RM

EMPLOYMENT TRIBUNALS

Claimant:	**Ms M Vicente**
Respondent:	**Image Office Cleaning Limited**
Heard at:	**East London Hearing Centre**
On:	**10 – 11 January 2019**
Before:	**Employment Judge Scott**
Members:	**Mrs J Henry** **Mr L O'Callaghan**

Representation

Claimant:	In person
Assisted by an Interpreter:	Day 1: Ms Rodrigues Day 2: Ms Barbosa
Respondent:	Mr Bradley

JUDGMENT having been sent to the parties on 1 February 2019 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1 Whilst not to excuse the delay in providing these reasons, we wish to explain it. The Respondent requested written reasons on 8 February 2019. An email was purportedly sent to the Employment Judge on 27 February 2019 but it was, unfortunately, incorrectly addressed and did not therefore reach the Judge. A follow up email was received by the Judge on 24 April 2019. The Judge requested that the tapes upon which the reasons had been recorded at the hearing be transcribed in accordance with the usual procedure. The Judge received a follow up email on 13 May advising her that the tapes were not on the file. It is not known what happened to the tapes. There were some further administrative delays before these reasons were produced. The Tribunal has agreed these written reasons but they will not be the same as those dictated on the day that Judgment was handed down. The Tribunal apologises to the parties for the delay in providing written reasons.

The Hearing

2 The Tribunal convened on 10–11 January 2019 to hear the Claimant's claims. The matter was listed for a full merits hearing. The hearing started late because we allowed time for the Claimant's representative to arrive. In the event, the Claimant's representative did not attend the Tribunal. We asked the Claimant whether she was happy to proceed without him and she confirmed that she was. The Claimant did not have a copy of the bundle with her but she used the bundle on the witness table on the first day and a copy that Mr Bradley had on the second day. The Claimant had not complied with Tribunal orders, save that she had supplied a schedule of loss. Mr Bradley told us that the Respondent had tried to communicate with the Claimant on a number of occasions without success. It was not clear why the Claimant had not complied with the case management directions. The Claimant had not prepared a witness statement. We relied on pages 9 and 81 – 82 as the Claimant's evidence-in-chief and asked the Claimant questions in the absence of a witness statement. We indicated to Mr Bradley that if he required time to reflect on the Claimant's evidence before cross-examining the Claimant we would grant him time. In the event, he did not request time.

3 The Tribunal raised an issue with the parties about the sum claimed by the Claimant for unpaid wages allegedly due for the period January-April 2018. The sum claimed by the Claimant was claimed in the schedule of loss [83]. The Tribunal explained to the Claimant that the sum could not be claimed as compensation for unfair dismissal as the sum did not flow from dismissal. It was, at the time, the Tribunal's understanding that was what the Claimant was alleging. The Claimant was asked whether she wished to amend her claim to include an unlawful deduction from wages claim for unpaid wages for the relevant period and she indicated that was the case. Mr Bradley objected to the amendment, referring to the late stage of proceedings.

4 The Tribunal considered whether or not to grant leave in accordance with the guidelines set down in *Selkent v Moore [1996] IRLR 661* and *Cocking Sandhurst Stationers Ltd [1974] ICR 650 NIRC*. In exercising its discretion, a Tribunal should take account of all the relevant circumstances and should balance the relative injustice and hardship to the parties in refusing or granting an amendment. It should consider:

i. the nature of the amendment; for example, whether it is a minor error, a new fact, a new allegation or a new claim;

ii. the application of time limits and whether there should be any extension of time. Where the Claimant proposes to include a new claim by amendment the Tribunal must have regard to the relevant time limit and, if the claim is out of time to consider whether time should be extended under the appropriate statutory provision.

iii. the timing and manner of the application, including why an application was not made earlier and why it is being made at this stage. However, delay in itself should not be sole reason for refusing an application.

5. The Tribunal concluded that the amendment was a relabelling exercise. It was clear from the summary of the case management Preliminary Hearing that the Claimant was claiming unpaid wages for the period January-April 2018 [101-105]. The sum was

also included in the Claimant's schedule of loss [83]. It was, we concluded, in the interests of justice to permit the Claimant to amend her claim and the balance of prejudice lay in her favour. The Respondent was on notice that the Claimant was claiming wages for the period January-April 2018. There was, we concluded, little, if any, prejudice to the Respondent. There was nothing additional for it to deal with. The prejudice to the Claimant, if we refused the amendment, would be to refuse a cause of action and, potentially, be deprived of a remedy to which she may be entitled.

6. In fact, having had to re-visit the facts to write these reasons, the Tribunal has concluded that an amendment was not, in the event, required. The Claimant claimed arrears of pay in the ET1. The Employment Tribunal had (we now think wrongly) considered that the sum was claimed as arising out of the unfair dismissal claim (which of course it could not be). In the event the Tribunal granted the amendment so, either way, the Claimant's claim for unpaid wages from January to April 2018 was considered and determined.

7. **List of issues**

1. Breach of contract

1.1 Did the Claimant work additional hours (covering for a friend) in 2016?

1.2 If relevant, was the Claimant paid for that work?

1.3 If not, what sum is payable?

2. Redundancy Payment

2.1 Was there a redundancy situation?

2.2 Did that situation cause the Claimant dismissal? The Respondent asserts that the Claimant was dismissed for misconduct.

2.3 If the Claimant's dismissal was caused by a redundancy situation, was the Claimant offered suitable alternative employment ('SAE')?

2.4 If the Claimant was offered SAE, did she unreasonably refuse that offer?

2.5 If the Claimant is entitled to a redundancy payment, what sum is payable?

3. Unfair Dismissal

3.1 Was the Claimant unfairly dismissed?

Dismissal was not in issue. The Claimant had over two years' continuous employment and was an employee.

3.1.1 Whether the Respondent had a potentially fair reason for dismissal? The Respondent relies upon misconduct as the potentially fair reason (unwillingness to take up work at another site which it asserts was suitable alternative employment). The Claimant

disputes that she was offered suitable alternative employment;

3.1.2 Was the dismissal within a range of reasonable responses? Did the Respondent act reasonably, pursuant to Section 98(4) Employment Rights Act 1996, in treating the reason for dismissal as a sufficient reason for dismissing the Claimant in all the circumstances, including the size and administrative resources of the Respondent's undertaking, and in accordance with equity and the substantial merits of the case?

3.1.3 Was the dismissal procedurally fair?

3.1.4 If the dismissal was unfair, what was the percentage chance, if any, that a fair dismissal could and would have occurred in any event (the *Polkey* argument)?

3.1.5 If the dismissal was unfair, had there been any unreasonable failure to comply with the Acas Code of Practice and if so, whether there should be any adjustment to compensation under Section 207 Trade Union and Labour Relations (Consolidation) Act 1992?

3.2 If the dismissal of the Claimant was unfair, whether the Claimant contributed to her dismissal and, if so, what proportion the Tribunal considered just and equitable as a reduction to the basic and/or compensatory award?

3.3 Remedy, if appropriate. The Claimant seeks compensation only.

4. Unlawful deduction from wages

4.1 Did the Respondent make an unlawful deduction from the Claimant's wages by not paying the Claimant for the period January to April 2018? What wages were payable under the Claimant's contract of employment for the period in question? Was the Claimant was employed on a zero-hours contract?

5. Holiday Pay

5.1 When the Claimant's employment ended was she paid the compensation she was entitled to under Regulation 14 of the Working Time Regulations 1998?

6. Race Discrimination

6.1 Was the Claimant directly discriminated against because of race?

6.1.1 Did the Respondent treat the Claimant less favourably than a comparator in the same relevant circumstances?

6.1.2 Was that less favourable treatment because of race as defined in section 9 of the EqA 2010?

The unlawful act relied upon is dismissal. The Claimant alleges that she was not offered suitable alternative employment because she is black and/or Portuguese. The Claimant compares her treatment to other members of the cleaning team: E, a black Spanish employee and S, a white Spanish employee.

6.2 Remedy, if appropriate.

The Evidence

8. There was one bundle of documents which we took as evidence, in so far as we were directed to the pages therein. During the hearing, the Respondent added, with our permission, a copy of their handbook [R1]; the Claimant's acknowledgement of receipt [R2] and payslips [R3 & 4].

9. We heard witness evidence from the Claimant and, on behalf of the Respondent, Ms Hart, IOC Director and Mr Bradley, HR Consultant and Dismissing Officer. We also had a witness statement from Mr SM, IOC Supervisor. Mr SM did not attend the hearing. The weight we attached to his witness statement is a matter for the Tribunal's discretion.

Findings of Fact

10. The Claimant began working for the Respondent in October 2014 as a cleaner. Her employment ended on 20 April 2018 [57-8]. At the time of her dismissal, the Claimant worked 15 hours per week from 5.00am – 8.00am each morning, Monday to Friday. The Respondent employs circa 450 staff in London. It operates only in London. The Respondent told us that there is a high turnover of staff but not as high as other similar companies. The Claimant has worked at a number of sites for the Respondent. The Section 1 statement, which the Claimant signed, states that the Claimant will normally be based upon a site upon which the company operates [37-38].

2016

11. The Claimant's evidence was that she was asked to cover for a friend who was on holiday in 2016 at 21 – 22 Grosvenor Street, and that she worked for 6 hours and 15 minutes but was not paid. The Claimant was unable to tell us exactly when she carried out the work and there is no correspondence with the Respondent raising unpaid wages for the work. Ms Hart told us that staff often do overtime but that she could not identify a record for work being carried out by the Claimant at Grosvenor Street for which the Claimant was not paid. The Claimant referred us to [62] but the Respondent told us, and we accepted their evidence, that [62] relates to a payment for a period of sick leave which was in fact, the Claimant accepted, subsequently paid (SSP).

Dismissal

12. In the summer of 2017 the Respondent learned that the site at which the Claimant worked (125 Shaftsbury Avenue) was to be refurbished and that the requirement for early morning cleaners was to end. Staff were advised that the company would seek to redeploy them.

13. In December 2017, staff at the site were reminded that the site was to partially close at the end of December. One employee was to remain at the site for work during the day (not the early morning shift). In essence, the Respondent would and eventually did require fewer employees to do work at Shaftsbury Avenue. The other early morning shift workers would not be required nor would the Claimant. The contract for early morning cleaners ended on 31 December 2017.

14. The Claimant was on holiday from 14 December to 29 December 2017, due to

return 2 January 2018. The Respondent did not contact the Claimant about her position whilst the she was on holiday. The Claimant texted the Respondent on 28 December 2017 to ask where she should return to work. She was told to go to White City [66]. The Claimant told us about two other employees who were redeployed to locations that would, she said, have been suitable for her: E, who was redeployed to Green Park and S, who was redeployed to Marble Arch. Ms Hart told us and we accept her evidence that she did not contact the Claimant as the Claimant was on holiday when the redeployments were arranged.

15. The Claimant did not attend White City on 2 January 2018 and on 5 January 2018, Ms Hart wrote to the Claimant [65]. The Claimant replied on 7 January and explained why White City was not suitable for her, citing the need to take her daughter to school [65]. The Claimant wrote to the Respondent on 17 January 2018 requesting to be dismissed by reason of redundancy [66]. On 23 January 2018, the Respondent wrote to the Claimant asking her to attend a consultation meeting on 25 January 2018 [39]. The meeting took place on 30 January 2018 [41 – 49]. The Claimant attended with an interpreter. Ms Hart told us and we accept her evidence, having observed the Claimant in Tribunal, that during the meeting the Claimant sometimes spoke in English and sometimes in Portuguese. The Respondent accepted that White City was not suitable as it involved a significantly longer journey. Ms Hart asked the Claimant whether she would work at a site in High Holborn, as it was close to Shaftsbury Avenue and/or a site in Kings Cross because the journey to Kings Cross from the Claimant's home was, according to Google maps, faster than the Claimant's journey to Shaftsbury Avenue. Ms Hart offered these locations because of the Claimant's childcare commitment and where she lived. Ms Hart told the Claimant at the meeting that Kings Cross would be a faster journey for her, according to google maps. The positions were vacant the day before the meeting and the Claimant would have been offered one or other if she had confirmed that one or other was suitable for her. However, the Claimant said that neither venue was suitable because of her childcare commitment.

16. Following the 30 January meeting the Respondent wrote to the Claimant on 7 February [50]. The Claimant was again told that she could be redeployed to Kings Cross or High Holborn and work the same hours that she had been working at Shaftsbury Avenue. She was advised that if she did not return to work on or before 12 February, action would be taken by reason of her failure to follow a management instruction. The Respondent wrote to the Claimant again on 7 March. The Claimant was asked to attend a disciplinary hearing on 14 March [53]. She did not attend the meeting. The Claimant wrote to Ms Hart on 16 March, referencing the Respondent's letter of 7 February (not their letter of 7 March), requesting a redundancy payment and other monies that she alleged were due [52].

17. By letter dated 10 April [55], the Claimant was invited to a rescheduled disciplinary hearing which eventually took place on 19 April 2018. The Respondent stated again that the Claimant's refusal to accept alternative employment was a breach of a management instruction. Rather oddly, it also advised the Claimant that the allegations have led the company into disrepute. The letter warned the Claimant that she might be dismissed.

18. The hearing on 19 April was chaired by Mr Bradley. Unfortunately, there are no notes. However, we accept Mr Bradley's evidence that the meeting lasted about an hour and that the Claimant was able to communicate with him at the meeting without

interpreter. We accept that he told the Claimant that, if she could tell him where she would like to work, he would "sort it". However the Claimant did not do so.

19. The meeting was followed up with a letter to the Claimant dated 20 April, dismissing the Claimant [57-58]. In essence, the Claimant was dismissed because she was unwilling to accept alternative employment at Kings Cross or High Holborn.

20. The Claimant appealed by letter dated 30 April 2018 [59 – 60]. The Claimant did not attend the appeal hearing. The appeal was dismissed in her absence and a letter dated 29 May 2018 was sent to the Claimant [61].

January 2018 – April 2018

21. The Claimant was dismissed on 20 April 2018 [57 – 58]. Prior to the workplace closure, the Claimant had been working 5.00am-8.00am x 5 days per week (Monday-Friday). Ms Hart told us that employees often work overtime and that therefore hours worked could vary each week. The Claimant was paid an hourly rate. The parties agreed that the Claimant's gross weekly wage for working these hours was £120.00 per week. The Respondent asserts that the Claimant was employed on a zero-hours contract and that therefore no wages are payable for the period January-April 2018 because the Claimant did not work during that period. The Claimant's statement of terms and conditions is at [37 – 38]. The statement records that the Claimant's hours were 6.00am – 8.30am and that her weekly pay was £93.75 in 2014. The Claimant's hours were, as we say above, subsequently varied to 5.00am-8.00am. As far as we know, the Claimant did not have to indicate her availability.

22. Mr Bradley referred the Tribunal to the Employee Handbook [R1] and, in particular, to pages 4-4, 6-3 and 7-7 of the handbook.

23. Page 4-4 states:

> *If you are required to confirm your attendance by signing in/out, you must do so on arrival and if leaving the premises at any time. The information will form the basis of your wages….*

Time-sheets were completed each day by the site manager, although we did not see such time-sheets.

24. Page 6-3 concerns rules about conduct at work and outside working hours and gross misconduct. Page 7-7 deals with, in so far as relied upon, lay-off/short working time.

Holiday pay

25. The Respondent's evidence was that the Claimant was paid accrued holiday pay upon termination. Late in the proceedings, the Respondent provided a payslip for the Claimant dated 4.5.18 [R3]. We accept the Respondent's evidence that the Claimant was paid accrued holiday pay upon termination. The Claimant accepted that is what the payslip demonstrated and said she would check her bank account to check that the payment had been made.

The Law

Redundancy Payments

26. The definition of redundancy is contained in Section 139 ERA 1996:

> 139(1) … an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly to mainly attributable to –
>
> (a) …
> (b) the fact that the requirements of that business –
> (i) …
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,
> have ceased or diminished….

If there is a redundancy situation, the Tribunal must determine whether that situation caused the Claimant's dismissal and, if so, whether the Claimant was offered suitable alternative employment (objective test) and, if so, whether she unreasonably refused the offer (applying a subjective test – was the alternative employment offered suitable for this claimant, taking her personal circumstances into account (see, for example, *Redman v Devon* [2013] EWCA Civ 1110)).

Unfair Dismissal

27. An employer has to prove that the reason for the dismissal falls within one of the potentially fair categories listed in sections 98(1)&(2) ERA 1996.

28. So far as material, s.98 provides:

> *(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) …*
>
> *(b) relates to the conduct of the employee,*
>
> *(c) is that the employee is redundant, or*
>
> *(d) ….*

29. It was said by Cairns LJ in *Abernethy v Mott, Hay & Anderson* [1974] IRLR 213 at

215 that:

> *A reason for the dismissal of an employee is a set of facts known to the employer, or it may be a set of beliefs held by him, which caused him to dismiss the employee.*

30. It is not for the Employment Tribunal to consider the substance of the employer's reason at the s.98(1)(b) stage (provided they are more than "whimsical or capricious" (*Harper v National Coal Board* [1998] IRLR 260)). It is important not to conflate the questions of whether there was a potentially fair reason with the question as to whether it was a fair dismissal in all the circumstances; they are two separate stages of the process.

31. If the employer establishes a fair reason for dismissal it is then for the Tribunal to decide whether it was in fact fair to dismiss for that reason by applying the test of fairness contained in s.98(4) of the 1996 Act. This provides as follows:

> *(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.*

32. This test does not permit a Tribunal to substitute its own view of what it would have done in the circumstances for that of the employer. Case law makes clear that "*a decision to dismiss must be within the band of reasonable responses which a reasonable employer might have adopted*" - *Iceland Frozen Foods v Jones* [1982] IRLR 439. Tribunals should not, when considering these matters, look at what they would have done but should judge, on the basis of the range of reasonable responses test, what the employer actually did. The appropriate test is whether the dismissal of the Claimant lay within the range of conduct that a reasonable employer could have adopted. The range of reasonable responses test applies equally to the procedure adopted by the employer (*J Sainsbury plc v Hitt* [2003] ICR, 111, CA).

33. In determining whether the employer has acted reasonably, the whole process, up to and including an appeal, must be taken into account: *Taylor v OCS Group Ltd* [2006] IRLR 613.

Polkey reduction

34. Where an employer can show that had it followed a fair procedure it would still have resulted in dismissal, then the compensatory but not the basic award may be reduced (the '*Polkey*' reduction) relying on section 123(1) ERA. There is no need to take an all or nothing approach to this. If there is doubt as to whether or not the employee would have been dismissed, this can be reflected by reducing the compensation by a percentage reflecting the chance that the employee would have lost her job anyway. S.123(1) ERA 1996 provides:

> *Subject to the provisions of this section and sections 124…, the amount of the compensatory award, shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained … in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

35. In *Software 2000 Ltd v Andrews and others* UK/EAT/0533/06, the EAT said that *"the question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice."*

ACAS

36. A breach of the ACAS Code of Practice on Disciplinary and Grievance procedures does not, in itself, give rise to any legal proceedings but compliance with the Code is relevant to the question of reasonableness under section 98(4) ERA 1996 and section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides that an unreasonable failure by either party to abide by its provisions can be taken into account by a Tribunal when determining compensation.

Contributory Fault

37. A reduction to the basic award on the ground of the employee's conduct can be made where the Tribunal considers that any conduct of the complainant for the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent – section 122(2) ERA 1996. As far as the compensatory element of an award is concerned, section 123(6) ERA provides:

> *"where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding".*

38. Only actions prior to dismissal are relevant and only the employee's blameworthy conduct is relevant. A tribunal is not bound to reduce the basic and compensatory awards in precisely the same proportions but in light of the similarity between the provisions it is likely to be only in exceptional circumstances that the deductions from the basic award and the compensatory award will differ.

39. In *Nelson v BBC* (2) [1980] ICR 110, CA, the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct: (1) the relevant action must be culpable or blameworthy, (2) it must have caused or contributed to the dismissal and (3) it must be just and equitable to reduce the award by the proportion specified. In *Hollier v Plysu Ltd* [1983] IRLR 260 the EAT suggested that contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100%); largely to blame (75%); employer and employee equally to blame (50%); slightly to blame (25%). This suggestion is useful but tribunals retain discretion as to what reduction to make.

Breach of Contract/Unlawful Deduction from Wages

40. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 Article 3 provides "that proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum if the claim arises or is outstanding on the termination of the employee's employment".

Section 13 Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deductions are required or authorised to be made by virtue of a statutory provision, a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

S.13 ERA 1996 provides:

(1) An Employer shall not make a deduction from wages…unless
(a)…
(b)…
(2) …
(3) Where the total amount of wages paid on any occasion by an employer…is less than the total amount of the wages properly payable by him to the worker on that occasion … the amount of the deficiency shall be treated …as a deduction made by the employer from the worker's wages on that occasion.

We must consider what amount was due ('properly payable') to the claimant under the terms of her contract.

Accrued Holiday Pay

41. Regulation 14 Working Time Regulations 1998 provides that where the employment is terminated during the course of a leave year, the worker is entitled to be paid in lieu of accrued leave. We must determine the amount of any payment in lieu of accrued but untaken holiday by multiplying the statutory entitlement by the proportion of the leave year expired and then deducting the actual amount of leave taken.

Race discrimination

42. Section 39 of the Equality Act 2010 defines the relevant unlawful acts. S.39 provides, in so far as material:

…

(2) An employer (A) must not discriminate against an employee of A's (B) –

(a) …

(b) …

(c) by dismissing B;

(d) ….

Direct discrimination

43. Direct discrimination is defined in section 13 EqA 2010 and provides, in so far as material:

> *(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*
> *…*

44. By s.9 EqA 2010 race is a protected characteristic and race includes colour and nationality.

45. In case of direct discrimination, on the comparison made between the employee and others, "*there must be no material difference between the circumstances relating to each case*" (s.23 EqA 2010). It is axiomatic that the comparator must not share the Claimant's protected characteristic.

46. Accordingly, for the Claimant to succeed in a direct race discrimination complaint , it must be found that:-

a. the Respondent has treated the Claimant less favourably than a comparator in the same relevant circumstances;

b. the less favourable treatment was because of race as defined in s.9 EqA - causation;

c. that the treatment in question constitutes an unlawful act: here dismissal.

47. The requirement for comparison in the same or not materially different circumstances applies equally to actual and to hypothetical comparators (see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11). The courts have emphasised that there is essentially a single question: did the Claimant, on the proscribed ground, receive less favourable treatment than others? In Shamoon, Lord Nicholls noted that when determining allegations of direct discrimination, tribunals usually consider first whether the Claimant has received less favourable treatment than an appropriate comparator and then, if so, secondly, whether that treatment was on the proscribed ground ('the reason why issue'). Lord Nicholls concluded:

> *"This analysis seems to me to point to the conclusion that employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application?"*

48. The courts have encouraged the 'reason why' approach, particularly where a hypothetical comparator is relied upon. In *Cordell v FCO* [2012] ICR 280 for example, Underhill J acknowledged that where there is an actual comparator the less favourable treatment question may be the most direct route to the answer "but where there is none, it will usually be better to focus on the reason why question than get bogged down in 'constructing a hypothetical comparator"'. The Tribunal must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected

characteristic. That will usually require an examination of the mental processes of the alleged discriminator to discover what caused him to act as he did (see too, for example, Lady Hale's Judgment in *R (on the application of E) v Governing Body of JFS and others* [2009] UKSC 15 where she calls that the 'relevant reason why question'; as opposed to a consideration of the alleged discriminator's 'motive, intention, reason or purposes' (the irrelevant reason why question) (paragraph 62)).

49. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 and the revised Barton guidance (see below).

Burden of proof

50. Section 136 EqA 2010 provides, so far as material, that:

> *…*
>
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
>
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

51. The provision has been the subject of a good deal of case law. It was dealt with most authoritatively by the Court of Appeal in *Igen Ltd. v Wong [2005] ICR 931* and confirmed in subsequent cases, including *Madarassay v Nomura International Plc [2007] ICR 867 (*approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054). In *Igen* the Court of Appeal endorsed the principles set out in *Barton v Investec Securities Ltd [2003] ICR 1025*. We do not repeat the principles here. They are well known.

52. The guidance in *Igen v Wong* was approved and explained in *Madarassy v Nomura*:

> (1) The burden of proof does not pass to the employer simply because the claimant establishes a difference in status and a difference in treatment. "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination…"* [paragraph 56].
>
> *(2) ""Could ... [decide]" in section [136(2)] must mean that "a reasonable tribunal could properly conclude" from all the evidence before it"…* [paragraph 57].
>
> *(3) "[Section 136(2)] does not expressly or impliedly prevent the tribunal at the first stage* [i.e. when considering whether the ET "could conclude"]*, from hearing, accepting or drawing inferences from evidence adduced by the employer disputing and rebutting the claimant's evidence of discrimination…"* [paragraphs 71-72].

53. 'Facts' for this purpose include not only primary facts but also the inferences which it is reasonable to draw from the primary facts. Discrimination may be unconscious and people rarely admit that considerations of race played a part in their acts. If there are no

primary facts or primary facts from which inferences can be drawn supporting allegations of race discrimination, then the Claimant will not pass the first hurdle. If there are primary facts or inferences drawn from the primary facts that support allegations of race discrimination, the Tribunal must consider the Respondent's explanation.

54. If the Claimant sets up a 'prima facie case' then the burden of proof shifts to the Respondent to prove that it did not commit an unlawful act of discrimination. The Respondent's explanation must be supported by cogent evidence showing that the Claimant's treatment was in no sense whatsoever related to race.

55. A Tribunal must have regard to any relevant Code of Practice when considering a claim and may draw an adverse inference from a Respondent's failure to follow the Code.

Conclusion

Breach of contract claim (2016)

56. The burden of proof is on the Claimant to prove that she carried out work in 2016 for which she was not paid. We accepted the Respondent's evidence that they have investigated the allegation and can find no evidence of work being carried out for which the Claimant was not paid. There is no evidence of the Claimant raising the issue with the Respondent, prior to issuing her claim. We are conscious that where an issue is to be determined on the balance of probabilities, it is unusual to resort to the burden of proof to determine the issue. However, given that all we have is a bold assertion by the Claimant that she carried out some work at Grosvenor Street in 2016, in circumstances where the Respondent has checked but cannot find a record of the Claimant working but not being paid, we have concluded that the Claimant has not discharged the burden upon her. The claim fails and is dismissed.

Holiday pay

57. Given our findings of fact that the Claimant was paid accrued holiday pay upon termination the claim fails and is dismissed.

Redundancy payment

58. As to whether the Claimant is entitled to a redundancy payment, we concluded that there was a redundancy situation - the Respondent required fewer employees to carry out work at the place where the Claimant worked. However, we had no hesitation in concluding that the Claimant's dismissal was not caused by that redundancy situation. Rather, the Claimant's dismissal was caused by the Claimant's refusal to accept suitable alternative work offered to her at other sites – a refusal to obey a lawful management instruction to move to another site in central London (High Holborn or Kings Cross). In case we are wrong on that, we also concluded, as we say below, that the Claimant unreasonably refused an offer of suitable alternative employment and would not therefore, for that reason too, be entitled to a redundancy payment. The redundancy payment claim fails and is dismissed.

Unfair dismissal

59. We have concluded that the Respondent has proved that the Claimant was dismissed for a potentially fair reason namely conduct – refusal to obey a lawful management instruction to move to another suitable site (King Cross or High Holborn). That was a reasonable management instruction, given the Section 1 statement (*you will normally be based at a site upon which the company operates* (the company only operates in London) and that the sites offered were in Central London and close to the Shaftsbury Avenue site and/or the journey to and from the Claimant's home would have been faster. We concluded that the Respondent acted reasonably when it asked the Claimant to move to either of those alternative central London sites. The offer of Kings Cross and/or High Holborn was objectively suitable and the Claimant unreasonably refused the offer (the Claimant's journey to Kings Cross at the relevant times of day would have been faster, according to the Google Maps search undertaken by the Respondent, and would have allowed her to continue, as she had been when she worked at Shaftsbury Avenue, to return home in time to take her daughter to school). The Claimant's action in refusing the offer was, we concluded, unreasonable. We concluded, without hesitation, that the dismissal was within a range of reasonable responses both substantively and procedurally. Mr Bradley had concluded that he had no alternative to dismiss in the circumstances where the Claimant was not attending work and was unwilling to accept the offers of suitable alternative employment put forward or to suggest alternatives, despite being asked to do so. In all the circumstances, the decision to dismiss was within a range of reasonable responses. The Claimant had been warned that she might be dismissed. She was invited to disciplinary and appeal hearings. She attended the disciplinary hearing. She participated in it. She had been absent from work for some 4 months. It is, in the end, hard to see what else the Respondent could have done. The unfair dismissal claims fails and is dismissed.

Unlawful deduction of wages (2018)

60. We have to decide what was properly payable to the Claimant for the period January to April 2018, if anything. The Respondent asserts that the Claimant was employed on a zero-hours contract and not entitled to receive at least 15 hours paid work per week. We have to decide whether there was a term of the contract (express or implied) entitling the Claimant to receive at least 15 hours' paid work per week or whether the Claimant was, on the contrary and as the Respondent asserts, employed on a zero-hours contract.

61. We had regard to the Section 1 statement, which the Claimant signed. The s.1 statement states that the Claimant's hours are 6.00am – 8.30am (her hours were subsequently varied to 5.00am - 8.00am). The clause stipulates standard working hours in the normal working week and a weekly wage. That cannot, in our view, be accidental. The s1 statement does not make any reference to the Claimant being employed on a zero-hours contract; instead it refers to the hours that the Claimant is expected to work (which were amended at a later date) and the Claimant's weekly wage and it is good evidence of the contractual position. It is expressly stated that the employment is for a number of fixed hours per week. We had regard to the fact that the s.1 statement states that the '*hours and days may be subject to change in accordance with the Clients['] requirements*'. The s1 statement also provides that the Claimant may be requested to work additional hours (for an overtime payment). We must consider the ordinary and natural meaning of the words; if there is ambiguity, we must construe the words objectively, as best we can, in

the context of this employment (see, for example, *Investors Compensation Scheme Ltd v West Bromwich Building Society and others* [1998 1All ER 98). We recognise that clients' requirements in the cleaning industry change from time to time and that zero-hours contracts are commonplace in the industry. However, we concluded that the ordinary and natural meaning of the words is that it may permit the Respondent to change the Claimant's hours of work (i.e. start and finish times) and/or days of work (e.g. Wednesday-Sunday, instead of Monday-Friday), in response to its clients' requirements but that the Claimant was entitled to receive a set number of hours of paid employment per week. The s1 statement also provides that the Claimant may be requested to work additional hours (for an overtime payment). We concluded that the ordinary and natural meaning that the words the s.1 statement (as good evidence of the contractual position) would convey to an employee and employer in the position they were at the time of entering the contract, was that the Claimant was entitled to receive a minimum hours of work per week for a weekly wage and that she may be asked to work additional hours for additional payment. The contract does not, in our view, provide that the Respondent may provide the claimant with zero hours. We note that the Claimant was not asked to indicate her availability each week/month, as would be usual in our experience, in the case of a zero-hours contracts.

62. We also had regard to the Employee Handbook. Leaving aside for the moment, whether any particular parts of the handbook were incorporated into the Claimant's contract, we concluded that there is nothing in pages 6-3 or 7-7 to support that the Claimant was employed on a zero-hours contract. If anything page 7-7 goes against the Respondent's assertion that the Claimant was employed on a zero-hours contact. It provides for 'lay-off/short-time working' in the event of a reduction in work. The Respondent did not seek to invoke the clause (for obvious reasons). Finally then, we considered whether page 4-4 assisted the Respondent's assertion that the Claimant was employed on a zero-hours contract and was not entitled to receive 15 hours paid work per week. We concluded it did not. We accept that the Claimant's manager would complete time-sheets and Mr SM's witness statement [97 – 98] confirms that he did indeed complete timesheets but that fact does not, in our view, demonstrate that the Claimant was employed on a zero-hours contract and not entitled to receive 15 hours paid work per week. Many employees employed on regular hours' contracts are required to clock in and out of work, in our collective experience. If the Claimant did overtime, that had to be recorded for payment purposes because she was entitled to be paid for overtime. We note that at [65] the Respondent informs the Claimant that she is not being paid and that at [40] it stated that the Claimant will be paid for duties accepted and undertaken. However, the fact that the Respondent considered the Claimant to be employed on a zero-hours contract does not mean that she was.

63. In conclusion, the contractual position is that the Claimant was entitled to receive at least 15 hours paid work per week - she was not employed on a zero-hours contract. The failure to pay the Claimant for the period January to April 2018 therefore amounts to an unlawful deduction from wages contrary to Section 13 ERA 1996. The parties agree that the Claimant's gross weekly wage was £120 per week and that the period of deduction is 16 weeks. The gross sum payable is £1,920. The Claimant will have to account for the tax and NI payable, if any.

Race Discrimination

64. Finally, as to whether the Claimant was treated less favourably because of race, the unanimous judgment of the Tribunal is that the complaint is not made out and it is

dismissed. The Claimant compares her treatment to that of E and S. We had no hesitation in reaching the conclusion on the reason why question, that race played no part whatsoever in the Respondent's decision to dismiss the Claimant. The Claimant was dismissed because she refused to accept offers of suitable alternative employment and thereby refused to obey a lawful management instruction. We were satisfied that there was cogent evidence that race played no part whatsoever in the Respondent's decision to dismiss the Claimant. The Claimant's claim for race discrimination fails and is dismissed.

Employment Judge Scott

1 July 2019