EMPLOYMENT TRIBUNALS

Claimant: Mr Mustapha Alli

Respondent: Duval FM Limited

FINAL HEARING

Heard at: Nottingham (in public) **On:** 30 & 31 May 2018

Before: Employment Judge Camp (sitting alone) Members: Ms D Newton
Mr MJ Pavey

Appearances
For the claimant: in person
For the respondent: Mr J Howlett, counsel

RESERVED JUDGMENT

(1) The claimant was unfairly dismissed and wrongfully dismissed (i.e. dismissed in breach of his contract of employment).

(2) The claimant's other claims, including his disability discrimination claim, fail and are dismissed.

REASONS

1. By way of background, please see the written record of the Preliminary Hearing that took place before Employment Judge Legard on 21 February 2018.

2. The claimant, Mustapha Alli, worked for most of his relevant employment, until the last few months, at the Regus Building at New Broad Street House, 35 New Broad Street, London EC2. Throughout his time with the respondent, he was a Security Officer.

3. The claimant's employment with the respondent began on or about 11 April 2016. He TUPE-transferred into the respondent's employment from a company called [something like] Emprise Services Limited. He had continuity of employment going back at least to 1 July 2013, and it may well go back significantly further. His case is that it went back to

February 2002 and that the respondent was the fifth employer he had had in relation to security work (and, previously, some cleaning work) at the Regus Building.

4. Pausing there, we note that this case does not belong in the Midlands (East) Employment Tribunals. It should properly be being dealt with in London East or London Central. Be that as it may, it comes before us because the respondent's head office address is in the East Midlands and because neither party has applied to have the case transferred.

5. The claimant has brought this claim because his employment was terminated by the respondent in July/August 2017. It was terminated by the respondent sending the claimant a P45, which had a termination date on it of 29 June 2017. We shall return to the way in which the claimant's employment was terminated later in these Reasons. We note, in passing as it were, that the claimant's employment did not terminate on 29 June 2017 because as a matter of law, someone's employment terminates when they are notified of its termination and the claimant did not receive the P45 until around Friday, 9 July 2017. Accordingly the effective date of termination of the claimant's employment was, we find, 9 July 2017.

6. The claimant has at least two tribunal complaints directly arising out of his dismissal. The first is an unfair dismissal complaint under the Employment Rights Act 1996 ("ERA"). The second is a wrongful dismissal complaint, that is: a complaint that the respondent breached his contract of employment by failing to give him notice of termination.

7. We have taken the claimant's complaints to be as set out by Employment Judge Legard in the written record of the Preliminary Hearing, supplemented by what is stated in the claimant's claim form, in a document attached to it headed "*Claimant's Submissions*", which was prepared for the claimant by the Citizens Advice Bureau in Newham, East London. At the start of the hearing, we went through with the parties what the claimant's complaints were. At that stage, neither party suggested what Employment Judge Legard had stated about the case was inaccurate or incomplete in any relevant respect. Similarly, neither party had made that suggestion between the date of the hearing in front of Employment Judge Legard and the start of this Final Hearing.

8. In addition to unfair and wrongful dismissal, the claimant claimed disability discrimination and we will return to that in a moment. He also made what we shall describe as miscellaneous claims: a claim for a redundancy payment; a claim for compensation for accrued but untaken holiday; a claim for a guarantee payment under ERA, section 28.

9. The termination of the claimant's employment followed the respondent losing the part of its contract with Regus which included the provision of security services at the Regus Building on New Broad Street. This happened around 15 March 2017. The claimant's disability discrimination complaint relates indirectly to that.

10. The claimant is and was at all relevant times a disabled person under the Equality Act 2010 ("EQA") because of anxiety with depression and schizo-affected schizophrenia.

The respondent, through its solicitor, accepted this was the case in a letter dated 28 March 2018. The claimant's case is that because of his disability it is impracticable for him to work nights. In summary, his disability discrimination complaints are to the effect that after the termination of the Regus contract he was required or expected to work nights and he shouldn't have been. He also seems to be alleging that this had, or might have had, something to do with his dismissal.

11. At the start of this final hearing, after the Tribunal raised with the claimant the fact that he appeared to be alleging race discrimination in his witness statement, the claimant, at the Tribunal's prompting, made an application to amend to add a complaint that his dismissal was an act of direct race discrimination. We refused him permission to amend. We gave reasons orally at the time. Written reasons will only be provided if asked for by a written request presented within 14 days of the date of the sending of this decision to the parties.

12. We are now about to go through each of the claimant's complaints one by one, setting out the essential facts and issues, and explaining why we have decided what we have decided in relation to each of them. But before we do so, we should like to make clear that nothing in our decision is meant to suggest that anyone, and in particular not the claimant, was deliberately lying to us. We are quite sure that the claimant gave us his version of events as accurately as he could. However, as the claimant himself told us, his memory is not particularly good, and it appeared to us that he often mixed up in his own mind things that had happened at different times. In particular, his recollection of the order of events and when things happened seems to us to be very unreliable. This is not a criticism of him in any way; it is most certainly not the claimant's fault if his memory is worse than he would want it to be.

13. We would like to add that where two people come to a Court or Tribunal and give different versions of events, we don't think it is usually the case that one of them is lying and one of them is telling the truth. Human memory doesn't work like a recording machine. Two people watching the same event will probably recall it differently; that's just human nature. Most of us will be able to think of occasions where we disagree with our nearest and dearest about something that has happened. If we can have a genuine disagreement without anyone lying with our nearest and dearest, we can certainly have that kind of genuine disagreement with someone who we are facing in a Court or Tribunal room.

14. We start with the three claims relating directly to dismissal: the redundancy payment claim, the unfair dismissal claim and the wrongful dismissal claim.

15. How the claimant was dismissed is not in dispute. Following the loss of the Regus contract, the claimant did three further shifts for the respondent in March 2017. They were all day shifts (although one of them was originally put to the claimant as a night shift) and they were on 18, 25 and 26 March 2017. Between 26 March 2017 and the end of his employment, the claimant did no further work for the respondent.

16. The claimant had worked at the Regus building on New Bond Street with three other individuals: Abdus Salam, Saad Sarshar, and James Cooper. Shifts with the respondent had to be booked through the respondent's help desk. Although a Site Manager or someone not on the help desk could contact workers like the claimant, all bookings had to go through the help desk in order to be properly logged on the respondent's system so that the individuals could, amongst other things, get paid.

17. On 18 April 2017, a woman called Samantha Essex from the respondent's help desk wrote to the respondent's Compliance Manager, Andrew Stone, stating: "*We have been calling/whatsapping/emailing Abdis, Saad and Mustapha* [the claimant] *regarding shifts in London but they are not always contactable. Sometimes they don't answer and other times they will but then they are offered shifts they are selective about the hours/days they want to work*". We note the claimant disputes the accuracy of the information provided in that email about him.

18. Following receipt of that email, Mr Stone wrote to the claimant as follows: "*I have been advised by the help desk that they are having difficulty in contacting you and as a result they are unable to allocate shifts for you. It is my understanding that you are unresponsive to both telephone calls and emails. Therefore, could you please contact the help desk or myself as a matter of urgency so that we can allocate suitable shifts for you*".

19. On 24 May 2017, Mr Stone sent a further letter to the claimant, the relevant parts of which are as follows: "*I refer to my letter of 18 April 2017 regarding you making contact with ourselves in order that we can allocate suitable shifts to you. To date I have still not heard from you, or had a response to my letter. Can you therefore contact me as a matter of urgency. Your lack of communication and your failure to attend work is not acceptable, therefore you are required to make immediate contact with myself in order that we can resolve this matter. Should I not hear from you within 5 working days of the date of this letter, then I shall assume that you no longer wish to work for Duval and subsequently assume that you are resigning your position with the company*".

20. The respondent, through Mr Stone, alleges that the claimant did not contact them at all after the end of March. The claimant alleges otherwise, although exactly what he is alleging was not very clear to us and at different times during his evidence he said different things in this respect. Consistently, however, the claimant has alleged that he was telephoned by somebody – a man he described in evidence, albeit the claimant was unable to say what this person's name was or what his precise job title was. This man apparently phoned him in or around the beginning of June to offer him two weeks' worth of day shifts. The claimant says he accepted that offer, then heard nothing further from the respondent, and so telephoned the help desk. The help desk knew nothing about the supposed offer of shifts and said that they would look into it and get back to him. The next communication from the respondent the claimant received was the P45.

21. We start with the wrongful dismissal complaint. In practice, there are no live issues for us to resolve in relation to this complaint; there can be no doubt that the claimant was

wrongfully dismissed. The respondent did not give him notice of dismissal and is not alleging he was guilty of gross misconduct or any other fundamental breach of his contract of employment. There are very significant issues in relation to how much, if anything, the claimant should get in damages. But at the start of the hearing, it was decided that we would not deal with any remedy issues at all at this stage; and accordingly the difficult question of the value of the claimant's breach of contract damages claim will have to be dealt with another day, if the parties cannot agree a figure between themselves.

22. Turning to the unfair dismissal claim, the first issue is: what was the reason for dismissal and was it a potentially fair one under ERA section 98? In considering this issue, we are concerned with what was in Mr Stone's mind. We have asked ourselves what was in Mr Stone's mind because we are entirely satisfied that he was the decision maker in this case; on the evidence, there is no one else it could have been.

23. We were given no good reason to doubt that the reason in Mr Stone's mind was a genuine belief that the claimant had failed to contact the respondent. We also note that during cross-examination the claimant did not suggest to Mr Stone that his real reason for dismissing him was different from the one that Mr Stone gave.

24. Mr Stone accepted he had no personal knowledge of what communications there had been between the help desk and the claimant and vice versa. He relied on what people from the help desk told him. We accept his evidence that he was not told about any contact from the claimant to the help desk before he authorised the sending out of the claimant's P45.

25. During Mr Stone's oral evidence, the Employment Judge asked him which of the potentially fair reasons in ERA section 98 he felt was the reason for this dismissal. He suggested "*some other substantial reason*". However, based on what else he said about it, which was to the effect that the claimant was under an obligation to keep in touch with the respondent and to respond to offers of work and had failed to do so, and on the contents of the letter of 24 May 2018 (in particular the phrase "*not acceptable*"), this was clearly, in our view, dismissal for a reason relating to the claimant's conduct. This is a potentially fair reason.

26. Pausing there, redundancy was not the, or even a, reason for dismissal. Even if a potential redundancy situation existed in March/April 2017 when the respondent lost the contract for the work the claimant had been carrying out, that had almost nothing to do with the claimant's dismissal some months later.

27. The next issue in relation to the unfair dismissal complaint is whether the dismissal was fair or unfair in all the circumstances, in accordance with equity and the substantial merits of the case, pursuant to ERA section 98(4). Legally this is very well-trodden ground. We considered the whole of the well-known passage from the judgment of the EAT in Iceland Frozen Foods v Jones [1982] IRLR 439 at paragraph 24, which includes a reference to the "*band of reasonable responses*" test. We may not substitute our view

of what should have been done for that of the reasonable employer. We have to guard against slipping "*into the substitution mindset*" (London Ambulance Service NHS Trust v Small [2009] IRLR 563 at paragraph 43) and to remind ourselves that only if the respondent acted as no reasonable employer could have done was the dismissal unfair.

28. We have taken into account the ACAS Code of Practice on Disciplinary and Grievance procedures. We have borne in mind that compliance or non-compliance with the Code is not determinative of any issue.

29. We are unanimously and firmly of the view that the respondent failed in almost every respect to act within the band of reasonable responses and that the dismissal was unfair.

30. The reasons why the dismissal was unfair pursuant to ERA section 98(4) include:

    30.1 there was a breach of the following paragraphs of the ACAS code: 5, 6, 9, 10, 11, 12, 18, 22; and a failure to provide any right of appeal in accordance with one of the bullet points under paragraph 4;

    30.2 there was no attempt to hold a meeting with the claimant or discuss the matter with him;

    30.3 there was a failure actually to tell the claimant that he had been dismissed in any clear way. There was no letter of dismissal. It is obvious the respondent was hedging its bets. Perhaps not realising that this doesn't work as a matter of law, the respondent seems to have been wanting to reserve the right to argue that the claimant had effectively resigned. That certainly appears to have been what Mr Stone's letter of 24 May 2017 was trying to set up. The respondent did not, so far as we can tell, concede that it had dismissed the claimant until the Preliminary Hearing in March 2018; the matter was left open in the ET3 response form;

    30.4 before making a decision to dismiss someone for failure to communicate, and in particular to respond to offers of shifts, we think any reasonable decision maker would expect to see written evidence of attempts to communicate. The respondent had previously communicated with the claimant successfully by email. Yet there is no evidence we have seen of any relevant written communications with the claimant of any kind other than Mr Stone's letters of April and May 2017;

    30.5 Mr Stone did not give evidence to the effect that he had asked the help desk to be on the lookout for communication by telephone from the claimant and we are not satisfied that he put any measures at all in place in an attempt to ensure that if the claimant did communicate with the help desk in some way, shape or form, the help desk would make a note of this and provide it to Mr Stone with a view to assisting Mr Stone with his decision as to dismissal. We think any reasonable decision maker in his position would have done something like this. Instead, so far as we can tell, the checks Mr Stone made as to whether the claimant had been in touch seemed to have consisted of a couple of telephone conversations with one person on a help desk around late May/early June;

30.6 following on from the previous point, Mr Stone did not suggest, for example, that shortly before having the P45 issued he spoke to a specific person on the help desk and was reassured the claimant had definitely had not been in contact. His evidence about his own contacts with the help desk was very unclear. In relation to this, we are not reassured by the fact that his letter of 18 April 2017 was a little disingenuous, in that it was evidently a direct response to Samantha Essex's email of the same date but was not an accurate reflection of the contents of that email. Samantha Essex did not, for example, state anything to the effect that the claimant was "*unresponsive to both telephone calls and emails*", as Mr Stone's letter stated he was.

31. The claimant was, then, unfairly dismissed. We underline the point that we have not made any decision at all on remedy issues. Nor do we mean to give any kind of preliminary or provisional indication as to what our decision on them might be. However, we sincerely hope the claimant and the respondent will be able to agree those issues between them, so that there won't need to be another hearing. In an attempt to help the parties to agree those issues, and for the claimant's benefit in particular (because he is unrepresented), we should like to remind him of one potential remedy issue that we explained to him during the hearing: an argument from the respondent that he would still have been dismissed even if the respondent had gone through a reasonable procedure in relation to his dismissal. We aren't saying this is necessarily a good or a bad argument. But the claimant should take into account that if we accepted it, it is possible he would end up with no compensation for unfair dismissal but only a basic award in accordance with ERA section 119.

32. We turn to disability discrimination. The claimant has only two types of complaint: an EQA section 15 complaint and a reasonable adjustments complaint. Neither of those complaints is clearly and fully set out in the list of issues, but one issue they both have in common is the issue of knowledge of disability: are we satisfied that the respondent did not know and could not reasonably have been expected to know that the claimant was a disabled person? We propose to concentrate on that issue.

33. The claimant does not have an obvious and/or visible disability. His disability is not the kind of thing we would expect the respondent to have noticed in the normal course of events. It is not, for example, the case that the claimant ever took any time off work when employed by the respondent because of his disability, at least so far as we are aware on the evidence.

34. In his witness statement, the claimant suggested that the respondent had acquired knowledge of disability through a meeting with "*one of the senior managers*". He was adamant, at least initially, that that meeting took place when the respondent took over the contract via a TUPE transfer; that that was about three years before the end of his employment; and that the meeting was with a woman. The claimant was also sure when first cross-examined that he had never had a meeting with Mr Stone. A three-year time

frame fitted with other evidence in his witness statement that the respondent "*offered me weekday job on fulltime basis which continued for few years*".

35. The TUPE transfer to the respondent was, however, around 11 April 2016, only 16 months or so before the termination of his employment and less than a year before his final day of work for the respondent.

36. Part of the way through his evidence, the claimant accepted he *had* had a meeting with Mr Stone on or about 11 April 2016, although he could not remember what had happened. We know from Mr Stone's own evidence, which we accept on this point (having no good reason to do otherwise and because it is supported by contemporaneous documentation) that he was the one who had the initial post-TUPE transfer meetings with the claimant and the other transferring staff and that his meeting with the claimant – on or about 11 April 2016 – was the only relevant meeting.

37. Putting all of that together, we accept that the claimant may well have had a meeting with a female senior manager of a new employer immediately after a TUPE transfer. But we think it is most likely that, if he did, it was in 2013, when the claimant began working for Emprise and not in 2016 when he began working for the respondent. For it to be a 2013 meeting with an Emprise manager ties in with the claimant's recollection of the meeting taking place approximately three years before the end of his employment and of him working for a "*few years*" after the meeting on a full time basis, as well as with his insistence that the person he discussed his disability with was a woman.

38. The claimant accepted in his oral evidence that he had completed a health questionnaire around 11 April 2016 in which he denied having any mental illness or any disability. That questionnaire is one of the documents in evidence before us and it is signed and dated by the claimant and by Mr Stone on 11 April 2016. The claimant could not remember what had happened at the meeting, but he did not challenge Mr Stone's evidence that the health questionnaire was completed by the claimant in front of him and that he went through it with the claimant before he signed it. That evidence from Mr Stone is consistent with what appears on the face of the health questionnaire itself.

39. The claimant told us orally that although he couldn't remember the meeting, he must have told Mr Stone about his condition. For us to accept that part of the claimant's evidence, we would have to decide that Mr Stone signed the form which stated that the claimant had no disability and had no history of mental illness, depression or nervous breakdown despite knowing that information to be incorrect. We can see no reason why Mr Stone would have done any such thing.

40. What may well have happened is that the claimant assumed, understandably but wrongly, that Emprise's knowledge of his disability would somehow transfer to the respondent in the same way that his employment transferred to the respondent. However, we do not think that the claimant did tell Mr Stone anything about his disability, nor that he told anyone else at the respondent about his disability when he first started;

we think that the meeting he recalls during which he discussed his disability was not with the respondent but with Emprise.

41. In addition, we don't think that any information relating to the claimant's disability passed from Emprise to the respondent. There is no evidence of any substance that any such information did pass. This was a service provision change transfer, brought about by Emprise losing a contract to the respondent, rather than a conventional TUPE transfer. Because of that, there was no significant pre-transfer communication between Emprise and the respondent, let alone the kind of passing of information one would expect in a conventional TUPE-transfer process.

42. Where else might the respondent have got knowledge of the claimant's disability from?

43. In paragraph 20 of his witness statement, the claimant states, "*I can confirm that I had not been fit to work at night since I started with the previous company (Emprise) and every one of their management was well conversant about it*". The claimant here is talking about the knowledge of Emprise's managers, not of the respondent's managers.

44. In part of the claimant's oral evidence, he suggested that he had been offered night shifts and had declined them and had told the people offering him them his reasons for declining them. But he gave that evidence when discussing paragraphs 8 to 11 of his witness statement, parts of which are demonstrably wrong.

45. Paragraph 8 is the one in which he refers to doing a week day job with the respondent on a full time basis for a "few years".

46. Paragraphs 9 to 10 are: "*… because of losing contract with Regus, Duval offered mixed shifts (day and night shifts). I declined to accept the offer. The respondent offered again for day shifts which I carried out*". However, after the Regus contract ended, he worked only three more shifts for the respondent. He was initially offered two day shifts and a night shift. Within a very short space of time, the proposed night shift turned into a day shift, but we have no evidence as to how that happened. It could, for example, have been as simple as the offer of a night shift being a mistake and the true offer always being of three day shifts; or it could have been something else. But what definitely did not happen was that the claimant was offered mixed shifts which he declined to accept and then was offered day shifts which he carried out. The evidence we have is that the claimant never worked a night shift for the respondent and the claimant's written evidence was to the effect that he was never asked to work a night shift until after the contract with Regus was lost by the respondent.

47. If the claimant did not tell Mr Stone or any other senior manager at the outset of his employment with the respondent about his disability, and we don't think he did, then the only other time when it might conceivably have come up in discussions with the respondent is in connection with being asked to work a night shift. On the evidence, he might potentially have been asked to work a night shift once – when he was offered 2 days and a night in March 2017. He did not in his written evidence suggest that that was

the occasion on which he told the respondent about his difficulties working nights – let alone that on that occasion he said anything that might reasonably have given the respondent knowledge of disability. His oral evidence about this was general evidence about telling people, on unspecified multiple occasions, about his inability to do night shifts when he was asked to do them.

48. The claimant's evidence relating to what he told, or might have told, the respondent in March 2017 was very vague. Even put at its reasonable highest, it would only give the respondent knowledge of his disability if we were prepared to assume in the claimant's favour that (because he generally, when he was asked to do a night shift, explained his difficulties) on this particular occasion, he explained his disability in sufficient detail to put the respondent on notice. We feel unable to make that assumption. We are not satisfied he actually raised the issue of his disability on that occasion. We are not even satisfied that there was any particular communication at all between the claimant and the respondent about that proposed night shift in March 2017 other than the confirmation that it was to be a day shift.

49. We should perhaps add that in a part of the claimant's evidence that was a little contradictory and confusing, the claimant suggested he was offered and yet did not work mixed shifts – that is day shifts and night shifts – between March 2017 and allegedly being offered two weeks of day shifts in or around early June 2017. However:

    49.1 precisely what he meant by this evidence was difficult to follow. He could not explain to our satisfaction (or really at all) why if such an offer had been made he had not accepted the day shifts and declined the night shifts;

    49.2 the claimant's final answer to the final question asked of him by the Tribunal when he was giving his oral evidence was that he had not been offered any work at all by the respondent between March 2017 and the offer of the day shifts in or around June 2017.

50. In conclusion, we are not satisfied that the claimant ever told anyone from the respondent that he was unable to carry out night shifts because of any health problem. It follows that we *are* satisfied that this respondent did not know and could not reasonably have been expected to know the claimant was a disabled person at any relevant time.

51. One or more of the respondent's predecessors may well have had knowledge of the claimant's disability, but our understanding is that knowledge of disability does not automatically pass under TUPE. Given that the TUPE-transfer in this case was a service provision change, it would be very unfair to the respondent to find that knowledge had passed; it would mean that the respondent had knowledge of disability despite not being told by anyone about it and not having any reason to know about it.

52. It follows that the disability discrimination complaints must fail because of the respondent's lack of knowledge. Whatever the merits of those complaints might otherwise be, the respondent has successfully raised the defence of lack of knowledge of disability, in accordance with section 15(2) and paragraph 20(1)(b) of schedule 8 of the EQA.

53. Finally, we deal with the remaining miscellaneous complaints: for holiday pay and for a guarantee payment.

54. The holiday pay claim is for compensation for accrued but untaken annual leave on the termination of employment. The claimant's legal entitlement was the same under his contract of employment as under the Working Time Regulations 1998: 5.6 weeks per year, with no right to carry untaken holiday over from one holiday year to the next. The claimant only worked two days per week from September 2016 and this would have been reflected in his holiday entitlement. In any event: the respondent's holiday year ran from 1 April to 31 March; the claimant did no work for the respondent after 1 April 2017 and would therefore not have accrued any holiday entitlement between then and the termination of his employment.

55. The claimant for a guarantee payment is misconceived. For ERA section 28 to apply, there has to be, "*a day during any part of which an employee would normally be required to work in accordance with his contract of employment*". Whatever else, the claimant's contract of employment did not require him to work, normally or otherwise, on any particular day or days.

56. Both of these claims therefore fail.

57. **CASE MANAGEMENT ORDER**: within 1 calendar month of the date this decision is sent to them, the claimant and the respondent must write to the tribunal either confirming they have entered into a settlement agreement or providing their proposals for case management orders for a one day remedy hearing, including any dates of unavailability to the end of March 2019.

SENT TO THE PARTIES ON

16 July 2018

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FOR THE TRIBUNAL OFFICE