



THE EMPLOYMENT TRIBUNALS

BETWEEN

Robert Turner

Claimant

AND

J D Wetherspoon plc

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central

ON: 11 and 12 April 2018

EMPLOYMENT JUDGE: Mr Paul Stewart

MEMBERS: sitting alone

Appearances:

For Claimant: In person

For Respondent: Mr Kieran Wilson

JUDGMENT

The claim of unfair dismissal is dismissed for reasons given orally before the parties and set out below.

REASONS

1. This is a claim for unfair dismissal.
2. I heard evidence from four witnesses. The Claimant gave evidence for himself and the Respondent called Mr Niall Mendes da Costa, Mr Steve Carle and Mr Ian Taylorson.
3. The facts are barely in dispute. The Claimant is a man of 36 who has been affected for much of his life with depression. He was employed by the Respondent for four years up to 2007 and then from 2010 to when he was dismissed by letter dated 25 April 2017 for gross misconduct.
4. The Claimant had started in 2003 as a bar associate and, by the time he left in 2007, he had been promoted first to shift leader and then to shift manager. He started his second spell of employment as a shift leader but was promoted to shift manager.

5. During this second spell of employment, the Claimant had periods of long term absence, the cause of which was depression. At a pub where he worked, he formed a relationship with a member of staff which, after 4 years, ended. This triggered a recurrence of depression and a period of long term absence and a phased return to work. When he learned that his ex-partner, with whom he had resumed a working relationship, had moved on and formed another relationship, this triggered a relapse into depression and long-term sickness.
6. He returned to full time work in November 2015 to the Central Bar in Shepherds Bush on a phased return before moving to full time capacity.
7. The Claimant lived with his mother. In May 2016, he returned home after his shift to find his mother collapsed on the floor. Investigation subsequently revealed she had cancer that, wherever it had started, had metastasised to a number of organs. The sudden appearance of such serious illness had a triggering effect on the Claimant's depression and, while he also acted as his mother's primary carer, the long period of absence was attributable to his illness as much as to his mother's.
8. It is of note that the Respondent had, during this period of the Claimant's absence, obtained with Claimant's permission a report upon him from Cordant Occupational Health services that was dated 11 August 2016. This clearly identified the Claimant's condition to be anxiety and depression which made the Claimant unfit for work with a prognosis that, at that time, tentatively suggested a hope that his illness would not last more than 12 months
9. In October 2016, his mother showed signs of being able to care for herself with some assistance from the Claimant's aunt. This permitted the Claimant to return to work on a phased basis in November 2016 which then morphed into full time.
10. During the period of long term absence that the Claimant had between May and November 2016, the Claimant proved to be unreliable in keeping in touch with his manager, Mr Niall Mendes da Costa. This led to a meeting between the two of them on 16 September 2016 where initially the Claimant was somewhat dismissive of his manager's questioning as to why he was not keeping in touch with him as required by the Respondent's long-term sickness policy. However, by the end of the meeting, he had accepted that it was reasonable that the Respondent should require him to keep in touch and apologised for not maintaining contact.
11. In late January 2017, the Claimant's mother's condition became worse and, on 21 March 2017, she died. Earlier in March 2017 the Claimant requested, and was granted, time off in order to care for her. The Claimant had annual leave to take so it was agreed that he would take the week beginning 13 March as leave. On 21 March 2017, the Claimant informed Mr Mendes da Costa of his mother's demise and announced that he would "not be back anytime soon". Mr Mendes da Costa spoke to the Claimant by phone a day or so after that email. He suggested the Claimant take the week commencing 20 March as annual leave and have the following week as compassionate leave. This would mean that the Claimant would return to work on 10 April.

12. There was some suggestion later from the Claimant that he misheard and or misunderstood Mr Mendes da Costa as having suggested that he should have 4 weeks compassionate leave. I reject this as being the case for the following reasons:
 - a) Mr Mendes da Costa was clear about the conversation he had with the Claimant at the time;
 - b) The granting of 4 weeks compassionate leave was contrary to policy which allows for only 1 week;
 - c) Mr Da Costa only had authority to give an employee 2 weeks' compassionate leave;
 - d) The Claimant did not make the point either at the time or subsequently: if he had truly believed he had been granted 4 weeks' compassionate leave, he would have asserted that to be the case when Mr Mendes da Costa suggested to him later that he had been expected back on 10 April.
13. The Respondent placed considerable emphasis placed on attendance management and on its policy of Unauthorised Absence [UA], matters on which the Claimant – in common with other shift managers - had been well trained or, as Counsel for the Respondent put it, had it drummed into them.
14. In particular, UA was highlighted in a slide show used in training, page 196, not as being the failure to follow the absence reporting procedure but in failing to report absence at all. UA was regarded as gross misconduct and written into the Claimant's contract of employment as being such and thereby a matter for which the sanction could be summary dismissal. The Claimant when cross-examined accepted that he knew the policy and the importance placed upon it by the Respondent.
15. The Claimant's mother's funeral was held on Friday 7 April. Mr Mendes da Costa, not knowing of the funeral date, attempted to contact the Claimant that day but failed. He sent an email to the Claimant's email address in which he pointed out that the Claimant had had a week's leave and compassionate leave for a week and was due back on Monday. The Claimant denied having received or at any rate having read this message. However, I do not accept this to be the case. The Claimant conducted both email correspondence and WhatsApp messaging through his iPhone. He was able to set up a WhatsApp chat grouping under the title "Pub 100 Ideas" to which he contributed on an almost daily basis. His contribution included 7 April, early morning 10 April (when he was due to return) and 13 April when he had been absent for 3 days. Given this involvement with his iPhone, it strikes me as being highly improbable that he would not have noticed and read the email which Mr Mendes da Costa sent him on 7 April.
16. Mr Mendes da Costa was on leave during the week beginning 10 April but, despite being on holiday, sent on 11 April a WhatsApp message to the Claimant pointing out that he had "emailed you last week as you were due to return to work yesterday. Technically you are UA. Can you get in touch with me pls?"

17. C responded 14 minutes later. He referred to his mother's funeral having taken place on Friday. He indicated that he was booking an appointment with his GP, he needed more time as he had a lot to do.
18. Mr Mendes da Costa responded, saying:

And I am sympathetic to that but ignoring work is not going to be feasible. If you need time off you need to email me a sicknote if that is appropriate or request on paid leave. Until I have that it will be UA which is a situation nobody wants. The company will try its best to assist normally but you have to play the game and communicate with it.
19. The Claimant responded with this message:

Once have a sicknote I will bring it. And I'm not ignoring work. I really want to back with my staff. But the possibility of becoming homeless and handling my very large family is making the running of a shift look like a vacation. I will be in contact once I've seen my doctor
20. Mr Mendes da Costa replied with:

Dude, I know but I have to keep HT at bay. When is your appointment? Send it in an email to us so I can demonstrate that you are in contact.
21. The Claimant's response was:

I'm literally trying right now. But it is Easter week and proving troublesome to get an appointment. My aunt is helping as she worked for NHS and is trying to push a quick appointment. So will send you an email once I know. And I will come in to speak with you.
22. Mr Steve Carle was a shift manager at the Central Bar - as was the Claimant – although Mr Carle was more senior and acted as deputy to Mr Mendes da Costa. It was his responsibility to establish the staff rota. He knew the Claimant had not been returning messages to Mr Mendes da Costa. He established a WhatsApp chat group containing just himself and the Claimant entitled MIA. The Claimant at at Employment Tribunal took offence at this title but not at the time – the person Missing In Action clearly refers to the C as can be judged from the content.
23. Mr Carle also gave evidence that he observed the C come into the bar on 7 April in a drunken condition and had to be gently restrained from going behind the bar to receive a sympathetic embrace from a female member of staff.
24. Thus, when Mr Mendes da Costa returned from leave week beginning 17 April, the Claimant was still absent without leave
25. Mr Mendes da Costa tried to contact him on 18 April by phone, which effort resulted in Mr Mendes da Costa leaving a message on the Claimant's voicemail. In addition, he sent an email indicating very clearly that, if the Claimant was unable to produce a sick note that day, he would have no option but to send out a UA1 – that being the initial call for disciplinary hearing if he did not engage.
26. Mr Mendes da Costa gave the claimant a further day to make contact but, by the 19 April, the Claimant had not made contact and so Mr Mendes da Costa, after consulting with the Respondent's Regional Personnel Manager, sent an invitation to the Claimant to attend I disciplinary hearing on 24 April at 14:00 hours at the Central Bar. The letter concluded with a warning that the meeting could result in disciplinary sanction up to and including summary dismissal. It informed him he was entitled to be accompanied to the meeting by a work colleague or a trade

union representative. And finally the letter warned the claimant that, if he did not attend the hearing, it would be held in his absence and the outcome communicated to him in writing.

27. The Claimant did not attend the meeting. Mr Mendes da Costa was present along with Mr Carle. Mr Mendes da Costa Delay the meeting by half an hour. As the note of the disciplinary hearing prepared by Mr Carle shows, Mr Mendes da Costa was concerned to establish first that the Claimant had received the invitation. Once he was satisfied on that issue, Mr Mendes da Costa articulated that the Claimant was aware of the Respondent's attendance and sickness policy principally because the Claimant had had several extended periods of absence and attendance review meetings. The result was that Mr Mendes da Costa concluded the Claimant had knowingly contravened the company's absence procedure, had failed to be contactable and had failed to enter into any dialogue with the company regarding his situation. Therefore, Mr Mendes da Costa with an expression of regret, issued the UA2 letter which terminated the Claimant's employment. That letter was sent to the Claimant on 25 April 2017.
28. In due course, the Claimant appealed and the appeal hearing (which he attended) was conducted by Mr Ian Taylorson. Nothing emerged in the cross-examination of Mr Taylorson which made me doubt the accuracy of the content of his statement – other than in his fourth paragraph where he accepted he might have identified the wrong Lucy as being the colleague with whom the Claimant worked in Hammersmith and was in a relationship.

The Law

29. The relevant law was well summarised in the Skeleton Argument of the Respondent's counsel. I do not intend to repeat that summary here.

Discussion

30. I was satisfied that the Respondent – in the person of Mr Mendes da Costa – had an honest belief that the Claimant was guilty of gross misconduct in the sense that he had failed to follow the UA procedure and had failed either to provide the Respondent with a sick note or otherwise explain his absence in line with the procedure.
31. I was further satisfied that the Mr Mendes da Costa had, at the time he formed that belief, had reasonable grounds on which to base it. And, further, I was satisfied that, at that stage, Mr Mendes da Costa had carried out as much investigation as was reasonable in all the circumstances of the case.
32. I am further satisfied that the Claimant produced no reason in his appeal which ought to have led Mr Taylorson to alter the decision to dismiss.
33. The Claimant has put forward that depression can cause people to act in various ways to their detriment without them really knowing what they are doing. I take the view that Mr Mendes da Costa did know of the history of the Claimant's depression but also knew that the UA policy was well known to the Claimant and that such policy, as Mr Mendes da Costa had emphasised to the Claimant, made it clear that failure to comply with the policy constituted gross misconduct and could lead to dismissal.

34. I therefore conclude that the Respondent has established that the reason for the Claimant's dismissal related to his conduct. I was further satisfied that, in treating that reason as being sufficient reason for dismissal, the Respondent had acted reasonably having regard to equity and the substantial merits of the case.
35. If I be wrong in considering the dismissal to have been procedurally fair – and the only way I perceive the dismissal might have been procedurally unfair would have been in failing to adjourn the meeting on 24 April to some later date and ensuring that the Claimant attended that later date - I take the view that dismissal would have followed in any event. At best, there might have been a delay of a week or so in the dismissal.
36. I was invited to consider the contribution which the Claimant made to his own dismissal, should the above conclusions be wrong and, upon appeal, it be declared to be an unfair dismissal. I take the view that the Claimant contributed to the extent of 75%. Accordingly, any compensation to which he would be entitled were it held to be an unfair dismissal would have to be reduced by 75%.
37. I therefore dismiss the claim.

EMPLOYMENT JUDGE STEWART

On:

4 August 2018

DECISION SENT TO THE PARTIES ON

2 October 2018

FOR SECRETARY OF THE TRIBUNALS