



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: ACTING REGIONAL EMPLOYMENT JUDGE P DAVIES
(sitting alone)

BETWEEN:

Claimant

MR M PAREKH

AND

Respondent

NATIONWIDE BUILDING SOCIETY

ON: 6 November 2019

APPEARANCES:

For the Claimant: No Attendance

For the Respondent: Mr M Pipkin (Solicitor)

JUDGMENT

The Judgment of the Employment Tribunal is that:-

1. The claim of unfair dismissal is dismissed.

REASONS

1. The judgment was sent to the parties on the 25th November 2019.
2. On 28 November 2019 the Claimant sent an email to the Tribunal which said:-

“I would like to request a formal letter explain the reason the judge for dismissing the case. I am to believe that the judge will need to do this. I will need this as soon as possible as I can consider a possible option of an appeal. Thank you for your time.”

3. These are the reasons which have been requested by the Claimant.
4. By a claim form received on 30 July 2018 the Claimant, Mr Mehul Parekh, claimed unfair dismissal from his employment as a Customer Representative with the Respondents. A response was received on 3 October 2018 that admitted the dismissal of the Claimant with notice on ill-health grounds on 30 May 2018. The response includes reference to the Claimant's lack of engagement during his six-month absence (paragraph 11). The Respondents also said that at the appeal meeting on 26 June 2018, the Claimant provided a brief letter from his GP saying that he would be fit to commence a phased return to work in August 2018 but also confirmed that the Claimant's medical condition has worsened and that he was awaiting specialist input although no date had been confirmed for this. The Respondents said that during the meeting, the Claimant said that he had to dial 999 in May 2018 as he was unable to move. The Respondents say that having considered the evidence, the Respondents did not uphold the Claimant's appeal.
5. A notice of hearing for the 9 January 2019 was sent to the parties on 5 September 2018. On 27 November 2018 the Claimant emailed the Tribunal to request a change to the hearing date because it had come to his attention that he would be out of the Country on the 9 January 2019 as he would be going abroad to assist with his mother's medical treatment. The email also says “from 10/01/2018 I will be in the UK, and available for any dates you see fit. I would also like to apologise for any inconvenience caused by this and thank you for your time and efforts.”
6. The Tribunal wrote to the Claimant on the 13 December 2018 saying “the application for a postponement will only be considered if the Claimant produces proof of travel arrangements including the cost, when tickets were bought and a fuller explanation for the reasons for the request for a postponement”.
7. On 20 December 2018 the Respondents emailed the Tribunal setting out a number of points. They allege that the Claimant had failed to provide copies of the documentation requested by the Tribunal, and he had also failed to comply with the Tribunal's order dated 5 September 2018 specifically, the Claimant had failed, despite repeated requests from the Respondents to disclose any documentation in respect of his claim. The Respondents said that they were unable to finalise witness statements without the Claimant disclosing any evidence. They asked the Tribunal for the claim to be struck out under Rule 37 on the grounds that the Claimant

has conducted the proceedings in an unreasonable manner and/or as the Claimant has failed to comply with an order of the Tribunal and/or as the claim is not being actively pursued. In the alternative, there was a request for a deposit order.

8. On 28 December 2018 the Claimant wrote to provide proof of flights, when they were bought and how much he paid, and that he was going away for his mother's treatment and that the Nationwide staff were aware that he was taking care of his mother as he had mentioned this during his time there.

9. On 3 January 2019 the Tribunal sent a notice to the parties as follows:-

"I have been asked by Judge Baron to write to you.

1. The application by the Claimant for a postponement of the hearing listed on the 9 January 2019 is granted.
 2. The applications by the Respondent in an email of 20 December 2018 for various orders are refused. The judge will strike out a claim of unfair dismissal where the burden is on the Respondent to show the reason for the dismissal and that it was a potentially fair for not disclosing documents, particularly in circumstances where the Claimant has said that he does not have any documents. The judge would not make a deposit order in this case without some further information, and in particular without seeing the trail of correspondence relating to the absence procedure. Further, the Tribunal would have to ascertain the means of the Claimant.
 3. The Respondent must now prepare a bundle of documents in the usual way if that has not already been done.
 4. The judge has ordered that the Claimant will not at the hearing be able to rely on any documents not in the bundle prepared by the Respondent unless he has provided a copy of them to the Respondent no later than 21 days before the hearing.
 5. The hearing will be relisted and a separate notice of hearing issued.
 6. Witness statements are to be exchanged 14 days before the hearing. Such statements must set out in short numbered paragraphs the facts which the Claimant and the witnesses for the Respondent wish the Tribunal to know."
10. A notice of hearing dated 4 February 2019 was sent to the parties informing them that the claim would now be heard on 6 November 2019. On the 27 October 2019 the Respondents wrote to the Tribunal to say that they were concerned that the Claimant was not actively pursuing the claim

and requested that the Employment Tribunal strikes out the claim or issues an unless order accordingly. They refer to correspondence with the Claimant asking him if he can confirm that the bundle was agreeable but the Claimant responded to say that he would check "at earliest convenience" and also in response to a further communication from the Respondent on the 18 October 2019, the Claimant said "sorry not just yet". The Respondents alleged that they could not take steps to finalise the hearing bundle or witness statements because the Claimant had repeatedly failed to take the steps ordered by the Tribunal.

11. The Claimant sent an email of 24 October 2019 explaining that he was a single Claimant with no support from anyone. He was generally struggling how to approach the case. He explained about juggling his job, care for his mother and his father is very ill. The Claimant confirmed that he wishes to pursue his claim for sure because he was confident the circumstances in which he was let go was unfair.
12. On the 6 November 2019 the Claimant failed to appear at the hearing. Directions were given for an email to be sent to the Claimant as follows:-

"You have not attended your hearing listed this morning 6 November 2019, 10am at Croydon Employment Tribunal. Can you please inform the Tribunal by return, what are your reasons for not attending the hearing today?"

That email was sent at 10.43am. The email address was the only contact details that the Tribunal given by the Claimant as he did not complete the claim form with any phone number, mobile number or fax number.

No response was received to that email.

13. The hearing of this case commenced at 11.10am. The Respondents were present. The Respondents called two witnesses. Mr James Mathias and Mr Matthew Nelmes.

Mr James Matthias.

Mr James Matthias gave evidence in accordance with his written witness statement. Mr Matthias was the District Manager and first became involved with the Claimant at the stage 3 capability meeting. Mr Matthias said that the Claimant repeatedly failed to report absence in accordance with the Sickness Absence Policy. As the Claimant had been absent for more than three months, the Respondents confirmed to the Claimant that it would be progressing to a stage 3 capability meeting.

Mr Matthias was the manager for the stage 3 capability process. The first hearing was re-scheduled at the request of the Claimant's union representative and the re-scheduled meeting took place on 3 May 2018. The Claimant attended the meeting and was accompanied by his trade

union representative. Mr Matthias' witness statement states that the Claimant had not wanted to attend but his union representative had strongly advised him to. The Claimant was asked why he had not engaged at all in the process, either with occupational health or with his manager, and the Claimant was unable to put forward any reason other than he thought it might be due to how he was feeling mentally at that point.

In paragraph 30 of the witness statement, Mr Matthias said that he considered a number of matters. These included that the occupational health report was unable to confirm when/if the Claimant would be fit to return to work but the Claimant had not provided any medical evidence to indicate that he would be fit to return to work. Mr Matthias considered that it was highly unlikely that the Claimant would provide his written consent enabling the occupational health provider to obtain his medical records and that the fact that his on-going back problem was the reason for his on-going absence, not any mental health issues, and that based on the occupational health report it was unclear when the Claimant's back condition would improve sufficiently to enable him to return to work. Furthermore, the Claimant had stated this his mental health had improved to the point that he felt that he was able to engage in the process, but he had not provided any medical evidence to support his view that he would be fit to drive in a months' time.

In addition to the points raised by the Claimant during the meeting, Mr Matthias considered the impact that his continued absence was having on the business. In order to cover the Claimant's full-time hours, Nationwide had to arrange for colleagues from other branches to travel to the branch in Redhill where the Claimant was employed. Having taken into account everything in mitigation, Mr Matthias decided to terminate the employment with notice on the grounds of capability due to ill-health. That was confirmed to the Claimant in writing on 8 May 2018.

Mr Matthew Nelmes

Mr Matthew Nelmes also gave evidence confirming that his witness statement was true. Mr Nelmes was the manager in respect of the Claimant's appeal.

The Claimant attended the appeal hearing on 26 June 2018 and was accompanied by his trade union representative. The Claimant confirmed his grounds of appeal. A letter produced by the Claimant from a physician associate dated 22 June 2018 confirmed that the Claimant had experienced eight months of lower back pain and had started physiotherapy in February 2018. The letter did not give any detail or prognosis other than the Claimant was currently under investigation for his spine and awaiting specialist input. Mr Nelmes said that, therefore, nearly two months after the stage 3 capability meeting and seven months after his absence initially commenced, the Claimant remained

unfit for work and it was still unclear as to when his back condition would improve sufficiently to enable any return to work. Whilst the Claimant confirmed that he felt that he would be able to commence a phased return to work when 'he felt ready', he envisaged this would be from the beginning of August 2018. The Claimant confirmed that he had been in excruciating pain with his back on a number of occasions to the extent that he had called 999 which resulted in an ambulance attending his home address to administer gas and oxygen to enable him to move. The Claimant confirmed that the medical experts were unable to confirm what the cause of his back problem was and that there was clearly an underlying issue. Although the Claimant confirmed that he was hoping to see the specialist in due course, having been referred for an appointment thirteen days prior to the meeting, the Claimant was unable to clarify any details regarding the specialist appointment other than the fact that it would be a back specialist. The Claimant confirmed that he did not have any medical evidence to support his contention that he was suffering with depression as he had not previously mentioned this to his GP until a week prior to the appeal meeting. The Claimant's trade union representative also put forward a number of points.

Mr Nelmes said that he confirmed his decision to the Claimant to not uphold his appeal and in particular, he considered that the Respondents had undertaken a fair process and had acted reasonably in dismissing the Claimant on the grounds of ill-health capability. The Claimant remained unfit to work and that whilst he thought he might be able to commence a phased return from the 1 August 2018, this was contrary to the medical evidence that the Claimant had provided. The letter of the 22 June 2018 made it clear that the Claimant's condition had, in fact, worsened and that there was no estimated time frame in which the Claimant was likely to have obtained the necessary specialist assessment to determine the cause of his back conditions and therefore what actions were necessary to remedy this. Mr Nelmes considered the decision to dismiss was made after Mr Matthias had considered all of the evidence.

14. Mr Nelmes said that he had no contact from the Claimant to explain why he was not present at the hearing. He did not know anything about whether the Claimant had any other employment.

Submissions

14. Submissions were made by the representative of the Respondents concerning Section 98 of the Employment Rights Act 1996. It was submitted that there was a fair reason, namely, capability for the dismissal. It was a reasonable response by the Respondents where the Claimant had been absent for six months, had failed to engage with the Respondents and ignored correspondence. The occupational health report was not updated and any return date was not clear. The absence

of the Claimant had caused operational problems. Applying the statutory test, the claim should be dismissed.

The Law

15. Section 98 of the Employment Rights Act 1996 says as follows:-

- ‘(1) In determining for the purposes of this part whether dismissal of an employee is fair or unfair, it is for the employer to show:-
- (a) the reason (or, if more than one, the principle reason) for the dismissal, and
 - (b) that it is either a reason falling within sub-section (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) The reason falls within this sub-section 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 ...
- (3) In sub-section (2)(a) –
- (a) ‘capability’ in relation to any employee, says that capability is assessed by reference to skill, aptitude, health or any other physical or mental quality ...
- (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether dismissal is fair or unfair (having regard to the reasons shown by the employer) –
- (a) depends on whether in the circumstances, including the size and administrative resources of the employers undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and
 - (b) shall not be determined in accordance with equity and substantial merits of the case.’

Conclusions

16. The Tribunal accepted the evidence of the Respondents and was satisfied that the Respondents had shown that the reason for the dismissal of the Claimant was a potentially fair reason which related to his capability to perform the work of the kind that he was employed by the Respondents to do. Further, applying the statutory test in Section 98(4), the Respondents had followed the ill-health procedure policy and had conducted a hearing

which allowed the Claimant to state his case and to give his account of his absences and the reasons for those absences including providing medical evidence. The Claimant was allowed properly to be accompanied by a trade union representative who assisted in the presentation of the Claimant's case. The process was fair and the Tribunal was satisfied, having heard from Mr Matthias, that he had conducted the meeting with the Claimant with an open mind and had considered all the points made by the Claimant. Furthermore, Mr Matthias had reached a conclusion which was reasonable in all the circumstances regarding the capability of the Claimant to undertake his role. Dismissal was in the band of reasonable decisions by a reasonable employer.

17. In addition, the Claimant was allowed to appeal the decision to dismiss him. The Tribunal accepted the evidence of Mr Nelmes that the Claimant was able to present his grounds of appeal with the assistance of the trade union representative. Those grounds of appeal and all the circumstances were considered by Mr Nelmes who then reached a conclusion that was reasonable based on the evidence and information given to him. His decision to not uphold the appeal was a reasonable decision by a reasonable employer and within the band of reasonable decisions by a reasonable employer.
18. Taken overall, and in all the circumstances, the Respondents followed a fair process. Applying the statutory test under Section 98(4), the dismissal of the Claimant was fair.
19. The claim for unfair dismissal is dismissed by the Tribunal.
20. It should be noted that on 7 November 2019 the Claimant sent an email to the Tribunal saying:

“Hello, I have had to travel to India for a family bereavement. I have just arrived here. What was the outcome of the Tribunal? Also, did you receive my email the other week regarding the Respondent's email.”

Acting Regional Employment Judge Davies

Date: 19th December 2019

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