



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE C HYDE (sitting alone)

BETWEEN:

(1) MR J GASPAR
(2) MR T DAVID

Claimants

AND

CRYSTAL SERVICES PLC

Respondent

ON: 5 March 2020

Appearances:

For the Claimants: Ms A Beech, Trade Union Representative
Interpreter for Claimants: Ms Pardington (Portuguese/English)
For the Respondent: Mr T Jerman, Director

JUDGMENT – RESERVED IN PART

The Judgment of the Employment Tribunal was:

1. The constructive unfair dismissal complaint of Mr David was dismissed forthwith on withdrawal.
2. The complaints that the Respondent had failed to provide written reasons for dismissal were dismissed forthwith on withdrawal by the Claimants.

The reserved Judgment of the Employment Tribunal is that:

3. **The First Claimant, Mr Gaspar's complaints of unfair constructive dismissal, and unfair dismissal under sections 95 and 98 of the Employment Rights Act 1996 were not well founded and were dismissed.**
4. **Therefore, in respect of Mr Gaspar, no consideration needed to be given to increasing any award for compensation for unfair dismissal under sections 1 and 124A(b) of the Employment Rights Act 1996 read with section 38 of the Employment Act 1992.**
5. **The Second Claimant Mr T David's complaint of ordinary unfair dismissal under sections 95(1)(a) and 98(4) of the Employment Rights Act 1996 was not well founded and was dismissed.**
6. **No consideration therefore needed to be given to increasing any award for compensation for unfair dismissal under sections 1 and 124A(b) of the Employment Rights Act 1996 read with section 38 of the Employment Act 1992 in respect of Mr David.**
7. **The alternative complaints by both Claimants that they had suffered unlawful deductions of wages from 12 April 2019 were not well founded and were dismissed.**
8. **The holiday pay claims by both Claimants were not well founded and were dismissed.**

REASONS

1. **Written reasons are provided for the reserved judgment above. They are provided only to the extent that the Tribunal considers it necessary to do so for the parties to understand why they have won or lost. Further, the reasons are set out only to the extent that it is proportionate to do so.**
2. **All facts, whether or not stated in these reasons, were found on the balance of probabilities.**

Preliminaries

3. **These claims arose out of the termination of a cleaning contract on 12 April 2019 on which the Claimants had been employed by the Respondent.**
4. **The early conciliation ("EC") dates for Mr Gaspar were 3 July to 3 August**

2019. In respect of Mr David, they were 17 July to 15 August 2019.

5. The single claim form submitted on behalf of both Claimants was sent to the Tribunal on 31 August 2019 without the details of their claims being attached, apparently in error. However, the nature of the claims being made was identified on the form. The attachment, containing the particulars, was subsequently submitted by the Claimants' representative by email on 25 September 2019, following an email from the Tribunal on 18 September 2019 indicating that the particulars were missing.
6. The claims were then served on the Respondent on 16 October 2019 and separate response forms in respect of each Claimant were duly submitted on 4 November 2019. In each response form, the Respondent set out very briefly in section 6.1, the grounds on which it defended the claim. The basis of the defence was almost identical in respect of each Claimant.

Evidence and Documents

7. Each Claimant gave evidence and relied on a witness statement as his evidence-in-chief. These were marked [C2] and [C3] from Mr Gaspar and Mr David respectively. The content of the witness statements was virtually identical. As set out in the heading above, each Claimant was assisted in giving evidence by the Interpreter. Further, on behalf of the Respondent, Mr Underwood, General Manager, gave his evidence in chief also by way of a witness statement dated 2 March 2020 which the Tribunal marked [R2].
8. In addition, Ms Beech had prepared a skeleton argument dated 5 March 2020 which the Tribunal marked [C1]. It was produced at the start of the hearing and helpfully set out the relevant law and the Claimants' submissions. The Respondent was given a copy of it. It also contained a statement of the Issues.
9. The Respondent had prepared a bundle of documents of approximately 75 pages which was marked [R1]. As the Respondent was not legally represented and not familiar with the process, it was laid out and paginated in a somewhat unusual manner. Further, for the same reasons, the Respondent had included certain without prejudice documents in the bundle. By agreement, these were removed at the beginning of the hearing.
10. There were also issues at the commencement of the hearing about whether some additional documents which the Claimants' representative had become aware of during the process of finalising witness statements, should be included in the hearing bundle. They were documents which had not been disclosed by either side, probably, due to oversight. In the event, these were included by agreement.

11. As these matters were all set out in detail in paragraph 5 of Ms Beech's skeleton argument, they are not repeated in these reasons.

The Issues

12. By the end of the case, the following issues were agreed. The Tribunal was grateful to Ms Beech for submitting to the Tribunal the re-drafted list of issues at the Tribunal's direction which was sent to the Tribunal by email on 11 March 2020 at 12:13. The content of that list has been cut and pasted below.

"ISSUES IN THE CASE

8. There are 4 issues in the case:
- (i) Has either JG or TD been ordinarily unfairly dismissed?
 - (a) Is the complaint of ordinary unfair dismissal out of time?
 - 1. Was it reasonably practicable for the claim to have been brought in time?
 - (b) Was either JG or TD dismissed and if so, when?
 - (c) Has R shown that there was a potentially fair reason for dismissal i.e. redundancy or some other substantial reason?
 - (d) Was dismissal a reasonable sanction?
 - (e) Did R follow a fair procedure?
 - (ii) Has JG been constructively dismissed?
 - (a) Did JG resign and if so, when?
 - (b) Did JG resign because of R's failure to provide suitable alternative offers of work?
 - (c) Did R breach the implied term of mutual trust and confidence?
 - (d) Has R shown that the conduct which brought JG to resign was for a potentially fair reason?
 - (e) Was R's conduct with the range of reasonable responses and was substantively and procedurally fair?
 - (iii) If there was no dismissal, has either JG or TD suffered an unlawful deduction to their wages?
 - (iv) Has either JG or TD received a statement of written particulars of employment?"
13. At the commencement of the hearing, Ms Beech confirmed that Mr David wished to withdraw his claim for constructive dismissal. The Tribunal

accordingly dismissed that complaint on withdrawal.

14. Thus, both Claimants alleged that they had been actually unfairly dismissed under sections 95(1)(a) and 98(4) of the Employment Rights Act 1996 (“the 1996 Act”), but only Mr Gaspar contended, in the alternative, that he had been constructively unfairly dismissed (under sections 95(1)(c) and 98(4) of the 1996 Act).
15. Both Claimants further argued, in the alternative, that if they had not been dismissed on 12 April 2019, they had suffered unlawful deductions from their wages, in effect from the end of the work at BCC until they were eventually dismissed.
16. It was further apparent, by the beginning of the hearing on 5 March 2020, that the Respondent had paid both Mr Gaspar and Mr David accrued holiday pay in respect of the hours that they had worked at BCC (pp 19D and 20D). This was consistent with the omission of any reference to these claims in the written Skeleton Argument prepared on behalf of the Claimants [C1].
17. In those circumstances, the Tribunal found that the holiday pay claims were not well founded and were dismissed.
18. Further, both Claimants complained that they had not been given a written statement of terms and conditions of employment in compliance with section 1 of the Employment Rights Act 1996, and that therefore if they succeeded in their substantive complaints, the Tribunal should consider increasing any awards under the provisions of section 124A(b) of the Employment Rights Act 1996.
19. Finally, as recorded in the judgment above, both Claimants withdrew their claims alleging failure to provide written reasons for dismissal (section 92 of the Employment Rights Act 1996). Those complaints were therefore dismissed on withdrawal.

Relevant Law

20. The central argument advanced by the Claimants in relation to the unfair dismissal complaints was whether their contracts of employment had each been terminated by an extreme and unilateral change in terms when the Brixton Road site was closed: *Hogg v Dover College* [1990] ICR 39.
21. The Tribunal was grateful to Ms Beech on behalf of the Claimants for setting out an outline of some of the relevant case and statute law in her skeleton argument which also covered other matters. As all parties had a copy of this document, it is not proportionate to repeat its contents in these reasons.

22. In addition, the Tribunal had regard to the applicable law in relation to the Tribunal's jurisdiction (time limits) under the Employment Rights Act 1996.
23. An unfair dismissal claim usually has to be presented to a tribunal before the end of the three-month period starting with the effective date of dismissal: (as defined in section 111(2)(a), ERA 1996), unless that deadline has been extended by initiation of the Acas early conciliation process in the relevant timeframe.
24. A tribunal may only extend time for presenting a claim where it is satisfied in accordance with section 111(2)(b), ERA 1996 that:
 - a. It was "not reasonably practicable" for the complaint to be presented in time.
 - b. The claim was nevertheless presented "within such further period as the tribunal considers reasonable".

It is for a claimant to prove that it was not reasonably practicable for him to have presented his claim in time.

25. The following relevant factors can be taken into account by the Employment Tribunal when considering whether to grant an extension of time:
 - a. The manner of, and reason for the dismissal.
 - b. The substantial cause of the claimant's failure to comply with the time limit.
 - c. Whether there was a physical impediment, such as illness or a postal strike.
 - d. Whether and when the claimant knew of his rights.
 - e. Whether the employer had misrepresented any relevant matter to the claimant.
 - f. Whether the claimant had been advised by anyone and the nature of the advice given.
 - g. Whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.
26. The test is quite strict, and an extension of time is only granted if a claimant establishes valid grounds.

Facts Found and Conclusions

27. The Respondent had cleaning contracts with a number of clients across London. The Respondent employed staff who provided cleaning services to the third party clients.
28. Both Claimants had worked for the Respondent as cleaners since July

2012. They initially cleaned premises occupied by the Respondent's client (referred to hereafter as "BCC"), in the Waterloo area, and then they moved with the client when it moved to Brixton Road in South London. Mr Gaspar agreed that no new contract was given to him when BCC moved from Waterloo to the Brixton Road premises. Mr David gave no evidence on this to the contrary.

29. It was not in dispute that 12 April 2019 was the last day on which the Claimants worked for the Respondent on the BCC cleaning contract.
30. The BCC contract was the only one that Mr Gaspar worked on for the Respondent, but Mr David worked at two other locations (Curzon and Riyadh Bank) for the Respondent at all material times, and his employment at those other locations continued after the termination of the BCC work.
31. It was further not in dispute that the Claimants worked alongside another colleague, Bernadino, at the BCC premises at the relevant time. His precise dates of employment were unclear. He was not a Claimant and did not give evidence in this case, but he was mentioned in the context of suitable alternative offers of work.
32. Both Claimants confirmed in the first paragraph of their respective witness statements that they had signed a contract at the commencement of their employment. However, no such document was produced to the Tribunal. The Tribunal therefore considered all relevant documentary and other evidence, to determine the relevant terms of the Claimant's contracts and the legal effect of the termination of the BCC work.
33. The Respondent relied on a statement of terms and conditions as set out in their Employee Handbook (pp 1R-1A of the bundle, internal pages 1-31).
34. The internally numbered pages of the Handbook (pp1P – 1A) contained various sections, some of which are referred to here.
35. In some respects, the copy of the Handbook produced appeared to be a draft. There were, for example, provisions covering the same matters more than once and not all of the sub-headings were contained in the Contents list at the beginning. Thus, for example, the statements in relation to pay, place of work, and hourly rate and working hours were set out at pages 18-19 in the first instance and then repeated at pages 21-22. Happily, both sets of text were identical.
36. The Respondent produced two front pages of the Handbook in the bundle (pp1R and 1Q). The first (p1R) bore no date but had on one half of the page copied for the bundle, what appeared to be part of a template on

which could be recorded information about the employee's entitlement to work, e.g., work permits, etc, their bank or building society account details for payment, confirmation that the booklet had been issued and that the employee accepted its contents as setting out the contract of employment. There were also sections for verifying that the induction had been carried out as set out in the document and that the provisions in relation to the making of deductions from wages were understood.

37. The second front page of the Handbook (p1Q) bore a footer stating "... Issue 1/March 18". This page did not have the continuation template described above and bore a different logo for the Respondent. It referred to Mr Jerman being the Managing Director and was followed in the bundle (pp1P – 1A) by what appeared to be a version of continuously numbered pages of a Handbook with internal pagination from 1 – 31 and which was also reflected in the Contents listed on p1P. However, the footer with the issue number and date on p1Q did not appear on these subsequent pages.
38. The Tribunal considered that it was at least possible that each of pages 1R, 1Q and 1P was created at different times. It was certainly likely that p1R was created at a different time to the remaining pages (1Q – 1A).
39. In the circumstance, the Tribunal considered that the documentary evidence produced by the Respondent as evidence of the terms and conditions of employment was not very cogent, but to the extent that it was consistent with the Claimants' evidence about the way in which the contract operated, it was potentially corroborative.

Provision of statement of terms and conditions

40. In relation to the question whether the Claimants had been given a written statement of terms and conditions of employment as required by section 1 of the 1996 Act, the Respondent's case was that when the Claimants started in 2012, the company had a paper-based Handbook with a perforated page for employee details (p1R). Its case was that each Claimant had signed a page identical to the blank template on p1R, which required notification of the payment details of the employee. If the Claimants had not provided the information required on this page and signed it, they would not have been paid, Mr Underwood argued. He further contended that the signed page was saved digitally as a pdf document, but according to information received by Ms Debbie Turner (the Respondent's Payroll and Personnel Manager), this document was lost when the Respondent had a change of servers. The procedure subsequently was that new starters were signed on electronically.
41. The Respondent relied on the necessity of completing the details in the template from the Handbook referred to above as a prerequisite for each

Claimant to have been paid. Mr Underwood also contended that it was evidence which tended to point to the Claimants having been provided with the paper Handbook.

42. The Respondent's case was also that even though the Claimants did not have a copy of and could not produce a signed copy of the statement of terms and conditions, they were well aware of them.
43. In his oral evidence Mr Gaspar indicated that he recognised page 1R when it was put to him. He described that after working for the Respondent for a while, a manager had turned up and had these documents with him and showed them to himself and Mr David. He estimated that this was maybe three to four months after starting. He confirmed that he had produced a passport and given details of his address, bank details, and national insurance number but he indicated that he did not remember receiving the Handbook.
44. The Tribunal concluded that the Respondent's documentation before the Tribunal did not establish that statements compliant with section 1 of the 1996 Act had actually been provided to the Claimants. In relation to the duty under section 1, I was not satisfied that the Claimants had been given the required statements. Whilst the Claimants agreed they had signed a contract, there was no reliable evidence before me that it had been given to them.
45. Further, the documents relied on by the Respondent and produced to the Tribunal did not establish on the balance of probabilities that the Claimants had each been given a statement which set out particulars of the names of the Claimants or of the dates when the employment began or indeed of the date on which the period of continuous employment began ("the required information").
46. It was also questionable whether the copy document which the Respondent relied on as representing a copy of the ones given to the Claimants, complied with the requirement under section 1(4)(a) to provide information about "the scale or rate of remuneration or the method of calculating remuneration". This was because it simply stated intervals and also that the pay would be for all "contracted hours". There was no reference to the remuneration applicable.
47. There was further no provision about the title of the job which the employee was employed to do or a brief description of the work for which he was employed as required under section 1(4)(f).

Relevant contractual terms

48. In order to determine the legal effect of the events which occurred at the

end of the BCC contract, I had to construe the relevant terms of the Claimants' contracts. My findings arose from the agreed evidence about the way the parties related to each other, and from any further evidence I accepted on the balance of probabilities. In some respects, it was agreed that the text of the Handbook reflected the parties' dealings with each other.

49. The relevant provisions in relation to pay were as follows: -

- 1) *"You will be paid 2 weekly, by BACS directly into your personal bank or building society account five days after the end of the pay period. Any subsequent changes in the amount of pay, statutory deductions and any deductions agreed between you and the company will be stated on your payslip.*
- 2) *You will be paid for your contracted hours actually worked.*
- 3) *Lateness for work will result in your wages being reduced accordingly."*

50. The provisions of the last sub-paragraph were not relevant.

51. Mr Gaspar agreed that the way in which he was paid was consistent with those terms of the Handbook.

52. The Tribunal found that the Claimants were paid on 13 April 2019 in respect of the two-week period from 25 March to 7 April. They were then paid again on 27 April 2019 in respect of the two-week period from 8 April to 21 April 2019 (pR1, p14NNN and 16PPP).

53. The next section under the heading "PLACE OF WORK" provided as follows: -

"You will be required to work at any place nominated by the company within reasonable daily travelling distance of your home address, and will be expected to make your own travel arrangements. The company does not reimburse travelling expenses.

You may be moved at any time from one location to another, as required by the company or the company's clients providing the travelling distance is within a reasonable distance of your home address."

54. Mr Gaspar's evidence was that he had no reason to believe that his contract with Crystal restricted his place of work to the site occupied by BCC. The Tribunal considered that this was consistent with the evidence about the fact that he had moved locations and that he worked alongside Mr David who he was aware worked at other sites through Crystal as well.

He further confirmed in oral evidence that he understood that the Respondent could move him from one location to another.

55. I therefore found that the contract allowed the Respondent to change the employee's place of work, allocating a different place of work, or terminating a current placement.
56. Neither the Handbook, nor any evidence from the parties indicated that there was any express provision about a minimum number of hours a week which the Respondent was obliged to offer, or which the Claimants were required to work.
57. The Handbook provided in relation to the hourly rate and working hours, as follows [R1, p1G/internal p19]: -

"Your hourly wage rate is minimum wage. Any wage rate notified over minimum wage includes a site bonus. This site bonus per hour may not be paid at the company's discretion if you fail to work for the full working week, arrive late or leave early. The company may at its discretion amend your hours of work in accordance with client's requirements."

58. It did not seem that the Respondent disputed the Claimants' account that for the first six years or so after their engagement, they were expected to work two hours per day from 6.00pm for five days per week. Nor was the subsequent change to their working arrangements subject to dispute. Thus, it was agreed that from January 2018 both Claimants started work at the BCC premises on Brixton Road, London, SW9 for 1.5 hours per day five days per week totalling 7.5 hours per week at a rate of £8.21 per hour equals £61.58 per week.
59. The Claimants described actually working more hours than this, i.e., ten hours, but they accepted that they were only entitled to be paid for 7.5 hours.
60. The evidence as to pay rates supported a finding that these varied depending on the site and the contract with the Respondent's client. Further, as set out above, the Claimants had had their hours on the contract reduced without protest. This clause of the Handbook therefore appeared to reflect the contractual terms in this respect.
61. The Handbook contained a statement of the notice pay to which the employee was entitled (at internal pages 28-29; pp1C-1B of the bundle). Thus, employees were entitled, according to the Handbook, after three months of service to notice of one week for up to two years' service and after two years' service, one weeks' notice for each year worked up to a maximum of twelve weeks. In other words, it reflected the statutory entitlement under the 1996 Act. There was no suggestion of any greater

entitlement.

62. The Tribunal concluded from the agreed evidence about the work, working hours, the Claimants' expectations about place of work and alternative positions, and from the circumstances of the business, that the Claimants were engaged by the Respondent to work at any premises to which the Respondent allocated the Claimants. There was a reference in the Handbook to a condition that the work offered had to be within a reasonable travelling distance of the employee's home address. However, it did not appear to the Tribunal that the Respondent was contractually prevented from offering work at sites further than reasonable travelling distance from the employee's, nor was there anything preventing the employee from taking up such an offer. There was an example of the former having occurred in this case.
63. The Tribunal next considered the circumstances in which their work at BCC came to an end, and whether it constituted a dismissal of either Claimant, and if so when the dismissal(s) took effect.
64. Save where expressly stated to the contrary, the Tribunal found that these Claimants spoke on behalf of each other in relation to the events which occurred in the period from early to mid-April 2019 when the BCC contract ended. The discussions about alternative placements from 15 April 2019 took place with each Claimant individually on their own account.
65. In early March 2019 (C2, para 5) about a month before BCC vacated the premises, the Claimants noticed when they attended work that BCC had started packing up their belongings.
66. A little while later, in about mid-March, (C2, para 6) Mr Gaspar called his manager Alex Trujillo who was responsible for the site, to enquire what was going on. Mr Trujillo reassured him and said that Mr Gaspar should carry on as normal. Mr Trujillo also talked about contacting the Respondent and then getting back to the Claimants.
67. In the event, no one from the Respondent contacted the Claimants until the Claimants themselves got back in touch on about 10 April 2019.
68. It was the Respondent's case that it was not until Friday, 29 March 2019 that BCC notified the Respondent that they would be leaving the site. There was no documentary or other corroboration of this assertion by Mr Underwood, nor was there any evidence to contradict it. The Tribunal accepted it on the balance of probabilities.
69. Further, it was the Respondent's case that Mr Trujillo, the manager responsible for the site, was on holiday throughout the shut-down notice period (JU's statement, para 3). The Tribunal accepted the latter

contention because that was consistent also with the evidence from the Claimants on this issue.

70. On Wednesday, 10 April 2019 the Claimants went to work as usual and saw that the premises had been deep-cleaned and were ready for occupation by new tenants. Either Mr Gaspar or Mr David (it matters not) sent a message to Alex Trujillo questioning what was going on (C2, para 8). They received no response. One or other of them called Mr Trujillo and he told them that he was on holiday and would be back in a couple of days and that he would call Mr Gaspar on his return to work on the Monday (15 April 2019).
71. On Thursday, 11 April 2019 Mr Gaspar sent a WhatsApp message to Alex Trujillo (pp1AA and 33B) about the client's imminent change of location. Mr Trujillo referred him to another manager named Jessica. After ascertaining from Mr Trujillo (in Portuguese) that Jessica could speak Spanish, Mr Gaspar agreed to contact her in an exchange of messages just after midday on 11 April 2019. He then telephoned Jessica and she referred him back to Alex. The first language of both Claimants was Portuguese, but they could understand Spanish.
72. That evening, between 6pm and just before 11pm, Mr David exchanged WhatsApp messages with Jessica (in English) (p1BB). He reported that he had been told by Alex to keep going to work and that when the client had fully transferred, he would also be moved (p1BB). In her response Jessica referred to having had a conversation earlier that day with another person who the Tribunal found, based on her description, was Mr Gaspar. She indicated that she had no knowledge of the contract or why Mr Trujillo had referred the Claimants to her. She suggested that the Claimants should contact Mr Underwood, who she described as "our company manager", the following day. She gave Mr Underwood's mobile telephone number to Mr David. Mr David acknowledged receipt of Jessica's message at just after 11.30am the following day and thanked her for her assistance.
73. Mr Jeff Underwood, as the Respondent's General Manager, oversaw the Regional and Area Managers.
74. The Claimants' evidence was that they did not know who Mr Underwood was, in the sense of not being familiar with him, and therefore they did not take up Jessica's suggestion.
75. It was not in dispute that Friday, 12 April 2019 was the last day worked by both Claimants at the BCC premises in Brixton.
76. On Monday, 15 April 2019, the Claimants did not receive the promised contact from Alex. Therefore, Mr Gaspar called him and confirmed that

they had stopped working and were at home. They asked about being paid and Mr Trujillo reassured them that there would be “no problem” and said that he would ask his boss and would call back.

77. It was unclear whether Mr David also sent a message to Alex asking him to find another job. This was referred to in paragraph 12 of Mr David’s statement but there was no confirmation of this in the bundle. Given the consistency of Mr David’s evidence with the contemporaneous evidence in all other respects, the Tribunal accepted this was correct on the balance of probabilities.
78. For the same reasons, I accepted the further point made by Mr David in paragraph 14 of his witness statement, namely that he had called Alex on an unspecified date at around this time and then chased him with a message, and that Alex’s reply was that the company would talk to BCC and maybe get some money from them. This tended to confirm that both employer and employee at that stage considered that there was an ongoing contractual relationship between themselves.
79. Next, on 24 April 2019 another of the Respondent’s Managers, Manuel Roca sent a message to Mr Gaspar and offered him another placement, working in the Bank area (R1, p3/1CC). Mr Gaspar rejected this offer on the basis that it was too far from his home. It was not in dispute that the premises referred to were at the Bank of India. Mr Gaspar lived in the Catford Hill area, London SE6.
80. On 27 April 2019 the Claimants, (pp 16PPP and 15000 respectively) received the last payment of wages in respect of the BCC contract from the Respondent. Both Claimants were paid fortnightly and a fortnight in arrears. Mr Gaspar initially contended that this was short pay, but this was not pursued at the end of the hearing. Moreover, the Tribunal was satisfied, having reviewed the relevant payslips, that he had been paid appropriately for work done up to 12 April 2019.
81. On 3 May 2019 Manuel Roca sent message to a Whatsapp group which included both Claimants, and an apparently identical message to Mr Gaspar individually (R1, p3/1CC). It contained an offer of alternative work in the Vauxhall Bridge area near Pimlico Station. The Respondent relied on it as a further offer of a suitable alternative position being made to the Claimants. The work was to start on the following Tuesday (which was the first working day after the Early May Bank Holiday). Mr Gaspar rejected the offer on the basis that he lived in Catford. The implication was, once again, that this job was too far away from his home address. Manuel responded that he would let Mr Gaspar know if another position became available.
82. It appeared to be agreed that following the receipt of the WhatsApp

message on 3 May 2019, a telephone conversation took place between Mr Gaspar and someone at the Respondent. Mr Gaspar explained that having received the pay on 27 April, which he considered was the wrong amount, he had chased up the Respondent.

83. Mr Gaspar also gave evidence that he asked Manuel if this job (that he was being offered) would be under a new contract and whether he would be starting from zero.
84. On 17 May 2019 Julio, another of the Respondent's managers, called Mr David and asked him if he was interested in covering the absence of someone else at Osborne's premises in London SE1. Mr David accepted this offer and commenced working there ten hours per week (two hours a day, five days per week) at £8.65 per hour. He continued working there thereafter.
85. Further, Mr Underwood said that he asked other managers to look for other sites for Mr David. It was unclear when he said he did this, and he produced no contemporaneous documentation or other corroboratory evidence. The fact that offers were made to the Claimants after 12 April was however established by the evidence produced by the Claimants of text or WhatsApp messages received.
86. In relation to the other sites which were discussed as being the potential alternative positions for the Claimants, Mr Underwood's evidence was as follows: -
 - a. During the shutdown weeks at BCC, all three cleaners (the Claimants and Bernadino) were offered work at the Bank of India by Manuel. He stated that this had occurred when Manuel called them on 1 April 2019. The Tribunal did not hear directly from Manuel and it was unclear why and how Mr Underwood knew that this was the date. It coincided with the day after he said that BCC gave them notice of termination. There was no other corroboration of this conversation having taken place. He said that he had been present in the office with Manuel when the call was made with Manuel having the mobile phone on speaker. In terms of credibility, there was also an issue because the Claimants' case was that they spoke Portuguese not English to Manuel. The Tribunal accepted this as true on the balance of probabilities as it was consistent with other contemporaneous evidence of their preferred language of communication. Mr Underwood does not understand Portuguese.
 - b. Apparently the other cleaner, Bernadino, accepted the Bank of India job which was near London Bridge/Bank and he started on 20 May 2019 and was content with that starting date as he was

away in any event for a few weeks before the start date. This was not disputed.

- c. Mr Underwood further stated that Alex offered Mr David a placement in Hammersmith on 15 April 2019, but that Mr David rejected this on 16 April stating that it was too far away and that he wanted work in London Bridge, Piccadilly, Westminster or Marble Arch. This was not in dispute and was confirmed by contemporaneous documentation (R1, p2 and 1AA). It was not in dispute that Mr David lived in New Cross, London SE14.
- d. Mr Underwood contended that Mr David had not accepted the Bank of India work (offered to Mr Gaspar on 24 April 2019) which Bernardino accepted even though it was near London Bridge, because, as he stated on the phone during the conversation with Manuel, Mr David did not believe that there was no work for him at the new premises to which BCC was relocating and he wanted to hold out for that job when it became available. Mr Underwood's case was that he had told Mr David that there were already cleaners attached to those premises working for a different contractor as BCC were simply merging offices. He stated that Mr David refused to believe this. The Tribunal accepted Mr Underwood's evidence on this on the balance of probabilities for the following reasons:
 - i. In the particulars of Claim (R1, p12D), the Claimants made no reference to any of the job offers made to them after the end of the BCC contract. Mr David did not dispute he had been offered the Hammersmith Arena job on 15 April, as this was confirmed in writing, but in his witness statement, he had made no reference to this offer. This was also relevant as the Bank of India job was in the Bank area, which is close to London Bridge, an area Mr David had stated to Manuel in the text that he was willing to work in.
 - ii. In one of his digital messages to Jessica on 11 April (R1 p1BB), Mr David told her that before BCC had vacated the premises, his manager had told him to keep going to work and that when BCC had fully transferred, he would also be moved, but this had not happened.
 - iii. Further, in his witness statement (at para 14), Mr David described having sent Mr Trujillo a message, at some point after 12 April, in which he suggested to Mr David that if he could not do anything about the problem, Mr Trujillo should talk to the company. He described that Alex responded that the company would talk to BCC and maybe get him some money. The time frame on his account was not precise but was consistent with the timing of the offer of the

Bank of India job to Mr Gaspar on 24 April. Mr David did not produce written confirmation of the messages he referred to between himself and Alex Trujillo.

- iv. Finally, in para 16 of his witness statement, Mr David complained that he had not been told what was happening to his job at BCC.
 - v. There was no documentary confirmation of Mr Underwood's case that the Bank of India job was also offered to Mr David (as opposed to Mr Gaspar) on 24 April, but the Tribunal considered that it was likely on the balance of probabilities that such an offer was made at the same time as it was made to Mr Gaspar, and that it was also rejected by him for the reason that Mr Underwood described.
87. The Respondent further argued that Mr David failed to accept a reasonable alternative job offer at the Bank of India, in a situation in which his previous placement had ended, thus potentially making him redundant. It was not in dispute, however, that the Bank of India work had not been due to start until 20 May 2019 which would still have entailed a delay of about five weeks during which there was no work for Mr David.
88. The Respondent's position in relation to the possible entitlement of Mr David in relation to a redundancy dismissal was as follows: -
- a. That he was notified that the office in SW9 was closing on 1 April 2019 and he worked two weeks of his notice at £60.00 per week. Therefore, if he had been made redundant, he was entitled to the remaining four weeks' notice at £60.00 per week equals £240.00; and the equivalent of nine weeks' pay as a redundancy payment. Given that Mr David was over 41 years of age for each of the 6 years that he was employed equals $1.5 \times £60.00 \times 6$ equals £540.00.
 - b. As set out above, it was not disputed by 5 March 2020 that Mr David had received his accrued holiday pay. Therefore, it was said that the total entitlement in respect of a redundancy dismissal was £780.00.
89. In relation to Mr Gaspar, Mr Underwood relied on identical evidence including that he had made a phone call on 1 April 2019 to Mr Gaspar to tell him that the cleaning would be stopping at that building and that there were no positions at the site that the BCC staff were moving into and that the Respondent would look to offer him another site. He explained that he had made this contact because Mr Trujillo was on annual leave. There was no contemporaneous corroboration of this telephone call. The Claimants disputed this, and it was not referred to in any of the

contemporaneous documents produced, nor was it consistent with them. The Tribunal considered that if Mr Underwood had already spoken to the Claimants on 1 April, they would not have been searching for answers about what was going on in the subsequent days of April prior to 12 April 2019 in their messages to other managers (pp1BB and 33B).

90. On the balance of probabilities therefore, I rejected the evidence that the Claimants had been given notice of termination of their employment prior to 12 April.
91. Mr Underwood further stated that Mr Gaspar was also offered a job in SW1 near Pimlico by Manuel by telephone at a time when Mr Underwood was also in the office with Manuel, but that Mr Gaspar declined it but did not give a reason for this. This was consistent with the findings made above about Mr David's expectations about work at the new BCC premises, and with the history of the two Claimants having previously moved with BCC to the Brixton office.
92. In Mr Underwood's statement this happened prior to the text offering alternative employment on 24 April 2019 at the Bank of India. The Bank of India offer was the first offer of alternative work for Mr Gaspar which was corroborated by a contemporaneous document by way of a print-out of the text message from Manuel. I therefore concluded that this was the date on which that offer was first made.
93. Thereafter, there was contemporaneous documentary corroboration of the Respondent's offer through Manuel to Mr Gaspar (and to the 'Group') of alternative work in the Vauxhall Bridge area, near Pimlico Station, London SW1 post on 3 May 2019 [R1, p3].
94. Ms Donda sent an email on 9 May 2019 to the Respondent [R1, pp7 & 6], introducing herself as Mr Gaspar's Union representative. She asked for a reason for the dismissal. Ms Turner who was Payroll and Personnel Manager for the Respondent replied on 10 May 2019 to say that Mr Gaspar had not been dismissed, that he had been offered two alternative jobs but had declined both. She listed that Mr Trujillo had offered him a job at Areen (sic) – taken by the Tribunal to be a reference to the Hammersmith Arena - and that Manuel Roca had offered Mr Gaspar a job at the Bank of India. On the evidence before the Tribunal, I concluded that these were references to job offers on 15 and 24 April respectively. She indicated that Mr Gaspar had declined both jobs and therefore "made himself out of work".
95. Ms Donda responded by email dated 17 June 2019 to dispute this, requesting at the same time a copy of Mr Gaspar's contract which she stated she had been instructed that Mr Gaspar had not yet received. She recorded also that Mr Trujillo with whom she had communicated, had

indicated that Ms Turner would send a copy of the contract but that to date Mr Gaspar had not received it. She further made the point that the alternative offers of employment were only made weeks after 'they' were initially dismissed, and the site had closed. She also stated that no information had been given to Mr Gaspar before the closure of the site [R1, pp 7 & 6].

96. Ms Turner responded by email dated 18 June 2019 [R1, pp 9 & 8] providing a copy of the staff Handbook and reiterating that it was the Respondent's position that Mr Gaspar had left the company. She stated that he had been offered other sites as soon as he finished at the BCC site. She compared his position to that of Bernadino who took one of the Bank of India jobs as confirmation that it was a suitable alternative.
97. There was no suggestion by anyone that Bernadino had been paid anything in respect of the hours lost when the BCC contract ended.
98. The Tribunal was further satisfied that no oral or written offers of alternative placements were made to the Claimants prior to 12 April 2019, the date on which it was agreed they last worked under the Brixton Road contract.
99. Indeed, the first suitable offer was not made until 24 April 2019 when Mr Gaspar received a text message from Mr Manuel Roca.
100. Mr Underwood contended that both the Bank of India job in the 24 April 2019 text and the Pimlico job in the 3 May 2019 text had been offered to the Claimants previously orally over the telephone.
101. The Tribunal did not accept that this was credible evidence. The wording of the texts set out above did not suggest that they were repetitions of previous offers. Further, the Respondent produced no documentary evidence to establish that these positions had been available prior to the dates that appeared in the texts.
102. The failure to manage the ending of the BCC placement appropriately was also consistent with the Respondent's case that the client gave short notice, and with the agreed fact that the manager dealing with that site was on holiday from the beginning of April 2019.
103. Mr David started work on another of the Respondent's contracts on 17 May 2019 at two hours per day, five days a week at a slightly higher rate of pay.
104. The Tribunal considered what the effect of these findings of fact was in terms of the Claimants' contracts of employment.

105. The Claimants argued that they had been dismissed by reference to the principles in the *Hogg v Dover College* case, in that by removing the work/hours/pay to which they were entitled under the BCC contract, the Respondent had unilaterally imposed a substantial change to the Claimants' terms and conditions of employment.
106. I was not satisfied that the employment contracts entitled the Claimants to a minimum number of hours, nor could such a term be readily implied into their contracts. It did not appear therefore that the removal of the BCC hours constituted a breach of contract by the Respondent, entitling Mr Gaspar to claim that he had been constructively dismissed.
107. Further as appears from the facts found above, I was not satisfied that the Respondent had actually dismissed either Claimant at any point. The Claimants' account was inconsistent with this having occurred on 12 April. Then the Respondent continued after 12 April to offer both Claimants alternatives, and the Claimants continued to await placements from the Respondent. There was moreover no obvious date on which such an event could be said to have occurred.
108. The unfair dismissal complaints therefore were not well founded and were dismissed.
109. The alternative claims for unlawful deductions of wages could also not succeed in the light of my finding that there was no entitlement to a minimum number of hours.
110. In all those circumstances, it was neither proportionate nor necessary to consider jurisdiction/time points either.

Employment Judge Hyde
Dated: 18 January 2021

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