EMPLOYMENT TRIBUNALS

Claimant: **Mr Aliu Adegbenro**

Respondent: **Axis Security Services Limited**

Heard at: **Watford (by Cloud Video Platform)** **On: 3 and 4 November 2021**

Before: **Employment Judge Halliday**

Representation
Claimant: In person
Respondent: Mr Paget, solicitor

JUDGMENT

1. The complaint of unfair dismissal fails and is dismissed.

REASONS

Claims and Issues

1. By a claim form presented to the Tribunal on 10 December 2020, the claimant, Mr Adegbenro, claims that he was unfairly dismissed.

2. The respondent, Axis Security Services, contends that the reason for the dismissal was "some other substantial reason" namely the request from a client to remove the claimant from the site following a complaint to them by one of their tenants and that the dismissal was fair.

3. Having heard the evidence and listened to the parties' submissions, I reserved my decision and this is the reserved judgment with reasons reached following that hearing.

Practical and Preliminary matters

4. This was a remote hearing, which has been consented to by the parties. The form of remote hearing was by cloud video platform (CVP). A face to face

hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

5. The documents that I was referred to during the hearing are contained in an agreed bundle numbered from 1 to 109 and C1-C50. With the consent of the parties an additional email chain was inserted into the bundle as C51 – C64 during the hearing.

6. I heard evidence from the claimant, and on behalf of the respondent from Mr Imtiaz, Assistant Account Manager, who took the decision to dismiss the claimant and from Mr Sephton, Account Director who heard the claimant's appeal.

7. The claimant, Mr Imtiaz and Mr Sephton each provided witness statements for the hearing in accordance with the Tribunal directions and Mr Imtiaz also submitted a supplemental witness statement to address some additional matters raised in the claimant's witness statement, which was admitted.

8. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Findings of fact

9. The respondent is a large professional security services provider which operates nationally.

10. The claimant was employed as a security officer from 1 June 2017 and the terms of that employment were set out in a Statement of Terms and Conditions (pages 33-40 of the bundle). The following relevant terms were set out in the Statement:

> "*You are employed as **Security Officer**. The Company reserves the right to request you to perform other duties deemed necessary to meet the needs of the business from time to time and it is a condition of your employment that you are prepared to do this.*
>
> *Your place of work: **Hatfield Business Park***
>
> *The Company will endeavour to ensure that your place of work is within a reasonable travelling distance of your home address. You are required to make your own way to your designated place of work and provide any food or refreshments at your own expense.*
>
> *The Company's contracts with its clients are such that our clients have the right to request or agree to the removal of an employee from an assignment. In such cases, every effort will be made by the Company to find suitable alternative work within a reasonable travelling distance from your home. Where the reason for removal from an assignment and involves a disciplinary offence, it may be necessary to invoke the*

Company's disciplinary procedure. Following any such removal your continued employment will be subject to your being willing to travel and/or may involve a reduction in your hourly rate."

Your normal hours of work will be 48 hours per week which may vary according to the needs of the business and are dependent on the shift pattern applicable to your assignment and this will include dayshifts and nightshifts and/or weekend shifts.

11. The claimant worked for 48 hours a week at the Hatfield site and until June 2020 no disciplinary or performance issues had been raised with the claimant. At all material times he was working nights.

12. The respondent's client at the Hatfield was Workman FM and the client contact was Heather Watson, the Business Park Manager. I heard evidence from Mr Imtiaz that the commercial terms between the respondent and their clients allow the client to ask for the removal of any particular employee and accept that this is the case in line with usual commercial arrangements and as is reflected by the terms of the employment contract.

13. On 16 July Mr Shiv Santhirakumar, an employee of the respondent raised a formal complaint about the claimant and referred to the following incidents:

    13.1. An incident on 16 June 2020 when a resident had called the office with a complaint about noise at Monument (which I understand to be in Ellenbrook Fields) and whose subsequent calls were not answered;

    13.2. An incident on 14 July 2020 when a call was received about an incident at Monument described by the tenant as a (large) noise disturbance where a group of youths damaged a bench and littered around the area (following an earlier incident when a fire had been started and security attended) and the claimant took no action but told the caller to call the police themselves.

14. The claimant was invited to an investigatory interview by letter dated 16 July 2020 to discuss the second incident and the fact that the claimant had not completed the Daily Occurrence Book and his comment that it was not his job to deal with violence.

15. The claimant attended an investigatory interview with Hassan Imtiaz on 21 July 2020. Mr Imtiaz found there was a case to answer and completed an investigation summary form on 25 July 2020 and referred the matter for disciplinary action.

16. The claimant was invited to a disciplinary hearing initially scheduled for 31 July 2020 by letter dated 29 July 2020. The hearing was postponed until 4 August 2020 and then again at the claimant's request due to a combination of holiday and sick absence.

17. On 25 August 2020, the claimant emailed Mr Wilcox to indicate he was ready to return to work. On 27 August 2020, Mr Wilcox, referred to a brief meeting with the claimant and confirmed that in the light of the claimant's medical

issues he required confirmation from a doctor that the claimant was fit to return to work and specifically to drive. Mr Wilcox confirmed that once this was received, a date could be arranged for the disciplinary hearing. The claimant sent a further sick note on 28 August 2020 and indicated that he hoped to return to work the following week. Mr Wilcox sent an email back the same day explain that he still needed medical confirmation that the claimant was fit to return to work before he could do so. The claimant sent a doctor's note confirming that he was fit to return to work on 1 September 2020. The disciplinary hearing was rescheduled for 8 September 2020 and I find based on Mr Imtiaz's statement and the claimant's oral evidence that the claimant was provided with work at an alternative site in Harlow pending the outcome of the disciplinary hearing.

18. The disciplinary hearing was heard by Neil Wilcox on 8 September 2020. I did not hear from Mr Wilcox, but a copy of the notes of the hearing and the outcome letter are in the bundle. In the absence of any evidence to the contrary I accept that, as set out in the notes and the outcome letter, having found that the misconduct had occurred, Mr Wilcox initially considered removing the claimant from the Hatfield site was the appropriate disciplinary sanction. However, after consideration and on advice from HR, Mr Wilcox instead decided to issue the claimant with a final written warning.

19. The claimant maintains that there was no evidence that the client, Workman FM, had requested his removal from the site and further doubted that the emails in the bundle were genuine. However, I accept Mr Imtiaz's evidence that on or around 11 September 2020 Mr Imtiaz spoke to Heather Watson to confirm the outcome of the disciplinary hearing and to seek to agree the claimant's return to the site and that she refused to agree.

20. I further accept that Mr Imtiaz sent an email to Ms Watson at 18:47 on the 11 September 2020 (included in the bundle) referring to that earlier call and asking her to reconsider "the decision of removal" and referring to the fact that the claimant would be given a final warning, that he "will improve his performance" and that "any further issues related to his performance will instantly result in his permanent removal from the site" .

21. I find that Ms Watson did not respond to this email, so Mr Imtiaz sent a further email on 15 September 2020 (of which there is a genuine copy in the bundle), chasing for a response as to whether or not the claimant would be allowed back on site. Ms Watson responded the same day to confirm that the claimant would not be allowed back on site. She referred in that email to performance issues going back to 2017. I heard no evidence that any previous issues had been raised with the claimant nor that the respondent was aware of any other than the two incidents on 16 June 2020 and 14 July 2020.

22. On 16 September 2020, the claimant accepts that he spoke to Mr Wilcox and I find that the conversation was as set out in the outcome letter namely that Mr Wilcox had informed the claimant that initially he had considered that removing the claimant from site was the appropriate sanction but after considering further and speaking to HR he had decided to issue the claimant with a final written warning. The claimant was also informed that the client had asked for his removal from the Hatfield site.

23. On 17 September 2020, Mr Wilcox sent a detailed letter to the claimant confirming the disciplinary outcome which was that he was being issued with a final written warning which would remain on file for 12 months. The letter also set out details of the misconduct, the required improvements to the claimant's behaviour and set out the right of appeal. Mr Wilcox also referred to the fact that the client had confirmed that they would not allow the claimant back on site and stated: "*We will now approach the customer to hopefully persuade them that you should be allowed to return to site. We cannot guarantee that this will be successful, but we will do what we can to ensure this happens. It is only right to point out that if it is not possible then we will have to look for an alternative post for you*"

24. On 18 September 2020, Mr Chris Lyons an account director, wrote to the client a thoughtful email which I accept was written with a view to persuading the client to change their mind and allow the claimant to return to the Hatfield site. Ms Watson responded the same day in an email which I find is genuine, indicating that she was not prepared to change her mind on the basis that: "*the recent (but not the first) incident shows an unwillingness to carry [sic] take instructions and carry out the tasks needed for the site. The incident also resulted in an external complaint from a resident"*.

25. On 20 September 2020, Mr Imtiaz wrote to the claimant to invite him to a meeting on 13 October 2020 at the KAO Data Centre. I find that as set out in Mr Imtiaz's letter, the claimant had previously been invited to a meeting on 28 September 2020 which he had refused to attend either at Axis' Staines office (as it was too far) or at an alternative proposed venue, Mercury Shopping Centre, but instead had asked to meet at the KAO Data Centre. In the letter Mr Imtiaz advised the claimant that; "*despite out best efforts, the client has informed us that they no longer wish you to continue working in your current role or any capacity at their premises; they have insisted that you are removed and will not allow you back. Under our contractual relationship with them, they have the right to do this*. I have found that this right does exist.The claimant was also advised that if no alternative position could be found, then the outcome of the meeting could be the termination of his employment for some other substantial reason, namely third-party pressure.
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26. The claimant did not appeal against his final written warning and emailed Mr Wilcox on 24 September 2020 confirming that he accepted the outcome of the disciplinary action.

27. The claimant met with Mr Imtiaz on 13 October 2020 as arranged and I find that at that meeting the claimant was provided with a list of current vacancies within the respondent. Under cross-examination Mr Imtiaz also referred to a verbal offer made to the claimant in that meeting of an Area Support Officer role based on a flexible 36 hour working week which would limit the need for the claimant to travel but which the claimant did not feel able to accept. The claimant refers to changing his contract to a 36 hour flexible contract in a later email dated 26 October 2020 and the position is also referred to in the dismissal letter and I accept Mr Imtiaz's evidence that this position was discussed and that the claimant indicated that it was not suitable. I further find it was explained to the claimant in the meeting that if an alternative position could not be found for the claimant then his contract may need to be

terminated on notice and the claimant was asked to confirm by 16 October 2020 if any of the available positions were suitable.

28. On 16 October 2020, Mr Imtiaz emailed the claimant a copy of his contract and the claimant responded by email the same day confirming his understanding that he has a 48-hour contract based at the Hatfield site and that he could only work within 25 to 30 minutes' drive from his home. He also stated that he felt that a final written warning was unfair and queried the reference by the client to previous issues.

29. Mr Imtiaz sent a further lengthy email to the claimant on 20 October 2020 re-iterating that the client would not have the claimant back on site and setting out the contractual provisions in the claimant's contract of employment which provided: "*The Company's contracts with its clients are such that our clients have the right to request or agree to the removal of an employee from an assignment. In such cases, every effort will be made by the Company to fins suitable alternative work within a reasonable travelling distance from your home. Where the reason for the removal from an assignment involves a disciplinary offence, it may be necessary to involve the Company's disciplinary procedure. Following any such removal your continued employment will be subject to your being willing to travel and/or may involve a reduction in your hourly rate".* Mr Imtiaz explained the difference between the two separate processes: firstly, the disciplinary process, and secondly the third-party removal process and stressed the need for the claimant to consider the list of vacancies and confirm whether there was a suitable one by an extended deadline of 21 October 2020. Mr Imtiaz also provided details of how the claimant could appeal against his final written warning.

30. On 26 October 2020 the claimant sent an email to Mr Imtiaz indicating that "the meeting with you was resolved around changing my contract from 48 hours to a 36 hours flexible contract" but that he needed a position within 21 miles due to child care and health and safety issues. I have found that the claimant was offered a position as Area Support Officer in that neeitng but that the claimant did not accept it. The claimant also stated that he could not find the contractual provision referred to by Mr Imtiaz, which I find is included in the claimant's contract, and whilst acknowledging that a vacancy could not be created for him, asked for further help in finding an alternative role.

31. On 29 October 2020 Mr Imtiaz sent a further email to the claimant attaching an up to date list of vacancies and asking again for confirmation as to whether the claimant was interested in any of these roles by 30 October 2020.

32. On 30 October 2020 the claimant responded stating that he needed to work nights only due to his family circumstances and the vacancies sent to him were not suitable as they were mostly a mixture of days and nights.

33. On 31 October 2020, the claimant was sent a detailed letter of termination of employment by email confirming termination of his employment with effect from 27 October 2020 for some other substantial reason namely third-party pressure. The letter summarised events to date and the attempts made by the respondent both to persuade the client to allow the claimant back on site and to identify an alternative position for him. The letter confirmed payment

would be made of three weeks' pay in lieu of notice and set out a right of appeal.

34. The claimant appealed against the decision to dismiss him by email dated 4 November 2020 and the appeal was heard by John Sephton, an Account manager with the respondent at a hearing on 26 November 2020. The claimant declined the offer to be accompanied. During the preliminary discussions about his appeal, the claimant raised some additional issues including some related to his disciplinary warning which Mr Sephton identified as grievances and also considered during the appeal process.

35. The first issue considered by Mr Sephton related to the incident on 14 July and the failure to attend Monument (the *14 July 2020 incident)* which the claimant also discussed at length in the tribunal hearing. Mr Sephton did not uphold this part of the grievance.

36. The second issue related to the behaviour of Mr Shiv Santhirakumar towards the claimant and this part of the grievance was also not upheld.

37. The third issue related to the claimant working alone at Hatfield. The finding was that the claimant had always worked either with another Axis employee or an agency worker.

38. The fourth issue related to the provision of a note of the meeting after the meeting with Mr Imtiaz and the fairness of sending the claimant home. The finding was that the handwritten non-verbatim notes were provided and signed by the claimant and that the claimant was sent home as he was unwell and that he could not return to site until the disciplinary issue had been resolved.

39. Mr Sephton then considered the fairness of the final written warning and upheld the decision to give this.

40. Lastly, he considered the fairness of the dismissal due to third-party pressure. He upheld the decision to dismiss firstly on the basis that he was satisfied that everything was done to ask the client to reconsider her position on this and secondly that the respondent could not continue to employ the claimant as he had refused available positions due either to the travel required or the shift pattern and there were no other positions available.

41. Mr Sephton also dealt specifically with the fact that the claimant stated that "*he had yet to find where it is stated that following any removal that [my] continued employment will be subject to being willing to travel or may involve a reduction in hourly rate*". He referred the claimant to both page 1 of the claimant's contract and to specific wording in the respondent's handbook which set out these provisions expressly.

42. Finally, he referred to a position in the KAO data centre and identified that this had been filled on 8 September 2020 before the discussions with the claimant about alternative positions commenced.

43. He therefore did not uphold either the claimant's appeals or grievances and the outcome was confirmed to the claimant in a detailed letter dated 18 December 2020.

The Law

44. Having established the above facts I now apply the law.

45. Section 98(1) of the Employment Rights Act 1996 ("the ERA") provides as follows:

    "*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."

46. Section 98(4) states that:

    "*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."

47. In applying this section, a tribunal must consider the reasonableness of the employer's conduct not simply whether it considers the dismissal to be fair and in judging the reasonableness of the dismissal the tribunal must not substitute its own decision for that of the employer but determine in the particular circumstances of the case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

48. I have been referred to the case of ***Dobie v Burns International Security Services (UK) Limited [1984 ICR 812***], in which the Court of Appeal held that third party pressure to dismiss is capable of amounting to some other substantial reason ("SOSR"). I have also been referred to the case of ***Henderson v Connect South Tynside Ltd 2010 IRLR 466*** which is authority for the premise that in order for a 'third party pressure' dismissal to be fair, an employer does not need to satisfy itself that the third party's allegations against the employee are true, but that it cannot just 'hide behind' the third party's reasons.

49. The burden of proof in relation to the reason for dismissal lies with the employer. Where an employer discharges that reason, the Tribunal must then consider whether the dismissal was fair or not. In a case where third-party pressure is relied upon as the fair reason for dismissal, the Tribunal

must consider the conduct of the employer and, in particular, whether dismissal is an injustice to the employee. It falls to the employer to do what it reasonably can do to avoid or mitigate any injustice brought about by the approach taken by the third party. This can include trying to change the third party's mind or trying to find alternative employment.

Submissions

50. Mr Paget submitted on behalf of the respondent that:

50.1. there was a potentially fair reason for dismissal, namely third-party pressure which constitutes "some other substantial reason", and that a fair procedure was followed;

50.2. whilst under ***Henderson*** the employer does not have to establish the truth of any allegations against the employee, on this occasion the respondent did attempt to establish the truth of what happened and the disciplinary process and sanction was in itself fair and reasonable;

50.3. the claimant's contract specifically provides for the removal of an employee by a clustomer and the respondent followed its own procedure;

50.4. the respondent did everything it reasonably could to avoid or mitigate the injustice to the claimant brought about by the stance of the third party by:

50.4.1. seeking to persuade the client to change their mind

50.4.2. considering available opportunities for redeployment.

51. The claimant challenged the fairness of his dismissal on a number of grounds including;

51.1. that he had not acted improperly in relation to the 14 July incident and therefore should not have been given a final written warning and that the allegations made by Mr Shiv Santhirakumar were false. Further detailed evidence and representations were provided to the Tribunal including (but not limited to) the risk of attending the incident and the lack of training in dealing with violence/conflict management and representations made about why the disciplinary process was unfair;

51.2. that there was no third-party pressure to dismiss and the decision was that of the respondent and that the documents submitted to support this contention were fabricated;

51.3. that his contracted hours were not honoured and he was suspended/not provided with work unfairly;

51.4. that his contract was for 48 hours at the Hatfield site and it did not state that continued employment was subject to being willing to travel or may involve a reduction in hours/pay;

51.5. that he had been offered the area support role on 13 October 2020;

51.6. that he should have been offered the vacancy in the KAO data centre.

Conclusions

52. I am satisfied that the respondent has demonstrated that the reason the claimant was dismissed was for some other substantial reason of a kind such as to justify the dismissal of the claimant, namely that, the claimant was dismissed because a third party, Workman FM, a client of the respondent's,

told the respondent that they did not want the claimant to return to work at their premises at Hatfield Business Park where the claimant was employed to work 48 hours per week under his contract of employment following a tenant complaint.

53. I have concluded having considered both the oral and documentary evidence, that it was the client's insistence that the claimant should not return to work at the Hatfield site and, and the lack of suitable alternative employment, that were the reasons for the claimant's dismissal and I have found that that the documents which evidence and record the client's decision were not fabricated as alleged by the claimant. Those reasons were specifically mentioned in both the letter of dismissal and the appeal outcome letter and the dismissal letter also referred explicitly to 'some other substantial reason'.

54. I have found that the claimant's contract specifically provided for a third-party removal process and do not accept the claimant's submission that he had an ongoing contractual right to be employed at the Hatfield site for 48 hours where a client had asked for him to be removed.

55. The claimant has also suggested that the decision to remove him from the Hatfield site as a disciplinary sanction was taken by the respondent and I have found that this was Mr Wilcox's intended decision until he took HR advice. However, I am satisfied that the disciplinary sanction that was in fact imposed by the respondent for the misconduct was a final written warning and that the reason for the claimant's dismissal was the client's refusal to allow him back on site which is some other substantial reason falling within section 98(1)(b) of the ERA.

56. I turn now to consider whether the dismissal was fair or unfair within the meaning of section 98(4) of the ERA.

57. I note that the respondent asked the client on a number of occasions to reconsider their decision not to allow the claimant back on to the Hatfield site and in particular have found that the email sent by Mr Lyons on 20 September 2020 was a thoughtful and genuine attempt to change the client's mind. I accept Mr Paget's submission that in light of the immediate and unequivocal response from the client refusing to alter their decision that the respondent had done all they reasonably could do to engender a change of mind in the context of the commercial relationship with the client.

58. The claimant states in his ET1 that he was unlawfully suspended and has submitted that this was as a consequence of the client's decision to remove him from site in late August. However, I am satisfied that the claimant was on sick absence until he sent a doctor's note confirming he was fit to return to work on 1 September 2020 and then worked his normal shifts at an alternative site until the disciplinary hearing on 8 September 2020. Mr Imtiaz spoke to the client on or around 11 September 2020 and sent an email on that day asking the client to change her mind and I do not therefore find that the claimant was at any stage suspended.

59. I have further found that Mr Imtiaz met with the claimant on 13 October 2020 and followed up that meeting with a detailed letter setting out the difference between the disciplinary process and the third-party removal process and the

importance of the claimant considering the alternative vacancies available if he did not wish to be dismissed.

60. I have also found that in that meeting Mr Imtiz offered the claimant a cover role based on a 36 hour contract which the claimant refused and that on two occasions the claimant was provided with a list of available vacancies none of which he found to be suitable and that he confirmed this expressly in his email to Mr Imtiaz of the 30 October 2020 after the deadline for expressing an interest in the positions had been extended on two occasions.

61. In relation to the alternative position at the KAO data centre (where the claimant had undertaken some cover shifts), I have accepted Mr Sephton's evidence that this position had been filled on or around the 8 or 9 September and therefore conclude that it was not available to offer to the claimant even if the hours had been suitable.

62. I am therefore satisfied that the respondent took all reasonable steps to try and find alternative employment for the claimant.

63. The claimant was also offered an appeal against the decision to terminate his employment at which detailed consideration was given to all his submissions and the decision to dismiss upheld.

64. Taking all these circumstances into account I conclude that:

    64.1. the respondent took reasonable steps to avoid injustice to the claimant; and
    64.2. that even bearing in mind the size and administrative resources of this employer, the claimant's dismissal was fair and reasonable in all the circumstances of the case.

65. I therefore dismiss the claimant's claim.

66. For the purposes of Rule 62(5) of the Employment Tribunal Rules of Procedure 2013, the issues which the tribunal determined are at paragraphs 1 and 2, the findings of fact are at made in relation to those issues are at paragraphs 9 to 43, a concise summary of the relevant law is at paragraphs 44 to 49 and how that law has been applied to those findings in order to decide the issues is at paragraphs 52 to 64.

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Employment Judge Halliday

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Date: 9 January 2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

13/1/2022

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FOR THE TRIBUNAL OFFICE