



EMPLOYMENT TRIBUNALS

Claimant:
A Akhtar

v

Respondent:
John Lewis plc

Heard at: Reading

On: 5-6 September 2023

Before: Employment Judge Anstis
Mr P Hough
Mr G Edwards

Appearances

For the Claimant: No attendance or representation

For the Respondent: Mr D Hobbs (counsel)

REASONS

A. INTRODUCTION

1. These are the tribunal's written reasons for its judgment of 6 September 2023. They are produced following a request made by the claimant on 19 September 2023 (a request for "*written reasons for all decisions made by the tribunal panel at 5-6th September hearing*") which was referred to the employment judge on 1 November 2023.

B. PRELIMINARY MATTERS

2. The first matter to be dealt with in the judgment is the respondent's application to strike out the claimant's claim – made by letter on 25 August 2023, with the claimant replying on 1 September 2023.
3. The basis of the application was that the claimant had not complied with the tribunal's order of 9 August 2023 and she had not actively pursued her claim. That suggests applications under rule 37(1)(c) and (d). In his oral submissions, Mr Hobbs expanded this to encompass rule 37(1)(b) and (e).
4. The first question that arises is whether a fair hearing is still possible. The basis on which Mr Hobbs said that a fair hearing was not possible was that the claimant had not provided her witness statement. However, it seemed to us that that was ultimately a matter for the claimant, and any breach of the order to provide a witness statement did not mean that a fair hearing was no longer possible. After discussion, Mr Hobbs did not pursue this point.

5. Where a fair hearing was possible, it seems to us that even if the circumstances described in rule 37(1)(b)-(d) arose, whether to strike out the claimant's claim remained a matter of discretion, not a mandatory requirement. Given that we were by that point at the start of the final hearing, even if the requirements of rule 37(1)(b)-(d) were made out we would not exercise our discretion to strike out the claimant's claim, since we were in a position to proceed with the final hearing and make a decision on the merits of the claim. Given that, we refused the application to strike out the claim without coming to a view on whether the requirements of rule 37(1)(b)-(d) had been met.
6. Given our refusal to strike out the claim it was not necessary to consider the claimant's response to the application in any detail.
7. The claimant did not attend the hearing. Pursuant to our duty under rule 47 we made enquiries about the reasons for her absence. On receipt of a phone call the claimant said that she would not be attending an in-person hearing. That was confirmation of something that was already reasonably clear from previous correspondence and applications she had made. Her applications to postpone the hearing or to attend remotely are dealt with in separate orders, and have been refused by the tribunal.
8. In those circumstances Mr Hobbs invited us simply to dismiss the claimant's claim on her non-attendance under rule 47, but we refused to do so. The respondent had attended with witnesses and a bundle, so we considered we were in a position to conduct the final hearing of the case, albeit that the claimant had declined to attend the hearing and not produced any witness statement.
9. Following the telephone call to her the claimant submitted a written application to the tribunal for Employment Judge Anstis to recuse himself. That application was refused and is dealt with in a separate order.
10. The respondent's witnesses Kate Inns and Nigel Towse gave evidence and were subject to brief questioning by the tribunal panel. We adjourned the hearing around 14:45 on 5 September to deliberate, with this oral judgment and reasons being given at 14:00 on 6 September 2023.
11. Although the claimant did not attend the hearing or submit any witness statement we have read and taken into account the document attached to her original claim form setting out what her claim is.
12. On the morning of 6 September 2023 the claimant made an application for the claim to be transferred to a different employment tribunal. We take this to be an application for the claim to be transferred to a different employment tribunal region. We have addressed this application in a separate order.

C. THE CLAIM

13. The claimant's claims are of unfair dismissal and race discrimination (harassment and victimisation).
14. The scope of the claimant's claims (following an application to amend her original claim) is set out in a list of issues prepared in the course of or following a case management hearing before EJ Tinnion on 25 October 2022. It is as follows:

"Unfair dismissal (ss.94-98 Employment Rights Act 1996)

1. It is not in dispute that the Respondent dismissed the Claimant on 16 September 2021.
2. What was the Respondent's reason (or if more than one principal reason) for dismissing the Claimant on 16 September 2021 – was it (a) the Claimant unauthorised absence (Respondent's case) or (b) the grievance the Claimant made against Kate Inns dated 2 July 2021 (Claimant's case)?
3. Was the Respondent's reason/principal reason for dismissing the Claimant her conduct?
4. Did the Respondent genuinely believe the Claimant was guilty of the misconduct for which she was dismissed?
5. Did the Respondent have reasonable grounds for that belief at the time of dismissal?
6. At the time of dismissal, had the Respondent conducted as much investigation as was reasonable into the conduct for which the Claimant was dismissed?
7. Did the Respondent conduct a fair disciplinary and dismissal procedure within the band of reasonable responses open to it at the time?
8. Was the sanction of dismissal for the conduct at issue within the band of reasonable responses open to the Respondent at the time?
9. Looked at in the round, was the Claimant's dismissal for the conduct for which she was dismissed within the band of reasonable responses open to the Respondent at the time of her dismissal?
10. If the Claimant was unfairly dismissed, was there a chance the Claimant would have been fairly dismissed if a fair disciplinary and dismissal process had been applied? If yes, how great a chance?
11. Did culpable conduct on the Claimant's part cause or contribute to her dismissal? If yes, to what extent?

Victimisation (s.27 Equality Act 2010)

12. Were either or both of the following protected acts by the Claimant (ie, did she allege there had been, there is, or there will be a breach of the Equality Act 2010):
 - a. Claimant's email to Kate Inn sent on 17 June 2021;
 - b. Claimant's grievance dated 2 July 2021?

13. Did the following conduct by the Respondent occur:
 - a. the Claimant was dismissed by the Respondent (this conduct is admitted);
 - b. the Respondent omitted to contact the Claimant (by one of its managers) to arrange a return to work for the Claimant?
14. If and to the extent the conduct above occurred, did the Respondent thereby subject the Claimant to a detriment?
15. If and to the extent the conduct subjected the Claimant to a detriment, did the Respondent subject the Claimant to the detriment because she had done a protected act (as alleged above)?

Harassment (s.26 Equality Act 2010)

16. Did the following conduct by the Respondent occur:
 - a. on 16 June 2021 did Kate Inns attend the Claimant's home address and hand-deliver a copy of the disciplinary paperwork to the Claimant, take a photograph of the Claimant's front door, and email that photograph to two members of the Respondent's management team;
 - b. on 16 June 2021, did one of the members of the Respondent's management team send Kate Inns a reply email which stated "thanks so much. Also hot off the press the special deliver letter has also been delivered and signed for by Ayesha";
 - c. on 16 June 2021, did one of the members of the Respondent's management team send Kate Inns a reply email which stated "Thank you, keep an eye on the email, just in case she makes contact".
 17. Did that conduct relate to the Claimant's skin colour (South Asian)?
 18. Was that conduct unwanted by the Claimant?
 19. Was the purpose of the conduct to violate the Claimant's dignity?
 20. Was the purpose of the conduct to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
 21. Taking into account (a) the Claimant's perception (b) the other circumstances of the case (c) whether it was reasonable for the conduct to have that effect, was the effect of the conduct to violate the Claimant's dignity?
 22. Taking into account (a) the Claimant's perception (b) the other circumstances of the case (c) whether it was reasonable for the conduct to have that effect, was the effect of the conduct to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?"
15. At a case management hearing on 21 June 2023 I allowed the addition of an issue as to whether there was an unreasonable failure by the respondent to follow the ACAS Code of Practice and, if so, whether there should be an uplift in any compensation.

D. RACE DISCRIMINATION

16. We will look first at the claims of race discrimination: harassment and victimisation.

Harassment

17. On the question of harassment, we do not understand it to be in dispute that the events alleged on 16 July 2021 occurred. What is in issue is whether they amount to harassment on the grounds of the claimant's race. The primary issue here is that at point 17: was any of that behaviour related to the claimant's skin colour?
18. We do not see any basis on which we could find that this behaviour was anything to do with the claimant's skin colour.
19. Ms Inns had explained why she made the hand delivery. The claimant lived quite locally to the respondent's store in Reading. As a manager she was able to park close to the store and had more control over her own time than others did. As such, it was convenient for her to hand deliver the letter. We do not see anything wrong with this, nor with the responses from her colleagues, nor do we see anything in this that would suggest this behaviour was to do with the claimant's skin colour. This was not racial harassment as it had nothing to do with the claimant's skin colour and, beyond that, it did not have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant nor could it reasonably have been considered by her to have this effect.

Victimisation – protected acts

20. The claimant's claims of victimisation require protected act(s).
21. Section 27(2) of the Equality Act 2010 says:
- “Each of the following is a protected act:*
- (a) bringing proceedings under this Act;*
 - (b) giving evidence or information in connection with this Act;*
 - (c) doing any other thing for the purposes of or in connection with this Act;*
 - (d) making an allegation (whether or not express) that [anyone] has contravened this Act.”*
22. It seems that if there are protected acts in this case they can only fall under s27(2)(d).

23. The email to Kate Inns sent by the claimant on 17 June 2021 is at pages 433-435 of the tribunal bundle.
24. In that email the claimant requests suspension of the disciplinary meeting. She says:

"Following from the details provided to you in previous email, I request you to suspend the disciplinary meeting for following reasons and in compliance with Acas code of practice for disciplinary and grievance at work.

Extract from Acas code of practice

- *Bias is alleged in the conduct of the disciplinary meeting*
- *Management have been selective in the evidence they have supplied to the manager holding the meeting*
- *There is possible discrimination*

It is unfair treatment that you wanted disciplinary meeting to go ahead when there is a grievance and I told you about it. As mentioned in previous email, grievance is in process and I requested for paid leave."

25. The claimant goes on to complain about breaches of confidentiality and the manager appointed as the hearing manager.
26. It is long established that tribunals should not take an unnecessarily restrictive approach in identifying protected acts. It is, for instance, not necessary for an individual to specifically allege a breach of the Equality Act. Nevertheless, it is clear that something more than a general complaint is required, and there must be something in the protected act from which the tribunal could find that the claimant was (implicitly or explicitly) alleging a breach of the Equality Act by someone.
27. The only phrase in that email that might imply a breach of the Equality Act is *"there is possible discrimination"* – but the word "discrimination" can be used in many senses, and does not necessarily suggest a breach of the Equality Act. In Durrani v Ealing UKEAT/0454/2012/RN (where the tribunal had found that the allegation of "discrimination" did not amount to a protected act) Langstaff P said:

"This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act. All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect

of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground.”

28. So an allegation of “discrimination” can usually be expected to amount to a protected act, but it does not necessarily. In Durrani the claimant expressly disavowed any allegation of racial discrimination. That is not the case here. However, we have to consider on the facts of the case whether the claimant citing an extract from the ACAS Code of Practice referring to “*there is possible discrimination*” (apparently on the basis that this would require the disciplinary process to be suspended pending resolution of her grievance) can be taken as an allegation of a contravention of the Equality Act.
29. We find that this is not a protected act. The bare reference to “discrimination” in that context does not imply an allegation that someone has contravened the Equality Act. In saying this we take into account the email as a whole. She refers to matters including “bias”. It is clear that the claimant is suggesting that she has been treated differently, but there is nothing in this email that suggests she considers her different treatment to be a matter in relation to a protected characteristic or a breach of the Equality Act. It would not take much to imply from a bare allegation of “discrimination” a breach of the Equality Act, but it does take something, and that something is not present in her complaint.
30. The second protected act is similarly brief. The claimant’s grievance of 2 July 2021 is set out at p508 of the tribunal bundle. She says:

“I would like to raise a grievance against head of branch Kate Inns. I recently wrote to Kate Inns on email issues regarding breach of confidentiality, discrimination, managers serious misconduct and unfair treatment. I am upset that Kate Inns has not acknowledged this and not advised what steps she can take to provide support and resolve the situation. She is not replying to emails either.”
31. This seems to flow from the earlier alleged protected act. The “discrimination” mentioned is that alleged in the earlier email, and for the same reason we find it is not a protected act when repeated here.
32. For the sake of completeness, the detriments alleged are:
 - (a) Dismissal, which did occur and must be taken to be a detriment. We will address this in the considering the unfair dismissal claim.
 - (b) Omitting to contact the claimant to arrange a return to work.
33. The “*omission to contact the claimant to arrange a return to work*” suggests that something occurring after the alleged protected acts should have triggered a manager contacting her about a return to work, but they did not do that because of her alleged protected act(s).

34. The allegation that someone should have contacted the claimant to discuss a return to work first arises in her email of 28 August 2021 responding to an invitation to a disciplinary hearing, where she says *"Nobody contacted to arrange return to work, which is why I have not been able to return to work. You and management do not want me back at work."* We are, however, at a loss to see what should have triggered an approach from management, and do not see any basis on which it could be said that such an omission was anything to do with any alleged protected acts.

E. DISMISSAL

35. The claimant was dismissed by way of a letter dated 16 September 2021. It was a summary dismissal, with the reason given being *"your serious misconduct namely unauthorised absence and failure to follow the correct absence reporting procedures"*.
36. "Unauthorised absence" is identified as potentially being "serious misconduct" in the respondent's disciplinary policy. The claimant's dismissal follows an apparently orthodox disciplinary process and her non-attendance at the disciplinary hearing (which was rearranged once to allow a second opportunity to attend).
37. On what we have heard, we are at something of a loss as to how the claimant could have considered her dismissal to be unfair, still less anything to do with her alleged protected act(s).
38. The list of issues describes the claimant's unfair dismissal claim in a somewhat generic manner. It appears clear to us that the claimant was dismissed for conduct, that the dismissing officer had a genuine belief that she had committed misconduct and that there was reasonable grounds for that belief following as much investigation as necessary. It is also clear to us that dismissal in those circumstances was within the range of reasonable responses.
39. In her claim form the claimant says *"There was no case for unauthorised absence as I was in contact with [members of staff] discussing bereavement support and return to work in email"*. She continues *"the dismissal was procedurally unfair as there was no disciplinary investigation process"*.
40. We are not sure what contact the claimant had in mind, or if this was raised by her at any stage in the process. However, whatever the rights and wrongs of this, being in discussion about a return to work is not inconsistent with a dismissal for unauthorised absence. The question of investigation is dealt with below in the context of her appeal.
41. The claimant appealed against her dismissal. If the basis on which a dismissal is said to be unfair is not clear, in some cases it can become clearer by seeing what was said on appeal.
42. The claimant's appeal can be found at p1272 onward.

43. A summary of the grounds of appeal is that there was no investigation stage ahead of her disciplinary hearing (or her previous disciplinary hearing), the disciplinary officer was unsuitable because he had been responsible for a data protection breach (he has mis-addressed a letter to her) and that the disciplinary hearing ought not to have taken place on the day it did. She mentions (unspecified) "possible discrimination".
44. We therefore understand the claimant's complaint of unfair dismissal to relate to matters of procedure, rather than the underlying disciplinary offence. There is nothing in her appeal letter to address the question of whether she had, in fact, been away from work on unauthorised absence.
45. Procedural protections are important to a fair dismissal, in the apparent absence of any dispute concerning the underlying allegation of unauthorised absence we are bound to say that any award of compensation would have to be subject to considerable reduction for contributory fault (perhaps to nothing) and/or be reduced to nothing or a minimal amount through a "Polkey" argument from the employer.
46. We do not consider that any data protection breach disqualifies someone from chairing a disciplinary hearing. We also do not consider an allegation of "possible discrimination" can lead to a finding of unfair dismissal without an explanation of what the discrimination was.
47. That leaves the question of the lack of an investigatory stage and the hearing proceeding on the day it did.
48. As for the investigation, Mr Towse explains matters this way in his witness statement (recounting a conversation with a colleague as part of his consideration of the appeal):

"[the colleague said that] in cases of alleged unauthorised absence if there is no contact from the Partner and they don't attend their shift then they would be invited to a disciplinary meeting. She went on to say that if the Partner subsequently attends the disciplinary meeting, then that meeting could perform the function of an investigation meeting as it would give the Partner the opportunity to explain the situation from their perspective and allow the manager to investigate the issues. [She] explained that if a Partner is not attending work, it is very difficult to investigate before inviting them to a disciplinary meeting as the primary reason for that meeting is their non-attendance for a contractual shift. I agreed with this view and would also make the point that given the nature of Ayesha's communications with her managers and the lack of any cooperation on her part, I found that the Branch had no other option but to invite her to a disciplinary meeting in the hope that the seriousness of the matter might persuade her that it would be in her best interests to attend disciplinary meeting in the hope that the seriousness of the matter might persuade her that it would be in her best interests to attend."

49. This is a reasonable and rational approach to an issue of misconduct that may not be susceptible to an investigation stage. The lack of an investigation stage did not make the claimant's dismissal unfair.
50. As for the date of the hearing, Mr Towse found that the claimant had been on an extended period of bereavement leave (two weeks) from 2 September, but that this would not account for her being absent on the day of the disciplinary hearing (16 September 2021). In those circumstances we do not see anything wrong with proceeding in her absence.
51. Although, so far as we are aware, it has never been part of the claimant's allegation of unfairness, we had some concerns about the respondent apparently having issued her with a first written warning and then subsequently dismissal without the intervening step of a final written warning. However, we are satisfied with the respondent's explanation that (amongst other things) unauthorised absence is itself an act of serious misconduct justifying dismissal so there is no need to step up warnings through different levels before dismissing.
52. The claimant's dismissal was not unfair, and we see no basis for her allegation that it was an act of victimisation.

Employment Judge Anstis

Date: 1 November 2023

Sent to the parties on:
1 November 2023

For the Tribunal Office

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