EMPLOYMENT TRIBUNALS

Claimant: Mr J O Olaitan

Respondent: Select Service Partners UK Ltd

Heard at: London South **On: 18th May 2018**

Before: Employment Judge Tsamados

Representation
Claimant: Mr A McKenzie, Solicitor
Respondent: Ms R Levene of Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

The Claimant was not unfairly dismissed and his complaint is dismissed;

REASONS

Claims and issues

1. By a claim form received by the employment tribunal on 8th November 2017, the claimant has brought the single complaint of unfair dismissal. Whilst the case was coded by the tribunal administration as including a wages claim, this was in error. In its Response received on 12th January 2018, the respondent denies dismissing the claimant unfairly.

2. The respondent has helpfully provided a list of issues. The claimant's solicitor is in agreement with these issues. In essence, these are as follows:

    2.1 What is the potentially fair reason for the claimant's dismissal? The respondent avers that the claimant 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 (under section 98(2)(d) of the Employment Rights Act 1996 ("ERA") or for some other substantial reason of a kind such as to justify

the dismissal of an employee holding the position that the employee held (under section 98(1)(b) ERA;

2.2 If a potential fair reason is shown, does the respondent satisfy the test of reasonableness within section 98(4) ERA;

2.3 If the claimant was unfairly dismissed, should any award of compensation be reduced because of the claimant's failure to appeal and/or subject to a Polkey reduction.

3. It was agreed that the tribunal would deal with liability first and, if necessary and there was sufficient time, then deal with the remedy. The claimant is seeking compensation only.

Evidence

4. I heard evidence by way of witness statements and in oral testimony from the claimant and, on behalf the respondent, from Ms Beata Bhavsar, its Operations Support Manager, and from Ms Bogumila Pinkowska, its Clothing and Home Manager at Waterloo M&S Main. I was provided with a consolidated bundle of documents which was produced by the respondent. I refer to this as "R1" where necessary. I also had a copy of section 15 of the Immigration, Asylum & Nationality Act 2006 ("the 2006 Act"), an article from Practical Law UK entitled 'Prevention of illegal working and establishing the right to work in the UK", Baker v Abellio [2017] UKEAT/0250/16/LA and Klusova v LB Hounslow [2007] EWCA Civ 1127.

Findings of Fact

5. I set out below the findings of fact I consider relevant and necessary to determine the issues I am required to decide. I do not seek to set out each detail provided to me, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and I have borne it all in mind.

6. The claimant is Nigerian and was subject to immigration control in that he was granted time limited leave to remain in the United Kingdom ("UK") which he had renewed on a number of occasions. His last period of leave to remain expired on 16th July 2017.

7. What is at the heart of this case is the legal position of both an employee, but to the greater extent an employer, when employing staff subject to immigration control as to their right to live and work in the UK. With this in mind it is important to set out the essence of the legal position of the employer at the start of my findings.

8. It is unlawful to employ someone who does not have the right to reside and the appropriate right to work in the UK or who is working in breach of their conditions of stay. To comply with its obligations, an employer must carry out right to work checks on prospective employees prior to employment and follow-up checks on employees who have a time-limited permission to live

and work in the UK, to keep records of all such checks and not to employ anyone it knows or who has reasonable cause to believe is an illegal worker.

9. The regime applicable to the claimant falls under the 2006 Act, in particular section 15. If an employer is found to be in breach of these obligations it could be liable for a civil penalty of up to £20,000 for each individual and the fact of this sanction published on a pubic register.

10. An employer can avoid liability for the civil penalty if it can show that it complied with prescribed requirements in conducting checks and taking copies of certain documents from the employee and if necessary undertaking Home Office verification checks. This is called "the statutory excuse". In the claimant's case the certain documents are those set out in List B of the Home Office guidance ("An employer's guide to acceptable right to work documents" May 2015).

11. Prior to the events in question the claimant had provided the respondent with the necessary evidence of his right to work in the UK on the requisite occasions in the past. I was referred to R1 72 to 88 being copies of various documents relating to his nationality and ability to work in the UK which were provided to the respondent on the specific dates shown on those documents. These include his National Insurance Numbercard, his Nigeria Passport, a Home Office acknowledgement of application letter and his UK Residence Permits.

12. The claimant was employed by the respondent from April 2013 until his dismissal with effect from 24th July 2017. The respondent operates branded food outlets at travel hubs such as airports and train stations throughout the UK. This included two Marks & Spencer outlets at Waterloo train station in London.

13. The claimant was initially employed as a Team Member working at The Pastry Shop at King's Cross train station, but from 9th March 2017 was transferred to work at Marks &Spencer at platforms 6-7 of Waterloo train station, where he worked night shifts on Thursdays, Saturdays and Sundays from 23:00 to 07:00 hours. My understanding is that he was transferred because of problems caused to his eyesight as a result of the installation of a powerful light at Kings Cross and although the circumstances of his was not relevant to the events in question.

14. I was referred to the claimant's original offer of employment letter from the respondent at R1 27 to 28. This made clear at R1 28 that the offer of employment was subject to the claimant's ability to prove his right to work in the UK by reference, if required, to satisfactory evidence. It went on to state that if, following commencement of employment, he was unable to satisfactorily prove his right to work in the UK, the respondent reserved the right to withdraw his employment with immediate effect without notice or payment in lieu of notice.

15. In addition I was referred to the claimant's contract of employment at R1 29 to 34, which contains similar conditions to those in the offer letter at R1 29. The contract was signed by the claimant at the time and in oral evidence he

accepted that he understood quite clearly the obligations placed upon him and the impact on his employment if he failed in those obligations.

16. Whilst the contract of employment refers to the respondent's Disciplinary Procedure which could be found in the Staff Handbook, I was not provided with copies of either. I note that the respondent did not refer or rely on its Disciplinary Procedure in terms of the action taken against the claimant and refers solely to its Immigration Policy and general principles of a disciplinary procedure.

17. I was referred to the respondent's Immigration Policy dated April 2016 at R1 35 to 53. This contains the most up-to-date policy which the respondent follows as to its obligations to comply with the requisite legal requirements relating to immigration law and employment of staff. This document sets out clearly the process for the respondent's managers to follow in terms of checking and continuing to check its employees' ability to work lawfully in the UK. I was particularly referred to R1 38 section 1.2 which relates to the evidence required from employees hired between 29th February 2008 and 15th May 2014. This is the period in which the claimant was first employed and in turn refers to Appendix 5, List B which set out the types of evidence required (this information being taken from the Home Office guidance).

18. I also note that the policy sets out the process available to a manager, the documents to obtain and the way in which to seek to verify the employee's position using the Home Office Employment Checking Service ("ECS") at R1 42. ECS is available where a manager is reasonably satisfied that the employee had made an in-time application or appeal to vary or extend their leave to stay and work in the UK. However, in order to do so the manager would require evidence of an in-time application and a Home Office reference number.

19. I further note that the policy sets out the procedure by which to deal with non-compliance, where the employee has failed to provide acceptable documentation of the right to work during employment at R1 43. This sets out the need to hold an Investigation Meeting, the ability to suspend the employee with or without pay for as long as necessary to conduct any further investigations but for not more than 21 days and the possible need to hold a Disciplinary Hearing following investigation.

20. The policy also makes clear at R1 43-44 the obligations upon the Line Manager to report matters to HR and to hold an disciplinary hearing as soon as possible as well as the possible consequences in terms of their own continued employment and potential criminal proceedings against them should these obligations not be met.

21. In evidence, Ms Beata Bhavsar, the respondent's Operations Support Administrator, stated that all employees are issued with the Immigration Policy upon commencing employment and that part of her role was to carry out induction for new starters including this policy.

22. The claimant disputed that he had ever been issued with this policy in cross examination. However, his evidence was equivocal, and it did appear that

he simply disputed that he had been given the document by Ms Bhavsar or for that matter the respondent's other witness Ms Pinkowska (who would not have been involved in this process in any event).

23. However, his representative did not challenge receipt of the Immigration Policy in cross examination with Ms Bhavsar, the matter is not dealt with in his witness statement (which as I state later was surprisingly brief) and he did not query receipt during the course of the events in question when on a number of occasions mention is made of the policy (at R1 59, R1 61, R1 62 and R1 69. In addition, clear indications as to the importance of providing evidence of the right to work were contained in the offer letter and the contract of employment. On balance of probability I find that the claimant did receive the policy, albeit obviously not the version in the bundle which was issued in April 2016, at the commencement of his employment.

24. During June 2017, the respondent became aware that the claimant's residence permit was due to expire on 16th July 2017. This had the implication that from that date the claimant would not be able to continue to work lawfully UK without obtaining a further renewal of his leave to remain. As a result, the respondent anticipated that it would be in breach of the immigration rules and in particular section 15 of the 2006 Act.

25. The respondent and the claimant largely communicated by e-mail. This would appear to have been expedient given that managers were not necessarily working at the same site and at the same times as the claimant, who worked nights. Whilst the claimant complains in his evidence that the respondent should always have sent correspondence by post and failure to do so somehow made communication unlawful or invalid, he does not appear to have voiced this concern at the time and in any event communicated with the respondent by e-mail. In addition, he was able to receive and to send e-mails from his mobile phone.

26. On 26th June 2017, Ms Bhavsar sent an email letter to the claimant requesting further original legal documentation to confirm his immigration status in line with the respondent's Immigration Policy (R1 54). This was part of her duties. Ms Bhavsar is based at the respondent's Marks & Spencer Main outlet at Waterloo train station ("Waterloo Main M&S"). In particular, she requested documentation which would provide evidence of a further application to the Home Office for an extension of his leave to remain, specifically the application form, proof of postage and an acknowledgement letter from the Home Office as to receipt. The claimant was required to provide these documents no later than 15th July 2017.

27. On 13th July 2017, the claimant replied to Ms Bhavsar's e-mail stating that he had applied for his visa through solicitors and was awaiting a response from the Home Office by next month or more for a reference number. I would note, as becomes apparent later on, that the claimant's immigration solicitors had not sent off the application until 14th July 2017. To this e-mail he attached a copy of a handwritten note presumably written by his solicitor on the firm's compliment slip, setting out details the fees that he had paid to them including part payment of the Home Office application fee. His e-mail

concluded with the words "if need confirmation please email or ring the number from the receipt attached" (R1 55).

28. Ms Bhavsar advised the claimant by return of e-mail that same day that this documentation was insufficient proof of his visa application (R1 57). She again advised him of the documents which the respondent required as acceptable evidence of his application in line with the respondent's Immigration Policy. The claimant responded "It hiswill (sic) speak to my solicitor abo (sic)" (R1 57) although a further e-mail that day would appear to indicate that this was sent in error (R1 59).

29. On 14th July 2017, Ms Bhavsar attempted to telephone the claimant to discuss his e-mail. However, she was unable to get through to him. She therefor e-mailed the claimant that same day and informed him that the document he had sent was not what was required and that given his right to work expired on 16th July 2017, she needed him to send the required documents no later than Monday (15th July 2017), failing which he might not be able to continue working until he had done so (R1 58-59).

30. The respondent was prepared to allow claimant to continue working after 17th July 2017 on the basis that he would be able to prove he had made a further application when he attended his shift on the evening of 16th July. However, the claimant did not attend his scheduled shifts on Saturday 15th or Sunday 16th July 2017.

31. An Investigation Meeting was held on 20th July 2017. This was held by Mr Atal Sapand, a Team Leader, at 23:00 hours at Waterloo Main M&S. The notes of this meeting are at R1 60-61.

32. The background events leading up to that meeting are set out in the notes of the meeting. These indicate that the claimant had indicated to Ms Bhavsar that he would speak to his solicitor. They further indicate that HR had confirmed to Ms Bhavsar that the claimant could work his shifts on Saturday and Sunday, that he was meant to provide documents by Monday 17th July, but failed to do so. The notes continue that on 19th July 2017, Ms Radka Martanovicova, a Team Leader, had telephoned the claimant to find out the outcome of his conversation with his solicitor given that there had been no further response from him. The claimant told that her that his solicitor would not release the information because it was private. Ms Martanovicova explained that he could ask his solicitor to provide this information because it is his. The claimant responded that his solicitor will not do so and so the respondent would have to wait for the Home Office letter. Ms Martanovicova asked the claimant to come to the store for an official meeting and he replied that he knows he cannot work so there is no point in him attending.

33. Any dispute as to the contents of the meeting notes was not apparent until the claimant's cross examination. In this evidence, the claimant disputed whether the conversation had taken place with Ms Martanovicova and stated that in fact it was an e-mail discussion with Ms Bhavsar. He also stated that he had not declined to come into work, he did not attend work because he was not rostered to work.

34. The claimant's witness statement is very brief and does not deal with much and certainly does not raise any dispute as to these matters. I am surprised that his witness statement is so brief given that he has been represented throughout these proceedings. Further, any dispute as to these events was not put to the respondent's witnesses in cross examination. The claimant has not addressed the matter, which is referred to in the respondent's grounds of resistance, is referred to in the notes of the investigatory meeting which were sent to him at the time and are referred to within the respondent's witness statements. There are no e-mails that support his construction of events. There is no evidence that he was unaware that the meeting took place or indeed expressed any concern if he had not known about it.

35. However, given that the claimant has accepted that what is recorded as being a conversation with Ms Martanovicova is essentially correct, save for him declining to attend the meeting, I find that I find on balance of probability that he did have this conversation with his team leader on 19th July 2017 and did indeed decline to come to the meeting albeit because he was not required to be at work. I think it more likely than not that the claimant has perhaps confused or conflated events.

36. The investigatory meeting took place in the claimant's absence on HR advice. At that meeting, Mr Sapand took the decision to suspend the claimant without pay on the basis that he had failed to provide the requisite documentation which proved his right to work in the UK and in addition he scheduled the matter for a disciplinary hearing to be held on 24th July 2017 at 06:45 hours at Waterloo Main M&S (R1 61). This was in line with the respondent's Immigration Policy.

37. On 20th July 2017, the respondent emailed the minutes of the investigation meeting, notice of his suspension and notice of a disciplinary hearing scheduled for 24th July 2017 to the claimant (R1 64, 63 and 62).

38. The disciplinary letter at R1 62 sets out the allegations against the claimant: failure to provide the respondent with valid documentation confirming his right to work in the UK and failure to follow the Immigration Policy. The letter advised of the date, time and location of the meeting and as to the claimant's right of accompaniment. The letter further advised him that a possible outcome could be that of dismissal for gross misconduct.

39. On 24th July 2017 a disciplinary hearing was held with Ms Bogumila Pinkowska, the respondent's Clothing and Home Manager at Waterloo Main M&S, acting as disciplinary officer. The notes of that meeting are at R1 67-68. From the notes and from Ms Pinkowska's evidence it is apparent that the meeting commenced at 06:45 hours and was adjourned two minutes later because the claimant was not there, the assumption being that he was running late. The meeting was then reconvened 07:00 hours by which point Ms Pinkowska was aware that Mr Sapand had received an e-mail the previous night from claimant in which he explained that he was not in London, was unable to attend the meeting and asked that it could be rescheduled for 28th July 2017 (at R1 65). The meeting was then adjourned at 07.02 hours.

40. During the following three hours, Ms Pinkowska took advice from HR as to how to proceed, reconsidered the documentation and reached the view that

the disciplinary hearing should continue in the claimant's absence. She took into account the respondent's Immigration Policy, the length of time that the respondent had already allowed the claimant in which to provide evidence of his visa application and his response, the likelihood of the claimant being able to provide satisfactory evidence of his ongoing right to work in the UK in the future and the risk to the respondent in continuing to employ him. She also took into account that his right to work in the UK had now expired and he had been given 3 weeks in which to provide satisfactory evidence and had not done so. She concluded that it was reasonable in all the circumstances to terminate the claimant's employment, that it was impossible for the respondent to use the Home Office ESC system so as to verify the claimant's current immigration status because he had not provided the necessary documentation such as his application form, proof of when it was sent or a reference number.

41. Whilst it was clearly evident that she had not followed the respondent's Disciplinary Procedure in the sense that she had it in front of her and she was not able to state what it set out in it, it was clear that she had taken advice from HR who were more expert in such matters, she had followed the Immigration Policy (in particular at R1 43) and her evidence indicated that she understood the basic principles applicable in conducting disciplinary proceedings and she referred to the contents of the disciplinary invite letter setting out the process that was to be followed at the hearing.

42. On 25th July 2017, the respondent sent the claimant a letter by email which confirmed that he had been dismissed without notice with effect from 24th July 2017 for failure to provide valid right to work documents and for failure to follow the Immigration Policy. The letter also indicated that the claimant had the right of appeal within seven calendar days.

43. On the evening of 25th July 2017, the claimant hand-delivered a letter dated 21st July 2017 from his solicitors to his workplace. This letter is at R1 66. The claimant handed it to Mr Patel, the Deputy Manager running the shift at that time. The solicitors' letter confirmed their instruction to act, that an application for indefinite leave was sent to the Home Office on 14th July 2017. The letter asserted that the claimant had the right to work in the UK and continued to do so until the Home Office decided his case otherwise and that any purported attempt to terminate his employment would be deemed unlawful.

44. Ms Pinkowska did not see that letter at the time but was of the view that had she done so it would not have altered her decision to dismiss the claimant because it did not contain sufficient information. She made the point that of course the claimant could have appealed and used that letter as a basis on which to appeal.

45. The respondent had no further contact from the claimant until these commencement of these proceedings (presumably at the ACAS Early Conciliation stage). The claimant did not appeal against the decision to dismiss him and did not approach the respondent to provide any further evidence of his application to the Home Office or his ability to work in the UK. In evidence the claimant explained that the decision to dismiss him had been made, he got the dismissal letter late and so he saw no further point in

contacting the respondent or appealing against the decision. In any event he said he did not get a letter from the Home Office acknowledging his application until September 2017. I have to say that his approach does not sit well with his stated desire to get his old job back certainly at the time he issued his claim (R1 8).

46. The respondent did not believe it was its place to contact the claimant's solicitors to obtain further information. Ms Bhavsar stated that the claimant is their employee and the respondent dealt with its employees direct and it was not appropriate for them to contact third parties on behalf of employees. The respondent had made clear what the claimant needed to provide by way of documentation on several occasions and he had not done so. Given the solicitors' stated view that the application was private it is doubtful such an approach would have gleaned the documentation requested.

47. In evidence the claimant stated that he has since been granted indefinite leave to remain in the UK and therefore the right to work from 14th December 2017 onwards.

48. His representative, Mr McKenzie, stated that it was extremely difficult to get any response from the Home Office for many months after an application was made. Mr Turner, the respondent's HR manager who was present at the hearing stated that in his experience, the Home Office state that an acknowledgement of application letter containing a case number is sent out within 14 days. He explained that the ECS allow employers a period of 28 days grace to obtain a copy of that letter. However, he stated that it was not possible to approach ECS without a copy of the application. Both pieces of information were by way informal testimony and in effect were purely by way of information. However, Ms Bhavsar did say in evidence that in order to carry out an ECS verification check she needed to have the requisite proof of the application. Further, Ms Pinkowska said in evidence that the claimant had not provided the necessary documents which would have allowed her to carry out any further checks. The claimant stated that it took 3 months to get a response from the Home Office.

49. From his evidence I formed the view that the claimant felt that the obligation to obtain the necessary documentation about his application to renew his leave to remain in the UK was primarily the respondent's, that he did all he could and it was then up to them. I note that the application was not made until 14th July 2017 on a visa which was to expire on 16th July 2017. I further note that the handwritten complement slip was provided on 13th July 2017, ie before the date on which his solicitors had made the application to the Home Office. I also note that his solicitor's response that it could not provide a copy of the application and proof of postage because it was private was, if this is indeed what they said to the claimant, was both in error and frankly most unhelpful to him given that his job was at stake. It seems to me that if this is the case, his immigration solicitors have much to answer for as to why the claimant is at this hearing today. The claimant did not attend the suspension meeting and he did not attend the disciplinary meeting. He did not appeal or provide any further information to the respondent after the solicitors' letter dated 21st July 2017. I also note that the claimant was able to return to London to collect that letter from the solicitors on 25th July 2017 but not able to attend his disciplinary hearing on 24th July.

50. Overall, I find that the claimant did not reasonably engage in the process with his employers notwithstanding the seriousness of the matter and the potential effect on his continued employment. At one point he stated that he had always successfully renewed his leave to remain in the past and so he would do so in the future and that the respondent should have accepted this. This somewhat naïve view of what was at stake for the respondent if he failed to provide necessary proof in the very least of his application was very much misplaced.

Relevant Law

51. Section 98 (1), (2) and (4) ERA:

'(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,
(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.

(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.'

Conclusions

52. The first matter for me to consider is whether the respondent has shown a potentially fair reason for the claimant's dismissal. The respondent avers that the potentially fair reason is either that the claimant was prohibited by

statute from working in the UK under section 98(2)(d) ERA or that there was some other substantial reason ("SOSR") for his dismissal under section 98(1)(b).

53. Under section 98(2)(d) ERA, the respondent's position is that the claimant could not provide satisfactory evidence of his continued right to work in the UK after his leave to remain expired on 16th July 2017 and this was in breach of the 2006 Act and placed it in jeopardy under section 15 of that Act.

54. In Baker v Abellio London Ltd UKEAT/ 0250/16/LA the EAT found that section 15(3) of the 2006 Act does not impose an obligation on an employer to obtain documents from an employee to prove the right to work in the UK but simply provides the employer excusal from a penalty if it does.

55. Under section 98(1)(b) the respondent's position is that the claimant failed to provide the respondent with the necessary documentation to provide the respondent with or allow it to obtain a positive verification notice which would provide it with the statutory excuse from liability to pay the civil penalty under the 2006 Act.

56. Klusova v Hounslow London Borough Council [2007] EWCA Civ 1127 and the earlier case of Kelly v University of Southampton (2008) ICR 357, EAT illustrate the importance of establishing illegality if section 98(2)(d) ERA is to be relied upon. In both cases the employer put forward SOSR in the alternative. But at that time the statutory dismissal and disciplinary procedures were in place and because neither employer had followed those procedures the dismissals were automatically unfair. The statutory procedures, which were abolished by the Employment Act 2008, did not apply to statutory ban cases but did apply to SOSR dismissals. In Baker, the EAT also upheld the employment tribunal's alternative finding that, since the employer had genuinely believed that it was illegal to continue to employ the employee, the dismissal had been for SOSR. Of course whether such a dismissal was fair would depend on the reasonableness of the employer's belief.

57. With my findings and these matters in mind, I am of the view that the respondent has shown that the potentially fair reason for the claimant's dismissal is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

58. I then turned to consider whether this was a sufficient reason for the claimant's dismissal within section 98(4) ERA. This involves an examination of both the way in which the respondent dismissed the claimant (the process followed) and the reason for the dismissal (the substance).

59. Klusova indicates that a person lawfully in the UK under a limited right to remain and to undertake employment who makes a valid application to extend his or her leave to remain before it expires is permitted, by virtue of section 3C of the Immigration Act 1971, to continue in employment when the right to remain expires pending the determination of his or her application. However, this is not something that the respondent appears to have been aware of at the time and its enquiry was limited to its own Immigration Policy issued to managers in determining such issues and support from its HR

department. I have no doubt that whilst its belief was mistaken it was nevertheless genuine, although the reasonableness of this belief is still a matter for me to consider when considering fairness of the dismissal.

60. The respondent has a disciplinary procedure but I was not provided with a copy of it and it is clear that it was not expressly referred to by those involved in the investigatory process or dismissal. However, it was clear from the evidence that a semblance of a disciplinary procedure was followed in terms of advising the claimant of the matters under investigation, inviting him to an investigation meeting, subsequently notifying him of disciplinary allegations and the potential of dismissal for gross misconduct, inviting him to a disciplinary meeting at which he would be offered the chance to raise issues and defend himself, advising him of the right of accompaniment, notifying him of the outcome of the disciplinary outcome and offering him the right of appeal. Such matters must be carried out without unreasonable delay and of course the respondent had in mind that from 16th July 2017 onwards the claimant's leave to remain and right to work had expired and it was seeking sufficient evidence of his renewed application to make the necessary checks and had an eye its legal obligations. In the absence of sight of the respondent's own disciplinary procedure, I certainly find that the respondent had complied with the requirements of the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015) and that his dismissal was procedurally fair.

61. I then turned to the substance of the dismissal. The respondent was clearly aware of its obligations under the 2006 Act from its Immigration Policy. The managers involved had regard to the terms of that policy and had access to HR advice at all times. The claimant was aware of the ongoing obligation to provide satisfactory evidence of his right to work in the UK, having been told of this at the outset of his employment and having complied with the respondent's requirements in the past. I have found that he had been issued with the Immigration Policy. He was aware of the implications of not providing such evidence on his continued employment.

62. The claimant was asked to provide satisfactory documentary evidence that he had made an in-time application to the Home Office to renew his leave to remain and thereby his right to work in the UK by way of a copy of that application, proof of postage and a Home Office acknowledgement letter. The first two alone would have enabled the respondent to then approach the Home Office to verify his immigration status.

63. The claimant was unable to do so initially I can see because his immigration solicitors did not submit the application until 14th July 2017. Moreover, rather unreasonably and inexplicably, those solicitors refused to provide documentation on the basis that the application was "private". As I have stated this was most unhelpful to the claimant, it what he relates is accurate, particularly given what was at stake.

64. The compliments slip detailing payment made by the claimant to the solicitors was woefully unhelpful. Whilst the claimant told the respondent to contact his solicitors and whilst some employers might have done so, I do not find it unreasonable of the respondent not to have done so. As Ms Bhavsar stated, the respondent dealt with its own employee, the claimant had been asked to

provide documents and it was not the respondent's place to approach the claimant's solicitors. Moreover, Ms Martanovicova had advised the claimant that the information in the application form was his and he could instruct his solicitor to provide him with copies.

65. The letter from the solicitors dated 21st July 2017, given to the respondent on 25th July 2017, did confirm that an application had been made on 14th July 2017, but provided no evidence in support, in the form that the respondent required for Home Office purposes. Further, the letter rather highhandedly stated that the claimant had the right to work in the UK until his case was decided otherwise but offered no statutory or legal authority for this and went on to say that any purported attempt to terminate his employment would be "deemed unlawful". Had they given the claimant a copy of his own application or perhaps simply referred to section 3C of the Immigration Act 1971, then maybe matters would not have come before this tribunal.

66. As I have said I did find that the claimant was to a degree did not engage in this process notwithstanding its seriousness, although I accept that his solicitors were not assisting him fully either. However, the onus was on him to provide the necessary documentation. But that said, he did not attend the investigation meeting, does not appear to have pressed his solicitors further for documentation in support of his application and did not attend the disciplinary hearing, although he was able to return to London the day after that hearing to pick up the solicitors' letter dated 21st July 2017. Moreover, he did not appeal and made no further attempt to contact the respondent with further information as to his application as it progressed.

67. I accept that the respondent took reasonable steps to obtain the requisite documentation from the claimant as required by its Immigration Policy which in turn was based on immigration law and Home Office guidance as to documentation. I accept that the respondent reasonably formed the view that without this documentation it was not satisfied that the claimant had the right to work in the UK and that it had not protected its position with regard to the statutory excuse. I accept that in the absence of the claimant at the investigation meeting and satisfactory documentation, the respondent acted reasonably in suspending the claimant without pay pending a disciplinary hearing. I accept that the disciplinary hearing was correctly called within a reasonable time frame.

68. Whilst the respondent could have postponed the disciplinary hearing and continued to suspend the claimant who was not being paid for up to 21 days, I accept that Ms Pinkowska considered the position and took HR advice and her concern was the perilous position that this placed the respondent in given its statutory obligations, the actions of the claimant thus far and the likelihood that he would be able to provide anything further. Her actions were reasonable. In any event, had she waited, the letter of 21st July 2017 did not take matters any further forward.

69. I accept that the disciplinary hearing was reasonably conducted by Ms Pinkowska who with HR advise reasonably continued with the hearing in the claimant's absence. I find that she had all of the information that was before the investigation meeting and in line with the respondent's Immigration Policy reached a reasonable conclusion that the claimant had not provided

satisfactory evidence confirming is right to work in the UK and had not followed the policy.

70. In addition, I reminded myself that I must be careful not to substitute my own decision for that of the employer when applying the test of reasonableness. With this in mind I asked myself whether what occurred fell within the "band of reasonable responses" of a reasonable employer. In terms of the procedure and the dismissal itself, whilst not all employers would have proceeding with the disciplinary hearing in the claimant's absence or dismissed the claimant in these circumstances, I cannot say that all employers would have acted this way. Thus the process and dismissal fall within the band of reasonable responses.

71. I therefore find in all the circumstances that the claimant was not unfairly dismissed and I dismiss his claim.

_____

Employment Judge Tsamados
24th May 2018