EMPLOYMENT TRIBUNALS

Claimant: Mr C Dhami

Respondent: GS Associates (Scotland) Limited

Heard at: Midlands West Employment Tribunal **On:** 19, 21, June, 28 June 2024

Before: Employment Judge Akhtar

REPRESENTATION:

Claimant: In Person

Respondent: Mr C McDevitt (Counsel)

JUDGMENT

The Judgment of the Tribunal is that:

1. The complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Oral reasons, having been given to the parties on 28 June 2024 and written reasons having been requested in accordance with rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

Claims and Issues

1. The issue before me for determination was whether or not the respondent had unfairly dismissed the claimant and if it had done, to consider what damages the claimant was entitled to.

Procedure, documents and evidence heard

2. I heard evidence from the claimant and heard the evidence of the following witnesses on behalf of the respondent:

   Mr Darren Talwar, Regional Manager;
   Ms Sarah Newland, Head of People Services at Excellerate Services.

3. There was a bundle of documents running to 213 pages.

4. On the first day of the hearing and towards the end of his cross-examination by Mr McDevitt, the claimant made an application to add additional documents to the hearing bundle. The documents he asked to be included were 7 audit inspection reports for the period between 9 February 2023 and 17 January 2024.

5. The claimant submitted that these reports were relevant to my considerations as they were evidence that the statement of one of the respondent's witnesses, Mr Talwar, was misleading in respect of the audit inspections scores being good after the rota was introduced. The claimant submitted the respondent only chose to reference select reports and did not refer to the whole period. The claimant confirmed that he was not suggesting that any of the audit scores referred to by the Respondent in the bundle were incorrect in any way.

6. In response Mr McDevitt set out the respondent's objections to the tribunal admitting the documents on 5 grounds. In summary these are; the timing of the application, the way in which the claimant has come by confidential management documents, the documents only being partial disclosure, consequential disclosure would be required and there was uncertainty as to what the issues are that these documents go to.

7. I reminded myself that the starting point for the Tribunal is the application of the overriding objective to deal with cases fairly and justly.

8. The claimant stated that he came into possession of these documents recently and did not want to disclose documents so late in the day. There was no clarity in respect of how he came about these documents and I accepted the respondent's concerns in terms of confidentiality.

9. Nevertheless, the duty of disclosure is an ongoing one between the parties. If the documents are considered relevant to the proceedings they should be disclosed at the earliest opportunity.

10. In terms of relevance, I find that the documents other than addressing matters relating to audit reports post the end of the claimant's employment at the Marks & Spencer Wednesbury store are of limited relevance. The documents do not go directly to the point of the reason behind what the respondents say was the need to change the rota. The bundle of evidence already included evidence of the inspections that led to the change of rota and the claimant can properly cross-examine the respondent's witness Mr Talwar in respect of these matters as well as seeking confirmation as to whether the rota remains in place.

11. There could be a multitude of reasons behind why the audit score varied over these periods and if I allowed the documents to be admitted, I accept the respondent's position, that they would have to review their own documents in respect of these inspections and further consequential disclosure and evidence may be required, which would in turn lead to this hearing having to be adjourned part heard. Should this final hearing be adjourned, this would lead to cost consequences and further delay and as such in line with the overriding objective, I refused the claimant's request to have these documents admitted.

Findings of fact

12. Having considered all the evidence, both oral and documentary, I made the following findings of fact. These findings are not intended to cover every point of evidence given but are a summary of the principal findings that I made from which I drew my conclusions.

13. This case concerns an unfair dismissal claim brought by the claimant in what are an unusual set of circumstances.

14. The respondent is a provider of contract cleaning and support services throughout the UK and Ireland specialising in retail, distribution centres and corporate office cleaning. It provides professional cleaning services to over 300 Marks & Spencer stores, employing approximately 1,800 employees across these stores.

15. The claimant commenced his employment with the respondent on 9 December 2017, based at the Marks & Spencer Store in Wednesbury. It is agreed that the claimant still remains in employment with the respondent, working at the Tamworth and Mosley Marks & Spencer stores. His position is that his dismissal relates solely to the Marks & Spencer Wednesbury store, for which he states he was under a separate contract of employment with the respondent. I will comment on this further in my findings of fact and conclusions.

16. At the point of his employment, the claimant entered into an employment contract with the respondent, which I will refer to as the 'original contract' for the purpose of this judgment. The claimant confirmed in evidence that this was the only contract that he signed that was set out in the way that it appears in the hearing bundle. He stated that there were other 'similar' contracts that he signed but these did not look exactly the same as the original contract. The claimant clarified in his evidence that these similar contacts were the documents in the bundle with the title descriptor, "change of details forms". I will come on to discuss these documents shortly

17. With regard to the original contract, the copy included in the bundle was not clearly legible in places, however, the parties confirmed they agreed with the following position, when I sought clarification. This was that that the location and job details was set out as Marks & Spencer Wednesbury and the role was that of morning cleaner.

Whilst the normal hours of work box was incomplete, the table beneath that box set out the claimants working hours as 3 hours on Mondays between 6am-9am and 3 hours on Sundays between 8am and 11am, this providing a total of 6 hours.

18. The reverse of the original contract is entitled 'contract of employment' with a number of terms and conditions set out. I will not seek to set all of these out but the relevant ones for the purposes of this judgment are location and hours of work.

19. In respect of location, the following clause is set out: *"your place of work shall be the location specified overleaf but the Company will reserve the right to move you to a different work location either on a permanent or part time basis provided that the conditions of employment are similar and the new location is within reasonable travelling distance of the previous location and/or your home".*

20. In respect of hours of work the following clause is set out: *"you will be required to work the hours as detailed on the reverse, which could be subject to variations. The individual requirement of each contract will determine the times at which you work. Additional hours may be required on occasions for which you would be paid the appropriate of pay. If there is a variation of hours we will endeavour to give whatever notice is possible under the circumstances."*

21. The claimant's evidence is that subsequent to the original contract, he entered into a number of different contracts with the respondent, these contracts appear in the hearing bundle with the title descriptor 'change of details form'. The respondent's evidence was there was a single contract of employment, that being the original contract and the change of detail forms were contract variations of the original contract.

22. I will not set out details of all of the change of details forms included in the bundle as there are a significant number. However, I will set out the change of details position, at the point that the claimant was informed by the respondent in writing that his role was redundant at Wednesbury, this is 23 March 2023, which is also the date that the claimant submits he was dismissed from the respondent's employment.

23. At that point, the claimant was contracted in total to 55.5 hours per week across 3 sites. There may have been a number of change of details forms completed but it was accepted by both parties that the following was the position as at 23 March 2023:

a) Marks & Spencer Tamworth (40 hours per week, 8 hours Mon-Fri) – change of details form completed 06.05.21.

b) Marks & Spencer Mosley (9 hours per week made up of Mon 5-9 and Saturday 5-8 am and 8-10 pm) – change of details form completed, 2 March 2023.

c) Marks & Spencer Wednesbury (6.5 hours per week, Thursday 6-9am and Friday 6-9.30am), – change of details form completed, 16 November 2022.

24. In his written evidence, the claimant states that he was told by payroll *"due to the nature of how GS Associates operate these" (the change of details forms) were separate contracts".* In his oral evidence to me he stated that he was told by Nicola Baker, Area Manager when he signed these forms that these were "new contracts". When asked in cross-examination why he had not mentioned Ms Baker in his written evidence, he stated that he could not find the evidence he needed to support this assertion.

25. In support of its position that there was only ever a single contract between the claimant and the respondent; the respondent's evidence was that the claimant only had a single payroll number and the payment in respect of all locations he was working at was all contained in one monthly wage slip. The claimant accepted that he had a single payroll number and that all of his pay was contained on one monthly wage slip but his evidence was this was done to make it easier for admin. It was also an agreed position that the change of details form all specified the same payroll number, which is the only payroll number the claimant has had throughout his employment with the respondent.

26. Darren Talwar's (respondent's Regional Operations Manager) evidence to the Tribunal was the respondent only operated on a single employment contract basis, where it had employees working at more than one store. He was not aware of any employees in such circumstances being issued with more than one contract of employment. Mr Talwar is responsible for the management of the respondent's operations in the East Midlands, Birmingham, Gloucestershire, Cheltenham and South Wales. He has five Area Managers reporting into him who each on average cover 20 stores in the region.

27. I find that the claimant was and is subject to a single employment contract with the respondent. I prefer the evidence of the respondent in relation to this matter; the claimant has failed to produce any evidence to back up his claims of multiple contracts of employment being in existence. The only additional contract documents are the change of detail forms, which I conclude are effectively contract variations amending the original contract of employment. The respondent does not have a practice of

issuing multiple employment contract in circumstances where employees are working at more than one location and I accept Mr Talwar's evidence in this regard. The fact that the claimant has only a single payroll number, one monthly wage slip detailing his wages across all the locations he works at is further supportive of my conclusion.

28. I now move on to the chain of events, which ultimately led to the respondent initiating a redundancy process and making the respondent redundant from its Wednesbury store. The respondent's position is that their following of the redundancy process was an error and that the process followed actually only amounted to a variation of contract. Their alternative position if I find that the claimant has been dismissed is that the claimant was dismissed fairly on the grounds of some other substantial reason, that being business reorganisation.

29. The process commenced in or around February 2023, when the respondent's client Luke Edwards (Store Manager at Marks & Spencer Wednesbury) raised concerns verbally with Mr Fizan Riaz, (the respondent's Area Manager). The concerns were around inadequate levels of cleaning supervision within the Marks & Spencer Wednesbury store. The concerns were flagged following a poor cleaning audit result of 18% in February 2023. In addition to the poor audit score, the respondent had logged 11 complaints from the Marks & Spencer Wednesbury for the period January to February relating to the standard of cleaning at the store.

30. As a result of these concerns being flagged, Mr Riaz, Mr Edwards and Mr Alex Coley (cleaning and waster Contract Manager of Marks & Spencer) discussed how they could improve the quality and delivery service and reviewed the rotas of cleaning staff at the store. It was identified that there was a need for a cleaning supervisor 5 days week, including the weekend, rather than 2 days a week, as worked by the claimant. The respondent's evidence was that this would provide consistent and regular management of the cleaning team to improve the performance at the store. It was Marks & Spencer as the client that requested the cleaning supervisor work weekends as that was their busiest trading days and would align with the needs of their business when there was increased demand.

31. Mr Riaz and Mr Edwards in conjunction with Mr Talwar considered whether it was possible having two cleaning supervisors, however, due to the rapid decline in performance it was considered one supervisor was considered necessary to drive

forward standards and motivate the team and also that two supervisors as opposed to one may result in inconsistencies within the team.

32. The claimant submits that the rota drawn up by the respondents in conjunction with Marks & Spencer was 'fake', however, he failed to put forward any evidence to support this bold assertion. Mr Talwar's evidence was that the proposal for a new rota was driven by Mr Edwards and partly Mr Coley as a result of poor service levels. Mr Talwar was not involved directly in the meetings but as line manager to Mr Riaz, he regularly discussed matters with him.

33. I prefer the evidence of the respondent in relation to this matter and accept Mr Talwar's evidence. I find the documentary evidence in the form of the poor audit results and complaints also supports the position that there was an issue with poor service levels at the store and I find that the review of the rota would be a logical and reasonable step for the respondent and its client to consider.

34. In addition, I accept Mr Talwar's evidence that the rota remains in place at the Wednesbury store and recent audit scores have been 100% in June and 93% in May.

35. Mr Talwar recommended that Mr Riaz hold an informal meeting with the claimant to explain the business rationale to him and discuss whether he would be willing to voluntarily drop the hours and pick up hours at other stores where there were vacancies. This was in the knowledge that the claimant was already working 49 hours a week for the respondent and it was unlikely that he would be able to take on a 5 day a week role.

36. The claimant attended an informal meeting on 28 February with Mr Riaz, where he was informed that his role was at risk of redundancy. It was explained to the claimant due to the recent unacceptable audit scores and complaints there was a need to restructure the operational hours for the cleaning supervisor at the Wednesbury store. It was explained that there was now a requirement for the cleaning supervisor to work 16 hours across 5 days including weekends rather than 6.5 hours across 2 days.

37. It was put to the claimant that as he worked 49 hours across Tamworth and Mosely, Marks & Spencer stores, he would not be able to adhere to the new working hours increase and the pattern proposed. The claimant put forward a number of proposals to Mr Riaz, however, these were not considered feasible for the following reasons:

a) The claimant was unable to work on the weekend due to his commitments at other Marks & Spencer stores;
b) The claimant's proposal of changing the bakery clean to a Sunday evening was not feasible as the claimant would then be working 7 days in breach of the working time regulations;
c) The claimant's proposal to work on a Saturday was not considered sustainable as he would have to find cover each week for the Moseley store and lastly;
d) The claimant's proposal to work Monday- Friday was dependent on the claimant finding cover for Moseley each week

38. Mr Riaz and Mr Talwar sought advice from Jan Stephens, (the respondent's People Services manager) who advised that the situation with the claimant was a potential redundancy situation and a redundancy consultation process should commence. The evidence of Mr Talwar on this point was that that he acknowledged the situation should not have been treated as a redundancy situation and should have a been restructure in hours, however, he went along with the professional advice of HR, namely Ms Stephens. Mr Talwar further acknowledged that the claimant would have been caused confusion.

39. On 7 March 2023, Mr Riaz wrote to the claimant advising him that he was at risk of redundancy and that this was the beginning of the consultation process.

40. On 10 March 2023, the claimant attended a first redundancy consultation meeting with Mr Riaz, at which a copy of the new rota was shared with him. The claimant again put forward proposals, which were considered not feasible again for similar reasons in him now being able to commit to the new proposed hours and work weekends.

41. On 21 March 2023, Mr Talwar wrote to the claimant inviting him to a second consultation meeting. The suggestion that Mr Talwar handle the second consultation was made by Ms Stephens given that he was more senior than Mr Riaz and had experience in running redundancy processes. In the letter Mr Talwar explains the purpose of the meeting was to allow the claimant an opportunity to discuss any views and suggestions that he felt the respondent could take into account to avoid his redundancy. Mr Talwar also explained that to the extent the respondent was unable to find suitable alternative employment his employment at Marks & Spencer Wednesbury

would be terminated. He clarified that this did not affect his other roles at Marks & Spencer Moseley, 9 hours and Tamworth, 40 hours.

42. On 23 March the claimant attended a second consultation meeting At this meeting, no further proposals were put forward by the claimant, however the claimant suggested that the redundancy exercise was to “get rid of him”.

43. Mr Talwar explained the background and rationale and proceeded to put forward other vacancies that the respondent had, however, the claimant advised that the roles were not suitable as they clashed with his other hours. As a result, the claimant was notified that his employment at the Wednesbury store would be terminated by reason of redundancy and his effective date of termination would be 23 March 2023.

44. On 24 March 2023, the respondent wrote to the claimant confirming that despite exploring all possible alternatives and suitable alternative employment, he was being made redundant from his position at the Wednesbury store. It was again confirmed, his roles at Tamworth and Moseley remained unaffected. The claimant was paid in lieu of his 5 weeks notice period and a statutory redundancy payment. He was given 7 days to appeal the termination of his employment at Wednesbury.

45. The claimant maintained the position in his evidence before me stating that the real reason for the redundancy exercise was because he had made a complaint against Mr Riaz regarding his treatment of a pregnant worker. The claimant presented no supporting evidence in this regard. The respondent’s asserted that an individual was interviewed for a cleaning role but she wasn’t offered this due to a lack of experience, the role was offered to someone with more experience. Additionally, Mr Riaz continues to manage the claimant at the Moseley store and I conclude that there is simply no evidence to suggest that the redundancy process that was followed was for these reasons, rather I prefer the evidence of the respondent that the process was followed in error, based on HR advice

46. The claimant submitted an appeal on 29 March 2023 setting out his appeal grounds as follows:

The redundancy was a sham;
The proposed new rota was fake;
The audit results contained false information;

The claimant's contracted hours had already increased from 2 to 5 days a week;
The cleaning standards at the store had suffered for other reasons that had not been considered;
The store had been overbudgeted by 9.5 hours

47. Ms Stephens wrote to the claimant on 18 April 2023 confirming receipt of his appeal and advising that his appeal hearing would be held on 24 April 2023 and he had the right to be accompanied at the hearing.

48. The appeal hearing took place on 24 April 2023 and was heard by Ms Stephens.

49. The bundle contains an outcome letter dated 6 June 2023 setting out the outcome of the appeal, which was the original decision to terminate the hours at Marks & Spencer Wednesbury was upheld. Ms Stephens highlighted that the claimant's loss in hours would be absorbed into the Marks & Spencer Tamworth budget and were to be implemented with immediate effect. These additional hours have subsequently been offered to the claimant but have been refused.

50. In respect of the outcome letter, the claimant states that he did not receive this and was not made aware of the offer until he went to ACAS early conciliation. The respondents advised that they have been unable to find any email confirming that the outcome letter had indeed been sent and that Ms Stephens has since left the respondent organisation.

51. I In the circumstances, I find that the claimant was not aware of the outcome letter until after he contacted ACAS. Nevertheless, once he became aware of the letter, it is clear that he understood that an offer had been made to him, which was repeated as he said as much to employment Judge Hughes at a case management hearing on 23 January 2024. He also told judge Hughes that he did not want other colleagues to lose out on hours by accepting the offer, this is also supportive of the fact that he understood the offer of 6.5 hours was made to him.

Relevant Law

Unfair Dismissal

52. The relevant sections of the ***Employment Rights Act 1996 ('ERA)*** the Tribunal considered were as follows:

53. ***Section 95 ERA***, confirms the circumstances in which an employee is dismissed:

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) —
(a) the contract under which he is employed is terminated by the employer (whether with or without notice).

54. Pursuant to ***section 94 ERA*** an employee has the right not to be unfairly dismissed by their employer. Whether or not an employee has been unfairly dismissed is *determined in accordance with section 98 (1).*

55. ***Section 98 ERA provides***: -
(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.

56. ***Section 98(4) ERA provides:***

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.

57. As is clear from the above, the statutory test has two separate stages. First, the employer carries the burden of proving that some other substantial reason "SOSR" is the sole or principal reason for the dismissal. To satisfy this stage, the employer needs only to establish an SOSR reason for the dismissal which could justify the dismissal of an employee holding the job in question: it is not necessary to show that it actually did justify the dismissal. Indeed, at this first stage, the tribunal must not consider the justification, reasonableness or fairness of dismissing for SOSR, since such an approach risks conflating the two distinct stages of the statutory test. The employer must then show that the decision to dismiss for SOSR was reasonable in all the circumstances (including the size and administrative resources of the employer's undertaking). For this second stage of the statutory test, the burden of proof is neutral, so the onus is neither on the employer to prove it was fair, nor on the employee to prove that it was not an unfair dismissal.

58. In order to establish SOSR as the reason for dismissal, an employer does not have to show that the reorganisation or rearrangement of working patterns was essential. In ***Hollister v National Farmers' Union 1979 ICR 542, CA***, the Court of Appeal said that a '*sound, good business reason'* for reorganisation was sufficient to establish SOSR for dismissing an employee who refused to accept a change in his or her terms and conditions. Subsequently, in ***Kerry Foods Ltd v Lynch 2005IRLR 680, EAT***, the mere fact that there were clear advantages to the employer in introducing a new rota for managers was held to be sufficient to pass the 'low hurdle' of showing some other substantial reason for dismissal. It was not necessary to show what the tribunal referred to as the *'quantum of improvement achieved'* if the changes were made, as that was to put too high an onus on the employer.

Discussion & Conclusions

59. The first matter, I turn my mind to is whether the claimant was dismissed from his employment. I repeat my findings at paragraphs 25 to 27 above, where I found that the claimant was and is subject to a single employment contract with the respondent.

60. Clearly, the respondent did follow the redundancy process in terms of the claimant's role at the Wednesbury store, however, I accept that this was done in error based on professional HR advice at the time. I find that there are express terms in the claimant's employment contract that allow the respondent to vary location and hours and it was open to the respondent to vary the claimant's contract to remove his hours at the Wednesbury store.

61. The following of the redundancy process did not have the effect of ending the claimant's employment with the respondent. The claimant remains in employment with the respondent at the Tamworth and Moseley locations under the same contract of employment and he was clearly informed in the redundancy dismissal notice that his employment at those stores would remain unaffected.

62. For all these reasons I conclude that the respondent was not dismissed from his employment and therefore his claim of unfair dismissal must fail.

63. If I am wrong about that and the claimant was dismissed, I consider in the alternative whether the claimant was fairly dismissed. The reason in the mind of the respondent at the time was redundancy for business restructure reasons. The respondent's position is that following a redundancy process was an error, however, the process that they followed would be exactly the same for a dismissal for some other substantial reason i.e. a business reorganisation as the hours that the claimant was working were no longer considered suitable and the change meant an increase in hours and days a supervisor was required was necessary.

64. It is indeed unfortunate that the respondents followed the redundancy process in error Had they gone down the contract variation route, as they had done on all previous occasions with location and hours changes it is very unlikely that the parties would be here before me today.

65. I conclude that the respondent had sound business reasons that there was a need for a reorganisation based on the issues that they had been experiencing at the Wednesbury store. I find that SOSR was a fair reason for dismissal.

66. The respondent followed a fair consultation and appeal process with the claimant, they considered all of his proposals and suitable alternative employment and the end result was that none of the proposals made by the claimant were considered suitable and neither were any other options considered suitable. The claimant was also offered the 6.5 hours that he was losing at Wednesbury at other locations, which he rejected.

67. In all of the circumstances if I had found the claimant to have been dismissed I would have found that a fair procedure was followed by the respondent. The respondent acted reasonably in all the circumstances, including the respondent's size and administrative resources, in treating the business reorganisation as a sufficient reason to dismiss the claimant.

Employment Judge **Akhtar**
7 August 2024