Case Number: 2207028/2018

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Ms EV Ngo Nouck Hioba		**Pret a Manger (Europe) Ltd**

REASONS FOR THE JUDGMENT
SENT TO THE PARTIES ON 15 OCTOBER 2021

Introduction

1 As their name suggests, the Respondents are retailers of food and drink for immediate consumption. In April 2019 they had 337 shops and employed more than 9,000 people in the UK.

2 The Claimant is a black woman born in Cameroon and now 33 years of age. She is an educated person and, although not a native English speaker, has an excellent command of the language. She was continuously employed by the Respondents between 2 June 2016 and 4 November 2018, in the role of Team Member. The employment was brought to an end by her summary resignation, which was communicated to the Respondents the day before she was due to attend a disciplinary hearing to answer a charge of gross misconduct.

3 By a claim form presented on 13 December 2018, the Claimant brought complaints of unfair (constructive) dismissal, wrongful dismissal, direct racial discrimination and unauthorised deductions from wages, all of which the Respondents disputed.

4 At a preliminary hearing for case management on 18 April 2019 Regional Employment Judge Potter gave directions for the Claimant to provide further details of her claims and set up a further hearing to determine her (anticipated) application for permission to amend the claim form. The judge also placed on record her view that the Claimant was unlikely to need an interpreter for the final hearing and remarked that engaging one would be likely to delay the hearing and disrupt the flow of evidence.

5 At the second preliminary hearing, on 7 June 2019, Employment Judge Clark granted the Claimant permission to make certain amendments to her claim but refused others. She also recorded that the Claimant “required” an interpreter for the final hearing.

6 The case came before us in the form of a final hearing held remotely by CVP on 13 October this year, with four days allowed. The Claimant appeared in person and the Respondents were represented by Mr B Oduje, counsel. A bundle of documents of over 300 pages was produced. We discussed timetabling and other procedural matters and, noting the Claimant's evident English language skills, dispensed with the services of the interpreter (to which the Claimant raised no objection). We then adjourned for the rest of the morning of day one to read into the case. When the hearing resumed we received oral evidence from the Claimant and the Respondents' witnesses, Mrs Dovile Svaze (formerly Motiejauskaite), General Manager and the Claimant's line manager at the time of the relevant events, Mr Gocha Rukhadze, General Manager, who conducted the disciplinary investigation, and Mrs Lucy Duncombe (formerly Windsor), Senior People Advisor. To avoid confusion we will refer to Mrs Svaze and Mrs Duncombe, who have married since the events with which we are concerned, by their maiden names. We also read a statement produced by the Claimant in the name of Ms Nicoleta Gavaneanu, an employee of the Respondents and a friend and former colleague of the Claimant's, and a statement produced by the Respondents in the name of Mr Manuel Gimeno. Closing argument was presented on the morning of day three and that afternoon we delivered an oral decision upholding the unfair dismissal claim but holding that the Claimant was entitled to no remedy therefor, upholding the unauthorised deductions from wages claim and deferring for separate consideration the quantification of the compensation payable, and dismissing the claim for racial discrimination. After a brief adjournment the parties were able to agree the sum to be awarded in respect of unauthorised deductions from wages at £288.75 (gross).

7 The short form judgment was sent to the parties on 15 October 2021. These reasons are given in writing pursuant to a written request by the Claimant dated 16 October 2021. The delay in supplying them, which is regretted, is explained by the extreme pressure of work under which the Tribunal has been operating in recent times and the need to give priority to cases in which outcomes are awaited (as opposed to reasons alone).

The Claims and Issues

8 In the course of the two case management hearings it seems that sight was lost of the fact that a wrongful dismissal (or 'notice pay') claim had been brought. There was no suggestion that the Claimant (who had acted in person throughout) had withdrawn that claim, and accordingly we proceeded on the footing that it remained a part of her case.

9 The bundle contained a list of issues which seems to have been prepared soon after the second case management hearing. The document contained an anomaly: the acts relied on as constituting (singly or collectively) breaches of the Claimant's contract exactly mirrored those said to ground claims for direct discrimination save for the omission of the complaint about enforcement of the food allowance policy (the foundation for the disciplinary action against her). It seemed to us that that was simply an oversight and that the parallel claims for unfair dismissal and racial discrimination must be seen as resting on all the same

allegations. No-one suggested otherwise. Accordingly, adjusting matters again marginally in the Claimant's favour, we treated both heads of claim as depending on our findings on the same five acts or allegations of the Respondents, namely:

(1) the instruction to the Claimant on 25 September 2018 to move to another till;
(2) the instruction to the Claimant on 25 September 2018 to work at another branch on 29 and 30 September 2018;
(3) the alleged failure to deal with the Claimant's grievance of 8 October 2018;
(4) enforcing the food allowance policy against the Claimant by disciplining her under it;
(5) informing the Claimant on 29 November 2018 that her pay would be stopped with effect from 27 November 2018 on account of her failure to attend a disciplinary hearing on that date.

The direct discrimination claim also asserted that, if the Claimant was constructively dismissed, her dismissal was itself a further act of racial discrimination.

The Legal Framework

Discrimination

10 The Equality Act 2010 protects employees and applicants for employment from discrimination based on or related to a number of 'protected characteristics'. These include race, which includes ethnic and national origins and colour.

11 Chapter 2 of the 2010 Act lists a number of forms of 'prohibited conduct'. These include direct discrimination, which is defined by s13 in (so far as material) these terms:

> **(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.**

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

12 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu v Akwiwu* [2014] EWCA Civ 279, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

13 Discrimination is prohibited in the employment field by s39 which, so far as relevant, states:

> **(2) An employer (A) must not discriminate against an employee of A's (B) –**
>
> **…**
> **(c) by dismissing B;**
> **(d) by subjecting B to any other detriment.**

A 'detriment' arises in the employment law context where, by reason of the act(s) complained of a reasonable worker would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment: see *Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL.

14 2010 Act, by s136, provides:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(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.**

15 On the reversal of the burden of proof we have reminded ourselves of the case-law decided under the pre-2010 legislation (from which we do not understand the new Act to depart in any material way), including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437 EAT, *Laing v Manchester City Council* [2006] IRLR 748 EAT, *Madarassy v Nomura International plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence.[1] But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

Unfair dismissal

16 By the Employment Rights Act 1996 ('the 1996 Act'), s95 it is provided that:

[1] And see to similar effect the judgment of Lord Leggatt JSC in *Royal Mail Group Ltd v Efobi* [2021] UKSC 33, esp at [38].

> **(1) For the purposes of this Part an employee is dismissed by his employer if … …**
> **(c) the employee terminates the contract … (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.**

The provision embodies the common law. A party to an employment contract is entitled to terminate it summarily in circumstances where the other party has breached an essential term.

17 Terms of employment contracts may be express or implied. Essential implied terms include those which require the employer to provide the employee with access to a means of redress in respect of any grievance (see *W A Goold (Pearmak) Ltd v McConnell* [1995] IRLR 516 EAT and *Hamilton v Tandberg Television* UKEAT/2002/65) and to conduct disciplinary processes fairly and without undue delay (*Lim v Royal Wolverhampton Hospitals NHS Trust 2011* EWHC 2178 QBD, at para 93).

18 A course of conduct or series of events may cumulatively amount to a repudiation of an employee's contract of employment entitling him or her to resign and treat himself or herself as constructively dismissed. In such a case, the 'last straw' need not itself amount to a breach of contract (*Lewis v Motorworld Garages Ltd* [1986] ICR 157 CA). On the other hand, it cannot be an entirely innocuous act or omission: it must add something to the overall breach (*Omilaju v London Borough of Waltham Forest* [2005] ICR 481 CA).

19 If there is a dispute as to whether a claimant was dismissed, the burden is upon him or her to prove dismissal. Subject to that, the outcome depends on the proper application of the 1996 Act, s98. It is convenient to set out the following subsections:

> **(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 – …**
>
> **(b) relates to the employee's conduct …**
>
> **(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.**

20 The first effect of s98 is that, if there was a constructive dismissal, it is incumbent upon the employer to prove a potentially fair reason for it. The 'reason' for a constructive dismissal is the reason for the employer's act or omission which precipitates the resignation. If a potentially fair reason is not shown, the dismissal is necessarily unfair.

21 Subject to a permissible reason being shown, s98 requires the Tribunal to weigh the reasonableness of the employer's action. No burden applies either way. That said, given that a complaint of constructive dismissal does not get off the ground unless it is shown that the employer has committed a repudiatory breach of the employee's contract of employment, it will be a rare case in which such a dismissal is not also found to have been unreasonable and unfair.

22 There was, and could be, no question of reinstatement or re-engagement in this case. The Claimant did claim compensation. By the 1996 Act, s118, compensation for unfair dismissal takes the form of a basic award and a compensatory award. The former is calculated by reference to the employee's age, period of service and rate of pay. The latter seeks to compensate the employee for the loss of his or her employment.

23 By the 1996 Act, s122(2) it is provided that, where the Tribunal considers that any conduct by the claimant before the was such that it would be just and equitable to reduce the basic award to any extent, it "shall" reduce that award accordingly.

24 The assessment of the compensatory award is governed by the 1996 Act, s123(1), which states that the amount shall be such sum as the Tribunal thinks just and equitable in the circumstances having regard to the loss sustained by the claimant in so far as that loss is attributable to action taken by the employer.

25 The s123(1) is subject to s123(6), which provides that, where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the claimant, it "shall" reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

Wrongful dismissal

26 Under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994, the Tribunal has jurisdiction to consider complaints of breach of contract. These include claims for wrongful dismissal, in which an employee complains of being dismissed in breach of his or her contract of employment. Such claims usually assert that the employer has failed to give any notice, or due notice, of dismissal. An employee employed continuously for more than two years is entitled under the 1996 Act, s86 to notice of not less than one week per year of service, up to a maximum of 12 weeks.[2] An employer who has dismissed an employee without notice or with short notice may defend a wrongful dismissal claim on the ground that, at the time of the dismissal, the employee was in repudiatory breach of his or her contract of employment and had, through that

[2] This is a statutory minimum: the parties are free to agree more generous terms.

breach, forfeited the right to rely on its terms as to notice. The burden is upon the employer to make out that defence.

Unauthorised deductions from wages

27 Under the 1996 Act, Part II (ss13-27), a worker is entitled to bring a claim in the Employment Tribunal to recover unauthorised deductions from her (or his) wages. Deductions may be authorised only by a statutory provision or by a "relevant provision" of the worker's contract (s13(1)). A "relevant provision" means a written contractual term or a contractual term of which the employer has given the worker written notification (s13(2)).

The Primary Facts

28 The evidence was extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history. The facts essential to our decision we find as follows.

The main narrative

29 The contract issued to the Claimant in or around June 2016 described her as a part time employee working a 20-hour week. Her 'usual job location' was stipulated to be 87-88 Strand, but subject to the Respondents' right to move her, temporarily or permanently, to any other shop "within reasonable travelling distance".

30 Having worked at certain other outlets operated by the Respondents the Claimant obtained a transfer to their Villiers St shop in January or February 2018. From then, or perhaps earlier, she routinely worked a 35-hour week, most of those hours falling on Saturdays and Sundays. This suited her because it was compatible with her studies (she was undertaking a Master's Degree at the time). The Respondents were initially able to accommodate her preferred hours but they never agreed to guarantee them and Ms Motiesjauskaite reminded her on a number of occasions that she did not have guaranteed hours (over and above the 20 provided for under her original contract). The Claimant suggested in evidence before us that she had at some point been issued with a fresh contract entitling her to 35 hours' work every week at Villiers Street. No such document was produced and we reject that part of her evidence.

31 Unfortunately, the Claimant's time at Villiers Street was not happy and she was involved in a number of altercations and disagreements with colleagues and with her line manager, Ms Motiejauskaite. The problems did not take long to manifest themselves. In March 2018 the Claimant spoke aggressively and abusively to a colleague who had been assigned to train her in food preparation. The colleague made a written complaint. Ms Motiejauskaite counselled her about her behaviour.

32 There was also a difficulty arising from the Claimant's repeated disregard of the Respondents' dress code. Despite requests not to, she insisted on wearing a

delivery coat when working in the shop. That garment was only for wearing on outside, deliveries-related duties. In about August 2018 Ms Motiejauskaite disposed of the coat. Shortly afterwards the Claimant complained to her and she offered to order a thermal top to wear under her work shirt. The Claimant declined the offer but came to work the next day wearing an undergarment of her own and said that she was comfortable. But unfortunately, some weeks later, Ms Motiejauskaite had to speak to her again about wearing a delivery coat in the shop.

33 On 23 September 2018 the Claimant complained to Ms Motiesjauskaite about a decision of the Assistant Manager to remove her right to a bonus payment for being late for work. She said that another Team Member had been treated more favourably in similar circumstances. On inquiry it was established that the colleague's circumstances had been different: he had telephoned in advance to say he was delayed by a transport problem and it had been agreed that his start time would be put back by 15 minutes. Accordingly, he was not late for work.

34 On or about 25 September 2018 the Claimant was working on till no. 1. She was leaning against a wall and was not responsive to customers. Two complained to Ms Motiesjauskaite of what they perceived as rudeness on the Claimant's part. Ms Motiesjauskaite asked the Claimant to move to another till but she refused, saying that she would be cold at the other tills as they were closer to the air-conditioning unit. Not for the first time, Ms Motiesjauskaite backed down rather than facing a confrontation.

35 Also on or about 25 September 2018 Ms Motiesjauskaite had a more general discussion with the Claimant. The Claimant said that she was coming to the end of her studies and was tired. She was also unhappy at Villiers St and felt that her colleagues were against her. These remarks may not have come as a great surprise to Ms Motiesjauskaite, who had received a number of complaints from staff members about the Claimant's rude and aggressive behaviour towards them. In the same conversation Ms Motiesjauskaite asked the Claimant to work her forthcoming Saturday and Sunday shifts at the St Martin's Lane shop. The main reason for this proposal was that it was increasingly difficult to justify the Claimant's weekend working hours at Villiers St, given a trend of falling sales. Ms Motiesjauskaite had in mind the possibility of the Claimant transferring to another store with higher weekend demand, at which her current working pattern might be accommodated in the longer term. The Claimant resisted Ms Motiesjauskaite's request but after some discussion and a later exchange of emails it was agreed that she would work at St Martin's Lane on Saturday, 29 September and return to Villiers St for the following day's shift.

36 The Claimant sent a letter dated 8 October 2018 to the Respondents' 'HR Services' at the Villiers St address, raising a formal grievance about work rotas, the delivery coat issue, the request to work at a different shop and certain other matters. It was forwarded to the correct address, where it was received on 16 October. Ms Windsor sent an email to the Claimant on the same day, inviting her to attend a grievance hearing on 19 October. She attached a formal invitation letter signed by the Operations Manager, Ms Di Bartolomei. A copy of that letter was also sent by post. Ms Windsor used the Claimant's email and postal addresses as

they appeared on her contact information page in the 'MyPret' personnel records. Employees were required to notify any changes of address as and when they occurred. Ms Windsor did not know that the Claimant routinely used a different email address for communicating with the Villiers St shop.

37 The Claimant did not respond to Ms Windsor or to Ms Di Bartolomeo and did not attend the grievance hearing. Ms Windsor then sent her a fresh invitation (by email, to the same email address) to a rescheduled grievance hearing, to be held on 25 October.

38 The Claimant did not attend the rescheduled hearing. Ms Windsor then sent a further email (to the same email address) stating that in view of her non-attendance on two occasions the Respondents would assume that she did not wish to pursue a grievance and that her concerns had been resolved.

39 Following contact between the Claimant and the Respondents' CEO on 19 November 2018 in which the Claimant complained that her grievance had not received a response, Ms Windsor sent an email to the Claimant the same day stating that two grievance hearings had been arranged but not attended, that if her contact details on 'MyPret' were wrong they should be corrected, and that if she wished to raise a grievance afresh, she was at liberty to do so. The Claimant did not renew her grievance.

40 On 25 October 2018 Ms Motiesjauskaite sent an email to the Claimant[3] informing her that she would be working Monday and Tuesday 29/30 October at the Mortimer St shop.

41 On the morning of 29 October 2018, ignoring the email of 25 October, the Claimant attended for work at Villiers St. Ms Motiesjauskaite asked her to report to Mortimer St but she refused to do so. She became loud and highly argumentative. She used bad language. She said that she had raised a complaint with HR. She passed a comment to the effect that the Respondents' managers who come from overseas are "nothing in their own countries." She accused Ms Motiesjauskaite of selecting her compatriots (she is Bulgarian) for promotion. She accepted that her contract entitled the Respondents to ask her to work at other stores but said that she did not care as she insisted on working at Villiers Street. Eventually, later the same morning, she was placed under 'Time Out', a form of suspension. By that stage, in addition to disobeying the instruction to report to Mortimer St and making offensive comments to Ms Motiesjauskaite, the Claimant was the subject of fresh allegations of repeated breaches of the Respondents' Food Entitlement Policy.

42 The Claimant was entitled to be paid while on 'Time Out' but was incorrectly classified as not so entitled. This was an error which was rectified in November 2018, following advice from Ms Windsor.

43 A disciplinary investigation was put in train. It was entrusted to Mr Rukhadze (already mentioned). He interviewed 11 individuals including Ms Motiesjauskaite

[3] She used the address through which she usually communicated with the Claimant, not that shown on the 'MyPret' record.

and the Claimant. From their accounts it was clear that there was ample evidence of the Claimant having sworn at a colleague on 22 October 2018, directed offensive and arguably racist language at Ms Motiesjauskaite on 26 October and, on diverse dates over the recent past, committed numerous breaches of the Food Entitlement Policy. These apparent breaches, which were to a significant extent supported by documentary evidence, took several forms including: appropriating more food/drink than the permitted daily allowances; appropriating items not within the permitted categories of food/drink under the policy; damaging food in order to make it unsaleable and then consuming it; failing to keep a proper or accurate daily record of items taken; giving food away otherwise than to approved charities.

44 A decision was taken that the evidence was sufficient to support disciplinary action. Accordingly, by a letter from Ms Rocca Galifi, dated 21 November 2018, the Claimant was invited at attend a disciplinary hearing on 27 November to answer charges of "gross misconduct", "discriminatory behaviour towards management" and "breach of food entitlement guideline" (sic). The letter drew attention to her right to be accompanied and pointed out that the allegations, if proved, were likely to lead to dismissal. The evidence generated by Mr Rukhadze's investigation was attached.

45 The Claimant did not attend the disciplinary hearing. She sent a text message on 27 November stating that she would not be present as she had received the letter of invitation that very day and so had not received sufficient notice. She said that the letter had been delayed because she no longer lived at the address to which it had been sent. She asked for the hearing to be re-scheduled.

46 The Respondents agreed to re-schedule the disciplinary hearing for 5 December 2018, and a fresh invitation was sent to the Claimant on 29 November. At the same time the Claimant was informed that, in view of her failure to attend the hearing on 27 November, she would be treated as "absent from work without authorisation" and would accordingly be unpaid from that date onwards.

47 The Claimant resigned by a letter dated 1 December 2018, citing the Respondents' decision to suspend her pay.

Policies and procedures

48 The Respondents have a written, non-contractual grievance procedure. It is an unremarkable document, differentiating in the usual way between formal and informal processes and envisaging a prompt outcome subject to a right of appeal.

49 The Respondents also operate a written, non-contractual disciplinary procedure. It is also largely unremarkable document. It includes a section on 'time out' which makes it clear that suspension is ordinarily with pay. One exception, relied on here by the Respondents, is where an employee has "failed to notify" the company that he/she is "unable to attend a scheduled disciplinary hearing despite being provided with the appropriate notice".

50 The Respondents' 'Dress Code' is contractual. It stresses the importance of smartness and cleanliness. The document specifies the uniform to be worn in the workplace by Team Members (white shirt, denim jeans or skirt, black shoes), some elements of which the company provides. That uniform does not include the delivery coat. Staff members are encouraged to wear white layers underneath their shirts if they feel cold. The Code warns that breaches may result in disciplinary action.

51 The Respondents also operate a 'Pret Gold Card and Food Entitlement Policy'. The Gold Card, issued to all staff on joining, is an ID document and discount card in one. Subject to conditions, it entitles the holder to purchase items from the Respondents' outlets at a 50% discount. The Food Entitlement Policy entitles staff to a free allowance of specified food and drink items. The amount of the allowance varies according to the length of the shift being worked. Staff members are required to record items taken using their own till cards. They are not allowed to take items for other people. Items taken are to be consumed during break times. Entitlements accrue daily and cannot be carried forward.

Miscellaneous facts

52 The diversity of the Respondents' workforce was not in question and we were shown no evidence of any practice or tendency, at Villiers St or more generally, to treat black staff, or any group or category of staff, less favourably than anyone else.

53 The practice of transferring staff to cover gaps at other shops was commonplace, as Ms Motiesjauskaite explained in unchallenged evidence. There is nothing to suggest that the practice was applied in a manner which caused disadvantage or inconvenience to black staff or to any particular group or category of staff.

54 Nor was there any evidence of the Respondents treating the Claimant, or black employees as a group, more harshly than others in relation to the food entitlement policy. Certainly at Villiers St, the rules were understood and, for the most part, respected. We specifically reject as untrue the Claimant's assertion that she was once told by Ms Motiesjauskaite that she could help herself to any food and drink she pleased.

55 The Claimant said in evidence that, in the conversation of 25 September 2018, asked by the Claimant why she was being required to work at the St Martin's Lane shop, Ms Motiesjauskaite made a comment along the lines of, "Look about you", and that this was a reference to her (the Claimant's) race or colour. The allegation was first raised in further particulars. We are not able to make any confident finding about particular language used in a conversation which took place over three years ago, but we are satisfied that nothing was said that was intended to carry, or was at the time interpreted as carrying, any racial meaning.

Secondary Findings and Conclusions

56 It is convenient to consider the unfair dismissal claim first.

Unfair dismissal

57 The first question is whether the Claimant establishes a repudiatory breach of her contract of employment. In our judgment, she fails to make out any remotely arguable breach in respect of items (1)-(4) listed at para 9 above. As to (1) and (2), the complaint is about perfectly rational and reasonable managerial acts. There was no question of singling the Claimant out. It was her unsatisfactory behaviour that prompted the request to move to another till and it was her unusual shift pattern and the diminishing demand for weekend hours at Villiers St that gave rise to the request to work two weekend shifts elsewhere. In short, the Claimant has not identified any act about which a sensible complaint can be made.

58 As to item (3), there was no arguably wrongful act on the Respondents' part. They did not ignore the grievance; they responded promptly and appropriately to it. There was a failure of communication, but that is not something for which they can be blamed. It was the Claimant's responsibility to keep her contact details updated and she failed to do so. Moreover, she was offered the opportunity to renew her grievance once Ms Windsor learned of the communication breakdown. In the circumstances, the Respondents manifestly did not deny the Claimant access to a means of redress.

59 As for item (4), the complaint is again utterly untenable. There was a great deal of evidence from a number of quarters tending to show that the Claimant was habitually and flagrantly breaching the Food Entitlement Policy. It is not true, as she asserts, that the conditions and limits of the policy were routinely ignored. Her apparent infringements were serious. The allegations were of theft of her employer's property. The fact that items taken were of very modest value is paltry mitigation if any, and certainly no ground for turning a blind eye to what had been disclosed. On any view, there was plainly an arguable basis for taking disciplinary action and it was, equally plainly, right to classify the case as alleging gross misconduct. And there is no question of the Claimant being singled out. Accordingly, here again, no arguable complaint is raised, let alone one capable of supporting a finding of a repudiatory breach of contract.

60 That leaves item (5). Here we have reached a view which favours the Claimant. In our judgment, the Respondents' claim to rely on the 'time out' provision cited above is misconceived. The starting point is that the disciplinary procedure is, on its face, non-contractual. That being so, the Respondents are in no position to argue that it accords them any legal right vis-à-vis the Claimant. It cannot, in particular, amount to a 'relevant term' for the purposes of the 1996 Act, s13(2). Absent any sustainable express term, Mr Uduje tentatively theorised about an implied term but that line of argument was obviously doomed since there could be no possible ground for implying a term to fill a gap which the Respondents' express contractual documentation had, presumably advisedly, left open. Our reasoning makes it unnecessary and inappropriate to ask whether, in fact, the

Claimant did, or did not, receive the "appropriate notice" referred to in the (non-contractual) 'time out' provision. Either way, the suspension was continued and the *contract* did not permit suspension without pay. And notification that she would not be paid beyond 27 November 2018 was, patently, not merely a breach but a repudiatory breach of the contract of employment.

61 Did the Claimant resign in response to the breach? We are quite satisfied that she did, in the sense that the breach was a material factor in her decision to resign when she did.

62 It follows that the Claimant was constructively dismissed. Was the dismissal fair or unfair? In our view, it was plainly unfair. The Respondents did not act reasonably in denying the Claimant her important right to be paid while under suspension.

63 The Claimant had no interest in any re-employment order and making such an order would have been manifestly wrong. That leaves compensation. By agreement with the parties we heard argument on *'Polkey'*[4] and contributory conduct points (strictly remedies issues) at the same time as the closing submissions on liability.

64 Starting with the basic award, we find, pursuant to the 1996 Act, s122(2), that it is just and equitable to reduce the basic award in this case, which would otherwise be two weeks' pay, to nil. To make any basic award in circumstances where (as we will explain) we find that she had misconducted herself in a serious way by dishonestly misappropriating her employer's property would, we think, be neither just nor equitable.

65 We turn to the compensatory award. In our view, it would not be just or equitable (see the 1996 Act, s123(1)) to award any monetary compensation in circumstances where, as we find, the Claimant cannot reasonably be seen to have lost anything that, absent the unfair dismissal, she would not have lost in any event. For two reasons, we are entirely satisfied that, had her pay not been stopped on 1 December 2018, the Claimant would in any event have resigned within a few days and certainly before the disciplinary hearing scheduled for 5 December. The first reason is that for some time she had seen no future for herself as an employee of the Respondents and wanted to make a fresh start. The second reason is that she knew that she faced a considerable risk, to put the matter at its lowest, of being dismissed at the hearing on 5 December. The evidence against her was substantial and the risk to her reputation was obvious. That risk, measured against what she can only have regarded as a small chance of fending off dismissal and remaining in a job she had come to hate under some lesser sanction such as a final written warning, argued overwhelmingly for seizing the initiative and resigning. Would the resulting theoretical chance of pursuing a

[4] See *Polkey v A E Dayton Services Ltd* [1988] ICR 142 HL. We use the term to refer to issues as to the proper quantification of compensatory awards in light of arguments as to the loss attributable to the dismissal (see the 1996 Act, s123(1)). Typically, these arise where the employer contends that, even if the dismissal was unfair, the employee would in any event have been dismissed when the dismissal in fact happened or within a short period thereafter.

constructive dismissal claim have had any value? We are quite satisfied that it would have had none. It must be assumed that such a claim would have mirrored the case put before us in so far as it rested on items (1)-(4) (see para 9 above) and we have explained why we regard those grounds as entirely without merit. If the Claimant had brought such a claim, it would inevitably have failed.

66 Moreover and in any event, had there been any compensatory award left following a proper application of the 1996 Act, s123(1), we would have reduced it, or further reduced it, to nil under s123(6) on account of the Claimant's contributory conduct. As to that, we rely on what has already been said and on our findings below in relation to wrongful dismissal.

67 For all of these reasons, we are satisfied that the Claimant is entitled to a finding of unfair dismissal but no separate remedy.

Discrimination

68 We can leave our findings above in relation to items (1)-(4) listed under para 9 above to speak for themselves. No arguable ground for complaint is demonstrated. There was no detriment. And in any event there is nothing whatsoever to point to the Claimant's race as a factor in any of the matters complained of.

69 By contrast, item (5) establishes a clear detriment. Is there any evidence capable of sustaining a link between the Claimant's race and the single detriment which she has made out? In our judgment, there is none. What happened is very simply explained: the Respondents misunderstood the law in believing that they were permitted to discontinue the Claimant's pay. The error was not surprising or suspicious. There is no possible reason to suppose that, had the Claimant been someone with different racial characteristics to her, she would have been treated differently. It follows that item (5) discloses a detriment but no discrimination.

70 It also follows from our reasoning on item (5) that the constructive dismissal, which flowed in part from the detriment, was not an act of racial discrimination.

71 Accordingly, all discrimination claims fail.

Wrongful dismissal

72 In our judgment, the Respondents establish their defence to the wrongful dismissal claim. We can well understand why the Claimant was charged with making discriminatory remarks to and/or about managers but prefer to concentrate on the allegations of breaches of the Food Entitlement Policy. Here the Claimant's stance was, more or less, to confess and avoid. She admitted that she routinely breached the policy but maintained that everyone else did too and that breaches by others were overlooked. We have rejected that assertion on the facts. In our judgment, on her own case, the Claimant flagrantly and repeatedly infringed against the policy and by doing so breached her contract of employment in a fundamental way disentitling her to rely on its terms as to notice. She may not have

regarded her behaviour as morally culpable but that is not the point. What she did amounted to misappropriation of her employer's property and that can only be seen as a fundamental breach of contract.

Unauthorised deductions from wages

73 The money claim succeeded on the basis of our findings already explained concerning the suspension of the Claimant's pay with effect from 27 November 2018. Our award was, as we have mentioned, agreed.

Outcome

74 For the reasons given, we concluded that the Claimant was entitled to succeed to the extent stated in our judgment but not otherwise.

Employment Judge Snelson

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3 January 2022

Judgment entered in the Register and copies sent to the parties on ……

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