EMPLOYMENT TRIBUNALS (SCOTLAND)

5 **Case No: S/4105216/2018**

Hearing Held at Edinburgh on 14 March 2019

Employment Judge: Mr A Kemp
10 **Members: Mrs Z van Zwanenberg**
Mr S Cardownie

Mr E Jarvie — **Claimant**
15 **In person**

Consortio Security Limited — **Respondent**
Represented by
20 **Mr P Warnes**
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Claims made by the Claimant are not successful and are dismissed.

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REASONS

Introduction

35 1. The Claim made was for automatic unfair dismissal under section 100 of the Employment Rights Act 1996 ("the Act") and for the failure to provide terms and conditions of employment under section 38 of the Employment Act 2002.

2. At the commencement of the hearing the Employment Judge explained the procedure that would be followed at the hearing, and the issues that arose. The Claimant appeared in person, and Mr Warnes appeared for the Respondent. Following the lunch break it was disclosed that the Claimant had been at a meeting at which the member Mr Cardownie, who had been a Councillor, had been present. Mr Cardownie had not recognised the Claimant from that. Neither party had any difficulty with that issue.

3. A Preliminary Hearing had been held before EJ McLeod on 10 September 2018, after which the Claimant had provided in answer to a series of questions set out in the Note following that hearing further particulars of his claim.

The evidence

4. The parties had each prepared a bundle of documents, most of which was spoken to in evidence. There was a large measure of duplication between the bundles. The Claimant gave evidence himself, and Mr Michael Stone gave evidence for the Respondent.

The issues

5. The issues that arose in the case were agreed to be:

   (i) What was the reason, or if more than one principal reason, for the dismissal of the Claimant?

   (ii) Was that reason either (a) that he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety, or (b) that in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work?

(iii) Had the Claimant been provided with a statement of terms and conditions of employment?

(iv) What remedy if any ought to be provided to the Claimant?

5 **The Facts**

6. The Tribunal found the following facts established:

7. The Claimant is Mr Eric Jarvie.

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8. He was employed by CE Security Limited with effect from 24 April 2017. When his employment commenced his then employers wrote to him with an offer of employment and a statement of terms under section 1 of the Act. The letter was dated 28 June 2017 but is in respect of that start date, and had 15 been sent prior to that start date. The Claimant received that letter and the attachment, but did not sign the statement of terms.

9. The Claimant's employment was transferred to the Respondent under the terms of the Transfer of Undertaking (Protection of Employment) Regulations 20 2006 in about June 2017.

10. The Claimant was employed as a security guard. He worked at the site of the former St James's Centre, in the centre of Edinburgh.

25 11. There was no safety representative or safety committee of the Respondent at that site.

12. The principal contractors for the site were Laing O'Rourke Services Ltd ("LOR"). The site is a large area, about the size of two football pitches, at 30 which a large shopping centre and office building was being demolished. Safety at the site was under the control of LOR.

13. The Respondent was responsible for the provision of security guards for the site. The Claimant was one of such guards.

14. There was CCTV at the site, under the control of LOR. It was viewed by their employees at office premises in England.

15. The site was one to which access was controlled. It had a perimeter fence. It had lighting along that perimeter fence. From time to time there were unauthorised intrusions into it by persons who were either seeking to steal property, or were not there for a lawful purpose. Some were under the influence of drink or other substances. Part of the role of the Claimant was to respond to such intrusions, and to seek to avoid injury being sustained by those persons.

16. The Respondent provided the Claimant with personal protective equipment (PPE) to wear which included a hard hat, and safety glasses. He was required to wear that equipment when working at the site.

17. On 12 March 2018 LOR informed the Respondent by email that CCTV footage had shown the Claimant smoking at a reception area of the site, and not wearing the PPE that was required, in particular a hard hat and safety glasses, over the weekend of 10 and 11 March 2018.

18. That PPE was required under a risk assessment that LOR had prepared for the site. The hard hat was required to avoid injury from falling objects. The safety glasses were required to avoid injury from moving debris or dust. The site itself was an area of potential danger in that it had been partly but not completely demolished, and about 75 piles had been made. The piles were holes for future foundations, about 20 metres in depth and about half a metre in diameter. The wall around an electricity sub-station had been demolished.

19. On 12 March 2018 the Respondent wrote to the Claimant to call him to a disciplinary hearing to address allegations of smoking and not wearing PPE over the weekend of 10 and 11 March. The letter had attached to it two stills from the CCTV recording. Those stills were of very poor quality, and did not identify the faces of the persons who were shown on them. There were two

individuals shown. The still was not taken in an area of a confined space, or during an attempt to gain access to an area restricted in size. The letter indicated that the issues were potentially ones of gross misconduct, that it was important that the Claimant attend the hearing, and that dismissal was a potential outcome.

20. Separately to that email, staff at LOR had informed the Respondent that they had viewed the CCTV footage from which the stills had been taken and that it showed the Claimant who was not wearing a hard hat or safety glasses. The Respondent accepted that assertion without themselves checking its accuracy or seeking to view the CCTV footage.

21. The Respondent believed that the person on the right of the two stills was the Claimant. The second person shown on those stills they believed was an employee of LOR.

22. There were then a series of emails sent by the Claimant in relation to those issues. The first was on 13 March 2018 and the last on 3 April 2018. He challenged the evidence against him, including the obtaining of evidence from CCTV which he argued was a breach of data protection law, and said in one of his emails of 13 March 2018 that he would not attend the disciplinary hearing set for 16 March 2018. He stated that he hoped that his explanation would negate the need for any further action by the Respondent. Mr Stone replied later that day to confirm that the hearing would go ahead in his absence should he fail to attend.

23. He thereafter sought to defer the disciplinary meeting to allow him to obtain union representation from his union, the GMB. The Respondent agreed to that. The Respondent also considered further the CCTV footage, and concluded that there was no case to answer in respect of the smoking allegation. It was not pursued.

24. On 15 March 2018 the Respondent emailed LOR and asked them to reconsider their position that the Claimant would not return to site pending an

investigation. (The email doing so had been redacted, and the author was not therefore known). That and related messages were not known to Mr Stone, or the Site Security Manager Mr Bill Armstrong.

5 25. On 15 March 2018 the Claimant made a subject access request to the Respondent seeking documents that included the CCTV footage. The Respondent did not provide the CCTV footage, which was held by LOR.

26. By letter dated 21 March 2018 the disciplinary hearing was fixed for 23 March 10 2018 but restricted to the allegation of not wearing PPE. The allegation as to smoking was not included.

27. The Claimant sought to raise a grievance on what he termed a health and safety matter by email of 21 March 2018. It referred to staff having decided 15 not to wear safety glasses at night as it restricted safety in dark conditions, and that the hard hat was not worn if entering confined spaces to search for an intruder.

28. By email dated 22 March 2018 Mr Stone informed him that the grievance 20 would be considered at the disciplinary hearing as it was treated as being "mitigation" for the alleged incidents. By that term, Mr Stone of the Respondent meant that the grievance was raised as a potential defence to the allegations.

25 29. The Claimant sent a further email including extracts from section 44 of the Employment Rights Act 1996.

30. In a number of the emails he sent, the Claimant stated that he would not attend the disciplinary hearing and set out his arguments as to why the 30 Respondent should not proceed.

31. The disciplinary hearing was re-arranged for 26 March 2018, then by letter dated 26 March 2018 for 30 March 2018 and finally for 3 April 2018 by email dated 27 March 2018. The letters repeated the allegation as to PPE, and that

it was important that the Claimant attend the hearing. It referred to dismissal as a potential outcome.

32. On 29 March 2018 the Claimant sent Mr Stone a further email referring to his grievance in relation to health and safety, and referring to Regulation 4 of the Personal Protective Equipment at Work Regulations 1992. He argued that his grievance was “the ideal and practicability of issuing safety glasses to staff expected to work outside and operate safely in the dark….”

33. By email sent a little after midnight on 3 April 2018 the Claimant stated again that he would not attend that disciplinary hearing.

34. The Claimant did not attend the disciplinary hearing on 3 April 2018. It proceeded in his absence. Mr Stone the Respondent’s HR Manager discussed matters with Mr Armstrong the Respondent’s Site Security Manager. The latter decided that the Claimant had failed to wear required PPE whilst on site. He dismissed the Claimant from employment on that date for that reason, which was the sole reason for the dismissal. Mr Stone drafted the letter of dismissal to confirm that that was the case.

35. The Claimant had been dismissed with effect from 3 April 2018. He had been paid one week’s pay in lieu of notice.

36. The Claimant’s net earnings were approximately £277 per week. He had not obtained new employment in the period up to the hearing on 14 March 2019, but it was likely that he would do so within two weeks of that date. He had not received relevant benefits during the period after termination.

The Law

37. Section 100 of the Employment Rights Act 1996 provides as follows:

“**100 Health and safety cases**

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

[(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),]

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to

his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them."

38. Where a Claimant does not have the service to claim unfair dismissal under section 92 of the Employment Rights Act 1996, as is the position for the Claimant, the burden of proof is on him to establish the facts from which a Tribunal can conclude that the sole or principal reason for the dismissal was one of those sets of circumstances that fall within section 100.

39. Tribunals do not expect employers to admit that they have acted in such a manner. They will however draw inferences where that is appropriate from primary facts that are established.

40. Section 1 of the Employment Rights Act 1996 provides that a statement of terms requires to be provided within 8 weeks of employment, and section 30 of the Employment Act 2002 provides that complaint may be made to a Tribunal in respect of a failure to provide a statement of terms where a claim under schedule 5 of that Act succeeds.

41. In order to succeed with a claim in respect of terms and conditions of employment, another claim must succeed. If the other claim falls, so does the claim in relation to terms. Subject to that however, the primary question is whether or not terms were in fact sent to the Claimant.

Submissions for Claimant

42. The Claimant argued that there had been serious safety issues at the site, and that he had been dismissed for raising such issues. He argued that the Respondent had not followed the proper procedures for the grievances he made. The Respondent had put both the disciplinary hearing and grievance hearing together. There was a safety aspect of the cameras, and they were looking at the employees not looking after them.

Submissions for Respondent

43. Mr Warnes argued that establishing a correlation did not establish causation. He stated that the Claimant had confirmed in answer to questions in cross-examination that the reason for dismissal, he believed, was third party pressure from LOR, and that there could be no claim under section 100 of the Act as had been alleged. The Claimant's complaints about process and fairness may have had some foundation if he had had the necessary service. The Respondent had sought to engage with him. They wanted to hear his side of the story. He did not appear. Had he done so and said that he had only taken his hard hat off for a minute that may have made a difference. The Respondent had gone beyond what was needed for someone without two years' service.

44. He also noted that the evidence was clear that the Claimant had received a statement of terms, which he now admitted, and that that had been subject to the transfer.

45. On remedy he did not press the point as to lack of mitigation, but argued that there should be limited if any future loss.

Discussion

46. The Tribunal was entirely satisfied that Mr Stone was a credible and reliable witness. He gave evidence in a clear and candid manner. He accepted that he could have handled matters more clearly. He was straightforward in explaining that Mr Armstrong who had signed the dismissal letter, which Mr Stone had drafted, had discussed matters with him and that the only reason for the dismissal was evidence that the Claimant had not worn PPE on site when that was required.

47. Mr Armstrong did not give evidence, but had left the Respondent's employment due to ill health. The Tribunal accepted as credible and reliable the evidence given by Mr Stone both in general and in respect of the specific point as to what had been the reason or reasons for dismissal.

48. The Claimant gave evidence in a respectful manner, but there were two fundamental difficulties with his evidence. The first is that although he had alleged that the reason for dismissal was his raising of health and safety issues, both initially and in the further particulars, in evidence his position was that the reason was third party pressure from LOR which he had discovered following a subject access request that had been answered after those particulars had been provided. They had been redacted to remove the identity of the author and recipient, but they had disclosed that LOR wished him removed from site. His position was that there had been two intruders at the site on the weekend prior to 12 March 2018, that managers at LOR had been informed by him as he had been required to do, that LOR were unhappy with that, and that he was made a scapegoat for the problems caused to LOR by the intrusions.

49. That was both entirely inconsistent with his claim, including the further particulars provided after the Preliminary Hearing held before EJ McLeod, but also destructive of the basis of his claim under section 100 of the Act. There

was no sufficient evidence to establish that the terms of that section were engaged.

50. The first aspect of that issue was whether the Claimant had brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. Reading his emails there were some references to health and safety, which included the question of safety glasses being worn at night, but in rather general terms. His emails were not always easy to follow. It is possible to read them as raising matters that he reasonably believed were potentially harmful to health or safety, but the Tribunal was entirely satisfied that his doing so had not been any part of the reason for the decision to dismiss. That decision had solely been because of the belief that he had not worn PPE on site when doing so was required, and that nothing written by the Claimant in his emails had been sufficient to exculpate or mitigate for that sufficiently to avoid dismissal. The Claimant not having attended at the disciplinary hearing had not disclosed to the Respondent the arguments over the hard hat and safety glasses that he made in his evidence.

51. The second aspect is that in circumstances of danger which he reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work. There was no evidence of the Claimant having left work or proposed to do so or not of returning to work save in relation to his not attending the disciplinary meeting itself. That decision was not however in circumstances of danger.

52. The second claim made was in respect of terms and conditions. At the commencement of the hearing he stated that he had not receive any such terms. In cross examination however he accepted that he had, but had not read them fully as he did not believe that they were legally binding. It was clear from that evidence that the letter sending such terms to him which the Respondent, the transferee following a transfer, had produced from the files

sent to them had indeed been sent at or about the time he commenced the employment.

53. It did appear to the Tribunal that some of the evidence that the Claimant gave was not relevant to the issues before it, and that the Claimant may not have had a full understanding of the law that applied to the claims that he was making. It was, the Tribunal considered, relevant to note that no health and safety issue had been raised by the Claimant for the 11 months or so of his employment until after he was informed of a disciplinary hearing.

54. He spoke in evidence to the effects on vision at night in wearing safety glasses. He also spoke about the difficulties in responding to intruders or other such issues if wearing a hard hat which did not have a chin strap. Essentially, his points were that the safety glasses were not suitable for night work, affected vision detrimentally, and themselves created a risk of injury or worse on a building site with dangers. He did not however communicate that clearly in the emails, and he did not attend the disciplinary hearing to make those comments. Had he done so, the indication from Mr Stone in evidence was that he may have received a written warning, but would not have been dismissed. But the essential point is that the reason or principal reason for the dismissal which did take place did not fall within section 100. In any event, from the limited view of the two still photographs, he was not at that point working in any confined or restricted space. The argument over the safety aspects of the hard hat and safety glasses did not therefore appear to the Tribunal to be directly relevant to the allegation that he had not worn PPE when required of him. That supported the view that the Tribunal formed that the Respondent had as its sole reason for dismissal the failure to wear PPE when required.

55. This is not to say that the Respondent handled matters perfectly. As Mr Stone conceded, they could have been clearer about how they were responding to the grievances that were intimated by email. They also appear to have proceeded on the basis of oral comments from LOR that the Claimant was shown in the CCTV, but sent the Claimant images which were at best

insufficient to establish that it showed the Claimant. They did not explain to him that they had been provided with detail from LOR that he was the person shown in them. They did not appear to have requested a copy of the CCTV footage or better still photographs from it.

56. But as indicated above, this was not a case of what may be described as "ordinary" unfair dismissal. It is not therefore directly relevant whether the ACAS Code of Practice on Disciplinary and Grievance Procedures was followed. Despite what the Claimant said in evidence, in any event that Code does not require a disciplinary hearing to be adjourned to allow a grievance to be addressed. At paragraph 46 it states that where an employee raises a grievance during a disciplinary process the disciplinary process "may" be suspended (not must) and that if the issues are related it may be appropriate to deal with both concurrently. That, essentially, is what the Respondent proposed in the present case. It is an issue to be considered. If the issue raised is inherently part of the disciplinary hearing, as was the case in the present matter, it is not a breach of that Code to proceed with the disciplinary hearing. The Tribunal did not consider that the failure to hold a grievance hearing, or to be as clear as the Respondent might have been about how the grievance would be dealt with, indicated that the Respondent did not have the failure to wear PPE as the sole reason for the decision to dismiss.

57. The Claimant alleged that his union, the GMB, had advised him not to attend the disciplinary hearing. The Tribunal was surprised at that evidence, which it did not accept. Where there was a letter for the hearing which stated that it could result in dismissal, the Tribunal would expect any union representative to advise a person to attend that hearing to challenge the allegations. Doing so by a series of emails, some of which were hard to understand in some respects, is no substitute for that.

58. In light of all of the evidence that it heard, the Tribunal was entirely satisfied that this was not a case that fell within section 100 of the Act. The reason for the dismissal was the belief by the Respondent that the Claimant had not worn PPE when he ought to have done. Mr Stone and Mr Armstrong had not

been aware of the emails from LOR. Had they been, they would have provided the reason for dismissal as that third party pressure. Not only did they not do so, but the person in the Respondent to whom the message from LOR was addressed argued in reply that the Claimant should not be removed from site. The Claimant acknowledged that the Respondent was seeking to assist him in doing so. That is not the behaviour of an employer who reacts to health and safety issues being raised by dismissing for doing so.

59. In so far as the Claim related to terms and conditions is concerned, the Claimant clearly did receive the same from the former employer, those terms are covered by the transfer to the Respondent, and there was no breach even if a separate cause of action existed to allow that point to be argued.

Conclusion

60. The Tribunal requires therefore to dismiss the Claim. The decision of the Tribunal is a unanimous one.

Employment Judge: Sandy Kemp
Date of Judgement: 20 March 2019
Entered in register: 22 March 2019
And copied to parties