EMPLOYMENT TRIBUNALS

Claimant: Mr A E Lagha

Respondent: Smart Systems Limited

Heard at: Bristol **On:** 23 September 2019

Before: Employment Judge O'Rourke
Members: Mr Howard
Ms Luscombe-Watts

Representation:

Claimant: In Person
Respondent: Mr Roberts - counsel

REASONS

(having been requested subject to Rule 62(3) of the Tribunal's Rules of Procedure 2013)

Background and Issues

1. The Claimant was employed as a design and manufacturing engineer by the Respondent, for approximately twenty months, until his dismissal, for alleged gross misconduct, with effect 23 May 2018.

2. There have been two case management hearings in this matter, on 31 October 2018 and 28 May 2019, at which it was agreed that the issues, as to automatic unfair dismissal on health and safety grounds, were, applying s.100(1)(e) of the Employment Rights Act 1996:

    a. Was the reason, or if more than one, the principal reason for the Claimant's dismissal that, in circumstances of danger which the Claimant reasonably believed to be serious and imminent, he took appropriate steps to protect himself (namely, by refusing to work at a particular machine, unless trained to do so).

b. In this respect, the burden of proof is on the Claimant.

3. We discussed the following preliminary matters:

    a. The Claimant brought along additional documents which he said were mainly emails, some of which he said had not been included in the joint bundle. He was unable to say which those documents were, but agreed that they related to correspondence between him and the Respondent solicitors, post the bringing of this claim. Therefore, on the basis that the Claimant had had ample opportunity to consider the contents of the bundle prior to this Hearing, but had failed to do so and in any event that the emails seemed unlikely to be relevant to the events leading up to his dismissal, we refused their inclusion, with which the Claimant did not dissent.

    b. The Claimant had only provided his witness statement today, despite having had the Respondent's statement for some time now. He said that he had been out of the Country for a period and was now, in UK, homeless and had being trying to obtain legal advice and could not, therefore, provide it sooner. While the Respondent objected to its late disclosure and its inclusion of privileged material, they agreed, nonetheless, to proceed with this Hearing.

<u>The Law</u>

4. Section 100(1)(e) ERA, as referred to above.

5. Mr Roberts referred us to the case of **<u>Oudahar v Esporta Group Ltd</u> [2011] UKEAT IRLR 730**, as to the correct sequencing of applying the criteria set out in s.100(1)(e).

<u>The Facts</u>

6. We heard evidence from the Claimant and on behalf of the Respondent from Mr Bill Jeffrey, the Claimant's line manager, who dismissed him.

7. A non-contentious sequence of relevant events is as follows:

    a. In or about March 2018, a project arose called the '*door line programming and automation'* project (shorthand 'the door project'). Either at the Respondent's or the Claimant's suggestion, the Claimant became involved in this project.

    b. Essentially, he was asked to produce a programme that would in turn, produce a sample door on a machine called Biesse.

    c. On 4 May 2018, Mr Jeffrey emailed the Claimant [71], saying that the sample would be reviewed on 8 May and '*after which I will give you five more patterns to do'* and that '*if everyone is pleased with the improvements in time and quality, I will then review your salary.'* The

Claimant replied the same day, stating '*I can do three. It is a very demanding job'*.. '*I've earned these skills through learning of engineering for a long time, where I had to pay money for my studies and time, so I would prefer to make it clear that the pay review, so it's obvious, as (£35,000), as fair treatment, reward and pay for the wide range of skills I'm offering the company.'*

d. On 17 May 2018, the Claimant attended a meeting with Mr Jeffrey and several other managers. There is a dispute as to what was said at that meeting, with Mr Jeffrey stating that the Claimant several times demanded a pay rise, before completing any more samples. The Claimant agreed that he did ask for a pay rise, but also coupled that with a request for training. The meeting ended inconclusively.

e. The Claimant did not complete certainly the five requested samples and Mr Jeffrey said that he viewed that failure as '*a refusal to carry out duties or reasonable instructions'*.

f. Although the date is disputed, it is agreed that at some point thereafter (Mr Jeffrey says 23 May), the Claimant was summarily dismissed, at a short, unminuted meeting. The letter of dismissal, dated 24 May [76] confirmed the dismissal for refusal to carry out duties for which he was employed. On the same date, Mr Jeffrey typed a summary note, in relation to the dismissal [75].

g. The Claimant appealed against that decision, by letter of 24 May [77], simply requesting an appeal hearing, '*as the dismissal was unfair'*.

h. An appeal hearing was held on 5 June [notes 79-80], by a Mr Morris, who upheld the decision to dismiss [letter 81].

8. Applying **<u>Oudahar</u>**, the questions we must consider, are as follows:

   a. Were there circumstances of danger which the Claimant reasonably believed to be serious and imminent? In that respect, the question is as to whether or not, as asserted by the Claimant, he had been instructed by Mr Jeffrey, to personally operate the mechanism of the Biesse machine (as distinct from its programming computer), for which he said he had not been trained and feared injury as a consequence.

   b. Did the Claimant take appropriate action to protect himself from danger?

   c. If that was the case, was it the reason or principal reason for his dismissal?

9. <u>Credibility</u>. In a case such as this, particularly one without much supporting documentation, our findings at to which oral evidence we prefer are crucial. In this respect, we prefer the evidence of Mr Jeffrey, for the following reasons:

a. We considered the Claimant's repeated assertions that he had not, at the appeal hearing, frequently referred to pay rises, despite such references being recorded in the notes, as not being credible. He had, on several previous occasions, in writing, disputed his pay level and it seems unlikely that he would not have raised it in the appeal. It seemed to us that he incorrectly perceived the reference to such requests as a criticism – as he said, '*it's no crime'*. However, because of that perception on his part, he therefore, it appeared to us, considered that he had no choice but to deny all such references, despite all the evidence to the contrary. We also consider that and his refusal to accept that his use of the phrase '*reward*' referred to pay, when all the evidence indicated that was his main concern, untruthful on his part.

b. Similarly, despite him stating, for the first time that the notes were fabricated, we find it very unlikely (as quite an unusual reference) for the Respondent to record that he had referred to a friend of the Claimant needing to be paid to assist him with the work. We consider his reference to the notes being fabricated as an attempt to escape the consequences of their contents and reflects poorly on his credibility.

c. In contrast, Mr Jeffrey gave straightforward evidence and was not afraid to admit error, or correct his evidence. He readily admitted little knowledge of employment law, stating, contrary to the Claimant's assertions that he had referred in the disciplinary hearing to the fact that the Claimant had less than two years' service, and therefore 'no rights' that in fact, he thought such qualifying period was six months, which evidence we accept. His evidence was not shaken in cross-examination.

10. Instructions to Use the Biesse Machine. We heard entirely contradictory evidence on this point: the Claimant said that he had been directly, verbally instructed by Mr Jeffrey to operate the machine (as opposed to the computer), by feeding in metal sheets into it, to create the samples and that he refused because he was not trained to do so and feared injury. Mr Jeffrey denied any such instruction, stating that the Claimant had only been told to programme the machine, but that there a full-time machine operator available to operate it. Mr Jeffrey agreed that the Claimant had, on several occasions, asked for further training, but said that that was in relation to programming, with the purpose of furthering the Claimant's career. He said it made no sense for the Company to train the Claimant to do a lower-level job and in respect of the programming training that the Claimant did not need any such further training to do his job, based on the extensive experience and education shown in his CV. We find as a fact that the Claimant was not instructed to operate the machine and therefore did not need training in respect of such operation, for the following reasons:

a. Our views as to his credibility.

b. Because he seemed completely unaware of what safety equipment might be necessary to operate it.

c. Because at no point in the disciplinary or appeal process did he refer to either being instructed to operate the machine, or to any danger or risk he may suffer as a consequence.

d. He was aware of the Respondent's grievance procedure [59], contained in his contract and while he was perfectly capable of putting his concerns in writing (as evidenced by emails around the time), he failed to take that opportunity.

11. Conclusion. On that basis, therefore, considering that the burden of proof is on the Claimant, we find that the Claim fails at the first point of consideration, namely that 'circumstances of danger which the Claimant reasonably believed to be serious and imminent' did not exist, as he had not been instructed to use the machine. Accordingly, therefore the Claimant's claim of automatic unfair dismissal fails and is dismissed.

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Employment Judge C H O'Rourke

Date: 23 October 2019