EMPLOYMENT TRIBUNALS

Claimant: A Sokunbi

Respondent: Asda Stores Limited

Heard at London South Employment Tribunal by CVP

On 20 January 2021

Before: EJ L Burge

Representation
Claimant: Mr Niyi (representative)
Respondent: Mr Taheri (Counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that the Claimant's claim of unfair dismissal is not well founded and is dismissed.

REASONS

Introduction

1. The Claimant worked as a Warehouse operative at the Erith XDC premises of the Respondent, Asda Stores Limited.

2. At a Preliminary Hearing heard on 18 September 2019 Employment Judge Ferguson found that the Claimant commenced employment with the Respondent on 7 July 2014.

The evidence

1. Andrew Perera, Operations Manager, gave evidence on behalf of the Respondent. The Claimant gave evidence on his own behalf.

2. The Tribunal was referred during the hearing to documents in a hearing bundle extending to 158 pages. Documents pertaining to pension information, pay information, wage slips and P60, appeal letter and a Schedule of Loss were also provided to the Tribunal. Both representatives provided the Tribunal with a written skeleton argument. Both representatives provided written closing submissions 28 days after the hearing date.

Issues for the Tribunal to decide

3. The issues for the Tribunal to decide were:

    a. What was the principal reason for the Claimant's dismissal and was it a potentially fair reason under sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserted that the fair reason was that:
        i. a statutory duty or restriction prohibited the continuation of the employment (s.98(2)(d) of ERA – on the basis that the Claimant no longer had the right to work legally in the UK without the Respondent contravening its obligations under s.15 of the Immigration, Asylum and Nationality Act 2006; or that
        ii. if the Respondent was mistaken that the Claimant no longer had the right to work legally in the UK, the fair reason was some other substantial reason, in accordance with s.98(1)(b) of ERA, namely the Respondent's genuine belief that the Claimant no longer had the right to work legally in the UK at the time of dismissal.

    b. If so, was the dismissal fair or unfair within section 98(4) and, in particular, did the Respondent in all respects act within the band of reasonable responses?

    c. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in *Polkey v AE Dayton Services Ltd [1987] UKHL 8 and Software 2000 Ltd v Andrews [2007] ICR 825*.

    d. Would it be just and equitable to reduce the amount of the Claimant's basic or compensatory awards because of any

blameworthy or culpable conduct before or after the dismissal, as set out in sections 122(2) and 123(6) of ERA, and if so to what extent?

Findings of Fact

4. On 2 March 2017 the Claimant submitted an application to the UK Home Office for Permanent Residence as a Non-EEA national Family member of an EEA national. This application was refused on 4 October 2017.

5. The Claimant's temporary visa, which allowed him a temporary right to work in the UK, was due to expire on 1 May 2018.

6. The Respondent has a Right to Work Policy ("the Policy") which states:

   "*If a colleague has a temporary right to work, the People Manager must carry out the three step check correctly again at the right times during employment at visa expiry or at six monthly intervals depending upon the document that has previously been checked."*

7. The Policy provides information on what to do if a Negative Verification Notice ("NVN") is received:

   "*If the colleague fails to provide the necessary documents which can include any confirmation of their application to renew/extend their visa and/or a Negative Verification Notice is received… the following action must be taken by the People Manager on the day the current visa expires:*
   - *You must hold a meeting with the colleague on their arrival at work on the date their visa expires. If a colleague is not scheduled to work they must be invited to a meeting straightaway within 24 hours of their right to work expiring. If necessary the letter inviting them to the meeting should be hand delivered to their home address*
   - *You must suspend the colleague without pay on the day the visa expires*
   - *You must issue the colleague with toolkit letter 3 inviting them to a formal hearing to discuss their failure to provide the required documents; 24 hours' notice of the hearing must be provided*
   - *If the colleague doesn't provide sufficient evidence to demonstrate their continued right to work we can't continue to employ them*
   - *Before confirming any decision to dismiss you must get advice from your SMP In Retail, Network People Manager in ALS or People Manager in Home Offices.*"

8. On 19 January 2018 the Home Office responded to the Claimants' Pre Action Protocol Letter and stated that the Claimant's application would be reconsidered. He was asked to forward the full application and documents and that once these were received aim was for a reconsideration to take place within 6 weeks.

9. On 26 February 2018, in accordance with the Policy, the Respondent wrote to the Claimant to remind him that his temporary visa was due to expire on 1 May 2018 (in 60 days) and asked him to provide updated evidence of his right to work in the UK before 1 May 2018. This letter notified the Claimant that the Respondent would carry out an Employer Checking Service ("ECS") check with the Home Office to verify any claimed right to work. If the Respondent were to receive a NVN they would be unable to continue employing the Claimant unless he could provide documentary evidence of his right to work in the UK.

10. The Respondent invited the Claimant to a meeting on 5 March 2018 to discuss the Claimant's progress with his visa application in line with the Policy. During the meeting, the Claimant advised the Respondent that his solicitors had written to the Home Office to ask for his application to remain in the UK to be reconsidered, and that they had agreed to this.

11. On 26 March 2018 the Respondent wrote to the Claimant to remind him that his temporary visa was due to expire in 30 days and that documents demonstrating a continued right to work in the UK were required. The letter gave examples of the documents required. One example given was described as follows: "Where a Certificate of Application provides you with the right to work it is your responsibility to ensure your Certificate of Application is always dated within 6 months." The letter went on to say that:

    "*Asda will complete a check with the Home Office Employer Checking Service, to obtain confirmation of any application at the time of your visa expiring or at 5 monthly intervals dependent on the checking requirements for the right to work documents you provide to us*."

12. The letter also reminded the Claimant that it was an offence for the Respondent to employ someone without sufficient documents to evidence their ongoing right to work in the UK, and that if he did not provide them by 1 May 2018 potential action could include the summary termination of his employment.

13. By letter dated 27 March 2018, the Claimant was invited to a meeting two days later to discuss the progress he had made with his application for permanent residence and the potential expiry of his visa. At the meeting the Claimant said that he had applied for permanent residence again and that all the necessary documents had been sent over to the Home Office.

14. The Respondent carried out an ECS check on 16 April 2018. On 20 April 2018, UK Visas & Immigration issued a NVN in respect of the Claimant. This stated that the outcome of the ECS check was that "This person does not have the right to work in the UK." In relation to "What this means" the NVN stated "you should not employ this person, or continue to employ them, if

they are an existing employee as they do not have the right to work in the UK". The NVN continued "If you are found employing this person illegally you could be prosecuted for knowingly employing an illegal worker which means that you may face an unlimited fine and or imprisonment".

15. An internal email of 23 April 2018 shows that the Respondent "queried the [negative] response with [their] Premium Service Account Manager at the Home Office". The Home Office had "confirm[ed] that the NVN result [was] correct". Further, the Home Office had asked the Respondent "to bear in mind that a COA is only valid while the application is live, so once the decision is made, the COA would cease to be acceptable for Statutory Excuse purposes." It was therefore concluded that "This would suggest that the colleague's application may have come to a conclusion and that a final refusal decision has been given."

16. On 24 April 2018 at 12.50 the Claimant emailed the Home Office requesting a replacement Certificate of Application as the one issued previously was no longer valid and provided the email to the Respondent. On the same day the Respondent suspended the Claimant pending documentary evidence that he had the right to work in the UK.

17. The Claimant was invited to a meeting on 1 May 2018 which was conducted by Mr Perera with David Barrett (Human Resources) note taking. The Claimant's representative, Jeff Cave, also attended the meeting. During this meeting, Mr Perera informed the Claimant that as the Respondent had received an NVN, they could not continue to employ him. Mr Perera stated that he was aware that the Claimant was pursuing a judicial review of his application for permanent residence and that he was allowed to remain in the country while that was ongoing but that this did not entitle him to work. He informed the Claimant that if he received a positive result from the judicial review and was then able to obtain the correct right to work evidence, he was welcome to apply for any vacancies that the Respondent had at that time. Mr Perera confirmed that the Claimant's last day would be that day (1 May 2018) and that:

    "you have the right to appeal against my decision. The appeal should clearly outline your grounds for appeal and should be submitted in writing to David Barrett HRBP with [sic] 7 days of the date of this letter."

18. The Claimant signed the meeting notes. In evidence Mr Perera stated, and it is accepted by the Tribunal, that at the end of the meeting the Claimant was given a photocopy of the signed meeting notes.

19. Mr Perera wrote to the Claimant the following day, 2 May 2018 to "confirm the content and outcome of the hearing conducted on 1 May 2018". The letter stated that the hearing had been arranged following the Claimant's

repeated failure to provide sufficient documentation to evidence his ongoing right to work in the UK which meant that the Respondent was unable to satisfy itself that it was complying with its obligations not to employ illegal workers and to avoid exposure to any penalties under the immigration legislation. The letter explained that:

- due to the NVN and the Claimant's failure to provide any documentation showing he had the right to work, his employment had been terminated;
- Mr Perera had considered that the importance of the Respondent being able to satisfy itself that it was not employing illegal workers had been explained to the Claimant on a number of occasions;
- the Respondent's request that the Claimant provide the right to work documents was a reasonable one and that the Claimant had been unable to put forward sufficient explanation for why he had failed to produce the documents;
- the Claimant had explained that he was waiting for confirmation of permanent residency and Mr Perera had explained that if this were to be granted the Claimant would need to reapply for any available positions; and
- at the meeting the Claimant had been informed of his right to appeal and that the appeal should clearly outline his ground for appeal and should be submitted in writing to David Barrett within 7 days.

20. The Claimant said in his claim form that he did not receive the letter dated 2 May 2018. In cross examination he said that the Respondent's usual practice was to send letters three times, once by first class, once by recorded delivery and once by special delivery. Mr Perera (who had given evidence before the Claimant) said in evidence that he followed his standard procedure in relation to this letter - he printed out the letter, put one in the file and one in an envelope to be sent.

21. On 10 May 2018 the Claimant's solicitor wrote to the Claimant informing him that, from the deemed date of 1 April 2011, the Claimant now had a right of permanent residence in the UK and that he did not need permission to work in the UK. It is unclear whether the Claimant provided this letter to the Respondent.

22. Unbeknownst to the Respondent, the Claimant completed an ECS check for himself and gave the name of an employee at the Respondent who would usually complete the check for the Respondent. In the contact box he gave the Respondent's address but he gave his personal email address. This time the ECS check result gave a positive result stating "this person has the right to work" (subject to certain restrictions). The Claimant emailed the Respondent with the PVN on 11 May 2018. The Respondent contacted the Home Office who replied that a PVN "produced by an individual should never be looked on as valid. This is because the check must be completed by the employer".

23. The Policy contains information about the ECS:

> *"- The role of the ECS is to allow the People Manager to verify a person's right to work in the UK where an individual has any of the following (List B Group 2):*
>
> > *An outstanding application appeal or administrative review which was made to the Home Office at the correct time*
> >
> > *An Application Registration Card (ARC) which states that the holder is allowed to undertake the work In question*
>
> *- A Certificate of Application which is less than 6 months old issued to or for a family member of an EEA or SWISS national which states the holder is allowed to work.*
>
> *- When requesting an ECS check central Labour and Employment Compliance email address should be used for all responses to be returned to - L&ECompliance@asda.co.uk*
>
> *- The People Manager must carry out an ECS check If any of the above circumstances apply and receive a Positive Verification Notice of the individual's right to work from the ECS before the employment start date or within 28 days of visa expiry. A statutory excuse is then established for six months from the date of the notice, at which point a further ECS check is required if the application or appeal remains outstanding. At Asda this means a further check must be carried out five months after the date the Positive Verification Notice was issued*
>
> *- Positive Verification Notices must be retained on file and always be dated within six months of each other. there must not be a gap for any colleagues in any of the above three circumstances ie. an ECS that expires on the 1st September must have had a further check carried out and a Positive Verification Notice received before the 1st September.*
>
> *- If a Negative Verification Notice is received, you must suspend the colleague immediately and invite them to a formal meeting providing 24 hours' notice. If we receive a Negative Verification Notice and fail to act on this we could be seen to be knowingly employing a colleague illegally. This is a criminal offence and could result in an unlimited fine and/or a prison sentence…"*

24. Mr Perera gave evidence that had the Claimant not been dismissed he would have been ultimately been dismissed for gross misconduct on account of the Claimant falsely applying for a notice in the ECS using another employee's name and providing his own email address.

25. The Respondent's disciplinary procedures provide:

"If a colleague feels that disciplinary action taken against them is wrong or unjust, they should appeal in writing, stating the grounds of appeal as appropriate to the relevant PM within seven days of the date on which they were informed of the decision in writing. Further investigation may be required if any new matters are raised in an appeal..."

26. On 17 May 2018 a letter to David Barrett stated:

    "[p]lease accept this letter as confirmation that I would like to appeal against Andrew Perera decision to dismiss me on the 01/05/2018.

    My reason for my appeal is as followed;

    Since the hearing on the 01/05/18 my circumstances have changed and would therefore would like to discuss further.

    Looking forward to your response

    Adeshina Sokunbi"

27. In his witness statement the Claimant stated "I wrote to the Respondent with a copy of the Home Office confirmation letter but was informed that the appeal could not hold because I was out of time to appeal." In cross examination the Claimant said that he did not write the letter of appeal, his Trade Union representative did. The Tribunal does not find this credible, it is written in the first person, the Claimant's name appears at the bottom of the letter and on the balance of probabilities a Trade Union representative would be unlikely to write a letter impersonating a Claimant instead of writing it from himself in the Representative's own name. It is unclear when or if the Claimant gave the Respondent the letter from his solicitor dated 10 May 2018 confirming his right of permanent residence.

28. On 25 May 2018 Mr Barrett (Human Resources) wrote to the Claimant saying that he had considered the Claimant's request to retract his resignation which had been received by email from the Claimant's Trade Union representative but that the Respondent was unable to accept this request as he had been clearly advised at the meeting on 1 May 2018 and the confirming letter dated 2 May 2018 that he had the right to appeal but that this had to be within 7 days and that the Claimant's appeal had not been received until 17 May 2018. The letter continued that the Claimant was welcome to apply for another position at the Respondent after 6 months by completing an online application form. The Tribunal finds that on the balance of probabilities Mr Barrett wrote the first part of the letter in error about the Claimant seeking to retract his resignation but that the contents thereafter show he was applying the correct facts to the decision not to allow the appeal.

The Law

29. Section 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under s.111. The employee must show that he was dismissed by the Respondent under s.95, but in this case the Respondent admits that it dismissed the Claimant. S.98 ERA deals with the fairness of dismissals. There are two stages within s.98. First, the employer must show that it had a potentially fair reason for the dismissal within s.98(2).

> *s.98 (1) 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.***
>
> *(2) A reason falls within this subsection if it—*
> *(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
> *(b) relates to the conduct of the employee,*
> *(c) is that the employee was redundant, or*
> ***(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.***
>
> **[Tribunal's emphasis]**

30. The second part of the test is that, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason:

> *s.98 (4) 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.*

31. Section 15 of the Immigration, Asylum and Nationality Act 2006 states:

"Penalty

(1) It is contrary to this section to employ an adult subject to immigration control if—

(a) he has not been granted leave to enter or remain in the United Kingdom, or

(b) his leave to enter or remain in the United Kingdom—

(i) is invalid,

(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or

(iii) is subject to a condition preventing him from accepting the employment.

(2) The Secretary of State may give an employer who acts contrary to this section a notice requiring him to pay a penalty of a specified amount not exceeding the prescribed maximum.

(3) An employer is excused from paying a penalty if he shows that he complied with any prescribed requirements in relation to the employment.

(4) But the excuse in subsection (3) shall not apply to an employer who knew, at any time during the period of the employment, that it was contrary to this section.

(5) The Secretary of State may give a penalty notice without having established whether subsection (3) applies…"

Adjustments to compensation

32. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards of the ERA. Where re-employment is not sought, as it was not here, compensation is awarded by means of a basic and compensatory award.

33. S.123(1) provides that the compensatory award can be reduced if the Tribunal considers that a fair procedure might have led to the same result, even if that would have taken longer (*Polkey v A E Dayton Services Limited)* [1988] ICR 142.

34. The basic award is a mathematical formula determined by s.119 ERA. Under section 122(2) it can be reduced because of the employee's conduct: Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

35. A reduction to the compensatory award is primarily governed by section 123(6):

"*Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding…"*

36. The leading authority on deductions for contributory fault under section 123(6) remains the decision of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 111. It said that the Tribunal must be satisfied that the relevant action by the Claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award.

37. Mr Niyi cited the case of *Baker v Abellio London Ltd: UKEAT/0250/16/LA* wherein the Employment Judge erred in holding that the employer was correct to consider that it was obliged by s.15 of the Immigration, Asylum and Nationality Act 2006 to hold that it was unlawful to employ someone who, although he had the right to work and reside in the UK, did not provide the employer with documents other than a passport to prove that right. S.15 did not apply to the Claimant as he was not subject to immigration control but also the reference in section 15(3) to seeking documents from an employee provides the employer excusal from a penalty. It does not impose an obligation on the employer to obtain these documents. The decision that the employer had established that the dismissal of the Claimant for failing to provide such documentation fell within section 98(2)(d) ERA was set aside. The Employment Tribunal did not err in holding that dismissal because of a genuine but mistaken belief that employment of the Claimant was illegal fell within s.98(1)(b) ERA.

Conclusions and associated findings of fact

38. Mr Niyi submitted that the Respondent failed to properly investigate the facts before dismissing. The Tribunal disagrees. The letter from the Home Office dated 19 January 2018 in which it stated it would make a decision within 6 weeks of receipt of information was 3 months prior to the events in question. In evidence the Claimant accepted that the only other information that he had provided during the relevant time period was the email request to the Home Office for a Certificate of Application on 24 April 2018 and the Home Office's automated reply one minute later. This did not negate the NVN, nor did it cast doubt on the NVN. No further information was received prior to the Claimant's dismissal on 1 May 2018 to suggest that the position had changed since the NVN of 20th April 2018.

39. At the dismissal meeting on 1 May 2018, the Claimant was given a copy of the meeting notes which stated "*you have the right to appeal against my decision. The appeal should clearly outline your grounds for appeal and should be submitted in writing to David Barrett HRBP with [sic] 7 days of the date of this letter."* The Respondent's procedures state that an employee could appeal "*within seven days of the date on which they were informed of the decision in writing".* The Tribunal finds that the meeting notes, because

of the directive way in which they were written, constitute the written notice of dismissal required by the disciplinary procedures.

40. Even if the Tribunal is wrong about the minutes of meeting constituting confirmation of the decision in writing, on the balance of probabilities the Claimant did receive the letter confirming the dismissal dated 2 May 2018. This is because the Claimant did not mention that he did not receive the letter in his letter of appeal, he addressed his appeal to the correct person and his uncorroborated evidence in cross examination that the Respondent's usual practice was to send three copies of its letters was not credible. Mr Perera had already given oral evidence (and this point was not put to Mr Perera in cross-examination). The evidence that Mr Perera gave was credible - he confirmed, and it is accepted by the Tribunal, that the 2 May 2018 letter had been sent to the best of his knowledge and that he followed the same process in getting it sent out as he usually did for other letters.

41. Given that the Home Office advised the Respondent that a PVN "produced by an individual should never be looked on as valid. This is because the check must be completed by the employer", it was reasonable for the Respondent to disregard the PVN received from the Claimant on 11 May 2018. In addition, the Tribunal has not been provided with any evidence to corroborate the claim that the letter dated 10 May 2018 was ever provided to the Respondent. In any event, the earliest the Claimant could have provided the letter was the day it was written (10 May 2018) and this was after the 7 day deadline for appealing. The letter stated that from the deemed date of 1 April 2011, the Claimant had a right of permanent residence and that he did not need permission to work in the UK. There is nothing to suggest that this letter was not accurate and so it transpired that the Claimant had actually had a deemed right to live and work in the UK for the previous 7 years.

42. The Claimant entered his appeal on 17 May 2018, this was not within the 7 day period. Although there would, no doubt, be many employers who would have acted more sympathetically towards a Claimant who appealed soon after the deadline, the Respondent did not and was not obliged to consider the Claimant's appeal given that it was entered late.

43. Mr Niyi sought to rely on the authority of *Baker v Abellio*, where the EAT held that, in considering the reasonableness of the dismissal in that case, the Employment Tribunal should have taken into account the information exchange between the employer and the Home Office. However, in *Baker v Abellio*, there was an "absence of letters or emails [that] makes it difficult to know exactly what was asked and what was said". The EAT remitted the issue of the fairness of the dismissal for a mistaken belief. This authority does not therefore assist the Claimant as in this case the Respondent sought an ECS check, obtained the NVN and did revert to the Home Office

to clarify the position before reaching the conclusion that the Claimant did not have the right to work in the UK.

44. It was within the range of reasonable responses for the Respondent to dismiss the Claimant for the reason that it had a genuine belief that the Claimant did not have a right to work legally in the UK. It was reasonable for the Respondent to rely on the NVN dated 20 April 2018 and the absence of any information negating that notice from the Home Office. The dismissal procedure had been run in accordance with the Respondent's procedures and the Claimant had been given ample opportunities to provide information to the Respondent. The Respondent, a large national employer, had reverted to the Home Office and had reached its conclusion reasonably based upon a fair process and based on the available and up-to-date evidence, it had sufficient reason to dismiss. The Claimant knew about his right of appeal, knew of the deadline for doing so but failed to put in his appeal in time.

45. The Claimant was dismissed for a fair "some other substantial" (s.98(1)(b) ERA) reason, namely that the Respondent had a genuine belief that the Claimant no longer had the right to work legally in the UK.

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Employment Judge L Burge
Date: 5 March 2021

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