mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr D Salazar Restrepo**

Respondent: **Atlantic Cleaning Services Ltd**

Heard at: **East London Hearing Centre**

On: **Thursday 13 February 2020**

Before: **Employment Judge Davidson**

Members: **Mr T Burrows**
Mr D Ross

Representation

Claimant: Mr F Magennis, Counsel

Respondent: Mr L Robinson, director

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that the claimant's complaints of unfair dismissal and automatic unfair dismissal fail and are hereby dismissed.

REASONS

Issues

1 The issues for the hearing were as follows:

1.1. Was the claimant dismissed by the respondent?

1.2. If so, was the dismissal unfair?

1.3. Alternatively, was the claimant dismissed automatically unfairly in connection with his trade union membership?

1.4. If the claimant was not dismissed by the respondent, was the claimant constructively dismissed?

Evidence

2. The tribunal heard evidence from the claimant on his own behalf and from Mr Lee Robinson, Director, on behalf of the respondent. There was also an agreed bundle of documents.

Facts

3. The tribunal found the following facts on the balance of probabilities.

3.1. The respondent operates a contract cleaning company in London with approximately 300 employees. In April 2018 it took over the cleaning contract at Gatehouse School in London and approximately 7 employees transferred to the respondent under TUPE. These included the claimant, who had been employed as a cleaner at the school since 2009. At the time of the transfer, the claimant was a supervisor working the evening shift.

3.2. The respondent's staff handbook contains the provision that the employee 'is required to be available for work in any area within the Contract site or at any other Contract within a similar travelling distance from your place of residence'.

3.3. After the transfer, the respondent reduced the average working hours of all the employees to meet the budgeted hours, which was the basis on which it had won the tender. The claimant's hours reduced from 3 hours to 2 hours by staged reductions in July and November 2018.

3.4. In late 2018, in response to comments from the client that cleaning staff did not appear to be working their full hours, the respondent introduced a monitoring system called EziTracker. This required the staff to telephone a number and input their PIN on arrival and on departure at the site. There was a dedicated telephone for this purpose located in reception. There was a conflict of evidence on the date that this was introduced, neither account being challenged by the other party. We find that the actual date of implementation is not material but we find it more likely to have been late 2018 in the light of the date of the complaint from the school.

3.5. For the purposes of payroll calculations, the amount of each employee's pay was based on a starting assumption that the employees were working the budgeted amount and this figure was then adjusted on the basis of the information from the EziTracker monitoring system.

3.6. There were a number of problems with the operation of the EziTracker which the claimant brought to the attention of the respondent.

3.7. On 5 November 2018, the claimant was issued with a written warning for failing to co-ordinate the team during the holiday period. This followed a complaint from the client. There was no disciplinary hearing prior to the warning being issued. The claimant alleges that he never received this.

3.8. In January 2019, the claimant took on additional hours as a cleaner working afternoons. On 30 April 2019, the respondent amended the claimant's working hours with the effect that his afternoon cleaning shift (paid at £10.20 an hour) was reduced by a half hour and his evening supervisor shift (paid at £11.50 an hour) was increased by a half hour.

3.9. In April 2019, the claimant consulted a trade union and his union representative wrote to the respondent complaining about the changes to his hours in April 2018 and November 2018. The letter mentioned the change to the claimant's hours in April 2019 but did not complain about this. The respondent replied to the union representative confirming that notice of the 2018 changes had been given in 2018 and that the reduction of hours was at the client's request.

3.10. On 30 April 2019, the claimant had an accident at work and slipped on wet stairs. He notified the respondent at 11am on the following day, 1 May 2019, that he would not be able to work on the afternoon shift (which started at 1.30pm) but that he would be available for the evening shift. It is a requirement of the respondent that employees give at least 3 hours' notice if they are not going to be attending work so that they can source an alternative worker. In the case of a school contract, the pool of replacement workers is smaller than usual as the individuals have to have DRB checks. The claimant rang 2.5 hours before his shift. In the event, the respondent was unable to cover the shift on that day and the client complained to the respondent. The respondent then issued a final written warning to the claimant for failing to give sufficient notice of his absence. This warning was issued without a hearing or any investigation.

3.11. The warning letter was dated 2 May but handed to the claimant on 30 May.

3.12. On 6 June 2019, various employees received payslips which had reflected their hours according to the EziTracker data, not the timesheets manually completed and submitted by the claimant (as supervisor). This therefore showed an underpayment against the amount the employees were expecting. They threatened not to work if this was not resolved, as reported by the claimant to Mr Robinson. Mr Robinson visited the site and confirmed they would all be paid according to the amount allowed for in the

budget (not according to the actual hours worked as recorded by EziTracker) and that any issues would be resolved subsequently. Therefore, in the meantime, they would be paid the amount they were expecting.

3.13. As the cleaners had not received the money by the start of their next shift on Friday, they attended the site but did not work. As a result, the claimant and the manager, Marco, worked extra hours on Sunday so that the school would be clean before it opened on Monday morning.

3.14. On 7 June, the client wrote to the respondent registering concern about the claimant. The letter includes the following comments:

> *"Personally I do not believe that Diego is an effective supervisor and the standards of cleaning at the school are not always good. You need to have a supervisor who is supportive of your management instructions and processes. I am appalled to hear that he has been unhelpful and has apparently encouraged other staff to be neglectful of their duties. I believe you have no option but to remove him from his position and I confirm I would be supportive of any decision you make in that respect. In fact, I suspect the sooner the better would be your best course of action".*

3.15. On 19 June 2019, the respondent wrote to the claimant (delivered to him on 20 June 2019) informing him that he was being removed from the school site. He was offered a position at another site but this was on less favourable terms than the position at Gatehouse. The claimant's union representative responded on 27 June, stating that the alternative employment was not suitable and alleging that he was being penalised for being vocal and being a member of a trade union. At that point, the claimant's representative stated that the claimant wished to continue working for the respondent but not at the reduced rate offered.

3.16. In August 2019, the respondent offered the claimant a position which substantially replicated the terms and conditions of the school job but without a supervisory role. The claimant did not follow this up or seek further information. He told the tribunal that he was concerned that he would not get continuity of service (although he confirmed that nobody told him that this would be the case) and that he no longer wanted to work for the respondent due to the way he had been treated.

3.17. The claimant states that this offer came after his P45 was issued and Mr Robinson's evidence was that the offer was made before the P45 was issued. Neither account was challenged by the other party. The P45 was not in the bundle so we are unable to reach a finding on this.

3.18. In July/August 2019, the claimant's knee and hip problems became worse and he is currently unable to work due to these problems. He stated that the stress and depression exacerbated his physical conditions. He is currently in receipt of Universal Credit.

Determination of the issues

4. We unanimously determine the issues as follows:

4.1. We find that the reason that the claimant was removed from his position at the school was because the respondent decided, under pressure and direction from the client, that the claimant no longer had the confidence of the client. We do not find that this was a dismissal.

4.2. The assignment at the school came to an end but the claimant's employment with the respondent continued. The respondent had a duty to find him other work. The first alternative position offered was not suitable and we find that the claimant was justified in turning it down. After a few weeks another, apparently suitable, position was offered but the claimant refused this. He stated that the reason was that he thought he would lose continuity of employment. He also stated that he no longer wanted to work for the respondent after the way he had been treated.

Constructive dismissal

4.3. We find that removal from site is not a breach of contract and, in any event, the claimant affirmed the contract on 27 June in the letter from his union representative, in which he wished to continue working but specified that he wanted to work at a site that matched his requirements. By the time such an offer was made by the respondent, just over a month later, the claimant appeared no longer to want to work for the respondent.

4.4. The claimant relies on breach of the implied duty of trust and confidence but no other conduct other than the removal from site has been argued. We do not find that the removal from the school was a breach of the implied duty of trust and confidence.

4.5. We therefore find that the claimant was not constructively dismissed.

Trade Union dismissal

4.6. We find that the fact that the respondent does not recognise a union is not, of itself, evidence of hostility to the union. The respondent willingly

corresponded with the claimant's union and there is no evidence of any negative implications for the claimant arising from that interaction.

4.7. The claimant relies on the timing of the disciplinary warning (for failure to give notice of absence), as this was shortly after the trade union contacted the respondent about the changes to the claimant's working hours. We find that the warning arose from the claimant's failure to give the three hours' notice required, not the union's involvement on a different issue. We have taken into account the claimant's submission that the issuing of a warning without any process is evidence that there was an ulterior motive for issuing it. We do not accept this submission and we note that the respondent universally fails to follow its own procedures, as it failed to do when issuing a warning in November 2018. Whilst this does not reflect well on the respondent in a general sense, we find it of no relevance to the submission that the claimant was dismissed for being a member of a trade union.

4.8. We see no evidence of the respondent being unwilling to engage with the claimant's union representative or any suggestion that it took exception to the claimant joining a union. We note that the respondent's handbook expressly states that the respondent recognises employees right to join a trade union of their choice.

Ordinary unfair dismissal

4.9. The claimant relies on *Hogg v Dover College* [1990] ECR 39 in support of the assertion that, by removing the claimant from the school and offering an entirely new contract on different terms and conditions, the employer had effectively dismissed the claimant. We reject that submission. The respondent was entitled to move the claimant from the assignment at the school and its decision to do so did not, in our view, amount to a dismissal. It is not the same situation as in *Hogg v Dover College* because the respondent did not unilaterally impose an entirely new contract on the claimant.

4.10. We find that the reason for dismissal was 'some other substantial reason'. The claimant's assignment at the school was terminated. This was the respondent's decision, albeit based on a strong indication from the client that this was the course of action it supported. In the light of comments from the client, we find that the decision to remove him was justified. It was not a decision arising from the respondent taking the view that the claimant had committed an act of misconduct or poor performance but it was a response to the client's negative view of the claimant's presence on site.

4.11. We accept that the claimant was justified in not accepting the first job which was offered and no criticism is made of him by us or by the respondent for this. We find that the respondent was obliged to offer that position but the claimant was entitled to reject it.

4.12. The respondent was obliged to offer any alternative that became available and we had no evidence before us that there were any jobs which it failed to offer prior to the 2 August offer. The respondent therefore acted correctly by keeping the claimant on their books until a new opportunity arose. In this case, by the time such an opportunity came up, the claimant was no longer interested in staying with the respondent.

4.13. If the reason for this is that he was concerned that his continuity of service would not be honoured, we find that this issue could have easily been dealt with by a question to the respondent or to the claimant's union representative, who was corresponding on his behalf at this point.

4.14. If the reason was that, by this time, he no longer had faith in the respondent to treat him properly, the claimant has not identified any conduct by the respondent after his removal from the school which explains his change of position. We note that, by this time, the claimant's health had deteriorated and it is unlikely he would have been fit enough to carry out a cleaning role or a supervisor role.

4.15. It appears that neither party did anything active to terminate the employment and there was no further communication after the claimant turned down the second offer of alternative employment. In any event, he was not able to take the position due to sickness.

4.16. In conclusion, we find that the claimant's complaints of unfair dismissal and automatic unfair dismissal fail.

Employment Judge Davidson

Date: 12 March 2020