



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: S/4107064/18 Held at Aberdeen on 1, 2 & 3 October 2018

Employment Judge: Mr N M Hosie (sitting alone)

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Mr Liam McGeoghegan

Claimant
In Person

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Cape Industrial Services Ltd

Respondent
Represented by:
Mr A Munro –
Solicitor

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REASONS

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On 4 October 2018 a Judgment was registered in the following terms: -

“The Judgment of the Tribunal, for the reasons given orally at the Hearing, is that the claim is dismissed.”

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On 9 October 2018 the claimant requested written reasons for the Judgment.

Introduction

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1. Liam McGeoghegan claimed that he was unfairly dismissed and subjected to a detriment for raising health and safety concerns. The respondent (“Cape”) denied

E.T. Z4 (WR)

the claim in its entirety. They admitted the dismissal but claimed that the reason was “some other substantial one” (third-party pressure) and that it was fair.

The Evidence

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2. On behalf of the respondent I heard evidence from:

- Karen Thomson, Employee Relations Manager.
- William (“Willie”) Smith, Operations Delivery Manager.
- Neil Riddle, Business Unit Director

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Each of these witnesses spoke to written statements.

3. I also had written statements from:

- Robert Hardy, General Manager.
- Kevin Porter, Project Manager.

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I then heard evidence from the claimant.

20 4. A joint bundle of documentary productions was also lodged (“P”).

5. In general, all the witnesses presented as credible and reliable.

The Facts

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6. Having heard the evidence and considered the documentary productions, I was able to make the following material findings in fact.

7. Cape is involved in the supply of multi-disciplinary services and resources for the energy sector, particularly the oil and gas industry. The claimant was

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employed by Cape as a Deck Foreman from 1 March 1988 until 26 January 2018 and contracted out to Cape's main client, B.P. which is responsible for 90% of the work undertaken by Cape.

- 5 8. The claimant was stationed at the B.P. Andrew installation in the UK Sector of the North Sea until March 2017 ("the Andrew").
9. On 9 November 2016 Cape received an e-mail from Chris Mackie, B.P.'s Offshore Installation Manager ("OIM"), on the Andrew in which he expressed
10 concerns regarding the claimant's performance (P.70).
10. The claimant was invited to a meeting to discuss these concerns and it was decided that he would be transferred to a "Core Deck Foreman role" on the "B.P. ETAP" ("the ETAP") installation, also situated in the central North Sea
15 where he would have less responsible duties (P.75/76). The claimant was agreeable to this transfer.

B.P. ETAP

- 20 11. On 10 August 2017 Willie Smith, the respondent's Operations Delivery Manager with responsibility for B.P. received an e-mail from Roy Watson, Cape's "Supervisor Team Leader" on the ETAP. His e-mail referred to a discussion that he had had with Colin Reid, the B.P. OIM on the ETAP, and detailed several issues which Mr Reid had raised with him concerning the
25 claimant's performance (P.94). The OIM is a very senior and influential position on an offshore installation.

Meeting on 13 August 2017

- 30 12. Mr Smith and Kevin Porter, Cape's Project Manager on the ETAP arranged to meet the claimant to discuss the issues which the OIM had raised. Mr Smith was concerned that these issues had been raised so soon after his

transfer. They met at the claimant's Hotel in Aberdeen where overnight accommodation had been arranged for him prior to his early flight offshore the next morning. As the Hotel was busy they spoke to him outside. It was acknowledged that this was perhaps not the best place to conduct such a meeting, but nevertheless the issues were raised with him, Mr Smith expressed his concerns and made it clear that his performance would have to improve.

13. On 16 August Mr Smith wrote to the claimant with details of the OIM's concerns and to confirm what he had told him about his "expectations going forward" (P.95/96). The following are excerpts from his letter: -

"You have a wealth of experience and the technical knowledge for the requirements of the Deck Foreman position, however this role also requires the individual to take full responsibility and demonstrate safety leadership along with strong supervisory skills ensuring all procedures are followed and maximum efficiency is achieved at all times thereby ensuring that you are managing not only yourself and but equally important you team. You must also ensure the reporting of all incidents or concerns has been carried out and if you feel that you require further support then please do not hesitate to ask, as in support you have the STL ETAP Project Manager and myself to discuss any concerns you may have.

On this occasion we are merely reminding you of our expectations going forward and no further action is required.

However the OIM must feel he can fully trust his Deck Foreman to deliver safely and efficiently at all times, it is now up to you to change his perception.

Finally, may I remind you that we have already moved you from another installation due to concerns/issues raised by another B.P. OIM, whereby you have given us your reassurance that you can deliver as a deck foreman, should there not be an immediate measurable improvement we will not be in a position to reallocate you elsewhere. However I have every faith you will be able to turn this round in a timely fashion."

Further Incidents on the ETAP

14. Unfortunately, the claimant was involved in two further incidents on the ETAP on 29 September and 12 October 2017 and this led to the OIM advising Cape that B.P. was no longer prepared to allow the claimant to continue working there.

Incident on 29 September 2017

15. This incident involved an Intermediate Bulk Container an ("IBC") containing disinfectant or bleaching agent, tipping as it was being transferred to a forklift carrier.
16. An Accident and Incident Report was prepared by Cape's Safety Department in respect of this incident (P.100-103).

Incident on 12 October 2017

17. This incident resulted in the claimant sustaining a foot injury when he was working alone, manual handling panels into a 20 feet half-height container.
18. An "Adverse Event Investigation Report" was prepared in respect of that incident (P.104-155). The claimant accepted that he was at fault as he could have "risk-assessed the work better".

Suspension

19. The claimant's trip offshore was due to end on 18 October, but he was suspended following the second incident and taken off the platform on 13 October. This was at the request of the B.P. OIM on the ETAP.

Investigation

20. Kevin Porter, the respondent's Project Manager on the ETAP who had completed the Adverse Event Investigation Report (P.104-155) wrote to the claimant on 16 October to invite him to attend an investigation meeting on 26 October (P.156).

Meeting on 26 October 2017

21. Notes of that meeting were produced. I was satisfied that they were reasonably accurate (P.159-162).

22. Mr Porter showed the claimant Cape's "Management System Disciplinary Procedure & Consequences" and the flowchart (P.28/32) and referred to Willie Smith's letter which was sent after the meeting on 13 August (P.95/96). He also advised the claimant that the OIM on the ETAP was concerned about his safety leadership.

23. The claimant explained his involvement in the two incidents. However, Mr Porter was of the view there was a "disciplinary case to answer". Accordingly, He invited the claimant by e-mail, therefore, to attend a Disciplinary Hearing on 7 November, to be conducted by Willie Smith and Karen Thomson (P.163/164).

24. However, the claimant objected to Willie Smith conducting the meeting (P167) and it was rescheduled for 17 November before Yvonne Storey, a Specialist Project Manager with the Company and at that time Willie Smith's Senior Manager (P.174).

E-Mail from the ETAP OIM

25. However, prior to the Disciplinary Hearing, on 8 November Mr Porter received an e-mail from Colin Reid, the B.P. OIM on the ETAP in the following terms (P.168): -

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“As per discussion on Monday at the monthly Cape Performance Review Meeting, the biggest concern I have about Liam is his safety leadership. In September I raised concerns with yourself and Willie Smith after two incidents on ETAP. The first was when rubbish was blown overboard during one of the helicopter operations. The investigation originally stated that the issue had been caused by a Steward leaving rubbish outside the gallery landing area. I followed up with Liam on this to ensure that he had carried out the downdraft exclusion zone check. As the conversation went on it became apparent that Liam was not physically checking these zones and was simply looking over the handrails to the areas below to see if anything looked amiss which to me was totally unacceptable, but this did not seem to be an issue with Liam. I shared a second incident where a bulk loading hose had parted and was left dangling in the sea. The incident occurred about 1600 and Liam took the shift offsite stating ‘nightshift can deal with that’. The STL had to drag Liam and his crew back out and get the hose recovered back to the platform.

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I believe Liam was then taken into Cape Office and warned about his performance. I was really disappointed to find out after this that Liam had been involved in further incidents, the failure to follow up on the team’s concerns regarding the sodium hypo IBC and then Liam accessed a cargo carrying unit to manipulate GT enclosure doors. These doors were put into the container using the crane so should only be manipulated using the crane with the full crew present. I believe that Liam again can see no fault in his behaviour.

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I really need support from CAPE, the deck and how the deck is managed is critical and we have underestimated the importance of the deck foreman role. In addition helicopter and deck operations pose a significant major incident hazard risk but we need a safety leader to manage these operations. All OIMs are aligned in requesting that you secure a new deck foreman, this could either be from an external source or there are a number of ETAP deck crew members that demonstrate the necessary behaviours” (the Tribunal’s emphasis).

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26. On 9 November, Ms Thomson sent the claimant a copy of the OIM’s e-mail (P.175) and advised him that this additional issue would be addressed at the Disciplinary Hearing : *“Your position as Deck Foreman on B.P. ETAP is no*

longer an option, this in turn could lead to the termination of your employment with notice if we cannot find you any alternative employment.”

Disciplinary Hearing on 24 November 2017

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27. This was conducted by Yvonne Storey. She is no longer employed by Cape and was not available to give evidence at the Tribunal Hearing. However, notes of the Disciplinary Meeting were produced and I was satisfied that they were reasonably accurate (P.176/180).

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Final Written Warning

28. On 8 November Yvonne Storey wrote to the claimant to inform him of the outcome of the Disciplinary Hearing (P.181-183). He was found to have had responsibility in the two incidents. He was given a final written warning of 12 months' duration.

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29. The claimant was also informed that, the B.P. OIM had requested that he be replaced as Deck Foreman on the ETAP. As Cape did not have a position for him as a Deck Foreman anywhere, it was proposed to try and re-deploy him as a Deck Operative, due to his Heli-deck experience.

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30. The following are excerpts from Ms Storey's letter: -

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“As we shared with you on the 09th November 2017 (P.175), we received an e-mail from our client raising their concerns in regards to recent incidents along with the two mentioned above whilst you were carrying out your duties as Deck Foreman on the B.P. ETAP. Given the considerable hazards associated with the Deck Foreman role it is paramount this individual is cognisant of the hazards in the working environment and demonstrates the correct safety leadership skills at all times. The client has expressed they have seen no improvement after previous talks you had with Cape Management in regards to your performance, expectations, safety leadership and safety behaviours. As a result of this they have requested a replacement Deck Foreman for the ETAP platform.

5 *As summarised above, we also have concerns in regards to the decisions you have made in the past few months; these are not behaviours we would expect from you with the amount of experience you have. This role is a safety critical role and at all times you have to be fully compliant with safe working practices and take the responsibility for being the team lead, leading by example.*

10 *Subsequently we have to inform you that there is no longer a position for you as a Deck Foreman.*

15 *However, you have vast experience in Heli/deck and we feel a position within a team on another platform, as Deck Operative, would be a better alternative as this moment in time. Being part of the team but not having the responsibilities of the Deck Foreman would allow you the opportunity to focus on your core delivery skills rather than the additional responsibilities which come with the Foreman position..... we do hope you will consider the position.*

20 *If this is not an option to you, we would have to write to inform you that your employment would be terminated and you would be entitled to a notice period of 12 weeks.”*

Appeal

25 31. On 4 December, the claimant intimated that he wished to appeal against the final written warning and his demotion (P.184).

30 32. The Appeal was conducted by Robert Hardy, General Manager, on 14 December 2017. I did not hear evidence from Mr Hardy at the Tribunal Hearing but had a witness statement from him.

35 33. Minutes of the Appeal Hearing were produced (P.187/188). I was satisfied that they were reasonably accurate. Karen Thomson was the notetaker.

34. On 18 December Mr Hardy wrote to the claimant to advise him that his appeal had been unsuccessful (P.189/190).

35. He further advised that if Cape was unable to find alternative employment for him which he was prepared to accept, his employment would be terminated with 12 weeks' notice.

5 **Alternative Employment**

36. B.P. had made it clear that it would not allow the claimant to work on any of its installations which were known as its "federal platforms". Although B.P. was responsible for around 90% of Cape's work and this greatly restricted the options, Willie Smith and Karen Thomson in particular, continued to actively explore the possibility of alternative employment for the claimant. On 19 December, Ms Thomson sent an e-mail to a number of Managers and asked them to advise her if any suitable posts arose as a Foreman or Deck Operative (P.192). She also sent a reminder e-mail on 3 January 2018 (P.194). She did not receive any positive responses.

37. On 4 January, Ms Thomson wrote to the claimant to invite him to a meeting on 9 January along with her and Robert Hardy, General Manager, to discuss the findings of the Appeal Hearing and discuss his continuous employment, including considerations of any options he had suggested (P.195).

38. The meeting could not take place until 22 January due to a bereavement. The claimant remained on full pay. As Robert Hardy was unavailable Kevin Porter, Project Manager, attended the meeting along with Ms Thomson, the claimant and his trade union representative. Willie Smith and Karen Thomson had continued to liaise concerning suitable alternative employment for the claimant, but there was none available.

39. A vacancy did arise on the Clair Ridge Installation in late January 2018, but the OIM, Chris Laughton, was not prepared to engage the claimant (P.208).

Dismissal

40. As Cape was unable to redeploy the claimant, Ms Thomson wrote to him on 30 January 2018 to advise that Cape had no alternative other than to terminate his employment (P.209/210) for 'some other substantial reason'. In her letter she gave the following reasons for the decision: -

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- *Client requested for you to be removed from the B.P. ETAP Project and informed Cape to secure a replacement. This was due to no improvement in your safety behaviours and leadership skills.*
- *No improvement on the expectations and concerns they have raised of which we had shared with you on 14 March 2017 and 16 August 2017 and also the incident that occurred on 12 October 2017.*
- *More than 90% of our current project and work scopes for offshore is with the Client, detriment to relationship with our Client.*
- *We have continued to seek alternative employment since 18 December 2017 but regrettably we have no alternative role to be offered.”*

Appeal

41. On 1 February the claimant wrote to the respondent to advise that he wished to appeal against his dismissal (P.211).

42. He was invited to an Appeal Hearing on 12 February (P.215) which was conducted by means of telephone conference call by Neil Riddle, Regional Director, from whom I heard evidence at the Tribunal Hearing. The claimant's trade union representative was in attendance with him

43. Notes of that Hearing were produced (P.216-218). I was satisfied that they were reasonably accurate.

44. On 19 February, Mr Riddle wrote to the claimant to advise him that his appeal had been unsuccessful (P.219). The following is an excerpt from his letter: -

5 “I have reached the conclusion due to the fact that your own historic performance has significantly contributed to the action taken by the client to replace your position and primary (sic) because we have no alternative employment to offer you. We have continued to seek alternative employment since 18 December 2017 but regrettably we have no alternative employment to offer. As you can appreciate your position as a Deck Foreman/Deck Operator – Rigger limits opportunity within Cape and we strongly believe it would be detrimental to our relationship with our Client to pursue this any further.”

10 45. Cape’s core work offshore tends to be scaffolding which was the claimant’s primary skill, but he was not prepared to undertake such work.

Respondent’s Submissions

15 46. The respondent’s solicitor submitted that the reason for the claimant’s dismissal was “some other substantial one”. It was a combination of third party pressure from the respondent’s principal client B.P. and the unavailability of alternative employment.

20 47. He submitted that there were reasonable grounds for the dismissal and that the respondent had followed a fair procedure.

25 48. He rehearsed the relevant facts and reminded me that the claimant had been warned by Willie Smith that he had to improve his performance.

49. He submitted that Karen Thomson had made substantial efforts to find alternative employment for him.

30 50. In support of his submission he referred me to the following cases:

Dobie v. Burns International Security Services (UK) Ltd [1984] ICR 812
Petrofac Offshore Management Ltd v. Olley & Others
UKEATS/0031/05/DM.

35 51. He also referred me to the respondent’s contract with B.P. and the following provision at para. 3.9 (P.64): -

5 *“The COMPANY reserves the right to demand the immediate withdrawal of any personal without explanation for non-compliance with the foregoing of which the COMPANY shall be the sole judge. Any personnel so removed shall be replaced without delay at the CONTRACTOR’S expense by a competent substitute approved by the relevant COMPANY REPRESENTATIVE.”*

10 52. B.P. had the contractual right, therefore, to require the claimant’s removal from its platform.

15 53. It was submitted that Willie Smith and Karen Thomson could not have done more to try and redeploy the claimant and Mr Riddle, Cape’s Regional Director, was convinced that B.P. would not change its mind. He submitted that “Cape was caught in the middle of this”.

20 54. In all these circumstances, therefore, it was submitted that the respondent had acted reasonably, and that the dismissal was fair.

Claimant’s Submissions

25 55. The claimant expressed concern at being dismissed after so many years’ continuous service.

56. He had worked on the Andrew for a number of years “*without incident*” and he was surprised to learn that B.P. had apparently seen a change in his management and leadership skills.

30 57. He had been happy to move to the ETAP and he submitted that he had “taken on board” Willie Smith’s concerns. He submitted that his position had been “undermined” by the “STL” on the ETAP. He said that he appreciated Ms Thomson’s efforts on his behalf. He submitted that the dismissal was not merited.

The Issues and the Tribunal's Decision

58. In every unfair dismissal case where dismissal is admitted, s.98(1) of the Employment Rights Act 1996 requires the employer to show the reason for the dismissal and that it was an admissible reason in terms of s.98(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. The respondent's position in the present case was that the reason was "*a substantial one*", namely the refusal by B.P. to allow the claimant to work on any of their installations and the unavailability of suitable alternative employment for him.
59. I was satisfied that the reason for the dismissal was "*a substantial one*". There was clear, consistent, corroborative, evidence of the reason from the respondent's witnesses who all presented as credible and reliable, along with supporting and consistent documentary evidence of B.P.'s position.
60. I had no difficulty finding that Cape had discharged the onus to show the reason for the dismissal. It was not for any of the reasons set out in s.98(2) of the 1996 Act. It was when B.P. advised Cape that the claimant would not be allowed to return to the ETAP, or indeed any of its installations, and Cape's inability thereafter to find suitable alternative employment which was acceptable to the claimant. That was a substantial reason of a kind such as to justify the dismissal of the claimant and the position which he held (s.98(1)(b) of the 1996 Act (and the case of **Dobie**).
61. Having established that the claimant was dismissed for a substantial reason, which is an admissible one, the remaining question which I had to determine, in terms of s.98(4) of the 1996 Act, was whether the dismissal was fair or unfair having regard to the reason; that depended on whether in the circumstances (including the size and administrative resources of their undertaking), Cape acted reasonably in treating it as a sufficient reason for dismissing the claimant and that question had to be determined in accordance with equity and the substantial merits of the case.

- 5 62. At the time of his dismissal the claimant had some 30 years' continuous service and until his final written warning and the issues which arose in the last 18 months or so of his employment, he had an exemplary work record and was a highly regarded employee who had been promoted over the years from the position of Scaffolder to Deck Foreman.
- 10 63. This was a fairly unusual case in that the reason for the claimant's dismissal was "some other substantial one", so-called "third party pressure", and, in particular, B.P.'s decision not to allow the claimant to work on any of its so-called "federal platforms" where he had worked previously.
- 15 64. Some other substantial reason is a sort of "catch-all" reason for dismissal and can be a valid reason and can result in a fair dismissal, but only provided the employer does everything it reasonably can to avoid or mitigate any injustice to the employee.
- 20 65. When considering any apparent injustice to the claimant, I was concerned that he was never given the chance to fully address with B.P. why they had concerns about him and, for example, challenge the five bullet points in Mr Smith's letter of 16 August (P95/96) and make representations to B.P. direct. The claimant was also unaware that there were health and safety concerns associated with his transfer from the Andrew to the ETAP. He only thought it was because of a "lack of proactivity". However, he did agree to the transfer. The perception B.P. had of the claimant was the reason why they were not prepared to allow him to work on their federal platforms and that led ultimately to his dismissal. But that perception was reached based, at least to some extent, on evidence he was not able to challenge with B.P.
- 25 30 66. However, the employer does not have to establish the truth of any allegations against the employer by a third-party client such as B.P. That may seem harsh, but as the EAT pointed out in **Henderson v. Connect (South Tyneside) Ltd. [2009] UKEAT/0209/09**, it would "*be equally harsh for an employer to have to bear the consequences of the client's behaviour*". As the

respondent's solicitor put it, "*Cape were caught in the middle here*", and Parliament has chosen not to create any kind of mechanism for imposing liability on a third-party, in such circumstances.

5 67. However, although an employer does not need to establish the truth of any allegations made by a client against an employee, an employer cannot simply hide behind the decision of the client and must do everything that it reasonably can to avoid or mitigate any injustice to the employee.

10 68. Whether in the present case Cape had done everything it reasonably could was the main issue for me.

69. When considering this issue, my impression of the respondent's three witnesses who gave oral evidence was important. I formed a favourable
15 impression of them and it was clear to me that they were supportive of the claimant, recognising his many years' valued employment and vast experience. The move from the Andrew to the ETAP with less responsibility demonstrated that. Also, he was made aware of B.P.'s concerns and Mr Smith made it clear to him that he had to make an effort to change that
20 perception and "*up his game*", as he put it.

70. Although I did not hear evidence from Ms Storey and Mr Porter, their evidence in their written statements was consistent with the evidence I heard from Cape's other witnesses.

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71. Cape did not want to lose the claimant. He was not dismissed by reason of conduct or capability, but because of circumstances driven by B. P's decision. It was also significant that B.P. had made it clear that they were not prepared to allow the claimant to return to *any* of their offshore installations.

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72. I also accepted Mr Riddle's evidence that nothing could be done to get B.P. to change its mind. Further, the removal of the claimant from their installation was something that B.P. could do in terms of their contract.

73. Cape was indeed in an extremely difficult position, with responsibilities to both employee and client who were in conflict and they had to remain mindful that B.P. was responsible for a very high percentage of their work.
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74. I had much sympathy for the claimant and could well understand his concerns and frustration at what he considered to be an unjust dismissal, especially after so many years working offshore and his progression to such a senior, responsible position. However, I must apply the statutory provisions and follow the guidance in the relevant case law and there is no legal basis, with claims of this nature, for imposing liability on a third party.
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75. I came to the view, therefore, that, in all the circumstances, difficult circumstances, Cape had done all it reasonably could to avoid the apparent injustice to the claimant.
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76. They were supportive of him when agreeing to the transfer to the ETAP, but made it clear he had to make efforts to change B.P.'s perception. However, after two further incidents on the ETAP, B.P. made its position clear: they had decided they were not prepared to allow the claimant to work on any of their installations and they were not going to change that decision. This meant that Cape had to try and find suitable alternative employment for him.
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77. I was satisfied that Cape and Karen Thomson, in particular, did all that could have reasonably been expected in this regard (the claimant spoke of her efforts in complimentary terms), but their options were extremely limited.
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78. I was satisfied that despite Cape's efforts, there was nothing suitable which meant that Cape had no alternative other than to dismiss the claimant.
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79. I was driven to the view, therefore, that the dismissal was fair.

80. I also record, for the sake of completeness, that there was no evidence to support the contention in the claim form that the claimant was subjected to a detriment for raising health and safety concerns. There was a valid basis for the disciplinary action which had nothing to do with the claimant raising any such concerns.

81. For all these reasons, therefore, the claim is dismissed.

82. Finally, it is worthy of comment, I believe, that while there were concerns about the claimant's performance, these only arose latterly and, in my view, could probably have been addressed by way of a written warning and training. It was extremely regrettable, therefore, that someone with such experience should be lost to the industry as a consequence of so-called third-party pressure, when his employer wanted him to remain in their employment.

Employment Judge: Nicol Hosie
Date of Judgment: 9 November 2018
Entered in register: 12 November 2018
And copied to parties