



# EMPLOYMENT TRIBUNALS

**Claimant** Mrs M Emery- Bell

**Respondent** Devon Norse Limited

**Heard at:** Exeter

**On:** 5 & 6 July 2021

**Before:**  
**Employment Judge Goraj**

**Representation**

**The Claimant:** Mr A Bell, the claimant's husband

**The Respondent:** Mr N Ashley, Counsel

**A SUMMARY JUDGMENT** having been sent to the parties and written reasons having been requested in accordance with Rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided: -

## REASONS

### Background

1. By a claim form presented on 8 July 2020, the claimant, who was employed as a Kitchen Manager at Ilfracombe Junior School, brought a complaint of unfair dismissal. The claimant's claim form is at pages 5 – 23 of the Hearing bundle ("the bundle").
2. The claimant contended in her claim form that she had been employed by the respondent (whom she named as Norse Commercial Services) from 1 November 2004 until 1 May 2020. In very brief summary, the claimant complained about her suspension and subsequent dismissal following a request by the Bursar of the School for her removal from

the School for what she described as unsubstantiated allegations. The claimant further contended that she believed that Bursar of the School had other reasons for wanting her out, that she believed that it was connected to an ongoing police investigation and that she had evidence of financial irregularities relating to meal numbers.

3. There were issues regarding the correct identity of the respondent, which was subsequently confirmed to be Devon Norse Limited which company was joined in the proceedings.
4. The claimant's ACAS Early Conciliation Certificate records that :- (a) the claimant's EC notification was received on 11 May 2020 and (b) that the EC Certificate was issued on 25 June 2020.
5. The respondent's response is at pages 24- 37 of the bundle. In summary, the respondent contended that the claimant was employed by the respondent from 1 April 2017 until she was fairly dismissed on notice given on 2 March 2020 because of the insistence of the School that the claimant be removed from the kitchen contract and its inability reasonably to find alternative employment for the claimant. The respondent further contended that the reason for the claimant's dismissal was some other substantial reason ("SOSR") for the purposes of section 98 (1)/(2) of the Act and that her dismissal was also fair for the purposes of section 98 (4) of the Act.
6. The matter was the subject of a Case Management Hearing on 12 April 2020 and was the subject of an associated Order dated 13 April 2020 ("the Order") which is at pages 38 – 45 of the bundle. It was confirmed at that hearing that the correct respondent was Devon Norse Limited (and Norse Commercial Services was by consent dismissed from the proceedings upon withdrawal by the claimant). The Tribunal clarified the issues with the parties as recorded at paragraphs 50.1 of the Order (pages 44 – 45 of the bundle). The key issues were identified as follows at paragraphs 1.3.1 - whether this was a genuine situation of "third party pressure" and 1.3.2 of the Order, whether the respondent, in any event did all that it could reasonably have done to avoid or mitigate the claimant's dismissal (including whether the respondent took sufficient steps to provide the claimant with alternative employment to avoid her dismissal).
7. The claimant confirmed at the commencement of this hearing that she contends that the School (not the respondent) had ulterior reasons for wishing to remove her from the School in respect of alleged issues relating to the investigation into missing monies/ matters relating to dinner numbers / safety issues.

8. It was agreed that the Tribunal would deal first with liability and also, if relevant, any issues pursuant to section 123 (1) of the Act – i.e. that if the Tribunal held that the claimant was unfairly dismissed also determine, if appropriate, when and the percentage chance that the claimant's employment would in any event have terminated fairly if a proper procedure had been followed. The respondent does not seek to rely on any alleged contributory fault by the claimant.

## **WITNESSES**

9. The Tribunal has received witness statements and has heard oral evidence from the following witnesses: -
  - (a) The claimant
  - (b) The respondent – (a) Mrs S Harrison, Catering Operations Manager and the dismissing manager and (b) Mr M Wilby, Managing Director of the respondent and appeals manager.

## **DOCUMENTS**

10. The Tribunal was provided with an agreed Hearing bundle (the bundle) to which the Tribunal added a number of additional documents as referred to below, including the claimant's contract of employment/ pay details evidencing the position with regard to the claimant's continuity of service.
11. It also emerged from the evidence of Mr M Wilby that there was a service level agreement governing the relationship between the School and the respondent including with regard to the removal of any employee of the respondent from the premises which the Tribunal took into account as referred to further below.

## **FINDINGS OF FACT**

### **The claimant's period of employment**

12. There was a dispute between the parties as to the length of the claimant's continuous service with the respondent. Having given careful consideration to the oral and documentary evidence supplied to the Tribunal (including the additional documentation provided by the respondent during the course of the hearing as contained in the emails from Mr Ashley together with the consequential submissions of the parties), the Tribunal is satisfied that although the claimant's employment with the respondent / its predecessor Devon County Council ("DCC") originally commenced in 2004 there was a break in

service for approximately 6 months and the claimant 's continuous service ran from 21 June 2010. The claimant's employment with the respondent terminated on 1 May 2020 which is the effective date of termination for the purposes of the Act.

### **The respondent**

13. The respondent is a joint venture company which is ultimately owned by Norfolk County Council and DCC. DCC is the minority shareholder. The respondent is a separate legal entity and operates at arm's length from DCC. The Tribunal has seen no evidence that DCC has any involvement in or influence on the day-to-day operations of the respondent. The respondent exists primarily to provide services to DCC and other public authority Devon based clients which would have previously received services from DCC. The respondent specialises in services such as catering, cleaning and facilities management. The respondent employed approximately 1,000 staff at the time of the claimant's dismissal (1 May 2020).

### **The School**

14. The respondent has a contract for the provision of catering services at Ilfracombe Church of England Junior School ("the School") which is a DCC voluntary controlled school. The respondent has included in the bundle a document issued by the Department of Education regarding the structure and governance of maintained schools which is at pages 138 onwards of the bundle. The governing body is the accountable body for maintained schools albeit that the Headteacher has responsibility for the day to day running of the School. DCC does not have any involvement in the day-to-day operation of the School.

### **The Contract for catering services**

15. The contract to provide catering services at the School commenced in April 2017. From August 2019, Simon Rothwell was appointed as the Key account Manager for the School. The Bursar at the School, Georgina Stafford, was the client contact on site throughout the contract term.
16. The Tribunal was provided, during the hearing, with a copy of the contract between the respondent and the School ("the Contract"). The Tribunal noted in particular paragraphs 2.2 and 10 of the Contract relating to the removal of contractor staff from the School premises and later provisions relating to the disputes resolution mechanism.
17. The relevant part of paragraph 2.2 of the Contract states that :-

“The Client acting reasonably shall have the right to require the Contractor to remove forthwith any employee of the Contractor from the Premises who, following a warning either: -

2.2.1 fails to comply with the rules or regulations, or

2.2.2 has in the opinion of the Client Manager, misconducted him or herself or has been negligent or incompetent.”

18. The Tribunal has also noted in particular the provisions of 10.1 of the Contract which require the client and the contractor to work in partnership and provides that any difficulty or problem should initially be discussed between the Client manager of the Client and the Key Account Manager. The Contract also provides for the matter to be referred to the Managing Director of the respondent and a higher representative of the client in the event of any ongoing issues. There is also a further mediation dispute procedure for any unresolved issues which appears however, to be intended for commercial type disputes.
19. There was no evidence before the Tribunal to indicate that the respondent / its employees had been subject to any formal warnings regarding performance prior to the events in question.

### **Background to the events in question**

20. The claimant had worked in the kitchen in the School (apart from a break in 2009/ 2010) since 2004. The claimant's employment transferred from DCC to the respondent pursuant to TUPE in April 2017 when the respondent was awarded the Contract (pages 50 -51 of the bundle). The claimant was promoted from Assistant to Kitchen manager at the time of the transfer. The claimant had not been the subject of any warnings regarding her conduct or performance prior to the events referred to below and had received positive feedback from the Bursar regarding the operation of the Kitchen from time to time. However, in 2018 some contract performance issues had been highlighted by the Bursar with the respondent on an informal basis and in a letter from the School's then headteacher dated 22 November 2018 the School raised concerns with the respondent regarding deficits in the budgets. Such concerns related to the recording of meal numbers and food costs. These matters were raised with the claimant by the respondent on an informal basis in response to which the claimant contended that the difficulties had lain with the previous Kitchen Manager. The respondent endeavoured to raise the claimant's responses with the Bursar however, these were rejected by the School. It was acknowledged by the respondent that it had, at times, a strained / difficult relationship with the School.

21. In May 2019 there was an incident involving the supply of a meal to a child at the school with an egg allergy. The claimant was suspended by the respondent pending an investigation and a subsequent disciplinary process. The upshot of the disciplinary process was that the claimant was issued with a written warning by the respondent which she accepted.
22. On 31 July 2019, Mrs Harrison of the respondent sent an email to the Bursar of the School advising her that their investigations had been completed and that the claimant would be returning to her position as Kitchen Manager on 4 September 2019. Mrs Harrison further advised the Bursar that the claimant would be supported on her return and that the claimant would be provided with refresher and additional training to address the procedural changes that had taken place whilst the claimant had been absent from work. The respondent invited the School to make contact if it had any questions or queries (page 58 of the bundle).

**The events in question**

23. On 5 September 2019, the respondent received an email from the Bursar of the School, marked urgent, in which it requested that the respondent replace the claimant with a different Kitchen Manager as soon as reasonably possible (page 73 of the bundle). In brief summary, the Bursar advised the respondent that :- (a) the School had struggled to maintain an efficient and effective catering service for a number of years and had contracted with the respondent in order to improve the service (b) that despite on-going communications between the School and the respondent about moving the service forward the claimant had struggled to support the changes and remained inflexible throughout which had inhibited progress and had resulted in a high turnover of staff (c) the claimant's recent extended absence had highlighted the impact of the Kitchen Manager and the positive changes which had been achieved in the claimant's absence (d) this was not a disciplinary issue and the School requested that the matter be dealt with in a sensitive manner (e) the School offered to provide further feedback and to support a transition process and (f) concluded the letter on the basis that "we feel we must take this decision, difficult as it is, as the school cannot afford to delay any longer".
24. The respondent's HR business partner responded to the Bursar the same day (5 September 2019) requesting, whilst acknowledging the School's right to request the claimant's removal, that the School reconsider its decision and allow them to address the concerns with the claimant internally in order to rectify the situation. The respondent pointed out that it had a duty of care to the claimant and that it would

therefore be grateful for an opportunity to remedy the situation internally (page 74 of the bundle).

25. The Bursar responded later that day (5 September) rejecting the respondent's request to reconsider its decision (page 74 of the bundle). In summary, the School stated that it had attempted to discuss the issues with the claimant over a number of years and had come to its conclusion following lengthy attempts to rectify the situation. The School further stated that: - (a) such issues had been instrumental in its decision to contract with the respondent in the hope that the experience and support of the respondent would lead to improvements (b) it understood the respondent's reluctance to accept its decision but they were not able to reconsider and (c) they appreciated the respondent's duty of care and was happy to accommodate an appropriate transition.
26. Mrs Harrison of the respondent arranged for Mr Rothwell to meet with the claimant on 6 September 2019 to explain the position and to inform her that she was being removed from the School following a formal request from the School. The Tribunal accepts that this was a very difficult situation for the claimant including in respect of the arrangements on the ground for the hand-over of duties and the removal of her belongings. The claimant's role was taken over by an employee from the Infants' School.
27. Mrs Harrison wrote to the claimant on 9 September 2019 (page 76 of the bundle) inviting the claimant to a formal meeting on 18 September 2019 to discuss the matter further. Mrs Harrison advised the claimant of the position with regard to the School and invited her to a meeting to discuss the impact on her employment. The claimant was advised that:- (a) in the light of the fact that the client had requested her permanent removal it was likely that she would be served with formal notice terminating her employment (b) the respondent would look to re-deploy her into alternative employment to avoid her dismissal and (c) was advised of her right to be accompanied at that meeting (page 76 of the bundle).

#### **The claimant's surgery and sickness absence**

28. The claimant was unable to attend the meeting because of planned surgery on 16 September 2019. The claimant then entered into a period of extended sickness initially because of her surgery and subsequently from November 2019, due to stress and depression during which period the claimant was not fit to attend an employment

meeting. The claimant was subsequently referred to occupational health to ascertain her fitness to attend a meeting – the upshot being that the claimant was not fit to attend a meeting until February 2020.

### **The events of February 2020**

29. Mrs Harrison of the respondent wrote to the claimant on 20 February 2020 (letter at pages 79 – 81 of the bundle) in which she summarised the position and invited the claimant to a further meeting which subsequently took place on 2 March 2020. The claimant was advised in the letter that a possible outcome of the meeting was that she could be formally served with notice to terminate her employment due to third party pressure but that the respondent would do all that it could to avoid the situation including looking at possible redeployment opportunities. The claimant was placed on suspension on full pay from 17 February 2020.

### **The meeting on 2 March 2020**

30. Mrs Harrison conducted a meeting with the claimant on 2 March 2020. The claimant was accompanied by a representative from a mental health team. This was a difficult meeting. When making its findings of fact regarding the conduct of the meeting, the Tribunal has had regard in particular, to the respondent's decision maker's checklist at pages 60 onward of bundle. In very brief summary:- (a) Mrs Harrison explored the position with regard to the School's request for the removal of the claimant (b) Mrs Harrison indicated that the respondent did not share the School's opinion of the claimant's work (c) the claimant referred to a police investigation which she said she believed was the reason for School's request for her removal (c) Mrs Harrison offered to go back to the School to ask them to reconsider their decision - the claimant however, said that she did not consider that it was worth doing that (d) they discussed options going forward regarding possible re-deployment – including that the respondent would provide the claimant with a vacancy list on a weekly basis (e) the claimant advised the respondent that she had other employment which started at 2.30pm so that any alternative employment would have to fit around that. The upshot of the meeting was that the claimant was served with 9 weeks' notice on the basis that her employment with the respondent would end on 1 May 2020 unless the respondent was able to provide her with alternative employment in the intervening period. The claimant was advised of her right of appeal.

### **The claimant's letter of dismissal**

31. The respondent wrote to the claimant by a letter dated 9 March 2020 confirming the claimant's dismissal together with the other matters referred to above. This letter is at pages 82- 84 of the bundle. Mrs

Harrison stated in her letter that she considered any police investigation to be a separate matter which had no bearing on the respondent's decision to dismiss the claimant. Mrs Harrison also confirmed her understanding of the claimant's start date for continuous service which she confirmed, after consultation with DCC to be 21 June 2010. Mrs Harrison also enclosed a copy of the respondent's redeployment policy (which is at pages 95-98 of the bundle). The claimant did not subsequently indicate any interest in any vacancies/ put forward any suggestions for alternative employment.

### **The claimant's appeal**

32. The claimant appealed against the decision to dismiss her. The claimant's letter of appeal dated 7 May 2020 is at pages 85 – 89 of the bundle. The Tribunal noted in particular, the matters raised at paragraphs 16 onwards (particularly at paragraph 19). The claimant did not have any suggestions to make regarding any alternative employment/ to avoid her dismissal other than that she be placed on furlough.
33. The claimant's appeal hearing on 18 and 19 June 2020 was chaired by Mr Wilby, the Managing director of the respondent. The respondent's notes of the hearing are at pages 102 – 104 of the bundle. The Tribunal is satisfied that they are broadly accurate. The Tribunal has also had regard to the respondent's decision-making checklist at pages 115 – 118 of the bundle. The claimant confirmed during the appeal hearing that she had refused the respondent's offer to ask the School to reconsider its decision regarding her removal from the contract.

### **The outcome of the claimant's appeal**

34. Mr Wilby rejected the claimant's appeal for the reasons set out in his letter dated 8 July 2020 at pages 119 -121 of the bundle. Mr Wilby addressed in the letter the claimant's concerns regarding the School's reasons for requesting her removal. Mr Wilby rejected the appeal – the claimant's dismissal was therefore confirmed from 1 May 2020 which is effective date of termination for the purposes of the Act.
35. The Tribunal has had regard to the vacancy lists which were sent to claimant in April 2020 which are at pages 134 – 137 of the bundle. It was however, accepted by the parties that they did not contain any suitable vacancies for the claimant. The claimant did not propose to the respondent during the dismissal/ appeal processes any alternatives to dismissal other than furlough. The respondent did not however agree to place the claimant on furlough for the following reasons namely, she was already on notice at the time of the introduction of the furlough scheme, her dismissal was not covid related and the claimant did not have a substantive post "to return to".

36. The claimant has worked in brother's garage since her dismissal to cover the shortfall in her working hours

### **Submissions**

37. The Tribunal has had regard to the closing submissions of the parties.

### **LAW**

38. The Tribunal has had regard in particular, to sections 98 and 123 of the Act. The Tribunal also had regard to the case law/ principles contained in the authorities of **Dodie v Burns International Security Services (UK) Limited 1984 ICR 812, CA** and **Henderson v Connect South Tyneside Limited 2010 IRLR 466 EAT** referred at paragraph 1.3.2 of the Order.

39. The Tribunal has reminded itself in particular that:-

39.1 It is for the respondent to establish, on the balance of probabilities, the reason for the claimant's dismissal including that the reason/ principal reason for dismissal was one of the permitted reasons for the purposes of sections 98 (1) / (2) of the Act.

39.2 If the respondent is able to establish the reason for dismissal the Tribunal is then required to consider whether it act fairly or unfairly in treating such reason as sufficient for dismissal having regard to the matters set out in section 98 (4) of the Act. The Tribunal is required to consider as part of that process ( both with regard to the procedure adopted and the decision to dismiss) whether the respondent acted within the range of responses of a reasonable employer and is not entitled to substitute its own decision.

39.3 In cases of third party pressure, a Tribunal is required to consider whether the respondent did all that it could reasonably have done to avoid or mitigate the claimant's dismissal (including in this case whether the respondent took sufficient steps to provide the claimant with alternative employment to avoid her dismissal).

### **THE CONCLUSIONS OF THE TRIBUNAL**

#### **The reason for the claimant's dismissal**

40. In summary, the respondent contended that the reason for the claimant's dismissal was SOSR for the purposes of section 98 (1) of

the Act namely, third party pressure from the School and the inability to provide the claimant with suitable alternative employment.

41. In summary, the claimant questioned the School's motives in seeking to remove her which she says, related to a police investigation/ the raising by her of health and safety concerns. The claimant did not however contend that the respondent dismissed her for such reasons.
42. The claimant further contended that this was not a genuine third party pressure case as the School was under the control of DCC and the respondent was a joint venture company owned by DCC.
43. Having given the matter careful consideration, the Tribunal is satisfied on the above facts that :- (a) the Contract for catering at the School was a commercial and arm's length contract and (b) the decision to dismiss the claimant was made by the respondent, which is a separate legal entity to the School/ DCC, alone including that this not a case in which DCC had any right to influence or, factually, any involvement in the decisions to dismiss/ reject the claimant's appeal.
44. The Tribunal is further satisfied that the reasons for the claimant's dismissal by the respondent were: - (a) the School's request for the claimant's removal from the School, which was made clear in the emails dated 5 September 2019, including that they were not prepared to reconsider their decision (constituting third party pressure) and (b) the inability of the respondent to provide the claimant with suitable alternative employment.
45. For the avoidance of doubt, the Tribunal is further, satisfied in the light of the above facts, that :- (a) the claimant was not dismissed by the respondent for any ulterior motive and (b) on the balance of probabilities, the School requested the claimant's removal for the reasons set out in their emails of 5 September 2019.
46. The respondent has therefore established the reason for the claimant's dismissal for the purposes of section 98 (1) of the Act namely, SOSR.

**Was the claimant's dismissal fair for the purposes of section 98 (4) of the Act?**

47. The Tribunal has therefore gone to consider whether the claimant's dismissal was fair or unfair for the purposes of section 98 (4) of the Act (with regard to both the procedure and the decision to dismiss).
48. The Tribunal has considered first the procedure adopted by the respondent. The Tribunal is satisfied, having had regard to its findings

of fact that, overall (and notwithstanding the difficulties on the ground on the claimant's return to the School in September 2019), the procedure adopted by the respondent (including at appeal) was in accordance with the respondent's Re- deployment Policy and fair for the purposes of section 98 (4) of the Act.

49. When reaching such conclusions the Tribunal has taken into account in particular that:- (a) the respondent went back to the School without delay to ask it to reconsider its decision / to allow them an opportunity to address their concerns (b) the respondent considered the question of alternative employment with the claimant and (c) conducted formal hearings (including at appeal) with the claimant at which she was given a proper opportunity to make her representations.
50. The Tribunal has therefore gone on to consider whether the decision to dismiss the claimant was fair or unfair for the purposes of section 98 (4) of the Act including whether the respondent did all that it could reasonably have done to avoid or mitigate the claimant's dismissal. The Tribunal has reminded itself that it has to consider whether, in all the circumstances of the case, the respondent acted within the band of responses of a reasonable employer in treating the established reason as sufficient for dismissal and that it is not permitted to substitute its own decision.
51. When reaching its conclusions, the Tribunal has taken into account that: -
- 51.1 This was a difficult situation involving a long serving employee and that the respondent did not share the School's assessment of the claimant's capabilities.
- 51.2 The circumstances in which the School was entitled to request the removal of contractor staff from site (including the contractual requirement for a prior formal warning).
- 51.3 The suggestions which were made by the claimant at the Tribunal hearing as alternatives to dismissal namely, swapping roles with the member of staff from the Infant School who had taken on her duties and /or working on a temporary basis as a lower grade kitchen assistant providing cover for absences.
- 52 Having given the matter careful thought, the Tribunal is however satisfied that, notwithstanding the above, the respondent acted reasonably in all the circumstances, and within the band of reasonable responses, in dismissing the claimant for SOSR.

52. When reaching this conclusion, the Tribunal has balanced against the above the following: -

52.1 The decision by the School to require the claimant's removal (and its subsequent refusal to reconsider its decision) was clearly and unequivocally articulated in its emails dated 5 September 2019. Further, although the School had not previously issued a formal warning, such decisions were articulated against the background of the fractured relationship between the claimant and the School following the concerns raised by the School in November 2018 regarding budgets and the subsequent sausage incident.

52.2 The claimant's confirmation that she did not wish the respondent to ask the School again to reconsider its decision.

52.3 On the facts, the respondent acted reasonably in all the circumstances with regard to the redeployment of the claimant having regard in particular to :- (a) the limited opportunities for alternative employment including as none of the vacancies were suitable for the claimant who was restricted in the hours which she could work by her other contractual commitments (b) the opportunities for re – deployment were further restricted / impacted by the claimant's sickness absence and subsequently by the effects of the coronavirus pandemic and (c) the claimant did not at the dismissal or appeal stages put forward any proposals for any alternative employment/roles to avoid her dismissal (including that the suggestions which were made by her at the Tribunal hearing regarding the swapping of roles/ working on a temporary basis as lower grade kitchen assistant to cover absences were not raised by her at any time prior to the Tribunal hearing) notwithstanding that she had had a long time to consider any such proposals between September 2019 and May 2020.

52.4 Further the Tribunal is satisfied that the respondent did not acted unreasonably in all the circumstances in refusing to place the claimant on furlough as :- (a) she was already under notice for non – covid related reasons at the time that the furlough provisions came into force and (b) the claimant no longer had a substantive post to return to and there was no prospect of any suitable alternative employment at the relevant time.

53. In all the circumstances, the Tribunal is satisfied that notwithstanding that from the claimant's perspective this was a very unfortunate

decision, the respondent acted fairly in all the circumstances for the purposes of section 98 of the Act in dismissing the claimant for SOSR.

Employment Judge Goraj  
Date: 31 August 2021

Judgment sent to parties: 11 October 2021

FOR THE OFFICE OF THE TRIBUNALS

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The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in anyway prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness