



EMPLOYMENT TRIBUNALS

Claimant: Mrs P Ashong

Respondent: Miss S Powell

Heard at: Leeds Employment Tribunal (by video)

On: 27 July 2023

Before: Employment Judge Armstrong

Representation

Claimant: In person

Respondent: In person (supported by Ms K Rogers, carer)

RESERVED JUDGMENT

1. The Claimant was not unfairly dismissed. The claim is dismissed.

REASONS

Claims

1. On 20 March 2023 the claimant brought a claim for unfair dismissal. The claim form makes reference to her pregnancy at the time of her dismissal. At a case management hearing on 2 June 2023 the claimant accepted that the respondent was not aware that she was pregnant until after her dismissal and therefore that she could not bring a claim for pregnancy discrimination, or on the basis that the dismissal was because of her pregnancy. The claimant was employed for less than two years therefore she cannot bring a claim for 'ordinary' unfair dismissal under section 98 of the Employment Rights Act 1996 ('ERA 1996').
2. It was identified at the case management hearing that the only potential unfair dismissal claim open to the claimant was if she could prove that she was dismissed for a health and safety reason (within s.100 ERA 1996). This would be an automatically unfair dismissal and therefore not require two years' continuous employment.

3. In the claimant's witness statement she mentions failure to provide her final pay slip and a P45. The Tribunal does not have jurisdiction to direct the provision of a P45. The respondent told the Tribunal that she would re-send the claimant's last pay slip and P45. The claimant denies having received the documents previously but on the basis they would be re-sent, the claimant did not seek to pursue an amendment to add that claim at the hearing today.

Conduct of the hearing

4. Both parties attended the hearing by video and represented themselves. There were no connection issues and all parties were able to participate fully in the hearing.
5. The respondent suffers from motor neurone disease. A number of adjustments were made to the hearing. We took regular breaks. The respondent had a carer next to her for general support and also to assist her with communication on occasions as the respondent's speech can be unclear at times due to her condition. She also assisted the respondent with documents.

Issues for the tribunal to decide

6. The issues for me to decide were therefore:
 1. What was the reason or principal reason for the claimant's dismissal and did it fall within s.100 ERA 1996?
 2. If the claim succeeds, what compensation should the claimant receive?

Evidence

7. The documents were not contained in a single paginated file but attached to several emails from both parties.
8. The claimant had submitted her documents and witness statements on 23 June 2023 whilst at hospital with limited internet connection and so the documents had been broken down into several separate files. The claimant confirmed which documents she had submitted. The respondent confirmed that she had access to all of these either in hard copy or on email and had read them previously. She was very keen to proceed with the hearing today and did not want to adjourn to another day to be provided with a single hard copy or electronic pdf bundle.
9. The respondent provided documents by email on 3 July 2023. These had not been placed on the Tribunal file in advance of the hearing but they were provided to me in the course of the hearing and I considered them before hearing the respondent's evidence.
10. I considered the following documents:
 - 10.1. Claim form (ET1) and response form (ET3);
 - 10.2. Respondent's 'response' documents dated 20 May 2023 and 1 June 2023;

- 10.3. Documents submitted by the claimant on 23 June 2023: schedule of loss, statement comprising four pages commencing 'on the 6th of march', mitigation document titled 'HOW I GOT A NEW JOB', copy text messages, witness statement from Mr Ebenezer Animah;
 - 10.4. Documents submitted by the respondent on 3 July 2023: statements of the respondent, Jo Taylor, and Jacqui Ball and 30-page pdf comprising exhibits to the respondent's statement.
 - 10.5. Claimant's rotas submitted on 14 July 2023
11. I heard oral evidence from the claimant and Mr Ebenezer (her partner), and the respondent. Ms Taylor and Ms Ball did not attend the hearing to give evidence.

Findings of fact

12. The claimant was employed as a personal assistant by the respondent from 8 March 2022 until her summary dismissal on 10 March 2023.
13. The respondent says that there were some previous issues with the claimant's performance. She gives three examples. Firstly, that on a few occasions the claimant 'went quiet' when dealing with personal care. Secondly that the claimant 'dozed off' on one occasion whilst the respondent was eating (when she requires supervision due to her disability). Thirdly that the claimant once 'shoved' all the respondent's clothes in one drawer, which the respondent finds distressing because she has Obsessive Compulsive Disorder.
14. The claimant accepts that the respondent raised the second issue ('dozing off' whilst the respondent was eating) at the time, and that the claimant explained that she was unwell. She does not recall the respondent mentioning either of the other issues to her.
15. Whether or not the claimant was made aware of the respondent's other concerns, and whether or not those concerns were justified, I accept that the respondent had previously been concerned on occasion about the claimant's performance.
16. The claimant completed a night shift on 6 March 2023 and the following day found out that she was pregnant. She accepts that she did not tell the respondent about her pregnancy until after her dismissal.
17. On 10 March 2023 the claimant awoke to heavy snowfall. She was due to attend work that morning. Her husband would usually drive her but he was unable to due to the snow. She sent a number of messages on a WhatsApp group which included the respondent, her daughter, and other carers. She stated as follows (I have only reproduced the claimant's messages):

07:19 'OMD the snow is really bad today'

07:21 'I can't move the car and the is hard to walk in'

07:22 'And taxis are not working'

07:23 'Nelly what should I do I don't want to disappoint Shelly'

07:31 'Oh dear me I might be late am trying to walk in'

[there are some messages amongst other individuals about what they should do]

08:01 *'Am trying on my way tho might be late as I said am really sorry shelly is not like me'*
[other staff then offer to walk in]
08:08 *'Am locked in middle of the road and am calling the taxi to see'*
[she is told by a colleague to walk as taxi will not be safe]
08:11 *'Am walking is 3 feet high'*
[they then express further concern about the claimant driving]
08:13 *'Guys am not walking I am in ok'*
08:14 *'I might I am walking in'*
[she is asked how far away she lives]
08:18 *'10 minutes drive an hour walk'*
08:19 *'but guys I cannot be texting my hands'*
[further messages of concern from her colleagues]
08:39 *'guys I am really struggling'*
08:39 *'Nelly 1sock' says 'where are you'*
08:41 *'I've passed the hill close to the garage where they sell cars'*
08:45 *'Nelly 1sock' says 'do you think you are going to get here x'*
08:49 *'Am trying everything but the struggle is real and I don't have snowboot so am with my normal one and am struggling Am sorry shelly am trying my best'*

18. There follows some discussion about someone on Facebook who is offering to give carers lifts due to the weather. The claimant indicates that the other carers should contact him and see if he can collect her. She initially says she is waiting at the garage, but then goes on to say:

09:04 'Is covered with snow am going back home to change as am really wet so they pick me up from home so I will come with everything and stay over till Sunday'

19. There are then further discussions about how the carers and the respondent's daughter can cover the claimant's shift, when she could get to the respondent's address, and whether they could identify someone to pick her up and bring her in to work. Eventually at 10.47 one of the claimant's colleagues confirms that she has arrived at the respondent's address.
20. The claimant now says that she returned home because she was feeling dizzy, which she suspects is a result of her pregnancy and the weather. She accepts that she did not tell the respondent this at the time.
21. The respondent's evidence is that she did not believe that the claimant had ever left home. She considered that the information given by the claimant about which garage she was near to was inconsistent, and because another employee, Jo, had been able to get to work, she considered that the claimant was being dishonest about the efforts she had made. I accept that this was the respondent's genuine belief, although that does not necessarily mean that it was in fact true that the claimant had not left home.
22. The respondent decided to give the claimant a verbal warning. Because of the respondent's speech impediment she chose to do this by WhatsApp message direct to the claimant (not on the group message), which she did at 16.44 the same day, as follows:

'Hi Patience

Whilst I can appreciate you say you really tried to commute to work, I'm sorry but as Jo has managed to walk without getting completely stuck, I don't believe you made the effort to get into work unfortunately!

You say you got to the car sales lot on Woodhouse Rd and had to turn back because you were wet but you should've have been more prepared (bring extra clothes to change into) and dry off when you get here. And you need to have appropriate footwear for such a commute! You knew that the snow was coming when you were due to be on shift with the weather forecast so you've had enough time to properly prepare yourself. Granted we all didn't really know it'd be this mad, but you knew it was coming.

I've also had no private text from yourself to apologise which is disheartening.

As this is the case, I'm considering this a verbal warning! If this does happen again, it could result in more disciplinary actions being taken.

See you tomorrow xxx'

23. The claimant respondent at 17.11:

'Thank you for your message

And you do know I put in extra effort in this job and this has not happened before. Even the news is saying how bad and dangerous the outside is. I called in several taxis and they all cancelled in the end, and that's why I even tried to walk which even in good weather takes 45-50mins. And you think I didn't put in much effort?

We did communicate in the group that's why and I apologise for not sending a private text, but to call this disheartening...

Anyways, my apologies once again and I hope you will see one day the effort I put into this job, even when I'm taking ill.

Am so sorry for any inconvenience hopefully, I know how the snow is like in the north and I've learnt my lesson so will get myself more prepared

Many thanks'

24. At 17:50 the respondent sent the following message:

'Hi

Yes you do put in the effort in and have taken everything on board I've said but you've never worked for me during the snow so I didn't know what to expect. If Jo hadn't have made it in, yes I would say you did make the effort but she did and we're all pretty close by and so the snow levels are pretty much the same.

That wasn't me texting this morning as I was still in bed. It was Shanelle but I think it's courtesy to privately text me. I'm sorry but can I ask what you don't like about me calling it disheartening? That's my opinion Patience!! I really don't like your tone here if I'm honest with you. It sounds pretty defensive.

I see everyone's efforts Patience and if I see anyone not putting in their efforts in I'll address accordingly'

25. The claimant replied stating 'Thank you'.

26. It is agreed that later that evening, some time after 18.00, the respondent sent a message to the claimant summarily dismissing her. I have not seen

this message as it was deleted by the respondent but it is not disputed that a message to that effect was sent, or that it had the effect of terminating the claimant's employment.

27. In her statement, the respondent identifies a part of the claimant's response to the 'verbal' warning which led to her decision to dismiss. At paragraph 11 of her statement she refers to the part of the message from '*I called in several times*' up to '*even when I'm taking ill*' and states:

'This part of the text I found defensive and patronising. I just didn't like her tone in the text and it's not the first time she's made me feel awkward with her silent treatment when she doesn't like something I've asked her to do something. So I terminated her contract.'

28. The claimant requested a letter confirming the termination of her employment. The respondent sent her a letter the following day, 11 March 2023 as follows:

'Date 10/3/23

Name of employee Patience Ashong

Dear Patience

With regards to the position of personal assistant, I regret to inform you that your contract of employment has been terminated with immediate effect.

The reasons are:

- Inadequate performance around the workplace*
- Poor attempt to commute to work, forcing another member of staff to walk in the same snow.*
- Being negligent relying on my daughter because she resides with me but was working the night before.*
- Rude response from Patience when issued a verbal warning.*

I wish you every success for the future.

Yours sincerely

Shelly Powell'

29. In her oral evidence, Miss Powell confirmed that these were the reasons that she decided to dismiss the claimant. She stated that the main reason was '*Being rude in the text messages to me. I don't want someone in my house around me making me be awkward in my own home.*'

Relevant law

30. Section 100 ERA 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that –

(a) ...[inapplicable],

(b) ...[inapplicable]

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.'

31. If an employee is dismissed for a reason falling within this section he will be regarded as 'automatically' unfairly dismissed. The effect of this is (amongst other factors) that she does not require two years continuous service to bring a claim, and the Tribunal does not need to consider the reasonableness of the dismissal.

32. Where, as here, an employee does not have sufficient service to bring a claim for 'ordinary' unfair dismissal, the burden of proving that the reason for the dismissal falls within s.100 ERA 1996 rests on the claimant (see *Smith v Hayle Town Council* 1978 ICR 996, CA, and *Tedeschi v Hosiden Besson Ltd* EAT 959/95 and *Parks v Lansdowne Club* EAT 310/95).

Conclusions

33. I am satisfied that the principal reason that the respondent dismissed the claimant was because she perceived her as being rude in her message in response to the 'verbal' warning sent on 10 March 2023. The other reasons for the dismissal were that the respondent thought the claimant had deliberately not attempted to come into work, the impact this had on other staff, and previous perceived inadequate performance. Against the backdrop of these issues, the respondent dismissed the claimant for the message she sent in response to the 'verbal' warning by WhatsApp. This was the principal reason and the operative cause of the dismissal. The respondent had decided to deal with the fact that the claimant did not come into work on time on 10 March 2023 by way of a warning. Therefore this is not the reason for dismissal. I accept that the decision to dismiss was taken as a result of the way that the claimant responded to that warning.

34. Therefore I am satisfied and find that the claimant was not dismissed for a reason which falls within s.100 ERA 1996.

35. The claimant was not unfairly dismissed. The claim is dismissed.

Employment Judge **Armstrong**

____ 27 July 2023 _____

Date

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

31 July 2023

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FOR EMPLOYMENT TRIBUNALS