



EMPLOYMENT TRIBUNALS

Claimant: Miss Gemma Pishbin

Respondent: Princeton Consumer Research

Heard at: East London Hearing Centre **On: 16 February 2017 (3 hours)**

Before: Employment Judge Scott (sitting alone)

Representation

Claimant: Mr Paul Ignotus (Counsel (FRU))

Respondent: Mr Reece Statham (Human Resources Director)

JUDGMENT

1. The Claimant was wrongfully dismissed.
2. The Respondent is ordered to pay the Claimant the sum of £692.30 within 7 days.

REASONS

The Complaint

1 The complaint for the Tribunal to determine was the Claimant's claim that she was wrongfully dismissed from her post as a Clinical Trials Assistant with the Respondent. The Respondent denied wrongful dismissal and asserted that the Claimant was dismissed for gross misconduct.

The Issues

- 2 Dismissal without notice was not in issue and the Claimant was an employee.
- 3 The following issue was agreed at a Preliminary Hearing on 24 October 2016:
- Does the Respondent prove that it was entitled to dismiss the Claimant without notice because the Claimant had committed an act of gross misconduct in that she failed to obey reasonable instructions from her employer not to take unauthorised absence, that she failed to provide a reasonable standard of attendance and performance at work generally and finally that she failed to attend work on 9 June and 15 August without authorisation?
- 4 The Respondent agreed at the outset of today's hearing that the Claimant was contractually entitled to 2 weeks' notice, subject to the allegation that the Claimant had committed gross misconduct. The Claimant's Schedule of Loss was agreed [Claimant's Bundle ('C') 40].

The Evidence

5 There were two Bundles of documents which I have taken as evidence to the extent referred to by the parties during the hearing. The Claimant had sent the Respondent a copy of the Bundle and the Claimant's witness statement in advance of today's hearing. The Claimant did not have a copy of the Bundle prepared by the Respondent but, by sharing the Bundles, concentrating on the Claimant's Bundle where possible and by allowing Mr Ignotus to take some time to consider documents referred to in the Respondent's Bundle, we were able to proceed with the hearing. The Claimant was cross examined by Mr Reece and I asked questions. The Respondent had not prepared witness statements for its witnesses (Mr Reece and Mr Chandler, formerly Site Director). The Respondent's witnesses were asked questions by me and cross examined by Mr Ignotus. I read the Claimant's witness statement and the skeleton argument prepared by Mr Ignotus.

Findings of fact

6 The Claimant commenced her employment with the Respondent in May 2015 as a Clinical Trials Assistant. The Claimant was summarily dismissed on 16 August 2016 [C/59]. The letter of dismissal was signed by Mr Reece.

7 The letter of dismissal states that the Claimant was dismissed by reason of sickness and unauthorised absences [C59]. The letter lists 8 alleged occasions of sickness between January 2016 and 1 July 2016 (22 January; 3&4 February; 3 & 14 March; 8 April; 25 May; 1 July 2016) and 2 alleged unauthorised absences (9 June and 15 August 2016).

8 The Claimant was sick on 22 January [R5]; 3 February (a half day's sickness [R5]); 4 February [R5]; 3 & 14 March [R5]; 15 April (the letter refers to 8 April but that is an error and should instead refer to 15 April (see paragraph 11 below) [R5]; 25 May (taken as holiday leave) [R4]; 1 July (taken as holiday leave) [R4]. Of the 8 occasions of sickness (7.5 days), the Claimant therefor took 5.5 days sick leave in 2016, prior to dismissal (the other 2 days were approved as holiday leave, rather than sick leave [R4]).

9 Mr Reece referred the Claimant to [R8/9] during cross examination. [R8] is a screenshot of a Facebook page dated 2 February 2016 displaying a picture of a cocktail. The Claimant comments 'be rude not to'. [R5] records that Mr Chandler 'believes that Gemma is hungover today' (refers to 3 February). The Claimant was at work on 3 February but took a half day's sickness absence and was off sick again on 4 February. The Claimant's evidence was that she had two drinks on 2 February and that she was not hungover on 3 February but was unwell. I accept her evidence; the allegation that she was hungover was not explored with the Claimant at the time, as far as I am aware, nor was it relied upon in the letter of dismissal [R59]. [R5] records that the Claimant 'called Chandler [on 4 February] to say she is still unwell'.

10 [R9] is another screenshot of a Facebook page posted on 14 March 2016 (the Claimant was off sick on 14 March). The messages were posted by friends of the Claimant (the second at 02.31) and tag the Claimant. The Claimant's evidence was that she was not there and had 'no idea what was going on then'. The Claimant's evidence was that she was unwell on 14 March. I accept her evidence; the allegation that she was absent from work on 14 March because she had been out with friends until the early hours of the same day was not explored with the Claimant at the time, as far as I am aware, nor was it relied upon in the letter of dismissal.

11 The Claimant denies being off sick on 8 April [C59]. Mr Reece accepted that was an error and that the reference to the Claimant being off sick on 8 April should read 15 April instead. I accept the Claimant's evidence that, given this was the first that she had heard that she was allegedly off sick on 15 April; she could not recall whether she had been off sick on 15 April 2016. The absence is however recorded at [R15] and I therefore accept that the Claimant was off sick that day. As for the 8 April, the Claimant's evidence was that she was running 10 minutes late on 8 April. She referred to a text conversation between herself and Mr Chandler which began at 9am [C74]. Mr Chandler told the Claimant that she should collect some milk on the way to work and explain that was why she was a few minutes late for work. It is clear that the Claimant was not absent from work on 8 April 2016.

12 The Claimant was absent on 9 June 2016. I accept her evidence that she had worked until late the previous evening and had been unwell during the night and overslept; that is consistent with what she told Mr Chandler at the time [C75]. In the text conversation with Mr Chandler at 12.20pm, following the Respondent sending somebody to the Claimant's flat as she had not appeared at work, he told the Claimant to take the rest of the day off [C75]. Mr Chandler accepted that it might be construed that he had authorised the absence. He told the Claimant that she could not help being unwell and that they would put a plan in place for the future and that the Claimant shouldn't worry about it. Furthermore, the absence was converted to a day's holiday leave to avoid it being unpaid leave [R4]. Its status is recorded as 'approved'. I therefore conclude that the Claimant's absence on 9 June was an authorised absence. The Claimant denies receiving a letter dated 9 June 2016, following the absence on 9 June [R13]. I deal with this at paragraph 15 below.

13 On 15 August 2016, the Claimant texted Mr Chandler at 8.59am to tell him that she would not be in work that day because a friend had been hospitalised and she was looking after her friend's children. Mr Chandler thanked the Claimant for letting him know and asked when she would be back (the Claimant replied that she wasn't sure but that she hoped to be back the following day, as she couldn't afford to have time off

work). The Claimant sent Mr Chandler another text at 6.52pm saying that she was *'a bit confused what to do about tomorrow as Barrie has messaged me saying he not happy and if it was him he will get rid of me but it's down to you and Reece to decide. What shall I do some in or have I lost my job over this'*. Mr Chandler replied at 7.58pm that *'Reece is going to talk to you tomorrow morning about it. The decision to come in or not is yours. He'll be in from 0800 if you wanted to go in early'*. I note that the Claimant's absence is again recorded as holiday leave at [R4], so it is difficult to understand how it can be considered as an unauthorised absence. Its status is recorded as 'approved'. I conclude that it was an authorised absence, given that a day's holiday leave was 'approved'.

14 The Claimant and Mr Chandler had a heated discussion about a work matter on 19 April 2016. Mr Chandler subsequently sent the Claimant a text at 11.23am apologising for upsetting her and suggesting that she 'take the [rest of the] day out'. Mr Chandler accepted that the incident between himself and the Claimant on 19 April was subsequently resolved and that he had acknowledged his element of culpability in the incident. The Claimant denies receiving a letter dated 19 April 2016, following the incident [R14]. I deal with this at paragraph 15 below. The incident is not referred to in the letter of dismissal.

15 The Claimant was asked about the two warning letters at [R13&14]. The Claimant does not make reference to the letters in her witness statement, presumably because the Respondent had not sent the Claimant a copy of its Bundle. The Claimant does, however, say in her witness statement that she had not received 'previous formal written or oral warnings about [her] conduct.' The Claimant denied receiving the letters at [R13&14]. The two letters are not referred to in the letter of dismissal [C59]. On balance, given that the letter of dismissal makes no reference to the letters, I accept the Claimant's evidence that she did not receive the two warning letters and that this was the first time that the Claimant had seen the letters.

16 The decision to dismiss the Claimant was taken by Mr Barlow, CEO. Mr Reece's & Mr Chandler's evidence was that the Claimant was dismissed because of her absences and the incident with Mr Chandler on 19 April (see paragraph 15 above) and that the multiple incidents of misconduct amounted to gross misconduct. Mr Reece said that it was his error not to include the 19 April incident as one of the reasons for dismissal in the letter of dismissal [R59]. I find as a fact that the incident did not form any part of the Respondent's reason(s) for dismissal. There is no reference to the incident in the letter of dismissal [R59]. I conclude that the Respondent would have referred to it if it had formed part of the reason for dismissal.

Policy and Procedures

17 The Respondent's Employee Handbook is at Tab 5 of the Respondent's Bundle. The Claimant received a copy when her employment commenced. Gross misconduct includes multiple acts of misconduct [R44]. Misconduct includes failure to report absences and persistent absenteeism [R43]. Mr Reece submitted that persistent means on more than one occasion.

The Law: Wrongful Dismissal

19 Gross misconduct involves either deliberate wrongdoing or gross negligence (see for example, *Sandwell & West Birmingham Hospitals NHS Trust v Westwood* [2009] UKEAT 0032/09). The conduct must 'so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment' (see *Briscoe v Lubrizol Ltd* [2002] IRLR 607/*Neary v Dean of Westminster* [1999] IRLR 288), reiterated most recently by the Supreme Court in *Chhabra v West London Mental Health NHS Trust* [2014] ICR 194. In *Chhabra*, it was held that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. It is for me to determine whether, on the balance of probabilities, the conduct in question amounted to gross misconduct entitling the Respondent to summarily terminate the Claimant's employment at common law.

Conclusion

20 I have no hesitation in concluding that the Claimant did not commit gross misconduct; conduct that is so serious as to make any further relationship and trust between the employer and employee impossible. The Claimant was sick on a number of occasions. Genuine sickness does not amount to gross misconduct. Had the Respondent suspected that the Claimant was not genuinely sick, it should have investigated that. It did not. As for the two alleged unauthorised absences, I have concluded that the absences were, in fact, authorised (they were 'approved' as holiday). Approved absences cannot amount to gross misconduct.

21 In conclusion the Claimant was wrongfully dismissed.

22 The Respondent is ordered to pay the Claimant the sum of £692.30 within 7 days.

Employment Judge Scott

13 March 2017