



# EMPLOYMENT TRIBUNALS

## Claimant

Miss Ginelle Semper

v

## Respondent

Eurochange Limited

**Heard at:** Norwich

**On:** 19, 20 and 21 June 2023

**Before:** Employment Judge Postle

**Members:** Mr D Hart and Mr B McSweeney

## Appearances

**For the Claimants:** In person

**For the Respondent:** Mr Hoyle, Consultant

## JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The Claimant was not automatically unfairly dismissed under s.90 of the Employment Rights Act 1996 by taking time off for dependents, pursuant to s.57A Employment Rights Act 1996.
2. The Claimant was not subjected to indirect discrimination pursuant to s.19 of the Equality Act 2010.

## REASONS

1. The issues in this claim set out at the Case Management Hearing in February 2023, in particular there is a claim for automatic unfair dismissal under s.99 of the Employment Rights Act 1996 ("ERA") for taking time off for dependents, pursuant to s.57A of the same Act. There is a second claim of indirect discrimination under s.19 of the Equality Act 2010 ("EqA"), the provision, criterion or practice (PCP) relied upon being the absence of mapping procedure which did not allow for contingency such as emergency childcare absence and records an absence with no explanation or description and the detriment relied upon by the Claimant was dismissal.

2. In this Tribunal we have heard evidence on behalf of the Claimant through a prepared Witness Statement. On behalf of the Respondents we heard evidence from Mrs Burrows, Head of Governance, who unfortunately was not able to assist the Tribunal in that she played no part in the dealings with the Claimant leading up to and including dismissal. The people responsible for the Claimant's dismissal, Michelle Taylor an Area Manager, although still working for the Respondents for reasons best known to the Respondents, was unable to attend the Tribunal to assist it in giving evidence and the Claimant's Supervisor Zoe Igoe, also still as we understand it, in the employment of the Respondents, she was unable again for reasons best known to the Respondents, to offer assistance.
3. The Bundle that the Tribunal had the benefit of included 235 pages. The issues and facts in this case are relatively simple and straight forward.

### **The Issues and Findings of Fact**

4. The Claimant commenced her employment with the Respondents as a Retail Sales Advisor on 6 December 2021, working four days per week, which was subject to a six month probationary period. The Claimant's employment being terminated part way through her probationary period on 5 April 2022, as a result of excessive sickness absence during that probationary period.
5. It is accepted by the Tribunal the Claimant was absent, as set out at paragraph 6 of her Witness Statement, on 10 December 2021 for childcare, 19 January 2022 for childcare, 2 February 2022 for illness, 21 February 2022 for childcare, 28 February 2022 for childcare, 16 March 2022 for illness, 18 March 2022 illness and 22 March 2022 for childcare.
6. The Respondent's Policies clearly allow reasonable time off for childcare, as set out in the Staff Handbook at page 93. The Line Manager originally Christopher Joyce and latterly Michelle Taylor were supposed to conduct a Return to Work Interview and complete the appropriate forms. The Respondents have two types of forms for Return to Work completion and that is one for a sickness absence which we see at page 119a of the Bundle, and the other form is referred to as 'Other Absences' which would be such things as childcare.
7. It would appear that the Respondent's Managers or Supervisors responsible for the Return to Work form completion were somewhat lackadaisical or perhaps even using stronger words, incompetent in correctly completing them and making sure that the correct data went back to HR for them to record.
8. As a result of the Claimant's absences, Michelle Taylor arranged a meeting described as a Probation Review Meeting, on 5 April 2021 and in attendance at that meeting was Zoe Igoe who is described as a note taker / witness. Presumably a witness for the Respondents. The notes of that meeting are at page 127. At that meeting the Claimant was dismissed as

a result of eight absences, described as sickness absence and only one described as childcare.

9. Perhaps not surprisingly the Claimant, being somewhat ambushed by the nature of the meeting, did not respond and explain five of those absences were for childcare.
10. As a result of the Claimant's dismissal, the Claimant emailed HR (page 158) to question the dismissal that had taken place. She said she had taken advice from ACAS and that she had a right as a single parent to have time off for childcare.
11. As a result of that, there was a response from the HR Team on 6 April 2021 and they said they had checked the electronic time sheets and could see the entries and stated,

“Unfortunately the system does not give details for the reason for the sickness absences and the Area Manager has left the business so we are unable to discuss this with him. None of these absences were entered as dependent leave so I am unclear as to your reference to being a single parent”

It then goes on to say,

“When you receive your termination letter it does give you the right to appeal.”

12. That is then followed (at page 157) with an email from the Claimant on 6 April 2021,

*“Good afternoon, the above dates are correct confirming that you do not have the reasons why I was absent ... and I completed all the necessary paperwork when I returned.”*

She also stated in that email that she would be appealing the decision of the dismissal.

13. Then we have (at page 131) on 7 April 2021, from Claire Goadsby of HR, a response which says,

*“Following the issue raised regarding termination during your probation with HR, this is now being investigated and I am writing to you with the conclusions.*

*Firstly an apology for the upset and distress that has been caused. Michelle was working with the information supplied to her in good faith and was unaware the majority of the absence was carer leave. Once you highlighted this, as far as you were concerned all paperwork being sent to the former Area Manager, I requested access to the archive email and found all of the Return to Work documents.*

*As you have not been processed as a 'leaver', given the new and correct information, the fact you have not been formally terminated during your probation, I invite you to speak to me and Michelle regarding your return to work and any planned shifts that you have not worked will be paid."*

14. In effect that was a re-instatement letter rescinding the dismissal.
15. On 7 April 2021, we have the Claimant's response (page 130) where she sets out her position and says she acknowledges the apology and suggests it was an attempt to brush the matter under the carpet, says she has been unfairly treated, discriminated as a single mother and says she will not be coming back to work.
16. It is trite Law, something that has been missed in this case by the Claimant and the Respondent's Representatives, that where there is an express dismissal which the Claimant was subjected to and then an offer of re-instatement, that operates as a matter of Law and Case Law dictates that will revive the contract of employment as if dismissal never took place. A point that seems to have been missed by everybody appearing in front of us.
17. That would mean that under s.99 and s.57A ERA 1996, it does not apply as there has been no dismissal because, the Tribunal repeats, an express dismissal and the Case Law supports this, revives the contract of employment whereby if a re-instatement is offered it acts as if the dismissal never took place.
18. Even if the Tribunal were wrong, s.99 ERA 1996 requires that the principal or sole reason for the dismissal is related to childcare and it is clear however unfair that might appear, that the person who took the decision albeit with not the correct information in front of them, took the decision to dismiss based on the sickness absence rather than childcare.
19. Now dealing with the indirect claim, the Law under s.19 EqA 2010 provides,

**19 Indirect discrimination**

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
  - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
  - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
  - (c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

20. What we have here is, the absence mapping procedure does clearly allow for contingencies such as childcare arrangements. The problem in this case is that it was not always properly communicated in the completion of the forms to HR, which made the data that they held inaccurate.
21. Therefore, as much as one would criticise the Respondents, there is no policy, practice or criterion that indirectly discriminates against single parents with childcare responsibilities.

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Employment Judge Postle

Date: 16/8/2023

Sent to the parties on: 22/8/2023

N Gotecha

For the Tribunal Office.