



EMPLOYMENT TRIBUNALS

Claimant

Miss Lynnette Muluswela

v

Respondent

Xtra Healthcare Limited

Heard at: Norwich (by CVP)

On: 22 March 2024 and 17 April 2024

Before: Employment Judge Postle

Appearances

For the Claimant: Mr Kohanzad, Counsel

For the Respondent: Mr Ogunshakin, Counsel

JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Claimant's claim for unpaid wages was withdrawn at the outset of these proceedings, the sums due having been paid.

REASONS

Background

1. This is a claim for unfair dismissal. The reason advanced by the Respondents for the dismissal is conduct.
2. Originally there was a wages claim, this was withdrawn at the outset of these proceedings as I understand this was paid.
3. In this Tribunal we have heard evidence from the Respondent's Witnesses, namely: Miss Eleri Brown, a Mrs Faye Brown, a Ms Badza and a Ms Taderera. All giving their evidence through prepared Witness Statements. The Claimant gave evidence also through a prepared Witness Statement. The Tribunal had the benefit of a Bundle of documents consisting of 307 pages.

Findings of Fact

4. The facts that I find in this case are relatively straight forward. The Claimant was employed by the Respondent on 10 November 2022 as a Support Worker, following a TUPE Transfer which gave her continuous from 17 February 2014 and that led to her dismissal on 12 July 2023.
5. The Claimant clearly had ongoing issues regarding pay, shifts and pension since the Transfer over to the Respondents.
6. In or about early April 2023 the Claimant's daughter had pre-booked a holiday to South Africa and the Claimant decided to travel in May 2023 as this would coincide with the then rotating Rota which the Claimant knew would allow her a period of two weeks within the roster when she was not required to work.
7. Normally four weeks' notice was required for leave requests so the Claimant believes she had ample time in which to request her leave. When the Director of the Respondents, Miss Badza announced changes to the Rota without warning or consultation to either the staff or the service users, the Claimant put the request on hold until the question of the new Rota issue was resolved.
8. In this respect Ms Badza, on 18 April 2023 by an email to staff oddly dated 1 April 2023 outlined the changes to pay and changes to the Rota for May (at page 222). These changes seemed to affect all TUPE staff and I repeat were made without any consultation to staff or service users in the Home where the Claimant worked.
9. As a result of these changes the Claimant would lose approximately eight of her ten 'sleep in' duties and apparently a number of these were given to another employee, particularly 24 sleeps per month. All the staff were, it is fair to say, annoyed by this sudden announcement and change to the Rota system. The reason for and the notice of the change indicated this came about as a result of the Working Time Regulations and Health and Safety. As a result of these changes the Claimant was to lose approximately £400 in wages.
10. The Claimant and her colleagues, as I have said were all TUPE over, raised a Grievance around 20 April 2023 (page 223 – 224). The Hearing of that Grievance was to take place on 3 May 2023. Ultimately, the outcome was on 11 May 2023 and the situation with regard to the new Rota was not changed.
11. In the meantime, on 28 April 2023, the Claimant sent an email to Ms Badza asking her to revert back to the old Rotas at least until the Grievance meeting on 3 May 2023 was heard. That email reads as follows,

“I am writing to you today appealing we revert back to the old rota. There are so many factors to consider. However I would like now to

discuss my upcoming leave. Firstly when this change was communicated it was sudden, I planned a two week absence from work as annual leave based on a normal rolling rota. I had to wait to submit my request allowing time to hear of your decision on the Grievance that had been collectively raised. I had already booked my flight as I had ample time to notify your office before the beginning of the month. Besides that you had mentioned in your communication holidays would now be covered by payroll office and it was my responsibility to advise of my intention within reasonable notice. The above changes will have a negative impact on my income due to loss of hours, not to mention that you also took away the flexibility of staff swapping shifts to occasionally helping each other. Lastly consultation and some notice to employees would have been a better approach and necessary to avoid hostility. I look forward to hearing from you.”

12. By any objective assessment, that email by the Claimant is neither offensive, rude, intimidatory or unprofessional. Unfortunately Ms Badza did not respond to that email, so the Claimant messaged her by WhatsApp and again that was neither offensive, rude or intimidatory, merely chasing up the matter. In the meantime, the staff were told that the new Rotas were to start on 1 May 2023 regardless of an outstanding Grievance. The outcome of the Grievance (page 226) was on 11 May 2023 and there was no change to the new Rota, it would stand.
13. On 6 May 2023 the Claimant therefore had no option but to submit her holiday request. The old Rota would have allowed her two weeks' leave, the new one only allowed her one week's leave. The Claimant was refused leave for the two week period, the reason being she had not given four weeks' notice, (page 54).
14. The Claimant replied firstly to Payroll, copied to Ms Badza, on 6 May 2023 stating the reason for the delay in requesting the leave was due to the changes to the Rota that had been made and how it had affected her. We see that at page 53,

“Thank you for your response. It is unfortunate you are seeing this as late notice rather as a result of the inconveniences caused by the sudden change to the rota. On another note, my leave notice had been affected by Winnie. I sent an email to Winnie on 28 April explaining that the rather impulsive, ill thought communicated rota changes would affect my upcoming leave. To date I have not had a response and have been anxiously waiting for this to be revoked. My Union Representative tells me that on Wednesday Winnie stated the rota had been changed due to CQC based Law. Can this be clarified as I am assured that Winnie will change the rota back if no such Law, rather Regulations exist. Winnie can you please urgently advise which CQC Law Regulations you are referring to, or when the rota reverts

back to our usual rolling rota as this is impacting both on personal lives and mental well being.”

15. Again by any objective assessment, that email cannot be read as offensive, rude or intimidating. It is merely an employee challenging a decision that has been made by the Respondents without consultation.
16. Ms Badza eventually replies on 9 May 2023, rather unfortunately in red ink which is always seen as aggressive and confrontational, saying she found the Claimant’s emails rude, unprofessional and her emails, i.e. the Claimant’s emails, were a form of abuse and bullying (pages 55 – 60). The Claimant replies on 9 May 2023 (page 56) and she questions how her emails amounted to being rude, unprofessional and bullying, etc. and if Ms Badza could explain to the Claimant how she had arrived at that decision, the Claimant would apologise. A good management practice would have suggested at that stage a meeting should take place between Ms Badza and the Claimant to discuss and no doubt that would have resolved matters and not led us to where we are now.
17. The Claimant also expressed frustration in that email at Ms Badza’s selective and delayed response to her emails, particularly about the leave issue and how the TUPE staff were frustrated the way they had been treated and extra hours had been given to satisfy employee’s working Visas which again was not discriminatory, it was merely stating a fact. It had nothing to do with anybody’s race or ethnicity.
18. The Claimant is then informed quite inexplicably that she is to be investigated for the tone of her emails between 28 April, 6 and 9 May (page 64). In particular,

“I write to inform you that the organisation has decided it is necessary to conduct an investigation into your actions in relation to email correspondence sent by yourself to Winnie Badza Care Manager on 6 May and 9 May. The contents of these emails alleging caused the recipient extreme stress and could be deemed as having malicious intent. ...”
19. Faye Brown, the General Manager of the Respondents was to conduct the investigation. Quite bizarrely, contrary to any good practice, she fails at any stage to sit down and have a meeting and take a statement from the Claimant to discuss the allegations. She merely talks over the telephone with Ms Badza to get her view. However, again there are no notes or records of those conversations. Ms Brown compiles her Investigation Report of sorts, dated 24 May 2023 and she did that without understanding the background to the issues via the Claimant, or aware seemingly of the collective grievance. She recommends disciplinary action (page 93), the conclusion part of her Report, “I would recommend a formal disciplinary” and then she sets out a number of reasons which are largely bullying, harassment, malicious content, rude, unprofessional and discriminatory.

20. The Claimant was then invited to a Disciplinary Hearing. She had not been suspended at any time in the meantime and at the Claimant's request the Disciplinary Hearing was rescheduled on a number of occasions. The reason being the Claimant simply wanted to clarify the allegations which were being put to her.
21. I repeat, in summary the allegations vaguely particularise the emails of 28 April, 6 and 9 May and contend that they are seen as bullying, harassment, malicious content, rude, unprofessional and discriminatory.
22. The letter inviting the Claimant to the Disciplinary Hearing did advise her of her right to be accompanied and did advise her that if the allegations were proven that could lead to dismissal. The Disciplinary Hearing was conducted by Ms Taderera, Care Manager, it took place on 5 July 2023 and the Claimant was accompanied by her Trade Union Representative. He responded on behalf of the Claimant to what is best described as vague allegations which had been put. The Claimant was now reluctant and scared to respond for fear of how her responses may be taken in the light of what had now transpired, i.e. that she may be seen again as allegedly unprofessional, rude or malicious, or discriminatory in the way she was responding during the course of the Disciplinary Hearing.
23. The Claimant was ultimately dismissed without notice for gross misconduct by letter of 12 July 2023, wrongly dated 12 June 2023 for reasons replicating the original allegations (page 145).
24. The Claimant Appealed by letter on 13 July 2023 (pages 150 – 155). She set out 16 grounds for the Appeal. The Appeal was conducted by Miss Eleri Brown who quite astonishingly did not deal with any of the grounds, could not justify in cross examination the reason she upheld the dismissal, she had no justification for upholding the dismissal in her Witness Statement and her Outcome Letter was, to put it bluntly, brief, to the point and had no justification whatsoever as how she reached her decision upholding the dismissal. She had not, I repeat, dealt with any of the grounds of the Appeal. Quite simply Miss Brown was rubber stamping a decision.

The Law

25. Dealing with the Law, Section 98 of the Employment Rights Act 1996 sets out potentially fair reasons to dismiss. One of those is conduct, that is not the end of the matter, section 98(4) says,

“(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.”

26. We then follow the well-trodden principles of the well-known case of British Home Stores v Burchell which are,
- 26.1. What was the reason for the dismissal?
- 26.2. Did the Respondents carry out a reasonable investigation into the Claimant’s alleged gross misconduct?
- 26.3. Did the Respondents have reasonable grounds for its belief that the Claimant had allegedly committed gross misconduct? and
- 26.4. Was the dismissal within the band of reasonable responses that was available to the Respondent?
27. I remind myself of course it is not for me to substitute my own view.

Conclusions

28. Was there a reasonable investigation? The investigation was to put it bluntly poor, one sided, a sham and a reasonable investigation at the very least you would expect them to sit down and discuss it with the person to whom the allegations are against the Claimant. That simply did not happen.
29. We then have the other side of the investigation with the Investigating Officer saying, *“well I spoke to Ms Badza on the telephone and got her views”* but unfortunately there are no notes or records of those discussions.
30. Moving on to the next part. Did the Respondents have reasonable grounds to believe the Claimant had committed gross misconduct? Here, I suggest you look at the facts. Changes were imposed by the Respondents without any consultation with the employees, particularly those affected by the TUPE transfer and further, they were not discussed with the service users. It was going to have an impact on everybody, including the Claimant. The Claimant simply challenges those and also the position regarding her holiday, how it impacts her colleagues and how there is a loss of income in respect of the loss of ‘sleep ins’ which had been given to satisfy the requirements of another worker, his Visa. She indeed, in one email, said

“... If I have been rude or unprofessional, please tell me exactly how and I am happy to apologise...”

31. Taking those factors together, looking at it objectively, there is no evidence before this Tribunal that the Claimant behaved in the manner that is said; namely gross misconduct. To dismiss as night follows day for gross misconduct, cannot under any circumstances fall within the boundaries of the range of a reasonable response test. The dismissal is not only procedurally but also substantively unfair.
32. At the Conclusion of the Judgment, the respective Counsels made submissions on contribution and Polkey.
33. The Tribunal could not conclude, given the reason for the dismissal particularly the content of the Claimant's emails of 28 April, 6 May, 9 May, that those by any objective assessment amounted to blameworthy or contributory conduct.
34. In relation to Polkey it would be too much of a speculative exercise to consider if the Respondent had followed a fair procedure, whether or not the Claimant would have been dismissed. We say that also because of the fact there were a number of wide ranging procedural defects in the process, particularly the lack of any investigation, vague and speculative allegations before the Disciplinary and that the Appeal was merely a rubber stamping exercise in circumstances where the Appeal Officer was unable to justify at any stage whether the Outcome Appeal Letter under cross examination, or her Witness Statement, the reasons why she upheld the dismissal.

Remedy

35. The parties have been encouraged now to discuss with each other the Remedy, given that there was insufficient time at the conclusion of today's Hearing and Judgment to deal with Remedy properly. As a fall back, a one day Remedy Hearing date has been set via the Cloud Video Platform (CVP) for 10 June 2024.

Employment Judge Postle

Date: 2/5/2024

Sent to the parties on: 13/05/2024

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For the Tribunal Office.

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