# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr Abdul Sesay**

**Respondent:** **Bardwood Support Services Ltd**

**Heard at:** **East London Hearing Centre (In person)**

**On:** **10 and 11 August 2023**

**Before:** **Employment Judge Hallen**

**Representation**

Claimant: In person
Respondent: Mr M. Cameron- Consultant

# RESERVED JUDGMENT

**The judgment of the Tribunal is that the Claimant was an employee of the Respondent pursuant to section 230 of the Employment Rights Act 1996 ('ERA') and was unfairly dismissed for some other substantial reason justifying his dismissal pursuant to section 98 ERA. The dismissal was unfair due to procedural irregularities, and I find that had a fair procedure been followed the Claimant would have been dismissed within a further two months of the effective date of dismissal (24 June 2022) which would have been on 24 August 2022. The Claimant was also wrongfully dismissed as he was not given or paid two weeks' statutory notice pursuant to section 86 ERA. The Claimant was not provided with his main terms and conditions of employment pursuant to section 1 and 38 of the ERA. In addition, the Claimant was not paid his holiday pay accrued during the entire period of his service (28 months). The Respondent is ordered to pay his accrued holiday pay in accordance with regulations 13 to 17 Working Time Regulations 1998 for the entire period of his service. A remedy hearing has been fixed for Thursday 29 February 2024 to determine what compensation should be awarded to the Claimant if the parties cannot reach an agreement on this. I have given the parties some assistance in this judgement to help them come to an agreement on the question of compensation as I believe such assistance is proportionate to helping the parties resolve these issues in order to avoid a remedy hearing. Nevertheless, if the parties cannot reach agreement, separate directions for the preparation for the remedy hearing will be sent out by the Tribunal.**

# REASONS

## Background and Issues

1. The Claimant was a security guard who was hired by the Respondent. He made a claim at this Tribunal for unfair dismissal asserting that he was an employee of the Respondent and was entitled to two week statutory notice pay which he was not paid. He claimed that he was dismissed on or around 19 June 2022 when he was not offered any more work by the Respondent and was not paid his accrued holiday pay by the Respondent for the entirety of his service of 28 months. He also claimed compensation in respect of the Respondent's failure to provide him with written terms of employment pursuant to section 1 and 38 ERA. The Respondent argued that the Claimant was a worker and not an employee and was not entitled to claim unfair dismissal protection or payment in lieu of statutory notice under section 98 and 86 ERA nor was he entitled to compensation for failure to provide him with written terms of employment. In respect of holiday pay, the Respondent argued that the Claimant's service had not been terminated by the Respondent, so he was not entitled to arrears of holiday pay.

2. As the Respondent disputed that the Claimant was an employee, I had to determine if he was employed under a contract of employment pursuant to section 230 ERA. The Respondent admitted that he was a worker as defined by section 230. The questions that I had to determine in this regard are well established. They were these: Was the Respondent obliged to provide work to the Claimant? Was the Claimant obliged to accept work offered by the Respondent? Did the Claimant have a right of substitution? What degree of control did the Respondent have over the Claimant, and what degree of freedom did the Claimant, exercise of how, where and when the Claimant performed his work?

3. The Claimant also claimed unfair dismissal and automatic unfair dismissal. I had to determine if the Claimant had been dismissed or whether his employment was ongoing as the Respondent insisted that it was. If he was dismissed, what was the effective date of termination? If he was dismissed, what was the primary reason for his dismissal? The Respondent asserted it was some other substantial reason justifying the dismissal of the Claimant ('SOSR') as it was not possible to place the Claimant at another site due to his performance and conduct at the sites that he had previously been assigned to. I had to ask if that reason was a potentially fair reason? If I found that the reason for dismissal was SOSR, I had then to determine whether a fair procedure had been followed in dismissing the Claimant? Alternatively, was the primary reason for dismissal that the Claimant asserted a statutory right? Specifically, the Claimant asserted that on 18 June 2022 he asserted a statutory right to annual leave? If he did, was that the primary reason for his dismissal?

4. If I found that the Claimant was unfairly dismissed, I had to determine if Claimant contributed to his dismissal, and if so to what extent and whether it was reasonable to reduce any award made to the Claimant on that basis? I also had to determine that if a fair process had been followed, what was the likelihood that the Claimant would have been dismissed in any event? Was it reasonable to reduce any award made to the Claimant on that basis? I also had to determine if there was a breach of the ACAS code of practice? If so, should an uplift or reduction be applied to the award.

5. With regard to the Claimant's claim for holiday pay, I had to determine that if the Claimant was dismissed, at the time of his dismissal, what was the Claimant's entitlement

to annual leave, accrued but untaken? What was the Claimant paid in respect of his annual leave entitlement, accrued but untaken? Were there any monies outstanding owed to the Claimant in respect of his annual leave entitlement, accrued but untaken?

6. In respect of his claim for notice pay/wrongful dismissal, if I found that the Claimant was dismissed, I had to determine what was the Claimant's entitlement to notice? In this case, it was accepted that the statutory notice period was two weeks. Were there any monies outstanding owed to the Claimant in respect of a period of notice?

7. With regard to the claim made by the Claimant in respect of failure to provide a Section 1 statement of terms and conditions of employment, I had to determine if the Claimant was entitled to written statement of terms and conditions of employment? If he was, was the Claimant provided with a written statement of terms and conditions? If not and in the event that one of his other claims succeeded, should the Claimant be awarded 2 or 4 weeks' pay as a remedy?

8. I had before me an agreed bundle of documents made-up of 157 pages agreed by the parties. The Claimant produced four additional documents marked C1 to C4. I had before me an agreed chronology of events and a list of issues. I had a witness statement form the Claimant and a witness statement from Ms Shannon McGrory for the Respondent. Ms McGory is currently the Strategic Recruitment and Development Manager for the Respondent since October 2022, and prior to this she was a Senior Account Manager since September 2021. From June 2021 she was the Claimant's Line Manager and was the officer to whom the Claimant reported. The witnesses were subject to cross examination and questions from me.

## Facts

9. The Respondent is an employment business that provides workers to its clients, such as the Ministry of Justice, Mitie Ltd, the Department of Education, OCS Ltd and Amberstone Ltd. These workers are predominantly security guards, or cleaners. The Respondent has some 500 security guards retained by it and who are supplied to its clients and some 100 cleaners on its books. Once supplied to these clients, they then place those individuals at various sites that the client wishes to place them at. In the Claimant's case, he made clear to the Respondent at the outset of his service that he did not wish due to his age and state of health to be placed on retail sites that the Respondent's clients also had. At the time he was 59 years old. I noted from his appearance at the Tribunal that he was an elderly man (now aged 62) who had difficulty understanding English and although he understood the language, he did have problems expressing himself. He is originally from Sierre Leone. When he was recruited by the Respondent he wished to be placed at the corporate sites as a security guard. This was agreed with him at the outset of his service with the Respondent and indeed for the entirety of his service he was placed at the Respondent's client's corporate sites. This was due to his request as a result of his age and apparent frailty.

10. The Respondent has clients all over the country, but the Claimant worked mainly in the London geographical area. With respect to security guards, the Respondent had an induction process with the guards that it recruited and following recruitment, references were checked, as well as Security Industry Authority Licence (SIA) that the Respondent insisted that they had otherwise they would not be retained. In addition to the security guards and cleaners, the Respondent also has 20 employees that are provided with contracts of employment in the United Kingdom and also has an operation centre with 70 staff in India.

The Respondent has a managing director, a commercial director, two regional managers, two account managers and five apprentices.

11. The Claimant was retained by the Respondent from the 18 February 2020 to 24 June 2022 which was the effective date of termination ('EDT'). It was accepted that he had over two years qualifying service to make a claim for unfair dismissal if he was found to be an employee as defined. From the EDT, the Respondent did not provide the Claimant with anymore work nor did it pay the Claimant. I did not accept the Respondent's contention that the Claimant was still a worker retained by the Respondent as it still had the Claimant on its books. I will go into more detail on this below.

12. The Claimant was recruited by the Respondent on 18 February 2020. He was interviewed individually and was one of approximately 30 other guards who were recruited on the same day. The interview, induction and the signing of the contract were all done on this day. The Respondent brought a laptop and asked the Claimant to sign the contract on it electronically which he did. He gave evidence at the Tribunal which I accepted that he did not read the contract and that he was never provided with a copy by the Respondent. There was a copy of the contract in the bundle along with the induction sheet. These two items were not given to the Claimant and only came to his attention as part of the discovery process in these proceedings.

13. The contract in the bundle of documents which the Claimant did not read and was not supplied a copy of until the discovery process in these proceedings, described him as a worker. It stated that he would be placed upon various assignments allocated to him by the Respondent, and that no contract existed between the Respondent and the Claimant between assignments. It stated that the contract was not a contract of employment, and that the Respondent would endeavour to obtain suitable assignments for the Claimant as a security officer. It stated that there would be periods of service where there would be no suitable work available, and that the Respondent would incur no liability to the Claimant if it did not offer opportunities to the Claimant during these periods. It confirmed that the Claimant could not obtain employment directly with a client of the Respondent within six months of the end of an assignment otherwise he would face liabilities to the Respondent. The contract confirmed that the Claimant would receive at least the national minimum wage, which would be subject to taxation as well as national insurance contributions that would be paid by the Respondent. The contract stated that the Claimant would not be paid by the Respondent in between assignments.

14. In relation to holidays, the contract confirmed that the Claimant was entitled to 5.6 weeks paid leave per leave year and could not carry across any unused leave until the following leave year. It gave notice requirements to the Claimant if he wished to take holiday which was a minimum of 28 days notice by email. If this notice was not given, he would not be entitled to take holidays. It also confirmed that where holidays were not taken, the Claimant would be entitled to payment to lieu of holiday at the termination of the assignment for the previous leave year in question. The contract also confirmed that the Claimant would be entitled to receive statutory sick pay for periods of time off due to sickness supported by relevant evidence. The Claimant was expected to provide timesheets for each assignment. The Claimant gave evidence that he did not use the Respondents remote application for logging on and off, but that he did so manually by filling in timesheets, as well as telephoning at the beginning and end of shifts attended on behalf of the Respondent.

15. In relation to his conduct on assignments, he was expected to dress in accordance with the Respondents uniform requirements, but no uniform was provided by the Respondent. He also had to follow reasonable instructions of the clients on site from their managers and not engage in any conduct that was detrimental to the interests of either the client or the Respondent that would bring the Respondent into disrepute. The contract gave the Respondent an ability to terminate at any time without notice or cause. If the Claimant wished to terminate, he had to give at least two weeks minimum written notice.

16. The induction sheet given to the Claimant was three pages long and confirmed that the Respondent would comply with health and safety laws. It confirmed what the expectations of the Respondent were of the Claimant whilst at work at client sites. For example, he was expected to arrive on time, suitably attired in plain black suit, white shirt, black tie and black shoes and black socks. This was a uniform requirement, but as stated above, the uniform was not provided by the Respondent. The Respondent also expected the Claimant to give notice of any sickness if he could not attend the assignments as well as ensuring that he did not arrive late at the client sites. There was also reiteration of holiday entitlement and notice required from the Claimant to take holiday as well as confirmation that he would be paid on the ninth day of the month for the previous months work.

17. There was no reference to a disciplinary or grievance procedure, but in evidence, it was confirmed that there was a grievance and disciplinary procedure that applied to security guards. For serious performance or conduct issues, the Respondent would apply a disciplinary procedure which was akin to a procedure that is similar to that applied to employees. This involved verbal warnings, written warnings, first written warnings, final written warnings and dismissal. It was confirmed that this would have been applied to the Claimant had the Respondent wished to take disciplinary action against him to terminate his service. The Respondent did not take disciplinary action against the Claimant at all, so he had a clean disciplinary record. With regard to grievances, the Respondent confirmed that the Claimant would raise this with the account manager at the Respondent at the relevant time and the Respondent would deal with the Claimant's concerns.

18. The Respondent confirmed that the Claimant had a line manager who was the account manager that dealt with the Claimant and all the security guards. The Respondent confirmed that the Claimant reported to the account manager and was at his or her direction at all times albeit operational instructions were given by the client on site. Ms McGrory gave evidence that she was the Claimants line manager in May to July 2022 towards the end of his service. The Respondent did not call any other account managers to give evidence. Ms McGrory confirmed that the Claimant had on at least six occasions been removed from assignments due to various performance and conduct issues. She confirmed that she raised these matters with the Claimant on or around 26 June 2022. She gave evidence which I accepted that whilst she raised these matters with the Claimant on or around 26 June 2022, she was not able to say whether the other account managers to whom the Claimant reported did or did not discuss these issues of performance and conduct with the Claimant at the time the incidents occurred. I accepted the Claimant's evidence that he was not aware of any matters related to performance or conduct that had led to his removal from assignments prior to Ms McGrory's raising them with him on around 26 June 2022. I will discuss this performance and contact issues later in the facts section of this judgement.

19. The Respondent confirmed that it paid the Claimant's wages on a monthly basis for the shifts conducted by the Claimant in the previous month. Tax and national insurance were deducted from these. In 2021, the Claimant was included in the workplace pension

and his contributions were deducted from his wages. The Claimant could not substitute anyone else to cover for him, whilst he was away on sick leave or absent and could not attend an assignment. Whilst the Claimant was entitled to paid holidays, the Respondent confirmed that the Claimant did not take any holiday during the entirety of his service and nor was he paid in lieu. The Claimant produced an absence certificate from his doctor for 21 days for July 2021 which confirmed the reason for one of his absences in May/June/July 2021.

20. The Claimant gave evidence which I accepted that for the majority of his duration of service with the Respondent he was allocated shifts by the Respondents operations centre on a regular basis, and these equated to between 40 to 60 hours work per month. He was allocated these assignments by the Respondent which were in the London geographical region and were in reasonable travelling distance from his home. It was contended by the Respondent that the Claimant had some say in respect of what sites that he worked at, but the Respondent produced no evidence of this. The Claimant said, which I accepted, that he had no say on what sites or shifts that he was allocated to and this was at the determination of the Respondents operations centre based in India. The time record produced by the Respondent in the bundle confirmed this evidence. The Claimant confirmed that there were gaps in his service, but they were not due to any actions on his part as he had a continued expectation of working for the Respondent and indeed chased the Respondents operations centre on a regular basis to be allocated work. Any gaps that did existed in the Claimant's attendance record were due to short-term breaks where work was not allocated to him. Nevertheless, the Claimant was available to undertake all duties that were assigned to him as he needed the money because the Respondent paid at the national minimum wage and the Claimant had to receive wages to survive. He gave evidence which I accepted that he did not refuse any shifts offered to him. The Respondent did not call any evidence to support this contention. In particular, the Respondent called no evidence to support the reasons for the gaps in the record of the Claimant's shifts that it produced. The Respondent suggested that the Claimant could turn down shifts if he wanted to but the evidence which the Claimant gave which the Tribunal accepted was that he never turned down shifts and tried to work on a continued basis. He accepted that he did variable hours per week, but that on average this amounted to 40 to 60 hours per week.

21. In respect of periods of time that the Claimant did not work as shown by the Respondent's record in the bundle of documents, Ms McGrory, being the Respondents only witness could not confirm, or give any evidence as to why the Claimant could not work on those days in question. This was because she was his direct line manager for only a few months towards the end of his service. The Claimant gave evidence that he worked for the most part, took very little sick leave and no holiday absences. For example, the Claimant did not choose any specific time or day to work and/or not to work. The Respondent used to give him different shifts, that were day and night shifts. Even during the 'COVID-19 Nationwide Lockdown' the Respondent told the Claimant that there was no furlough leave/pay for him because they needed him to report for duties as a key employee. Even during this period, he did not refuse any assignments and he worked full-time throughout the Covid-19 outbreak.

22. In relation to holidays, the Claimant on or around the 20 September 2020, called his line manager to discuss his holiday request, but he was told to call him again later. Thereafter, the Claimant could not get the account manager to discuss on the phone to discuss his holiday request. During his induction, he was told that it was better to first discuss holidays with his line manager about a holiday before booking one. The next time

he talked to his manager about his holidays was sometime in December 2020, when the Claimant was told that the Respondent did not approve or give holidays in December. In March 2021, the Claimant was told to put his holiday request in writing and send it by email giving 28 days notice of it. The Claimant did try to take holiday entitlement but appeared to be thwarted at every attempt. However, he produced no evidence to confirm that he wished to take holiday on or around 18 June 2022 and that this was refused or that it was the reason for the termination of his last assignment at Radisson Blue hotel.

23. There was some dispute about the termination of the Claimant's last assignment at the Radisson Blue hotel which was used for the housing of asylum seekers by the Respondent's client Mitie Ltd and at which the Claimant was a security guard. The Claimant gave evidence that his last day of work on this assignment was on 19 June 2022. I preferred the evidence of the Respondent which was that the last date of service was 24 June 2022. Whilst there were no timesheets or CCTV footage produced by the Respondent to confirm that this was the last day of service, the Respondent did produce a wage slip dated 8 July 2022, which confirmed that the Claimant was paid up to 24 June 2022 having undertaken 12 hours work on that date at that site. Therefore, the last day of service was 24 June 2022 which I found to be the EDT. I find that the Claimant must have been confused about the termination date.

24. The Claimant did have a discussion with Ms McGrory about the reason for his removal from the site. This was as a consequence of a complaint made by the project manager of Mitie Ltd at the site which stated that the Claimant had conduct and performance issues. These related to the fact that he did not listen to instruction, he did not do his patrols properly, he used his phone on personal calls and had arguments with other security guards. In addition, it was confirmed that the hotel management complained about the Claimant. As a consequence, the Respondent was asked to take the Claimant off the assignment.

25. At this time, Ms McGrory raised other similar performance and conduct issues with the Claimant related to previous assignments which he was also taken off site due to performance and conduct issues. The Respondent asserted at the Tribunal that there were at least five previous examples of the Claimant being removed from other assignments. These were in October 2020, December 2020, January 2021, May 2021 and January 2022. The Claimant agreed that these matters were discussed with him by Ms McGory at this time, but no specific details were given to him either by Ms McGrory at the time nor by other account managers at the time of the incidents. Ms McGrory had earlier said that the Claimant had no previous disciplinary issues. I preferred the evidence of the Claimant that whilst he was told of the complaints about his conduct/performance at the Radisson Blue hotel on or around the EDT and the generality of previous complaints were raised with him, he was not given specific detail of them at that time. Whilst the Respondent may have had legitimate cause for concern about the Claimant's conduct/performance on those previous occasions, I find that the details of those concerns were not raised at the relevant time of the EDT. The Respondent did not produce a contemporaneous note of the discussion between Ms McGrory and the Claimant on or around the EDT relating to the reasons for his removal from the Radisson Blue hotel or the other incidents of his removal from the Respondents sites in 2020 and 2021.

26. The Claimant was told by Ms McGrory that as he had previous complaints from other corporate sites, he could not be placed at another corporate site and could only be placed at a retail site. The Claimant made clear that he had previously indicated, and which had previously been accepted by the Respondent, that he would not be placed at retail sites due

to his age and physical health. Nevertheless, he was not offered any other assignments by the Respondent from 24 June 2022 which was the last date of his service and which I found to be the EDT.

27. The Respondent stated that it was not obliged to offer the Claimant any more assignments due to the contract it had with the Claimant. I did not accept this as it was clear that the Claimant had been offered regular assignments on a continued basis by the Respondent at corporate sites for nearly the whole period of his service. The Respondent had also accepted that the Claimant's would not be placed at retail sites due to his age and health since the commencement of his service. The failure of the Respondent to place the Claimant at another corporate site, to offer him any more shifts at such sites and the failure to pay the Claimant his wages amounted to a termination of the Claimant's employment. I did not accept the Respondent's assertion that the Claimant was at the date of the Tribunal hearing still a worker on the Respondent's books. The fact that the Respondent sent the Claimant two emails after the effective date of termination was irrelevant as he had been dismissed on 24 June 2022.

28. The Respondent accepted that no procedure was followed at the time of the Claimants EDT to terminate his employment, and this included the ACAS code of practice in respect of disciplinary proceedings and appeals.

**Law**

29. Under the Employment Rights Act 1996 an 'employee' is defined as an individual who has entered into or works under (or, where the employment has ceased, worked under) a 'contract of employment'.

30. For these purposes, a 'contract of employment' is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

31. The most common judicial starting point for identifying a contract of employment was provided by Mr Justice Mackenna in the case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD** in which he said, *"A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other the master. (iii) The other provisions of the contract are consistent with its being a contract of service.'*

32. The continuing relevance of this passage was confirmed by the Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC**, where Lord Clarke called it the 'the classic description of a contract of employment' and said that the Read Mixed Concrete case can be condensed into three questions: (a) did the worker agree to provide his or her own work and skill in return for remuneration? (b) did the worker agree expressly or impliedly to be subject to a sufficient degree of control for the relationship to be one of employer and employee? (c) were the other provisions of the contract consistent with it being a contract of service?

33. However, 'the contract' (as referenced above) is not purely defined by reference to the written contractual terms between the parties but rather the reality of the working

relationship between the parties. This has been made clear several times in the authorities, notably by the Supreme Court in **Autoclenz Ltd v Belcher and ors 2011 ICR 1157, SC**. The SC authoritatively stated that a Tribunal has and should look beyond the contractual documentation that describes an employment relationship and consider the reality of the situation when determining employment status. In Autoclenz one of the clauses stated that there was no obligation on A Ltd to offer work or on the claimants to accept it. However, the evidence before the Tribunal showed that the reality of the working situation was that the claimants were obliged to carry out the work offered, and the employer was under an obligation to offer work. The contract, as performed, was therefore a contract of employment.

34. Following the Ready Mixed Concrete decision, the courts have established that there is an 'irreducible minimum' without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements: (a) Control; (b) personal performance or service, and (c) mutuality of obligation and control.

35. Most cases on employee status now focus on one or more of the three elements comprising the irreducible minimum. However, a wide range of other factors may also be taken into account (including the extent to which the worker is integrated into the business, whether the worker uses his/her own tools, etc) and these can serve to supplant the presumption of employee status that arises when the irreducible minimum is present.

36. Section 98(1) Employment Rights Act 1996 (ERA) provides that it is for the employer to show the reason or principal reason for dismissal of the employee and 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 ('SOSR'). If the Respondent fails to do so the dismissal will be unfair.

37. If the Tribunal decides that the reason for dismissal of the employee is a reason falling within Section 98(1) or (2) ERA, it will consider whether the dismissal was fair or unfair within the meaning of Section 98(4) ERA. The burden of proof in considering Section 98(4) is neutral.

38. Section 98(4) ERA provides: -

> *"the determination of the question whether the dismissal is fair or unfair (having regards 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."*

39. The Tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer **(London Ambulance NHS Trust v Small [2009] IRLR 563).**

40. A business reason behind a "*some other substantial reason*" dismissal does not need to be particularly sophisticated or strategic so long as it is genuine and rational. As long as it is not a section 98(2) of the Act reason, any reason for dismissal, however obscure, can be pleaded on grounds of some other substantial reason, with the proviso that it must be a substantial reason and thus not frivolous or trivial; and must not be based on an inadmissible reason such as race or sex (**Willow Oak Developments Ltd t/a Windsor Recruitment v Silverwood and ors 2006 ICR 1552, CA**). However, while the reason for dismissal needs to be substantial, it need not be sophisticated — merely genuine. For example, in **Harper v National Coal Board 1980 IRLR 260, EAT**, H was dismissed because he sometimes attacked fellow employees during his epileptic seizures. The employer held inaccurate beliefs concerning people suffering from epilepsy in general. The tribunal found dismissal to be fair either on the ground of capability or for some other substantial reason. The EAT said that an employer cannot claim that a reason for dismissal is substantial if it is a whimsical or capricious reason which no ordinary person would entertain. It stated that where, however, the belief is 'one which is genuinely held, and particularly is one which most employers would be expected to adopt, it may be a substantial reason even where modern sophisticated opinion can be adduced to suggest that it has no scientific foundation'. The EAT therefore upheld the tribunal's decision.

41. The employer is required to show only that the substantial reason for dismissal was a potentially fair one. Once the reason has been established, it is then up to the Tribunal to decide whether the employer acted reasonably under section 98(4) of the Act in dismissing for that reason. As in all unfair dismissal claims, a Tribunal will decide the fairness of the dismissal by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt. Depending on the circumstances, this may involve consideration of matters such as whether the employee was consulted, warned, and given a hearing, and/or whether the employer searched for suitable alternative employment. In other words, to amount to a substantial reason to dismiss, there must be a finding that the reason could, but not necessarily does, justify dismissal (**Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC**). Whether the reason, once established, justifies dismissal is to be answered by the Tribunal's overall assessment of reasonableness und section 98(4) of the Act.

42. If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd [1987] IRLR 503**, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event. The question for the Tribunal is whether this particular employer (as opposed to a hypothetical reasonable employer) would have dismissed the Claimant in any event had the unfairness not occurred.

43. Section 1 of the ERA 1996 provides that an employee is entitled to receive a written statement of terms and conditions of employment within 2 months of starting work. Section 38 of the Employment Act 2002 provides that an employee is entitled to an award of 2 weeks' pay unless there are exceptional circumstances which would make an award unjust or unequitable. The tribunal may increase the award to 4 weeks' pay if considered just and equitable.

44. Pursuant to s.86(1)(b) ERA 1996 an employee is entitled to receive notice of dismissal which is contractual notice of statutory notice whichever is the greater up to 12

weeks maximum statutory notice unless the employee's employment was terminated due to the employee's repudiation of the contract (i.e. gross misconduct).

45. The law on annual leave can be found in Regulations 13 to 17 of the Working Time Regulations 1998 (WTR). This is a case to which **Smith v Pimlico Plumbers Limited [2022] EWCA Civ 70** applies. In that case it was decided that if a worker takes unpaid leave when the employer disputes the right and refuses to pay for the leave the worker is not exercising the right. Although legislation can provide for the loss of the right at the end of each leave year, to lose it the worker must actually have had the opportunity to exercise the right conferred by the WTR. A worker can only lose the right to take leave at the end of the leave year (not in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take the paid annual leave, encourage the worker to take the paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, then the right does not lapse but carries over and accumulates until the termination of the contract, at which point the worker is entitled to a payment in respect of the untaken periods.

## Conclusion and Findings

46. Following the **Ready Mixed Concrete** decision, I reminded myself that the courts have established that there is an *'irreducible minimum'* without which it will be all but impossible for a contract of service to exist. It is now widely recognised that this entails three elements: (a) Control; (b) personal performance or service, and (c) mutuality of obligation and control. I had also to look beyond the label used by the parties in respect of contractual documents to ascertain the true circumstances of the relationship as set out in the **Autoclenz** case cited above.

47. I find that the Claimant did prove on the balance of probability that all of the above three elements existed in the relationship that he had with the Respondent at the time of the termination of his employment with the Respondent. On the facts found by me in the facts section of this judgement, it was clear to me that the Claimant was under the control of the Respondent at all material times that he worked for the Respondent. He had a line manager who was the account manager at the relevant time to whom he reported. The account manager would give him instructions as per his duties and he was allocated shifts by the Respondent's operations team based in India. He undertook variable hours between 40 to 60 per week and did day and night shifts. He did not have a say as to when and where they were. He worked at various sites within the London area at the direction of the Respondent.

48. The Respondent confirmed that the Claimant was subject to the Respondent's disciplinary and grievance procedure and that if his services were to be terminated, the Respondent would have to go through that procedure. The Claimant also had a grievance procedure that was applicable to him in the event of any complaints and issues that he had either with the Respondents conditions or those of the Respondent's clients. The Respondent paid the Claimants wages and deducted the appropriate tax and National Insurance as well as provide the Claimant with a pension scheme.

49. The Claimant provided personal performance at all times when he worked for the Respondent and gave evidence that he attended all shifts as much as possible and when there were temporary cessations of work, he regularly chased the Respondent's operations team to obtain further shifts. The records produced by the Respondent showed that the

Claimant worked on a regular basis. Where there were gaps in the record, the Respondent was not able to explain those gaps as no evidence was produced by the Respondent in this regard. When the Claimant was asked about the gaps, he confirmed that they were temporary cessations of work and that he was always ready, willing and able to work for the Respondent and indeed chased work on a regular basis as he needed to do so in order to survive on the national minimum wage that the Respondent paid. He accepted all the shifts offered to him.

50. The Respondent asserted that the Claimant had the right to turn down shifts and to work whenever he wished to work. However, the Respondent produced no evidence of when indeed he did turn down shifts or did not work. All that was produced was a table showing periods of time when the Claimant did not attend work. However, no witnesses were called to explain the reasons for such absence or whether the Claimant did turn down work and the reason for this. The Respondent's only witness, Ms McCrory, confirmed that she could give no such examples of when the Claimant turned down shifts when he reported to her. Furthermore, she could give no examples of shifts he turned down when he reported to her. In this case, it was clear that there was sufficient mutuality of obligation for the Claimant to be an employee employed under a contract of employment. I had no difficulty in finding this to be the case based upon the facts that I found above. The Claimant was integrated into the Respondent's workforce and was at the control and direction of the Respondent at all material times of his employment.

51. As I have found that the Claimant was an employee, it was not denied that he had sufficient service to claim the statutory protection of unfair dismissal. At the effective date of dismissal, the Respondent asserted that the reason for his dismissal was SOSR. This was on the basis that at the time of his last day of employment on 24 June, the Claimant was removed from the Radisson Blue hotel site due to conduct and performance issues. The Respondent could not place the Claimant at other corporate sites of its clients because there were no such corporate sites available at the time. The Respondent was aware that due to the Claimant's age and state of health, he could not work at retail sites and therefore no more work was offered to him. I find that in this situation, the reason for the Claimant's dismissal was SOSR. However, as was accepted by the Respondent, no fair procedure was followed by the Respondent to dismiss the Claimant at the EDT and nor was the ACAS code of practice on dismissal and disciplinary procedures followed. Therefore, I find that the dismissal for the reason of SOSR was outside the band of a reasonable response is open to the Respondent. The Respondent agreed that it had a disciplinary procedure that it could have followed in respect of performance and conduct issues but in this case, it did not follow its own disciplinary procedure. The ACAS code of practise was not followed either. Therefore, the dismissal of the Claimant was unfair by reason of SOSR. The Claimant asserted that he had requested paid holiday on or around 18 June 2022 and that this was an automatically unfair dismissal for asserting a statutory right. The Claimant did not produce any evidence of this and so I find that the principal reason was not asserting a statutory right. Therefore, his claim for automatic unfair dismissal for asserting a statutory right was not found proven.

52. The Respondent submitted that if it had followed a fair procedure and the ACAS code of practice, it would have dismissed the Claimant within a further week of the EDT. As I stated in the facts section of this judgement, apart from the instruction from a Mitie Limited to remove the Claimant from the Radisson Blue hotel site due to his poor performance and conduct on or around 24 June 2022, the five other examples given by the Respondent of poor performance and conduct were never put to the Claimant in a reasonable way for him

to defend himself at a disciplinary hearing. I do, however, find that the evidence produced by the Respondent of the Claimant's poor work performance and conduct on the previous five occasions as well as the instruction from the project manager to remove the Claimant from the Radisson Blue hotel on 24 June was sufficient evidence for the Respondent to proceed with disciplinary action against the Claimant in order to terminate his employment. Although the Respondent argued that had if it had followed a fair procedure the Respondent would have dismissed the Claimant within one week, I find that this was a very optimistic submission. I find that a reasonable period to dismiss the Claimant would have been two months from the EDT that is 24 August 2022. This would have been sufficient time for the Respondent to have undertaken a reasonable investigation and follow its own disciplinary procedure and the ACAS code of practice in order for the dismissal to have been a fair one. The Respondent argued that the Claimant contributed to his dismissal by reason of his poor performance/conduct, but I do not find this to be the case. The Respondent could not make such an argument until it had concluded a proper, fair and reasonable disciplinary process in order to dismiss the Claimant and so I do not find that the Claimant contributed to his dismissal at all.

53. The Claimant was not paid his two weeks statutory notice under section 86, nor was he given notice of termination of employment. The Respondent did not argue that it was entitled to dismiss the Claimant for gross misconduct, and I find that it was unlikely that had a fair dismissal procedure been followed, the Respondent would have dismissed the Claimant for gross misconduct. Therefore, I find that the Claimant is entitled to two weeks pay in lieu of his statutory notice entitlement.

54. In this case, the Respondent accepted that the Claimant was a worker and was therefore entitled to accrued holiday pay at the termination of his employment. However, they Respondent also agreed that no accrued holiday pay was paid to the Claimant at the EDT. As this is a case in which the Claimant was not permitted to take holiday at all during the period of his 28 month service, the case of **Smith-v- Pimlico Plumbers** cited above applies. The Respondent is therefore obliged to pay the Claimant his accrued holiday pay for the entirety of the 28 months of his service.

55. In addition, the Respondent was under the mistaken belief that the Claimant was a worker rather than an employee at the commencement of his service. As I have found above, he was an employee employed under a contract of employment. Although he was asked to sign a contract purporting to be applicable to a worker, I have also found as a matter of fact that no such contract was provided to him. It must also follow, that as I have found that he was an employee employed under a contract of employment, he was entitled to written terms and conditions of employment pursuant to Section 1 ERA. As a matter of fact, this document was not provided to the Claimant and therefore I find that he succeeds in respect of his section 38 ERA complaint. As he has succeeded in this complaint against the Respondent, the Respondent will have to consider making an award of between two to four weeks pay to the Claimant for its failure to provide him with his section 1 statement.

56. I have arranged a remedy hearing date with the parties for Thursday 29 February 2024. This is some time away and I will provide separate directions to the parties in order to prepare for that hearing. However, I believe that it is proportionate to give an indication to the Respondent as to the likely award of compensation to the Claimant that the Tribunal may make so as to assist the Respondent to settle the matter in a proportionate way. It is clear that the Claimant will recover a basic award calculated in accordance with the statutory formula. He will also recover a compensatory award of two months net pay in respect of his

unfair dismissal. There will also be some kind of uplift to the compensation due to the Respondent's failure to follow the ACAS code of practise in dismissing the Claimant. This element of the compensation should be agreed between the parties in a sensible manner. The Claimant is entitled to two weeks pay in respect of the Respondents failure to give him with his statutory notice to terminate his employment. He will also recover all of his accrued holiday entitlement for his 28 months service. Finally, the Claimant will receive two to four weeks pay in respect of the Respondent's failure to provide the Claimant with a section 1 statement of terms and conditions of employment. I hope that this guidance given to the parties will assist them in resolving the remedy aspect of the dispute so that the Tribunal can allocate its limited resources to another case and the remedy hearing listed for 29 February 2024 can be vacated.

**Employment Judge Hallen**
**Date: 15 August 2023**