EMPLOYMENT TRIBUNALS

Claimant: Mr N Hafeez

Respondent: Maintec Services Limited

Heard at: **East London Hearing Centre** **On:** **15th October 2019**

Before: **Employment Judge C Lewis**
Members: **Ms J Hartland**
Dr J Ukemenam

Representation
Claimant: In person
Respondent: Mr R Scupnak, Consultant

RESERVED JUDGMENT

The unanimous decision of the employment tribunal is that:
1. The Claimant's claim for automatically unfairly dismissal under section 100 of the Employment Rights Act 1996, health and safety reasons, succeeds;
2. The Claim for unlawful deductions from wages is dismissed upon withdrawal.
3. A remedy hearing has been listed on Monday, 24 February 2020 at 10 a.m and case management orders accompany this decision.

REASONS

1. By a claim form issued on 24th of April 2019 following a period of early ACAS conciliation from 24 April to 24 April 2019 the Claimant who had been employed by the Respondent from 3 September 2018 until 12 March 2019 brought a claim for unfair dismissal falling within section 100 of the Employment Rights Act 1996 (the ERA), dismissal for health and safety reasons; the Claimant also claimed unpaid wages but this was resolved before the final hearing and that aspect of the Claimant was withdrawn by the Claimant.

2. The Respondent entered a response 6 June 2019 in which the Respondent accepted that it dismissed the Claimant but put forward the reason for its decision to dismiss the Claimant on 12 March 2019 as being

"for wilful failure to follow reasonable management instruction for which the employee is accountable, which amounts to insubordination." Adding the actions of the Claimant also causing difficulties between the client and Maintec terms of expected service.

The issues

3. The issue for the tribunal to decide was whether the principal reason for the dismissal fell within s100 (1) (c) (d) or (e) of the ERA.

4. The tribunal heard evidence from the Claimant and from Mr Woodfine, and Mr P Hamilton for the Respondent. Mr Woodfine was the Technical Director and Mr Hamilton was a Finance Director.

5. At the conclusion of the evidence the Claimant and Mr Scuplak made submissions and Mr Scuplak provided the tribunal with a copy of section 100 from the Employment Rights Act and a copy of *Oudahar v Esporta Group Limited IRLR [2011] 730* .

6. The hearing finished at 4.15 the afternoon, leaving insufficient time for the tribunal to deliberate and the tribunal but met again on 15 October in Chambers to reach its decision. This is the reserved judgement with reasons

Findings of fact

7. The tribunal made the following findings of fact as far as they are relevant to the issues it had to decide.

8. The Respondent provides maintenance engineering for mechanical and electrical plants within schools and leisure centres, hospitals and offices. The Claimant was employed as a mobile multi-disciplined service and installation engineer from 3 September 2018 until his dismissal. He was required to work on various clients' sites in accordance with his role as described in his contract of employment. The Claimant had a background as an air conditioning engineer and his CV refers to his experience in previous roles in that capacity.

9. Clause 21 of the Claimant's contract refers to health and safety in the following terms:
"The Employer has a detailed health and safety policy a copy of which is available from the office. The employee is required to read the policy and take all necessary steps to comply. Failure to comply may result in disciplinary action and, in serious cases, dismissal." [page 31 of the bundle] .

10. The tribunal was provided with a copy of the Respondent's Health and Safety Policy Statement, the first page under the heading "Responsibilities" just above the signature of the Managing Director, Mr Green, [page 37] states as follows:
"Ultimate responsibility for Health and Safety in Maintec Services Ltd rests with the Managing Director. However, everyone working in and with the business has a part to play in assisting us to meet our obligations. Our Employees and Associates share a responsibility for their own Health and Safety, as well as for the Health and Safety of others who may be affected by their work and behaviour."

11. At paragraph 2.3 of the policy the employees' responsibilities are set out [page 40], the Claimant made reference to the following subparagraph: "All our employees must:
    a) take reasonable care for their own Health and Safety;
    b) consider the safety of other persons who may be affected by their behaviour at work. This includes looking out for the safety of their colleagues and members of the public;
    …
    f) not undertake any tasks for which they do not possess the relevant competency, skill and/or physical capability and/or they have not received suitable training."

12. The policy also provides for the managing director to be responsible for ensuring that risk assessments are carried out and that method statements have been produced and are in operation for potentially hazardous activities at the Respondent's premises and on sites.

13. A revised health and safety policy dated 2018 was also in the bundle [page 64], at page 9 of that document, under the heading "Selection of Contractors" the policy states that, "Managers will gauge the competency of any sub-contractors…" and sets out provisions for assessing the competency of sub-contractors to be used.

14. Manual handling is addressed at page 11 [page 66] noting that:

    - The Manual Handling Regulations require employers to avoid manual handling activities wherever possible. Where such activities are unavoidable then lifting aids should be provided (where possible). The regulations also require manual handling risk assessments to be undertaken of all activities likely to cause injury.
    - Manual handling training will be given where required pressure training provided on a regular basis

15. On 11 March 2019 the Claimant was asked to attend a job to replace a pump head at a leisure centre in Alton. He attended this leisure centre at 2 p.m. that day. On the way to the job he phoned Gary Woodfine to get more details of the job as his line manager Mr Bernard Subebe had limited information about the job. There was no answer from Mr Woodfine. It was accepted by the Respondent that the Claimant had not been provided with the risk assessment or method statement prior to attending the site although these had been completed by Mr Woodfine.

16. The method statement was in the tribunal's bundle [at page 70] and records that when the Claimant reached the site he was to sign in with reception and obtain work permits if required, no other on-site contact for the client was provided.

17. The method statement identifies the operatives as the Engineer and site assistant and the work as: ensuring electrical supplies isolated using suitable meter; ensure motors come to complete rest; isolate water supplies and drain pump; disconnect and remove existing pump head; remove head adhering to manual handling RAMS, with site assistance;

locate new pump head; reconnect pump head; fill unit and system; reconnect electrics; tidy work areas.Additional measures included use of PPE, gloves, goggles and safety footwear. In th box next to working with other trades the entry was “None”.

18. The risk assessment [page 69] identified the following hazards and associated risks: live electrical supply, risk of electric shock; moving rotating machinery, risk of trapped appendages or clothing; uneven floor, risk of trips and falls; sharp edges, risk of cuts and abrasions; scalding water, risk of burns and scolds (assessed as the highest risk); heavy load, risk of strains; use of hand tools, risk of scrapes and trapping of fingers.

19. When the Claimant arrived on site he found the pump in its casing in the reception area. The indication on the casing was that it weighed 50 kg. The Respondent accepted the pump head outside the casing, itself weighed some 24 kg.

20. The Claimant was aware of what was involved in the job as he had attended on a previous occasion to assist another engineer called Sam. On that occasion he had watched Sam change the pump and had provided him with assistance, but he had never carried out the job on his own, nor had he been responsible for instructing someone else how to do the job. The Claimant was aware that the task of changing the pump head involved a potential a risk of hot water in the region of 60 to 70°. It was possible that hot water remained in the pump head and would escape when the pump head was removed. The job required the engineer to isolate the water, remove the existing pump head, replace it with the new pump head, inserting the bolts while supporting the weight of the pump and at the same time lining up the pump head with the gas pipe, all of this would have to be carried out at head height. None of this was disputed by the Respondent.

21. The Claimant listed his concerns as follows: when he arrived on site he assessed the job and was unable to carry it out for the following reasons a) being too heavy lifting on his own would cause serious danger to his health b) never carrying out the task on his own before c) no risk assessment or method statement provided to him by his employer.

22. The Claimant contacted his line manager, Bernard Subebe, and told him that it was a two-man job and that he wasn't comfortable carrying out on the task on his own. The Claimant explained to his manager that his expertise was in air conditioning units and not boilers or pumps and that this was not something that he felt competent to deal with alone.

23. The Claimant asked his line manager to send another engineer and told him that he would wait for the engineer to arrive. Bernard told him that sending another engineer was not an option The Claimant then tried to phone Mr Woodfine again, whilst he was on site, but again there was no answer. The Claimant then rang Bernard back and said that there was no response from Mr Woodfine and nothing that he could do. The Claimant informed the client it was a two-person job and told the client that two engineers would be booked to attend first thing the next morning. He then rang Bernard and told him that he that he had informed the client that it was a two-person job and that engineers would need to be booked for the

following morning and that as there was nothing else he could do he was leaving the site.

24. After he left the site the Claimant had a number of conversations on his phone during his journey back towards London, some of which he recorded. We have seen the transcripts of those recordings and are satisfied that the Claimant's position and his explanation for leaving the site was consistent throughout, namely that it was as a result of it not being safe to carry out the job on his own and that he was told that another engineer would not be sent, he was not told that there was a site manager who could assist him.

25. The Claimant told us that he believed that it was not safe for him to do this job on his own. The Respondent maintained either that he could or should be able do it on his own or with the assistance from someone at the leisure centre. The method assessment from Mr Woodfine records that assistance will be needed and the engineer would need on site assistance, no information was provided to the Claimant about any on-site assistance. We are satisfied that he was not informed that adequate assistance would be or should be available to him. We accept the Claimant's evidence that it was suggested to him by his line manager, Bernard, that he could ask "the gym guys" to assist, by which it was mutual ground that he meant the people who worked in the gym at the leisure centre. The Respondent told the tribunal that the "gym guys" were likely to be strong and fit and would be able to support the weight of the pump while the Claimant installed it.

26. It was also suggested in evidence that the leisure centre's maintenance manager would be able to assist. We are satisfied that no mention of the maintenance manager was made to the Claimant at the time, either by the Respondent or by the client.

27. In respect of the weight of the pump, we accept that the Claimant was aware of the weight the pump head, having been involved in assisting Sam to change a similar pump head on the previous occasion. He described how on that occasion Sam had placed a steel bucket upside down on the floor beneath the pump to support the weight of the pump head when they removed it from its fixings on the wall, however the pump head was so heavy that it had gone straight through the bucket to the ground. The Claimant described how on the previous occasion when he had assisted Sam, they had attached a ratchet strap to the first bolt to hold the pump head in place while they fitted the remaining seven bolts, and that this had to be done at the same time as lining up the gas pipe to the unit. The Claimant was clear that he was not able to support the weight of the pump head at head height at the same time as attaching the bolts. He believed it was unsafe for him to try to carry out the task. We heard evidence as to respective weights: the Claimant was a slightly built man who weighed in the region of 75 kg, the 25 kg weight he was being asked to lift and hold at head height was a third of his weight. Mr Hamilton told us he would be happy to lift 25 kg but he admitted to weighing around 136 kg and being particularly strong. Mr Hamilton told us that he was not saying he would be able to lift a 45 kg weight, which was the equivalent of one third of his body weight, and hold it with one hand and work on it at the same time.

28. The Claimant told us that after his first experience of assisting Sam with the pump he clearly saw that the job should be done properly and that no corner should be cut. He was asked whether he had asked for assistance from the leisure centre staff but the Claimant responded that he did not seek that assistance because he believed the health and safety of himself and others would then have been in danger. He believed that it was unsafe to try to do that task on his own, and he also believed that it would not be safe to try to do the job with the help of others who were untrained and about whose competence he had no idea. He explained that if that motor had dropped on someone it could break their leg he was not going to put his own and others' health and safety at risk by doing that. He didn't feel competent to supervise someone who was not trained in replacing the motor and he would have no knowledge of their training in manual handling. He was clear that he could not be responsible for supervising them. We accept that the Claimant was concerned that he had no knowledge of the gym guys' training or competence and he believed that asking them to provide assistance, as had been suggested to him on the phone by his supervisor, was unsafe

29. We accept that the Claimant believed that if he stayed to carry out the job there would be a serious risk to his health and safety and danger to himself or others.

30. The Claimant was asked about why he didn't remain on site longer to try to resolve the problem there. We also accept his evidence that once it became clear no assistance was going to be provided from his employer in the form of another engineer he felt that by staying on the site that he would be pressurised into doing the job in a way that he felt was unsafe, with untrained or unqualified assistance from "the gym guys" ; that he did not want to be put in the position of being pressurised into doing the work in an unsafe way and thereby putting not only himself in danger but others also in danger.

31. We are satisfied that the Claimant had a reasonable belief that doing the job as required by the employer would be unsafe and also that in remaining on-site there was a real possibility that he would be pressured into doing the job in an unsafe manner. We are satisfied that by leaving the site the Claimant was taking appropriate steps to protect himself and others from the danger which he reasonably believed to be serious and imminent if he stayed.

The reason for dismissal

32. Having made those findings we have to consider the reason, or principal reason, for his dismissal.

33. The Claimant was called into the office the next day for a meeting with Mr Woodfine, Phil Hutson the Group Operations Manager, and Mr Hamilton. According to Mr Hamilton's evidence the notes of the meeting taken by Mr Hutson not did not record everything that was said, but they were fairly accurate in noting what the Claimant said. The Claimant was first asked to explain his actions and why he hadn't sought assistance from staff on site. The Claimant said that he didn't seek the assistance of the client's staff,

despite being told to, because they were untrained.

34. It was clear that the Respondent had a different view as to the health and safety risk in respect of what the Claimant was being asked to do. However we have to assess the Claimant's belief and whether it was a reasonable one for him to hold.

35. Mr Hamilton told the tribunal that the decision to dismiss the Claimant was based on him leaving the site and therefore leaving the Respondent at risk of losing one of their biggest clients. The decision was stated to be based on the Claimant's actions in leaving the site without resolving the issue and leaving the client.

36. Mr Woodfine accepted that the Claimant did follow the health and safety policy and that if he had carried out the job believing that he was not competent to do it then he would have been breaching the Respondent's policy.

37. Mr Woodfine told the tribunal that the decision to sack the Claimant was based on him leaving the site and thereby putting the Respondent at risk of losing one of their biggest clients. Mr Woodfine told us that he expected the Claimant to wait on site until Bernard phone him to say he could leave and that he expected him to wait on site until he had spoken to the duty manager who was client.

38. There was some dispute as to how long the Claimant was on the site and the Respondent, in particular Mr Woodfine, suggested that the Claimant simply wanted to get home which was why he left the site. The Respondent relied on the tracking app which recorded the time of arriving and the time leaving. It was accepted that the app is reliant on the person remembering to enter the information. We accept the Claimant's evidence as to the time he spent on the site. We do not find that his reason for leaving when he did was because he wanted to get home and we find that it inconsistent with his offer to come into the office to speak to Mr Woodfine which he made in his phone calls on the way back to London. We have already set out above our findings as to why the Claimant left as he did.

The relevant law

39. **Employment Rights Act 1996 s100 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—

…

(*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.

Reasonably believed

40. Provided that the employee had such a reasonable belief he is covered by the section, and a dismissal because of the actions taken will be unfair. Unless the employer can show that the employee's belief was unreasonable they cannot merely disagree with the employee, state that there is no actual danger and dismiss for failure to carry out orders: *Oudahar v Esporta Group Ltd [2011] IRLR 730, EAT*.

Conclusion

41. Having found the Claimant's belief in the danger to health and safety to be reasonable the fact the employer takes a different view is not relevant for the purposes of section 100. We are satisfied that it is clear from the evidence the Respondent's witnesses gave that refusing to do the job as instructed and leaving the site was the principal reason for dismissal. In its ET3 the Respondent relied on "failing to follow a reasonable management instruction".

42. While we accept that at least in Mr Woodfine's mind there was a belief that the Claimant wanted to get home after a long day, we are satisfied that ultimately he had formed a different assessment as to the risk involved in the job and therefore the reasonableness of the Claimant 's actions and we find that it was the Claimant's actions in leaving the site without having completed the job that was the principal reason for the decision to dismiss him.

43. The Respondent has not shown that it was so negligent for the Claimant to

take the steps that he took that a reasonable employer might have dismissed him for taking them.

44. We are satisfied on the evidence before us that the principal reason for dismissing the Claimant was that he left the site in the circumstances in which he did. We are also satisfied that those circumstances fall within section 100 (e) of the Employment Rights Act 1996; We also find in the circumstances that the Claimant's actions fell within section 100 (d).

45. We therefore find that the Claimant 's dismissal was unfair.

46. A Remedy Hearing has been listed for 24 February 2020 at 10 a.m and the following case management orders are made in respect of preparation for the remedy hearing.

Case Management Orders

Made under the Employment Tribunals Rules of Procedure 2013

1. The Claimant is to serve an updated schedule of loss by 16 December 2019
2. The Claimant is also to provide disclosure of all documents relevant to remedy by 16 December 2019
3. The Claimant is to provide a witness statement relevant to the issues in respect of remedy by 20 January 2020.
4. The remedy hearing has been listed for 24 February 2020 at 10 a.m at East London Hearing Centre 2nd Floor Import Building, 2 Clove Crescent, London E14 2BE with a time estimate of 1 day.

Employment Judge C Lewis

Date 08/11/2019