RA

EMPLOYMENT TRIBUNALS

Claimant: **Mr A Ayinde**

Respondent: **Corps Security**

Heard at: **East London Hearing Centre**

On: **28 March 2019**

Before: **Employment Judge Prichard**

Representation

Claimant: Ms S Alyamani, LLB
(Free Representation Unit, Holborn)

Respondent: Mr N Bidnell-Edwards, counsel
(instructed by TL Thomas Ltd Solicitors, Hitchin)

JUDGMENT

1. It is the judgment of the Tribunal that the Claimant was fairly dismissed and his claim for unfair dismissal therefore fails and is dismissed.

2. The unspecified claim for arrears of pay has not been pursued at this hearing, and is dismissed.

REASONS

1. The claimant Abdel Ayinde lives in the Thamesmead area. He worked for Corps Security as a Security from 5 October 2015 to 6 August 2018 - nearly 3 years. He was dismissed with pay in lieu of notice.

2. Corps Security is a large security company employing some 3,200 employees in the UK. The majority of that number are security officers at the various sites they have. The site I have been concerned with in this case was a major client's - Wincanton Logistics. The site in Harlow specifically dealt with deliveries for IKEA. The Contract Manager for that contract at Harlow is Paul Tice. He was one of the

witnesses to give evidence here. His manager is Mr Paul Cloke - Senior Contract Manager who has not really featured in this account.

3. This is one of many cases that the tribunal has to hear in which the respondent is stating the claimant was dismissed for some other substantial reason under s.98 (2) Employment Rights Act - namely, a request by a third-party client for removal of a particular individual from their site.

4. The background to this is that the claimant has had an apparent problem with time-keeping. On the balance of the indirect evidence of this, and some direct, I have to accept that there is truth in it. The claimant's problems are not entirely of his own making. He sustained serious injuries in a motor accident some time ago and he still gets lower back pain as a result of it. It means he is unable to drive long distances such as it would be, from Thamesmead to Harlow, to attend work. He is reliant on public transport. That is not an easy journey, through Liverpool Street. It is on the Liverpool Street/Cambridge line. He has to get to Liverpool St from Thamesmead.

5. The claimant received a final written warning on 22 February 2018 and his appeal against that final written warning was refused. This arose from an event on 7/8 January 2018 when he was on a night shift. The respondent has a team of 4 security officers allocated to the Harlow site where only one officer attends at a time. It is not at the main security gate for transport with the barrier. It is for pedestrians. All people attending site must be searched on exit from the site.

6. According to the respondent's agreement with the client. The site must never be left unmanned. Somebody must be there on shift for the full 12 hours. The shifts are from 7pm to 7am and 7am to 7pm. This depot is a 24/7 operation. It will be immediately apparent that problems with time keeping impacted on the team, particularly substantial problems - 30 minutes to one hour late. They work 4 shifts on and 4 off, usually in pairs. The impact would be greater if it came at the end of a 4 on, when a member of a new pair was taking over.

7. On the date in question, the claimant was late reporting for duty because of track repairs on the Cambridge line. Which had been a problem from October 2017 and continued to be a problem until April 2018. The claimant attended Liverpool St and train after train was cancelled. It was beyond his control. He did not arrive at site until 8pm to relieve his colleague. He spoke to Mr Tice on this occasion. He had also reported he was running late to the Glasgow Control Centre. Mr Tice told him that he would have to now stay until 8am, an hour later and do the twelve-hour shift so that his colleague could report later for duty than the normal 7am because he had only been relieved of duty at 8pm instead of 7pm.

8. It seemed that his partner colleague therefore later did an 11-hour shift. The twenty-four hours would normalise itself and it could get back to the 7am to 7pm shift routine. I understand that.

9. The claimant was disciplined for this. Notwithstanding that he had an agreement from Ben (one of the managers in Wincanton). He said he also had an

agreement from Mr Tom Pape (Senior Manager of the depot), signed in writing.

10. I accept Mr Tice's evidence that the claimant did not telephone him, Mr Tice, contrary to what the claimant told the tribunal, to say who was going to cover the duty if he left at 7am. When he spoke to Mr Tice on the evening of the 7th, he had stated that he would not work until 8am, as would it affect his return journey. He said that he would try and make some arrangement. Mr Tice said that he should telephone and inform him, Mr Tice, what arrangements he had made.

11. The claimant states Mr Tice was abusive to him. But as he described it, what Mr Tice said was that the claimant was habitually late, and his colleagues were fed up with him. Mr Tice accepts that he did say that to the claimant, which does not seem altogether surprising. This was just one incident but Mr Tice had the impression that it was habitual, and that his colleagues had been moaning about it.

12. The claimant was suspended from duty. Then he was given a final written warning. At the time he commenced a period of sick leave with back pain and following sick leave he took a period of annual leave. Some of which was abroad.

13. Come May 2018, he was talking about returning to duty. In the meantime, Mr Tice had routine monthly meetings with the clients. The question of the claimant's return had not yet come up because he had not previously said he would return to work. It was over this time that he was appealing unsuccessfully against his final written warning as well.

14. When the time came for the claimant to return, it appears that Mr Pape decided that he really did not want the claimant back. In the 5 months that he had been off, the site was running better, and morale was higher amongst the security team. He did not want to go back to how it had been before. As a result of that statement, Mr Tice had a duty to get that in writing and that happened in an email dated 6 June, as follows:

> "On the back of our meeting I am writing to advise that I am not happy for Kenny (the applicant) to be returning to site. His timekeeping is poor at best and seems to be having a negative effect on the other guards. I have previously raised a number of concerns about Kenny prior to your time looking after the site. Where he would go missing from his post, sleep in the cabin when actually there, and generally not show the behaviours expected from a security guard on site. If there is anything you can do to support this as the team also seem to be working together far better than when Kenny was part of it".

15. This is an event that happens relatively frequently for the respondent with individual security officers. They have a written procedure for managers on how to deal with this situation which involves, as Ms Alyamani rightly argued, two processes. First is to re-visit the client to ask if there is any way that they would accept them back on any terms. The second is to consider redeployment. As the respondent is a large security company the prospects for redeployment to another client's site are usually reasonably good.

16. There was a meeting between the claimant and Mr Tice. On 20 June, Mr Tice emailed Mr Pape again not with much hope, stating: -

> "Part of this process is to contact you before we have a second/ final meeting with him to ask if you are willing to reconsider your decision to have him removed from site".

The response 21 June was: -

> "Hi Paul, due to the number of issues I wouldn't be happy with Kenny returning so, I wouldn't consider reversing the decision. Thanks, Tom".

17. As this stage Mr Tice forwarded the email to the second witness I heard from, Mr Akram Mouanja, who is another Contract Manager. He reports to the last witness I heard from who is Mr Mark Johnson, who is the Senior Contract Manager. Mr Mouanja has nothing to do with this Wincanton site. We have established that the client had been consulted and re-consulted about the claimant's removal from site.

18. Throughout, the claimant's stance has been that he simply does not accept that Mr Tom Pape would spontaneously have raised this complaint. He suggested in evidence at this hearing that he might have been pressured by Corps Security management to express such view which would suit Corps' agenda. He stated that he got on very well with Tom Pape. He stated Tom Pape had always commended him and his work on site, and this seems true. But if one reads the emails carefully, the people who were having issues with the claimant were the other security guards because the claimant's time-keeping only affected them. Wincanton's site was never left unmanned. There was little criticism of what the claimant did when he was on site, other than the above allusion to sleeping in the cabin, and wandering off.

19. Mr Akram Mouanja looked into suitable vacancies. For some reason, I have seen the list of vacancies and the first three which look extremely attractive - London EC1, London SE1, and another one the city. They seem to have evaporated. None of the managers could tell what had happened to those rather better paid roles - Front of House Commissioner, Front of House Concierge, and Patrol Supervisor role. Nobody here knew the first thing about them, which was not very convincing evidence.

20. Apparently, there was a role for Security Officer in Harlow. Which looks like it was the vacancy created by the claimant's removal from site. I cannot make any finding on that because it was not put to any of the witnesses, but was only raised at the submission state when it was too late.

21. The Security Officer role which has been mentioned was the only one on the table at the time. It seems, it was the only one at any stage of the process and that was as a Relief Security Officer at Thurrock, Purfleet and Harlow.

22. The claimant had started work in 2015 and worked for over a year as a Relief Security Officer. There is dispute as to how that came to an end but he moved from there into the Harlow role. He stated he knew this role. It involved going to faraway places which, in view of the public transport, was not good for the claimant. He said he even had to go to Brighton at one stage. I can understand that he would not want to revert to such a role. He liked working in Harlow, and got on well, he considered. It appears that his colleagues did not see it that way.

23. There was a second meeting to consider redeployment to an alternative role as nothing else seem to be on the table at this stage. Mr Mouanja was unable to conduct that meeting, and therefore asked his manager Mark Johnson to take the meeting for him. Mr Johnson was therefore the manager who made the final decision to dismiss the claimant. He stated and has stated throughout that the claimant told him at that meeting that he already had a job. It only came out, literally at this tribunal hearing, that the minutes are ambiguous on this point.

24. Mark Johnson asked about the core job opportunities which were given to the claimant at the first meeting and whether he was interested in any of them. The claimant argued that he was not prepared to discuss any jobs option since he "had a job", apparently referring to his job there at Harlow which had been wrongfully taken from him. Mr Johnson did not make any further enquiries apparently. He said he got no information, but he did not seek any information either. He got the impression that the claimant was then working elsewhere.

25. I consider one of the most natural readings of the minutes, given the claimant's stance, was that Tom Pace was not really asking him to be removed from site and therefore he had a job at Harlow already and had never truly lost it. When this was put to the claimant unfortunately he completely missed the point of the questioning from the judge, the respondent's counsel, and from his own representative. All we are left with is his general assertion that the minutes are "inaccurate". Although, he has nothing against the note taker or with Mr Johnson personally. They were not in the same section of the respondent company, and did not come across each other often.

26. Mr Johnson wrote a letter of termination. "Wrote" may be putting it too strongly because it is by and large a lengthy template, provided on the document centre for managers. I suspect that the words "it is with great regret" are probably part of that template. Nonetheless, it was unsurprising outcome given that there was only one job on the table at the time. That itself has not been meaningfully or effectively challenged at this hearing. I need to accept that as the evidence notwithstanding the rather misleading and tantalising list of vacancies that was printed off on 20 June 2018.

27. At the same time as he received this letter on 7 August, the claimant also received his P45. This seems to have given a mixed message. On the one hand, the letter states that he got a right of appeal against the decision within five working days. On the other hand, he got his P45. There is nothing wrong that intrinsically. The respondent had closed the payroll account. That is all a P45 means. The claimant thought it negated his right of appeal and therefore did not appeal. He could and should have asked about this. The reason the P45 was issued then was because the respondent understood him to be working elsewhere and thought he might be demanding it. Otherwise he would have had to pay emergency tax in the new job, at a high rate, unnecessarily.

28. The claimant was not working elsewhere. Apparently, he is still not working. I did not need to go into this in any detail because this is only a hearing for liability, plus *Polkey*, plus contributory conduct. That is the evidence in the case.

29. I was not very impressed with the respondent's management overview of the process, and overview of the information which seems to have come from different sources. There was no explanation for the vacancies list, with the disappearing senior vacancies that nobody could tell me anything about.

30. I did take evidence from Mr Johnson, answering my direct questioning. He said he had consulted Paul Cloke, and other Senior Contract Managers, Glen Brown and Jimmy Flynn - two other managers who, like him oversee the London contracts. Apparently, they told him orally that they had nothing in their sections which they were aware of.

31. Unfortunately for the claimant. I cannot see there has been any serious challenge to the situation that presented itself to Mr Johnson. In her submission, Ms Alyamani ingeniously argued that actually this may be a conduct dismissal and therefore the respondent has failed to prove the reason for dismissal they set out to prove.

32. I found that it was not. I have no doubt that this was a third-party request / some other substantial reason dismissal. The context was the claimant's conduct, bad timekeeping, and possibly sleeping on duty. But these were not the reason for the dismissal by the employer. None of these were the subject of disciplinary charges. It was information that was the basis on which Mr Pape decided that he would ask for the claimant to be removed from site. The only thing that was subject to a proper disciplinary process was the late arrival and early departure on 7/8 January 2018. That had resulted in the final written warning. That did not feature in this dismissal, so far as I can see.

33. Bizarrely in his statement, the claimant states that he had a good disciplinary record at the Harlow site. It seems that our terms of reference are not the same for the meaning of what a "good disciplinary record" actually means. I think he is relying principally on Tom Pape's apparent approval of him. Their relationship seems to have been good enough.

34. It is an invidious situation for a senior manager of a client to be responsible for a process that leads to a man losing a job in another company because that is what it is. That is why an amount of confidentiality is observed. For instance, Mr Pape was not happy for his email to be given to the claimant. The respondent honoured that and said that there had been a removal request but Mr Johnson, to his credit went further, took advice from senior management and HR who told him that he could read aloud the words of the email but that he was not to give the claimant a copy or to forward it to the claimant. It has been disclosed in these tribunal proceedings, as it always had to be. It may be confidential in context of a workplace disciplinary proceedings whereas it is not in these judicial proceedings.

35. The claimant seemed to have a different view of his relationships there than other people had. His colleagues, not Wincanton, were personally impacted by his poor timekeeping. Most of the colleagues had to make up for it, when it occurred.

36. The claimant's evidence in other ways was bizarre but I can overall see a logic to it. I consider that when he said that he had a job he meant he had a job at the Harlow site and that there was no good reason for him to be removed from that site because he did not accept that Tom Pape genuinely did not want him there. That remains his belief today. That was very evident from his impassioned evidence to the tribunal. However, I accept that the respondent's case that there was a genuine problem with time-keeping.

37. I was helpfully referred to the most modern example of caselaw on this type of dismissal - *Henderson v Connect (South Tyneside) Ltd* IRLR [2010], 466, EAT - Underhill P. At Para 16 he stated: -

> "Cases of this kind are not very comfortable for an Employment Tribunal. Nevertheless, it has long been recognised that the fact that the client who procures directly or indirectly the dismissal of an employee, may have acted unfairly and the employee has thus suffered an injustice. It does not mean that the dismissal is unfair within the meaning of the statute. That is because the focus of s.98 is squarely on the question of whether it was reasonable for the employer to dismiss. There is no secondary liability".

38. Although, that is not the case put on behalf of the claimant who says that actually in reality Tom Pape was his ally but somehow has been pressured by Corps Security management to bring it about. I do not accept that analysis at all. In fact, the majority of the complaints seemed to come from the claimant's colleagues. Apart from the sleeping allegation which a colleague would not have been in a position to see because they were not there at the same time, in this shift system.

39. The upshot of it is that, I consider, that this was within the range of reasonable responses - eminently within the range of reasonable responses

40. . That passage from *Henderson* indicates that the respondent need not demonstrate that they are about to jeopardise the whole commercial contract with their client on account of this one guard. The client merely seems to have to state a reasoned position on the claimant's continued engagement.

41. In any case, an employer is going to want to examine the client's reasoning. If only, to see that it is not infected with unlawful discrimination, for instance. There may be such cases. These are people who are not recruited by the client. Nonetheless I consider the respondent did have a proper reason which was a genuine client request to remove. I cannot see at the time what else they could have done given as I accept, that there was only one alternative role on offer. It would have involved a lot of traveling, and the claimant had done it before. It would have been a backward step for the same money.

42. There are parts of the respondent's process that one can criticise. Some of the templates were inappropriate. Talking of red circling a salary which seems to be the lowest pay rate in the company is meaningless. It was in the template and just left there. If there is a moral to the story, it may be to read these templates more carefully and to make sure that each is truly appropriate to the case in question and to write

more bespoke information. That is just an incidental comment on management style and process. It does not actually affect the substantive decision I have made on this case.

43. The reason for the dismissal was a third-party request. That was reasonably believed to be a good reason for dismissal. It is a reason within s.98 (2) of the Employment Rights Act 1996. Under s.98 (4) the respondent handled it reasonably and fairly.

Employment Judge

Date : 19 August 2019