Case number: 1400654/2022

EMPLOYMENT TRIBUNALS

Claimant: **Mr T Dus**

Respondent: **First West of England Limited (1)**
Sasse Limited (2)

Heard at: **Bristol** **On:** **24-25 October 2022**

Before: **Employment Judge Oliver**

Representation
Claimant: In person
First Respondent: Mr C Riley, solicitor
Second Respondent: Mr T Brennan, representative

JUDGMENT having been sent to the parties on 28 October 2022 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

Issues

1. This is a claim for unfair dismissal.

2. The Respondents had prepared a draft list of issues. This was discussed with the parties at the start of the hearing and agreed as follows:

3. Preliminary Issue – Jurisdiction

   3.1 Was the Claimant an employee of the First Respondent? All parties accept he was not.

   3.2 If not, should the claim be struck out against the First Respondent on the grounds of having no reasonable prospects of success/the Tribunal having no jurisdiction to consider it?

I decided this issue at the start of the hearing after hearing representations from all parties and gave full oral reasons for my decision. I decided that the First Respondent was not the Claimant's employer at the time he was dismissed. All parties agreed that there had been a TUPE transfer of the Claimant's employment to the Second Respondent, and he had no direct contractual relationship with the First Respondent. He worked at the First Respondent's site under a commercial contract between the two respondents. This means that it is not possible to bring a claim for unfair dismissal against the First Respondent, because such a claim can only be made against an individual's employer. I decided that the claim for unfair dismissal against the First Respondent should be struck out as the Tribunal does not have jurisdiction to hear it.

4. Unfair Dismissal

4.1 The Claim is for unfair dismissal and at Section 8 – being treated with no respect by some First Respondent members (been bullied).

4.2 Does the allegation of being treated with no respect by some First Respondent members (been bullied) amount to a claim which a Tribunal has jurisdiction to hear?

4.3 What was the reason for dismissal? The Second Respondent asserts that dismissal was because the First Respondent notified the Second Respondent that it would not allow the Claimant on any of its sites.

4.4 The Second Respondent contends the reason amounts to some other substantial reason of a kind such as to justify the dismissal under s98 of the Employment Rights Act 1996.

4.5 Did the Second Respondent follow a fair procedure, including an investigation as was reasonable in the circumstances?

4.6 Did the Second Respondent consider the Claimant for alternative employment?

4.7 Was dismissal within the range of reasonable responses?

4.8 Was dismissal fair or unfair?

4.9 If it did not use a fair procedure, would the Claimant have been dismissed in any event and/or to what extent and when?

4.10 If the dismissal was unfair, did the Claimant contribute to the dismissal by culpable conduct? If so to what extent expressed as a percentage?

4.11 Does the ACAS Code on Disciplinary and Grievance Procedures apply in this case?

4.12 If yes did the Second Respondent comply with it?

4.13 If the Code was not followed did the Second Respondent act

unreasonably in failing to comply?

4.14 Should there be an uplift or reduction and if so what percentage?

Evidence

5. I had an agreed bundle of documents. I have read and taken into account the documents in the bundle that were referred to in witness statements and during the hearing.

6. The Respondents had prepared written witness statements, which I read. For the First Respondent I heard evidence from Mr Richard Northey (Engineering Director of the First Respondent). For the Second Respondent I heard evidence from Mr Patrick Czarny (Operations Manager at the Second Respondent), Mr Alex Borg (Senior Operations Manager at the Second Respondent), and Mr Daniel Pecce (Head of Transport UK at the Second Respondent).

7. The Claimant had not prepared a written witness statement. We used the information provided in his claim as his evidence in chief.

8. I heard final submissions from the Claimant and the Second Respondent (the claim against the First Respondent having been struck out).

Facts

9. I have considered all the evidence and submissions, and find the facts necessary to decide the issues in the case.

10. The Claimant was employed from March 2007 to 3 December 2021. He initially worked for the First Respondent, then transferred to another contractor for one year, before transferring to the Second Respondent under TUPE on 8 August 2018. The First Respondent is a bus operator. The Second Respondent carries out cleaning, fuelling and shunting services for the First Respondent at its bus depot in Bath, where the Claimant worked. The Claimant was a Team Leader at the time of his dismissal.

11. On 9 June 2021, an Engineering Chargehand at the First Respondent (Mr King) filed an internal complaint about the Claimant.

12. On 10 June 2021, Mr Morris (Engineering Manager) emailed Mr Patryk Czarny (Operations Manager at the Second Respondent) and raised a formal complaint that the Claimant was uncooperative.

13. On 17 June 2021, Mr Morris emailed Mr Richard Northey (Engineering Director at the First Respondent). He said there had been further complaints about the Claimant and asked that the Claimant be transferred out of the First Respondent's depot in Bath. The First Respondent obtained statements from two other employees, as well as Mr Knight, which made complaints about the Claimant. The complaints all related to disputes with the Claimant about the parking and moving of buses, and washing of buses.

14. On 18 June 2021, Mr Northey forwarded a copy of this email to Mr Czarny

and asked that the Claimant be removed from all of the First Respondent's sites. His email says, "*Another to discuss today. However there will not be a discussion as I want him removed from all West of England sites*."

15. The Claimant was suspended on full pay on 21 June 2021. I have seen a letter dated 21 June which gives the reasons for suspension as "*Not following reasonable requests from the client*" and "*Jeopardising the operations and damaging the relationship with the client by not cooperating*". The letter goes on to say, "*On the grounds above, client has requested your permanent removal from all sites*."

16. The Claimant was invited to an investigation meeting in a letter dated 2 August 2021. The letter says, "*the company intends to investigate this matter fully before determining whether it is appropriate to take action under the company's disciplinary procedure*."

17. Mr Czarny met with the Claimant on 5 August 2021, and I have seen a full record of this meeting. The Claimant provided explanations for the complaints. He said that a bus he had been told to move was parked before he arrived and was a vehicle on repair, so he couldn't move it without the right authorisation. He explained that they were required to manually wash buses as the bus wash was broken, and Mr Czarny agreed that they weren't paid to do this. The Claimant provided quite a lot of detail in response to the various complaints, and explained the situation in the workplace. He said that the complaints were lies by Mr King.

18. The Claimant left the investigation meeting with the impression that there would be more investigation, and that Mr Czarny would speak to various witnesses he mentioned. The notes of the meeting record Mr Czarny saying at the end that he would "*grab the statements from people that you've mentioned during this meeting*", although this was not put to him during his evidence. There are no notes of any meetings with witnesses, and no investigation outcome report. Mr Czarny's evidence was not clear on whether he spoke to witnesses or carried out any further investigation. He could not remember whether he had done this. Based on the documents, I find on balance that he did not speak to witnesses or carry out any further investigation.

19. Mr Czarny's evidence was that he thought on balance of probabilities the statements from the client were true. The issue was the way the Claimant went about things and how he dealt with the client, rather than failing to follow the client's requirements. He should have called his manager if there were issues with what the client was asking him to do.

20. Mr Czarny did contact the First Respondent to ask if they would allow the Claimant back on site. He asked this during a Teams call with Mr Northey and Mr Morris at an early stage after the complaints had been made, and was told they would not reconsider. After the investigation meeting he spoke with Mr Morris again about whether they would allow the Claimant back on site. Mr spoke to Mr Northey, and then told Mr Czarny that he was not changing his decision.

21. The Claimant was invited to a formal review meeting in a letter dated 28 October 2021 from Mr Alex Borg, senior operations manager. The letter says,

"*As you are aware the client has informed us you are no longer allowed on site and or any other First Bus sites. The purpose of the meeting is to discuss what this means going forward, please be aware this could result in dismissal due to client removal from site…There are no other local vacancies in the Bristol / South-West area with Sasse*." The letter explains he can bring witnesses and documents to the hearing. The Second Respondent has not been able to explain what happened between the investigation meeting and the review meeting. The Claimant was suspended on full pay throughout this time.

22. The review meeting took place on 21 November 2021, and I have seen a full record of this meeting. Mr Borg starts the meeting by explaining that it is an employment review meeting, not a disciplinary. The Claimant gave the same explanations to Mr Borg as he did at the investigation meeting. He made it clear that he thought everyone was happy with his work, and this was all due to Mr King making problems.

23. On 3 December 2021, Mr Borg wrote to the Claimant notifying him that he was being dismissed for some other substantial reason. The letter says, "*Unfortunately, we must advise you that the Company has now decided to terminate your employment effective as of 03/12/2021 due to S.O.S.R. (some other substantial reason), as the client does not allow you on their property and the business has not have any suitable vacancy in the area. You are entitled to 12 weeks of notice, which will be paid in lieu*." Mr Borg's evidence was that he felt there was no option except to dismiss the Claimant because this was what the client had requested, and there was nothing they could do. He had no choice, as there was no place to put the Claimant. He also said that on balance of probability he thought there was not a conspiracy against the Claimant, as there were three statements from different people and the email from Mr Morris.

24. The Claimant appealed on 7 December 2021. His grounds of appeal were that according to the investigation meeting, he had not committed any irregularities in his work. He said that the client's decision was too harsh and unfair, allegations had been created without any logical explanation, and it was a clear conspiracy against him.

25. The appeal was heard by Mr Daniel Pecce (Head of Operations) on 18 January 2022, and I have seen a full record of this meeting. The Claimant explained again his response to the complaints. He said that his supervisor Richard had been antagonising Mr King against him, and allegations had been created against him.

26. On 25 January 2022, Mr Pecce emailed Mr Northey of the First Respondent to ask whether they would accept the Claimant back into the Bath depot. Mr Northey replied that they would not allow him in any of the First Respondent's sites as he has a disruptive attitude in the depot. Mr Pecce said he sent this email because they would not have dismissed the Claimant for this reason, but he didn't explain this in the email as this was an important client and they had already asked him to reconsider twice.

27. Mr Northey's evidence was that he felt the Claimant was argumentative and disruptive, based on the statements he had asked for and the email from Mr Morris. He felt he could not have the Claimant on his sites, and was not willing to

have him back when the Second Respondent asked about it. He had done the same thing before with a number of different contractors.

28. The appeal upheld the Claimant's dismissal. The outcome letter dated 26 January 2022 says, "*All of the points you raised in your appeal letter were investigated and discussed during the appeal. We have reached out to the client again about your re-deployment, but the client upholds the decision of banning you from their sites; and there is no other vacancy available in the area*." Mr Pecce said that he had a reasonable belief that the Claimant had done the things complained about, based on the three statements. But it would have made no difference to his decision if he had spoken to more witnesses, because the client had told them to remove the Claimant. The client had confirmed this more than once, and again when he asked after the appeal, so they had no choice but to dismiss. The client was "adamant".

29. In relation to other available work for the Claimant, the Second Respondent's witnesses all confirmed that none was available in the West of England. The only other client in the area was Bristol Airport, which had reduced the need for staff during the Covid-19 pandemic. I asked Mr Borg whether they had considered roles outside the West of England. He said that there were no vacancies anywhere else either, as they actually had to reduce staff during this time.

30. I have seen a copy of the contract between the First and Second Respondents. This gives the First Respondent the right to refuse any of the Second Respondent's employees access to its premises under Clause 14.2 – "*The Customer reserves, at its sole discretion, the right to refuse the Supplier, or its employees, agents or sub-contractors access to the Customer's premises*."

31. In relation to the importance of the First Respondent's business to the Second Respondent, Mr Pecce explained that they are the second biggest contract in his division out of a total of approximately five contracts. The witnesses all confirmed that the First Respondent is an important client for the business.

32. The Claimant's position on what happened is clear. He feels there was a conspiracy against him led by Mr King, which started when he did not get on with a colleague who later became his supervisor. He says that the Second Respondent found he had not done anything wrong. He thinks there should have been a meeting involving the First Respondent to sort out the situation.

33. All three of the Second Respondent's witnesses said that they would not have dismissed the Claimant for the complaints made against him, even if they were true. He was not dismissed for anything he had done. He was dismissed because the client said he could not work on their sites and there was no other work for him to do.

Applicable law

34. The applicable law is set out in section 98 of the Employment Rights Act 1996 ("ERA"). Some other substantial reason ("SOSR") is a potentially fair reason for dismissal - "*some other substantial reason of a kind such as to justify*

the dismissal of an employee holding the position which the employee held" (section 98(1)(b)).

35. The burden of proof is on the employer to show a potentially fair reason for dismissal. The test is whether the dismissal was fair or unfair, having regard to the reason shown by the employer, and in particular whether in the circumstances the employer acted reasonably or unreasonably in treating this as a sufficient reason for dismissing the employee (section 98(4)(a)). Under section 98(4) the Tribunal should also assess the fairness of the procedures used to dismiss the employee. The overall fairness of the dismissal should be determined in accordance with equity and the substantial merits of the case (section 98(4)(b)).

36. A number of cases have considered whether it can be a fair to dismiss an employee for SOSR due to pressure from a third party, such as a client. Although SOSR is a potentially fair reason for dismissal in this situation, it is still necessary for the Tribunal to consider all the elements of the test in section 98(4) in order to decide whether dismissal for that reason was fair or unfair.

37. In ***Dobie v Burns International Security Services (UK) Ltd*** 1984 ICR 812 (CA), the Court of Appeal upheld a Tribunal's decision that third-party pressure to dismiss can amount to SOSR. The Court of Appeal stated that when considering the reasonableness of the dismissal, the tribunal must consider the conduct of the employer and, most importantly, whether dismissal is an injustice to the employee. An injustice argument would be much less sustainable if the employee's contract provided that a third party might request his dismissal.

38. The relevant caselaw was reviewed by the Employment Appeal Tribunal (EAT) in ***Henderson v Connect (South Tyneside) Ltd*** [2010] IRLR 466. The EAT upheld a decision that there had been a fair SOSR dismissal of a bus driver who had been accused of sexual abuse (which he denied and which never gave rise to formal criminal charges), which caused the council to exercise its right to have him removed from the relevant contract.

39. Underhill P confirmed that dismissal at the request of a client or customer may be a SOSR. He stated that this may cause a procedural injustice to the employee as the client is under no obligation to follow a procedure and the employer is not the real decision-maker, and it may also be a substantive injustice if the client's decision is unreasonable. However, this may still be a fair dismissal, even if the client who has procured the dismissal may have acted unfairly and the employee may have suffered an injustice. Dismissal may seem harsh, but it can be fair if the employer has done all it reasonably could to avoid or mitigate the injustice – including trying to get the client to change its mind, and looking for alternative work:

> "*Cases of this kind are not very comfortable for an employment tribunal. Nevertheless, it has long been recognised that the fact that the client who procures, directly or indirectly, the dismissal of an employee may have acted unfairly, and that the employee has thus suffered an injustice, does not mean that the dismissal is unfair within the meaning of the statute. That is because the focus of s. 98 of the Employment Rights Act 1996, and its statutory predecessors, is squarely on the question whether it was reasonable for the*

employer to dismiss…

It must follow from the language of s. 98 (4) that if the employer has done everything that he reasonably can to avoid or mitigate the injustice brought about by the stance of the client – most obviously, by trying to get the client to change his mind and, if that is impossible, by trying to find alternative work for the employee – but has failed, any eventual dismissal will be fair: the outcome may remain unjust, but that is not the result of any unreasonableness on the part of the employer. That may seem a harsh conclusion; but it would of course be equally harsh for the employer to have to bear the consequences of the client's behaviour, and Parliament has not chosen to create any kind of mechanism for imposing vicarious liability or third party responsibility for unfair dismissal."

Conclusions

40. I have considered the issues in turn.

41. ***Does the allegation of being treated with no respect by some First Respondent members (been bullied) amount to a claim which a Tribunal has jurisdiction to hear?*** The First Respondent did not employ the Claimant, and this is not a claim that the Tribunal has jurisdiction to hear in the context of a claim for unfair dismissal.

42. ***What was the reason for dismissal? The Second Respondent asserts that dismissal was because the First Respondent notified the Second Respondent that it would not allow the Claimant on any of its sites. The Second Respondent contends the reason amounts to some other substantial reason of a kind such as to justify the dismissal under s98 of the Employment Rights Act 1996.*** Having considered the evidence, I find that the Claimant was dismissed for some other substantial reason. There was some confusion at the investigation stage, as the disciplinary procedure was referred to by Mr Czarny. However, it is clear that the reason for dismissal was the First Respondent's refusal to allow the Claimant to work on any of its sites. The Second Respondent did not dismiss the Claimant because he had done anything wrong, they dismissed him because he could no longer work for the client and there was no other work available.

43. ***Did the Second Respondent follow a fair procedure, including an investigation as was reasonable in the circumstances?*** I find that they did. The Second Respondent did hold a meeting with the Claimant to discuss the situation, and he was given a right of appeal. He was invited to these meetings in writing, and given the opportunity to produce witnesses and documents. The Claimant complains that the Second Respondent did not investigate fully and did not speak to the witnesses he had named. It is correct they did not do this. That may well have been unfair if this had been a disciplinary dismissal. However, this was a SOSR dismissal. The Claimant was not dismissed because of his behaviour. As noted in ***Henderson***, any investigation into a client's requirement that an employee is moved is of limited value. The caselaw makes it clear that the employer is not under an obligation to investigate the client's reasons, even if the client may have acted unfairly. The Second Respondent did listen to what the Claimant had to say and allowed him to comment on the statements provided

by the client. Although it may seem harsh on the Claimant, this is all the Second Respondent was required to do in this situation.

44. ***Did the Second Respondent consider the Claimant for alternative employment?*** I am satisfied that the Second Respondent did do this. I accept their evidence that there were no options at their only other client in the area, Bristol airport, due to the ongoing effects of the pandemic. I also accept Mr Borg's evidence that there were no vacancies elsewhere due to cuts in staffing.

45. ***Was dismissal within the range of reasonable responses?*** This is the key issue. The caselaw is clear that I should consider the conduct of the employer, and in particular whether the employer did enough to limit injustice to the employee. I have looked at whether the Second Respondent did all that they reasonably could to avoid the injustice to the Claimant and allow him to remain in employment. Having considered this carefully, I find that they did. Dismissal for this reason was within the range of reasonable responses. I have taken into account the following:

45.1 The contract with the First Respondent had a clear clause which said they could refuse employees access to any of their premises at their sole discretion. This is an important factor that is relevant to an assessment of injustice (as referred to in ***Dobie***). It meant that the Second Respondent could not challenge the requirement to remove the Claimant from their sites under the terms of the contract.

45.2 The Second Respondent did ask Mr Northey whether he would reconsider his decision several times – twice during the investigation, and again after the appeal hearing.

45.3 The Second Respondent did consider alternative employment, and none was available. They continued to pay the Claimant full pay throughout this time.

45.4 The Claimant says that the Second Respondent should have done more investigation and involved the First Respondent. I can understand why he says this. However, the caselaw indicates that an employer in this situation is not required to verify whether a client's reasons for requesting the removal of an employee are fair and accurate. I am also satisfied that this would not have been a reasonable step in this case. Mr Northey was adamant that they did not want the Claimant back on site, and the contract was clear that they could refuse access to any employee at their discretion.

46. I therefore find there was nothing else the Second Respondent could reasonably have done to keep the Claimant in employment. This means that ***the dismissal was fair***, based on equity and the substantial merits of the case.

47. It is not necessary for me to consider the rest of the issues, but for the avoidance of doubt I find that the ACAS Code on Disciplinary and Grievance Procedures does not apply in this case as it was not a disciplinary dismissal.

48. In ***Henderson***, the then President said that cases of this kind are not very

comfortable for the employment tribunal. I agree. I have not found it comfortable to decide this case. The Claimant says that he had not done anything wrong, and his employer would not even have issued him with a warning. He says that his employer was concerned about their business and did not care about what really happened. The Second Respondent has confirmed that they would not have dismissed him themselves based on the complaints. The Claimant says this means that a client can just do what they want and say anything they like against a contractor, and this could happen to other people as well. He says that he has lost his job and this has ruined his life. He is angry and upset about what has happened.

49. I have considerable sympathy for the Claimant. I can understand why he finds what happened harsh and unfair. However, my role is to apply the law to the facts of the case. ***Henderson*** makes it clear that a dismissal in this situation can involve an injustice to the employee but still be a fair dismissal under the law. I have found that the dismissal of the Claimant was fair in accordance with the legal tests. This means that the claim for unfair dismissal fails and is dismissed.

Employment Judge Oliver
Date: 13 November 2022

Reasons sent to the Parties: 22 November 2022

FOR THE TRIBUNAL OFFICE