EMPLOYMENT TRIBUNALS

Claimant: **Mr J Lynch**

Respondent: **ICTS (UK) Ltd**

Heard at: **Croydon** **On: 26/11/2019**

Before: **Employment Judge Wright**

Representation

Claimant: In person

Respondent: Mr J Gilbert - consultant

RESERVED JUDGMENT

The Judgment of the Tribunal that the claimant's claim that he was automatically unfairly dismissed as a result of a health and safety reason contrary to s.100(1)(e) Employment Rights Act 1996 fails and is dismissed.

REASONS

1. This was a final hearing to determine the claimant's claim of dismissal under s. 100(1)(e) Employment Rights Act 1996 (ERA). The claimant was employed by the respondent as a Security Officer between 5/12/2017 and 29/4/2019. He presented a claim form on the 18/7/2019. The respondent provides security services to its clients throughout the UK. The claimant worked at the American Express site in Brighton.

2. The Tribunal had before it a bundle of 150-pages. It heard evidence from the claimant and for the respondent from: Mr Smith the investigating officer, Mr Benwell the dismissing officer and Mr McGowan, the appeal officer. Due to lack of time, judgment was reserved.

3. There was little factual dispute between the parties and the main issue was whether or not the claimant could demonstrate his circumstances fell within s.100(1)(e) ERA.

4. At the start of the hearing, Mr Gilbert followed up on the written strike out application dated 17/10/2019 which had not been considered. Mr Gilbert said that the claimant was essentially trying to run an unfair dismissal claim as a s.100(1)(e) ERA claim as he did not have qualifying service for an unfair dismissal. The matter for which the claimant was dismissed, was that when a fire alarm went off in the American Express building, the security gates open in order to allow the staff to evacuate the building. What the claimant did was to stop the staff from exiting, even though the gates automatically opened; and he held the staff for eight minutes. Mr Gilbert says the claimant cannot show, that he believed there to be circumstances of danger, which he reasonably believed to be serious and imminent and so he took appropriate steps to protect himself or others from the danger. Mr Gilbert says that for the claimant to come within s.100(1)(e) ERA, he would have had to do the opposite; by which he means that the claimant would have had to allow the staff to leave the building, contrary to an instruction not to do so. There was no such instruction and it is the respondent's case that the claimant was instructed, when the alarm sounded, to prepare to evacuate the building; and he did not allow the evacuation to take place.

5. The claimant's case is that the message was to 'hold' the staff in the reception, pending further instructions. He was instructed to do so, until told otherwise by his superior. The claimant went onto develop this argument to suggest that it was in fact more dangerous to allow an unnecessary evacuation of the building, if for example, the incident was found to be a false alarm.

6. On balance, it was decided that was in the interests of justice to hear from both sides and to allow the evidence to be tested, before reaching a decision.

The Law

7. Section 100 of the ERA provides:

> (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—
>
> …
>
> (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.

8. The claimant referred to and relied upon the authority of Oudahar v Esporta Group Ltd UKEAT/0566/10/DA. In that case, the EAT held:

> Firstly [the Tribunal] had to consider whether there were circumstances of danger which the employee reasonably believed to be serious and imminent and whether he took or proposed to take appropriate steps to protect himself. Secondly, if the criteria were made out, the Tribunal should have asked whether the employer's sole or principal reason for dismissal was that the employee took or proposed to take such steps. If it was, the dismissal must be regarded as unfair. The Tribunal did reach a conclusion on this question but it did not reach a conclusion on the first. Also, the mere fact that the employer disagreed with the claimant as to whether there were circumstances of danger, or whether the steps were appropriate, was irrelevant.

Findings of fact

9. On the 18/4/2019 (the day before Good Friday) at 15:50 a fire alarm was activated. This was not a planned test or drill and so there were two options. Firstly, that there was a fire; or secondly, that it had been set off accidentally or was a false alarm. The glass case on the fire alarm had been smashed, indicating that the person triggering the alarm had thought there was an emergency.

10. The claimant was on duty on the ground floor in reception. His case is that the building is evacuated floor by floor, starting with the floor where the incident has occurred, then the floor above and below and then the remaining floors. There is a tannoy system on each floor. Staff were also leaving the building at the end of the day for the Easter weekend. The tannoy message for the ground floor was to remain at your station (in effect to stay put).

11. The end result of that was that the claimant prevented the staff from leaving the building for eight minutes. He was obeying the instruction to stay put from the tannoy on the ground floor. This was irrespective of other members of staff obeying the instruction to evacuate their floor from higher up.

12. The claimant had various explanations for preventing the staff leaving. He says holding people on the ground floor prior to or after an automatic evacuation is not a risk. He was instructed by the building manager to hold the staff (the respondent states the building manager has no authority over it or its staff and certainly does not have any right to intervene in a security situation). There were complexities and contradictions in respect of the alarm

system at the American Express building. There was no excessive build up or panic, that it was not a 'Hillsborough'[1] situation. It was dangerous to let the staff leave without them presenting their passes at the exit, as if there was then another security incident, it could not be known who had already left the building. The risk would be increased if he were to allow an evacuation. The claimant also says the evacuation procedure (which states the staff must leave) was not the one which applied at the time of the incident.

13. The claimant also says, which is not doubted, that he acted in good faith.

14. The claimant was interviewed via telephone by Mr Smith on 18/4/2019 and he made a written statement to his line manager (pages 61-64). He said: 'because of my actions, for the duration of the situation reception was calm, and under control.' He went onto say; 'at no point during the situation was there any panic or alarm…'

15. Mr Smith then interviewed the claimant in person on 25/4/2019 (pages 65 to 66). At that meeting, the claimant was asked what he had thought he was dealing with and he said a false alarm. When asked if he had made that assumption, he said he did not know either way and he was waiting for his line manager to give him direction. He did not know there was an evacuation happening.

16. Following that meeting the claimant was suspended. He attended a disciplinary meeting on 29/4/2019 conducted by Mr Benwell (pages 69-71). Mr Benwell started the meeting by saying to the claimant that his actions on the 18/4/2019 could have been catastrophic and he was asked why he did what he did. The claimant replied that it could have been a false alarm and he understood his role in that scenario was to secure the exit and that the crowd waiting was relatively calm. The claimant was waiting to be told that it 'was an evacuation' before he would let the staff leave.

17. There was a discussion and eventually, the claimant said that he realised three minutes into the situation that he was doing the wrong thing, although he did not explain why he did not rectify this for a further five minutes. He went onto say that 'we were in a false alarm'.

18. Mr Benwell took the decision to summarily dismiss on 1/5/2019 (page 72). He found the claimant's explanation to be unsatisfactory, there was a concern this was a major breach of health and safety policies and the consequences could have been disastrous. Mr Benwell went onto find there had been a fundamental breach of the contractual terms, which irrevocably destroys trust and confidence in the employment relationship.

[1] Mr Benwell said he was offended by this reference.

19. The claimant appealed that decision on 4/5/2019 (page 73). The appeal hearing took place on 11/6/2019 and was conducted by Mr McGowan. In the appeal meeting the claimant said that he realised that at minute eight it was a false alarm. He also said, 'it was a controlled situation why would I radio things are calm, people are being compliant it's just the alarm hasn't been cancelled.'

20. On 27/6/2019 Mr McGowan upheld the decision to dismiss (pages 93-94).

Submissions

21. The respondent's case was that this could not be a situation where the claimant could say there were circumstances of danger which he reasonably believed to be serious and imminent, Mr Gilbert submitted that if the claimant had reasonably believe that there were such circumstances, that he would have done the opposite of what he did do. If the claimant had believed there were circumstances of danger, then he would have let the staff exit the building. The claimant it was submitted, thought it was a false alarm and that is the reason why he held the staff.

22. The respondent said that this was an unfair dismissal claim, 'dressed up' as a s.100 (1)(e) ERA, claim, as the claimant did not have qualifying service to bring an unfair dismissal claim. It was only after the claimant received correspondence from the respondent pointing that out to him that he decided to refer to s.100 (1)(e) ERA. The claimant was given the opportunity before cross-examination to add anything further to his witness statement and he did not do so.

23. The burden is on the claimant and when it was specifically put to him to ask him to identify the circumstances of danger, he shrugged his shoulders. The claimant could not therefore have believed there were circumstances of danger which were serious and imminent. The claimant offered no evidence of this in the investigation, disciplinary and appeal hearings. The claimant could not therefore hold such a reasonable belief.

24. The claimant has not pleaded that his claim was an automatically unfair dismissal for health and safety reasons. He confirmed he had taken legal advice prior to presenting his claim as referenced in the documents. As far as the claimant was concerned, he held the staff for eight minutes. The respondent concluded, rightly so, that his actions were severe, grave and potentially fatal and this was something which the claimant failed to see. The claimant described the scene of one of peace and tranquillity. If that were the case then it follows there was no panic. The claimant was preventing the staff from leaving not because he was protecting himself, but because he believed it was a false alarm.

25. The key is what was the reason for dismissal? The principal reason was the claimant's breach of health and safety procedures had led to a breach and a breakdown of trust and confidence between the parties. Refusing to allow the staff to exit cannot amount to the claimant having a reasonable belief that there were circumstances of danger which were serious and imminent.

26. The claimant submitted the fire alarm being triggered is of itself a circumstance of danger. An evacuation following a false alarm could be a circumstance of danger and an evacuation for no good reason is a risk to health and safety. The claimant says he acted in good faith.

Conclusions

27. Were there circumstances of danger which the claimant reasonably believed to be serious and imminent? If there were, was that the reason (or the principal one) for the dismissal?

28. The claimant believed that the alarm was a false one, hence why he held the staff. The claimant suggests that the fact of the alarm going off is of itself a circumstance of danger. If however, that were the case (the alarm going off was a circumstance of danger) then logically, the claimant would have allowed the staff to evacuate the building. The finding is that if the claimant had reasonably believed there were circumstances of danger due to the alarm going off, that he would have allowed the evacuation for that reason. As Mr Gilbert submitted, the claimant did the opposite. In holding the staff and believing that it was a false alarm, the claimant cannot have reasonably believed there were circumstances of danger that were serious and imminent.

29. The burden is on the claimant and there is no evidence from him as to what he reasonably believed were circumstances of danger. It is not enough that he now says in submissions the circumstance of danger was the fact of the fire alarm being activated.

30. The claimant says the procedure was confusing. If the procedure is that once an alarm is triggered, the staff exit the building, that is why the gates open automatically. The staff would have seen the gates were open and would have expected to follow the training and to exit the building through the open gates; not to be held there by the claimant. This is irrespective of what the tannoy was saying. It may well be that some of the staff had come from a floor where there was an instruction to evacuate.

31. The claimant was dismissed for failing to follow the respondent's procedure when an alarm is activated. He made an assumption that it was a false alarm and he held the staff.

32. The Tribunal finds that there were no circumstances of danger, which the claimant reasonably believed (he believed there was a false alarm and therefore no danger, hence his decision to hold the staff) to be serious an imminent.

33. It therefore follows that the respondent did not dismiss the claimant for taking appropriate steps to protect himself and others. The step the claimant took of holding the staff was not appropriate and in any event, there were no circumstances of danger which the claimant reasonably believed to be serious and imminent.

34. For those reasons, the claim fails and is dismissed.

Employment Judge Wright

Dated:9 December 2019

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