



# THE EMPLOYMENT TRIBUNAL

---

**SITTING AT:** LONDON SOUTH EMPLOYMENT TRIBUNAL

**BEFORE:** EMPLOYMENT JUDGE WEBSTER

**BETWEEN:**

Miss N Thomas

Claimant

AND

TFL – London Underground Ltd

Respondent

**ON:** 26 May 2017

**Appearances:**

**For the Claimant:** Did not attend

**For the Respondent:** Mr P Livingstone (Counsel)

## JUDGMENT

1. The Claimant's claim for unfair dismissal fails.

## WRITTEN REASONS

### The claim

1. By a claim form dated 11 January 2016, the Claimant brought a claim for unfair dismissal. The Claimant was dismissed on 13 October 2016 for gross misconduct. She also stated in her ET1 that she had been victimised and harassed although she does not provide details of which protected characteristic under the Equality Act she was harassed or victimised in relation to in the ET1 or her witness statement.
2. The Respondent submitted an ET3 refuting the claim stating that the decision to dismiss the claimant was within the range of responses for an employer in the circumstances. They asserted that they dismissed the claimant because they reasonably believed that she had claimed sick pay whilst being on holiday.

### The hearing

3. The claimant did not attend the hearing. A notice of hearing was sent to the parties on 8 March 2017 listing the hearing for 26 May 2017. On 9 March 2017 the claimant was sent a Notice to pay a hearing fee. The Notice stated that she must pay the fee of £950 or submit an application for help with the fees no later than 5 May 2017. No payment was made. A further notice to pay was sent on 22 May 2017 requesting that the payment or an application for help with the fees be made by 24 May 2017.
4. On 23 May 2017 the claimant made an application for the hearing to be postponed on the basis that she felt intimidated and scared, needed to seek further legal advice and stating that her application for help with fees had been refused and she needed longer to raise the money needed to pay the fee. In that email she stated that she understood the last day for her to pay the court fee was 24 May 2017. This application for a postponement was refused by the tribunal on 25 May.
5. On 25 May at 18.21 the claimant emailed the tribunal stating that her attempt to pay the hearing fee had been unsuccessful with a screen shot of the error screen. It transpires that this error occurred because the deadline for payment had already passed.
6. On 26 May the claimant did not come to the tribunal for the hearing. The clerk called her to find out why and she said that she had not come because she had not been able to make payment on 25 May as per her email described in paragraph 5 above.

7. At around 10.20 I asked the clerk to call her and ask her to come to the hearing in any event. She said that she could not come as she was working and it would take her some time to get to Croydon. She was asked whether she wanted her claim to continue in the future and she said that she did.
8. I invited the respondent in to give their comments on the situation. The respondent made an application for the claims to be struck out on the basis that the claimant had not attended the hearing (Rule 47), or in the alternative that the claim had not been actively pursued under Rule 37(1)(d), or in the alternative because the claimant had not paid the fee under Rule 40.
9. I carefully considered the situation. I had witness statements from the claimant and the two respondent witnesses as well as a bundle of evidence that had been agreed between the parties.
10. The overriding objective set out in Rule 2, Schedule 1 Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 states that the tribunal must deal with a case fairly and justly including:
  - (b) Dealing with cases in ways which are proportionate to the complexity and importance of the issues;
  - (d) Avoiding delay, so far as compatible with proper consideration of the issues; and
  - (e) Saving expense
11. The respondent's application for strike out had considerable merit, particularly for non-attendance. Nothing the tribunal had sent to her or said to her indicated that the hearing would not go ahead today. The claimant was given a second opportunity to attend today, knowing that the respondent and the Judge were considering the situation. She failed to do so because she was working. The fact that she was at work appears to indicate that she had no intention of coming to the hearing even before the payment error. Nonetheless, because I had all the relevant paperwork and because the claimant had been given the opportunity to attend I decided that it would be in accordance with the Overriding Objective to consider the evidence presented to me and make a decision today. The claim was for unfair dismissal and having read the witness statements and the bundle of documents I felt that I had sufficient evidence to make an informed, reasoned decision.
12. In making this decision I weighed up the potential detriment to both parties. Both parties provided me with written evidence. Neither party had the opportunity to 'test' each other's evidence through cross examination so in that regard they were on an equal footing. Postponing the hearing would have caused the respondent considerable additional expense. The claimant had had ample time to make the fees payment and at the time I made my decision not to postpone, she had still not made the fees payment. She had had ample

time to apply for a postponement prior to 23 May were she experiencing difficulties and she was given the opportunity by me to attend the hearing today but refused to do so. I therefore decided that delaying the matter further was not in accordance with the Overriding Objective.

13. The respondent witnesses, Ms L Adesida and Mr G Belizaire were sworn in and confirmed that their witness statements were accurate and correct but gave no further evidence. The respondent's representative provided me with written submissions. I then reserved my reasons and the respondent's representative and witnesses left.

14. I read the claimant's witness statement, the respondent's witness statements and the agreed bundle of documents provided to me. No further evidence was provided to or considered by me.

#### List of Issues

15. On reading the statement attached to the ET1 and considering the boxes ticked on the ET1 I consider that the claimant only sought to bring a claim for unfair dismissal. The respondent, in its written submissions to the tribunal states that the claimant also appears to be claiming for wrongful dismissal, holiday pay and a failure to provide a statement of terms and conditions. I could find no evidence or information provided by the claimant that she intended to bring any claim apart from a claim for unfair dismissal.

16. Unfair dismissal – s 98 Employment Rights Act 1996 ('ERA 1996')

13.1 What was the reason for dismissal? Can the Respondent show that the reason or principal reason for dismissal was a potentially fair reason under s 98 (2) Employment Rights Act ('ERA') 1996? The Respondent relies on conduct (s98(2)(b)).

13.2 If the dismissal was for a potentially fair reason, was the dismissal fair or unfair under s98(4) ERA 1996?

13.3 The Tribunal should take account of all the circumstances including the size and administrative resources of the Respondent's undertaking in determining whether the respondent acted reasonably or unreasonably in treating conduct as a sufficient reason for dismiss the claimant. In particular the Tribunal should consider:

- i. whether the respondent held a genuine belief of misconduct
- ii. whether the grounds for any such belief were reasonable
- iii. whether at the time it held that belief it had carried out as much investigation as was reasonable
- iv. whether the procedure followed was within the range of reasonable responses;
- v. whether the sanction imposed was within the range of reasonable responses

13.4 If the dismissal was unfair then the tribunal must consider issues of remedy including:

13.4.1 Should any award be reduced to reflect a change that the claimant would have been dismissed fairly had a fair procedure been followed?

13.4.2 Has the claimant caused or contributed to her dismissal If so, by how much is it just and equitable to reduce any award?

### Findings of Fact

17. The claimant was employed from 25 April 2016 until 13 October 2016 when the respondent terminated the contract for gross misconduct.

18. It is not disputed that on 17 June 2016 the claimant rang the attendance hotline to notify the respondent that she was not fit to attend work due to ill health. She sent a self-certification notice of her ill health on 20 June.

19. On 20 June the claimant posted on Twitter and Instagram that she was going on a surprise holiday for her birthday. She posted further pictures on 21 June showing her on holiday with the location as 'Sofitel Marrakech Palais' and 'Marrakesh, Morocco'. On 23 June she posted again on Twitter/Instagram saying '*Take me back,,, please*' with the location showing London, UK. The claimant states that she was not in fact on holiday in Morocco at this time and that she was ill in bed. She states that she posted the pictures to make someone else angry and to publicise her beauty business. She said that the pictures dated from when she had been to Morocco earlier in the year and that she had falsified the location on the pictures.

20. The respondent's manager, Ms Henderson called the claimant on 20 June 2016 and got through to an international dialing tone and so hung up. The claimant disputes that this happened as she had no call record showing that on her phone. The claimant says that had this been correct Ms Henderson would have left a message or that there would be a call log on the claimant's phone.

21. The claimant returned to work on 27 June 2016. The respondent had a fact finding investigation meeting with her and she was suspended with immediate effect. A further investigatory meeting was held on 8 July 2016. The claimant maintained at both investigatory meetings that she had not been on holiday, that she had been sick and that she had posted the pictures to anger someone else. She showed the respondent how to change the location setting so that you could indicate you were in Morocco when in fact you were in the UK. She stated that the pictures came from a trip she made to Morocco in March that year though she could not remember the exact dates of the trip. The respondent also interviewed Ms Henderson and obtained copies of the social media posts that they relied upon.

22. The claimant was invited to a disciplinary hearing on 29 September 2016. She was accompanied at that meeting by her TU representative and was invited to make representations and provide further evidence. The claimant was informed that the allegations against her were capable of resulting in dismissal as she had breached the respondent's code of conduct as follows:

22.1 Breached s 3.1.1 in that she had failed to comply with the respondent's policies and standards.

22.2 Breached 3.5.1 in that she did not report for work on time at the appropriate place and did not provide medical certificates as required.

22.3 Breached the implied duty of trust and confidence in that it demonstrated dishonesty.

23. The claimant provided her passport which was damaged on the relevant page. The claimant asserted that it showed the stamp she had received for going to Morocco in March. The date on the stamp illegible because of apparent water damage. The rest of the passport appeared undamaged. The claimant had also submitted a GP letter dated 5 July which backdated her ill health and confirmed she had been unwell. The claimant asserted that she had seen her GP twice, once during her period of ill health and once on 5 July. Having read the letter I do not consider that the GP letter (provided in the bundle) confirms that she saw the GP before 5 July. It only references the meeting at which the claimant attended after she had returned to work.

24. The claimant also provided a copy of a travel insurance document which was an email to her friend stating that the friend and the claimant were insured for travel in March 2016. Mr Belizaire states that the format of the document was capable of being edited and that he could amend the document easily. He therefore placed little weight on this evidence. I find it reasonable that he did not accept this evidence as demonstrating that the claimant had not travelled in June. Even if the document produced was genuine, it did not add significant weight to the claimant's assertions that she had not been away in June as well. I do not accept the claimant's evidence that this was the only piece of evidence she could produce in so short a period of time. It is not plausible that she could not have also found flights, hotel bookings etc. in the 6 weeks to demonstrate that she had travelled to Morocco earlier in the year thus accounting for the photos. The claimant had 6 weeks to produce evidence.

25. The claimant states in her evidence that she was unable to provide any proof of being in the UK during this time because she had been ill in bed and lived with her parents so had not been out and spent money generating a receipt. It is true that proving a negative is often very difficult. However I find it implausible that it would not have been possible to produce any evidence whatsoever confirming that she had been in the UK during this period of time or that she had in fact been to Morocco in March instead of in June.

26. Throughout the disciplinary hearing and the appeal hearing the claimant and her representative objected to the claimant being asked to prove her innocence. However I find, on balance, that it was reasonable in the circumstances for the respondent to ask the claimant to explain the social media posts and if possible, to demonstrate that she was in the UK.
27. Having read the transcript of the hearings I find that the respondent's conduct during the disciplinary process and hearing was reasonable and that they did not behave improperly towards the claimant or her representative. Their requests for evidence were reasonable in the circumstances as they were giving the claimant the opportunity to persuade them that she was not in Morocco which is what the evidence they did have appeared to demonstrate.
28. In contrast I find that the claimant and her representative were argumentative and difficult during the disciplinary hearing and that this did not assist matters. Their arguments were based on what the respondent should or should not be asking the claimant to do as opposed to addressing the allegations against the claimant and demonstrating that they were not correct.
29. Mr Belizaire concluded that the claimant had travelled to Morocco in June as opposed to being genuinely off sick and that she had lied to her employer and obtained sick pay when she was not in fact unwell. He deemed her actions to be gross misconduct and that she should be dismissed with immediate effect. I find that Mr Belizaire considered all the evidence provided to him reasonably and that there were no procedural errors made by the respondent during the disciplinary process or investigation.
30. The claimant appealed against the decision to dismiss her via her TU rep on 13 October 2017. An appeal hearing was held by Ms Adesida on 10 November 2016. The claimant was accompanied at the hearing by her TU rep.
31. The basis for her appeal was that the sanction was too severe, that the original decision had ignored important evidence, and that there was an assumption that the claimant had to prove her evidence as opposed to adopting an innocent until proven guilty approach.
32. At the appeal hearing the claimant's TU rep asserted that the sanction of dismissal was too severe because this was a first offence. He asserted that Mr Belizaire had failed to consider the evidence about the ability to change a person's location on social media posts and that they had disregarded the lack of evidence regarding Ms Henderson's call to the claimant when she got an international dial tone. He also stated that Ms Henderson should not have called the claimant whilst she was off sick and that requiring the claimant to produce her passport was unreasonable.

33. I find that Ms Adesina considered all the points of appeal carefully and accept her evidence that she contacted Ms Henderson again to check her evidence regarding the call and considered everything relevant before making her decision.
34. Overall I find there was no evidence to support the claimant's assertions regarding the allegations and the respondent's conduct of the disciplinary process. She was given ample time and opportunity to explain her actions. Her witness statement states that she was harassed and victimised. Given that no Equality Act 2010 protected characteristics are relied upon I believe she uses these words in a non-legal context to mean that she has been bullied and badly treated during the process. However, there is no evidence to support this in either her witness statement, her claim form or the bundle of evidence provided to me. The transcripts of the meeting show that there were disagreements in the disciplinary hearing but they do not show bullying or improper behaviour.

### The Law

35. Section 98 of the Employment Rights Act 1996 (ERA) provides as follows:
- (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 –
    - (a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
    - (b) Relates to the conduct of the employee,
    - (c) Is that the employee was redundant, or
    - (d) Is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
  - (3) In subsection (2)(a)
    - (a) 'capability' in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental qualify and
    - (b) 'qualifications in relation to an employee means any degree, diploma or other academic technical or professional qualification relevant to the position which he held.



- (4) In any other case 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 reasonable 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.
36. The respondent's case was that this was dismissal for conduct. That is a potentially fair reason under s 98 ERA. In the event that the respondent is correct in that context a determination of the fairness of the dismissal under s98(4) is required. This involves an analysis of whether the respondent's decision makers had a reasonable and honest belief in the misconduct alleged. Further a tribunal must determine whether there were reasonable grounds for such a belief after such investigation as a reasonable employer would have undertaken. The burden of proof is neutral in relation to the fairness of the dismissal once the respondent has established that the reason is a potentially fair reason for dismissal. The tribunal must also determine whether the sanction falls within the range of reasonable responses to the misconduct identified. This test of band or reasonable responses also applies to the belief grounds and investigation referred to.
37. In the event that the claimant is found to have been unfairly dismissed a monetary award is made under s119 ERA (basic award) and s123 ERA (compensatory award). Reductions may be made to those awards. For the basic award a reduction can be made where the tribunal considers that any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, then the tribunal is to reduce that amount accordingly. Under s123 ERA subsection 6, where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

### Conclusion

38. I find that the reason for dismissal was misconduct which is a potentially fair reason in accordance with s98 (2) (b) ERA 1996. I find that the Respondent genuinely believed that the claimant had committed an act of gross misconduct namely that she had gone on holiday whilst claiming to be sick and claimed sick pay for this period of time.
39. The respondent had a genuine belief that the claimant had gone to Morocco rather than being off sick and that this was a breach of the respondent's code of conduct and undermined trust and confidence. I accept Mr Belizaire's

evidence that this was his belief at the time of making his decision and I accept Ms Adesida's evidence that she also genuinely believed that the claimant was guilty of misconduct when she decided the appeal outcome.

40. Mr Belizaire based his decision that the claimant was guilty of gross misconduct on screenshots stating that the claimant was going on a surprise holiday for her birthday which was on 20 June and the photos which stated her location as Morocco and Ms Henderson's evidence that she had called the claimant and heard an international dial tone. No plausible explanation was given by the claimant to counter this evidence. Her passport appeared to have been deliberately damaged to obscure the date of the stamp in her passport, she stated that she had been to see the GP during this period but the GP letter did not confirm that and she had no other evidence which showed any other explanation for the claimant's social media posts other than that she was in fact on holiday as opposed to off sick.
41. The investigation into the misconduct was reasonable and the claimant was given ample opportunity to provide any evidence. Two fact finding meetings were held with the claimant and the claimant 6 weeks to prepare evidence for the disciplinary hearing. Mr Belizaire had a meeting with the claimant and her TU rep and also interviewed the claimant's manager Ms Henderson and considered the evidence provided by the claimant namely her travel insurance document and her passport and a letter from her GP.
42. The claimant asserts that Ms Henderson's phone records should have been obtained and whilst I accept that this would have been ideal I do not think that failure to do so renders the investigation outside the range of reasonable responses in all the circumstances.
43. Whilst dismissal should always be the last resort, given the respondent's conclusions that the claimant was on holiday as opposed to unwell and this is clearly an act of gross misconduct which breached the respondent's code of conduct and fundamentally undermines trust and confidence, I do not consider that dismissal is outside the range of reasonable responses for an employer in all the circumstances.
44. I find that Ms Adesida properly considered the facts afresh for the appeal and carried her own additional investigation when she thought it necessary. I therefore find that if I am wrong regarding the reasonableness of Mr Belizaire's decision, any unfairness in the original decision by Mr Belizaire would have been rectified by the appeal in any event.
45. I therefore find that the claimant's claim for unfair dismissal fails. The respondent's decision to dismiss her, was procedurally fair, was based on a reasonable investigation, and fell within the range of reasonable responses in all the circumstances.

Employment Judge Webster

Date: 26 May 2017