EMPLOYMENT TRIBUNALS

Claimant: Mr E Ahmed

Respondent: ICTS (UK) Ltd

HELD AT: Manchester **ON:** 2 October 2018
7 November 2018

BEFORE: Employment Judge Humble

REPRESENTATION:

Claimant: Mr B Norman, Counsel
Respondent: Mr Z Malik, Trainee Solicitor

JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant was not unfairly dismissed. That claim is dismissed.

2. The claimant was dismissed in breach of contract. The respondent is ordered to pay the claimant the sum of £1251.36.

REASONS

The Hearing

1. The hearing took place on 2 October and 7 November 2018. The claimant was represented by Mr Norman of Counsel, and the claimant gave evidence on his own behalf. The respondent was represented by Mr Malik, a trainee solicitor, and evidence was given on behalf of the respondent by Anthony Hughes (the respondent's Site Supervisor), Mr Stephen Budd (the Investigating and Dismissing Officer), Darren Peers (Area Support Manager) and Scott Hanson (the respondent's Area Manager and the Appeals Officer).

2. There was an agreed bundle of documents which extended to 256 pages. Evidence in chief was taken as read based on written witness statements provided by the parties. The case was originally listed for one day but, because of the extent of the evidence and number of witness, the tribunal was unable to hear all the evidence in a day. Evidence was given by the respondent's witnesses on 2 October 2018 and the case was adjourned and re-listed for Wednesday 7 November 2018 when evidence was given by the claimant and submissions were taken from the parties' representatives. Judgment was reserved.

The Issues

3. The claimant brought a claim for unfair dismissal and the issues were identified at the outset of the hearing as follows:

3.1 It was for the respondent to show a potentially fair reason for the dismissal in accordance with Section 98(1) and (2) Employment Rights Act 1996. In this case the respondent relied upon 'some other substantial reason' as being the potentially fair reason for dismissal.

3.2 If the respondent was able to show that the dismissal was for a potentially fair reason, the tribunal would go on to assess whether the respondent acted reasonably under Section 98(4) ERA 1996. In this particular case the respondent was relying upon third party pressure as being the fair reason for dismissal. The tribunal therefore indicated it would have particular regard to whether the employee was facing a potential injustice as a consequence of the third-party pressure to dismiss, and if so whether the respondent had taken reasonable steps to avoid or mitigate against any injustice and whether the respondent had taken reasonable steps to find alternative employment for the claimant.

3.3 The tribunal would have regard to whether the decision to dismiss was procedurally fair. There was an argument as to whether the ACAS code of practice was applicable to the circumstances of this particular case.

3.4 If the claimant was held to be unfairly dismissed the tribunal would have regard to whether there should be any Polkey reduction and/or to whether the claimant contributed to his dismissal. The tribunal indicated it would deal with liability only at the initial stage but that it would determine any matters relating to contributory fault and Polkey if required.

4. The claimant's representative indicated at the start of the hearing that he was also seeking to bring a claim for holiday pay. However, this claim was not particularised in the pleadings and the respondent said it was not in a position to deal with it. In the absence of a properly pleaded claim, the tribunal indicated at the outset of the hearing that the claimant would be required to apply for an amendment should it wish the tribunal to determine a holiday pay claim. No application to amend the pleadings to pursue a holiday pay claim was made at that point and the matter was not raised at any subsequent stage.

5. The tribunal was satisfied that there was a claim for breach of contract before it since this was specifically referred to in the pleaded case. The claimant's case was that he ought to have been paid four weeks statutory notice pay rather than the one week which he received. This point was ultimately conceded by the respondent on the afternoon of the final day of the hearing and therefore the breach of contract claim was determined in favour of the claimant.

The Law

6. The tribunal applied the law at Section 98 of the Employment Rights Act 1996. By sub-section 98(1) ERA:

"*In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show:*

a) the reason (or, if more than one, the principal 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."

Then by sub-section (4):

"*Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)*

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

b) shall be determined in accordance with equity and the substantial merits of the case."

The burden of proof in establishing a potentially fair reason within Section 98(1) and (2) rests on the respondent and there is no burden either way under Section 98 (4).

7. The tribunal reminded itself that it must not substitute its own view for that of the employer as to what is the proper response on the facts which it finds (Iceland Frozen Foods Limited v Jones [1982] IRLR 439, EAT) as confirmed in Post Office v Foley/HSBC Bank v Madden [2000] IRLR 827, CA). It was held in the case of Iceland Frozen Foods that: "*It is the function of the [employment tribunal] to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside the band it is unfair.*"

There may be occasions where one reasonable employer would dismiss, and others would not, the question is whether the dismissal is within the band of reasonable responses.

8. The band of reasonable responses test applies to procedural requirements as well as to the substantive considerations see Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA, Ulsterbus Limited v Henderson [1989] IRLR251, NI CA. On appeals, in Taylor v OCS Group Limited [2006] IRLR 613, the Court of Appeal

stated: "*What matters is not whether the internal appeal was technically a rehearing or a review but whether the disciplinary process as a whole was fair.*"

9. There was some debate in this case as to whether the ACAS Code of Practice on Disciplinary and Grievance Procedures applied, with this being a SOSR dismissal rather than a conduct dismissal. The respondent referred the tribunal to 12 separate cases on the point, including some first instance cases. The main cases upon which the tribunal was invited to rely were Holmes v Qinteq Limited [2016] UKEAT/0206/15/2604 and Phoenix House Limited v Stockman [2017] ICR 84, EAT.

10. In respect of the application of section 98(4) the tribunal had particular regard to the cases of Dobie -v- Burns International Security Services (UK) Limited [1984] IRLR 329, CA and Henderson -v- Connect (South Tyneside) Limited [2010] IRLR 466, EAT which give helpful guidance on third party pressure to dismiss cases.

11. If the tribunal held that the respondent failed to adopt a fair procedure the dismissal must be unfair (Polkey v A E Deighton [1987] IRLR503, HL) and any issue relating to what would have happened with a fair procedure would be limited to an assessment of compensation (i.e. a Polkey reduction). The only exception to Polkey is where the employer could have reasonably concluded that it would have been utterly useless to have followed the normal procedure. It is not necessary for the employer to have actually applied his mind as to whether the normal procedure would be utterly useless, Duffy v Yeomans [1994] IRLR, CA.

Findings of Fact

The employment tribunal made the following findings of fact on the balance of probabilities (the tribunal made findings of fact only on those matters which were material to the issues to be determined and not upon all the evidence placed before it):

12. The respondent operates a business which provides and manages security services, providing security guards to client sites throughout the United Kingdom.

13. On 19 October 2013 the claimant commenced work as a security supervisor for MITIE, another security service provider. In April 2015 the claimant's employment transferred to the respondent by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006. Following the transfer the claimant was issued with a document on which he signed his confirmation that he had access to a staff handbook which was available to the employees online. The company handbook was reproduced in the bundle at pages 81 to 100, and the claimant's signature at page 101. The Handbook contained a section relating to third party pressure to dismiss which set out a specific process which the company would follow in the event of such a case (page 85-87).

14. The claimant worked at various sites for the respondent and in 2016 he was transferred to Maple House, a Home Office building in Wythenshawe, Manchester which was deemed to be a high security building. The claimant had held the position of supervisor at previous sites but on transfer to Maple House there were various tasks which he did not have clearance to perform and he therefore undertook the role of security guard, with his pay being reduced accordingly. He was required to report to Anthony Hughes who was appointed to the role of supervisor at that site.

15. The claimant worked night shifts at Maple House from 7:00pm to 7:00am, alongside one other security guard. The two guards took it in turns to man the front desk while the other patrolled the building, with the roles being reversed at approximately three-hour intervals. On the evening of 20 November 2017 and the early hours of 21 November the claimant was working with Alan Jones, a colleague who was also a security guard. During one of the claimant's patrols, at about 5:00am on the morning of 21 November 2017, the claimant noticed that an access door to the building was broken. This door had originally been a fire exit but had recently been modified to allow for access from the outside of the building. It was a security door which was operated by the use of swipe cards which released a magnetic catch allowing for access to the building. The claimant discovered the inside of the door had a fault caused by a latch sticking out which was preventing the door from closing shut. The claimant noticed that there was some tape around the door which seemed to indicate an earlier attempt to repair it.

16. The claimant went to the front desk and informed the other guard, Mr Jones, of the problem and then took a role of Sellotape from the office. The claimant took the Sellotape to the door and used it to hold up the latch in such a manner that it allowed the door to close on to the magnetic catch. He believed that, having made this temporary repair, the door was left secure. The claimant said that he was not aware of any "formal reporting procedures" and he assumed that Mr Jones had recorded the defect in the daily observation book since Mr Jones was sat at the desk where that book was situated at the relevant time. The claimant did not advise anyone else of the fault aside from Mr Jones.

17. The claimant's shift was supposed to be from 7:00pm to 7:00am but it was customary for the guards to take it in turns to start their shifts early and to finish early. This was not officially sanctioned but was a practice which had arisen between the guards and which the claimant decided to join in when he was transferred to the site. On this occasion, the claimant finished his shift at about 5.30am, half an hour before the handover to the day shift and one and a half hours before the scheduled time for completion of his shift.

18. Later that morning, when a member of staff from the Home Office came into the building, they were able to gain access through the door without using a swipe card and this triggered a security alert. The claimant genuinely believed that he had left the door secure but on balance of probabilities it seems likely that the Sellotape did not adequately hold the latch. The claimant accepted in his evidence that it was likely the repair had failed since it was a temporary repair made with standard Sellotape which was all that was available to him. As a consequence of the security door being unlocked, management at the highest level on the site investigated and, because of the sensitive nature of the site, the Police were notified.

19. Later that day, 21 November 2017, the claimant was called to a meeting with Darren Peers (the respondent's Area Manager) who explained that a Director of Maple House, Colin Brown who was also an employee of the Home Office, had requested the removal of the claimant from the site. He had viewed CCTV footage of the claimant putting tape across the door and formed the view that the claimant had put tape between the magnetic strips of the door to prevent it from locking, he

therefore believed that the claimant was responsible for the door being left unsecure. Mr Peers explained that the Home Office had requested the claimant's removal from site. The claimant said that he had found the door unsecure and had attempted to fix it with the Sellotape. Mr Peers asked the claimant whether he had reported the matter according to "site regulations" to which the claimant replied, "*no, I told Alan",* a reference to Mr Jones, the other officer on shift. Mr Peers said that site procedure had not been followed and that the claimant was suspended with immediate effect.

20. The claimant was issued with a letter (page 44) which summarised the reason for his suspension as follows:

"*The Home Office have contacted the company requesting that you be removed from Maple House due to the following matters of concern: You allegedly taped the door locks on the rear staff access door to the site. This made the site vulnerable and unlocked for an extended period of time."*

The letter went on to explain that the matter would be investigated and the suspension *"was a holding measure pending that investigation*."

21. The claimant took issue with the accuracy of the notes from the suspension meeting and of notes from subsequent meeting. The tribunal noted however that the claimant had signed his agreement to the notes of the subsequent meetings and, while he did not sign notes of the meeting of 21 November, the comments attributed to him at that meeting were consistent with comments he made at the meeting of 24 November 2017. The tribunal therefore accepted that the notes of the suspension, investigation and appeal meetings were reasonably accurate summaries of the content of those meetings, albeit not a verbatim record.

22. On 24 November 2017 the claimant was called to an investigation meeting which was conducted by Steven Budd, the notes of which are at pages 45 to 47. At that meeting the claimant explained that he had attempted to fix the door with the tape and he believed he had left it secure. When asked again why it had not been reported to the help desk, recorded it in the incident book or reported it to the day shift on handover the claimant replied that it was "*too early/late to report to the supervisor*" and reiterated that he had informed Mr Jones of the repair. Mr Budd examined the door with Mr Hughes who took him to show it and he considered the claimant's response. Mr Budd did not challenge the claimant's explanation that he had attempted to repair the door, and he appeared to accept that the claimant genuinely believed he had left the door secure. Mr Budd's focus however was on the claimant's failure to report the matter since it was this which Mr Budd believed led to the security alert. Mr Budd's believed he should have reported the matter, either directly to the Home Office or to his supervisor. In his view this amounted to serious misconduct rather than gross misconduct.

23. The claimant did not disclose, at any point during the investigation or disciplinary proceedings, that he had left his shift approximately one and a half hours earlier than his scheduled time. This would have explained why he did not pass on the relevant information during the handover to the day shift and instead relied upon Mr Jones to do so. The tribunal formed the view that the claimant failed to disclose that he left his shift earlier because he was aware that he should have worked a full

shift and had failed to do so. This was in line with the practice operated by the other security guards on the site but was not sanctioned by management. It was not a matter which was operative in the mind of the respondent, either at the investigation or the appeal, since the decision makers assumed the claimant was on shift at the time of the handover. Mr Budd therefore formed the view that the claimant was remiss in not informing the day shift of the fault.

24. At the investigation meeting on 24 November Mr Budd mentioned a vacancy on the company website and said words to the effect that "*if vacancies are not applied for then dismissal is the only option*". Mr Budd in his evidence before the tribunal said that he offered the claimant a position at the Amazon site and had further conversations "*about vacancies*". This was not reflected in the notes from the investigation meeting and Mr Budd appeared to be vague in his recollection. The tribunal preferred the claimant's evidence on this point since he was more precise in his recollection of what was said and this was consistent with the notes of the meeting. He was told that he could apply for vacancies on the Company "*web site*" but nothing was specifically offered. There was a subsequent telephone conversation, which the claimant took whilst he was driving, during which Mr Budd asked the claimant whether he would be interested in a position in Leeds. The claimant's response was that it was likely to be too far to travel since it was 70 miles from his home. Mr Budd said that he would speak with Vicky Smith and would seek to confirm the availability of that role but there was no further discussion with the claimant about vacancies before his dismissal.

25. Following the investigation meeting Mr Budd sent an email to John Blunt of the Home Office which is reproduced at page 49 of the bundle. In that email he made the following representations on behalf of the claimant:

"*I conducted the meeting to finalise the SOSR (Site Removal) for the above officer, that had failed to report the faulty door at Maple House. Part of this process would be to seek the decision to revert, following the meeting, prior to dismissal. During the meeting* [the claimant] *confirmed that he believed the door was left secure following a quick repair thus he did not report the matter to his superior or the home office staff. This would lead to serious misconduct rather than gross misconduct so please confirm if you still wish to remove. I understand the decision either way as the client and await your response*".

26. Mr Budd received an email from the Home Office later that same morning. The email read as follows:

"*It is our understanding that he had taped up a secure door on a high value Home Office site under his own volition and left the building insecure* (sic)*. He failed to notify his own/your line of management. He failed to inform anyone on site. This included failing to inform any of the security team and his ICTS supervisor, the on-site security liaison office, the 24-hour estate helpdesk, our 24-hour central control room, John Blunt or myself. He did not therefore follow any of the procedures put in place to safeguard our building, himself and his colleagues.*

We are not in a position to influence your disciplinary proceedings in respect of your investigation. Any penalties are entirely your own decision.

However, we would state there is a lack of trust in this officer's capabilities to carry out the basic functions that we require, and would therefore request that you do not provide him as part of the staff that you use within our contract".

27. The respondents did not make any further written representations to the Home Office in respect of the events of 21 November. On 29 November 2017 Mr Budd wrote to the claimant (page 51) and said, among other things, that he had emailed the client on 27 November and had "*now received their response. I regret to inform you that they have refused our request.*" The claimant was "*required to attend a formal meeting to discuss this on Thursday 7 November 2017*" (which was meant to state 7 December). It further stated: "*It is very important that you attend this meeting because a failure to do so will be regarded as a breach of a reasonable management instruction and the meeting will go ahead in your absence. I must point out to you that if no alternative position can be found for you, your employment may be terminated*".

28. The claimant did not attend the meeting of 7 December 2017 since he was on annual leave. He had a one-month pre-booked holiday in Pakistan. In the claimant's absence, Mr Budd took the decision to dismiss. The letter of dismissal was sent on 15 December 2017 (page 53) and Mr Budd's reasons for the dismissal were summarised in that letter as follows:

"The matter(s) of concern were/was:

- *Reports of leaving a high-risk site insecure* (sic)
- *Failing to report the faulty door to the home* [office] *or* [the respondent's] *chain of command*

As a result of the above concerns, our client had requested that they no longer wish for you to continue working in your current capacity on the Home Office contract.

I have considered alternative employment, however, unfortunately there are no other suitable roles in which you can be redeployed. I regret to inform you that your contract of employment is being terminated as a result of third party pressure. Our inability to find you alternative work is some other substantial reason which justifies your dismissal."

29. The claimant was paid only one week's notice, which was paid in lieu, although he had four years of continuous service.

30. The letters of 29 November and 15 December 2017 were not received by the claimant until he returned from his holiday at the end of December 2017. Upon his return the claimant submitted a detailed letter of appeal (pages 54 to 55) which focussed principally on what he said, in terms, was the injustice of being removed from the site and upon the procedure, saying that he had not had a "*fair, impartial hearing*" and alleging he had been discriminated against because of his race. That latter point was not pursued before the tribunal

31. After some exchange of emails, the claimant was informed of an appeal hearing to take place on 18 January 2018 by way of a letter of 11 January 2018 from Scott Hanson, the respondent's Area Manager (page 58).

32. The appeal hearing took place on 18 January 2018 and, in advance of that hearing, Mr Hanson spoke with John Blunt of the Home Office who indicated that he would not countenance the claimant's return to the site. As a result Mr Hanson was not, during the course of the appeal, considering that aspect of the case since the conversation with Mr Blunt had effectively closed the door on any further representations to the Home Office. This was reflected in the notes from the appeal meeting (pages 59-61) in which he said, "*the Home Office had lost their trust in you*" and later, "*You can't go back to the Home Office."* He said, in terms, that the claimant had failed to carry out a written record or to input any information in the daily occurrence book and that "*the mistake had been that this wasn't reported on [the claimant] leaving site."*

33. Mr Hanson asked whether the claimant would be willing to consider other vacancies or work on another contract and mentioned some other contracts that the company had in the area. Mr Hanson's focus was principally upon exploring whether the claimant was interested in alternative roles whilst the claimant wanted to re-open the events which led to his removal from Maple House. The meeting was adjourned and Mr Hanson asked Darren Peers to look at alternative roles and to convene a meeting with the claimant to go through possible roles.

34. On 13 February a meeting was convened between the claimant and Mr Peers during which specific positions were discussed. There was some dispute on the evidence as to what positions were put forward, the claimant said that he was offered only two roles whereas the respondent's case was that five positions were offered. Having viewed the notes from that meeting (pages 68 to 70) the tribunal found on the balance of probabilities that three roles were mooted, which were Trafford Park Amazon Site; the Manchester Airport Amazon site (referred to as MAN1); and a relief officer role. The first two were full time positions working over both night and day shifts, and the relief officer role was to cover other shifts on an ad hoc basis which would depend upon the availability of work. There was confusion over the number of roles put forward, which it appeared might be explained by the two fixed site jobs being proposed as either full-time or part-time or relief officer positions. The lack of clarity was caused in part by the fact that the respondent did not commit any of the alternative positions to writing, save for the note at page 69, and also by the claimant's apparent reluctance to explore the roles further since he remained focused on the perceived injustice of his removal from Maple House. In response to the question of whether he was interested in other vacancies he said that he had "*child care issues and would look to sort something out once issues had been resolved*".

35. At the end of the meeting the claimant was asked to respond within 48 hours as to whether he was interested in any of the available positions. Instead, on 15 February 2018, he sent an email again requesting that he be allowed to return to Maple House and setting out in some detail his belief that the door was left secure. He said that he was "*under mental stress because of the situation"* and was not in a position to make a decision upon the alternative roles (page 70-71). By that time he

had received a GP sick note which stated "*stress at work*". On 16 February, Mr Hanson emailed the claimant and requested that he contact him no later than 19 February to "*confirm whether you wished to be considered for any of the vacancies discussed with Mr Peers*" (page 73).

36. On 19 February Mr Hanson emailed the claimant again and said, "*I feel it is in your best interests to consider the vacancies discussed with you at the meeting on 13 February and let me know your intentions. This will enable me to provide an outcome to your appeal and concluding the process may alleviate your symptoms.*

We have allowed you a reasonable amount of time to consider the vacancies discussed with you on 13 February and therefore I respectfully request that you let me know your thoughts on these no later than 21 February 2018. A failure to let me know your thoughts regards the vacancies by this date will leave me with no other option but to conclude that you do not wish to be considered for any vacancies". (page 77).

37. Later that same day the claimant sent an email to Mr Hanson with a copy of an advertisement for an Area Manager role based at Manchester Airport on a salary of £33,000 per year, working 55 hours per week "*flexible Monday to Sunday*". The claimant said, "*I have seen this position advertised, is it possible to be considered for it."* It was not adequately explained by the claimant how he could commit to a 55 hour week and flexible hours when he said that his childcare arrangements were precluding him from considering other full-time roles. Mr Hanson replied by saying *"you are welcome to apply for the position but it is only fair to warn you that I have had 120 applications so far, many with far more management experience than you. So to be totally honest your chances would be slim at this point. But as I said if you would like to apply please do and your application will be considered with the other applicants".*

38. The claimant interpreted this as an attempt to discourage him from applying for the post and so he did not do so. He also did not evince any interest in the other positions which had been put to him. On 20 February he sent an email making some further representations about Maple House and saying, among other things, *"Due to losing my role I gave up [my sons] nursery place, so I no longer have childcare and am struggling to find it to fit in with the work patterns you are offering me…if you have any alternative sites with set working patterns and a less physical role I would be happy to look at those, but I believe I can't work at Amazon."* (page 85).

39. At that point Mr Hanson took the view that the claimant was not interested in the vacancies which were available. He had already ruled out making any further representations to the Home Office. Accordingly, he wrote to the claimant on 23 February 2018 informing him that the decision to dismiss for 'some other substantial reason', namely third-party pressure, had been upheld (pages 79-80). In essence, he concluded that the claimant had failed to report putting the tape on the external door which had "*caused major disruption when the Home Office staff arrived for work the following day*" and they had "*launched a full-scale investigation involving senior management from both the Home Office, the Police and* [the respondent], *believing there had been a criminal attempt to gain access to the building."* It was this lack of communication, he said, which led to the Home Office asking the respondent to

remove the claimant from the site due to a "*lack of trust in your ability to carry out the functions of the job required".*

40. Mr Hanson did conclude that the claimant was not, at the dismissal stage, "*given an opportunity to look at other vacancies within* [the respondent]*"*, and that he was *"not provided with evidence of the Home Office's request to remove you from site".* He therefore found the appeal to be *"partially substantiated as whilst it appears that the company intended to follow a fair process I believe vacancies within [the respondent] should have been discussed with you and you were entitled to see a copy of the request to remove you from site".* Mr Hanson found however that the claimant had, during the appeal process, been *"provided with a copy of the evidence*" (the email) and the respondent had *"discussed available vacancies with you and given you ample opportunity to consider these"* and so *"I believe any procedural issues have now been rectified and a fair process has been followed."*

Conclusions

41. It is a long-established principle that third-party pressure to dismiss can amount to some other substantial reason for dismissal under Section 98(1) Employment Rights Act 1996. The tribunal was satisfied that the reason for dismissal in this case was for the potentially fair reason of some other substantial reason under that section. The only alternative reason submitted by the claimant was a suggestion that Alan Hughes was instrumental in having the claimant removed from the site so that his wife, who was also employed by the respondent, could take the claimant's position. The tribunal were not persuaded by that argument, there was no significant evidence that Mr Hughes improperly influence the decision of either Mr Budd or Mr Hanson. Those two men were focussed upon the views of the Home Office and not Mr Hughes.

42. Having held that the decision for dismissal was for a potentially fair reason the tribunal went on to assess whether the respondent acted reasonably under Section 98(4). An important factor for the tribunal to assess in a case of this kind is whether the respondent had taken into account the potential injustice suffered by the claimant. In the case of Dobie -v- Burns International Security Services (UK) Limited [1984] IRLR 329, CA the Court of Appeal stated: *"In deciding whether the employer acted reasonably or unreasonably a very important factor of which he has to take account on the facts known to him at that time is whether there will or will not be injustice to the employee and the extent of that injustice."* The tribunal also had regard to the case of Henderson -v- Connect (South Tyneside) Limited [2010] IRLR 466 in which the EAT stated: *"As we understand it, the effect of Dobie is that in a case where the client's stance appears liable to cause injustice, the tribunal must consider with special care whether the employer has indeed done all that it could do to avoid or mitigate that injustice:* ***in a case of patent injustice it may be necessary for the employer to pull out all the stops****. But Dobie cannot be read as holding that, even where the employer has done all he could to avoid or mitigate the injustice but without success, an eventual decision to dismiss will be unfair"* (our emphasis)*.*

43. In each case it will be a matter of fact and degree as to the extent of the potential injustice and how this should be weighed in the balance. In this case, Mr

Budd had taken reasonable steps to investigate the matter, he examined the door, spoke to a colleague of the claimant, and he gave the claimant a reasonable opportunity to explain himself at an investigation meeting. Having taken those steps, Mr Budd concluded that the claimant had failed to report the unsecure door and this was the essential finding of importance to him. Mr Budd did not reject the claimant's explanation that he had attempted to repair the door but he found against the claimant in respect of his failure to report the fault. His view was this amounted to serious misconduct rather than gross misconduct, and as such it did not justify a summary dismissal but nonetheless the claimant was substantially to blame for the security alert which followed. The tribunal held that this was a reasonable conclusion for Mr Budd to reach. The claimant had previously held a supervisory position, he had at least some prior notice of the requirement to report incidents, he was aware that there was a daily occurrence book to be completed and he had previously been issued with a memo (page 88 of the bundle) reaffirming the requirement to report faults. The claimant knew this was a door through which access to a high security Home Office building was gained and he knew it was not fully secure since he had been required to make a temporary repair using only Sellotape. As the security officer on that shift who discovered the fault, it was incumbent upon him to ensure that it was properly reported. If he was unable to do so immediately to the Home Office or to his supervisor, he could have at least completed the incident book and ensured that information was conveyed to the next shift on the morning hand over. Irrespective of his knowledge of any specific policies, common sense dictated that he should have reported the matter which may well have avoided the security alert later that morning. It was not adequate mitigation for him to rely upon a colleague to report the matter and it did not help him that he did not complete his full shift, a fact of which the respondent was unaware, which would have enabled him to pass the information on to the morning shift.

44. In those circumstances, the respondent had formed a reasonable view that the claimant was substantially to blame for a security breach by failing to properly report the faulty door. Accordingly, this was not a case of a "*patent injustice*" to the claimant and the respondent was not required to "*pull out all the stops*" for him in the manner alluded to in the *Henderson* case. The claimant's case, in essence, was that the respondent should have more clearly set out the claimant's position: it should have explained in full his attempt to repair the door; said that he had told a colleague of the fault; and essentially made more vigorous representations on behalf of the claimant. Mr Budd did however speak with a representative of the Home Office and he sent an email to them in which he specifically said that the claimant believed he had left the door secure and had attempted to repair it, also confirming that the claimant had failed to report the matter to his superior or to Home Office staff. In circumstances in which Mr Budd reasonably believed the claimant was responsible for a failure to report an unsecure door, the content of the email to the Home Office was reasonable and accurate. It is true that the respondent did not submit a wholehearted defence of the claimant but it was not required to do so in circumstances where the claimant was largely to blame for the security alert by failing to report the fault. It was also said that the respondent should have informed the respondent that the claimant's colleague, Mr Jones was also aware of the fault but, as was pointed out in the respondent's evidence, this would only have served to jeopardise Mr Jones position as well as that of the claimant.

45. The response of the Home Office was fairly emphatic: the claimant could not return to their site. Their focus in that response was that the claimant had failed to properly report the matter and, having received that response, the tribunal held that it was not incumbent upon the respondent to make further representations to the Home Office. More vigorous representations may well have been required if the claimant was entirely blameless but not in circumstances in which the claimant had in large part contributed to his own downfall. Nor was it unreasonable for Mr Hanson, at the appeal stage, to have formed a view that there was nothing to be gained from reverting to the Home Office again, particularly since he had recently had conversations with Mr Blunt about the matter and the position of the Home Office was unchanged.

46. It was however incumbent upon the respondent to seek an alternative role for the claimant and the tribunal found that the respondent failed to properly engage with the claimant at the dismissal stage in respect of vacancies available. It advised the claimant to look on a website and raised the possibility of a position in Leeds but went no further than that. These matters may have been discussed further if the claimant had attended the hearing convened for 7 December but the claimant did not attend that hearing since he was on annual leave, a fact of which Mr Budd would have been aware if he had taken reasonable steps to establish the claimant's whereabouts. It was accepted by the respondent that the claimant's holidays were authorised and that there was a holiday system which could have readily been checked by management. Accordingly, the tribunal held that there was a flaw at the dismissal stage in terms of a failure on Mr Budd's part to properly apply his mind to alternative roles for the claimant and to reconvene the meeting of 7 December, in the claimant's absence on that date, to discuss those alternatives and give the claimant an adequate opportunity to consider them.

47. The tribunal found however that the respondent did take reasonable steps to find an alternative role for the claimant at the appeal stage. At least three positions were put forward for the claimant's consideration and he was given sufficient time to show an interest in them, with two extensions to the initial time limit of 48 hours in which to evince an interest in the roles. In the event, he did not pursue an interest in any of them. The tribunal did not find Mr Hanson's response to the claimant's enquiry about the area manager role unreasonable. It was a more senior role of which the claimant had no experience and he had received 120 applications, some from people with managerial experience, in those circumstances it was not unreasonable for the Mr Hanson to point out that the claimant's prospects were slim. The tribunal found that, while the respondent failed to adequately consider the claimant for an alternative role at the dismissal stage, it corrected that error on appeal by giving him a full opportunity to put himself forward for those positions it had available. The tribunal found that the claimant did not take that opportunity, in large part because he was still preoccupied with his perceived injustice at being removed from the Maple House site and still hoped to return to that site despite the respondent having made it clear to him that it was not an option.

48. There were some additional matters which might be regarded as purely procedural, of which the significant ones were the failure to adjourn the claimant's dismissal hearing in his absence and the failure to show him the correspondence with the home office. In respect of the latter point, the tribunal did not share Mr

Hanson's apparent view that the claimant not been *"provided with evidence of the Home Office's request to remove [him] from site"* rendered the original dismissal unfair. The claimant was aware of the reason that he was removed from the site and had a full opportunity to reply to those reasons at an investigation meeting. The failure to reconvene the dismissal meeting, and the associated failure to properly outline any alternative roles, would have taken the decision to dismiss outside of the band of reasonable responses. However, that issue was dealt fully with on appeal and looked at as a whole, having regard to the principles in Taylor v OCS Group Limited [2006] IRLR 613, CA, the tribunal was satisfied that the procedure was reasonable. The tribunal was not required to engage with the debate as to whether the ACAS Code of Practice was applicable since, working on the assumption that it was applicable, the tribunal was satisfied that, albeit it there were some procedural flaws, taken as a whole the procedure did not fall outside the band of reasonable responses having regard to Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23, CA.

49. Accordingly, the claimant was not unfairly dismissed. That claim is dismissed.

50. The claimant was dismissed in breach of contract since the respondent did not dismiss summarily for gross misconduct and the claimant did not receive his contractual notice pay of four weeks. The respondent did pay him one weeks notice and it appeared to be an oversight that he did not receive his four weeks statutory notice. The point was conceded by the respondent during submissions on the final day of the hearing. The respondent is therefore ordered to pay the claimant three weeks notice pay; the sum of £1251.36, that being the sum claimed by the claimant with which the respondent did not take issue.

Employment Judge Humble

Date 5th December 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON

11 December 2018

FOR THE TRIBUNAL OFFICE

[JE]

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2411391/2018**

Name of case: **Mr ME Ahmed** v **ICTS (UK) Limited**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **11 December 2018**

"the calculation day" is: **12 December 2018**

"the stipulated rate of interest" is: **8%**

For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.