Case No: 2301431/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr. D. Forson

Respondent: Guardforce Security Limited

Heard at: London South, Croydon
On: 1 February 2019 and the 21 March 2019 (in chambers)

Before: Employment Judge Sage (sitting alone)

Representation

Claimant: Mr Ceasar solicitor

Respondent: Mr. Ridgeway Consultant

RESERVED JUDGMENT

1. The Claimant was an employee
2. The Claimant's claim for unfair dismissal, breach of contract and holiday pay are not well founded and are dismissed.

REASONS

1. By a claim form presented on 19 April 2018, the Claimant claimed unfair dismissal, unauthorised deduction from his wages and holiday pay. The Claimant stated that he had been employed for over 11 years and was dismissed without any due process. He claimed that the grounds for dismissal was not for a potentially fair reason and the dismissal process was unfair and unreasonable.

2. The Respondent denied that the Claimant was an employee, they stated that he was a subcontractor. They denied the Claimant was entitled to holiday pay and he had never claimed holiday pay, despite high-profile cases being reported in the press. There was no evidence that the Claimant worked exclusively for the Respondent and in fact, he worked elsewhere. The Claimant paid his own tax and was self-employed, submitting his tax returns

on an annual basis. The Respondent stated that the Claimant provided his own equipment and his uniform.

3. The Respondent denied that the Claimant was dismissed. If the Claimant was found to be an employee, the Respondent will state that he was called to a meeting on 26 March and removed from site but was not told his contract would be terminated. The Claimant was invited to an investigation meeting and advised to book work on another site. The Respondent denied the Claimant was suspended if he was found to be an employee. The Respondent stated that the Claimant left of his own accord and was not dismissed.

The Issues

The issues were agreed to be as follows:

a. Was the Claimant an employee?
b. If so was there a dismissal?
c. If there was a dismissal, was it procedurally and/or substantively fair?
d. Has the Respondent shown a potentially fair reason to dismiss?
e. Was a dismissal within the band of reasonable responses?

Witnesses

The tribunal heard from the Claimant and Mr Hanratty for the Respondent

The Findings of Fact

4. The Claimant started working for the Respondent in March 2007. The tribunal saw the agreement that was signed on the 16 June 2008 at page 42 of the bundle headed 'Sub Contractual Agreement' which provided that the Claimant was hired as a self-employed contractor working for a fee. The Claimant was wholly responsible for the payment of his own income tax and National Insurance and was paid gross, without deduction of tax and was paid on the production of completed timesheets.

5. The Subcontractor Agreement stated that the Claimant was expected to perform all his assignments "in a professional manner" and failing to do so could result in the subcontractor not receiving the full or any fee for an assignment. The agreement at paragraph 6 stated that "as a subcontractor you will receive no benefits whatsoever, such as sick pay, holiday pay, clothing allowance, pension or personal insurance. To protect your own interest, you should consider taking out personal accident, sickness insurance, personal pension and life assurance."

6. The Claimant accepted in cross examination that he raised no complaints at any time about his self-employed status and he accepted that he benefited from the tax situation and was always registered for tax purposes as self-employed and hired an accountant to submit his accounts.

The Guards Handbook.

7. The Respondent provided its guards with a Guards Handbook which was seen at page 30 of the bundle; this document set out the rules and procedures set down for self-employed and subcontractor security guards and was dated 1 September 2014. There was a provision in the Handbook

for disciplinary action to be taken under certain circumstances (page 35). The Handbook required all guards to be punctual and to abide by a code of conduct (page 34), which included an instruction not to leave their place of work without permission or consent and "*not to use the Companies uniform, equipment or identification without prior permission from Guardforce*", this supported the Claimant's evidence that some uniform was provided by the Respondent.

8. The Handbook made no mention of the right to send a substitute when the individual could not attend work. The rules in the Handbook stated that guards were required to inform the office '*as soon as possible, but in any event more than four (4) hours before your rostered duty start time'*. The Tribunal find as a fact that the Sub-contractor Agreement did not accurately reflect the terms and conditions reached between the parties or of the reality of the relationship. The Handbook reserved the right to take disciplinary action and under the heading of Gross Misconduct (page 37 of the bundle). One of the offences that would lead to summary termination was "….*breach of the Company's confidentiality, competition and non-solicitation policies*". The Tribunal did not see the competition or non-solicitating policy or rules. The Tribunal find as a fact that the discipinary policy in the Handbook appeared to be inconsistent with the right to withhold part or whole of the 'fee' if an assignment was not completed in a professional manner, which suggested imposing a financial penalty. The Handbook made no mention of imposing a financial penalty or of withholding a fee. There appeared to be a contradiction of the way in which performance issues were dealt with between the Sub Contractor Agreement and the Handbook.

9. The Claimant told the tribunal that he was provided with a uniform which was a black polo shirt bearing the Respondent's logo and his evidence to the Tribunal on this point was that he had asked the office to provide staff working on site with a polo shirt. The Claimant also told the tribunal that he was provided with a High viz jacket with the Respondent's logo on it. Mr Hanratty denied that the Respondent provided guards with a uniform. The Claimant provided photographic evidence of a polo shirt bearing the Respondent's name. The Tribunal find as a fact that the Claimant's evidence appeared to be consistent on this point and was preferred to that of the Respondent, considering the photographic evidence and the reference in the Guards handbook to a uniform (see above at paragraph 7).

10. The Claimant accepted in cross examination that he provided services to the Respondent working for 3rd parties as a security guard and he performed an additional role for the Respondent as a Supervisor managing a team of 20 guards. He told the Tribunal that at the time his contract ended, he was working in Vauxhall in a building called The Tower.

11. The Claimant accepted in cross examination, he was not provided with a work email account and he communicated with the Respondent via his personal email account. The Claimant was asked in cross examination why he said he had a company email account (in his statement at paragraph 15.15) and he accepted that this evidence was incorrect, and he did not have an email with the company name on it. His evidence on this point was found to be unreliable.

12. The Claimant's evidence given in cross examination was that he was unable to work elsewhere and when he attempted to secure employment for a different company, he was told he could not do so. The Claimant provided an example of when he was working on a site called Witenhurst House in 2016 the role of Banksman came up, he applied for this role direct to the client and was offered and accepted the role. The Claimant's evidence at paragraph 15.4 of his statement was that he was told by Mr Sinclair Operations Manager and Russel Sampayo the CEO that they did not allow guards to join their clients. The Claimant said he was then taken off site and was informed that he had to agree to take on the role of Banksman but via the Respondent at a reduced rate of pay (£90 instead of the £150 he had been offered by the client). The Claimant agreed to take the role of Banksman for two years via the Respondent.

13. The Tribunal found the Claimant's evidence to be credible and consistent on this point and it was not substantively challenged in cross examination. The Tribunal also noted that the Claimant's evidence appeared to be corroborated by an email in the bundle dated 26 March 2015 (page 102) confirming that the Respondent had negotiated a 'better arrangement' for the Claimant to be engaged via the Respondent rather than being hired by the client direct. Although the date appeared to be different to that in the Claimant's statement (he said it was in 2016 and not 2015), the facts were consistent with those described by the Claimant. The Tribunal find as a fact on the balance of probabilities that the Respondent prevented their Security Guards from working for or accepting employment with any of their clients. This conduct was consistent with the non-solicitation and non-competition clause referred to in the Handbook and further corroborated that the terms of the Handbook more accurately reflected the reality of the agreement between the parties.

14. On the 7 June 2017 the Claimant asked for the following two days off (page 18 of the supplementary bundle). Mr Sinclair emailed several managers to express his concern; he stated that the Claimant was acting in an 'unprofessional' manner for not ensuring that cover was in place. It was Mr Sinclair's view that if the shift was not covered the Claimant "*should be in for [his] shifts*". This evidence suggested that the Claimant was obliged to accept work when it was offered, and he was required to carry out the work personally. There was no evidence that the Claimant could send a substitute of his own choice. The Respondent attempted to obtain cover for the Claimant's shifts by asking the guards on the night shift. This email made no mention of withholding fees or claiming against the Claimant for unprofessional conduct as suggested in the Subcontractor Agreement, this was a further example of how the Agreement did not accurately reflect the agreement between the parties. Mr Sinclair's conduct was consistent with the terms of the Handbook referred to above at paragraph 8 which required the guard to inform the office when they were unable to attend work and then to see if other guards could cover.

15. The tribunal heard that Mr Hanratty joined the company as a General Manager on 11 December 2017. The Claimant first met Mr Hanratty was on 20 December.

16. It was the Claimant's evidence that he worked continuously for the Respondent from 2007 until the date of termination of his contract. Mr.

Hanratty told the tribunal that the Claimant had not worked for the Respondent continuously and had worked for several different organizations and was free to accept work from others. Mr Hanratty made specific reference to the other companies that the Claimant had worked for, they were Open Space, ITV, and Witenhurst (paragraph 10 of his statement). Mr Hanratty conceded in cross examination that these were all contracts held by the Respondent and the Claimant was placed with these companies by the Respondent. Mr Hanratty confirmed in cross examination that he had no evidence to corroborate that the Claimant had worked elsewhere whilst working for the Respondent. The tribunal find as a fact that the Claimant's evidence on this point was preferred to that of Mr Hanratty, that the Claimant worked for the Respondent continuously and exclusively from 2007 until 2018 when his contract terminated. Mr Hanratty's evidence that the Claimant was free to work for others was also found to be unreliable as the tribunal has found as a fact that the Claimant was subject to a restriction on accepting work from the Respondent's clients.

17. On the day of the Tribunal hearing the Respondent disclosed text messages sent to the Claimant and a supplementary bundle. It was put to the Claimant that the text messages showed that he had flexibility on where he worked and whether he wished to work. The Claimant was then taken to a text message asking if he was free to work a Saturday at a West Ham Football Club match in September 2016. It was put to the Claimant that this showed that he had flexibility in the roles that he accepted; the Claimant denied that the text messages reflected this. The Claimant explained that these texts were not related to his work at the Vauxhall site where he worked on a permanent rota. The Claimant told the Tribunal that these were offers for work that coincided with the guards' days off and it was up to each person whether they accepted this additional work or not.

18. The Tribunal accepted the Claimant's evidence that offers went out for the guards to take on additional work (for one off events or to cover absences) when they were free to do so and this they could refuse. The consistent evidence before the Tribunal was that in relation to a permanent placement on site, when work was offered, the Claimant was obliged to accept it and on the rare occasions when the Claimant had been unable to attend (in 2017), he was reminded of the obligation to give notice of his inability to attend. It was also noted that the Claimant was in a position of responsibility on site and his attendance was crucial to the proper and effective administration of the duties. This was reinforced in the meeting referred to below with Mr Hanratty. This reflected that the Claimant was bound by the mutuality of obligation that where work was offered he was obliged to accept and to carry out the duties in accordance with the instructions given to him.

19. The Claimant indicated that there was no right to substitute and when he was provided with work he always performed it personally. Mr Hanratty accepted in cross examination that the right to substitute would be limited to those already on the Company books, it was therefore a limited right which was not inconsistent with the obligation for personal service. The Claimant accepted that the right of substitution had never been tested as he always attended his shifts. The Tribunal find as a fact that there was no right to send a substitute, Mr Hanratty's evidence on this point in his statement 9 (that the Claimant could send an appropriate individual to undertake his

work), did not appear to be credible; he accepted when challenged that there was no right to substitute and conceded that this would be limited to the other guards on their books.

20. The Claimant accepted in cross examination that at no time had he requested paid annual leave and he did not challenge this clause in his Sub Contractor Agreement. The Claimant provided no evidence to support his claim for holiday pay.

The Meeting on the 13 March 2018.

21. The Claimant was taken in cross examination to the minutes of the meeting on 13 March 2018 at page 66-67 bundle. Mr Hanratty's evidence about this meeting was at paragraph 20 of his statement; he stated that there had been a complaint that the Claimant was asking for guards to be removed from site and of being "involved in short staffing, falsification of records and money changing hands". Mr Hanratty was asked in cross examination whether he had any evidence of the Claimant's dishonesty and he referred the Tribunal to the letter dated March 2018 and the cheque for £228.40 in the supplementary bundle at page 23. This letter appeared to confirm that guards were swapping shifts; the writer of the letter returned the shift payments he had received for a shift that he had been paid for but had not worked. Mr Hanratty also referred the Tribunal to page 26 of the supplementary bundle which was the minutes of a meeting on the 7 March 2108 with the guard who had returned the payment for the two shifts; he appeared to accept that he had been paid on two occasions when he had not worked a full shift. Mr Hanratty accepted that there was no direct evidence that it was the Claimant who had taken money from other guards.

22. The Claimant was taken to an extract of the notes of the meeting on the 13 March 2018 at page 67 where he was asked if he had been paid money by one of the security guards called Ayo and he was recorded to have said 'yes'. The Claimant told the Tribunal that there had been issues on the night shift, where staff had not turned up or had turned up late, but he worked on the day shift and had delegated the handover and checking the night shift to others. The Tribunal noted that these minutes were not agreed or signed and there was no evidence that they were sent to the Claimant at any time prior to the termination of his contract. The Claimant stated that these minutes were fabricated. It was not disputed by the Claimant that he had a meeting with Mr Hanratty on the 13 March about guards not showing up. Although the minutes of the meeting were not agreed the tribunal noted that they reflected that the meeting was divided into two distinct parts, the first part of the meeting appeared to be a question and answer session about what was happening on the site and the second part of the meeting dealt with ways of improving the performance of the site. Mr Hanratty confirmed that he felt that the meeting was positive, and he had helped the Claimant better manage the site going forward.

23. The Claimant was taken in cross examination to an email at page 68 of the bundle dated 14 March 2018 sent to him by Mr Hanratty. In this email, it was confirmed that "measurements and discussions" would take place on a weekly basis and would be carried out with a view to improving the service to clients including escalating concerns as they arose regarding operational or staffing issues. The email also confirmed that leadership was paramount

for a cohesive service to be provided. The email asked for all documentation and signing in and out sheets to be submitted to head office on time. The Claimant accepted that he received this email and it was reasonable for the Respondent to set these standards. This evidence further corroborated the positive discussion that had taken place the day before about performance management on site.

24. The Claimant was taken to an email on page 72 of the bundle dated the 20 March 2018 regarding a concern about time sheets, in relation to a practice that had arisen where staff were signing in in advance (i.e. days before completing the shift). Mr Hanratty indicated that this practice was unacceptable; he also raised concern about the number of discrepancies on the timesheets. The Claimant accepted that he was aware that at the time there was an issue with the timesheets on the site and told the Tribunal that there were always issues with the timesheets.

25. The Claimant emailed Mr Hanratty on the 20 March (page 78 of the bundle) where he stated that "it's so bad for moral (sic) when staff on site are playing detective around each other on instruction from office staff..". He then went on to state that "*I can't help but think, someone is trying to get me sacked irrespective of any work I do..*". The tribunal concluded that this email appeared to be consistent with what was discussed in the meeting on the 13 March about the falsification of timesheets and of fraudulent claims for work. It is concluded therefore that, overall, the minutes of that meeting were accurate and reflected the Respondent's concerns about the accuracy of timesheets and of record keeping and they were entitled to discuss those concerns with the Claimant in his role as Supervisor of the site.

The Meeting on the 26 March 2018

26. There was a meeting on the 26 March 2018 which was referred to in Mr Hanratty's statement at paragraph 31-2 and the meeting notes were seen on page 100. The Claimant accepted in cross examination that Mr Hanratty had told him that things did not look good on site. The Claimant was asked if any of the minutes taken were accurate and he denied that they were as no notes were taken at the time. It was the Claimant's recollection that Mr Hanratty said to him that "*I told you I didn't want to see you again and here you are. He said he will send my things and he would not let me speak*". The Claimant denied saying in the meeting that he would see him 'in a Court of Law' but accepted that he sought legal advice straight after the meeting.

27. It was Mr Hanratty's evidence of the meeting that the Claimant became loud and abusive and said he would not take the blame for what he described as 'the actions of adults'; the Claimant denied saying this. Mr Hanratty terminated the meeting at that point. Mr Hanratty told the Tribunal that the Claimant was removed from site whilst matters were being investigated and an appointment would be made for the Claimant to give his version of the events. Mr Hanratty denied that the Claimant was dismissed at this meeting because it was his evidence (paragraph 32) that he told the Claimant to "*contact the booking team for work during this period*" and not to contact the site where he worked. Mr Hanratty denied that he terminated the contract. Mr Hanratty confirmed that in his view this was not a disciplinary hearing, it was a follow-on meeting from the 13 and 23 March where performance issues had been discussed.

28. The Claimant's evidence was that he had been dismissed and he denied that he was aggressive towards Mr Hanratty in the meeting.

29. The Tribunal find as a fact and on the balance of probabilities that the meeting on the 26 March was consistent with the description provided by Mr Hanratty. The minutes, which the Tribunal found to be an accurate representation of the meeting, referred to their previous discussions regarding performance issues. At the end of the minutes it showed that Mr Hanratty was to arrange a further meeting. The Claimant was advised to 'contact the office'. There was no evidence to suggest that this was a discipinary hearing, therefore the Claimant had no right to be accompanied. There was no evidence that the Claimant was dismissed in this meeting.

30. Mr Hanratty sent the Claimant an invitation to attend a meeting on the 4 April 2018 (see page 108 of the bundle) dated the 29 March 2018 (sent at 15.31) and the covering email was at page 105. The letter confirmed that the Claimant had been removed from site and all matters would be discussed at the forthcoming meeting. The letter therefore corroborated Mr Hanratty's recollection of the meeting. The Respondent confirmed that they would pay travelling expenses for him to attend the meeting together with his rate for attendance. The letter reminded the Claimant to contact the booking team to be placed on an alternative assignment.

31. The tribunal find as a fact that this letter was further corroboration that the Claimant was not dismissed at the meeting on the 26 March. The Claimant had been removed from site pending investigation and had been told to arrange to work at another site. The Respondent's offer to pay the Claimant's expenses and daily rate for the meeting and to remind him to contact the office to be placed on another assignment corroborated the Respondent's evidence that the contract had not been terminated.

32. The Claimant replied to this email and letter at 17.21 on the 29 March 2018 stating that he could be contacted through his solicitors and in his view he "was dismissed" (page 104). Mr Hanratty replied on the 3 April 2018 (page 106) informing him that he had not been dismissed "*as he was not an employee*". Mr Hanratty told the Claimant that he would have an opportunity on the 4 April 2018 to explain his concerns.

33. The Claimant confirmed that he did not attend the meeting scheduled for the 4 April because, in his view he had been dismissed. He confirmed that at that stage he was taking legal advice and it would "*not be in the best interests of the case*" to attend the meeting. The Claimant also suggested that the Respondent failed to follow a fair procedure as he should have been informed of the right to be accompanied to the meeting on the 26 March 2018.

34. Since the termination of the contract the Claimant started a new job on the 20 August 2018 with an agency called Titan and his first assignment was in October 2018.

Closing Submissions

35. These were oral by both parties and they were considered and were referred to where appropriate in the decision. The Claimant also provided a skeleton argument on the issue of sham contracts and the essential elements for a contract for service and referred to the cases of;

> Protectacoat Firthglow Limited v Szilagyi [2009] IRLR 365
> Autocleanz Limited v Belcher and others [2011] IRLR 820.

These submissions will be referred to in the decision, where appropriate.

The Law

Section 95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ..., only if)--

> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> [(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Section 98 General

(1) 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 subsection (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.

(2) A reason falls within this subsection if it--

> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
> (b) relates to the conduct of the employee,
> [(ba) ...]
> (c) is that the employee was redundant, or
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

[(2A) ...]

(3) In subsection (2)(a)--

> (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
> (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [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 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.

Section 230 Employees, workers etc

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)--

> (a) a contract of employment, or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual;

and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"--

> (a) in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and
> (b) in relation to a worker, means employment under his contract;

and "employed" shall be construed accordingly.

Decision

36. The first issue for the Tribunal is whether the Claimant's contract with the Respondent referred to above was a sham. It was noted from the oral submissions made on behalf of the Claimant that it is for the Tribunal to determine the true relationship between the parties. The Tribunal considered the cases referred to above and the guidance that when faced with a sham allegation, it is necessary to consider whether the words of the written contract represent the true intentions or expectations of the parties not only at the inception of the contract but at the termination. The Claimant stated in closing submissions that he was an employee because there was no right to substitute, there was 'performance management' in place, there were timesheets, there was no evidence the Claimant could turn down work and he was restricted in the work he could do. The Claimant states that this indicated that he was an employee.

37. The Respondent submissions on the issue of status were that the Tribunal has to look at the issue of control, performance management is not enough (and referred the Tribunal to the case of Customs and Excise v Post Office [2003] ICR), they submit that personal performance is not always enough (referring to Pimlico Plumbers). They stated that the Claimant was able to turn down work, he was not integrated into the Company and had no company email (and his evidence on this point was unreliable). There was no consistent evidence that the Company provided a uniform and no evidence he was provided with targets. There was no consistent evidence that the Claimant was restricted or prohibited from competing with the Respondent, he was not forbidden from working for a competitor. The Respondent also stated that at all times the Claimant was paid gross without deduction of tax and national insurance. Other factors that were consistent with a sub-contractor relationship was that the Claimant was not integrated into the workforce, he had no company email and used his personal email to communicate with the Respondent, this can be compared with Mr Hanratty who was provided with an email address and was fully integrated into the company.

38. The Tribunal has found as a fact that the Sub-contractor Agreement signed in 2008 did not accurately reflect the terms of the agreement between the parties and some of the sub-contractor terms appeared to be inconsistent with the conduct of the parties. One example of an inconsistency was that the Subcontractor Agreement provided for monies to be withheld in the case of unprofessional conduct however there was no evidence to suggest that this term reflected the reality of the agreement between the parties. This term was also inconsistent with the Guards Handbook which provided for disciplinary action to be taken as set down in the code of conduct. The consistent evidence was that Claimant was subject to the Respondent's code of conduct, the disciplinary policy and was performance was managed by the Respondent in accordance with the terms of the Handbook. The Tribunal noted that the Claimant was performance managed by Mr Hanratty in March 2018 which was again entirely consistent with the Handbook and inconsistent with the Sub Contractor Agreement.

39. The other term that was consistently applied by the Respondent throughout the relationship was the obligation that the Claimant was required to perform the duties personally. Mr Hanratty conceded this point in cross examination. He accepted that there was no right general right to send a substitute and if one were sent, they would have to be from the Respondent's list of guards who possessed the relevant clearances. It was concluded therefore that the Claimant was required to perform the work personally when work was provided. The Tribunal have also found as a fact that in 2017 the Respondent clarified that if the Claimant was scheduled to work he must attend personally; this obligation was entirely consistent with the expectation contained within the Handbook and was consistent with the mutuality of obligation and strongly suggested an employment relationship.

40. The Claimant's role was to work as a security guard on client sites and he occasionally undertook addition work on his days off but that was also on additional assignments with the Respondent. Mr Hanratty's evidence was unreliable when he suggested that the Claimant worked for other Companies as he conceded that all the Companies he referred to in his statement were clients of the Respondent. There was no evidence to suggest that the Claimant worked for other customers while working for the Respondent. As the Claimant worked exclusively on site he was not provided with a Company email and his evidence given on this point was found to be unreliable. There was also no evidence to suggest he was provided with equipment to perform the role but there was no evidence to suggest that any specialist equipment was required.

41. The Claimant provided consistent evidence that he was provided with a polo shirt bearing the Respondent's name and a High Vis jacket which he wore as a uniform, but he accepted that this was only on certain sites. There was no evidence that all those working on sites were required to wear a uniform. The provision of uniform was consistent with reference to a uniform in the Handbook.

42. The Tribunal found that the restriction placed on the Claimant to prevent him working for others tipped the balance in favour of this being an employment relationship. The findings of fact are referred to above in paragraph 8. The restriction in the Handbook referred to competition and non-solicitation policies and was invoked when the Claimant secured employment with one of the Respondent's clients. The Respondent prevented the Claimant from taking up employment with their client, removed him from site and required him to take up the role via the Respondent. The reality of the relationship between the parties was that the Claimant was subject to restrictions which included a requirement that he was to provide his services exclusively to the Respondent and could not solicit work from the Respondent's clients or compete with the Respondent. It is concluded therefore that the relationship was not one of self-employment contractor status but was on balance one of employment. The Tribunal conclude on the balance of probabilities therefore that the Claimant was an employee.

43. Turning to the issue of whether there was a dismissal, it has been found as a fact that the meeting called on the 26 March 2018 did not result in a dismissal. The meeting was called to remove the Claimant from site for

the purposes of carrying out an investigation. The evidence regarding the conduct of the meeting was consistent, that the Claimant was told he was being removed from site to carry out an investigation and he was reminded that he should arrange to seek an alternative assignment. This was confirmed in the letter sent to the Claimant. It was only on receipt of this letter that the Claimant indicated that he was dismissed. He did not indicate why he had concluded that the meeting had resulted in a dismissal and did not seek to appeal any purported decision to dismiss.

44. The evidence before the Tribunal was consistent with moving the Claimant off site pending investigation. The Respondent was clear on the 26 March that the Claimant should arrange to work on a different assignment and that he would be paid for his attendance at the meeting. The Tribunal conclude on the balance of probabilities that the meeting did not result in the termination of the contract. The Claimant was not dismissed in the meeting of the 26 March 2018. The Respondent removed the Claimant from site to investigate complaints that had come to light.

45. The Claimant's failed to give a credible reason why he failed to attend the meeting on the 4 April 2018 or why he concluded that he had been dismissed in the meeting on the 26 March 2018.

46. The Tribunal have considered in the alternative whether the actions of the Respondent in the meeting on the 26 March 2018 could amount to a fundamental breach that entitled the Claimant to consider that the contract was at an end. Both parties accused the other of being aggressive, but the Claimant pursued no complaint at the time about Mr Hanratty's conduct (despite having the benefit of legal advice). The Claimant was removed from site but as the Tribunal has found as a fact, the contract was not site specific and the Claimant had been removed from sites on previous occasions and had raised no complaint. There was no evidence to suggest that the conduct of the meeting or the decision to remove the Claimant from site could amount to a fundamental breach that entitled the Claimant to treat himself as dismissed. The Tribunal conclude on the balance of probabilities that the Claimant was not dismissed.

47. Although the ET1 referred to a claim for holiday pay, no evidence was produced to the Tribunal in support of this claim. This claim is therefore dismissed.

48. As it has been concluded that the Claimant was not dismissed, his claim for unfair dismissal and breach of contract are dismissed.

Employment Judge Sage
Date: 24 April 2019