



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Krajewski

**Respondent:** NIC Services Group Limited

**Heard:** via Cloud Video Platform in Midlands (East) region

**On:** 23 April 2021

**Before:** Employment Judge Ayre (sitting alone)

## Appearances

For the claimant: In person, accompanied by his daughter, Ms Beata Krajewska

For the respondent: Mr D Jones, Counsel

**Polish interpreter:** Ms Monica Savage

## JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.

## REASONS

### The Issues

1. The issues that fell to be determined at today's hearing were as follows:-
  - (1) What was the reason for the claimant's dismissal and was it one of the potentially fair reasons for dismissal set out in sections 98(1) and (2) of the Employment Rights Act 1996 ("**the ERA**")?
  - (2) If so, was the dismissal of the claimant fair or unfair in accordance with section 98(4) of the ERA? This involves considering the following questions:-
    - a. Did the respondent follow a fair procedure when dismissing the claimant?
    - b. Did the respondent make sufficient enquiry of Sainsbury's as to its reason for refusing to allow the claimant back on site?

- c. Did the claimant accept the respondent's offer of alternative employment at the Co-op in Duffield and did the respondent fail to action it?
- d. Was the claimant's decision to decline other alternative employment reasonable?
- e. Was the dismissal of the claimant within the range of reasonable responses?

## **The Proceedings**

- 2. By claim form presented to the Tribunal on 9 October 2020 following a period of Early Conciliation from 18 September 2020 to 29 September 2020 the claimant brought a complaint of unfair dismissal. The respondent defends the claim.
- 3. The case was originally listed for a final hearing on 1 February 2021. The claimant did not prepare a witness statement for that hearing, so it was converted to a preliminary hearing at which the issues were identified and case management orders were made. A witness statement was subsequently prepared for the claimant, so the hearing today proceeded as a final hearing.
- 4. I heard evidence today from the claimant and from his daughter Beata Krajowska and, on behalf of the respondent, from Chris Whitton, Area Services Manager, who took the decision to dismiss the claimant, and from Gary Haman who heard the claimant's appeal.
- 5. There was an agreed bundle of documents running to 234 pages.

## **Findings of fact**

- 6. The respondent is a family owned business which provides contract cleaning and support services to a number of clients and has approximately 7000 employees. In October 2019 it took on a new contract to provide cleaning services to Sainsbury's. The services had previously been supplied by Interserve, and there was a transfer of employees from Interserve to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).
- 7. The claimant's continuous employment started on 13 March 2010 and he was employed by Interserve immediately prior to the TUPE transfer to the respondent in October 2019.
- 8. The claimant was employed as a cleaner and, until July 2019, worked at the Sainsbury's premises in Kingsway where he was responsible for early morning cleaning of the car park.
- 9. The claimant does not have his own car, and was reliant on public transport to get to and from work.

- 10.** On the morning of 5<sup>th</sup> July 2019, whilst carrying out his duties, the claimant found a wallet in a trolley. He handed the wallet into Sainsbury's. The individual to whom the wallet belonged alleged that there had been money in the wallet which had disappeared.
- 11.** The claimant was suspended the following day whilst an investigation was carried out by his then employer, Interserve, into allegations of theft of customer monies, loss of trust and confidence and bringing the company name into disrepute.
- 12.** On 31<sup>st</sup> July 2019 the claimant was invited to attend an investigation meeting on 8<sup>th</sup> August. The claimant strongly denied having taken money from the wallet and suggested that the respondent check the CCTV footage. The claimant was effectively 'cleared' during the investigation and no disciplinary action was taken against him. He remained suspended on full pay however and did not return to work at any time prior to the termination of his employment by the respondent the following year.
- 13.** On 6<sup>th</sup> September 2019 Interserve wrote to the claimant stating that no further action would be taken in relation to the incident as there was insufficient evidence to prove the allegations. The letter also informed the claimant that Interserve had received a formal request from their client for the claimant to be removed from site, and that as a result the claimant would remain suspended.
- 14.** In October 2019 Interserve wrote to the claimant informing him of the measures that the respondent was proposing to take in connection with the TUPE transfer of staff.
- 15.** The claimant remained suspended by Interserve until the TUPE transfer in October. Interserve paid him full pay until 10<sup>th</sup> January 2020. He was subsequently suspended on full pay by the respondent until the termination of his employment. The claimant has therefore received full pay from the date of his suspension on 6<sup>th</sup> July 2019 through to the date his employment terminated.
- 16.** At the time that the respondent took over the contract from Interserve the respondent was not aware that the claimant was an employee of Interserve who was in scope to transfer to the respondent under TUPE, because Interserve failed to include details about the claimant in the Employee Liability Information it provided to Interserve.
- 17.** Subsequently however, on being made aware of the claimant's employment with Interserve, the respondent accepted that the claimant had transferred to its employment along with other of Interserve's employees, and arranged a meeting with the claimant.
- 18.** On 24 January 2020 Mark Carey who was, at the time, employed by the respondent as an Operations Manager, met with the claimant.
- 19.** The claimant's native language is Polish and he has some difficulty understanding spoken English. He informed the respondent of this in an email sent on 23 January 2020 to Mr Carey, when he asked if his daughter could

accompany him to the meeting on 24 January. Mr Carey agreed that the claimant's daughter could attend the meeting.

- 20.** During the meeting on 24<sup>th</sup> Mr Carey discussed with the claimant the possibility of an alternative role with the respondent at a different site. The claimant was offered a role as a cleaner at the Sainsbury's store in Chaddesden. Mr Carey warned the claimant that if he did not accept the offer then there was a risk that his employment may be terminated.
- 21.** On 2 February 2020 the claimant wrote an email to Mark Carey in which he said: *"Thank you very much for offering me the cleaning position in Sainsbury's at Chaddesden. After considerable thought I have decided not to accept your offer. I appreciate the job opportunity you gave me and this has been a very difficult decision for me but it is too far from the place I live at the moment. As you are aware I do not drive. I checked public transport and it would take me one and a half hours to get to work one way..."*
- 22.** On 4<sup>th</sup> February Mark Carey contacted the claimant by email to sell him that he had a vacancy on the respondent's contract with the Co-op to clean a petrol station in Driffield. He asked the claimant if this would be of any interest and the claimant said that it would be. The claimant asked a number of questions about the role, such as whether he would be working mornings or afternoons, whether he could have Sundays off and when could he start. Mr Carey replied, by email, that *"We will be in touch very soon to arrange someone to meet with you and when"*.
- 23.** The respondent's evidence was that an Area Manager tried to contact the claimant to discuss the role at Driffield, but was unable to get hold of the claimant. The claimant's evidence was that he was not contacted by an Area Manager. He told me that he did not receive any phone calls from the Area Manager and that he had asked for communication to take place via email rather than telephone. I find that the respondent did take steps to try and contact the claimant about the role at Driffield, but that the claimant genuinely believes he did not receive any contact. It is unfortunate that the respondent attempted to contact the claimant by telephone. It is possible that the calls to the claimant were made from a withheld number, or that the incorrect number was used to try and contact the claimant.
- 24.** In April 2020 Mr Carey was placed on furlough, and a month later he left the respondent's employment.
- 25.** On 30 April 2020, another Operations Manager, Gary Farquhar, invited the claimant to a meeting to discuss the claimant's current situation. That meeting took place on 4<sup>th</sup> May and, during the meeting, the claimant asked about the position at the Coop in Driffield. It appears that by that stage the role was no longer available. There was also a discussion about the transfer of the claimant's employment from Interserve to the respondent, and about an outstanding pay issue, which was subsequently resolved.
- 26.** On 16 June the respondent wrote to the claimant inviting him to a formal meeting on 24 June to consider the possible termination of his employment as a result of the request by a third party (Sainsbury's) that the claimant should not

be permitted to return to site. The claimant was informed that he could be accompanied at the meeting, and was sent a list of the current vacancies within the respondent's business.

27. In advance of the meeting Mr Whitton contacted the manager of the Sainsbury's store at Kingsway to find out whether they would be willing to take the claimant back on site at Kingsway. Mr Whitton was told that Sainsbury's position had not changed and that they did not want the claimant back on site. On 16 June the manager of the Sainsbury's store in question wrote to Mr Whitton: "*Chris – as discussed in my previous email, please take this as final confirmation that I don't wish Leslaw to return to this site*".
28. The claimant attended the meeting on 24 June with his daughter. During the meeting Mr Whitton updated the claimant on his recent contact with Sainsbury's, and explained that Sainsbury's still did not want the claimant back on site at Kingsway. Mr Whitton asked the claimant if there were any jobs on the current vacancy list that he was interested in. The claimant replied that he was not interested in any of them, and that, as far as he was concerned, he had been offered and had accepted a job at the Coop in Driffield.
29. After the meeting on 24 June, Mr Whitton did some further investigation into the question of whether the claimant had been offered a job at the Coop in Driffield. He contacted the Operations Director for the Coop who told him that the Area Manager had tried to call the claimant about the role numerous times, but that the claimant had not returned the calls.
30. Mr Whitton concluded that, as a result of Sainsbury's insistence that the claimant should not go back on site, and the claimant's indication that he did not want to accept an offer of any other role on the respondent's list of vacancies, that he had no option but to dismiss the claimant. By the time Mr Whitton took his decision to dismiss the claimant, the role at the Coop in Driffield was no longer available.
31. Mr Whitton wrote to the claimant informing him of his decision in a letter dated 30 June 2020. The claimant was dismissed on 30 June 2020 and paid in lieu of his ten week notice period. In his letter Mr Whitton wrote that:-
- "...I believe that whilst we have pushed back on the client to reconsider this decision, Sainsburys are adamant that the trust and confidence in your employment relationship has been breached and they do not want you to return to site. Also, despite there being job vacancies available, there is not one that is suited to yourself.*
- In light of my belief that the above issue show you are unable to continue to undertake the role for which you were employed to do, I have determined that you should be dismissed with immediate effect but with a payment in lieu of notice."*
32. I asked the claimant what he thought Mr Whitton should have done in June 2020, given that the job at the Coop in Driffield was no longer available. The claimant replied "*I think I should have been offered some kind of solution to bring me to my retirement age.*" He did not however point to any particular role

that was available in June that he believes he should have been offered. As the claimant did not have a car, he was restricted in the roles that he could accept. He told me that he would have to travel by public transport or on foot to and from work, and that most cleaning jobs involve working early mornings when there is limited public transport available.

33. The claimant appealed against the decision to dismiss him and the appeal was heard by Gary Haman, a Regional Director of the respondent. An appeal hearing took place on 24 July 2020 and the claimant was again accompanied at the meeting by his daughter.
34. At the appeal hearing there was a further discussion about alternative roles with the respondent, and the claimant again said that he did not want to accept any other role. The claimant told Mr Haman that he wanted to work until December 2020 and then retire. The claimant was not willing to travel or to relocate which, in the circumstances, was understandable.
35. There was a discussion about the position at the Coop in Driffield, and Mr Haman explained that the Area Manager involved in discussions about that role no longer worked for the respondent.
36. Mr Haman decided not to uphold the claimant's appeal, and wrote to him on 10<sup>th</sup> August to inform him of his decision. In his letter Mr Haman referred to the fact that the store manager at Sainsbury's had written to the respondent on two occasions "*giving confirmation that following an incident with Leslaw last year, I no longer have trust and confidence in having him as 3<sup>rd</sup> Party Contractor*".
37. Mr Haman's letter also stated that:-

*"We followed the correct process for a "Some Other Substantial Reason" dismissal which included offering you a full list of our available vacancies in different stores however, you concluded that you did not want to accept any of this roles. Given Sainsbury's request we are obliged to act on this and unfortunately, no new evidence has been produced to go against their request. We have treated this situation the same as we have done with all similar situations where a client requests for an employee's removal..."*

## The Law

38. Section 98 (1) of the Employment Rights Act 1996 ("the ERA") provides as follows:-

*"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*

- (a) *the reason or (if more than one, the principal reason) for the dismissal, and*
- (b) *that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."*

39. Section 98(4) states that:

*“Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) shall be determined in accordance with equity and the substantial merits of the case.”*

40. In the case of *Dobie v Burns International Security Services (UK) limited 1984 ICR 812*, the Court of Appeal held that third party pressure to dismiss is capable of amounting to some other substantial reason (“**SOSR**”). In order for a ‘third party pressure’ dismissal to be fair, an employer does not need to satisfy itself that the third party’s allegations against the employee are true, but cannot just ‘hide behind’ the third party’s reasons and must do everything that it reasonably can to avoid or mitigate any injustice to the employee (*Henderson v Connect South Tynside Ltd 2010 IRLR 466*).

41. The burden of proof in relation to the reason for dismissal lies with the employer. Where an employer discharges that reason, the Tribunal must then consider whether the dismissal was fair or not. In a case where third party pressure is relied upon as the fair reason for dismissal, the Tribunal must consider the conduct of the employer and, in particular, whether dismissal is an injustice to the employee. It falls to the employer to do what it reasonably can do to avoid or mitigate any injustice brought about by the approach taken by the third party. This can include trying to change the third party’s mind or trying to find alternative employment.

42. In *Scott v EC Maritime PCC Ltd (Debarred) EAT 0032/16* the EAT held that, if alternative employment is not available, an employer’s failure to look for it will not necessarily render a dismissal unfair.

## Submissions

### Respondent

43. Mr Jones submitted on behalf of the respondent that:-

- a. There was a potentially fair reason for dismissal, namely some other substantial reason – specifically third party pressure;
- b. The claimant had not advanced a positive case as to any other reason for dismissal;
- c. The claimant had never worked a single day for the respondent;

- d.** On 4 occasions, in February, May, June and July 2020 the respondent had sought to explore alternative sites where the claimant could work;
- e.** The respondent had asked Sainsbury's to reconsider their position and had, therefore, made sufficient enquiries of Sainsbury's;
- f.** The claimant agreed during the meeting on 24 June with Chris Whitton that there were no roles he wanted to be considered for due to his travel constraints;
- g.** The claimant had been suspended on full pay for some time and there were no alternative roles that he was interested in.
- h.** The claimant's suggestion, made in evidence today, that a role should have been created for him, was unreasonable.
- i.** The procedure followed by the respondent was fair;
- j.** There was no actual offer of employment at the Coop in Driffield. There is evidence in the bundle from two different people confirming that the respondent had made attempts to contact the claimant to discuss the possibility of the role. It cannot therefore be said that the respondent failed to action the role.
- k.** The key question identified in *Dobie v Burns International* is : has there been an injustice to the employee and the extent of that injustice.

Claimant

**44.** The claimant submitted that:-

- a.** He was expecting to be employed until he reached his retirement age;
- b.** As a result of what happened he was left without the means to support himself for six months;
- c.** After 10 years of loyal work for his employer he was put in the situation of having no prospect of finding a new job, due to his age and Covid restrictions;
- d.** The respondent had not fulfilled its obligations by not putting enough effort into reinstating him at Sainsbury's, not taking into account his many years of work, his good name and that he was innocent;
- e.** The respondent had not put enough effort into securing a job for the claimant at the Coop in Driffield, which was the only job in the claimant's locality and one which suited him well;
- f.** It was unreasonable of the respondent to send him offers of jobs in other towns that it was impossible for the claimant to get to, and which the respondent knew he could not get to;



- g. There were delays with payments to him and with his transfer from Interserve to the respondent;
- h. There was a lack of response to his emails; and
- i. In every meeting he was faced with different managers, such that there was a breakdown in communications between the respondent's managers.

## Conclusions

45. It is for the respondent to show the reason for dismissal and that it was a potentially fair one. *Abernethy v Mott, Hay and Anderson* [1974] ICR 323 establishes that a reason for dismissal is a 'set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'. The burden of proof at this stage is not a heavy one.
46. I am satisfied in this case that the respondent has discharged that burden, and that the reason the claimant was dismissed was some other substantial reason of a kind as to justify the dismissal of the claimant. In particular, the claimant was dismissed because a third party, Sainsbury's, a client of the respondent's, told the respondent that they did not want the claimant to return to work at their premises in Kingsway. The claimant was employed as a cleaner at Sainsbury's Kingsway store and there was no evidence before me of the claimant ever having worked at another store whilst employed by the respondent or by Interserve.
47. It was clear to me, from the oral and documentary evidence, that it was Sainsbury's insistence that the claimant should not return to work at the Kingsway store, and the lack of suitable alternative employment, that was the reason for the claimant's dismissal. Those reasons were specifically mentioned in both the letter of dismissal and the appeal outcome letter. The appeal outcome letter also referred explicitly to 'some other substantial reason'.
48. No alternative reason for dismissal was suggested by the claimant, and I therefore find that the reason for the claimant's dismissal was some other substantial reason falling within section 98(1)(b) of the ERA.
49. I turn now to consider whether the dismissal was fair or unfair within the meaning of section 98(4) of the ERA. I note that the respondent in this case took a number of steps to try and find the claimant alternative employment, such that dismissal was the last resort. In particular:-
- a. It asked the manager of the Sainsbury's store on more than one occasion whether he would allow the claimant back on site. The manager repeatedly refused;
  - b. In January 2020 it offered the claimant a job on another Sainsbury's site, which the claimant initially accepted and then declined;

- c. It subsequently discussed the possibility of a position at the Coop in Driffield with the claimant and took steps to try and contact the claimant about that role;
- d. In May 2020 Gary Farquhar met with the claimant to try and find a solution to the position;
- e. In July 2020 Chris Whitton sent the claimant a list of all of the vacancies within the respondent's business for the claimant to consider. He then asked the claimant during the meeting on 24 July whether he was interested in any of them, to which the claimant replied no.; and
- f. Mr Haman also considered and discussed the possibility of alternative employment with the claimant during the appeal hearing, and the claimant again indicated that there were no roles he was interested in.

**50.** In these circumstances I am satisfied that the respondent took all reasonable steps to try and find alternative employment for the claimant. In the meantime, it continued to pay the claimant full pay, despite the fact that the claimant never carried out any work for the respondent throughout the time that he was employed by them.

**51.** It is unfortunate that the respondent failed to make contact with the claimant about the role in Driffield. I accept however that the respondent tried to do so, albeit by telephone which was not the claimant's preferred method of communication. There was in my view no firm offer of a role at Driffield which the claimant accepted. There were a number of key questions outstanding when the claimant last communicated with Mr Carey about the role, namely the hours and days of work and the start date. It cannot therefore be said in my view that it had been contractually agreed that the claimant would transfer to Driffield, as there was still uncertainty about a number of key elements of the role.

**52.** Whilst the respondent could, in my view, have done more to try and contact the claimant about the Driffield role (for example by sending an email), its failure to do so does not, in itself, render the dismissal unfair, in light of the other steps taken by the respondent.

**53.** In any event, the respondent subsequently took further steps to try and find alternative roles for the claimant, sending him a list of all vacancies across the business and asking him whether he was interested in any of them. I understand and accept the claimant's reasons for not accepting any of the alternative roles, and make no criticism of him for that.

**54.** His inability to travel and his unwillingness to relocate, whilst understandable, did place the respondent in a particularly difficult situation. There were, quite simply, no available roles that the claimant was interested in. In those circumstances, and given that the situation had been ongoing for some time by June 2020, the respondent had taken all reasonable steps to avoid dismissal. It

was not, in my view, incumbent upon the respondent to create a role for the claimant.

- 55.** I am satisfied that the employer in this case did what it reasonably could do to avoid or mitigate any injustice to the claimant brought about by the approach taken by Sainsbury's. It asked Sainsbury's if it was willing to change its mind, tried to find alternative employment for the claimant, and continued to pay him in full whilst it did so.
- 56.** I am also satisfied that the respondent followed a fair procedure when dismissing the claimant. Meetings took place with Mr Carey and Mr Farquhar to try and find alternative roles, and subsequently the claimant was invited to a meeting with Mr Whitton. He was accompanied by his daughter at all of the meetings. He was warned as far back as January that if no alternative role could be found he may be dismissed, and yet it was another five months before he was invited to a meeting to consider his dismissal. In advance of that meeting Mr Whitton wrote to the claimant warning him that a potential outcome of the meeting could be the termination of his employment. Mr Whitton also sent him the list of vacancies.
- 57.** The claimant was offered the right to appeal, and his appeal was considered by a more senior manager within the business. The procedure followed by the respondent was, in my view, a fair one.
- 58.** In light of my conclusions about it cannot, therefore, be said that dismissal was outwith the range of reasonable responses in this case. At the time the claimant was dismissed there were no alternative roles that the claimant was interested in, and the claimant had, by that stage, been suspended on full pay for almost a year.
- 59.** I turn finally to set out specifically my findings on the issues that I identified at the start of this judgment:-
- a. Did the respondent follow a fair procedure when dismissing the claimant?  
  
I find that the respondent did follow a fair procedure.
  - b. Did the respondent make sufficient enquiry of Sainsbury's as to its reason for refusing to allow the claimant back on site?  
  
Yes, in my view the respondent did make sufficient enquiry of Sainsbury's.
  - c. Did the claimant accept the respondent's offer of alternative employment at the Co-op in Duffield and did the respondent fail to action it?  
  
There was no offer made, but merely an indication that one may be made.

- d. Was the claimant's decision to decline other alternative employment reasonable?

Yes, I find that it was.

- e. Was the dismissal of the claimant within the range of reasonable responses?

Dismissal was within the range of reasonable responses for the reasons set out above.

**60.** For the above reasons the claim for unfair dismissal fails and is dismissed.

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**Employment Judge Ayre**

26 June 2021