



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Y Farah

v Metroline West Limited

Heard at: Watford

On: 31 January 2017

Before: Employment Judge R Lewis

Appearances

For the Claimant: Mr M Djama, Support Worker

For the Respondent: Ms H Norris, Solicitor

JUDGMENT

1. The claimant was fairly dismissed by the respondent and his complaint of unfair dismissal fails.

REASONS

1. This was the hearing of a claim form originally presented in August 2016, but not accepted until October, in which the claimant complained of unfair dismissal.
2. This hearing was listed on 31 October when the claim was served, and a case management timetable was set then, in accordance with usual procedure.
3. In late January 2017, Mr Ibrahim, representative on behalf of the claimant, sent the tribunal the first of a number of emails on the claimant's behalf. He sent in a remedy statement and requested a Somali interpreter.
4. The claimant attended represented by Mr M Djama, a support worker with experience of tribunals, who is also a Somali speaker. An interpreter in Somali language provided by the tribunal was available.
5. Some time was taken on case management before the start of the hearing. The claimant had not complied in any respect with case management discipline. He offered no explanation. He had not served a witness statement, and I therefore confined his evidence to the contents of his claim form, and to adopting the general question that he stood by the cases which he had advanced at the three disciplinary meetings of which there was evidence before me. Mr Djama brought with him a number of documents, the claimant having failed to give disclosure. Ms Norris confirmed that all

save one were in the bundle, and as the one was a letter written several weeks after dismissal, it could not take matters any further.

6. Ms Norris had emailed to the claimant copies of the bundle and the respondent's witness statements, but he had not opened them. Although this failure was the responsibility of the claimant, my concern was to consider its impact on the need of a fair hearing. It was common ground that the bundle contained almost no items which the claimant had not already seen during his employment, even if he had not seen them presented as a bundle. I took a long adjournment to enable the claimant and his representative to read the respondent's witness statements, which in the event did not seem to me to go further than the case put in the grounds of resistance, which in turn replicated the case set out at the claimant's disciplinary and dismissal.. I therefore took it that the contents o the statements did not take the claimant by surprise.
7. Mr Djama said that on behalf of the claimant, further witness statements were to be provided to the tribunal by email. I delayed restarting and the emails were not received. Mr Djama showed them to me on his phone. One was a statement dated September 2017 (sic) from a former colleague, which was in the nature of a general character reference. One was a fresh copy of one of Mr Ibrahim's emails sent earlier in the month.
8. During the adjournment I read the bundle, and the respondent's statements. I was ready to start at about 12 noon, and Mr Djama confirmed then that he was ready to proceed.
9. The case was split, so that I dealt with issues of liability only. The respondent was heard first. It called two witnesses, Jacqui Carter, Garage Manager, who had dismissed the claimant and Alison Duberry, Garage Manager, who had heard and rejected his appeal against dismissal. They adopted their statements on oath and were briefly cross examined. The claimant adopted on oath the claim form and the case which he had advanced at disciplinary and appeals. He was also briefly cross examined
10. The order of closing submissions was reversed. Ms Norris had helpfully provided written submissions, which she supplemented orally. There was an adjournment to enable Mr Djama and the claimant to have a discussion, and Mr Djama then replied on the claimant's behalf.
11. Before the start of the evidence I explained to the claimant the procedure and structure of the tribunal. I also explained to him that as this was a case of unfair dismissal only, the tribunal was not concerned with making a fact find as to what had actually happened before his dismissal, (ie whether he had actually committed the misconduct for which he was dismissed), but was to focus its enquiry on the reasonableness of the management response. In that context, I told him that an employee can be fairly dismissed for something he did not do, and unfairly dismissed for something he did do. The claimant had been a long serving Unite member, and I had hoped that this outline would be familiar to him.
12. I should record that both the claimant and Mr Djama struggled to adhere to the discipline of this approach, and that I intervened in evidence and

questioning when they sought to draw to the tribunal's attention a narrative of what had taken place during the claimant's absence in Africa.

13. Making every allowance for the claimant's unfamiliarity with the procedure, lack of professional representation, use of a second language, and the stresses of unemployment, the claimant was an unconvincing witness. He appeared not only unprepared for this hearing, but he repeatedly answered awkward questions by denying any recollection of the most crucial events in sequence; or by introducing, for the first time, challenges to matters and points which he had had the opportunity to challenge earlier (eg the accuracy of meeting notes) but had not done so. Ms Norris' observation, that the claimant applied blame liberally to everyone else (the respondent, his union, its lawyers, his travel agent, and the hospital) without accepting any responsibility, was well made.
14. As is not unusual in the work of the tribunal I heard evidence about a range of matters about which I make no finding, or sometimes do not make a finding as to the depth to which I was taken. That is not oversight or omission but a reflection of the extent to which the point was truly of assistance to the tribunal.
15. Within that structure, I make the following findings of fact:
 - 15.1 The claimant, who was born in 1954, and is of Somali origin, worked as a bus driver for over 20 years, although with breaks in service. His service with the respondent dated from April 2012.
 - 15.2 The respondent's disciplinary procedure included as gross misconduct "deliberate or falsification of records, including ... medical forms, attendance sheets, absence forms.." and "absence from duty without prior notification or authorisation ie where authorisation has not been sought or has been sought but refused" (21-22).
 - 15.3 In February and March 2015 the claimant asked for, and was refused, special leave of two months to attend to family business in Somaliland. He wanted an extra month's leave on top of annual leave.
 - 15.4 The claimant departed on one month's authorised leave on 11 April 2015, but failed to return on the preset date, and in fact returned some weeks later.
 - 15.5 When asked to explain his late return, the claimant stated that he had been taken ill while in Somaliland, and produced two hospital documents headed "Medical Report/Sick Report" (43-44) dated 28 April 2015.
 - 15.6 The two hospital sick notes were problematical. One appeared to be a further written copy of the other. They were handwritten. They stated that they were signed by Dr Ayanle Abdillahi Abdi.
 - 15.7 The claimant was invited to attend a disciplinary hearing for predetermined absence (44a). In preparation for the hearing, Mr

McManus, Operations Support Manager, emailed the hospital address, and telephoned the number on the sick notes, and additional hospital numbers that he found online, and was unable to make contact with any of them.

- 15.8 A disciplinary hearing took place on 28 May 2015. The claimant was accompanied by Ms Campbell of Unite. The bundle contained notes of the meeting. He stated that while abroad, he had fallen ill, been admitted to hospital, and been unable to return as planned. In closing, Ms Campbell stated "I can understand where you have some doubt and the double covering letter from the hospital" (44s).
- 15.9 In giving his decision, Mr Webley pointed to what he called "several anomalies which are not in your defence and the most obvious being that you have booked your original flight on the same day you were due to return work. You also supplied two hospital certificates with different information on them... You booked your ticket to return on the same day that you due back at work."
- 15.10 Mr Webley found that the claimant had committed gross misconduct. He found there were no extenuating circumstances. He issued a two year final written warning, confirmed in writing (44v). The claimant was offered the right of appeal but did not exercise it.
- 15.11 When asked in evidence about this episode, the claimant stated that the warning was unfair, the meeting notes inaccurate, but also that he could not remember the details.
- 15.12 In my judgment, particularly as he was accompanied by Unite, the claimant could be in no doubt, in June 2015, that he was found to have committed the gross misconduct offence of arranging and taking longer leave than that permitted; that he had been issued with a final written warning; why he had been warned, and the meaning and effect of the warning.
- 15.13 On 1 February 2016 the claimant booked authorised annual leave. His purpose was to return to Somalia, and his travel dates were from 14 March, and returning 13 April. He had permission to travel returning to work on 18 April, and completed Holiday Absence Forms to that effect.
- 15.14 On 16 April, when due to return on shift on 18 April, he telephoned the respondent from Somalia to state that he was ill, and his return would be delayed (54). In the event, he departed Somalia on 15 May.
- 15.15 The claimant returned to the workplace on 16 May, but said that he was too tired from travelling to work that day. He was interviewed on 16 May by Ms Hollanda (62) and suspended on 23 May pending investigation (65).
- 15.16 On 24 May the claimant attended an investigation interview with Ms Hollanda. Ms Campbell of Unite again accompanied him. The

meeting lasted about an hour (69/73). There was an enquiry as to the claimant's travel arrangements, and the reasons for his delayed return. The claimant stated that he had had a diabetic crisis and had been admitted to hospital. He produced two sick notes (57 and 58) which were considerably scrutinised.

- 15.17 On 24 May the claimant was invited to attend a disciplinary hearing on a charge of taking predetermined absence. He attended accompanied again by Ms Campbell. The meeting was conducted by Ms Carter. It lasted some two hours (76-85), and concluded with the claimant's dismissal.
- 15.18 A discussion took place which was in outline very similar to that held at the meeting on 5 June 2015. The claimant was asked about the detailed circumstances of his travel, and of his absence. He produced a number of travel related documents and tickets, as well as booking records.
- 15.19 Although this paperwork should be read in full, and considered in full, and its problems are not easy to summarise, Ms Carter made the position clear in evidence. She simply did not believe the claimant's case, which was that there had been a health emergency, wholly unforeseen, which had forced him to remain in Somalia longer than he wished. She based that view on a number of matters, to which I now turn.
- 15.20 The claimant had produced two sick notes of 9 May 2016 (57/58). One stated that he had been admitted to hospital on 18 April and one on 18 May. The claimant could not explain this mistake.
- 15.21 Secondly, the claimant was asked why there were in fact two sick notes, and the claimant stated that he had noticed the error and been given the second one. He stated that the sick notes had been given to him (78) although he later asserted that they had been emailed.
- 15.22 Thirdly, he was asked why the text of the sick notes referred to a Dr Jamac although they were both apparently signed by the same Dr Abdi who had treated him the year before, and the claimant could not explain this.
- 15.23 Ms Carter asked why he had presented documents which did not appear to be original, to which the claimant's recorded answer is "This is what they gave me", at odds with his subsequent assertion that the documents which he produced were emailed.
- 15.24 Fifthly, Ms Carter asked the claimant whether he could see any dissimilarity between Dr Abdi's signatures in 2015 and 2016. To the non expert eye, there appeared to be some discrepancy, but the claimant could not comment.
- 15.25 Both Ms Carter and Ms Duberry described the copies shown to them by the claimant as showing the signature of Dr Abdi as plainly scanned or added from another document, which the claimant was

unable to explain. In evidence, Ms Duberry pointed to the very faint lines of dots around Dr Abdi's signature (57/58) and explained that in the version she saw, they clearly showed transposition from another document.

- 15.26 It was pointed out at this hearing curiously that Dr Abdi's name was written and spelled differently in 2015 and 2016. It was written in 2016 as Dr Ayanle Abdi Abdilahi.
- 15.27 The claimant was then asked about documents relating to his travel arrangements, of which the only clear document was page 50, an e-ticket, showing the issue on 1 March 2016 of flight tickets, for departure on 14 March and return on 15 May.
- 15.28 At this hearing and for the first time the claimant produced a letter from Daallo Airlines of 17 August 2016 which stated that the reservation in question had been made on 1 February, and due to technical reasons was printed as showing having been made on 1 March. In closing I asked the claimant what difference this made, as it still showed that he had booked his return date without having obtained permission to travel for two months. The claimant gave no satisfactory answer.
- 15.29 Ms Carter's careful summary of her decision is set out at 83 to 85, confirmed in a letter of the same day at 86 to 87, all of which should be read in full, and which I summarise briefly as follows. Taking all the circumstantial evidence, she did not believe the claimant's account that his return was delayed by an unforeseen illness. She believed he had planned the late return, and had then sought to deceive the company. Reaching that conclusion, she did not believe in the integrity of the medical documents from 2016, and noted the apparently pasted on signature of Dr Abdi, and the differences between the documents of 2016 and those of 2015. She attached weight to the travel documents which appeared to show a booking in March for a return date of 15 May.
- 15.30 The claimant was on a valid final written warning for exactly the same conduct the year before. Ms Carter dismissed the claimant.
- 15.31 The claimant completed an appeal form on the grounds of severity of sanction. The appeal was heard on 21 June by Ms Duberry and the claimant was accompanied by Mr H Djama of Unite (not the same representative who appeared before me). The claimant brought to the appeal another letter from the hospital (90) and a letter from the travel agent (91). The former confirmed the claimant's dates of admission. It was signed by Dr Hadi. The latter stated that the claimant had originally booked his return date on 15 April, but that he had telephoned on 8 May to ask for his ticket to be changed.
- 15.32 The appeal hearing lasted about two and a half hours including a long adjournment (92-97). Ms Duberry's evidence was that during the adjournment she emailed and telephoned the hospital in Somalia, but got no reply and never has had a reply to her email.

- 15.33 As Ms Duberry pointed out in evidence, the claimant's version of his illness in Somalia differed slightly from that which he had given earlier. Ms Duberry formed similar views to those of Ms Carter. She regarded the travel paperwork as implausible, and regarded the 2016 sick notes at 57/58 from Dr Abdi as not authentic, because it seemed to her clear that Dr Abdi's signature had been, in her word, superimposed on another piece of paper.
- 15.34 Although Mr Djama appears to have conducted the claimant's defence robustly, he concluded with an admission to the extent of suggesting a return on another final written warning.
- 15.35 The appeal outcome was given by letter of 24 June (99-100). In short Ms Duberry remained unconvinced by the paperwork which the claimant had shown Ms Carter and by that which he had brought to the appeal, and concerned by the unexplained inconsistencies and discrepancies between them.
- 15.36 At the appeal the claimant had sought to raise an issue of inconsistency of treatment. No time was taken on this point in oral evidence. I noted the paperwork in the bundle (113-126). A Somali driver, Mr K, had in late 2015 received a warning for unsatisfactory attendance, including two periods of sickness after returning from Somalia. The paperwork gave no indication of any previously disciplinary event in about ten years of service. It seemed to me that Mr K had, like the claimant in June 2015, been treated in a reasonable and proportionate way on a first disciplinary event. However, the claimant was dismissed when on a final written warning. Mr K was not on a warning. That point alone seems to me to render the two cases so different as to dispose of any argument on inconsistency.
16. This was a case of unfair dismissal, brought under the provisions of Part 10 of the Employment Rights Act 1996 ('ERA'). The first task of the tribunal is to find the reason for dismissal, in the sense of the operative consideration in the mind of the person making the decision to dismiss.
17. The reason advanced by the respondent for dismissal was unauthorised absence. I find that the reason for dismissal, in the sense stated above, was precisely and only that reason. That was a reason which related to the conduct of the claimant. It was therefore a potentially fair reason for dismissal, in accordance with section 98(2) of ERA.
18. I next had to consider it through the provisions of section 98(4) of the 1996 Act, which provides, "[T]he 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."

19. I then had to have regard to the guidance given in authorities, notably British Home Stores v Burchell 1978 IRLR 379 (always bearing in mind that that case was decided under a burden of proof which differs from that now in force) and Sainsburys Supermarkets Ltd v Hitt 2003 IRLR 23. I must take care not to substitute my own view for that of the employer at any stage, and to bear in mind that at each stage where the employer exercises discretion, the question is whether its decision or conclusion has been within the range of reasonable responses: that range includes the range of reasonable inquiries open to the reasonable employer investigating the allegation. An employer is not duty bound to pursue every line of inquiry. In setting penalty, the question is not whether the tribunal considers the sanction of dismissal to be harsh or excessive, but whether it is within the range of reasonable responses.
20. The questions to be answered by the tribunal are whether in dismissing the employee, the respondent had a genuine belief, based on a reasonable inquiry and on reasonable evidence, that the claimant had committed the misconduct alleged; and if it did, was dismissal within the range of reasonable responses.
21. If the tribunal finds that the dismissal was unfair, but that the conduct of the claimant was such that it would be just and equitable to reduce the basic award to any extent, it must reduce the basic award to that extent. If it finds that the claimant's actions caused or contributed to his dismissal, it shall reduce the compensatory award by such proportion as it considers just and equitable. The reduction need not be the same in both instances, bearing in mind in particular that the basic award represents accrued service before the dismissal event.
22. The particular difficulty about this case is that only one person involved in it could know as fact what actually happened in Somalia. I accept that two managers on behalf of the respondent did their best to find out, by emailing and telephoning the hospital in Somalia. That was commendable thoroughness. The task of the tribunal is to look at the information that was reasonably available to the respondent.
23. I ask first if the dismissing officer genuinely believed that the claimant was guilty of misconduct and I find that she did.
24. I next ask whether she did so on reasonable evidence and after reasonable enquiry. I am alive to the danger of making assumptions about the practice of medicine in a developing country. However, the difficulty in this case is that the evidence was circumstantial and all one way. Circumstantial evidence in this case was consistent, but indirect, evidence, all of it against the claimant and none of it in his favour. It consistently showed that there were grounds for suspicion about the claimant's original booked travel arrangements, his alleged health crisis, and the documentation which he had produced about them. It is particularly important for me not to substitute my view of the shortcomings in these documents, but to base my decision on whether Ms Carter and then Ms Duberry could reasonably find that the case of misconduct was made out on the material before them.

25. As stated above, the claimant had, on two successive visits, had health episodes which prevented him from returning when the respondent wished, but which on both occasions tallied with his original, unsuccessful travel requests. He had produced medical reports which showed some inconsistency, and some indication of being unreliable. Attempts to contact the hospital directly had been unsuccessful. The travel agent's explanations faced the same problem as the original travel issue: it turned out that all the errors in the paperwork led to the same end, ie the claimant taking the leave which he had asked for and been refused. Taken together, and in light of the 2015 warning, I find that there was reasonable evidence after reasonable inquiry on which to base a finding that the claimant was guilty of misconduct.
26. That being so, and in light of the disciplinary policy, and as the claimant was on a final written warning for exactly the same conduct, dismissal was plainly well within the range of reasonable responses.
27. The claimant was fairly dismissed, and his claim of unfair dismissal fails.

Employment Judge R Lewis

Date: ...20 February 2017

Sent to the parties on: 20 February 2017

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For the Tribunal