



EMPLOYMENT TRIBUNALS

Claimant: Mrs W Osinska

Respondent: Pendergate Limited, trading as Ridge Crest Cleaning Services

Heard at: East London Hearing Centre

On: 18 September 2019

Before: Employment Judge C Lewis

Representation

Claimant: In person

Respondent: Miss H Wheatley

Polish interpreter: Mr W Talar

RESERVED JUDGMENT

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

REASONS

The issues in the claim

1. By a claim form issued on 7 June 2019, following a period of Early Conciliation from 16 April 2019 to 15 May 2019 the Claimant brought a complaint of unfair dismissal. Her claim was initially recorded as also including a claim for a redundancy payment although the facts pleaded do not give rise to a claim for a redundancy and the Claimant clarified that this was in fact the remedy she was seeking for her unfair dismissal claim.
2. The Claimant's employment began on 19 April 2010 and she was dismissed on 15 March 2019. She was employed as a cleaner at St Bernard's High School in Essex. The Respondent is a contract cleaning company which provides outsourced services to public and private sector clients. The Claimant was transferred to the Respondent in 2016 under the TUPE Regulations 2006 following the Respondent's successful bid for the contract to clean the client school.
3. The Respondent relies on some other substantial reason as the reason for the Claimant's dismissal. The Respondent the Claimant was dismissed following receipt of request from the school business manager asking that she be removed from their site and following a period of suspension on full

pay during which the Respondent attempted to find her alternative roles.

4. The Employment Judge explained the role of the tribunal and the provisions of section 98 of the Employment Rights Act 1996. The Respondent has to show that they had a potentially fair reason for dismissal and the tribunal is to decide whether the dismissal for that reason was fair or unfair in all the circumstances of the case including the size and administrative resources of the Respondent in considering whether they acted reasonably in treating that as sufficient reason to dismiss. Some other substantial reason being a potentially fair reason under section 98(1) of the Employment Rights Act 1996. The Employment Judge explained that the Respondent was to be assessed against the range of reasonable responses open to a reasonable employer and the Judge was not to substitute its own view for that of the Respondent.

Findings of fact

5. The Employment Judge heard evidence from Mr Tom Newton, Regional Manager, and Ms Ozdemir, the site manager, on behalf of the Respondent and evidence from the Claimant. The tribunal made the following findings based on the evidence before it.
6. The Respondent is a medium-sized cleaning company with around 800 employees and a turnover up to £10 million per year working within small profit margins. St Bernard's High School was a significant client being in the top five clients by turnover and the value of the contract was in the region of £130,000 per annum.
7. The Claimant told the tribunal that there were no problems with her work or with any colleagues until Ms Ozdemir took over as her manager in July 2017. The Claimant admitted however a clash of personalities between herself and Ms Ozdemir; she believes that if Ms Ozdemir had not taken over as her manager then she would still be employed at St Bernard's High School.
8. Mr Newton accepted that as far as he was aware the Claimant had not had any disciplinary proceedings for the previous 8 1/2 years up until September 2018. However, where the Claimant referred to references from teachers Mr Newton told tribunal it was not uncommon for teachers and other employees of clients to become attached to 'their' cleaner and rather protective of them. He did not take this as an objective assessment of their performance. What he did take into account was the result of any site audit which is completed by the client. A site audit is carried out by the Regional Manager and the client, they walk around of the site together and the client completes the audit survey as they go around; Mr Newton explained that the survey is an application on his phone but it is completed by the client.
9. In November 2018 he carried out a site audit of the St Bernard's High School with Ms Krone, the School Business Manager. During the walkaround site survey the client was asked to assess the state of the cleaning as falling into one of 3 categories: green, meaning it was okay; amber, needs improvement; and red which means unsatisfactory. It was during his site audit meeting with the school manager in November 2018 that Miss Krone raised the problem she was having with the Claimant's behaviour. Ms Ozdemir was present at

that site meeting but as an observer only and she took no part in the conversation.

10. The Claimant told the Judge that she had no issue with Mr Newton and accepted what he said in his evidence. She did, however, have an issue with Ms Ozdemir and accused her of lying to the tribunal and manufacturing evidence to get the Claimant into trouble and trying to influence Ms Krone to have the Claimant removed from the site.
11. Ms Ozdemir told the tribunal about an incident of particular concern raised by Miss Krone at the site audit, which was an occasion when the Claimant had been shouting and disruptive and that this had not been the only incident when she had been disruptive. The Claimant did not dispute that she lost control of herself and shouted and swore in front of teachers and at least one sixth form student. The Claimant did not dispute what was said about the incident but she blamed Ms Ozdemir for provoking her by making false allegations against her and harassing her in the preceding weeks and months.
12. The Claimant accepted Miss Krone had made complaints but she did not accept that she was to blame for those and sought to blame Ms Ozdemir for turning Ms Krone against her. I was taken to an email dated 19 November 2018 [p47] from Ms Krone to Mr Newton in which Ms Krone asked that Ms Osinska be removed from the site. Mr Newton told the tribunal that he contacted Ms Krone to ask if there was another way of dealing with her concern and his email dated 20 November 2018, in which he offered retraining for Ms Osinska and re-educating managers on their role before starting the removal process. Ms Krone emailed Mr Newton on 26 November repeating her request that Ms Osinska be removed from the site and asking for assurance that the Respondent would expedite the situation immediately.
13. Ms Osinska had been signed off as unfit for work from 16 November 2018. She had previously been invited to an investigatory meeting (by letter dated 10 September 2018) in relation to an allegation of unacceptable behaviour towards management which led to a Record of Discussion form being retained by Ms Ozdemir and Lorraine Goodwin. She had lodged a grievance on 7 November 2018 complaining that she was being labelled a trouble maker and that she and her brother were being badly treated by Ms Ozdemir. The Claimant's brother worked as a caretaker at the school. A meeting had been arranged for 28 November 2018 to discuss her grievance, this was re-arranged for 18 December due to the Claimant's illness. The grievance was again rescheduled this time for 3 January 2019.
14. In the meantime the Claimant was suspended on full pay on 21 December 2018 as a result of the client's request that she be removed from site. She was told not to return to work on 3rd January (her sick note having expired on 24 December 2018) and that a meeting had been arranged for 4 January 2019 to discuss options of other available roles within the company. Mr Newton wrote to the Claimant on 31 December 2018 rescheduling the meeting to 7 January but declining to allow the Claimant to attend with her solicitor. He restated that the purpose of the meeting was to discuss options of other available role within the Respondent. The letter included the following warning: "Please note if we do not have a suitable role for you

within Ridgecrest, or if you choose not to accept a suitable replacement, the result may be dismissal for some other substantial reason”

15. Mr Newton considered the Claimant 's grievance on 3 January 2019, the Claimant did not attend although the meeting had been rescheduled twice. The outcome letter is at page 38 of the bundle and I accept that was written on 3 January 2019 and is wrongly dated 9 October 2018.
16. Mr Newton conducted the meeting with the Claimant on 7 January 2019. The notes of the meeting are at pages 56 to 60 of the bundle. Lorraine Goodwin was present as notetaker and a Polish speaking employee called Marta (who worked in the office) attended by phone so that she could translate between Polish and English if necessary. The Claimant was told that the reason that the client had requested her removal was because the standard of cleaning had gone down and her conduct made the other staff uncomfortable. I accept Mr Newton's unchallenged evidence that he also discussed the Claimant's conduct, that she had been getting upset and shouting and that she accepted she shouted and got upset but maintained that it was on the basis of unfair criticism. Mr Newton made clear that she could not return to site due to the client's objection and she would have to consider other sites. A list of all the Respondent's available vacancies was provided and the Claimant was informed that if she didn't want them she would have to say why she couldn't accept them. She was also informed that if she took a new job her hours would remain the same so that it would be ok for her. She was told she would be on full pay for the next 7 days to allow her time to consider the available positions. Following the meeting the Claimant wrote to the Respondent (the letter was undated but received on 15 January 2019) rejecting the alternative jobs on the basis that the distance meant that travel would be too difficult and expensive. She stated that she would like to carry on working at St Bernard's.
17. Mr Newton wrote to the Claimant on 17th of January 2019 in response to her letter rejecting the alternative roles. He restated that reasons that the client had requested her removal were due to the standard of cleaning and that they had received complaints concerning her behaviour at work; that he had tried to resolve the situation with the client but the the client was not prepared to change its mind; he continued,

“in the meeting on 8th [sic] January 2019 alternative work was offered to you based on the vacancies the company had at the time and you said this was unacceptable due to the change in location of the work. Unfortunately, we have no other work available and failing to choose one of our vacancies will result in your dismissal for “some other substantial reason”.

You have eight complete years of service and so will receive eight weeks' dismissal. This makes your end date of employment 15 March 2019. You will not need to work this notice period but will be paid for your contracted hours.”

The letter concluded by informing the Claimant she had the right of appeal and directing her to the address and the date by the time within the appeal should be brought. The letter was also translated into Polish and the Polish letter was sent together with the English version as it had been with each of

the previous letters sent to the Claimant.

18. The Claimant denied receiving that letter. Mr Newton confirmed in evidence that the letter had been approved by him and he had informed Marta that it was approved by him and should be sent out. He was certain that it had been sent out by Marta. He had no explanation as to why the Claimant had not received it when she had received all other communications from the Respondent. He accepted that it was only when he was contacted by ACAS about the Claimant's pay and P45 that he became aware that she had not received her P45 or her notice pay. However a copy of the letter had been placed on her file and he had not been aware that he had to issue a separate instruction to the payroll section to process the payment and the P45, he had mistakenly assumed they would process that on receiving the letter. I am satisfied on the balance of probabilities that the letter was sent to the Claimant and ought to have been received by her in the normal course of the post.
19. Ms Osinska gave evidence about the alternative roles on the lists provided by the Respondent. It was not disputed that the role at Hockley had already been filled by the time she was given the list but the Claimant stated that she would not have accepted it in any event as she would have had to take three buses to get there. She accepted that she had been offered a position at Swaynes Park in Rayleigh and that was close to Southend, but she had rejected that position because her brother had told her that Rayleigh is an infamous place and no-one would ever want to work there. Mr Newton believed that vacancy was within a reasonable travelling distance from Southend where the Claimant lived and that there was a train and also 3 possible buses to Rayleigh from Southend. Mr Newton told the tribunal that it would not have been possible to create a vacancy for the Claimant by moving someone else so that she could take their role, and in any event the next nearest site was Rayleigh and the Claimant had refused to go there.
20. During her notice period the Claimant was sent two further letters by Mr Newton, on 4 February and 26th February 2019, containing lists of job vacancies, both of which she received. None of the jobs on those lists were within reasonable travelling distance for the Claimant. She wrote to Mr Newton on 27 February 2019 informing him that she wished to continue her employment at her present place of work. Mr Newton responded on 4 March reiterating that her removal from site had been beyond his control and that there was no possibility of her returning to St Bernard's School.
21. The Claimant complained that her grievance had not been addressed but I am satisfied Mr Newton understood the underlying issues and had addressed her grievance as best he could in the circumstances. He was still happy to offer the claim alternative work but was not able to return her to the St Bernard's School site. The Claimant believed that Mr Newton should have gone over the head of the School Business Manager and spoken to the Headteacher but Mr Newton was clear that this would not have been appropriate, the person responsible for managing the contract was the Business Manager and Mr Newton believed that attempting to bypass her or go over her head to the Headteacher would not have secured a different outcome and would have jeopardised the contract.

The submissions and the relevant law

22. Miss Wheatley had prepared a written summing up which referred to the following authorities: *Greenwood v Whiteghyll Plastics Ltd UKEAT/0219/07*, *Scott Packing & Warehousing Co Ltd v Paterson [1978] IRLR 166* and *Bancroft v Interserve [2012] UKEAT/0329/12*. The Employment Judge explained the relevant legal principles to the Claimant as well as the principles established in *Dobie v Burns International Security Services* and *Jafri v Secretary of State for Justice* referred to below.
23. Section 94 of the Employment Rights Act 1996 sets out the right of an employee not to be unfairly dismissed by her employer.
24. Section 98(1) of the Employment Rights Act 1996 provides that some other substantial reason is a potentially fair reason for dismissal.
25. 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 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 sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case.
26. The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, *Post Office –v- Foley, HSBC Bank Plc –v- Madden [2000] IRLR 827*, CA. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, *London Ambulance Service NHS Trust v Small [2009] IRLR 563*.
27. The Respondent relies on the request by its client that the Claimant be removed from its site and the subsequent unsuccessful attempts to find an alternative role for the Claimant as amounting to some other substantial reason. The Respondent also contends that it followed a fair process and that the Claimant's dismissal with notice was fair in all the circumstances. In *Dobie v Burns International Security Services (UK) Ltd [1984] 3 All ER 333*, [1984] IRLR 329, [1984] ICR 812, CA, Sir John Donaldson MR put the position as follows:

"In deciding whether the employer acted reasonably or unreasonably, a very important factor of which he has to take account, on the facts known to him at that time, is whether there will or will not be injustice to the employee and the extent of that injustice. For example, he will clearly have to take account of the length of time during which the employee has been employed by him, the satisfactoriness or otherwise of the employee's service, the difficulties which may face the employee in obtaining other employment, and matters of that sort. None of these is decisive, but they are all matters of which he has to take account and they are all matters which affect the justice or injustice to the employee of being dismissed'."

28. In *Jafri v Secretary of State for Justice UKEAT/0436/12, [2013] All ER (D) 288 (May)* the EAT considered the steps taken by the employer to change the client's mind and held that the employer's dilemma (and the steps taken by it to change the client's mind) outweighed the injustice to the employee.

Conclusions

29. I accept Mr Newton's unchallenged evidence as to the reason for the Claimant's dismissal. He had received a request from the client asking for the Claimant to be removed from its site. Mr Newton responded by seeking alternative ways to deal with the matter without removing the Claimant, including retraining the Claimant. Ms Krone repeated the request that she wanted the Claimant removed immediately. Mr Newton suspended the Claimant on full pay until their meeting on 7 January and looked for alternative roles for the Claimant, and offered all available vacancies.
30. Mr Newton had clearly warned the Claimant prior to the meeting on 7 January 2019 that if she did not accept an alternative role the outcome would be dismissal. I am satisfied that this was reiterated at the meeting and the Claimant was made aware that she was going to be dismissed on notice if an alternative role was not found within the next 7 days. Mr Newton considered the offer of a role in Rayleigh to be within a reasonable distance as it was connected by bus and train to Southend where the Claimant lived. He continued to send the Claimant lists of their vacancies until her letter of 27 February 2019 again stating she wanted to continue working at St Bernard's School.
31. I find that the Respondent took into account the injustice to the Claimant in reaching the decision to dismiss. Mr Newton had to balance the clear instruction from the client, refusal of which would risk losing the contract, against the consequence to the Claimant of her losing her job. He took into account her length of service and previous good record and he was prepared to offer and did offer her other vacancies. I accept that Mr Newton believed that there was nothing else he could do in the circumstances.
32. I find that that the procedure followed was one that was within the range open to a reasonable employer and that the decision taken to dismiss for some other substantial reason was within the range of reasonable responses open to a reasonable employer in the circumstances.
33. The claim for unfair dismissal fails and is dismissed

Employment Judge C Lewis

14 October 2019