



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Hussain

v

Signature Flatbreads Limited

Heard at: Watford

On: 15 May 2018

Before: Employment Judge Palmer

Appearances

For the Claimant: Mr G McKetty, Consultant

For the Respondent: Ms Mueller, HR

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal is upheld.
2. The claim for race discrimination is dismissed having been withdrawn by the claimant.
3. A remedy hearing is listed for 23 October 2018 at 10am.

REASONS

Claims

4. The only remaining claim is for unfair dismissal.

The issues

1. There is no dispute that the claimant was dismissed summarily on 21 March 2017.
2. The first issue is what was the principal reason for dismissal and was it a potentially fair one. The respondent asserts that the reason was the claimant's conduct, the claimant having taken unauthorised leave from 25-28 January 2017. The claimant asserts that he was genuinely sick during this period, and it was not unauthorised leave.

3. If so, was the dismissal fair or unfair. Did the respondent genuinely believe the claimant was guilty of misconduct, did they hold that belief on reasonable grounds, having followed a reasonable investigation and was the alleged conduct the reason for dismissal.
4. Was the decision to dismiss a fair sanction, that is was it within the reasonable range of responses for a reasonable employer?
5. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct.

Evidence

6. I heard evidence from Adrian Hills (Technical Manager and chair of the Disciplinary) and Adelaiz Benchaoui (Joint Managing Director, who heard the claimant's appeal) for the respondent and from the claimant.
7. There was an agreed bundle of documents and I read those to which I was referred. On the balance of probabilities, I find the following relevant facts.

The Facts

8. The claimant was employed by the respondent from 4 March 2013 to 21 March 2017 when he was dismissed without notice.
9. The respondent company makes flatbread. It employs over 850 employees in the food manufacturing sector. There is an HR team.
10. Initially the claimant worked as a Production Operative but was given a new contract as Key Skill Production Operative from 11 November 2013, then progressed to the position of Production Line Manager from 14 March 2014. From 5 September 2016 his job title was Quality Assurance. The claimant worked nights with Qamar Dad (Quality Assurance Supervisor) and Asif (Shift Manager), but his Line Manager was Mr Alekna, who worked days.
11. The claimant had had no disciplinary action taken against him; he had a clean record. He had raised a grievance as a result of the respondent's conduct and argued this was the reason for his dismissal.
12. On 6 January 2017 the claimant booked holiday from Sunday 29 January 2017 until 1 March 2017. This was signed off, on the 6th, by four managers, including the Head of Department (p78). It transpired that the claimant booked his flight at 1.30 am on 6 January (p73) before he had had the holiday signed off. At the appeal hearing, if not before, the claimant said he would have rebooked his ticket if it had not been signed off.
13. Mr Hills said the main issue for him was not that the claimant had booked the flight prior to the approval but he booked his holiday to start from 29 January

and his flight left at 9am, which he could not make if he was working the night shift until 8am. In addition, the claimant did not report his absence every day he said he was sick.

14. Mr Hills believed that the claimant always intended to be off work before 29 January and when further time off was refused, he simply took unauthorised leave by 'pulling a sickie'. This, Mr Hills said, was a breach of trust and confidence warranting summary dismissal.
15. The claimant denied he pulled a 'sickie'. He argued that he was genuinely very ill and that the reason for his dismissal was that he had brought a grievance about how he had been treated and that the Human Resources Manager disliked him. The grievance was not before the tribunal.
16. The Absence Reporting Procedure, which was only produced on the day of the Hearing, states:
 - 3) As a food manufacturer, you are required to inform the company if you have been suffering from any infectious illnesses or food poisoning, or any illness or circumstances that we should be aware of as a food manufacturer, as you need to be clear of your symptoms for at least 48 hours.'
 - 4) Call the Security department every day of your sickness absence, up to 7 days. Call security and advise them when you will return to work on your next shift. ...
 - 5) Call security and advise them when you will return to work...
 - 6) If your absence will be over 7 days, you will need a Doctors Fit Note authorising your sickness absence... (p118).'
17. The Holiday Request Form, which the respondent said was part of their procedure (although this was not provided) states:

'NB An employee must give notice of at least twice as long as the leave period. Holiday request form has to have three signatures to be valid if the number of holiday days is up to 2 weeks. For holidays over 2 weeks, the form will have to be authorised by the Head of Department. ...'
18. On 12 January, the claimant requested an additional two days holiday on 27 and 28 January so that he could prepare for the early flight on 29 January, which was at 9am (p77). The respondent refused this request on the basis of business requirements and that the claimant had already been offered longer holiday than normal.
19. The claimant then asked for one day off which would enable him to catch the flight as his night shift finished at 8am, only one hour before the flight. On 13 January, a QA supervisor, Qamar Dad, sent an email to Mr Alekna saying:

'He has requested if he can have just 1 holiday on Saturday 28 January 2017. He has sent me a copy of his flight ticket, he is to fly out on Sunday 29/01/2017 at 09:00am and says

he will not be able to make his flight if he is working Saturday night. If you require a copy I have attached it. If this is not possible could it be put down as an authorised unpaid absence.'

20. On 22 January Mr Alekna emailed back saying:

'He needed to purchase the tickets after the holiday approval but not prior. I already gave him extended holidays after the conversation with my superiors. Any extra holiday at this stage is declined, also unpaid leave isn't permitted'. (p74)
21. On 30 January Mr Alekna wrote to the claimant refusing the extra days holiday and stating that unauthorised leave would be unpaid and absence from work without permission and without just cause was regarded as a serious disciplinary matter which could result in disciplinary action up to and including dismissal (p79). The letter said that upon his return he would be subject to investigation and disciplinary action may be taken. By 30 January the claimant was on holiday, having taken the flight at 9am on 29 January.
22. The respondent's disciplinary procedure set out what are described as the most common types of gross misconduct. This includes failure to follow the absence reporting procedure, unauthorised absence and acts of insubordination (p115-116).

Return to work interview / investigation

23. On his return from holiday, on 2 March 2017, the claimant attended a Return to Work Interview with Mark Solomon (p71-72). Mr Solomon started by saying: 'Tsawar I am here to conduct a return to work interview with you.' In fact, the meeting also formed part of the investigation into the claimant's conduct though the claimant was not aware of that at the time. He was not given advance warning nor time to prepare.
24. The claimant told Mr Solomon that on the Tuesday night (25 January) he got a throat infection and flu, so he was off sick from the Wednesday. He told Mr Solomon that he went to the hospital as he felt really bad and then to see his GP and was given antibiotics and told to rest. The claimant said he felt 50% better on the Saturday, but he still had throat pain so could not go to work, but he was OK to fly on the Sunday as he took the medicine with him.
25. Mr Solomon said to him that it seemed strange that holiday was requested then declined and then the claimant was off sick. The claimant responded that if he had done this intentionally he would have gone off sick on the Friday and he did not understand why his request for extra days was refused as he was on training and he did not think they were short on those nights. He said he wanted to discuss his holidays with his manager, but was sick from the Wednesday so could not do so.
26. At the end of the Return to Work interview the claimant asked about the purpose of the investigation. He was not aware that it was a formal investigation meeting.

27. The investigatory report (p80), which was based on the meeting set out the sequence of events, as understood by Mr Solomon, including the fact that the claimant booked his flight before it was properly authorised, the claimant's further requests for extra holiday and their refusal, and that the claimant had reported his absence on 25 January but not the following days. It stated that there was evidence to support the allegations of gross misconduct and recommended a disciplinary hearing. The gross misconduct was unauthorised absence.

Disciplinary hearing

28. On 8 March 2017 the claimant was invited to a disciplinary hearing (p82-83). Attached were the investigatory interview and report, the flight ticket, email correspondence regarding the declined holiday, holiday forms and letter of 30 January.
29. The disciplinary hearing took place on 21 March and was chaired by Adrian Hills (p85-88). The claimant was represented by his union representative, Jit Singh.
30. The claimant said that he had not seen the Absence Reporting Policy before and did not know that he had to ring in sick every day. He had signed the policy, but it was not clear when. There were also two policies after a transfer of the business though they did not differ significantly.
31. The claimant told Mr Hills that when he called security on the Wednesday he was told not to call in every day as they would tell his managers and he should call when able to return to work. The claimant said he accepted this advice so did not call after the Wednesday.
32. The claimant told Mr Hills he went to hospital because his body was shaking as a result of which he was given antibiotics. He handed to Mr Hills a doctor's certificate dated 21 March which related to the period 25 – 29 January, the claimant saying that he had seen the doctor on 25 January. The certificate stated that the doctor reviewed the case on 21 March and because of an upper respiratory tract infection the claimant was not fit for work for 4 days or from 25-29 January 201. The certificate was signed on 21 March. There was no dispute that this was a genuine sick certificate provided by the doctor, but Mr Hills said he still did not believe that the sickness was genuine.
33. Mr Singh said that it was a coincidence, that at this time when he had asked for further leave, the claimant was sick.
34. Mr Hills believed, on the evidence before him, that the claimant intended to go on holiday on 27 and 28 January whatever happened and when further holiday was refused, he took unauthorised leave instead so he could catch his plane on Sunday morning (28th).
35. Mr Singh said the claimant was told he need not ring in every day and that this was custom and practice, he had done it before and security said

the same thing. Mr Hills responded that this evidence was not in front of him to review.

36. Mr Hills said, 'The information I have in front of me suggests it was Tsawar's intention to go on holiday on these days all along, his extension was rejected' and because of this he had gone 'awol'. Mr Hills concluded by saying that he could only go with the information that was in front of him and that the claimant was dismissed without notice. Mr Hills did not consider investigating further after hearing from the claimant.
37. There was no investigation about whether Security had told the claimant he did not need to call in every day. Mr Hills' response was that the failure to report every day was breach of the procedure, so it did not matter what Security had said as it was the procedure that counted.
38. The claimant raised his concern that the notes of the disciplinary meeting were inaccurate but did not give details. There was no note that the claimant told Mr Hills that he had been taken to the hospital by one of the respondent's managers, nor that he had initially been told that he could go ahead and book his ticket even though he did not at the time have the required four signatures, nor that he had been told by a manager that he could leave 5-6 hours early to catch his plane. Although the claimant said that the notes were not complete, he only said in his appeal letter that the minutes had items missing but did not explain why this was relevant. Mr Hills did not have this further information at the time he made the decision to dismiss.
39. On 24 March Mr Hills wrote to the claimant confirming that the circumstances giving rise to the disciplinary hearing were the allegations of going on unauthorised leave after his holiday request was declined and booking his flight ticket before his holiday was approved and these allegations were gross misconduct warranting summary dismissal.
40. The reasons he gave were: First, Mr Hills had an honest and true belief that the claimant always intended to go on holiday on 27 and 28 January. Second, that he only brought in his sickness certificate 56 days later on the hearing date though he ample time to produce it before then. Third, the sickness certificate was issued on the day of the hearing. Fourth, the claimant booked his flight before his holiday was approved therefore when he went on sick leave he intended to take those days off regardless. Fifth, after his additional holiday was refused, he went on unauthorised leave and he committed acts of insubordination. Sixth, acts of insubordination and unauthorised absence constitutes a gross misconduct offence (p90-91).
41. Mr Hills believed from early on that the claimant went AWOL, 'pulling a sickie'. He had made up his mind early on relying, as he said, on his belief based on the information before him. He did not feel he needed to investigate further when faced with the claimant's assertion that he really was sick. He did not believe what the claimant said, including his sickness or that Security advised the claimant he did not have to call in every day.

42. Mr Hills' belief in the claimant's guilt was based on a number of factors about which he gave evidence. The main reason was the coincidence between the series of events, in that the claimant's illness occurred at the same time he requested, and had been refused, holiday and the fact that he could not catch his flight if he had to work the Saturday shift. He was then well enough to catch his plane. This is not a surprising first impression given the sequence of events.
43. Mr Hills said that the claimant was dismissed because he did not turn up to work and did not notify the business.
44. Mr Singh said the claimant got a sick note because he knew the company would not believe him, saying that usually doctors did not give sick notes just for five days. Mr Hills accepted that the doctor's certificate was genuine but still did not believe the claimant was sick so did not consider investigating further. When asked if it would have changed his decision if the claimant was ill, he said that if there was evidence supporting that, it would have given him something else to consider but he was not sure what he would have done.
45. Mr Hills considered that the claimant should have provided a doctor's sick note well before the date of the hearing. He did not take account of the fact that the claimant was not required to provide a sick certificate for the first 4 days of sickness when the claimant could self-certify, despite this being in the absence policy.
46. In relation to the sanction of summary dismissal Mr Hills said that it was proportionate based on the company policy whereby gross misconduct includes failure to follow the absence reporting procedure and unauthorised absence by not phoning in on the Thursday, Friday or Saturday. He said that there was a breach of mutual trust and confidence which was a serious issue and Mr Hussain was not willing to admit his wrongdoing or that he acted in breach of procedures.

Appeal

47. On 29 March the claimant appealed saying there was no full and fair investigation, the holiday policy does not state you require 4 signatures to go on holiday and you only require a self-certificate if off sick on 4 consecutive days not a doctor's note. He also said that the minutes had items missing (p92).
48. The Appeal Hearing was conducted by Mr Benchaoui (Operations Director) and took place on 12 April 2017. He said it was not a rehearing but only a review of the decision to dismiss. Mr Benchaoui said he had seen the investigation notes mistakenly titled 'Return to work interview' and the letter of 30 January (p79). Mr Benchaoui said there had been an investigation meeting, that a reasonable investigation had been conducted into the alleged issues and an investigation report had been produced with supporting

evidence (p71-81). Mr Benchaoui doubted the claimant's honesty because the sick note was produced on the date of the disciplinary hearing, 56 days after his alleged sickness.

49. When the claimant said he thought the dismissal was connected to his grievance Mr Benchaoui would not discuss this, saying they had a copy of the grievance and it was already dealt with.
50. During the appeal hearing the claimant said that a quality supervisor (Qamar) told him in the presence of the Shift Manager (Asif) that he would allow the claimant to go 5-6 hours early in order to catch his plane at 9am. Mr Singh suggested that a statement should be taken from them. Mr Benchaoui responded that a supervisor did not have the prerogative to authorise an early finish, only a manager, so it would make no difference if this conversation happened.
51. Mr Benchaoui concluded by saying that he was satisfied that Mr Hills had a reasonable belief, based on reasonable grounds to dismiss the claimant and the sanction was appropriate and that this was what a fair and reasonable employer would do in the same circumstances. He agreed with Mr Hills' view that the claimant always had the intention of not working on that Saturday. It was impossible for the claimant to travel at 9am and he was sure that because of this he would be allowed to leave 2-3 hours early. He felt that there was a lack of trust between the employer and employee. Mr Benchaoui considered lowering the penalty to a final warning but the claimant's attitude showed that he was not interested in admitting the fault or to apologise for his conduct.
52. On 9 May 2017 Mr Benchaoui wrote to the claimant saying that it was his belief that the claimant planned this from the start as he always had the intention to go on holiday on 29 January knowing he would be working the night before until 8am and it would be impossible for him to make the flight departing at 9am. The claimant was dismissed effective from 21 March 2017.

The law

53. Section 94 Employment Rights Act (ERA) states that an employee has the right not to be unfairly dismissed. Section 98(2) lists the potentially fair reasons for dismissal which includes the conduct of the employee.
54. S98 ERA provides that it is for the employer to show the reason for the dismissal. Section 98(4) provides that:

'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.

55. Where the dismissal is for misconduct the Burchell test applies (*British Home Stores v Burchell* [1978] IRLR 379. A dismissal for misconduct will only be fair if, at the time of dismissal:
- The employer believed the employee to be guilty of misconduct,
 - The employer had reasonable grounds for believing that the employee was guilty of that misconduct
 - At the time it held that belief, it had carried out as much investigation as was reasonable.
56. The burden is neutral. In determining fairness, the tribunal should not consider whether the employee was actually guilty of the misconduct, but whether the employer believed, and had reasonable grounds for believing, that the employee was guilty of the misconduct alleged.
57. To have reasonable grounds for the belief, the employer must have conducted a reasonable investigation into the alleged misconduct. If the investigation was as thorough as could reasonably have been expected, it will support a reasonable belief in the findings, whether or not some piece of information has fallen through the net. There is no justification for imputing to that person knowledge that he did not have and which (ex hypothesi) he could not reasonably have obtained during the investigation (see *Orr v Milton Keynes Council* [2011] EWCA Civ 62).
58. The next question is whether the decision to dismiss fell within the range of reasonable responses available to a reasonable employer in the circumstances. This is based on the information the employer had at the time of dismissal, having carried out a reasonable investigation. The question, again, is not what the tribunal would have done but whether the employer acted reasonably in forming that belief, having carried out a fair investigation. The question of whether the employer acted reasonably must be judged objectively.
59. The test of 'reasonable responses' applies both to the decision to dismiss and to the investigation (see *Sainsbury's Supermarkets Ltd v Hitt* 2003 IRLR 23). It is not for the tribunal to decide whether it would have investigated things differently but whether the investigation was reasonable.
60. The tribunal must not substitute its opinion for that of the employer. The question in relation to the investigation and decision to dismiss is whether they were within the band of reasonable responses.
61. Where a claimant's conduct before dismissal was such that it would be just and equitable to reduce a basic award it may do so (Section 122 ERA). Where a tribunal finds that the dismissal was caused or contributed to by any action of the claimant it shall reduce any compensatory award by such amount as it considers just and equitable having regard to that finding (Section 123 ERA). The questions are what was the conduct giving rise to

the reduction, was that conduct blameworthy, did the conduct cause or contribute to the dismissal and to what extent should the award be reduced.

62. Account must be taken of the ACAS Code of Practice. In addition, the ACAS guidance, to which the tribunal is not obliged to refer but may be relevant, provides that when investigating cases, it is important to keep an open mind and look for evidence which supports the employee's case as well as evidence against. It also states that if there is an investigatory meeting the employee should be given advance warning and time to prepare.

Submissions

The claimant

63. The claimant's representative submitted that the claimant had worked for the respondent for five years without any disciplinary action against him. He had permission to book his flight from someone with authority. He was sick the evening of 24 January and visited the hospital. He went to the GP the following day, when he called in sick. He did not need a doctor's note as he could self-certify. If the respondent had asked the right questions these issues would have been addressed. The claimant had issues with his grievance and this contributed to his dismissal.
64. Burchell requires intensive investigation and there was none about his medical history. The respondent said nothing else could have changed their minds.

Respondent

65. The respondent provided written submissions. In brief, they said the case was about a worker who prepared a scenario which was that he would 'pull a sickie' in order to take additional annual leave which was previously denied to him and that they conducted a fair and reasonable investigation at which they formed a reasonable belief that the claimant should be dismissed for gross misconduct based on the following:
- a. His flight ticket which was booked prior to the manager's approval in breach of the holiday booking procedure
 - b. The fact that his flight was one hour after the end of his Saturday night shift
 - c. Going on unauthorised leave for three days before the 29 January and acting in breach of the Absence reporting Procedure.

Conclusions

66. I find that the dismissal was unfair. This is for the following reasons.
67. The respondent decided at an early stage, because of the sequence of events, that the claimant had always planned to take time off before his flight and when this leave was refused, he threw 'a sickie' and had unauthorised

absence without good cause. Although initially this may have appeared to be the case from the sequence of events, the respondent should have investigated the claimant's explanation, to the extent it was reasonable, keeping an open mind during the process.

68. I find that there was a failure to carry out a reasonable investigation. The failure to tell the claimant, before or at least at the beginning of the 'Return to Work' interview, that it was an investigation meeting into unauthorised absence, which could lead to disciplinary action, was not reasonable. The claimant should have been told in advance of the reason for the meeting to give him an opportunity to prepare for it, particularly given the seriousness of the allegations.
69. The early belief that the claimant was lying about being sick meant that the respondent did not have an open mind throughout the process. There was not a reasonable investigation into what the claimant said about being sick and his response to the allegation that he had taken unauthorised absence without good cause.
70. A reasonable employer would have taken steps to investigate whether the claimant's account of events was true rather than assuming that he had lied throughout. Even if initially the evidence appears to be damning, fairness dictates that there must still be a reasonable investigation. What looks obvious at the outset is not always so.
71. If after a reasonable investigation the respondent believed that the claimant had 'pulled a sickie' and 'gone awol' so he could catch his flight, this may well amount to a fundamental breach of the trust and confidence that is at the heart of the employer/employee relationship, entitling the respondent to dismiss, as was pointed out by the EAT in *Metroline West Ltd v Ajaj*, (UKEAT/0185/15/RN) a decision provided by the respondent.
72. Some steps would have been easy and reasonable to take, whether at the disciplinary hearing or the appeal, for example interviewing Security about whether they told the claimant he did not need to call in every day and whether he had been told by a manager he could leave his Saturday shift early in order to catch his plane. A reasonable employer would take reasonable steps to ascertain the truth of the claimant's account, by contacting relevant employees, even if what the claimant had been told by those employees was a breach of procedure. It is not clear what further investigation would have revealed.
73. I accept that Mr Hills genuinely believed, on the information he had, that the claimant had decided that he would take off the 27 and 28 January even though he had no permission to take the extra days and that he went AWOL on 25 January. The evidence Mr Hill had in front of him was mainly from the Return to work discussion, which was referred to as the investigation. It also included the claimant's sick note which Mr Hills accepted was genuine, but he still believed the claimant to be lying, arguing he should have presented it on his return, not 56 days later. He did not take account of the fact that as the claimant was only sick for 4 days he did not need to produce one, as he

could self-certify, so he only got the certificate to prove he had been to see the doctor on 25 January.

74. The failure to investigate could have been rectified at the appeal stage but there was no further investigation. When asked why the claimant was sacked for 2 days, having been sick for 4 days, Mr Benchaoui said Mr Singh could ask Adrian (Hills) and that he was not there to reopen the disciplinary. At the appeal meeting Mr Benchaoui repeatedly referred back to Mr Hills' belief that the claimant was lying about being sick, having planned his absence in advance and the sick note was provided too late.
75. The claimant referred to the grievance he had brought and was told that this was not evidence and had nothing to do with the case, so Mr Benchaoui would not discuss it.
76. Mr Singh suggested that Mr Benchaoui interview the managers who said the claimant could leave early but this was not done.
77. For these reasons I find that there was not a reasonable investigation, which a reasonable employer would have carried out, to test whether the claimant was in fact lying. It is not reasonable for an employer to rely on information before them, without carrying out a reasonable investigation. The belief, not certainty, in the claimant's guilt must be based on a reasonable investigation.
78. If there had been a reasonable investigation from the outset, and the respondent obtained evidence that the claimant was not sick, had lied about what Security and other managers said, this could well have been gross misconduct, warranting summary dismissal. Dismissal without keeping an open mind and investigating the claimant's account where possible to do is, is not what a reasonable employer would do. It is not within the band of reasonable responses.
79. I will hear submissions, and if necessary further evidence, about contributory fault, at the Remedies Hearing.
80. The claimant's claim for unfair dismissal is upheld.

Employment Judge Palmer

Date: 12 June 2018

Sent to the parties on:

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For the Tribunal Office