RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Sanha**

Respondent: **Facilicom Cleaning Services Limited**

Heard at: **East London Hearing Centre**

On: **28th June 2018**

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

Representation

For the Claimant: **Mr Cook, Counsel**

For the Respondent: **Mr Joshi, Peninsula**

RESERVED JUDGMENT

The judgment of the Employment Tribunal is that:-

1. **The Claimant was unfairly dismissed by the Respondent contrary to s94(1) Employment Rights Act 1996. Compensation is set out below.**

2. **The Claimant was wrongfully dismissed by the Respondent.**

3. **The Respondent made an unauthorised deduction from the Claimant's wages contrary to s13 Employment Rights Act 1996 for the period 18th August 2017 to 29th September 2017 in the sum of £3,553.70 (gross)(calculation set out below).**

4. **The Claimant is owed 4 days accrued but untaken holiday pay under Regulation 14 of the Working time Regulations 1998.**

Compensation

1. Unfair dismissal

A. Unfair dismissal – basic award

Aged 53 at date of dismissal
2 complete years' service
3 x £362 (gross weekly pay at 40 hours per week at £9.05 per hour, being his normal working hours (s234 ERA 1996, extra hours being voluntary or non-guaranteed so not within normal working hours))

= £1086

B Unfair dismissal – compensatory award

Net average weekly pay = £447.51*

* Average net weekly wage in June and July 2017 is £447.51 (pages 123-124).

Loss of statutory rights £500

Plus Loss of earnings: 29th September 2017 to 10th November 2017 (6 weeks)

6 x £447.51 = £2,685.06

Plus Employer pension contributions (average calculated as above) (6 weeks)

6 x £4.74 = £ 28.44

Total loss £ 3,213.50

Less reduction under s123(6) Employment Rights Act 1996 at 25% = £803.37

Total compensatory award £2,410.13

(Notice pay already compensated by compensatory award).

A+B = £3,496.13

2. Pay during suspension period 18th August 2017 to 29 September 2017 (6 weeks actual gross pay)

Gross average weekly pay = £586.95*

* Average gross weekly wage in June and July 2017 is £586.95 (pages 123-124).

6 x £586.95 = 3,521.70

Plus bank charges (incurred between 18th August 2017 and 29 September 2017) (page 153,152) (s24(2) ERA 1996)

£ 16 + £16 = £32

Total unpaid wages £3,553.70

REASONS

Background

1. The Claimant was employed by the Respondent as a full-time cleaner from 3rd August 2015 until dismissed with immediate effect on 29 September 2017. By a claim form presented on 20th February 2018 the Claimant brought claims for unfair dismissal, breach of contract (notice pay) and holiday pay (4 days). The Respondent conceded that 4 days' holiday pay was due to the Claimant but resisted the other claims.

2. I gave permission at the beginning of the hearing for the Claimant to amend his claim to also include a claim for unpaid wages under s13 Employment Rights Act 1996 for the period he was suspended without pay prior to his dismissal, between 18th August 2017 and 29th September 2017. The date of the start of the commencement of the suspension had been in issue between the parties but it was accepted on behalf of the Claimant at the hearing that this was the start date for the suspension for which he claimed unpaid wages. I gave reasons at the hearing for allowing this amendment. It was confirmed that the Respondent's consequent defence to this claim was that, in the absence of the prescribed documents showing that the Claimant had the right to work, he could not go to work and discharge his duties because of the risk of a civil penalty being imposed on the Respondent and this was why he was not paid during the suspension.

3. The Claimant attended the hearing and gave oral evidence. Ms Preston of the Respondent also attended and gave oral evidence (though since March 2018 she has been employed by another company following a TUPE transfer). There was a one file bundle. I heard oral submissions on both sides on both liability and remedy issues and was also provided with written submissions on behalf of the Claimant. There was a schedule of loss but the figures in it were updated in submissions.

Findings of Fact

The Claimant's employment and immigration status

4. The Claimant was employed by the Respondent from 3rd August 2015. He signed an employee engagement form (page 37). It was conceded at the hearing on behalf of the Respondent that the document referred to at para (e) (statement of terms and conditions of employment) did not in fact exist from which I find there were no additional contractual terms contained in another document. The Claimant produced his passport containing his residence permit (according to Ms Preston's oral evidence, explaining the writing at the bottom of the form as to documents produced to the Respondent at the time) showing his residence permit (page 100) which was valid from 16th August 2012 to 16th August 2017. This showed that the Claimant was the family member of an EEA national and that he was permitted to work. His right to live and work in the UK was contingent upon his wife, a Portuguese national, exercising Treaty rights in the UK. I find that the Respondent was aware this was the basis on which the Claimant could work in the UK.

5. As the family member of an EEA national the Claimant was not subject to immigration control (s25 Immigration Asylum and Nationality Act 2006) as he did not need leave to enter or remain in the UK. This meant that an employer of the Claimant could not be subject to a penalty under s15 Immigration Asylum and Nationality Act 2006 provided he was resident with his wife in the UK and she was exercising Treaty rights. Whilst the Respondent may have thought, given what was said in the Employee Checking Service checks done (see below) that there was a risk of such a penalty, this was not in fact the case and it was not obliged in order to avoid a penalty to show that it had obtained certain documents from the Claimant evidencing his right to live and work in the UK. The Respondent's employment of the Claimant after his residence permit expired was not therefore not in breach of any statute.

6. I find that there was no contractual right to suspend the Claimant without pay as I was not shown any documents evidencing such a right and it was conceded on behalf of the Respondent that one would not be identified. Given the employment of the Claimant was not in fact unlawful I find that there was no legal basis on which the suspension could be without pay.

The Claimant's application to the Home Office in July 2017

7. The Claimant's residence permit was due to expire on 16th August 2017 and I find he made a written application to the Home Office on 24th July 2017. The Claimant kept a proof of posting for this and gave a copy to the Respondent taking into account Ms Preston's oral evidence that she was aware that the Claimant had provided a copy to the Respondent (although no copy was available from either party at the hearing). The Claimant said it was an application for a permanent residence card but he did not (and has never) produced a copy of that application, though I have found an application was sent on 24th July 2017. More noticeably he did not at the time provide the Respondent with a copy of the follow up letter received from the Home Office (C witness statement para 11) or his reply. I find therefore that the Claimant was being less than forthcoming with the Respondent prior to his dismissal because showing a copy of the actual application and a copy of the follow up letter and his response would have shown to the Respondent the basis of his application for a residence card and what any issues/delays were about, rather than simply relying on proof of postage to the Home Office on 24th July 2017 and

subsequently on 22nd September 2017 (page 89-91) when he replied to the Home Office follow up letter.

The Claimant's suspension and dismissal

8. The Claimant was suspended without pay by Mr Pereira (C witness statement para 8) conceded to have been with effect from 18th August 2017. He was not given a letter confirming that suspension until 13th September 2017 (page 86) which wrongly stated he had been placed on authorised leave from 6th September 2017.

9. The Respondent waited until 5th September 2017 to make its first Employer Checking Service (ECS) check (page 84), some 3 weeks after the unpaid suspension had started. The ECS check confirmed that as yet no certificate of application had been issued showing that an application had been made by the Claimant. The ECS check advised that whilst no certificate had been issued and that therefore a statutory excuse against a civil penalty could not be relied upon, the ECS check went on to say that the individual may nonetheless have the right to reside and work in the UK and that professional advice may be needed before taking an employment decision. It also stated that it was up to the individual to supply acceptable documents to the employer. The Respondent was aware that the basis on which the Claimant was working in the UK was his wife's exercise of Treaty rights in the UK.

10. Ms Preston wrote to the Claimant on 13th September 2017 (page 86) enclosing the first ECS check and asking him to meet her on 19th September 2017. That meeting was postponed until 25th September 2017 (page 87) so that the Claimant could see his solicitor. In her letter Ms Preston advised that his employment may be at risk if he could not provide satisfactory proof of his right to work in the UK.

11. I find based on her oral evidence that Ms Preston was instructed by the Respondent's HR department to do the meeting with the Claimant without any detailed knowledge of the Claimant's situation or what the legal situation was as regards the employment of EEA family members, based on her oral evidence that she was not personally aware of his status before that meeting (despite having counter-signed his employee engagement form) and was simply asked to go to Bank Street 'do' the meeting after her return from holiday in early September, not knowing why he had already been suspended some weeks before her letter said he had been suspended from. I find based on her oral evidence that that she was not aware that the family member of an EEA national was not subject to immigration control and that therefore there was no risk of a penalty. I find she did not consider either prior to or at this meeting that the first ECS check did not say that the Respondent could not legally employ the Claimant.

12. The meeting on 25th September 2017 was very brief (page 88). I find based on the Claimant's oral evidence that the minutes were accurate and that all he said at the meeting was that his paperwork had been sent to the Home Office and provided the 22nd September 2017 proof of postage (page 89-91). The Claimant did not produce the letter he said he had received from the Home Office or his

reply which would have given the Respondent more information to go on in terms of the reason for the delay to the issue of the certificate of application. In particular I find that the Claimant did not tell the Respondent (as he does now in his witness statement para 11) that the Home Office had in fact sent back his July 2017 application and asked for further documents which was likely to mean that his July 2017 application had not in fact been accepted by the Home Office when it was made and would only be accepted as made once resubmitted with the correct documents on 22nd September 2017. All the Respondent knew was that an application submitted on 24th July 2017 was still not showing as made because the ECS showed that no certificate of application had been issued. However the Respondent was aware that the Claimant had sent an application to the Home Office and some further documents which he had now evidenced by two sets of postal receipts. It would therefore have been reasonably apparent to the Respondent that the issue was some unexplained delay in the issue of the certificate of application, given it accepted that an application had been made.

13. Having been given proof that something further had been sent to the Home Office on 22nd September 2017 the Respondent waited until 29th September 2017 to do a second ECS check (page 93) with the same response that no certificate of application had been issued and containing the same advice. The Respondent was nonetheless aware that the Claimant had sent some further documents to the Home Office on 22nd September 2017 which could not have reached the Home Office before 23rd September 2017 and it was unreasonable of the Respondent to then rely solely on an ECS check made less than a week later knowing that some further documents had been sent to the Home Office only a few days previously and which were unlikely to have been acted on by the Home Office by 29th September 2017.

14. I find based on her oral evidence that Ms Preston did not take the decision to dismiss the Claimant but that the dismissal letter (page 92) was drafted by someone in HR (either Robin Taylor or Vicky Hall according to Ms Preston) and sent to her to put on the Claimant's file. She was not responsible for approving the letter or confirming it could be sent out although she saw it before it was sent. She did not sign it herself. Based on her oral evidence I find that her input to the Claimant's dismissal had been to do the 25th September 2017 meeting and to file his dismissal letter. I therefore had no evidence before me from the decision maker as to how the decision to dismiss was reached and what was in the mind of the decision maker.

15. I find that the Respondent did not act reasonably either in not making a further enquiry of the Home Office before dismissing the Claimant or asking the Claimant further questions about what he understood the delay to be caused by or to see the 22nd September 2017 correspondence. As far as the Respondent was aware an application had been made in July 2017 and there was an inexplicable delay in the issue of the certificate of application but the Respondent knew and accepted that documents had been sent to the Home Office, some in the recent few days. Whilst the Claimant did not help himself by being more forthcoming about what the delay was caused by, I find based on the evidence before me that the Respondent relied solely on the two ECS

checks and did not sit back and consider the Claimant's status as an EEA family member or consider that the problem possibly lay with a delay at the Home Office. Ms Preston did not call the Claimant as she had said she would at the meeting (page 88).The Respondent had already suspended the Claimant without pay and whilst concerned about possible penalties (given the statement in the ECS check that there might be no statutory excuse) it unreasonably jumped to dismissal based on the two ECS checks when it accepted that the Claimant had in fact made an application, such that a short delay to make further enquires would have been reasonable, taking into account the Respondent is a large employer with an HR department. There was also an absence of evidence that the Respondent had in fact made the 'repeated requests' to the Claimant referred to in the dismissal letter (page 92). The advice given in the ECS checks was not entirely helpful in that it referred to no statutory excuse but also referred to the individual nonetheless possibly having the right to live and work in the UK but I find based on the evidence before me that no consideration was given by anyone within the Respondent to the Claimant's actual circumstances taking into account I have heard no evidence from the person who took the decision to dismiss, having found it was not Ms Preston.

16. The Respondent offered the Claimant a right of appeal. His oral evidence was that he asked his union to make an appeal on his behalf and thought that it had done so, so did not lodge an appeal himself. I find that no appeal was lodged by either his union or by the Claimant, even when ultimately some 3 weeks later his certificate of application was received (page 95). The Claimant had a solicitor so also had access to legal advice at this time.

17. By this stage the Claimant's old job had been taken by someone else and whilst the Claimant was informed by Ms Preston during a brief discussion on 26th October 2017 that he could now apply for any vacancies the Respondent had, the Claimant did not do so. I find there were around 10 vacancies based on her oral evidence. I find based on the fact that the Claimant went in person to see Ms Preston when he got the certificate of application shows that he was prepared to consider working again for the Respondent in some way, whether that was reinstatement in his old job or in another job and whether or not with a break in his continuity of employment. The lack of an appeal by the Claimant evidenced that he accepted that he had been dismissed and implicitly therefore that if he worked again for the Respondent it might be with a gap ie with his continuity of employment broken. If what the Claimant was prepared to accept was only reinstatement in his old job or re-engagement in a new job with no break in his continuity of employment I find he would have appealed his dismissal at the latest when he received the certificate of application (albeit beyond the usual 5 day time period) because he by then had the very document which might persuade the Respondent to re-instate or re-engage him with no break in his continuity of employment. Ms Preston said at the hearing that he said at the time that he would not consider the vacancies because they involved working at night Whilst it was then put to her that there were medical reasons why the Claimant could not work nights about which the Claimant had informed the Respondent in 2016, this was not the reason he gave in his witness statement for not applying for the vacancies (para 22) and no evidence was produced by him of what that medical condition was (or the condition even

identified) which would mean he could not work nights. I therefore find that there was no medical reason why the Claimant could not have applied for one of the Respondent's then night vacancies. I therefore find that the Claimant's failure to apply for the Respondent's vacancies after 26th October 2017 was a failure by him to mitigate his losses. I find it likely that the Respondent would have re-employed him given the situation had now been resolved with the issue of the certificate of application and given there had been no issue about any misconduct on his part (albeit he had been less than forthcoming) or any past performance issues.

Relevant law

18. The relevant law is s98 Employment Rights Act 1996. Contravention of an enactment is a fair reason for dismissal (s98(2)(d)). To rely on this as a fair reason the employment must in fact be in breach of an enactment. The family member of an EEA national is entitled to live and work in the UK despite the expiry of the passport entry (*Okumimose v City Facilities Management UKEAT/0192/11*). A person not subject to immigration control under the definition in s25 Immigration Asylum and Nationality Act 2002 cannot be the subject of a penalty on the employer under s15 (*Baker v Abellio London Ltd [2018] IRLR 186).*

19. A dismissal can also be fair for some other substantial reason justifying dismissal of the employee holding the position they held (s98(1)(b)). A genuine but mistaken belief that an employee cannot legally be employed can amount to some other substantial reason (*Bouchaala v Trusthouse Forte [1980] ICR 721*).

20. The range of reasonable responses test in *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 applied to the dismissal and as that test applies to the reasonableness of the extent of an investigation, *Sainsburys v Hitt* [2003] IRLR 23 (although this was not a conduct dismissal).

21. Reduction of the basic award for conduct can be made under s122(2) Employment Rights Act 1996. The conduct must be blameworthy (*Nelson v BBC (No 2)* 1979 IRLR 346). Reduction of the compensatory award under s123(6) of the Employment Rights Act 1996 can be made in relation to any action of the Claimant which caused or contributed to his dismissal.

22. The Claimant was under a duty to mitigate his losses by seeking further employment (s123(4) Employment Rights Act 1996). The failure to appeal cannot be a failure to mitigate (*Lock v Connell Estate Agents [1994] ICR 983*).

23. The ACAS Code applies to 'some other substantial reason' dismissals where there is a conduct issue when the dismissal process is initiated even if ultimately the dismissal is not for conduct but for some other substantial reason (*Lund v St Edmunds School [2013] ICR 26*). There was no issue here of the Claimant's conduct at the initiation of the process such that the ACAS Code should have been followed. Consequently there can be no increase or reduction to compensation for failure to follow the Code by either party because the Code did not apply.

24. Section 13 Employment Rights Act 1996 provides for the right not to have unauthorised deductions from wages. There is no right to suspend an employee without pay where there is a mistaken belief that the family member of an EEA national does not have the right to work in the UK (*Okumimose v City Facilities Management UKEAT/0192/11*).

Reasons

Dismissal – unfair dismissal and wrongful dismissal claims

25. Taking into account the above findings the dismissal of the Claimant was not fair under s98(2)(d) (contravention of an enactment) because the employment of the Claimant was not in fact in breach of an enactment despite the expiry of the residence permit in his passport, due to his status as the family member of an EEA national.

26. Taking into account the above findings the dismissal of the Claimant was not fair under s98(1)(b) (some other substantial reason) because whilst the guidance from the Home Office on the ECS checks was not terribly clear and gave the impression that an employer was potentially at risk of a penalty notice (at the same time as saying they might not, due to the employee in fact having the right to live and work in the UK and also saying that there was no requirement for a residence document in situations involving the exercise of Treaty rights), the Respondent unreasonably did not consider the Claimant's actual situation as someone who had evidenced the sending of letters to the Home Office, particularly relying on the second check made only a few days after further documents had been provided to the Home Office by the Claimant. The Respondent had already suspended him without pay (and so could not be criticised for letting him carry on working and being paid) and could reasonably either have made further enquiries of the Claimant to find out what the September Home Office letter had been about to see what the problem might be or made further enquiries of the Home Office providing the Home Office with the information it had about the Claimant, taking into account that the EDS check specifically said that the person may still have the right to reside and work in the UK. The Respondent knew that the Claimant was an EEA family member from the outset of his employment and knew from the EDS checks that as such he was not in fact required to have a residence document and that the absence of a certificate did not mean he had no right to work in the UK. In the absence of any evidence from the person who took the decision to dismiss, the Respondent has not shown what the thought process was (if there was one) and what the Respondent believed to be the situation meaning that it had to dismiss the Claimant when it did (as opposed to continuing the suspension for a short period pending further enquiries). The Respondent has not therefore shown that it had a genuine but mistaken belief as to the Claimant's immigration status which might mean that the dismissal was fair for some other substantial reason within *Bouchaala v Trusthouse Forte*.

27. The Claimant was dismissed without notice. He was entitled to two weeks statutory notice under s86 Employment Rights Act 1996 (there being no evidence of a longer contractual period of notice). He cannot however be awarded damages if the loss is already covered by his unfair dismissal compensatory award.

28. Taking into account the above findings of fact I find that the Claimant failed to mitigate his losses by applying for the October 2017 vacancies at the Respondent. Although there was an absence of specific evidence as to the hourly rate he would have earned doing nights and the number of hours involved, I find that that it is unlikely that the hourly rate would be any lower than Claimant was being paid for day work. Had the Claimant re-applied to the Respondent now having the certificate of application I find that his new employment would have started within 2 weeks of providing the certificate on 26th October 2017 ie by 9th November 2017.The Respondent had no issue with the Claimant's work and appreciated that he had to a degree been caught in an awkward situation because of Home Office delays such that it was likely that they would have re-employed him in such a vacancy and likely, given it is a large employer, that it would have been able to give him extra hours that meant he could earn a similar amount as he had done prior to his suspension. I find given the Claimant's prior willingness to work beyond 40 hours that he would have continued to do so or that any reduction in his hours was likely to have been offset by a higher rate of pay for night work. There was no medical reason on the evidence before me that the Claimant could not have been expected to work nights. I therefore limit his loss of earnings to 6 weeks.

29. Taking into account the above findings of fact, the Claimant's actions in being less than forthcoming with the Respondent contributed to his dismissal. I find that it is just and equitable to reduce his compensatory award by 25%. I do not make a reduction to the basic award because the test is slightly different and requires blameworthy conduct.

Wages – pay during suspension

30. Taking into account the above findings of fact, the Claimant is owed his wages during the period of suspension from 18th August 2017 to the date of dismissal.

Holiday pay

31. This claim was conceded by the Respondent and it agreed to pay 4 days holiday pay to the Claimant.

Employment Judge Reid

4 July 2018