and she was employed latterly on a full-time basis as a facilities service support assistant.
8. In March 2020 the claimant had a period of annual leave booked. Her annual leave started on 9 March and she was due to return to work on 24 March.
9. The claimant arranged to go on holiday in the Gambia during her annual leave. There is some confusion in the paperwork before me as to when the claimant booked her return flights but I am satisfied that she intended to return.
10. Unfortunately the claimant's holiday coincided with the outbreak of the covid pandemic, the lockdown in the UK and the world-wide restriction on air travel.
11. By 26 March Gambia had closed its airspace and its border with Senegal and had declared a state of public emergency. It was extremely difficult to travel in or out of the country and a number of people including the claimant were effectively left stranded there. The claimant was unable to return to work as planned on 24 March.
12. On 14 April the claimant contacted her manager, Julie Mould, about the situation and informed her that she was unable to return to work.
13. Julie Mould took advice on how best to record the claimant's absence. She put the claimant on medical suspension on 24 April. This meant that the claimant could continue to be paid at full pay and was not recorded as absent on sick leave which would have triggered the sickness absence procedures. Plainly this decision was advantageous to the claimant. She continued to receive full pay even though she was not working, was not sick and was not using annual leave.
14. The claimant informed Julie Mould that several flights had been cancelled and she was not sure when she would be able to come back to the UK. The claimant initially said that she was hoping to return by 6 May 2020, but that did not happen
15. Julie Mould discussed the situation with HR in June 2020. She was informed that internet searches had revealed that there were by that stage flights

available for the claimant to return from the Gambia to the UK. Therefore on 22 June 2020 Julie Mould emailed the claimant to confirm that flights were available and to ask if she had managed to book a flight. The claimant responded to that to say that the flights were very expensive (around £1500). Nevertheless she said that she had vouchers from the tour operator which she would be able to use to get a flight back soon. However that did not happen and during this hearing the claimant said that she did not in fact have any vouchers to use. This was one of a number of inconsistencies and confusing elements in the claimant's evidence about why she could not return from the Gambia.

16. On 15 July 2020 the claimant sent Julie Mould an email attaching information about three flight bookings. These all related to bookings or attempted bookings of flights which the claimant had made in March 2020, including what appears to be her original travel to and from the Gambia. At the same time the claimant requested to book annual leave for dates between August 2020 and March 2021.
17. In August 2020 the claimant sent Julie Mould information referring to Gambia having once again shut its borders and airspace due to a rise in Covid cases. The claimant told Julie Mould that flights back to the UK would start again in October 2020 and she would write in November 2020 regarding the flights available, but she did not in fact do that.
18. In December 2020 Julie Mould had another discussion with HR about the situation. She was advised that there were flights from the Gambia regularly coming into Manchester at that stage. On 11 December 2020 Julie Mould wrote to the claimant to say that they were daily flights from the Gambia to Manchester costing about £200. The claimant's response to that was rather unclear. She said that she thought the tickets were more expensive than £200 and she had been advised by the embassy that it was safer in the Gambia than in the UK.
19. By January 2021 the respondent was getting very concerned about the situation. It was now clear that there were affordable flights available back to the UK and the claimant did not seem to be doing enough to try and return home. The claimant appeared to believe that it was better for her to stay in the Gambia and that was why she was not making any attempt to get back to work.
20. On 27 January 2021 Julie Mould wrote to the claimant requiring her to provide a full chronology of all the efforts she had made since March to secure flights home together with copies of documents in support. The claimant was advised that she would move to nil pay on 1 March 2021.
21. The claimant replied to Julie Mould to say that she did not understand what was being asked of her, although it seems to me to be clear. The claimant never provided a full response to Julie Mould's request. On 3 February the claimant's union representative sent an email attaching some flight documents but this fell very far short of demonstrating that the claimant had been making sufficient effort to arrange flights home since March 2020. It gave information about cancelled flights in March 2020 and January 2021 but contained no information for the period in between. The claimant's union representative agreed to try and

gather further information from the claimant. However no further information was provided.

22. Julie Mould wrote to the claimant on 18 February 2021 advising her that she was expected to return to work by 2 March and that if she failed to attend then it would be treated as an unauthorised absence.
23. The claimant responded to Julie Mould to say that she had now decided to take early retirement and wished to take her pension early as she needed money to remain in the Gambia. Julie Mould replied that the claimant could not claim a pension as she had not resigned and her employment had not terminated.
24. The claimant further explained that she had bought flights that were cancelled that had cost her £2000 and she now had no more money to buy flights. The claimant was asked to provide copies of the documentation to evidence those booked flights but the claimant did not reply to that request.
25. On 2 March 2021 the claimant went on to nil pay. Julie Mould began an investigation into the claimant's absence and her failure to provide documentation to show that she had been unable to return to employment since 24 March 2020.
26. On 26 March 2021 Julie Mould received an email from the claimant's GP surgery attaching a sicknote. The claimant had been signed off sick between 1 March 2021 and 31 May 2021 with foot pain. As a result of this the claimant's absence was changed to sick leave and she received pay.
27. On 19 April 2021 Julie Mould met with the claimant and her union representative with the claimant attending remotely from the Gambia. The claimant was again asked to provide evidence to support the cancellation of flights she had booked and any information on rescheduled flights. This request was followed up in an email sent to the claimant after the meeting. The claimant did not provide any additional evidence herself but on 19 April her union representative forwarded screenshots of a text message stating that a flight on 24 April had been cancelled. The union representative stated that the claimant would send in other flight cancellations but they never arrived.
28. On 10 May 2021 Julie Mould completed an investigation report which found that the claimant had failed to provide information requested to show that efforts had been made by her to return to the UK from the Gambia. She found that the updates which had been provided by the claimant were vague and many questions were left unanswered. Julie Mould concluded that there had been a lack of engagement from the claimant and she had not cooperated to provide evidence that had been requested.
29. On 23 May 2021 the claimant emailed Julie Mould to say that she had a flight booked for 4 July. On 24 May Julie Mould replied asking the claimant to forward the evidence of that flight and any other evidence to support her efforts to return home, but once again the claimant did not provide any further documentation.
30. The case was progressed to a disciplinary hearing on 28 May 2021. There were two allegations. Firstly unauthorised absence from March 2021 and secondly a

failure to provide documentation to show an inability to return to work since March 2020. The disciplinary hearing took place on 10 June 2021. The claimant was still in the Gambia and she attended the hearing by video link. She was represented by her union representative. The disciplinary panel was chaired by Chris Eccles and the management case was presented by Julie Mould as investigating officer.

31. At the end of the hearing Mr Eccles informed the claimant that she was dismissed for gross misconduct. As the outcome letter makes clear the crux of the decision was that the panel concluded that the claimant had not taken every opportunity to return back to the UK in order to return to work. The panel found that the allegations were well-founded and the claimant was on an unauthorised absence which amounted to gross misconduct because she was not fulfilling her contract of employment. The claimant was therefore summarily dismissed.
32. The panel's considerations included that the claimant had been on full pay the majority of the time that she had been in the Gambia and that she therefore would have had sufficient money to purchase a flight home. The panel were highly concerned that in the 15-month period that the claimant had been in the Gambia she had only been able to partially evidence booking flights home in March 2020 and in April 2021. In total there was only evidence of four flights booked and the only clear evidence of a flight being cancelled was the text message sent by the claimant's union representative.
33. The panel checked whether there were flights available from the Gambia to the UK on the day of the disciplinary hearing. They conducted a search on the sky scanner website which showed that there were at least nine flights available that day from the Gambia to London and these cost between £250 and £375. This was comparable to the claimant's stated monthly spend in the Gambia which was around £300.
34. The claimant appealed the decision to dismiss her on 16 June 2021. Her appeal was based on the grounds of procedural failings and also on the factual basis that she had done her utmost to get back to the UK.
35. The claimant returned to the UK on or around 30 July 2021 and her appeal was heard on 1 September 2021. Mr Eccles presented the findings of the disciplinary panel and this included an explanation of the research that been done on the day of the disciplinary hearing to search for flights that were available on that day.
36. The chair of the appeal hearing was Helen Inglewood. The panel concluded that the claimant had been given every opportunity to provide evidence to support her case that she had made efforts to return to the UK but she had not done so sufficiently. It remained the case that there was only partial evidence relating to 4 flights – 3 in March 2020 and 1 on 24 April 2021. This was not considered to be sufficient evidence to demonstrate that the claimant had done her utmost to return to work. A particular concern was that the claimant had been informed in June and December 2020 that flights were available but had apparently not booked anything. The panel concluded that the claimant's failure to return to the UK for such a significant period of time was serious and the

sanction of summary dismissal was reasonable and fair in circumstances. The claimant's dismissal was therefore upheld and the claimant was informed of that outcome in writing.

Conclusions

37. The reason for the claimant's dismissal was her conduct. More specifically the respondent dismissed the claimant for the conduct which is summarised in the dismissal letter i.e. unauthorised absence from March 2021 and a failure to provide documentation to show that the claimant was unable to return to work since March 2020. As I have observed the crux of that decision was that the respondent took the view that the claimant had not taken every opportunity to return to work since March 2020.
38. I next considered the question of whether the dismissal was fair in all the circumstances. I remind myself that I should not substitute my own view. What I must do instead is to assess whether the respondent's actions fell within the range of reasonable responses that were open to a reasonable employer.
39. The respondent had a genuine belief that the claimant committed the misconduct which I have identified.
40. The investigation was a reasonable one. The claimant was informed of the allegations and the evidence, she had clear opportunities to explain her position and provide relevant evidence in response.
41. The procedure adopted by the respondent was overall fair. The process was in my view transparent. The claimant knew of the allegations and she knew of the evidence relied upon by the respondent. She was assisted by her union representative throughout and she had a number of opportunities to explain her position and provide relevant evidence.
42. I did have a potential procedural concern which was that as I mentioned in the findings of fact research was done on the day of the disciplinary hearing on sky scanner to establish that flights were available on that day and that was taken into account by the panel when they reached their decision. However as that was only done at the end of the disciplinary hearing the claimant did not have a proper opportunity to comment on that particular evidence. In context I do not consider this was a flaw which caused any substantive unfairness. The claimant was aware that the specific concern of the respondent was that flights were available and she was not booking them. The claimant had been informed of that concern previously. Therefore the sky scanner evidence did not add anything new it merely confirmed what the respondent's position had been for some time. Furthermore, the claimant was made aware of that particular evidence at the appeal and she the opportunity to comment on it then. The claimant's explanation as to why she had not booked flights remained (and remains) unclear and the respondent was reasonably entitled to view it as vague and unhelpful. I therefore consider that the process was overall fair.
43. I turn now to consider whether the respondent's belief that the claimant committed misconduct was held on reasonable grounds. In particular I have to consider whether there were reasonable grounds for the respondent to find the

two allegations proved and for the conclusion that the claimant had not taken every opportunity to return back to the UK in order to return to work. It seems to me that this is really where the key battleground was in this case. In fairness to the claimant it should be acknowledged that the circumstances which led to the claimant being stranded in the Gambia were unforeseen and were not her fault. The pandemic and the difficulties that it caused were unprecedented. It was a time which was very uncertain and it seems to me that the claimant was through no fault of their own left in a very tricky and unusual situation as a result of the situation caused by the pandemic.

44. On the other hand the respondent gave considerable leeway to the claimant and recognised the difficult situation that she was in. This was most apparent by the fact that the claimant was left on full pay even though she was not working and was not sick for nearly a year. Furthermore, the respondent certainly did not rush the process. The claimant was not dismissed until June 2020 which was some 16 months after she should have returned to work from her annual leave. In my view the respondent gave the claimant ample opportunity to show that she was making efforts to return home and it was only when it became clear that she was not that her absence was treated as unauthorised.
45. The crucial factor it seems to me is that the situation changed after the initial time when the claimant was stranded in March 2020. The respondent became increasingly concerned because it could see that on occasions between June 2020 and December 2020 and certainly by 2021 flights were available, they were not prohibitively expensive and there was little to no cogent explanation from the claimant as to what she was doing to try and return to work. The claimant's explanations as to why she was not booking flights were either unclear or non-existent. The claimant in fact became equivocal over whether she wanted to return or not because she indicated that it was safer in the Gambia and she was making enquiries about claiming her pension so that she could stay.
46. When the claimant was asked, as she clearly was on a number of occasions, to provide evidence about her efforts to return to the UK the evidence that she provided was minimal. It left a lot of questions unanswered and there were significant gaps where there was no evidence of the claimant making efforts to return home. The respondent was reasonably entitled to take into account the deficiencies in the evidence provided by the claimant despite numerous requests and opportunities and the fact she was being assisted by her union.
47. In my view in light of the above the respondent had reasonable grounds to make the findings which it did.
48. The claimant's misconduct was extremely serious because it meant she was not fulfilling her employment contract. She was not at work and she did not demonstrate that she was making sufficient effort to return to work even when the respondent requested relevant evidence yet she had been on full pay for a long time. The claimant was not making herself available for work and she was not making reasonable efforts to make herself available. She could and should have returned to work long before she was dismissed. In these circumstances I

consider that the sanction of dismissal fell within the range of reasonable responses.

49. For these reasons I must conclude that the claimant was fairly dismissed and therefore her claim must fail. That concludes my judgement

Employment Judge Meichen

23 March 2023