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Claimant: Mr P Malpass

Respondent: C J Bardwells Ltd

Heard at: East London Hearing Centre

On: 30 November 2017

Before: Employment Judge Burgher

Representation

Claimant: In person

Respondent: Mr D Smith (Consultant)

JUDGMENT

- 1. The Claimant was unfairly dismissed by the Respondent.**
- 2. A remedy hearing, to consider issues of mitigation and *Polkey*, will take place on 19 March 2018.**

REASONS

Issues

1 The Claimant claims unfair dismissal. The following issues were identified as relevant to the claim for determination:-

- 1.1 Whether the Respondent has established a potentially fair reason for dismissal. The Respondent asserts that it dismissed the Claimant on grounds of some other substantial reason, namely third party pressure from a major client and the Claimant's refusal to agree to work at a different location. The Respondent did not seek to rely on conduct as the reason for dismissal having opted to discontinue the disciplinary proceedings that the Claimant and his colleague, Mr Paul Middleton, were subject to at the time.
- 1.2 If the Respondent establishes a potentially fair reason for dismissal it is necessary to consider whether the dismissal was fair and reasonable in all the circumstances.

Witnesses

2 The Respondent called Mr Pat Thurgood, Construction Manager, and Mr Clint Bardwell, Managing Director. The Claimant gave evidence on his own behalf. He decided against calling Mr Gavin Miller as a witness given that the Claimant's conduct was not the reason for dismissal by the Respondent.

3 All witnesses gave evidence by way of sworn witness statements and were subject to cross-examination and questions from the Tribunal.

4 I was also referred to relevant pages in an agreed bundle of documents and permitted a transcription of a text message exchange between the Claimant and Mr Sean Reilly.

Facts

5 I have found the following facts from the evidence.

6 The Claimant commenced working at CRO Ports as an engineer in 2006. His employment subsequently transferred to the Respondent by way of TUPE transfer in 2014. The Claimant's terms and conditions and place of work remained the same. During this time the Claimant had developed a working relationship with CRO Ports Structural and Civil Engineering Manager, Mr Sean Reilly.

7 CRO Ports is a major client for the Respondent, involving a long term contract. Whilst working at CRO Ports the Claimant had raised a number of complaints against Mr Paul Middleton. The Claimant believed that he was being bullied and harassed by Mr Middleton but no action was taken due to Mr Middleton's family relationship with the Respondent's site manager, Mr Tony Purdy.

8 A heated argument occurred between the Claimant and Mr Middleton on 16 January 2017. The Claimant complained about this to Mr Thurgood by telephone and stated that Mr Middleton's behaviour was threatening and that it was not an isolated occurrence. Mr Middleton also made complaints about how the Claimant was acting towards him. Mr Purdy subsequently sent an email to Mr Thurgood expressing concerns about the state of the relationship between the Claimant and Mr Middleton.

9 Mr Thurgood undertook initial investigations on 19 January 2017 and on 25 January 2017. He suspended both the Claimant and Mr Middleton from work on full pay. The Claimant was informed that the following allegations would be investigated:

- 9.1 Rudeness, bad language and bullying behaviour towards another employee;
- 9.2 Taking part in activities which resulted in adverse publicity;
- 9.3 Serious breach of the Health and Safety Act; and
- 9.4 Gross insubordination.

10 Investigations took place. The Claimant and Mr Middleton were interviewed and further interviews with those who may have witnessed the argument took place.

11 On 30 January 2017, the Claimant provided a full account of his allegations of the threatening and bullying behaviour of Mr Middleton.

12 On 2 February 2017, Mr Purdy reviewed the CCTV of the incident which was not useful in determining what happened or what was said. He sent an email stating that the picture quality was not great, there was no sound and stated that generally the CCTV did not hold much use.

13 On 13 February 2017, the Claimant was invited to attend a disciplinary meeting to discuss the above allegations. It seemed that the focus of this meeting was purely on the event which took place on 16 January 2017 and the Claimant was concerned about the limited contextual background being considered for the allegations.

14 A disciplinary hearing took place on 17 February 2017. A similar separate disciplinary process was adopted for Mr Middleton.

15 No disciplinary hearing outcome followed this meeting. Mr Thurgood stated that the reason for this was that he was on holiday, he was busy and then the disciplinary process was discontinued due to CRO Ports indication that neither the Claimant nor Mr Middleton should return to their site on 13 March 2017.

16 Prior to 13 March 2017, CRO Ports was oblivious to the argument between the Claimant and Mr Middleton that took place on 16 January 2017 and was not aware that they were both suspended on full pay. That changed following Mr Bardwell's inexplicable involvement in the process on 13 March 2017.

17 Mr Bardwell explained that he was in constant communication with Mr Thurgood about what was happening and wanted to satisfy for himself what happened regarding the argument before a disciplinary sanction was imposed. He therefore visited CRO Ports to view the CCTV. This was despite the fact that the Respondent was taking detailed legal advice on the process, the disciplinary hearing had taken place, of which he was not the disciplinary officer and that he would have been the appeal officer in the event of an appeal against disciplinary sanction and that it had been previously clearly indicated that the CCTV was of no use. I find that there was no reasonable basis or purpose for Mr Bardwell to have attended CRO Ports site on 13 March 2017.

18 The Claimant contended that the CCTV would have been wiped by 13 March 2017 and that Mr Bardwell attend to solicit CRO Ports removal of the Claimant from continuing to work on its site. There is some force in the Claimant's contention and Mr Bardwell's attendance at the site on this occasion certainly had that effect.

19 Mr Bardwell's account is that when he had viewed the CCTV on 13 March 2017, he 'by chance' met Mr Reilly. Mr Reilly enquired what Mr Bardwell was doing at the CRO Ports and Mr Bardwell told Mr Reilly that he was reviewing the CCTV regarding what had happened on 16 January 2017 then expanded on both the Claimant's and Mr Middleton's account. Mr Reilly then informed Mr Bardwell that he did not want either the Claimant or Mr Middleton on site. Mr Bardwell then asked Mr Reilly for an email to this effect. Mr Reilly subsequently consulted with his manager and sent a short email on

13 March 2017 stating that given the risk Mr Middleton and the Claimant were presenting each other, he did not want either of them on site. Mr Reilly's disquiet was precipitated by what Mr Bardwell had conveyed to him, there being no prior concerns from CRO Ports perspective.

20 No further consideration of the disciplinary process was made. However, given the indication that CRO Ports did not want either the Claimant or Mr Middleton back on it's site, the Respondent wrote to both of them on 20 March 2017 informing them that their employment may be at risk.

21 There was no determination of who could have been said to have been the alleged aggressor of the argument on 16 January 2017 so that Mr Reilly could take a more informed position on respective culpability. Instead, Mr Bardwell continued on the basis that the client did not want either of them on site and did not make any case for one to be onsite and the other removed.

22 The Claimant tried to contact Mr Reilly despite the fact that the Respondent prohibited him from doing so as part of the process. Text messages were sent, including a text from Mr Reilly stating that he did not want to get involved in Bardwell business.

23 There was subsequent communication between Mr Bardwell and CRO Ports on 30 March 2017, seeking confirmation that neither of the employees could return to the site. Again, no attempt was made to distinguish any relative distinctions in culpability between them. If, for example it was found that the Claimant was not at fault but Mr Middleton was, then that case could have been made to CRO Ports. This was not done as the disciplinary process was discontinued and both employees were presented as indivisible in returning to the site. CRO Ports maintained that it did not want both of them on site for health and safety reasons.

24 On 3 April 2017, Mr Thurgood wrote to the Claimant inviting him to attend a meeting on 5 April 2017 to consider termination of his employment. The Respondent asked the Claimant if he would be prepared to work elsewhere. The Claimant refused. No specific alternative roles were mentioned and Mr Bardwell was generic in his evidence before me saying that the Respondent always needs engineers at its sites. However, the only long term contract for engineers that the Respondent has is at the CRO Ports sites. All of its other engineer contracts are short term.

25 A similar process was applied to Mr Middleton who was offered the chance of alternative work. Unlike the Claimant, he expressed his willingness to work elsewhere, but was then informed that there was no alternative work.

26 Given the Claimant's assertion that he was being bullied by Mr Middleton, the fact that he had worked at CRO Ports for over 10 years and the absence of any specific role being offered to the Claimant at the time, I find that the Claimant was reasonable in his objection to being moved from his place of work.

27 The Claimant was informed that he was dismissed by a letter dated 7 April 2017. This was due to CRO Ports request and the Claimant's failure to agree to a move. The Claimant appealed against his dismissal on 12 April 2017. His appeal was heard by Mr Bardwell on 26 April 2017 and was later dismissed by letter dated 30 May 2017.

Law

28 Section 98 of the Employment Rights Act 1996 states:

- (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.*
- (3) *In subsection (2)(a) –*
 - (a) *“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
 - (b) *“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
- (4) *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.*

29 When considering the law, I have considered the principles outlined in *Dobie v Burns International Security Services* which held that where a dismissal is at behest of a third party and where no improper pressure was involved, this was potentially a fair dismissal within s.98(1)(b) of the 1996 Act as some other substantial reason provided the employer had taken into consideration the potential injustice to the employee in considering whether the dismissal was fair in all the circumstances within s.98(4) of the 1996 Act.

Conclusions

30 In view of my findings of fact and law outlined above I conclude that the Respondent has established that it dismissed the Claimant for a potentially fair reason, namely third party pressure.

31 However, I do not conclude that the dismissal was fair and reasonable in all the circumstances. The potential injustice to the Claimant was not considered by the Respondent at all.

32 The potential injustice to the Claimant could have been easily dealt with by simply resolving the disciplinary process, instead of discontinuing it. This would not have affected the implementation of CRO Ports request as both employees were suspended on full pay. The completion of the disciplinary process, including the appeal, could have addressed the Claimant's concern that he was being bullied by Mr Middleton and therefore should not have been considered as the same as Mr Middleton by CRO Ports. This was not done.

33 The fact that CRO Ports request was precipitated by the inexplicable involvement of Mr Bardwell in the disciplinary process, also meant that it was appropriate for the Respondent to complete the disciplinary process and provide CRO Ports with the full picture of its findings for CRO Ports to form a proper basis as opposed to only the counter allegations that the Respondent was in the process of considering.

34 The Claimant's unwillingness to consider alternative work was reasonable in these circumstances, it was appropriate to address the underlying reason for the argument, suspension and disciplinary process. This was not done.

35 I therefore conclude that the Claimant was unfairly dismissed.

36 A remedy hearing, to consider issues of mitigation and *Polkey* will take place on **19 March 2018**.

Orders for remedy hearing

37 The Claimant is ordered to provide an updated schedule of loss by **12 February 2018**.

38 The Respondent is ordered to provide a counter schedule of loss by **26 February 2018**.

39 Witness statements relevant to the remedy hearing are ordered to be exchanged by **5 March 2018**.

Employment Judge Burgher

18 December 2017