



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

AND

Respondent

Mr Z Ali

OCS Group UK Limited

HELD AT Birmingham

ON

10th and 11th June 2019

EMPLOYMENT JUDGE Choudry

Representation:

For the claimant: In person

For the respondent: Mr J Heard (Counsel)

JUDGMENT

The claimant's claim for unfair dismissal fails and is dismissed.

REASONS

Background

1. The claimant brought a claim for unfair dismissal following the termination of his contract of employment by the respondent on 18th

August 2018 due to some other substantial reason namely, the suspension of the claimant's licence by the Security Industry Authority ("SIA") and his incarceration in prison.

2. The respondent is an outsourcing company, which provides facilities management and property-related services for a large portfolio of both public and private sector clients throughout the UK.

Evidence and documents

3. I heard evidence from Mr Lee Baugh (Group Security Project Manager) for the respondent and from the claimant and his wife. In addition, I was presented with a bundle of some 108 pages.
4. At the commencement of the hearing I sought confirmation from the parties as to whether the bundle was agreed. This was confirmed to me. Subsequently, during the course of the hearing additional documents were added to the bundle by both parties.

Issues

5. The issues for me to determine are as follows:

Unfair dismissal

- 5.1 Having regard to ss94-98 of the Employment Rights Act 1996 ("ERA"), was the Claimant's dismissal unfair?
- 5.2 Was he dismissed for a potentially fair reason; that is some other substantial reason – namely the claimant having his SIA licence suspended and his incarceration in prison? It is accepted that the respondent dismissed the claimant.
- 5.3 Did the respondent follow a fair procedure in dismissing the claimant?
- 5.4 Was the decision to dismiss within the range of reasonable responses?
- 5.5 If the tribunal determines that the dismissal was procedurally unfair, what difference, if any, would a fair procedure have made?
- 5.6 Did the claimant contribute to his dismissal?
- 5.7 If the respondent is found to have unfairly dismissed the claimant, has the claimant mitigated his losses, and to what extent?
- 5.8 Should any compensation be increased or reduced as a result of any failure to comply with the ACAS Code of Practice by either party.

Facts

6. I make the following findings of fact:
 - 6.1 The claimant commenced employment with the Respondent on 22nd May 2004 as a Security Officer. He was based at the NEC Birmingham. In order to carry out his role the claimant was required to have an SIA licence.
 - 6.2 The respondent is an outsourcing company, which provides facilities management and property related services for a large portfolio of both public and private sector clients throughout the UK.
 - 6.3 The respondent has been working with the NEC since 2012 and its current contract runs out in 2022.
 - 6.4 The contract with the NEC is a prestigious contract for the respondent with a value of approximately £18 million pounds in turnover.
 - 6.5 At the time of his dismissal the claimant was working on a part time basis – 2 days a week (Saturdays and Sundays) followed by 5 days off due to his childcare commitments. During his evidence the claimant accepted the possibility of increasing his hours when his personal circumstances changed but there was no firm agreement was reached.
 - 6.6 As a part of the claimant's role, he was required to have a licence from the SIA, which is the regulatory body for the security industry.
 - 6.7 On or around 13th June 2018, the claimant commenced, at his own request, a period of absence from work, which consisted of annual leave and unpaid absence until July 2018. There is a dispute between the parties as to the end date of this period of absence with the respondent indicating 13th July 2018 and the claimant indicating that his absence had been authorised until 24th July 2018. I am satisfied that this disagreement on the dates does not impact on the fairness of the decision to dismiss the claimant and, as such, I do not think it is necessary to make a finding either way.
 - 6.8 On or around 13th June 2018 the respondent received a letter from West Midlands Police informing it that the claimant had been arrested and charged with an allegation of kidnap. This letter from the police indicated that the claimant had been arrested on 8th June 2018, that he had appeared before the Birmingham Magistrates Court on 9th June 2018 and released on bail and that he would appear before Birmingham Crown Court on 6th July 2018.
 - 6.9 On 14th June 2018 the respondent was notified in an email from the SIA that the claimant's SIA licence had been suspended.
 - 6.10 Both the claimant's arrest and the suspension of his licence were brought to Mr Baugh's attention on or around 20th June 2018. As such, Mr Baugh was of the view that the claimant needed to be spoken to as soon as possible to discuss the allegations against

him. As the claimant was employed in a licensable role it would have been a criminal offence for the respondent to continue to employ the claimant as a Security Officer.

- 6.11 Accordingly, Mr Baugh sought advice from the respondent's HR team and then on 22nd June 2018 he wrote to the claimant to advise him that he had been placed on paid suspension due to allegations that he had (1) committed an act outside of work which was liable seriously to undermine the performance of his contract; and (2) his SIA licence had been suspended and, therefore, he was unable to remain in his existing role. The claimant was invited to a meeting on 3rd July 2018 to discuss the allegations against him and also to complete an alternative employment form so that suitable vacancies could be discussed.
- 6.12 On 29th June 2019, whilst at work, Mr Baugh was informed that the claimant's wife had arrived unexpectedly at the respondent's premises and had asked to speak to him. During his conversation with Mrs Ali, Mr Baugh was informed that the claimant was awaiting a plea hearing on 6th July 2018 and that she expected him to be released following this. Mr Baugh was also informed that the claimant was not on bail but was, in-fact, on remand in prison. Mrs Ali asked Mr Baugh to preserve the claimant's privacy during this time. Mr Baugh asked Mrs Ali to contact him following the hearing on 6th July 2018 as he needed to ensure that he followed the respondent's processes. He provided Mrs Ali with his telephone number in order to facilitate this. I accept the evidence of Mr Baugh that he was not provided with an alternative address for correspondence with the claimant at this meeting and that the address he used for sending the letter of 22nd June 2018 and subsequent letters was the address that the respondent had on its system for the claimant, which was the claimant's mother's address (1 Monk Road). In his evidence the claimant indicated that he visited his mother's address every day before his arrest.
- 6.13 On 4th July 2018 the respondent's employee relations team (ER Team) contacted Mr Baugh to ascertain whether the claimant had attended the meeting arranged for 3rd July 2018. Mr Baugh advised the ER Team that the claimant had not turned up for the meeting. However, in line with his commitment to Mrs Ali that he would try and keep the matter confidential Mr Baugh did not mention his conversation with Mrs Ali or the fact that the claimant was actually on remain in prison. As such, the ER Team advised Mr Baugh that the claimant could be placed on unpaid suspension as a result of the claimant's failure to attend the meeting without reason. However, Mr Baugh did not implement this advice straightaway. Instead, on 9th June 2019 Mr Baugh sent a text message to Mrs Ali requesting an up-date as he had not heard back from her following the hearing on 6th July 2018.
- 6.14 Mrs Ali responded by indicating that the hearing had been postponed and that she would be in touch with the claimant's

solicitor that day. Mr Baugh advised Mrs Ali that further letters would be sent to the claimant as he had not shown up at the last meeting and “*HR are asking lots of questions*”. Mrs Ali indicated that she would put the claimant’s solicitor in touch with HR so that “*it can be dealt with legally*”. As such, Mrs Ali was provided with the details of Karen Clement in HR in order to facilitate this contact. In her evidence Mrs Ali indicated that from her perspective she had “*passed the baton*” to Mr Ali’s solicitor to maintain contact with the respondent after 9th July 2018 as she had been too upset following her interactions with Mr Baugh on 29th June 2018 to continue to deal with him. In any event it was a very difficult time for her and her priority was her children.

- 6.15 On 11th July 2018 Mr Baugh gave instructions for the claimant’s pay to be suspended. On the same day Mr Baugh wrote to the claimant inviting him to attend a re-scheduled job search meeting on 17th July 2018. In his letter Mr Baugh made it clear that if the claimant failed to attend the hearing, the hearing could be progressed in his absence and that this could lead to the termination of his employment. When questioned as to why he had invited the claimant to a meeting when he knew that the claimant was in prison Mr Baugh indicated that, following his discussions with Mrs Ali, he thought that Mrs Ali would be liaising with the claimant and either she or the claimant’s solicitor would be in touch with the respondent to put forward representations on the claimant’s behalf.
- 6.16 On Monday 16th July 2018 Mr Baugh sent a text to Mrs Ali at 8.41am asking her to call him. Mrs Ali responded by indicating that she was at work and asked what Mr Baugh wanted to speak about. Mr Baugh replied by indicating that rumours were beginning to fly around about the claimant’s absence and he was struggling “*to keep a lid on this*”. Mrs Ali responded by indicating that the claimant had a right to confidentiality and as a manager it was Mr Baugh’s role to quash the rumours. Mr Baugh informed Mrs Ali that he was doing this but wanted to either Mrs Ali or the claimant’s solicitor to contact Karen Clement as another meeting had been arranged for the following day. Mrs Ali replied by indicating that all information had been passed to the claimant’s solicitor as the claimant was having a legal visit that week so he could discuss the matter with his solicitor himself. She indicated that the solicitor would be in touch. Mrs Ali did not question why a meeting had been arranged for the following day nor did she ask for it to be postponed.
- 6.17 In the event the claimant’s solicitor did not get in touch with the respondent nor did he or Mrs Ali attend the meeting arranged for 17th July 2018. As such, on 18th July 2018 Mr Baugh wrote to the claimant to indicate that following the claimant’s failure to attend the meetings scheduled for 3rd and 17th July 2018 to discuss alternative employment following the suspension of his SIA

licence, the respondent had not been able to find a suitable alternative role for him and, therefore, the respondent was left with no option but to terminate his employment on the grounds of Some Other Substantial Reason. For some reason the claimant was only given 4 weeks' notice when in-fact he was entitled to 12 weeks' statutory notice. The claimant was informed that his termination date would be 18th August 2018 and that the respondent would continue to look for alternative employment for the claimant during his notice period. The claimant was advised of his right of appeal.

- 6.18 In the event the claimant did not appeal the decision to dismiss him. Indeed, there was no contact from the claimant or his wife until 29th August 2018 when Mrs Ali emailed Karen Clement querying why the claimant had only been paid £40 that month. In her email Mrs Ali indicated that the claimant was querying why the respondent had not made contact with her as his next of kin as the claimant was not able to make contact himself and no correspondence had been received from the respondent. In her email Mrs Ali indicated she had been made aware by Mr Baugh, that the claimant had been suspended and Mrs Ali queried what impact this had on the claimant's pay. The first email, which Mrs Ali sent to the Karen Clement, had the incorrect email address but a second email was sent to the correct email address. When she did not receive a response to her email Mrs Ali sent a follow up email to Karen Clement on 10th September 2018. However, Mrs Ali made no other contact with Mr Baugh. The respondent's evidence is that the Karen Clement has no recollection of having received the emails from Mrs Ali.
- 6.19 No further contact was made by the claimant, nor Mrs Ali with the respondent until the early conciliation process was commenced in October 2018.
- 6.20 There is a dispute between the parties as to when the correspondence sent by the respondent to the claimant was received on behalf of the claimant. The claimant produced to the tribunal two original envelopes and letters which were addressed to him and delivered to his mother's address (1 Monk Road) on 12th July 2018 together with a track and trace record for 18th July 2018 (page 59f(1)) which was sent to him by the respondent as a part of a subject access request that he made of the respondent. The respondent accepts the document at page 59(f)(1) is genuine but does not accept the claimant's assertion that the track and trace record contained at page 59f(1) contains its letter of 11th July 2018 which is contained at page 57 of the bundle. The respondent has not, however, been able to present me with any evidence to rebut the claimant's assertions.
- 6.21 The claimant asserts that he was not aware of any of the correspondence sent by the respondent until 15th September 2018 when he was visited by his wife in prison as this was sent by the

respondent to 1 Monk Road, Birmingham B8 2TR which is the claimant's mother's address. Mrs Ali's evidence was that when she went to visit the claimant on 15th September 2019 she saw the claimant's brother Mal Ali who lived at 63 Monk Road. Mal Ali informed her that he had post for the claimant, which had been delivered to his mother's house. The claimant gave his wife permission to open these letters and indicated that he would call her later that evening to find out the contents of the letters. When the claimant rang his wife later that evening he discovered that these were the letters sent by Mr Baugh on 22nd June, 11th July and 18th July 2018. It was at this point that the claimant discovered that his employment had been terminated. Turning to the issue of when these letters were received I make the following findings:

- 6.21.1 the respondent sent a letter dated 22nd June 2018 which is the same as the letter contained at page 46 of the bundle save for the date and signatory. This was sent by Recorded Delivery under reference KS828125991GB. This letter was signed for by a member of the claimant's family on 12th July 2018 and confirms the claimant's suspension;
 - 6.21.2 the respondent's letter of 25th June 2018 also confirming the claimant's suspension which also included a form called "*Employee's Criteria for Alternative Employment*" sent by recorded delivery under reference KS716634861GB and was also signed for by a member of the claimant's family on 12th July 2018.
 - 6.21.3 the respondent's letter of 11th July 2018 inviting the claimant to a meeting on 17th July 2018 was sent by Recorded Delivery under reference number : KS824651087GB and was signed for by a member of the claimant's family on 18th July 2018.
 - 6.21.4 the respondent's letter of 18th July 2018 confirming the claimant's dismissal on the grounds of SOSR was also sent by Recorded Delivery under reference KS824652961 and was signed for by a member of the claimant's family on 25th July 2018.
- 6.22 The claimant's evidence was that he had lived at 1 Monk Road with his mother until December 2017 when he moved in with his wife at an address 3 miles away. The claimant asserts that he notified the respondent of his change of address but accepts that he continued to receive his pay slips to the 1 Monk Road during 2018. I am not satisfied on the evidence before me that the claimant did notify the respondent of the change in his address. I also note that the pay slips that the claimant has produced in respect of his employment following his dismissal (pages 96 to 108) also have 1 Monk Road as his home address. I also do not

accept the claimant's evidence that he was not aware of the contents of the letters from the respondent given the fact that they were signed for by members of his family in July 2018. However, even if the claimant is correct and he did not know about the respondent's invitation for him to attend a meeting until 15th September 2018 it is clear from the evidence that Mr Baugh informed the claimant's wife on 16th July 2018 that a meeting had been arranged for the following day. Mrs Ali did not express surprise about the meeting nor query its purpose. On the contrary her response was "*All information has been passed to the solicitor. Paddy [the claimant sic] is having a legal visit this week so he can discuss himself with the solicitor. The solicitor will be in touch*".

- 6.23 When asked why the claimant did not seek to appeal the decision to dismiss him when, as he says, he became aware of the respondent's decision to dismiss him on 15th September 2018 given the fact that the letter of dismissal indicated that he had 5 days from the date of receipt of the letter to appeal the claimant indicated that this was because he was still in prison and not in a position to appeal and even if he had appealed he was not in a position to carry out any work for the respondent due to his incarceration and believed he would have been disciplined for being absent without leave. The claimant also accepted that his freedom had been more important to him than work.
- 6.24 The claimant was released from prison on 22nd November 2018 after the Crown Prosecution Service determined that there was no longer a realistic prospect of prosecution.
- 6.25 The claimant asserts that he has been treated inconsistently compared to two other employees of the respondent – Employee A and Employee B. In his witness statement he describes feeling "directly discriminated" against in comparison to Employee A and Employee B. However, the claimant confirmed, inter alia, at a preliminary hearing (case management) on 20th May 2019 that he was not pursuing a claim for race discrimination or victimisation under the Equality Act 2010.
- 6.26 Employee A was arrested following an altercation at a club venue where he worked in a security role in addition to his role at the NEC. Employee A had his licence suspended. However, Employee A was released on bail and was not held on remand. Employee A was able to discuss his situation with the respondent and provide information in relation to his case in order to satisfy the respondent that he was not guilty of the charges against him. As such, the respondent was able to support him and find alternative employment for him. However, the claimant's situation was different to Employee A in that the claimant was on remand and the respondent did not receive any communication from him or on his behalf (except from the initial contact from his wife on 29th June) as to what was happening in relation to his case.

- 6.27 In relation to Employee B, he was arrested following allegations of rape by his wife. Once again Employee B was not on remand and he was able to explain his personal circumstances to the respondent and, in particular, that the allegations against him were borne out of a relationship breakdown and he was able to satisfy the respondent that he would not be found guilty at trial.
- 6.28 In contrast to both Employee A and Employee B the respondent was not able to properly discuss the claimant's case with either him or anyone on his behalf and therefore had to conduct an assessment of the claimant's case based upon the limited information provided by West Midlands Police (which suggested that the allegations against the claimant were extremely serious) and the information provided by his wife. The claimant alleges that Mr Baugh had pre-determined his guilt in respect of the criminal charges and/or his dismissal. I do not find any evidence to support this nor that there was a poor working relationship between the claimant and Mr Baugh.

Applicable law

7. Section 98 (1) Employment Rights Act 1996 provides that 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).*
- (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.*
8. Section 98(4) provides that 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 reasons shown by the employer) -
- (a) *depends on whether in the circumstances (including the size and administrative resources of the employers 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.*

9. The Tribunal must finally consider whether dismissal was a reasonable sanction. In determining whether the respondent's decision to dismiss is reasonable pursuant to Section 98(4) of the ERA, the Tribunal is assisted by the band of reasonable responses approach which is proved in the case of **British Leyland (UK) Limited -v- Smith [1981] IRLR 91**. It was stated that:-

“the correct test is:

was it reasonable for the Employer to dismiss [the Employee?]. If no reasonable Employer might reasonably have dismissed him, then the dismissal was unfair. But if a reasonable Employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all cases, there is a band of reasonable responses within which one Employer might reasonably take one view whereas another might reasonably take a different view”.

10. The Tribunal cannot substitute its own decision for that of the Respondent (affirmed by the Court of Appeal in **Sainsbury's Supermarkets Limited -v- Hit [2003] IRLR 23** even if it believed that the decision to dismiss was harsh in the circumstances. The dismissal will be fair unless the respondent's decision to dismiss was one, which no reasonable employer could have reached.
11. The case of **Polkey -v- A E Dayton Services Limited 1987 IRLR 503 HL** indicates that generally an employer will not have acted reasonably in treating a potentially fair reason as a sufficient reason for dismissal unless or until it has carried out certain procedural steps which are necessary, in the circumstances of that case, to justify the course of action taken. In applying the test of reasonableness in Section 98 (4) the Tribunal is not permitted to ask whether it would have made any difference to the outcome if the appropriate procedural steps had been taken, unless doing so would have been “futile”. Nevertheless, the **Polkey** issue will be relevant at the stage of assessing compensation. **Polkey** explains that any award of compensation may be nil if the Tribunal is satisfied that the Claimant would have been dismissed in any event. However, this process does not involve an “all or nothing” decision. If the Tribunal finds that there is any doubt as to whether or not the employee would have been dismissed, the **Polkey** element can be reflected by reducing the normal amount of compensation accordingly.
12. Tribunals are also obliged to take the provisions of the ACAS Code of Practice on Discipline and Grievance Procedures 2009 into account in that it sets out the basic requirements of fairness which are applicable in most cases of misconduct. In his submissions (see further below) Mr Heard pointed me to a number of authorities (including conflicting

authorities of the EAT) which considered whether the ACAS Code of Practice on Discipline and Grievance applied to dismissals on the basis of some other substantial reason.

13. Section 123(6) of the ERA states:

“where the Tribunal finds dismissal was to any extent the cause or contributed to by any action of the complainant, it shall reduce the amount of compensation by such proportion as it considers just and equitable having regard to that finding”.

Submissions

14. The claimant made no closing submissions.
15. Mr Heard made written submissions, which he talked me through.
16. Mr Heard submits that the claimant’s dismissal was a substantial reason and is a category of decisions to dismiss, which falls within the category of some other substantial reason. The claimant was in custody and unable to work and had his SIA licence suspended.
17. It is argued for the respondent that in order to retain the claimant then the respondent would have needed continual updates from the claimant or his wife about his position and in order to keep the claimant employed the claimant would have needed to be placed in some sort of alternative role.
18. Mr Heard argues that the claimant took a deliberate approach not to engage with the respondent and not to update it with regards of his ongoing situation. At no time did the claimant or someone on his behalf provide any information as to the claimant’s situation.
19. It is also argued that there was no inconsistent treatment of the claimant as Employee A and Employee B’s circumstances were materially different to the claimant including significantly the fact that neither Employee A nor Employee B were incarcerated and both were able to update the respondent of their situation.
20. Mr Heard submitted that there was no reasonable alternative other than dismissal and that dismissal was in the range of reasonable responses.
21. Furthermore, Mr Heard argues that there was a 100% chance of the claimant being dismissed in any event given that from the period of July to the claimant’s release in November would have been a period of just under five months and it would not have been able to keep the claimant employed for that period given that keeping the claimant employed in

an licensable role was a criminal offence subject to sanctions. In relation to alternative roles, this was something that would need to have been considered in conjunction with the claimant and at no time did the claimant indicate that he was able and wanted to undertake an alternative role. The claimant also failed to appeal his dismissal when the dismissal came to his attention. Had he done so the issue of alternative employment could have been explored by the respondent. Mr Heard argued that the claimant could have been dismissed fairly at some point in the future.

22. Mr Heard goes further and submits that the claimant contributed to his dismissal by taking a deliberate approach to not updating the respondent of his situation.

Conclusions

23. In reaching my conclusions I have considered all the evidence I have heard and considered the bundle in its entirety. I have also considered the submissions made.
24. I am satisfied that the reason for the claimant's dismissal was some other substantial reason of a kind to justify dismissal namely the loss of the claimant's SIA licence and his subsequent incarceration. I am therefore satisfied that the respondent had a potentially fair reason for dismissal under Section 98(2) of the Employment Rights Act 1996.
25. The first issue is whether the respondent followed a fair procedure. In this particular case, whether the respondent acted reasonably in dismissing the claimant in circumstances when he was in prison and unable to put forward representations on his behalf.
26. I was initially troubled by the fact that the respondent continued to write to the claimant after the claimant's wife informed Mr Baugh that he claimant was on remand in prison. However, I accept Mr Baugh's explanation that he thought that the claimant's wife or his solicitor would turn up to the arranged meetings to make representations on the claimant's behalf. As indicated above I am not satisfied that the claimant informed the respondent of his change of address. I also note that the letters sent by the respondent were signed for by members of the claimant's family. In the circumstances, it was reasonable for the respondent to write to him at his mother's address.
27. I also note that Mr Baugh tried to make contact with the claimant's wife on two occasions before his dismissal and was told that the claimant's solicitor would be in touch to provide an update to the respondent but no such contact was made. The claimant's own wife was dealing with

a difficult situation and her first priority was understandably her family as such she did not have the time or inclination to be involved in the process. In her mind she had "*passed the baton*" to the claimant's solicitor. Unfortunately, for the claimant his solicitor also did not make any contact and neither did the claimant.

28. I am satisfied on the evidence before me that both the claimant and his family were more focused on dealing with the consequences of his arrest and in securing his freedom and that remaining in contact with the respondent was not a high priority. Even though the respondent's wife was informed that a meeting had been arranged for 17th July 2018 no promised contact from the solicitor materialised. Indeed, no contact was made other than to query the claimant's pay. The claimant made no attempt to appeal his dismissal as freedom was more important to him than his work particularly as the claimant recognised that the respondent would not be able to give him his job back if he was unable to undertake any work due to his incarceration.
29. Given this continuing lack of communication by the claimant I conclude in all the circumstances that that dismissal was in the bands of reasonable responses open to the respondent.
30. I do not accept that the claimant has been treated inconsistently compared to other Employee A and Employee B and am satisfied that these circumstances were not truly comparable to the claimant for the reasons set out above.
31. I am satisfied on the information before me that a fair procedure has been followed by the respondent and that the dismissal is a fair and reasonable one taking into account equity and the substantive merits of the case. I do not accept the claimant's assertion that the decision to dismissed was pre-determined.
32. The claimant's complaint of unfair dismissal therefore fails and is dismissed.

Signed by _____ on 7th July 2019
Employment Judge

Judgment sent to Parties on

Case number: 1305492/2018
