Case Nos: 2303842/2018
2303860/2018

EMPLOYMENT TRIBUNALS

Claimants: (1) Mr I K Aniffa
(2) Ms A Szomolai

Respondent: Dall Cleaning Services Plc

Heard at: **London South Employment Tribunal (by CVP)**

On: **22-24 March 2021**

Before: **Employment Judge Ferguson**
Members: **Ms C Edwards**
Ms S V MacDonald

Representation
Claimants: (1) In person
(2) Mr I Aniffa (husband)

Respondent: Mr C Dall (co-owner and managing director)

JUDGMENT having been sent to the parties on 29 April 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. The Claimants are a married couple. They were both employed by the Respondent and were dismissed by reason of redundancy on 23 July 2018. They brought complaints of unfair dismissal and various complaints under the Equality Act 2010 by claim forms presented on 25 October 2018 (following early conciliation which took place in both cases from 13 to 25 September 2018).

2. Because of restrictions related to the Covid-19 pandemic the hearing took place as a remote video hearing with the consent of the parties.

3. The issues were agreed at a preliminary hearing on 12 July 2019 and are as follows:

1. Unfair dismissal claim – both claimants

1.1. What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for section 98(2) Employment Rights Act 1996 namely redundancy.

1.2. Was the dismissal procedurally fair? To be considered are whether the selection process was carried out fairly, whether the consultation process was genuine and whether suitable alternative employment existed.

1.3. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer in all the circumstances?

1.4. If the dismissal was procedurally unfair, what percentage chance was there of the claimant being fairly dismissed in any event?

2. Section 13: Direct discrimination on grounds of race – Mr Aniffa only

The claimant identifies as being of Indian nationality and not white.

2.1. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely*:*

2.1.1. Investigating the claimant because someone else had done something wrong and receiving a written warning on 28 June 2017

2.1.2. *Sending the claimant a letter of concern on 24 January 2018*

2.1.3. Sending the claimant an email on 20 February 2018 and inviting him to attend a meeting which turned into a disciplinary meeting against him

2.1.4. The area manager, Marcello, not speaking to the claimant from 26 June 2018 until the claimant's dismissal in particular with regard to issues regarding and necessary for him to do his work ***[withdrawn; see below]***

2.1.5. The area manager, Marcello, accusing the claimant of harassing and bullying an area supervisor called [Luis] without any proper investigation.

2.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on a hypothetical comparator.

2.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

2.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

3. Section 13: Direct discrimination on grounds of marriage – Ms Szolomai only

The claimants are married to each other.

3.1. Did the respondent dismiss Ms Szolomai because she was marred to Mr Aniffa?

3.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on a hypothetical comparator.

3.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

3.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

4. Section 13: Direct discrimination on grounds of sex – Ms Szolomai only

4.1. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely*:*

4.1.1. Excluding her from a meeting on 16 July 2018

4.1.2. The area manager, Marcello, making assumptions about the work that she could do and in particular refusing to give her the cleaning schedule in June 2018 when her male colleagues were given it. When questioned about why he did this he confirmed on 23 July 2018 that it was because he could trust them to get the job done.

4.1.3. Undertaking a disciplinary investigation of her allegedly overtaking breaks on a day when she was not scheduled to work ***[withdrawn; see below]***

4.1.4. Changing the cleaning schedule/shift pattern so that the cleaners were working at hours that she could not supervise because of her child care commitments which in turn led to a reduction of her duties ***[pursued as indirect sex discrimination only; see below]***

4.2. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on a hypothetical comparator.

4.3. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

4.4. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

5. Time/limitation issues

5.1. Some aspects of the claimants' claims appear to be out of time.

5.2. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?

5.3. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

6. *Remedies*

6.1. If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy.

6.2. There may fall to be considered reinstatement, re-engagement, a declaration in respect of any proven unlawful discrimination, recommendations and/or compensation for loss of earnings, injury to feelings, breach of contract and/or the award of interest.

4. At the start of the hearing Mr Aniffa withdrew the complaint at paragraph 2.1.4 of the list of issues and Ms Szomolai withdrew the complaint at paragraph 4.1.3. Ms Szomolai also applied to amend her claim to pursue the complaint at paragraph 4.1.4 as indirect sex discrimination. For reasons given orally at the time I allowed the application but ruled that, given the lateness of the application and the potential prejudice to the Respondent, Ms Szomolai would not be allowed to adduce any new evidence, other than what is already in her witness statement and in the bundle, in support of the complaint. She would be allowed to cross-examine the Respondent's witnesses about it but where they gave evidence on a matter that she had not given evidence about the Tribunal would be bound to accept their evidence. I also noted that there was a potential issue about time limits, which would have to be decided after hearing all the evidence.

5. I heard evidence from both Claimants. On behalf of the Respondent I heard from Clinton Dall, Marcelo Cerda and Christopher Fenn.

THE FACTS

6. The First Claimant describes himself as Indian non-white. The Second Claimant is white. They started working for Busy Bee Cleaning Services on 4 January 2016, based at St George's College in Weybridge. Mr Aniffa was employed as site manager, and Ms Szomolai as site supervisor. Their contracted hours were Monday, Tuesday, Wednesday, Thursday and Sunday evenings, 9pm to 2am. The Respondent took over the contract on 3 April 2017 and the Claimants' employment transferred under TUPE.

7. The Respondent is a medium-sized cleaning company with around 400 staff. It has around 100 contracts, mostly within a 30-mile radius of central London, with an emphasis on the area near its offices in Feltham and around the southern stretch of the M25. It has four area managers, each responsible for around 25 contracts. Marcelo Cerda was and remains the area manager in charge of the contract at St George's College.

8. At the same time as the Respondent took over the contract at St George's College it also took over a smaller contract at St George's Junior School. At that time the Respondent employed an area supervisor, Lisa, who was primarily responsible for supporting Mr Cerda in setting up the new contracts at St George's College and Junior School.

9. There were approximately 18 cleaners employed to work at St George's College, of whom about ten were assigned to the evening shift. There were around nine cleaners at the Junior School. The Junior School had a part-working supervisor for 3.5 hours a day who would also do some cleaning as part of their job description.

10. There is a dispute about whether the Claimants' jobs differed from the part-working supervisor at the Junior School. The Claimants do not dispute that the job title was different, but they say that in reality they were doing cleaning as well, and the jobs were effectively the same. The Respondent refutes that.

11. We do not accept the Claimants' evidence on this. Mr Aniffa's job description is in the bundle. Ms Szomolai's is not, but she listed the duties from her job description in her witness statement. The only reference in either list to cleaning is "Help to cover any areas in case of large staff shortages". We accept that they would have done some cleaning in that situation, and perhaps occasionally had to do some cleaning if they discovered at the end of the shift that something had not been done, but it was ancillary to their jobs and they did not have regular cleaning duties in the way that the part-working supervisor at the Junior School had.

12. On 28 June 2017 Mr Aniffa was given a written warning because he had allowed cleaners to leave the site early and enter a later time for signing out. Mr Cerda said this was a health and safety issue because the records showed that cleaners were on site when they were not. The issue had been identified after Lisa, the area supervisor, attended the site at around 1am. A meeting took place on 27 June 2017, but it appears that no formal disciplinary hearing took place prior to the warning being issued. It is not in dispute that no other staff were investigated or disciplined in relation to signing out discrepancies. Mr Cerda said this was because Mr Aniffa was responsible, as the site manager.

13. After the Respondent took over the St George's College contract they were finding it difficult to recruit and retain cleaners to do the evening shift starting at 9pm and finishing at 2am. In around September 2017, with the agreement of the client, the Respondent allowed the cleaners to start at 6pm in term time. During the school holidays they were sometimes allowed to start earlier at 3, 4 or 5pm.

14. The Claimants suggested in their evidence that the cleaners started even earlier, including during term time, so that they generally finished before the Claimants started their shift at 9pm. We do not accept that. Neither of Claimants addressed this issue in their witness statements and in cross-examination of Mr Cerda, Mr Aniffa accepted that there was some overlap between the cleaners and the Claimants' shifts. Mr Cerda said the school would not have allowed cleaners to attend before 6pm during term time because the pupils and parents would still be around. We were taken to a sign-in sheet for a week during the school holidays which shows some cleaners signing in at 3pm but most signing in after 5pm, so they would have overlapped with the Claimants.

15. It is not in dispute that the Claimants' hours were never changed. Mr Cerda said this was because he discussed it on a number of occasions with Mr Aniffa, who always said he could not change his hours because he had a day-time job and could not leave for the evening shift until the childminder arrived. Mr Aniffa did not dispute that evidence and we accept is it correct, i.e. that the Claimants always made it clear that they did not want to change their contracted hours, and that is why Mr Cerda did not take the matter any further.

16. Around the same time, September 2017, the area supervisor Lisa left. The Respondent did not replace her straight away. Mr Dall, the managing director and part-owner of the business, said in his evidence to the Tribunal that this was because they felt they had done a lot of the hard work in establishing the new contracts.

17. On 24 January 2018 Mr Aniffa was given a "letter of concern" relating to a number of performance issues, including delays in sending timesheets, cleaning cupboards being in an unsatisfactory state and poor communication with Mr Cerda. This followed a meeting between Mr Cerda and Mr Aniffa on 22 January. It was not treated as a formal disciplinary matter.

18. On 20 February 2018 Mr Aniffa was invited to a meeting to discuss an allegation that the caretaker had seen him taking longer breaks, and that the supervision of the cleaning was insufficient. A meeting took place on 22 February 2018, which Mr Cerda thought was a disciplinary hearing, but when Mr Aniffa pointed out to him in the meeting that the letter did not say it was a disciplinary hearing, Mr Cerda accepted that no disciplinary action could be taken. Ms Szomolai was not invited to any such meeting. Mr Cerda accepted that the allegation about the break related to her as well, but he said that as Mr Aniffa was in charge of the site, it was his responsibility.

19. In early 2018 the Respondent decided to appoint a new area supervisor to support the area managers. This was partly because the Respondent was anticipating a new contract at the Mall School in Twickenham, and Mr Dall said he felt it would be "pushing it" to manage the contracts in that area without area supervisor support. The job was advertised on 13 April 2018 and Luis dos Santos was appointed on 15 May 2018. This was a full-time job at a slightly higher level of seniority and pay to Mr Aniffa. Mr dos Santos's focus was on the three contracts at St George's College, St George's Junior School and the Mall, but he was also available to provide support on other contracts, including those under the remit of other area managers.

20. The Mall contract started in June 2018. It had a part-working supervisor and approximately five cleaners. The part-working supervisor had effectively the same role as at Junior School, a shift of around three hours, including some cleaning.

21. In late May or early June 2018 Mr Dall reviewed the contract at St George's College. This was partly prompted by complaints from the client that the standard of cleaning was not as high as they wanted and there had been specific mention of the Claimants appearing not to be doing much during their shift. Mr Dall said they had inherited the structure as part of the TUPE transfer,

but that the contract did not warrant ten hours of non-working supervision/ management. He decided there was no need for any on-site manager or supervisor and that supervision could more effectively be carried out by the area supervisor.

22. On 26 June 2018 Mr Cerda met the Claimants to inform them that they were at risk of redundancy. He gave them a consultation document. They were informed that the Respondent was proposing to make the posts of site manager and site supervisor redundant, and management of the team would be undertaken by the area manager and area supervisor. The reasons given were to reduce costs and improve the quality of cleaning.

23. On 6 July they were each invited to a first consultation meeting with Mr Cerda. The meeting took place on 9 July and they attended together. The focus of the meeting was alternative employment. Mr Cerda said there were no vacancies in his area. There was some discussion about the new proposed structure and the reasons for the reorganisation. The Claimants said they would be interested in any job opportunities, with no restrictions as to time of day and this was not limited to supervision roles.

24. A second consultation meeting was scheduled for 23 July.

25. In the meantime the Claimants saw on the Indeed website that some jobs at the Respondent had been advertised:

    25.1. On 5 July: Twickenham, evening cleaner, 2 hours, 5 days a week.

    25.2. On 12 July: Henley-on-Thames, evening cleaner, 3 hours, 5 days a week.

    25.3. On 12 July: Henley-on-Thames, evening supervisor, 3 hours, 5 days a week.

    25.4. On 20 July: Addlestone, evening cleaner, 5 hours, 5 days a week. This was a cleaning job at St George's College. Mr Cerda's evidence, which was not challenged on this issue, and which we accept, was that one of the cleaners had said she might be leaving so he decided to place this advertisement, but a week later she confirmed she was not leaving so the vacancy was withdrawn.

26. The Claimants did not apply for any of the posts. They could have done so via the Indeed website.

27. Two things happened which the Claimants complain about on 16 July. First, Ms Szomolai says that she was excluded from a meeting. The evidence on this was somewhat confused. Ms Szomolai's witness statement refers to a meeting between Mr Cerda, one of the male cleaners and Mr dos Santos on 16 July, but it appears from the documents and Mr Cerda's oral evidence that this meeting actually took place on 9 July. There may have been another meeting on 16 July, but Mr Cerda said that was between Mr dos Santos and a few of the cleaners only. There appears to have been some tension around this time

because Mr Cerda had asked Mr dos Santos to take over supervision of the site because he perceived the Claimants were not engaging with their roles properly.

28. The second thing that the Claimants complain about is an email from Mr Cerda to Mr Aniffa on 16 July 2018. It read as follows:

> "Hi Ibrahim,
> I was having a chat with Nicole and I then I had a call from a Luis who had just arrived from the School in Twickenham and he wanted to talk to me about a few issues there.
>
> Nothing to do with you really.
> You better stop harassing and provoking Luis. He is there to help with the cleaning and nobody has told you you are not in charge therefore you are in charge and you need to do what you are supposed to do. Not just walk around and keeping a low profile.
> Please stop also recording the staff when you approach them as this is illegal."

29. Mr Cerda's evidence was that shortly before this email Mr dos Santos had reported that when he visited the site Mr Aniffa approached him with a raised voice saying "you should not run the show, it's my contract, you're not supposed to talk with my staff". Mr Cerda decided to follow this up with Mr Aniffa, but not to take any further action as Mr dos Santos agreed that a conversation with Mr Aniffa would be sufficient.

30. The second consultation meetings took place on 23 July. There were two separate meetings, one for each Claimant, but Claimants each attended both. Mr Cerda said at the outset of both meetings that he had made enquiries about vacancies but there were none, "not even a part time". In his oral evidence to the Tribunal he said in fact he had not personally made any enquiries, but had got this information from the office. He did not know whether, when the office told him there were no vacancies, they meant none at all in the whole company, or whether they excluded any as not being suitable for the Claimants. The Claimants did not mention during the meeting the vacancies that they had seen on the Indeed website.

31. During Ms Szomolai's meeting there was a discussion about deep cleaning work that was due to take place during the school holidays. Ms Szomolai says that she raised a complaint about not having been given the cleaning schedule whereas it was given to her male colleagues. Mr Cerda responded, according to the notes: "If I sent to you I don't have no confident the work will be done, and then we will be getting in trouble at the end of the week". His evidence to the Tribunal was that he said this because Ms Szomolai had disengaged from her work around this time, and that was why he lacked confidence in her.

32. At the end of the meetings both Claimants were informed they were dismissed by reason of redundancy. They were paid in lieu of two weeks' notice and each paid a statutory redundancy payment.

33. Both Claimants said in their oral evidence that if any of the vacancies they had seen on the Indeed website had been offered to them they would have accepted.

34. The Tribunal looked up the distances of the jobs during the hearing on Google Maps and they were not disputed. The Twickenham site is approximately 13 miles from the Claimants' home. The Henley site is 52 miles away and St George's College is 22 miles away.

35. Both Claimants appealed against their dismissals. They complained that the Respondent failed to provide alternative employment. The Claimants did not mention the vacancies they had seen. Mr Aniffa said in his oral evidence this was because they assumed the vacancies had been filled. Mr Aniffa also alleged in his appeal that he had been discriminated against on grounds of his race, and Ms Szomolai said she had been discriminated against on grounds of her sex. Both said that they believed the redundancy outcome was pre-determined.

36. Both appeals were heard by Christopher Fenn, director of the Respondent and joint owner. He dismissed both appeals. He found there was no evidence of discrimination in either case. On the issue of alternative employment, he said the Claimants had made it clear to Mr Cerda during consultation that they were only interested in similar positions, i.e. management roles. In his oral evidence Mr Fenn said he had got that information from his assistant. However, because the Claimants had made it clear during the appeal hearing they would consider any role, in the appeal outcome Mr Fenn informed them of four vacancies and invited them to contact his assistant if they were interested. The roles were:

    36.1. Kington Upon Thames, evening cleaner, 2.5 hours, 5 days a week

    36.2. Maidenhead, corporate receptionist, 8 hours a day, 5 days a week

    36.3. Henley, evening cleaner, 3 hours, 5 days a week

    36.4. Twickenham, evening cleaner, 2 hours, 5 days a week

37. The Claimants did not make any further contact with the Respondent. Their evidence was that they had lost trust in the Respondent because it dismissed the appeals, and yet accepted there were vacancies.

38. The Respondent asserts that the St George's College site continues to be managed by the Area Supervisor and the Area Manager (Mr Cerda) with no other supervisory support. The Claimants did not dispute that.

THE LAW

Unfair dismissal

39. Pursuant to section 98 of the Employment Rights Act 1996 ("ERA") it is for the employer to show the reason for the dismissal and that it is one of a number of

potentially fair reasons, or "some other substantial reason". Redundancy is a fair reason within section 98(2) of the Act.

40. Redundancy is defined in s.139 ERA as follows:

> **139 Redundancy**
>
> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
>
> (a) the fact that his employer has ceased or intends to cease—
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business—
>
> (i) for employees to carry out work of a particular kind, or
>
> (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 or are expected to cease or diminish.

41. According to section 98(4) the determination of the question whether the dismissal is fair or unfair "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 "shall be determined in accordance with equity and the substantial merits of the case."

42. In redundancy cases, the employer will not normally act reasonably "unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by deployment within his own organisation" (Polkey v AE Dayton Services Ltd 1988 ICR 142, HL, per Lord Bridge).

43. In Williams v Compair Maxam Ltd 1982 ICR 156, the Employment Appeal Tribunal laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These include, so far as relevant to the present case, considering whether the employee could be offered alternative employment instead of being dismissed. The EAT emphasised, however, that the Tribunal should not impose its own standards and decide whether the employer should have behaved differently. Instead it should ask whether "the dismissal lay within the range of conduct which a reasonable employer could have adopted".

44. If the Tribunal finds the dismissal unfair, it should assess the chance that the employee would have been dismissed in any event and take that into account when calculating the compensation to be paid (Polkey).

Discrimination

45. The Equality Act 2010 ("EqA") provides, so far as relevant:

> **13 Direct discrimination**
>
> (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.
>
> (2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
>
> …
>
> **19 Indirect discrimination**
>
> (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
>
> (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
>
> (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
>
> (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
>
> (c) it puts, or would put, B at that disadvantage, and
>
> (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

46. Race, sex and marital status are all protected characteristics under the EQA.

47. Section 123 EqA provides, so far as relevant:

> (1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …

(3)For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

CONCLUSIONS

Unfair dismissal

48. The first issue is whether the Respondent has shown that the reason for dismissals was redundancy. There are two sub-issues here: was there a genuine redundancy situation, and was that the reason for the dismissals? The Claimants do not dispute that there was a reduction in supervision/ management work at St George's College as a result of the restructure. There was, therefore, a redundancy situation within the meaning of s.139 ERA. They do not accept, however, that it was the genuine reason for their dismissals. They believe they were targeted as a result of Mr Aniffa having raised complaints and grievances against Mr Cerda.

49. Mr Aniffa gave evidence of having raised two grievances against Mr Cerda, one in June 2017, which was heard on 13 July 2017, and one on 2 July 2018 about staff signing in and out.

50. We have concluded that the redundancy situation was the genuine reason for the dismissals. The suggestion that the dismissals were motivated by the grievances was not raised in either of the appeals and was not put to Mr Cerda in cross-examination. Also we note that one of the grievances was a year before the redundancy consultation, and the other was after it had commenced. There is nothing in the documents to suggest any link to the grievances. Given there is no dispute that the management/supervision work on site was reduced, and the Claimants' roles still do not exist, we accept that redundancy was the reason for the dismissals. We note that the decision to restructure was prompted in part by concerns about the Claimants' performance, but that does not preclude the Respondent from making a commercial decision that could also have the effect of addressing those concerns. We are satisfied that the Respondent has shown the reason or principal reason for the dismissals was redundancy.

51. We must next consider reasonableness under s.98(4) ERA.

52. The Claimants complain that the pool for selection was unfair. They say that the two site supervisors at the Junior School and the Mall should have been included, as well as the area supervisor, Mr dos Santos.

53. We remind ourselves that it is not for us to decide what would have been the appropriate pool. We must only consider whether the Respondent's approach was reasonable, i.e. did it fall within the range of reasonable responses? We

find that it did. The obvious pool for selection was the two Claimants because they were the only people doing the work that was being reduced at that site. As to the other two supervisors, we did not hear much evidence about their roles, but we have found that there was a significant difference in that they were "part-working", i.e. cleaning was part of their job descriptions. We also note that making them redundant would not have achieved the cost-saving the Respondent sought; their hours added up to a maximum of seven hours a day, so the Respondent would also have had to reduce the Claimants' hours or make one of them redundant. In those circumstances, it was not unreasonable not to include them in the pool.

54. As for the area supervisor, this was an entirely different role, involving responsibility for multiple sites. It was more senior than the Claimants' roles and full time. Mr Dall's evidence was that neither of the Claimants would have been suitable for it. The Claimants did not give any evidence about their suitability for the job, other than asserting that they could have done it. We cannot therefore find that the Claimants could have done Mr dos Santos's job and in the circumstances we conclude it was not unreasonable not to include Mr dos Santos in the pool.

55. The Claimants also complain that their dismissals were unfair because the Respondent did not offer them alternative employment. Again, the range of reasonable responses test applies.

56. We have found that there were three roles available during consultation: the Twickenham cleaner role and the two Henley roles. We accept that the St George's College role advertised on 20 July 2019 was not a definite vacancy at the time.

57. The Respondent did not inform the Claimants of any of those three roles. There is no dispute that the Claimants could have done any of them.

58. The Claimants say that the Respondent never tried to find alternative employment for them because their dismissals were predetermined.

59. We consider that the Respondent did not give sufficient consideration to the alternative employment issue. The Claimants made it absolutely clear at the first meeting on 9 July that they wanted to be informed of all opportunities, at all levels, for any hours, and in any area. Despite assurances from Mr Cerda that he would look into the matter, he did not do so personally and nor did he check what the understanding was of the administrative staff in the office. We accept that he genuinely believed there were no vacancies as at 23 July meeting, but he did not make sufficient enquiries about that. If he had done, he would have known about the three vacancies that had been advertised. He certainly did not go out of his way to find alternative employment for the Claimants. We do not, however, find that the process was predetermined, and we accept that the vacancies were offered at the appeal stage in good faith.

60. We did not hear any evidence about why the office told Mr Cerda there were no vacancies, but it seems likely, given Mr Fenn's evidence about what his assistant told him, that they assumed the Claimants would not be interested in

them, either because two of them were not supervisory roles, or because they involved travelling some distance for only two- or three-hour shifts. The Respondent was not entitled to make those assumptions, given what the Claimants had said in the first meeting. We find that the failure to offer the three vacancies that arose during the consultation period was unreasonable.

61. We have considered whether this affected the fairness of the redundancy process, given that the Claimants did in fact know about the vacancies. We conclude that it did, because the only option for the Claimants would have been to apply for the vacancies along with external candidates. Given there is no dispute they could have done any of the roles, they should simply have been offered and then they could have decided whether to accept.

62. We have also considered whether the offer of the roles at the appeal stage corrected the unfairness. We find that it did not because the Henley supervisor role was not included in the jobs listed in the appeal outcome letter. We accept that the distance to Henley was considerably greater than to St George's College, and the role was for fewer hours, but it is possible the Claimants would have been interested in the two roles in Henley because that would have enabled them to travel and work together, as they had done throughout their employment with the Respondent. They were denied the opportunity to consider that option.

63. We therefore conclude that the Claimants were unfairly dismissed.

64. We must then consider whether, if the Respondent had offered the three positions, either of the Claimants would have accepted any of them, i.e. would they have been dismissed in any event? The Claimants say they would have accepted any of the positions. We note that both the Claimants say they were unemployed for 7.5 months after their dismissals. The loss of two incomes in the same household would have put considerable pressure on them and makes it more likely that they would have accepted even roles that were for fewer hours, at a more junior level, and/or further away. However, the fact that they did not apply for the roles and did not even mention them during the consultation or appeal stages is strong evidence that they were not genuinely interested in them. We also consider it significant that they did not respond to the offers in the appeal letters, which included two of the vacancies that had arisen during the consultation period. It may be true that by that stage the relationship with the Respondent had deteriorated, but we consider if they had been genuinely interested in the roles, they at least would have made further enquiries.

65. The Twickenham job would only have been available to one of the Claimants. It was a cleaner role, for only two hours, with a total commuting distance of 26 miles. It would not have been a particularly attractive offer. Given their failure to apply or mention it in the consultation, we conclude they were not genuinely interested in it and would not have accepted it if offered. The Henley jobs, as already noted, would at least have enabled them to continue to work together, but the roles would have involved a demotion and a reduction in 4 hours' work a day. Given the distance, around 52 miles each way, we would need strong evidence to conclude that they would have accepted the roles if offered. Given

that they did not apply for them and did not raise the vacancies at any stage with Respondent, we conclude that the Claimants were not genuinely interested and would not have accepted the roles if offered.

66. We therefore conclude that the failure to offer the vacancies made no difference to the outcome; the Claimants would have rejected any offers to take up the alternative positions, so they would inevitably have been dismissed. There should be 100% reduction to their compensatory awards.

Mr Aniffa: Race discrimination

67. Because Mr Aniffa contacted ACAS on 13 September 2018, any act that took place before 14 June 2018 is on its face out of time.

68. We have first considered the latest complaint, the only one that is definitely in time. This relates to Mr Cerda's email of 16 July 2018. It is not in dispute that Mr Cerda did not speak to Mr Aniffa to get his side of the story before sending this email. It might have been better if he had done, but that alone is not sufficient to shift the burden to the Respondent. Mr Cerda has given an explanation for sending the email that was not challenged in cross-examination and has nothing to do with Mr Aniffa's race. There is nothing in the evidence to suggest any link to Mr Aniffa's race. This complaint cannot succeed.

69. The consequence of this is that the earlier alleged acts cannot constitute a continuing act of race discrimination ending on or after 14 June 2018. They are all therefore out of time, so the Tribunal only has jurisdiction to consider them if it is just and equitable to do so.

70. Mr Aniffa has not put forward any reason why the complaints were not brought earlier. They are between one year and three and a half months out of time. It is for Mr Aniffa to establish that it is just and equitable to extend time and he has not done so. The Tribunal therefore has no jurisdiction to consider the earlier complaints.

71. Even if we did have jurisdiction, we note that there is nothing to suggest a connection to race in any of the earlier complaints. Nor did Mr Aniffa complain of race discrimination at any time until his appeal against dismissal. The comparators Mr Aniffa relies on were not in an equivalent situation. Action was taken against him on each occasion because he was the person in charge of the site.

Ms Szomolai: marital status

72. We have already accepted that redundancy was the genuine reason for dismissal, so this complaint must fail. We also note that, as a matter of law, it is doubtful that EqA covers discrimination because of marriage to a particular person, as opposed to marital status itself (Hawkins v Atex Group Ltd and ors 2012 ICR 1315, EAT).

Ms Szomolai: direct sex discrimination

Excluding her from a meeting on 16 July 2018

73. The Claimant has not given sufficient evidence about this incident for us to make any finding that she was excluded from a meeting. Her only evidence on the issue appeared to have confused the events of 9 and 16 July. Also, the complaint is made solely on the basis that the attendees at the alleged meeting happened to be men. That would not be a sufficient basis on its own to shift the burden to the Respondent. This complaint cannot succeed on the facts.

The area manager, Marcello, making assumptions about the work that she could do and in particular refusing to give her the cleaning schedule in June 2018 when her male colleagues were given it. When questioned about why he did this he confirmed on 23 July 2018 that it was because he could trust them to get the job done.

74. It is not in dispute that a comment along these lines was made. We do not accept, however, that there was any implication that it was connected to sex. In his evidence to the Tribunal Mr Cerda gave an explanation for the comment that was entirely plausible, namely that he had lost confidence in Ms Szomolai because she had disengaged from her work during the redundancy consultation process. In the absence of any other evidence suggesting that his attitude towards Ms Szomolai had anything to do with her sex, this complaint must also fail.

<u>Ms Szomolai: indirect sex discrimination</u>

Changing the cleaning schedule/shift pattern so that the cleaners were working at hours that she could not supervise because of her child care commitments which in turn led to a reduction of her duties

75. It is not in dispute that the cleaners' shifts were changed and that this meant they did not usually align with Ms Szomolai's shift pattern. We would accept that there was a practice of allowing the cleaners to start their shifts earlier than contracted, and earlier than Ms Szomolai, but we have not accepted that this resulted in no overlap so that she was incapable of doing her job. We can see that it might have suited her better to have all the cleaners working the same hours as her, but we do not accept that the practice put her at a particular disadvantage. Her own hours were not changed because Mr Aniffa had made it clear they did not want to change them. As long as there was some overlap, it was still possible for her to check the work and address any issues with the cleaners. Ms Szomolai has not established particular disadvantage, so the complaint must fail.

76. It is therefore unnecessary for us to address the issue of disparate impact or connection to her sex. We should say, however, that we would not accept without any evidence on the issue that the practice had a disparate impact on women because they are less likely to be able to work an earlier shift for childcare reasons. Different people have different childcare arrangements and it is quite possible that most people with childcare responsibilities would find it easier to work a slightly earlier shift.

77. The complaint of indirect discrimination therefore fails and is dismissed.

APPLICATION FOR RECONSIDERATION

78. By email dated 12 May 2021 the Claimants applied for reconsideration of the decision to reduce their compensatory awards for unfair dismissal to nil. The application asserts that Mr Cerda's evidence about the Addlestone job advertised on 20 July 2018 was false. The Claimants rely in particular in paragraph 12 of the Amended Grounds of Resistance, which states:

> "Since the redundancies took place in July 2018, two cleaners have left the St George's College site, on 9 August and 6 November 2018. These roles (which have no supervisory duties comprised within them) were advertised both internally and externally and replacements were appointed on 28 August and 13 November 2018. The site continues to be managed effectively by the Area Supervisor and the Area Manager with no other supervisory support."

79. This paragraph does not relate to the job that was advertised on 20 July 2018. That vacancy is addressed in paragraph 11 of the Amended Grounds of Resistance (p.102 of the bundle), and Mr Cerda's evidence (which we accepted) was consistent with that paragraph.

80. Insofar as the Claimants say that paragraph 12 of the Grounds of Resistance shows that there was another vacancy at St George's College at the time of the appeal hearing on 16 August 2018 that was not offered to them, and which they would have accepted, this is a point the Claimants could have made during the hearing. They did not raise it or cross-examine any of the Respondent's witnesses about it. It does not amount to a valid basis for reconsideration. The application is therefore refused under Rule 72(2) because there is no reasonable prospect of the original decision being varied or revoked.

Employment Judge Ferguson

Date: 27 May 2021