EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Koomson	**v**	**Xpo Supply Chain (UK) Ltd**

Heard at: Watford **On**: 1 November 2018

Before: Employment Judge Tuck

Appearances

For the Claimant: Mr K Antini-Boasiako
For the Respondent: Mr S Liberadzki, Counsel

JUDGMENT

The claimant was not unfairly dismissed and the claim is dismissed.

REASONS

1. By an ET1 presented on 1 May 2018 the claimant brought a complaint of unfair dismissal. He gave his dates of employment as being 4 October 2010 until 27 November 2017 but it was accepted between the parties that dates of employment given by the respondent were accurate - namely 14 October 2012 until 16 January 2018.

2. The claimant entered into a period of early conciliation between 3 March and 3 April 2018. The respondent admits dismissal. The issues for determination by the tribunal were;

   2.1 whether the claimant could continue to work in the position which he held without contravention of a duty or restriction imposed by or under an action, or whether the dismissal was potentially fair under s.98(2)(d) of the Employment Rights Act 1996; or

   2.2 in the alternative did the respondent have some other substantial reason for dismissal, namely a genuine and reasonable belief that the claimant did not have the right to work in the UK.

Evidence

3. I was provided with a joint bundle of documents which ran to some 96 pages and had witness statements - on behalf of the respondent from Ms Catherine Mallon who conducted the disciplinary hearing and from Mr Adam Buchan who conducted the appeal hearing - and from the claimant. The claimant's representative did not receive copies of the witness statement until today but had had the bundle in advance and had a short period of time this morning in advance of the hearing to be able to look through the statements. He confirmed that he was ready to proceed when we started at 11 o'clock and did not seek any adjournment to the hearing. He had had all the documents which were referred to in those statements for some months.

Facts

4. The claimant worked as a warehouse operative originally for DHL, and since a TUPE transfer in the summer of 2017, for the respondent. The claimant has a Ghanaian passport and is married to an Italian national. In 2014 he provided to his then employer a certified copy of his passport which included a residence stamp, valid until 6 July 2015, indicating that he was the family member of an EEA national. He also provided his national insurance card number.

5. By September 2015 the initial five year period that the claimant and his partner had been in the UK had come to an end. The employer carried out a check with the 'employer checking service' run by the UK Visa and Immigration Department. A positive verification notice was issued on 9 September 2015 stating that the claimant had a right to work in the UK; it stated that the result of the check was valid for six months, expiring on 8 March 2016. The effect of the positive verification notice was to provide the employer with a time limited statutory defence against any civil liability for penalty for breach of immigration rules.

6. On 22 February 2016 a notice was issued to the claimant's employer saying that they would have 'no statutory excuse' in relation to their employment of the claimant should they be found to be in breach of immigration rules. It stated that the 'certification of application' (for UK residence) issued to the claimant was more than six months old and was therefore invalid. The notice went on to warn that a person claiming to exercise treaty rights can choose to make an application to the Home Office for a residence document but they are not required to do so when such an application is being processed. However, in the absence of a certificate of application issued in the last six months, it is the responsibility of the worker to present an employer with acceptable documents to confirm their right to work in the UK. The treaty rights referred to are the rights under the citizens' rights directive of 2004 which are set out below.

7. On 15 March 2016 the claimant obtained a Certificate of Application setting out that he had applied for a Permanent Resident's Card and it was

expected that a decision would be made within six months. Upon receiving that, the employer was then able to obtain a positive verification notice which stated that the claimant had the right to work and that that check was valid for six months expiring on 24 October 2016. As is set out in the statement of Ms Mallon and was accepted by the claimant when he was cross examined, during 2016 when his immigration status was questioned, he was suspended without pay by DHL and when the certificates with a positive verification notice was issued he was reinstated.

8. On 15 August 2016 a further positive verification notice was issued for the claimant with a validity period of six months expiring on 12 February 2017. None of the witnesses were able to assist with what happened in relation to the period between February 2017 and the next Employer Checking Service notice which was issued on 27 November 2017.

9. The claimant told me, and I accept, that in October 2017 he saw his immigration solicitor. It appears that the claimant and/or his wife's right of residence for a period beyond three months in the UK had been brought into question and an appeal was pending. The claimant said that he explained to his solicitor that his employer did not have a current certificate from the Employer Checking Service and so his solicitor said that he would write to the Home Office. This caused on 1 November 2017 a letter to be sent to the claimant, purporting to be a "Certificate of Application" for a permanent residency card. That letter said:

> "You are permitted to accept offers of employment in the UK or to continue in employment in the UK whilst your application is under consideration and until you are either issued with residence documentation or if your application is refused until your rights of appeal are exhausted."

10. It went on to say under a heading of Note for Employers:

> "This document may form part of the statutory defence against liability to pay a civil penalty under s.15 of the Immigration Asylum and Nationality Act 2006 for employing an illegal migrant worker. However, it should only be accepted for this purpose if presented within six months of the date of issue and provided you can demonstrate the document has been verified by the Home Office Employer Checking Service."

11. I read the Home Office Employment Checking Service to be a reference to that operated by the UK Visa and Immigration part of the Home Office.

12. On 23 November 2017 the employer applied again for an Employment Checking Service update. The information given by the employer to that service is set out before me. The respondent reported that the claimant had a Certificate of Application which stated that the claimant was entitled to work in the UK, and the case reference number that the claimant had earlier provided to them was given. On 27 November a negative Verification Notice was issued. This stated that the claimant did <u>not</u> have the right to work in the UK because he had not submitted an application for leave to remain. Under the heading of "what this means" the employer was warned: "You should not employ this person or continue to employ them if they are an existing employee as they do not have the right to work in the UK." It

went on to say that if you are found employing this person illegally you could be prosecuted for knowingly employing an illegal worker which means that you face an unlimited fine and/or imprisonment.

13. Upon receipt of that notification the claimant was invited to a meeting where he was suspended. In the course of the meeting he told his employer, (though he had not earlier given him a copy), that he had a letter of 1 November which was a 'Certificate of Application', and he also told his employer that he had a court date for "30 April 2017". (This was an error and he meant "2018" but it was an error which was not corrected when the minutes were signed and the claimant did not pick up on and tell Ms Mallon during the following process it was erroneous in referring to a past rather than a future date.)

14. After that suspension meeting the respondent emailed the Employer Checking Service saying that they had spoken to the employee who had produced a letter dated 1 November 2017 saying that he was eligible to work in the UK – in contradiction to the information sent to them. The case ID number on the latest letter was the same as the case ID on the checking form. The Employer Checking Service were asked to clarify the information they had given. They replied later that same day saying that having reviewed the records: "We can confirm that our Employer Checking Service response relating to your employee was correct."

15. The claimant was issued with a letter of suspension setting out the information the employer had received under the negative Verification Notice. He was thereafter invited to a disciplinary investigation meeting to take place on 11 December. The claimant and attended on that date accompanied by a representative of his choosing, and I have been provided with the minutes of that meeting.

16. Upon the conclusion of the investigation the claimant was invited to a disciplinary hearing to take place in front of Ms Mallon on 29 December 2017. In preparation for that hearing a further email was sent to the Employer Checking Service saying:

> "Please find attached a certificate of application letter for the above named which confirmed he is available to work. I have also attached the ECS track which stated that he could not work. Can you please clarify if this individual is eligible to work in the UK as the information is conflicting and we will have to make a decision with regards to his employment."

17. The reply received on 29 December, prior to the disciplinary hearing was as follows:

> "I have reviewed our records and can confirm that our Employer Checking Service response was correct. In this case it appears that the COA (Certificate of Application) was issued in error by the casework team. However, it is important to note that a COA is only relevant whilst that application is ongoing. Therefore in order to obtain a statutory excuse against the imposition of a civil liability penalty for employing an overseas worker illegally a COA less than six months old must be supported by a positive Verification Notice from the Employer Checking Service."

18. The disciplinary hearing took place on 29 December 2017 at which again the claimant was accompanied by a representative of his choice. In that hearing he was asked whether he was aware that the Certificate of Application had been issued in error and he confirmed that he had not been so aware. The claimant's case was that he clearly was eligible to work in the UK because he had that Certificate of Application letter of 1 November. In order to make good this submission, Ms Mallon thought it prudent to adjourn the disciplinary hearing to give the claimant an opportunity to speak to his immigration solicitors and collate any further evidence that he wanted to be submitted.

19. He was invited to a reconvened disciplinary hearing which eventually took place on 15 January 2018. Again, it is minuted, again the claimant was accompanied by a representative of his choice. By the time of this reconvened hearing the claimant had not adduced any further documentation either from his solicitor, the Home Office or at all. Ms Mallon found that she had been provided with no evidence to suggest that the information contained within the ECS was incorrect and at the conclusion of the hearing she found that she had no choice but to terminate the employment of the claimant. A letter of dismissal dated 16 January states that checks having been carried out with regards to his eligibility to work showed that the claimant did not have the right to work in the UK and that he would therefore be dismissed. It stated that these allegations amounted to gross misconduct but it is clear that the claimant had not committed misconduct per se, it was a question of whether he had the correct documentation to show a right to work in the UK and whether he in fact had that right.

20. The claimant submitted a letter of appeal saying that he did have a valid document from the Home Office and that he had a court case listed for 30 April 2018. That appeal hearing was listed to be heard in front of Adam Buchan, warehouse operations manager, and took place on 9 February 2018. In preparing for the hearing Mr Buchan caused a further check to be made with the ECS which on 1 February again stated that the claimant did not have the right to work in the UK.

21. On 9 February what appears to have been a very short hearing took place; again minutes were taken again the claimant was accompanied. The claimant said that at the end of five years of UK residence, his wife's application to remain had been refused because she had not worked enough, that they had gone to court where it had been decided that in fact she should receive indefinite leave, to remain. Mr Buchan after that hearing caused a further check to be made of the Employer Checking Service and by a notice dated 14 February 2018, for a third time, a notice was issued saying that the claimant did not have the right to work in the UK and that the employer should not continue to employ them. The outcome to that hearing was confirmed in a letter dated 19 February 2018.

22. In around March 2018 the claimant received an Italian Passport which he had applied for quite some time earlier. However, there is nothing in the

documents before me to indicate that the claimant ever told the respondent that he was applying for an Italian passport and I accept the evidence of Ms Mallon and Mr Buchan that they had no knowledge of his pending Italian passport application. It was also put to Ms Mallon and Mr Buchan that they knew that the claimant did not need any documents to evidence his right to work in the UK as his wife was an EEA National. It was not clear to me whether it was being suggested that that was an assertion the claimant made during the internal process or not, but as a matter of fact I find that he did not make that assertion. Rather he was relying squarely on the letter of 1 November which stated that he had a right to work in the UK while his application for permanent residency card was pending.

Law

23. I have been helpfully referred by both parties to the Citizens Rights Directive of 2004 which was transposed into domestic law by the Immigration European Economic Area Regulations of 2006, later replaced by 2016 Regulations. Art 7 of that Directive says that:

> "All EU citizens have the right of residence in the territory of another member of state for a period of longer than three months if
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> (a) They are workers or self-employed persons in the host member state; or
> (b) Have sufficient resources for themselves and their families and have comprehensive sickness insurance; or
> (c) Are following a course of study and have comprehensive sickness insurance; or
> (d) Are family members accompanying or joining EU citizens who satisfy the conditions in (a) (b) or (c)."

24. There are derogations from that initial set of conditions if a person is temporarily unable to work. Article 23 of the Directive provides that irrespective of nationality the family members of the union citizen who have the right to residence or the right of permanent residence in a member state shall be entitled to take on employment or self-employment there. This effectively makes clear that the right of residence is also accompanied by the right to work, the two going hand-in-hand.

25. Article 25 provides that possession of a Registration Certificate or of a document confirming residence status may under no circumstances be made a pre-condition for the exercise of a right or the completion of an administrative formality as entitlement to rights may be attested by any other means of proof.

26. S.98 of the Employment Rights Act 1996 provides under sub-section (2) potentially fair reasons for dismissal; that includes at sub-paragraph (d) "If an employee cannot continue to work in a position without contravention of a restriction imposed by or under an enactment further a potentially fair reason for dismissal in addition to those listed may be some other substantial reason." S.98(4) provides that "where an employer has shown a potentially fair reason for dismissal, whether that is a reasonable reason for the dismissal depends upon all the circumstances including the size and

administrative resources of the employer's undertaking whether the employer has acted reasonably or unreasonably in treating it as a sufficient reason."

27. I have been referred to three cases by the parties before me and in particular a judgment of His Honour Judge McMullan from September 2011 in the case of Okuoimose v City Facilities Management Ltd UK EAT/0192/11; that was a case of unlawful deductions from wages where the sole question for the tribunal and indeed the EAT was whether the contract of employment of the claimant was tainted by illegality because he as a matter of law did not have the right to work in the UK. The claimant in that case was a member of the family of an EEA National who was at all material times entitled to reside and work in the UK. It was held that the reasonable belief of the employer as to the immigration status was an irrelevant consideration when considering the s.13 claim – the claimant was entitled to reside permanently in the UK and contract was therefore not illegal. It appears that no issue arose as to the status of the EEA national to whom the claimant was married which is in contrast to the position in this case.

28. I have also been referred to the case of Baker v Abellio London Ltd [2018] IRLR 186 and the judgment of Mrs Justice Slade. That case concerned a claim of unfair dismissal where the employer in dismissing a Jamaican national considered that there was a breach of immigration legislation such that they were entitled – and indeed obliged – to rely upon s.98(2)(d) of the Employment Rights Act. Actually those with Jamaican passports have leave to enter or remain in the UK under the Immigration Act of 1971 and as a matter of fact the claimant did have the right to work in the UK. The employment judge had gone on to hold that if that finding was wrong in relation to s98(2)(d), there had been some other substantial reason for dismissal, namely the mistaken but genuine belief that there was not permission under the immigration provisions to employ the individual. That finding was overturned by the EAT in circumstances where there was no evidence of what the employer had asked of the Home Office, nor whether full information had been given to those authorities. There was no documentary evidence about what was asked and what answers were given and therefore the dismissal was on a fundamentally mistaken basis. The conclusion of the EAT was that the failure of the respondent to produce evidence of giving full information to the relevant authorities or taking reasonable steps to ascertain the position under the Immigration, Asylum and Nationality Act of 2006 was such that the fairness of the decision was brought into question and the matter was remitted to the tribunal.

Conclusions

29. Whether s.98(2)(d) applies in this case involves asking the question, did the claimant have the legal right to work in the UK after 27 November 2017 when the Employer Checking Service issued the negative Verification Notice? It is an unsatisfactory position that the legal obligation is on an employer to show a potentially fair reason for dismissal but that the documents available to an employer do not tell it the whole story of an

employee's right to work in the UK. The negative Verification Notices in and of themselves do not tell employers whether somebody does or does not have the right to work in the UK. What they effectively do is tell an employer whether they will have a defence to being found to face unlimited fines or imprisonment under the Immigration and Asylum Act.

30. The claimant has not produced documents from court hearings which he and his wife have attended, and it is not clear to whether or not he in fact had the right to work in the UK (in contrast to the case of Baker). The claimant's wife appears, on the basis of what he said in the appeal hearing before the employer, not to have been within Article 7.1 in that she had not been employed or self-employed, did not have sufficient resources and had not been studying for the relevant period. It may have been that thereafter an appeal showed that she had illness such that she didn't have to qualify within Article 7.1 but I simply do not have that evidence before me.

31. It makes it very difficult as a matter of law to say definitively whether the employee could or could not work without the employer contravening an enactment. However, this is not central to my finding because I am entirely satisfied that there was some other substantial reason for dismissal.

32. I ask first of all whether Ms Mallon and Mr Buchan had a genuine belief that the claimant did not have the right to work in the UK. I find that they were honest witnesses and the submission on behalf of the claimant that they had delayed the dismissal process because they did not believe the Home Office documents is in my view misplaced. I consider that neither Ms Mallon nor Mr Buchan considered the Home Office information to be infallible. However, the reason they took the time they did to make numerous enquiries was, in my judgment, to give the claimant every opportunity to produce any additional evidence he had, or could procure.

33. I then ask whether they had a reasonable belief that the claimant lacked the right to work in the UK. I considered whether they had carried out such investigation as was reasonable to formulate that belief. I find that they did. This is in stark contrast to the case of Baker. The employer has adduced both the information given to, and replies received from, the Employer Checking Service. It is apparent that the respondent in at least two email exchanges challenged the information from the Employer Checking Service in light of the conflicting information that the claimant.

34. In my finding, once the respondent had a genuine and reasonable belief that the claimant did not have the right legally to work in the UK, the only possible outcome was dismissal. It is not simply that it was within a range of reasonable responses. In my view it was inevitable.

Costs

35. At the conclusion of the hearing on behalf of the respondent a costs application was made under Rule 76 of the Employment Tribunal Constitution and Procedure Regulations 2013. It was primarily on the basis of Rule 76(1)(b) that the claim had been pursued which had no reasonable

prospects of success. Alternatively, it was said that in pursuing the proceedings the claimant had acted unreasonably on the basis of his claim having no reasonable prospects of success.

36. Two documents were handed up on behalf of the respondent, the first was a letter dated 27 June 2018, without prejudice save as to costs, putting the claimant on notice that it was considered that his case was bound to fail and that a Costs Order up to £20,000 would be pursued if the claimant did not withdraw his claim by 11 July 2018. Mr Antini-Boasiako stated that he had not seen this letter until it was handed to him this morning at the tribunal. It is not clear whether the solicitor with conduct of this case, Ms Regina Spio-Aidoo, to whom the letter was addressed, had seen it. The evidence of the claimant, which I accept, is that it had not been brought to his attention.

37. The second document relied upon is one stating that the respondent has been charged a fixed price to conduct the tribunal hearing of £4,750.00 plus VAT. £2,750.00 of that was in the preparation of the ET3 assessment of the case collating the documents and drafting the witness statements and £2,000.00 was the preparation for the final hearing and advocacy at the final hearing.

38. The application was fiercely resisted on behalf of the claimant and it was submitted that the case had not been won which had no reasonable prospects of success because the claimant did have a right to work in the UK. When pressed as to the position in relation to the dismissal for some other substantial reason, I was very fairly told that the claimant's legal advice was privileged and there was no waiver of that privilege.

39. The claimant gave evidence in relation to means. He obtained an alternative job a short period after being dismissed by the respondent, but for fewer hours; he currently works in a hospital as a porter earning £8.50 gross per hour. He usually works 4 hours per day unless he is covering for absent colleagues or colleagues on holiday so his weekly wage is usually in the region of £170 per week gross. Last week, having done additional hours, he earned £220. He and his wife and two children live in rented accommodation. He is the sole breadwinner in the family, the two children being of school age. He has no saving accounts either here or in Ghana and owns no property either here or in Ghana. He has no significant assets.

40. I do consider that the claim that has been pursued, had no reasonable prospects of success and therefore the first hurdle in relation to the ordering of costs has been crossed. Thereafter there is a discretion to be considered as to whether costs are appropriate in any particular case. It is fair that the claimant has been represented by a solicitor, her name appears on the ET1 form and certainly she has had conduct of the case and has engaged in correspondence since the receipt of that form was sent by the Tribunal Service. It is a case where the claimant had the opportunity to be advised as to the very strong case the respondent had in relation to showing that it had some other substantial reason for dismissal. As to reasonableness it was said on behalf of the claimant it was accepted that the procedure that the respondent had followed had been a fair one and the sole submission

that a reasonable employer would have sought independent legal advice lacked any credibility in my view as it was premised on the basis that receiving information from the Home Office is an incompetent source.

41. I take into account the claimant's very very limited means and in this case I make a Costs Order in the sum of £100.00.

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Employment Judge Tuck

Date: 30/11/2018

Sent to the parties on: 30/11/2018

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For the Tribunal Office