**Case Numbers: 3202429/2018 &**
**3201376/2019**

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# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr A Karami**

**Respondent:** **NSL Limited**

**Heard at:** **East London Hearing Centre**

**On:** **15, 16 & 17 October 2019**

**Before:** **Employment Judge B.A Elgot**

**Representation**

Claimant: In person

Respondent: Mr R Lassey, Counsel

**JUDGMENT** having been sent to the parties on 30 October 2019 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013.

## REASONS

1. The decision of the Employment Judge is that the claim of unfair dismissal does not succeed and is dismissed. The claim for unlawful deduction from wages (failure to pay bonus) does not succeed and is dismissed. The reasons for the judgment are as follows.

2. The Claimant was employed by the Respondent since 2015. In 2017 he was promoted to be a senior supervisor.

3. The Respondent is a large company employing 4,000 employees. It has what it calls a 'flagship' contract supplying a variety of parking and other services to the London Borough of Waltham Forest. That contract commenced in 2003 for an initial period of 10 years and is worth over £60m over the length of the contract; 92 staff are employed on the Waltham Forest contract. For parts of his career as a senior supervisor the Claimant was responsible for the supervision of up to 67 of those 92 staff. I accept the evidence of the Respondent's witnesses that the Waltham Forest contract was and is crucial to the commercial success of the Respondent.

4. There is an excerpt from the contract between the London Borough of Waltham Forest (WF) and the Respondent which is at page 388 of the bundle. It envisages a situation where WF may insist upon the removal from that contract of any particular employee of the Respondent. This is exactly what happened in the circumstances involving the Claimant. He was eventually dismissed on 17 May 2019 following the insistence of WF (particularly the robust views of Mr A Hall who is the WF Head of Parking Services) that he be no longer permitted to work on the WF contract. He was dismissed on five weeks' notice and received notice pay.

5. The law in these difficult situations is as follows. Section 98 of the Employment Rights Act 1996 is the relevant statutory provision. An employer who dismisses one of its employees must make the decision to dismiss for one of the potentially fair reasons set out in s 98(2) of the 1996 Act. It is for the employer to show the reason for the dismissal and that must be either one of the reasons in section 98(2) or for 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held' (sometimes called an SOSR reason). I am satisfied that the Claimant was dismissed for some other substantial reason as defined in section 98(1)(b).

6. The SOSR reason was that, in accordance with its contractual entitlement, the WF client required the Claimant's removal from the Waltham Forest contract. That requirement was vehemently expressed three times by Mr Hall in robust terms in emails at pages 218 and 221 of the bundle and at page 271 dated March 22, 2019. The emails were sent by Mr Hall to Mr Neil Hutchins who at that point was the Account Director (Local Government) for the Respondent. Mr Hutchins was a grade higher than the Contract Manager grade referred to in the relevant contract clause at page 388. In the Claimant's case the Contract Manager, Beth Rutherford, could not deal with this matter because she was one of the complainants who was aggrieved by his conduct. The matter was thus escalated to Mr Hutchins.

7. I am satisfied that eventually Mr Hutchins and Mr Hall, via email and telephone conversations, reached the type of agreement referred to in paragraph 14.2.3 of the WF contract to the effect that the Claimant must be immediately removed from the provision of parking services for Waltham Forest. The dispute resolution procedure in paragraph 14.2.4 was never invoked because there was no formal dispute and I am satisfied that that this was a reasonable exercise of the Respondent's discretion. Indeed, the Respondent's witnesses said that no dispute resolution process has ever been invoked in their experience.

8. It was commercially imperative for the Respondent to accept the decision of Mr Hall since otherwise the WF contract itself was prejudiced. There was danger not only to the Respondent's income and profits but also a risk to the 92 jobs of the other staff employed by the Respondent to work at Waltham Forest. The Claimant told me that he acknowledges that if a third party client insists on the removal of a particular employee then '*it has to happen'*.

9. The second part of the law relating to unfair dismissal, once the reason for the dismissal is established, is set out in s 98(4) of the 1996 Act. Once a potentially fair reason is established the Tribunal must look at the question of whether the dismissal for that reason is fair or unfair. It is necessary to look at all the circumstances, including

the size and administrative resources of the Respondent, and be satisfied that the Respondent acted reasonably. In this case the Employment Judge must decide whether the Respondent acted reasonably or unreasonably in treating the 'some other substantial reason' (SOSR) described above as a sufficient reason for dismissing the Claimant. That question has to be determined in accordance with equity and the substantial merits of the case. This is sometimes called the fairness question. Was it fair and reasonable for the Respondent to dismiss the Claimant for the SOSR that has been identified?

10. First, I am satisfied that the Respondent took conscientious steps to appease Mr Hall and to persuade him that the problems he identified in relation to the Claimant's alleged misconduct had been dealt with internally. Mr Hutchins attempted to persuade Mr Hall that the conduct, part of which was referred to him by WF but some of which came from other complainants, had been thoroughly investigated by Mr Palmer and Ms Champ and that there had been a disciplinary hearing with an experienced senior manager of the Respondent, Mr Paul Boxall, who gave evidence in this case.

11. In this connection I am satisfied that the Respondent carried out a thorough investigation into that misconduct, that Mr Boxall carried out a fair and properly conducted hearing on 13 March 2019 and at the end of that hearing he issued a final written warning to the Claimant. He explained his decision to the Claimant thoroughly and gave him full information about what was happening during the disciplinary process and why he decided as he did. Thereafter, once the final written warning had been issued, Mr Hutchins wrote immediately at page 271 and made strenuous efforts to persuade Mr Hall as follows:

> "*I've taken steps to ensure a thorough investigation into the concerns and as a safeguard measure Ali has not worked on the Waltham Forest contract during the investigations. I now write to advise that our investigation is complete, NSL do believe that any concerns raised around Ali's conduct can be addressed appropriately through the company's internal procedures and due to our findings, we would like to ask for your agreement for Ali to return to the Waltham Forest contract."*

12. Within 21 minutes of receipt of Mr Hutchin's correspondence Mr Hall entirely refused to accept his position and wrote as follows:

> "*Thank you for your update. I appreciate the efforts you have taken so far in determining the facts around this case. I understand how you've reached your decision. However, I believe the trust and confidence the council has to have with the members of the contractor staff has broken down to such a degree with Ali Karami that having him back as a member of the local management team would not be conducive to a good relationship and in my view, may destabilise the local team."*

The Respondent was therefore placed in an extremely difficult if not impossible situation. It had carried out its internal disciplinary investigation, issued its employee with a final written warning and taken steps to persuade the WF client that the matters

of concern had been resolved. It asked that Mr Karami should be permitted to return to WF but that was categorically not accepted.

13. It was therefore necessary for the Respondent to take further steps in relation to the Claimant's continued employment. It must be emphasised that the final written warning was issued for misconduct. This was a separate reason to the SOSR for which the Claimant was eventually dismissed. At the disciplinary hearing Mr Boxall had an option and an opportunity to dismiss the Claimant but he did not. If the Respondent had been determined, as the Claimant puts it, to 'get rid of him' Mr Boxall could, at his discretion, have overruled the provisions of the disciplinary policy which require a succession of warnings issued in stages and dismissed the Claimant rather than issue a final warning. Mr Boxall did not act in a way which demonstrated a fixed and pre-determined decision to terminate the Claimant's employment with the Respondent.

14. The Respondent must show that it acted fairly in carrying out the SOSR dismissal relating to the third party (WF) insistence on removal. The Respondent must show that it took reasonable steps to consult and discuss with the Claimant about what to do concerning his continued employment with NSL at a time when WF continued to refuse to retain him on the WF contract for parking services. The Respondent was obliged to look for alternatives to an SOSR dismissal which was not inevitable if another job could be found for the Claimant somewhere within its organisation.

15. Mr Boxall took the first step of continuing the Claimant's suspension and he arranged another meeting which took place on 8 May 2019 at which the Claimant was represented by his trade union shop steward. His representative quite correctly and repeatedly advised him, as recorded in notes signed by the Claimant, that the purpose of the meeting was to try to 'move forward' and find him another job outside WF. I am satisfied that the Respondent took reasonable steps to find employment for the Claimant within its wider organisation. Those steps were taken by Mr Boxall and by Mr Adam Ball from Human Resources. At the appeal against dismissal Mr Parish, who also gave evidence to the tribunal, took further steps to assist him.

16. I am satisfied that the Claimant was sent job vacancy lists which covered all jobs within the Respondent organisation. Mr Parish personally rang the IT department of the Respondent to check if there were any jobs in IT because the Claimant had explained that he had relevant IT skills. The Claimant was encouraged to make applications for vacancies. Mr Boxall referred him for a job at the London Borough of Camden which is convenient to where the Claimant lives. This was a vacancy as an on-street parking supervisor and Mr Boxall offered to arrange for the Claimant to 'slot in' to the job immediately. Unfortunately Mr Boxall, who was then based in Kensington and Chelsea, did not appreciate that there had been a recent dispute between the Claimant and the parking services management at Camden.

17. The manager at Camden, Mr Paulo Orezzi, and indeed his senior manager, Mr Pugh, refused to work with the Claimant. Those two managers said that there had been a fundamental breakdown of any working relationship they had or might have with the Claimant. This breakdown had occurred as a result of an earlier grievance raised by the Claimant when he was working at WF. Mr Orezzi adjudicated upon and

ultimately rejected the grievance and Mr Pugh as the appeal manager similarly declined to uphold it. Not only did Messrs Orezzi and Pugh allege aggressive behaviour towards them by the Claimant during the grievance process but Mr Orezzi had thereafter been made the individual subject of an Employment Tribunal claim by the Claimant containing serious allegations of discrimination. That claim has been discontinued.

18. I am satisfied that this subjective response by Mr Orezzi was additionally founded in rational organisational reasoning in which he was supported by his own manager, Mr Pugh. Both took the view that the Claimant would be too disruptive to the Camden contract to permit him to work there with them. It was reasonable for the Respondent not to insist that this transfer to Camden took place against the wishes of the Camden management.

19. There was one other job the Claimant was initially interested in. It was in Birmingham as a Base Manager but he did not eventually apply and page 334 of the bundle makes it clear that he only expressed real interest in the Camden job. The Claimant refused to consider any one of a number of Civil Enforcement Officer jobs (CEO) because they were several pay grades below his earnings. Since he declined to look at any such CEO vacancies the Respondent could not help him in that respect. He later changed his mind and did make a CEO application but that was not until 11 June 2019, after his dismissal, by which time it was too late for the Respondent to intervene or assist and indeed the Claimant did not ask for any such help.

20. I am satisfied by reference to the Claimant's replies to a lengthy cross-examination and supplementary questions from me that the Claimant sought no other assistance from the Respondent or even told the Respondent about any other job he was interested in. He did not apparently seek or require support. He made many unspecified pleas for help to get him a job, '*to find him a job anywhere'*, but he did not take any specific action to seek the practical help of the Respondent; there was nothing more the Respondent could do to assist him. At the appeal hearing Mr Parish, as appears from pages 375-377, conscientiously sought to assist the Claimant and explain what was happening, why the situation had arisen whereby he had to move from WF and what the Respondent could do. He again reiterated that the Respondent, in his professional view, had acted fairly in investigating the misconduct about which Mr Hall complained, had tried to persuade WF to retain him and had thereafter taken all possible steps to assist the Claimant to obtain another job within NSL. I agree with Mr Parish's analysis and I am certain that it was properly explained to the Claimant.

21. I now deal with a number of other allegations of unfairness made by Claimant so that he will hopefully understand that all these issues have been taken into account in this judgment.

22. First, the Claimant alleges that the Respondent failed to take into account any of Mr Hall's improper motives for wanting him removed from WF. He says that having failed to take into account those improper motives there has been consequent injustice to him. I disagree that Mr Hall's reasons for wanting the Claimant to be removed were not looked at closely by the Respondent. Mr Hall was personally interviewed and

questioned by Mr Boxall in connection with the disciplinary hearing on 13 March 2019 (page 274). This was done in order to establish what grounds Mr Hall had for his allegations of misconduct. There were other complainants who were interviewed separately from Mr Hall and who made different allegations.

23. At page 218 there is reference to a conversation between Mr Hall and Mr Hutchins on 16 November 2018 'regarding Ali Karami'. I note that the conversation on 16 November 2018 took place before the Claimant lodged claims in the Tribunal against NSL and Mr Orezzi on 28 November 2018. It cannot therefore be the case that it was the tribunal claims that prompted Mr Hall to contact Mr Hutchins in order to seek the Claimant's removal from WF. None of those claims were made against WF. The complaints by Mr Hall were certainly made well before the Claimant lodged another claim in case number 3200838/2019 on 22 March 2019 in which he sought to sue Mr Hall personally for unfair dismissal (this claim was struck out). I am satisfied that the various tribunal claims were not what prompted a number of misconduct complaints by Mr Hall and others against the Claimant. Those complaints and the findings of fact are comprehensively and accurately summarised in the disciplinary outcome letter at page 273 dated 22 March 2019.

24. Secondly, the Claimant believes that the Respondent acted unfairly in asking him to attend the 8 May 2019 meeting to discuss his future employment when he was unwell and absent through sickness, including stress related symptoms and anxiety. Again, I conclude that the Respondent did not act unfairly. The final written warning had been issued on 22 March with a full explanation given as to why the company still could not have the Claimant back in WF and why he must remain suspended. The next meeting was scheduled for 28 March in order to promptly explore where and when the Claimant could be re-deployed outside WF. That meeting was postponed to 1 May and then again postponed to 8 May in order to take account of the Claimant's ill-health. Meanwhile, Mr Boxall referred him for an occupational health assessment and an OH report was issued on 13 April 2019. During this time job vacancy lists were being sent to the Claimant. Even if the Claimant did not, as he told me, receive a copy of the occupational health report dated13 April, he was sent a summary of it on pages 301-302 which is a letter from Mr Boxall in which he attempts to reschedule the meeting to 1 May. The OH advice is again summarised at page 322. From that correspondence it is clear to the Claimant that Mr Boxall has received advice from OH that it would be better for the Claimant's health to resolve the question of his employment. Furthermore it is stated that OH have discussed the situation with Mr Karami and he agrees it should be resolved promptly. The report at page 298b reads as follows:

> "*I believe and he agrees that the situation does need to be resolved as soon as possible and he has therefore agreed to engage in the process."*

That letter is signed by Elaine Hickson the OH practitioner. It was therefore reasonable for the Respondent to continue with the arrangements for a further meeting which eventually took place on 8 May 2019.

25. Thirdly, the Claimant says that he had outstanding grievances which were never resolved and which should have been resolved before he was dismissed for SOSR. He alleges that the fact that these outstanding grievances were not resolved shows that the Respondent were prejudiced against him and had pre-determined to dismiss

him. From his evidence I have identified three such grievances. I am satisfied that all of them were resolved by the Respondent before dismissal.

26. The first of the Claimant's grievances concerned his pay and his contractual terms and conditions. The grievance was lodged in August 2018. The grievances were investigated and then dealt with by Mr Orezzi at Camden, outside WF. An appeal was heard by Mr Pugh. The Claimant was not satisfied with the outcome and indeed was outraged by the result but nonetheless the grievance was dealt with and concluded in accordance with the Respondent's procedures.

27. Secondly, the Claimant says he had a grievance which he wrote on 11 March 2019. The complaint, consisting of four points and sent to Mr Boxall begins at page 253 and was acknowledged at page 251. Mr Boxall explained the procedure he intended to follow, confirmed that he was satisfied that a full investigation had taken place and then goes on in the disciplinary hearing notes at page 259 to deal with all four of the points raised by the Claimant at page 252. In particular, at point 4 where the Claimant again queried the attitudes and motivations of Mr Hall, Ms Rutherford, Ms Smith and others Mr Boxall explained that this would all be looked at as part and parcel of the disciplinary investigation into the Claimant's alleged misconduct. It is clear that these issues were considered in the disciplinary hearing and Mr Boxall's conclusions about each issue is set out in the outcome letter at page 273. That grievance of 11 March 2019 was resolved albeit with a different result to the one which the Claimant sought.

28. Thirdly, the Claimant says that he made another complaint at page 253 of the bundle. That page refers to what the Claimant calls 'ganging up' against him by his colleagues 'to take advantage of his position'. I am satisfied that page 254 does not refer to a grievance, it refers to a grievance he intends to take out. He says '*I am going to put grievance against the above employees. I am going to put forward against Sarah Smith etc I am going to request company procedure to be put on hold while dealing with my grievances'.* However, he never sent that grievance to the Respondent or provided any detail at all. I find page 253-254 to be a threat of further complaint which the Claimant never carried through. It therefore did not remain in any sense unresolved whilst the disciplinary or later SOSR dismissal procedures ran their course.

29. Fourthly, the Claimant is concerned that the dismissal was unfair because he was unable to access his emails after he was suspended on 5 February 2019. In fact, he had been on holiday and on unpaid leave from 30 November 2018. I was persuaded by Mr Boxall that to deny access to emails is a standard security practice of the Respondent in relation to suspended employees. I conclude however that the Claimant knew of and was offered the facility whereby Mr Boxall or indeed Mr Parish would access his email account, search and produce any documents he wanted to see and which he could identify to them. I find Messrs Boxall and Parish to be credible and cogent witnesses who were unlikely to refuse to comply with any such reasonable requests. There was only one such request from the Claimant - he asked to see some emails between himself and Mr Hall about a spelling mistake. Mr Boxall looked at his emails but was unable to locate any such correspondence between the Claimant and Mr Hall.

30. In all the circumstances I find there were no significant procedural flaws which make this dismissal unfair. In considering the fairness test described above the dismissal was fair and the claim of unfair dismissal does not succeed.

31. Finally, there is a claim for unlawful deduction from wages. I can deal with this claim briefly. I am satisfied that the Claimant was offered the job of senior supervisor at a salary of £31,900. This fact appears from page 128 of the bundle. In addition, he was entitled to attendance allowance and cleaning allowance in accordance with an agreement with the trade union UNITE. The Claimant accepted that job offer on those terms. The acceptance of that offer formed his contract of employment and he worked in his new job accordingly. Pages 128, 129 and 130 make no mention of any additional entitlement to a bonus of £5,000 relating to the Claimant's performance. He queried none of those documents at the time. When he brought his first grievance about his pay he could produce to Mr Orezzi and to Mr Pugh, who were looking at his grievances about pay, no evidence at all of any agreed bonus. He not shown me any such document to prove his claim that he is entitled to this bonus.

32. The Claimant states that the bonus was promised to him by a previous manager Mr Micah Harris who has left the employment of the Respondent. Mr Harris could have appeared as the Claimant's witness without any risk of the 'intimidation' which the Claimant alleges has occurred in relation to other potential witnesses still employed by the Respondent. In addition, the Claimant has had at least two case management discussion meetings with Employment Judges and has been in frequent correspondence with the Tribunal. He had the opportunity to ask 'how do I get a witness here and what do I have to do?' He made no such query. He made insufficient attempts to produce evidence about the promises allegedly made to him for bonus payments and has failed to discharge his burden of proof in this respect.

33. The Claimant accepts the calculations made by Mr Herring in his witness evidence on behalf of the Respondent. I accept that the Claimant has been paid his cleaning allowance and attendance allowance correctly. In addition, I accept in its entirety Mr Herring's clear and coherent evidence in his largely unchallenged witness statement that 'on target earnings' or OTE does not refer to a bonus payment. The Claimant was entitled to no such bonus payment and his claim for those amounts does not succeed.

Employment Judge B. A Elgot

3 January 2020