EMPLOYMENT TRIBUNALS

Claimant: **Mr J Duckworth**

Respondent: **Hampshire Demolition and Recycling Limited**

Heard at: **Birmingham** **On:** **14 & 15 October 2019**

Before: **Employment Judge Gilroy QC**
Sitting with Members: Mrs G Sheldon and Ms J Keene

Representation

Claimant: **Mr Alex Passman - Consultant**
Respondent: **Mr Anthony Korn - Counsel**

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

(1) The Claimant's claim of breach of contract is dismissed on withdrawal.

(2) The Claimant's claims of Health & Safety detriment contrary to s.44 of the Employment Rights Act 1996 are dismissed on withdrawal.

(3) The Claimant was automatically unfairly dismissed contrary to s.100(1)(c) of the Employment Rights Act 1996.

(4) The matter of remedy will be considered by the Tribunal at a fresh hearing on 29 November 2019.

REASONS

Background

1. The Claimant originally pursued claims of automatic unfair dismissal contrary to s.100 of the Employment Rights Act 1996, "ERA", and Health & Safety detriment contrary to s.44 of the ERA. The Claimant withdrew his s.44 detriment claims on the first day of the hearing.

2. There was an issue between the parties at the beginning of the hearing as to the basis upon which the Claimant's automatic unfair dismissal was put. In the claim form, the Claimant pleaded simply s.100 of the ERA whereas

the case he wished to place before the Tribunal was a more specific two-pronged claim: first of all, a claim under s.100(1)(c), and secondly, a claim under s.100(1)(e). The fact that the Claimant had not condescended to particulars as to which specific provisions he would rely upon, was a matter taken up by the Respondent in its grounds of resistance (at paragraph 13), where it observed that the Claimant had failed to identify which subsection of s.100 was relied upon, leading the Respondent to contend that, on that basis, the Claimant needed to amend the grounds of complaint.

3. The response form was filed with the Tribunal on 29 October 2018. It was not until a much later stage that the Claimant's representatives communicated with the Tribunal to address this issue. By e-mail sent to the Tribunal on the morning of 1 October 2019, the Claimant's representatives indicated that it was the Claimant's case that he was relying on both ss.100(1)(c) and 100(1)(e) of the ERA.

4. The Tribunal adjourned to deliberate on the matter and concluded that no amendment was necessary because the way in which the matter had been pleaded at paragraph 15 of the grounds of complaint was that there was a generic complaint under s.100, and obviously claims under ss.100(1)(c) and 100(1)(e) both fall under the umbrella of s.100. Accordingly, the Tribunal dealt with this case on the basis that the Claimant maintained that his dismissal was automatically unfair, contrary to s.100(1)(c) and/or s.100(1)(e) of the ERA.

5. In his claim form, the Claimant included a claim for breach of contract but at the beginning of the hearing his representative Mr Passman indicated that this claim was not pursued because the Claimant had already received monies in lieu of notice in excess of what he might have expected to recover if he were to succeed in such a claim.

6. Upon the conclusion of the evidence, each of the representatives made oral submissions. Those submissions are not contained within this judgment.

Evidence and Material before the Tribunal

7. The Claimant gave oral evidence. The Respondent called as witnesses Mr Mark Bailey (Managing Director), and Mr Mark Parrott (Contract Manager, Demolition Department). All witnesses who gave oral evidence provided written witness statements, which were taken by the Tribunal "as read" and treated as their evidence in chief.

8. The Tribunal was provided with an agreed bundle of documents [**R1**] together with a Joint List of Issues. The Respondent produced a written outline submission. The Claimant produced a copy of an e-mail dated 1 October 2019 to the Tribunal with attachments. Counsel for the Respondent produced copies of the following authorities: ***Abernethy v Mott, Hay and Anderson [1974] IRLR 213 (CA)***; ***Kwik-Fit (GB) Ltd v Lineham [1992] IRLR 156 (EAT)***; ***Wilson v Racher [1974] IRLR 114***; ***Sovereign House Security Services Ltd v Savage [1989] IRLR 115***; ***Cotswold***

Developments Construction Ltd v Williams [2006] IRLR 181, and ***Oudahar v Esporta Group Ltd [2011] IRLR 730***.

9. The three principal issues that fell for determination by the Tribunal were (1) whether the Claimant was employed by the Respondent (ie whether he had employment status); (2) if so, whether or not the Claimant was dismissed, and (3) if so, whether the Claimant's dismissal was automatically unfair, being contrary to s.100(1)(c) and/or a 100(1)(e) of the ERA.

Issue (1) The Claimant's Status

10. The first substantive issue for the Tribunal's determination was whether the Claimant was an employee because employee status is a crucial prerequisite for the making of a claim of unfair dismissal (automatic or otherwise).

11. The Claimant worked for the Respondent, which is concerned in the business of demolition, remediation and asbestos removal, from 4 January 2017. The Claimant initially worked from home, until an office was sorted out for him. Whilst he organised his own calendar, and also covered sites for demolition, he worked under the overall direction of Mr Mark Bailey, the Respondent's Managing Director.

12. Whilst working for the Respondent, the Claimant bore the title of "Asbestos Manager". The main focus of his role was to set up a business called HDR Environmental Limited, "HDR Environmental".

13. The Tribunal had no hesitation in concluding that the Claimant was employed by the Respondent.

    13.1. The Claimant was, along with Mr Bailey, one of only two "Relevant Persons" for the purposes of HDR Environmental's application to the Health and Safety Executive for an asbestos licence. In that application he was described as "Licence Holder".

    13.2. Claimant held the title of Asbestos Manager (ie he was the *Respondent's* Asbestos Manager).

    13.3. The Respondent paid the Claimant a salary of £60,000.00 pa (gross), which was paid on a monthly basis in the sum of £5,000.00 (gross) each month.

    13.4. There were no variations in the above gross figure throughout the period of the Claimant's service from the beginning of 2017 until the termination of his employment in April 2018.

    13.5. He received the same salary payment regardless of the number of hours he worked.

13.6. He received the same salary payment whether he was working or on holiday. He was, therefore, the beneficiary of holiday pay, which is traditionally an incident of a contract of employment.

13.7. The Respondent provided the Claimant with a car, a telephone and a laptop.

13.8. The Claimant had no right to delegate. There was some evidence of what would happen if a substitute appeared one day in his place. The Tribunal was left in no doubt that it was certainly not the expectation of the Respondent that the Claimant could elect to nominate a substitute.

14. All of the above factors can be placed alongside one other factor pointing in the other direction (ie supportive of the proposition that the Claimant was not employed by the Respondent). The remuneration paid by the Respondent to the Claimant was paid via the Construction Industry Scheme, ("CIS"), a scheme operated by the state for the recovery of tax and national insurance from sub-contractors. For the purposes of that scheme, the Claimant was assigned a Unique Taxpayer Reference, ("UTR").

15. The Tribunal assessed the matter as a whole and concluded, based on the substance of the arrangements and not their form, that the relationship between the Claimant and the Respondent was that of employer and employee.

16. Accordingly, on the basis of that finding, the Claimant was entitled to protection against unfair dismissal, and in particular automatic unfair dismissal.

Issue (2) Was the Claimant dismissed ?

17. The next question for the Tribunal's consideration was whether the Claimant was dismissed.

18. The key date in relation to this issue was Friday 20 April 2018. It was common ground between the parties that on that date, the Claimant had an argument with a Manager, effectively his Manager, Mr Mark Bailey, in relation to an issue concerning the completion of a method statement for the purposes of a construction project. In simple terms, a method statement is a document which details the way in which tasks at the particular should be completed in order to adhere to safe working practices.

19. The Respondent and a main contractor, Clark Contracts, "Clark", share a long-standing client, Vastint Hospitality, "Vastint". In April 2018, whilst excavating the ground at a new development in Southampton, Clark identified asbestos, and Vastint contacted the Respondent to address the issue. It was determined that before work commenced on the site, it would be necessary to prepare method statements and risk assessments. Risk assessments and method statements were to be carried out for both the

erection of a scaffold enclosure (which was to be carried out by a sub-contractor) and the asbestos remediation works which were going to be carried out by the Respondent. SCA Group, "SCA", was engaged by the Respondent as sub-contractor to erect the scaffold.

20. The Claimant received a method statement from SCA. It had been rejected by Clark's Safety Officer. It was rejected because it was not site-specific and there were errors and omissions contained within it. It was Mr Bailey's position that the amendments required were trivial. The Claimant did not agree. As the Claimant viewed the matter, SCA had merely sent back a slightly amended pro-forma safety template, and the deficiencies in the method statement were important from a health and safety perspective. In the Tribunal's judgment, the Claimant was entitled to his view.

21. The Claimant spoke to Mr Keith Best, Contract Manager at SCA, and was assured that all necessary amendments would be made, and that the document would be returned to the Respondent.

22. Until the amended authorised method statement was received on site, no works could proceed. The Claimant believed that Mr Bailey was irritated by the delay because this was costing the Respondent money. For his part, Mr Bailey denied this, but ultimately it was not necessary for the Tribunal to resolve this issue.

23. It was common ground that there were two conversations between the Claimant and Mr Mark Bailey on the afternoon of 20 April 2018. The Claimant's position is that he was required to deal with the above method statement.

24. The Claimant received a telephone call from Mr Bailey, who asked him to print out the findings of Safety Officer, so that he could look through them. On arriving at the office, Mr Bailey looked through the printout and asked the Claimant to make the amendments that were required.

25. It was at this point that the factual accounts of the parties diverged. It was the Claimant's case that Mr Bailey asked him to forward the corrected document back to Clark. It was Mr Bailey's position that he asked the Claimant to make the appropriate amendments to the document to make them *"site specific and to remove any mention of any projects"*, and that he made the request of the Claimant that when he had made those amendments to send the document to SCA for their review, and that there had then followed a heated conversation. The Claimant agreed that there had been a heated conversation.

26. Before dealing with that conversation, it should be recorded that it was the Tribunal's view that there was there was a mismatch in the understanding of the Claimant and that of Mr Bailey as to where the relevant document was going to be sent. The Tribunal concluded that the Claimant believed, and reasonably so, that he was being asked to send it to Clark. The Tribunal found that it was entirely possible that Mr Bailey either said, or meant to say *"send it back to the SCA Group"*, but regardless of what he said, the

Claimant believed that he was being asked to send that document to Clark. This aspect had a potential significance, because if the document had gone back to Clark and it had the appearance of being effectively an approved document, that would make the commencement of works all the more likely or imminent than would have been the case if this had simply been a communication sent to the SCA Group.

27. In the Claimant's mind, (a) if an approved method statement were to be sent to Clark, there would be nothing to stop the relevant works taking place, and (b) this state of affairs would be either harmful or potentially harmful to health or safety. In the judgment of the Tribunal it was reasonable for the Claimant to hold that belief.

28. Returning to the heated conversation, and regardless of what Mr Bailey had said to the Claimant or vice versa, Mr Bailey, on his own admission, said: *"If you aren't going to do it, you might as well fuck off"*. The Tribunal accepts that "industrial language" can be quite commonplace in the workplace, and further that it can be used quite frequently without offence being taken. It was clearly unfortunate that the conversation between the Claimant and Mr Bailey deteriorated to the extent it did, but the Tribunal was entirely satisfied that this was not a case of a bullying employer trying to intimidate an employee. The Tribunal simply records, in accordance with Mr Bailey's own admission as to what was said, that the above words were uttered.

29. There was then a pause whereupon the two parted, the Claimant to go and collect his possessions, and Mr Bailey, from his best recollection, to go outside for a cigarette, but they were back together fairly soon when the Claimant moved to his car outside. Again, there was a dispute between the parties as to what was said on this occasion, but the Tribunal took the view that it did not need to resolve that dispute. The Claimant's case was that as he was getting in his car, or as he was sitting in the car, there was a conversation about the Claimant returning property and Mr Bailey said to him that he was *"sacked"*. Mr Bailey is adamant that he said no such thing, and in particular that he did not say to the Claimant that he was sacked. The reason the Tribunal concluded that this was an issue it need not determine was because it was accepted by the Respondent through the evidence of Mr Bailey that he did ask the Claimant to return his laptop and phone when the two of them were outside.

30. It is obviously most unfortunate that a relationship as important as that of employer/employee should end in acrimonious circumstances in what might be described as the "heat of the moment", but unambiguous words and conduct in such circumstances will usually be held to mean what they appear to mean, especially if, in the case of words uttered, they are not quickly retracted.

31. The Tribunal considered the agreed evidence as to the request by the Respondent of the Claimant to return his laptop and mobile phone (given the need on an almost constant basis to use a mobile phone), taken against the background of the earlier conversation and the words used in that conversation, again based on the agreed evidence.

32. It is the Tribunal's unanimous conclusion that there was, on the given facts, a dismissal.

Issue (3) Automatic Unfair Dismissal

33. The third issue for the Tribunal to determine was whether the Claimant's dismissal was automatically unfair by virtue of one of the two routes contended for under s.100 of the ERA, ie s.100(1)(c) or s.100(1)(e).

34. S.100 of the ERA provides as follows:

> ***"100 Health and safety cases***
>
> *(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that -*
>
> *(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,*
>
> *(b) being a representative of workers on matters of health and safety at work or member of a safety committee -*
>
> *(i) in accordance with arrangements established under or by virtue of any enactment, or*
>
> *(ii) by reason of being acknowledged as such by the employer,*
>
> *the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,*
>
> *(c) being an employee at a place where -*
>
> *(i) there was no such representative or safety committee, or*
>
> *(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*
>
> *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*
>
> *(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or*
>
> *(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.*
>
> *(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.*

(3) Where the reason (or, if more than one, the principal reason) for the dismissal of an employee is that specified in subsection (1)(e), he shall not be regarded as unfairly dismissed if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have dismissed him for taking (or proposing to take) them".

35. As indicated above, the focus of the Tribunal's enquiry is s.100(1)(c) and 100(1(e), but the full section has been quoted for the purposes of context.

36. The Tribunal dealt with these matters in reverse order. The claim under s.100(1)(e) was rejected because the Tribunal concluded that the Claimant had not established that he held a reasonable belief that there were circumstances of danger which the Claimant reasonably believed to be *serious* and *imminent*.

37. Turning to s.100(1)(c) of the ERA, it will be noted that under (c)(i) and (ii) there are two possibilities catered for. The first is where there is no Health & Safety Representative or Safety Committee within the workplace, or within the employer. The second is where there such a Representative or Safety Committee exists, but it was not reasonably practicable for the employee to raise the matter via those channels.

38. The Tribunal examined the evidence. The parties did not address the issue of the existence of a Health & Safety Representative or Safety Committees, but the Tribunal unanimously concluded that, either way, in the circumstances the Claimant found himself in on 20 April 2018, it was not reasonably practicable for him to raise *"the matter"* by means of going off to find the Health & Safety Representative or the Safety Committee. He was in a situation where, as far as he understood the position, he was being required by his line manager to accelerate the process for the signing off of the method statement in circumstances when it was not safe to do so. As far as he was concerned, he was being told that if he did not comply with the relevant instruction, he could "f*** off", and in those circumstances the Tribunal concluded that it was not reasonably practicable to expect him then to "down tools", and to head off to try to find a Health & Safety Representative or Safety Committee. The more important finding the Tribunal makes under s.100(1)(c) is that under contingency (ii) (ie if there where there was such a Representative or Safety Committee) the Claimant was, in the Tribunal's judgment, bringing to the Respondent's attention by reasonable means, circumstances connected with his work, which he reasonably believed were harmful or potentially harmful to health or safety.

39. The Tribunal has already indicated what its view is as to what the Claimant perceived the instruction to be that he was receiving. He was entitled to hold the view that if an approved method statement were to be sent to Clark (in circumstances whereby the proper process had not been completed), there would be nothing to stop the relevant works taking place, and he was entitled to hold the view that this state of affairs would be either harmful or potentially harmful to health or safety.

40. The Claimant was also entitled to hold the view that on the basis of Mr Bailey's instructions as he perceived them, this gave rise to a state of affairs which he reasonably believed would be harmful or potentially harmful to health or safety. Accordingly, the Tribunal unanimously found that the claim under s.100(1)(c) was made out.

Remedy

41. The matter of remedy will be considered by the Tribunal at a fresh hearing on 29 November 2019.

42. Again for the sake of completeness and for the avoidance of doubt, in his Schedule of Loss the Claimant advanced a claim under s.38 of the Employment Act 2002 (failure to give statement of employment particulars). Whilst no such claim was made in the claim form, it was referred to in the Schedule, and it is a matter which does not have to be pleaded. The Tribunal mentions this aspect in order that the parties are clear on this issue in anticipation of the remedy hearing.

Signed by: Employment Judge Gilroy QC

Signed on: 24/11/2019