EMPLOYMENT TRIBUNALS

Claimant Mrs E Geldard

Respondent: Axis Security Services Limited

HELD AT: Leeds **ON:** 6th, 7th & 8th November 2019

BEFORE: Employment Judge Lancaster
Ms N H Downey
Mr M Brewer

REPRESENTATION:

Claimant: Mr J Flaherty, Solicitor's Agent
Respondent: Mr P Paget, Solicitor

JUDGMENT

The claim is dismissed.

REASONS

1. Written reasons having been requested by the Claimant, these are now provided, taken from the transcript of the oral judgment delivered immediately upon the conclusion of the case.

Introduction

2. No 1 Leeds is a multi-tenanted office block on the outskirts of the city centre. The claimant had worked there as a receptionist for six years before she was dismissed. In the course of those six years the contract for the management of the building had passed to BNP Paribas and some time after that in around

2016 the outsourced contract for security had been won by the respondent in this case, Axis Security Services Limited. It then became the claimant's employer on a transfer of undertaking. The position on the ground therefore was that the claimant was managed remotely by her employer based in South Yorkshire and operationally she dealt on the ground with employees at BNP Paribas who were the management agents.

3. There is a clause in the contract between the respondent and BNP Paribas which enables the management agents to require the removal of any of the security staff from site. So although when the claimant was taken off site it was expressed as being a request or a preference we are satisfied that had it come to the crunch BNP Paribas would have been able simply to rely on their contractual entitlement.

The claims

4. There are two claims in law, one is of unfair dismissal where the potentially fair reason advanced by the respondent, and which we find quite clearly to be the reason for termination, is "some other substantial reason", that is the third party pressure: **section 98 (1) (b) Employment Rights Act 1996 ("ERA")**. The claimant having been removed from site and BNP Paribas not being willing to take her back, that led to her termination because the respondent says that it was unable to find alternative work for her.

5. So the question on the unfair dismissal claim is whether or not, having regard to that reason, the respondent acted reasonably or unreasonably in all the circumstances in treating it as sufficient grounds for dismissing the claimant; **section 98 (4) ERA**. In particular, in the light of **Henderson v Connect (South Tyneside) Ltd [2010] IRLR 466** following **Dobie v Burns International [1984] ICR 812,** that is whether it had sufficient regard for the potential injustice of the claimant. As set out in **Henderson** primarily the measures that an employer faced with this situation will have to take will require them to take appropriate steps to seek to change the mind of the third party and to find alternative employment if it is available.

6. There is also a claim for victimisation (under **section 27 Equality Act 2010**) where the unfavourable treatment, the act of detriment, is also the dismissal.

7. An application at the start of the hearing to amend to add a further allegation of victimisation in respect of the conduct of the grievance procedure was refused. This was because the issues had been clearly identified at a preliminary hearing on 8th August 2019 and in the intervening 3 months the case had been prepared on the basis of those issues only. It would necessarily cause delay and prejudice to the respondent if it were now to be required to meet an entirely different case.

The factual background

8. Dealing firstly with the circumstances of the unfair dismissal claim. It is apparent particularly from the claimant's own evidence that since BNP Paribas had taken over the management of No 1 Leeds she had had a strained relationship with its employees, particularly with Mr Phillip Brown. However there is nothing, we find, in the circumstances of this case to bring it within the example postulated in the case of **Bancroft v Interserve (Facilities Management) Ltd UKEAT/0329/12/KN** where it might be incumbent upon a

respondent acting fairly to intervene at an early juncture to remove the source of tension between its employee and the third party.

9. Even though Mr Jason Brown of the respondent was aware of some issues brought to his attention by BNP Paribas regarding the claimant, it is clear that they are not particularly serious and the first indication therefore that anything was substantively amiss was on 25 January 2019. That was an issue regarding the management of tenants car parking at the building. On that date BNP Paribas sent emails re-affirming their instructions on this subject to the claimant and also to the other full-time security guard employed by the respondent, Mr Mo Maroof. They also submitted a complaint specifically about the way the claimant was dealing with this issue. That initial complaint went from Phillip Brown to Jason Brown and later that same day the 25th there was also an email from Mr Mark Simpson of BNP Paribas where he expressed his concern about the report that the claimant was favouring one particular tenant over another in allocation of car parking spaces. He asked whether that report could be put in writing, and at that stage he also expressly asked the question to Mr Jason Brown of the respondent "can we seek to dismiss?"

10. The respondent did not immediately act to implement that desire on the part of Mr Simpson. It is quite clear that it was intent upon pursuing some form of independent procedure to investigate the complaints against the claimant. In the course of preparing for that investigation, over a period of time from that date until 5 February, BNP Paribas submitted documentary evidence to Jason Brown indicating what they said was amiss with the way the claimant was handling parking issues.

11. It is right from 25 January there was no repetition of the specific complaint that the claimant was allowing tenants to park in spaces designated for BNP Paribas' own use. But there were still other issues identified regarding the cancellation or issue of parking permits and purportedly allowing access on a side road was not actually within the management of BNP Paribas at all.

12. Those matters continued to be under investigation. On 8 February the security guard Mr Maroof submitted a short email where he made complaints about the claimant having made xenophobic comments, particularly because they were made in the presence of somebody from Eastern Europe, but also apparently causing distress to himself. It appears from his name that Mr Maroof will be of Asian or Middle Eastern descent.

13. The respondent therefore invited the claimant to an investigative meeting. That was expressly stated to be to discuss all the concerns about car parking; allowing tenants to park in the car park against the wishes of the client, and managing the parking on the access road at the side of the building to which the client had no responsibility. Also there was a separate issue regarding an allegation of misuse of the company's and client's IT equipment for the purpose of finding alternative employment and, as the fourth bullet point, the very recently complaint received regarding xenophobic behaviour. That meeting was scheduled for 14 February six days later.

14. Up to this point even though Mr Simpson had expressed an indication that he thought this may be sufficient grounds for dismissing the claimant, she was not removed from site. The intention at this point was that the investigation would take place but she would remain in post until it had.

15. However having received that invitation letter on the 8th, there was then a verbal complaint to BNP Paribas, on or about 11th February, that the claimant was discussing her pending investigative with the tenants and that they considered this unprofessional. On 18 February that matter was reinforced in an email from Niamh Gillespie who is the centre manager. She is not employed by BNP Paribas but is employed on behalf of the tenants and on the face of it is completely independent. In an email to Phillip Brown she confirmed in writing that she believed the claimant was seeking to embroil tenants in the pending investigative dispute and she considered that behaviour extremely unprofessional and was expecting it to be stopped. She also commented that the general atmosphere on main reception she thought, was dreadful and that was having an impact on the experience of tenants using the building. She did, however, say that she wished that matter to be kept confidential.

16. As a result of having received that communication from Ms Gillespie, there was then also on 18 February a request from BNP Parabas certainly implying that the claimant be removed from site. Again Mr Phillip Brown at that point also said "is this grounds enough to take the disciplinary action that was already proposed further to remove Anne from site as I can't have this atmosphere on the front desk/" Particularly it was identified as tension between the claimant and Mr Maroof.

17. Mr Phillip Brown's first email of 18 February was followed up later that same afternoon by a very specific requirement that the claimant be removed from site as form the end of the shift the following day and pending an investigation into what he contemplated then as being a permanent removal. At this stage BNP Paribas were certainly contemplating a position where they would not allow the claimant to work on their premises.

18. So at that point the claimant was suspended from work. The letter of suspension makes it clear that that is not simply related to the nature and investigation that was taking place but more specifically at the request of the client, who as we have said were contractually entitled to require her removal from site.

19. But once again the respondent did not simply and immediately accede to that request on a permanent basis. It did still carry out its own investigation. The claimant had already by this stage attended a first meeting on 14 February. She had attended the first meeting before being removed from site. In the course of that meeting the claimant had indicated that she wished to raise a grievance against Mr Maroof and she put that in writing the following day, 15 February. It is accepted that elements of that grievance constitute a protected act for the purposes of **section 27 of the Equality Act**. It makes general allegations about the behaviour of Mr Maroof but does also refer to things he is alleged to have said which are potentially acts of sexual harassment and unwanted conduct of a sexual nature. That is the making of an allegation under **section 27 (2) (d)** that there had been a contravention of **section 26 of the Act.**

20. We of course are not able to determine whether there was in fact any harassment. That is not a complaint that is brought before the Tribunal. We have not heard evidence and we were not able to judge whether any of that unwanted conduct actually took place in the way described by the claimant or, if it did, whether it would meet the definition of harassment. But for our purposes we do not need to explore that further. It is sufficient that the raising of those allegations may amount to a protected act, but they form only apart and are not

the entirety of the grievance. There are other allegations of inappropriate conduct both in terms of the general language by Mr Maroof and of potential dishonesty in respect of a number of matters.

21. Having raised that grievance a decision on the investigation into the disciplinary matters was held in abeyance whilst the claimant was invited to a grievance meeting. That letter of invitation was 25 February and the meeting took place on 6 March. At this point the claimant was off sick and had been since 18 February which is why there was some delay in holding that meeting.

22. The investigation into the grievance, apart from holding a meeting with the claimant, was not extensive. This is a difficult situation in so far as it relates to complaints that may have been substantiated by the tenants of the building. That is a matter where the respondent necessarily had to go through BNP Paribas as it had no direct right to approach independent witnesses. Although the respondent spoke to Mr Maroof himself there is no record of that conversation. However the matter, albeit briefly, was considered and the claimant was then advised of the outcome on 8 March.

23. Having discussed the matter with BNP Paribas and identified whether any complaints about Mr Maroof had been addressed to them it was concluded there was no proof of the allegation regarding his behaviour in the workplace. So far as any allegations of illegal or dishonest behaviour were concerned the claimant was advised to report to those to the police if she had evidence. There was a strong suggestion that mediation between the claimant and Mr Maroof would be appropriate, though of course as the claimant was still suspended from work that could not practically take place at that point.

24. Whilst the grievance was being considered by Jason Brown he was also concluding his investigative report on the disciplinary allegations and that was finally signed off by him on 7 March. At that stage he recommended that it proceed to a disciplinary hearing and the claimant was then summoned to that meeting by a letter dated 8 March.

25. The invitation letter does not say what sanction may be imposed but most significantly it does not state that the claimant is potentially liable to dismissal. Indeed, with the matter having been reviewed by Mr Antill of the respondent's HR department in the meantime, there is an internal email which expressly rules out the appropriateness of dismissal. His view, having reviewed where the investigations have got to at that stage, as that although there were grounds for going forward to a disciplinary meeting it would not justify termination of employment. And indeed when the matter was then heard by Mr Michael Jones on 13 March the claimant was not dismissed.

26. At that disciplinary hearing she effectively accepted that there was some malpractice in relation to the management of car parking. She denied any appropriate use to the computer equipment, though Mr Jones found that allegation proved on the basis that he had been alerted to screenshots that showed activity and supported the allegation. He expressly did not uphold the allegation in relation to the alleged xenophobic comments.

27. The decision of Mr Jones was then to issue a final written warning and at that point he had to raise the matter with BNP Paribas to seek to have the suspension removed. He told the claimant that is what he would do and he did. The covering letter to Mr Simpson and to Mr Phillip Brown is a very clear request that the claimant be allowed to return to work, and although he does not indicate

what sanction had been imposed Mr Jones does state that the respondent company have carried out a complete investigation and taken what action it deemed to be appropriate (necessarily that is to be understood to be action short of termination) and it was satisfied the matter had been resolved.

28. And in the letter formally drafted requesting reinstatement Mr Jones specifically refers to the concerns which had been identified by BNP Paribas. That was firstly that the claimant had discussed the investigation issues with tenants within the building. That certainly was the immediate trigger for BNP Paribas requiring her removal from site, following Ms Gillespie's verbal complaints followed up by her confidential email of 18th February. That matter was only addressed briefly with the claimant, but it was left that the respondent did not identify that as a further disciplinary matter to be taken forward. This would be part of the background to the disciplinary only, and not any substantive charge. It was something that was of concern to BNP Paribas but they did not clearly consider that it warranted any further investigation, beyond it having already elicited the suspension at the client's behest.. In the course of that somewhat informal discussion the claimant had apparently stated that she had only made these comments to friends of hers within the building. That of course is not the entire picture because the letter from Niamh Gillespie does not support that account, and that is the complaint that BNP Paribas had received. But in any event the claimant had been removed from site following that letter. There had been no further contact with the tenants and the substantive disciplinary investigation had now been concluded. It is not at all unreasonable for the respondent not, in these circumstances, to have sought to satisfy the client further that the claimant had indeed only discussed the matter with her friends. The letter from Mr Jones identifies more particularly on the substantive issues that the respondent had addressed the parking issues and also the alleged misuse of the equipment for personal use. It makes specific reference to the claimant's good service record and the upset and distress caused to her by the continued suspension and uncertainty about her employment which that was engendering. And it does specifically request that the matter be dealt with promptly by the client.

29. Although the claimant takes exception to the indication that if no response was received before 21 March it would be concluded that the client was not willing to accede to that request, in actual fact responses were received both from Mr Simpson and Mr Phillip Brown within that time scale where they reiterated that they were not prepared to change their earlier decision.

30. As they were not prepared to change their mind the next stage was to consider further possible employment for the claimant. The respondent's procedure envisages a two stage process where there is a further investigative meeting to consider alternative employment and if nothing is forthcoming a subsequent disciplinary meeting to consider dismissal on the grounds of some other substantial reason. That was, in the event, conflated to a single meeting held by Mr Jones but in the circumstances we can see there may well have been a reason for that. That is because the claimant was in a unique position. As we have said she transferred under TUPE as a receptionist. She was the only person employed within the respondent's northern region who did not have an SIA licence, so all other positions within the region were occupied by people who were licenced and the claimant was not. There were therefore no other simple receptionist positions available to her. At the meeting the claimant

confirmed that she did not have a licence and she did not at that stage give any indication that she would wish to become qualified. Nor did she ever appeal the dismissal, at which stage she might have informed the respondent that she would contemplate seeking to obtain a licence. She has now said in her evidence to us, and there is no reason to doubt her, that she had previously raised that matter with Mr Mark Simpson of BNP Paribas but that is not the same as raising it with her own employer.

31. So the respondent was given no indication that the claimant would be interested in trying to find a place on a course undergoing the four week course and then, if successful, receiving her license probably some 12 weeks later at which point they may then have been able to consider redeploying her somewhere else in the region.

32. Absent that indication and given that there were certainly no other receptionist roles in the area, and with no suggestion ever being given by the claimant that she was prepared to travel the considerable distances if there had been any other roles outside of the northern region, the inevitable decision to terminate was taken.

Unfair Dismissal, conclusion

33. We are satisfied on that chronology that the respondent did act reasonably in all the circumstances. It does not have to satisfy itself of the truth or the reasonableness of the allegation of misconduct made by its clients but in this situation effectively it did because it carried out its own enquiry at arm's length. It did not immediately accede to the request for the claimant be removed permanently and indeed tit came to a conclusion which was at odds with the suggestion from the client that the claimant should be removed on a permanent basis. And having come to that conclusion, It then expressed in a sufficiently robust manner the request that the suspension be removed and it specifically drew attention to potential areas of injustice to the claimant given the stress she was under, that she had received what they considered an appropriate sanction and that she had a good record. Having failed to elicit any change of heart on the part of BNP Paribas we are satisfied that again in all the circumstances the respondent took appropriate steps to consider redeployment, but in reality there was no indication that anything was available or suitable to the claimant.

34. Given that the claimant's actions did not of themselves in the view of the respondent's warrant termination it is clear this is a harsh result for the claimant but we are looking at the reasonableness of the actions of the respondent faced with the intransigent response of its client, over which it ultimately has no control.

35. And of course, in looking at the overall justice of the case even though it would not warrant termination this is not a situation where the claimant is entirely blameless. She accepted some responsibility for the mismanagement of car parking.

36. Against that we would say, though it does not affect our decision, that it is a cause of great concern that a large employer with some 2000 employees across the country and with HR support should so singularly fail to carry out proper procedures. They failed to carry out their own disciplinary procedure and they fail to comply with the ACAS Code. There was no sufficient attempt to identify the specific allegations that the claimant should have faced. There was no provision of supporting documentary evidence and the matter was dealt

with perfunctorily. Similarly in relation to the grievance that she herself raised against Mr Maroof, although she was properly called to a meeting there was no apparent proper investigation with suitable record keeping. But this does not ultimately affect the fairness of a decision to dismiss as a result of third party pressure applied by a client who had a contractual right to remove the claimant from site and where the respondents had stepped back from the wishes of that client to seek to investigate the matter, had sought to dissuade the client from persisting it's opposition to the claimant being on site and had done what was appropriate in all the circumstances to find alternative employment where there had simply been none that would be suitable for Mrs Geldard. So the claim of unfair dismissal fails.

Victimisation, conclusion

37. It does not necessarily mean that the claim of victimisation must also fall. They are entirely different matters as pointed out in **Orr v Milton Keynes Council [2011] 317 at paragraph 61**. There are different tests and the Tribunal's task in deciding unfair dismissal cases is fundamentally different from that in discrimination cases. That is because the statutory provision regarding unfair dismissal are directed to the employer's conduct and state of mind at time of dismissal where as the discrimination provisions, and also victimisation, are directed at the fact of victimisation or discrimination.

38. Nonetheless it must be that on the claim of victimisation we have to determine the reason the respondent employer did the act complained of. That is established in the case of **Martin v Devonshire Solicitors [2011] ICR 352.** So we are looking at what the respondent did and it is common ground between the parties that where the alleged evidence of victimisation is on the part of BNP Paribas there must be some clear indication that the respondent itself had adopted that rationale, and that therefore it as the liable employer has done something where the reason was wholly or substantially that the claimant had done a protected act.

39. However on the facts that is not made out here. At no stage does the respondent itself make any reference to the raising of the grievance against Mr Maroof and incorporating the potential allegations of sexual harassment as forming any part of its decision. The only place that that comes in is in the final decision of Mr Mark Simpson not to vary his earlier opposition to the claimant remaining on site. And that opposition leading to the suspension from 18 February of course is quite clearly on the face of it as a result of Ms Gillespie's complaints about the effects of the bad atmosphere and what it was doing to the tenants. It had nothing to do with the raising of any grievance against Mr Maroof.

40. In his letter or email of 14 March refusing to change his mind Mr Simpson says that he believes the claimant has a misguided sense of loyalty. He continues: "Furthermore I feel she has wrong footed ourselves and the client we represent on numerous occasions. We also have a written complaint from one our tenants over her behaviour" and then the key words "if fairly confident she raised a false grievance with Mo whom we specifically place at the property to ensure it is run correctly". There appears to be a typographical error there where it says "if fairly confident" may more properly be construed as " I'm fairly confident", but in any event it is the expression of a personal opinion. There is a basis for Mr Simpson coming to that view. That is that the timing of the complaint against Mr Maroof was only after the claimant had been aware of the

allegations made by him against her and also BNP Paribas had necessarily as we have said been involved in the investigation as to whether there was any substantive cause for concern about Mr Maroof's behaviour expressed by the tenants or the potential witnesses. Therefore Mr Simpson was aware that that enquiry had resulted in no evidence forthcoming, and that is sufficient to justify his expression of an opinion.

41. But in any event it is unclear that the reference to his personal belief that he was fairly confident that it may therefore have been a "false grievance" actually relates to any doing of a protected act. As we have said the grievance in its entirety is not limited to the complaint of sexual harassment but makes many other allegations against Mr Maroof. So on that basis a single line at the end of the process is not sufficient to fix in the mind of the respondent employer an ill motive such that it can be said to have been influenced in any way by the fact that the claimant had raised an allegation of sexual harassment. And of course as is also established in **Martin v Devonshire Solicitors** we must be careful to draw distinctions where appropriate between the fact that a protected act had been done and the surrounding circumstances or the manner in which it was done. This quite clearly on the face of Mr Simpson's email, as we have indicated, an expression of his personal belief that the manner of the raising of the grievance in its entirety may have been "false", whatever he meant by that. It is not the fact that it had been raised at all but his view, with some strongly indicative supporting evidence that would have entitled him to come to the view, that it may have been false.

42. So the claim of victimisation although separately considered is also dismissed.

Employment Judge Lancaster

Date 19th November 2019