



EMPLOYMENT TRIBUNALS

Claimant: Mr D Norton
Respondent: Encore Personnel Services Ltd
Heard at: Leeds **On:** 13 March 2018
3 & 4 April 2018
Before: Employment Judge Shulman

Representation

Claimant: Mr A McMillan of Counsel
Respondent: Mr K Ali of Counsel

RESERVED JUDGMENT

1. The Judgement of the Tribunal is that the Claimant was unfairly dismissed by the Respondent.
2. The claim will now be set down for a remedy hearing.

REASONS

Introduction

1. In this case Mr Norton was employed by Encore Personnel Services Ltd as a contract manager from 29 April 2014 until his dismissal on 7 August 2017. The Claimant complains to this Tribunal that he was unfairly dismissed.

Issues

2. The issues in this case relate to what was the reason for dismissal and whether the dismissal was fair. Both parties agree that the reason could fall within section 98(1)(b) of the Employment Rights Act 1996 (ERA) being some other substantial reason of a kind such as to justify the dismissal of an employee holding the position

which the employee held, known as some other substantial reason, in this case being alleged pressure exerted on the Respondent by EMS Adare (Adare) to whom at the time of his dismissal the Claimant was contracted.

Facts

3. The Tribunal having carefully reviewed all the evidence (both oral and documentary) before it finds the following facts (proved on the balance of probabilities):

3.1 The Respondent provides staff for the industrial engineering, energy and driving sectors. It has 10 offices and 120 staff and Adare comprises 10% of the Respondent's business.

3.2 In 2017 there had been complaints by Adare relating to the Claimant's performance but there was no evidence before the Tribunal that these complaints had found their way to the Respondent in such a manner that disciplinary action was taken or required.

3.3 Later in June 2017 Mr Glynn Blackburn of Adare complained to the Claimant (copied to Kav Sangha, an HR manager in Adare and Ross Sylvester, the Claimant's manager), that the Claimant had put forward four unsatisfactory candidates.

3.4 On 4 July 2017 Mr Sangha sent an email to three of the 14 Adare managers the Respondent served, Mr Glynn Blackburn, Mr Qudah and Steve Davis stating that Mr Sylvester had asked that Adare collate feedback, information, evidence, supporting emails and/or correspondence and examples, to build a case that could be beneficial in managing the desired outcome, and obviously the quicker the Respondent had this the quicker it could begin the process. The Tribunal finds as a fact that this relates to the removal of the Claimant from the Adare contract with consequences, therefore, for the Claimant. Reference was made by Mr Greg Latham the managing director of the Respondent, who gave evidence before the Tribunal, to the possibility of the Respondent losing the contract with Adare but no direct evidence was called of that fact before the Tribunal.

3.5 Indeed Mr Sylvester on 7 July 2017 asked Mr Sangha if he would be able to provide a basic statement informing the Respondent that Adare had lost faith and confidence in the Claimant and would like him to be removed from site as soon as operationally possible. This email was not originally in evidence. It emerged as the forerunner to a document which subsequently was sent from Mr Sangha to Mr Sylvester as follows:

"As per the recent discussions that we have had and the feedback collated from all relevant management at Adare, we have made a collective decision that Drew is not suited to either the role and/or the business requirements here.

You are aware from our part that there have been numerous efforts for a number of months to drive improvements. We do not feel that the service provided has improved and therefore expect to see some changes.

Due to more recent breakdown in communication with Drew with Managers and HR we feel in no option but to move forward by replacing Drew and starting afresh.

We would appreciate details of the plans in action from Encore to provide a resolution.

Many thanks.”

- 3.6 Mr Sylvester had to chase for that statement on 13 July 2017. When sent by Mr Sangha on the same date attaching the above statement Mr Sangha said “I hope this will suffice”.
- 3.7 Mr Glynn Blackburn had on 5 July 2017 produced his own list of “issues”, including constantly chasing the Claimant to set up interviews, pre-vetting of staff, most candidates not screened, the candidates only receiving an email of the time to attend interviews, trying to contact the Claimant before interviews for CVs, room booking, suitability of candidates, candidates without typing skills, and candidates speaking very little English.
- 3.8 Mr Sangha also drew Mr Sylvester’s attention on 6 July 2017 to a lapse in screening. He gave personal feedback to Mr Sylvester on the same date. He said the Claimant did not come across as proactive, that suggestions had to be made to the Claimant of methods of attracting candidates, which was the Claimant’s job, that there was a lack of focus by the Claimant, with the Claimant being defensive as opposed to solution driven, that most managers were generally negative with regard to the Claimant’s conduct and candidates brought in by him, unawareness of candidate’s roles, and pre-screening. Mr Sangha said Adare had tried to resolve matters over a number of months and that the feedback was in fact collective from managers. Mr Sangha said Adare could no longer progress without a change. All this feedback Mr Sangha said was his.
- 3.9 There was a meeting between Mr Sylvester, Mr Davis and Mr Sangha to discuss the situation, but the Claimant was neither present nor invited to comment. The date of this meeting is unclear but it was certainly prior to the date of the Claimant’s dismissal. Mr Kim Blackburn, the dismissing officer and operations manager with the Respondent, who gave evidence before the Tribunal, was not present at this meeting.
- 3.10 Though there was an enquiry from Adare as to who would the Respondent replace the Claimant with there was no evidence of a threat that if they did not do so the Respondent would lose the Adare contract (see paragraph 3.4 above).
- 3.11 In the Respondent’s Grievance and Disciplinary Procedure specifically under the Disciplinary Rules and Procedures at paragraphs 2.1.1 and 2.1.2 there were the following provisions:-
 - 2.1.1: “No disciplinary action will be taken until the situation has been investigated. The Company may suspend you with or without pay while the investigation takes place. Your suspension will be reviewed as soon as possible and will not normally exceed 20 working days”.
 - 2.1.2: “At every stage in the procedure you will be advised of the nature of the complaint and will be given the opportunity to state your case before any decision is made”.
- 3.12 Indeed in cross-examination Mr Kim Blackburn conceded that there would normally be an investigation, that there was no investigatory meeting with

the Claimant, though he said he felt he could reach a decision without one but it would have been appropriate to have such a discussion.

- 3.13 A meeting was in fact convened with the Claimant by HR manager's letter dated 4 August 2017. It was headed "Notice of Disciplinary Hearing". Therefore, the Tribunal finds as a fact that the above procedures apply. (see paragraph 3.11). In his appeal on 22 August 2017 the Claimant took the point that he should have been made aware that an investigation was going on, that at no time was he made so aware, that he was not made aware that he was the recipient of further points from Mr Glynn Blackburn, that Mr Glynn Blackburn and Mr Sangha were the only persons who provided such evidence and that that of Mr Sangha was more of a "collective" nature. The Claimant's point was that he needed a reasonable time to prepare. In any case Mr Kim Blackburn told the Tribunal that he would not consider having an investigatory meeting in this case. This was too small a point and so it was that the Claimant was invited to the disciplinary hearing by letter dated 4 August 2017 referred to above. This letter referred to performance and also loss of trust and confidence of Adare. It enclosed documents, some of which we have referred to earlier in our findings of fact.
- 3.14 The Claimant had received the letter convening the disciplinary meeting at 6pm on 6 August 2017, eighteen hours before the time of the meeting on 7 August 2017. The Claimant was given the opportunity to be accompanied which he did not take up. He was also given several opportunities to postpone the hearing during the hearing itself. He did not take these up. The Claimant asked in the meeting to provide evidence later. Mr Kim Blackburn took the Claimant through the Adare evidence which had accompanied the letter convening the meeting. The Claimant said that the only issue on the site related to his relationship with Mr Glynn Blackburn. He disputed the fact that other managers had negative comments and insisted that he always pre-screened candidates.
- 3.15 After the substantive hearing Mr Kim Blackburn said that there should be a break for 10 minutes and told the Tribunal that the Claimant had been unable to persuade him during the course of the meeting that there was any realistic prospect of the Respondent being able to persuade Adare to retain the Claimant and that therefore the Claimant's position with the Respondent would be terminated and he would receive payment in lieu of notice. He could appeal in writing within seven days to Mr Latham.
- 3.16 After the dismissal of the Claimant the Claimant asked if there were other vacancies and Mr Kim Blackburn said there were none.
- 3.17 On the same day Mr Kim Blackburn wrote to the Claimant, yet again setting out issues of under performance and the loss of trust and confidence of Adare in the Claimant's ability to fulfil the role of contract manager. He added that the Respondent had been instructed by Adare to remove the Claimant from the position of contract manager on Adare's account.
- 3.18 In that letter Mr Kim Blackburn told the Claimant that the Respondent had looked to identify an alternative role that might be available for the Claimant but unfortunately the Respondent did not have any available vacancies "within a reasonable distance of your home address" at that point in time. The expression "a reasonable distance of your home" is an incorrect statement of the Claimant's contract. Clause 3.1 of the Claimant's contract

states that the Claimant may be required to work at any other location as the Company may from time to time reasonably require.

- 3.19 The letter also gave the Claimant the right of appeal.
- 3.20 At the dismissal hearing Mr Kim Blackburn used different terminology and stated that there were no vacancies in the locality. At the appeal hearing which took place on 22 August 2017 (at which Mr Latham dismissed the Claimant's appeal) there was a discussion between Mr Latham and the Claimant about the possibility of the Claimant working at Newark. That vacancy was referred to by Mr Latham in his letter dated 4 September 2017 when he stated that the nearest vacancy was in Newark, which was over one hour's drive from where the Claimant currently lived and which he did not believe was sustainable as a daily commute given the long working hours the job would require.
- 3.21 Instead at the appeal hearing Mr Latham mentioned that there was potential for a suitable alternative vacancy with Troy Foods Limited in Leeds though Mr Latham had acknowledged that there was a job at Know How at Newark during the appeal hearing.
- 3.22 In relation to Troy Foods Limited the Claimant says that Mr Latham had told the Claimant that Troy Foods Limited would not really be viable at the time and that notice had been given to terminate the contract between Troy Foods Limited and the Respondent. Mr Latham told the Claimant about the difficulties there had been with Troy Foods Limited and asserted that the Claimant had been better off not having been transferred there on an earlier occasion when the possibility had arisen.
- 3.23 The Claimant told Mr Latham that he was prepared to travel to Newark and could even have re-located. He said he had commuted much further in the past. He said he had not had a proper opportunity to discuss the length of travel.
- 3.24 After the dismissal of the Claimant and the dismissal of his appeal the Claimant was offered the job at Troy Foods despite the fact that Mr Latham during the appeal hearing had described Troy Foods Limited as toxic. The offer, however, was in Leeds and in most respects seemed on similar terms to his existing position, save that the Claimant would be deprived of an out of hours allowance payment of £510 per annum. The Respondent says there was no contractual right to such a payment. It was certainly not in his contract. No other employees within the EMS division of Adare had this allowance. At all events the Claimant declined to accept the offer of the job with Troy Foods Limited.
- 3.25 The Claimant's appeal was heard on 22 August 2017 by Mr Latham as we have said. A Miss Best took notes and the Claimant elected to attend unaccompanied.
- 3.26 At the outset of the hearing Mr Latham said that he would listen but not adjudicate or comment on the rightness or wrongness of anything to date.
- 3.27 Paragraph 2.2.6 of the Appeals section of the Disciplinary Rules and Procedures states that Mr Latham himself would hear the appeal and make the decision.

- 3.28 Mr Latham told the Tribunal that he had never been involved in any Grievance or Disciplinary matter and that he was not sure of the difference between a Grievance and a Disciplinary hearing.
- 3.29 The Claimant emphasised that he was not aware of any investigation. He alleged that the decision to dismiss was made prior to the disciplinary hearing. He alleged that the only direct evidence came from Mr Glynn Blackburn. He alleged that there were conversations which went on between Mr Sylvester and Mr Sangha and was not made aware of what they were.
- 3.30 In his evidence Mr Latham said that he carried out some investigatory work before coming to his conclusion on the appeal. In the appeal decision letter dated 4 September 2017 he said that he had investigated the Claimant's concerns. In cross examination however Mr Latham said he did not carry out any investigations, nor did he look at notes prepared by the Claimant for the purposes of the appeal which ran to one and a half pages of close type.
- 3.31 In the decision itself Mr Latham said that the relationship with Adare had been damaged to the point that they were not prepared to agree for the Claimant to remain in post on their site. Having been required to move the Claimant from this role at Adare's insistence, regardless of what the Respondent thought of the decision, the Respondent had had to consider whether there was any role which they could offer the Claimant instead.
- 3.32 Although these were not in the decision letter during the appeal hearing Mr Latham gave evidence to the effect that the Respondent had been "backed into a corner" and that the Claimant would be dismissed for "some other substantial reason".
- 3.33 In cross-examination Mr Latham said that he did not engage with any performance issues suggested by Adare. He said that there were other managers than Mr Glynn Blackburn but he did not know who and he did not feel it was relevant. He said that he disregarded the original four grounds of appeal. He conceded he should have made a response of those grounds.

The law

4. The Tribunal has to have regard to the following provisions of the law in coming to its decision namely:
- 4.1 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 ... some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*
- 4.2 Section 98(4) ERA
- "Where the employer has fulfilled the requirements of subsection (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 the administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee in accordance with equity and the substantial merits of the case"

4.3 Some other substantial reason (SOSR)

The particular aspect of SOSR which the Tribunal has to consider is whether third party pressure was brought to bear on the Respondent so that the Respondent had to withdraw the Claimant from the Adare contract. Insofar as it affects S98(4) ERA there is considerable case law on this issue and the Tribunal has been referred to it by Counsel on both sides. The Tribunal has had regard to the following:

4.3.1 Henderson v Connect (South Tyneside) Ltd [2010] IRLR 466 EAT

This was a case where indeed the Respondent dismissed the Claimant because of third party pressure. Henderson did review some important cases in this area, in particular, Dobie v Burns International Security Services (UK) Ltd [1984] ICR 812, where Sir John Donaldson MR said at p817 B-D –

"In deciding whether the employer acted reasonably or unreasonably, a very important fact of which he has to take account on the facts known to him at the time, is whether there will or will not be injustice to the employee and the extent of that injustice. For example, he will clearly have to take account of the length of time during which the employee has been employed by him, the satisfactoriness or otherwise of the employee's service, the difficulties which may face the employee in obtaining other employment, and matters of that sort. None of these is decisive, but they are all matters of which he has to take account and they are matters which affect the justice or injustice to the employee being dismissed."

This strand of justice and injustice was followed in Henderson by a reference to the case of Greenwood v Whiteghyll Plastics Ltd UKEAT/0219/07. In Henderson itself at paragraph 18 Underhill J. said -

"As we understand it, the effect of Dobie is that where the client's stance appears liable to cause injustice, the tribunal must consider with special care whether the employer had indeed done all that he could to avoid or mitigate that injustice: in a case of patent injustice it may be necessary for an employer to "pull out all the stops"."

Henderson itself was followed in Bancroft v Interserve (Facilities Management) Ltd UKEAT/0329/12

4.3.2 Greenwood

Greenwood was referred to in Henderson. At paragraph 23 Silber J said (referring to and distinguishing at the beginning the case of Retarded Children's Aid Society v Day [1978] ICR 437) -

"In our view this case is very different as there was nothing in the documents or anywhere else to which we were referred to show

that injustice to the appellant was considered by the respondent in deciding to dismiss the appellant or to dismiss his appeal from that decision or was even the subject of any evidence to the Employment Tribunal. Thus we reach the conclusion in spite of Miss Gower's clear submissions that the Employment Tribunal did not consider as the Court of Appeal said "in Dobie" that they should have done and what they described as the "very important factor" of whether the respondent considered the injustice for the claimant and the extent of the injustice in deciding whether the respondent acted reasonably. This we regard as an error".

5. Determination of the issues (after listening to the factual and legal submissions made by and on behalf of the respective parties):

- 5.1 There is no doubt that Adare was at the material time a significant customer of the Respondent and equally there is no doubt that Adare was unhappy about the service being provided by the Respondent through the Claimant, certainly from June 2017.
- 5.2 On the other hand the evidence is that it was the Respondent who pushed Adare for evidence of the Claimant's performance and that there is no evidence that the continued activity of the Claimant on the Adare contract would result in loss of business by the Respondent from Adare.
- 5.3 On balance the Tribunal finds that the Respondent has satisfied S98(1)(b) ERA and that therefore the Claimant's dismissal was for some other substantial reason of a kind such as to justify the dismissal of the Claimant holding the position which he held.
- 5.4 The question of fairness of that dismissal requires closer scrutiny.
- 5.5 Insofar as its Disciplinary Procedure is concerned the Claimant was not included in the investigatory process nor was he advised of the nature of the complaint at every stage in the procedure.
- 5.6 The discipline started out as a matter of the Claimant's performance and trust and confidence with no issue around third party pressure.
- 5.7 The Claimant received very short notice of his disciplinary hearing and this hearing was a month after the provision of evidence which we have seen from Adare to the Respondent. No evidence was called of a need for such haste.
- 5.8 Whilst it is true that the Claimant was given the opportunity to postpone the disciplinary hearing, having declined to take that opportunity he was denied the right to provide evidence later, being dismissed after a 10 minute break in the hearing.
- 5.9 The dismissal letter repeated the issues of under performance and trust and confidence and for the first time, in writing, stated that the Respondent had been instructed by Adare to remove the Claimant from the Adare contract.
- 5.10 So far as the appeal was concerned Mr Latham, who was the appeals officer, seemed confused as to his role. At the outset he said he would listen but not adjudicate or comment on the rightness or wrongness of

anything to date. On the other hand the Respondent's appeal process specifically earmarked him as a decision maker, which he turned out to be.

- 5.11 Mr Latham said he had never been involved in any other grievance or disciplinary matter and that he did not know the difference between a grievance and a disciplinary hearing.
- 5.12 Mr Latham told the Tribunal that despite having said so he did not do any investigations relating to the Claimant's appeal, nor did he read a document specifically prepared by the Claimant for his appeal.
- 5.13 Mr Latham said he did not engage with the Claimant's performance issues, nor respond to the Claimant's four grounds of appeal.
- 5.14 The question of a possible alternative post for the Claimant within the Respondent's organisation is open to scrutiny.
- 5.15 After his dismissal the Claimant asked for other vacancies and was informed there were none in the locality and in the dismissal letter he was told there were no vacancies within a reasonable distance of his home address. This expression did not match his contract which stated the Claimant may be required to work at any other location as the Respondent may from time to time reasonably require.
- 5.16 The discrepancy between the dismissal letter and the Claimant's contract demonstrates in the view of the Tribunal a lack of care, similar to the Respondent's approach to its Disciplinary and Appeals Procedure.
- 5.17 On the question of vacancies at the appeal the Claimant raised the possibility of working at Newark. The Respondent did not believe this was sustainable as a daily commute given the working hours the job would require. The Claimant was prepared to relocate but there is no evidence that this was explored by the Respondent.
- 5.18 Also at the appeal Mr Latham discussed with the Claimant the possibility of working with Troy Foods Limited in Leeds, but the Claimant says that Mr Latham put him off, by saying the contract was about to terminate, that there were difficulties and that when, previously, the Claimant had had the opportunity to work there he was better off not going.
- 5.19 After the appeal decision had been given, despite the discussion at the appeal, the Claimant was offered a job at Troy Foods Limited, which he declined.
- 5.20 The Tribunal has set out the issues which may be material to the justice/injustice line of cases. It is important to note however that that line of cases relates to SOSR and the Tribunal also has to consider S98(4) ERA generally.
- 5.21 Henderson requires the Tribunal to consider whether the Respondent did all it could to avoid or mitigate injustice. The Tribunal is of the view that there was indeed a lack of care in the way in which the Respondent went about the procedure in general and the issue of alternative employment in particular. This impacts not only on the SOSR aspect of reasonableness but also on general fairness.

- 5.22 Involving the Claimant in investigation, slowing down the disciplinary process and widening the tunnel effect of the Appeal, quite apart from the job search, might all have brought a different result for the Claimant.
- 5.23 In all the circumstances the Tribunal finds the Claimant was unfairly dismissed.
- 5.24 The matter will now be set down for a remedy hearing.

Employment Judge Shulman

01/06/2018