EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs M Correia	AND	Atalian Servest Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bristol (By CVP) **ON** 22 and 23 March 2022

EMPLOYMENT JUDGE **J Bax**
MEMBERS **Ms J Killick**
Mr C Williams

Representation

For the Claimant: Mrs M Correia (in person)
For the Respondent: Mr A Sendall (counsel)

JUDGMENT

The claim of discrimination on the grounds of race is dismissed.

REASONS

1. In this case the Claimant, Mrs Correia, brought a claim of direct race discrimination in relation to her dismissal from the Respondent's employment on 28 February or 1 March 2019.

Procedural matters and background

2. The claim was presented on 14 March 2019.

3. The claim had a complex procedural history. The Claimant had said she has continuous service from 27 November 2013 following a TUPE transfer

on 10 November 2017. The Respondent said there were three separate employment relationships: (1) between 11 November 2017 and 21 March 2018, (2) between 23 February 2019 and 1 March 2019, and (3) a separate period of employment arising from a TUPE transfer on 12 August 2019. Those issues were determined on 12 March 2021.

4. At a case management preliminary hearing on 25 February 2020, before Employment Judge Gray, it was recorded that the Claimant was alleging her dismissal in 2019 was direct discrimination on the grounds of her race. She also said that she had been subjected to victimisation, by the Respondent, which was not part of the current claim. It was explained to the Claimant that she could make an application to amend her claim. The claim was then listed for a hearing to consider the Claimant's amendment application.

5. On 30 September 2020, the Claimant's amendment application was listed. The Claimant confirmed she was not pursuing an amendment application to add a complaint of victimisation or disparity of contractual terms and said that she intended to raise a new claim about those matters. It was confirmed that she still complained her dismissal in 2019 was an act of direct discrimination. She also said she intended to claim unfair dismissal and that she was seeking to complain that the purported dismissal in March 2018 was an act of discrimination on the grounds of race. A further preliminary hearing was listed on 12 March 2021, to determine the duration and continuity of the employment relationship, whether there was a TUPE transfer, and the claimant applications to amend the claim to include unfair dismissal and discrimination in March 2018.

6. At the hearing on 12 March 2021, Employment Judge Gray gave Judgment that the Claimant's employment did not transfer to the Respondent on 21 November 2017 and that she had a first period of employment with Respondent, relevant to this claim, which started on 10 November 2017. It was also concluded that the Claimant was dismissed from that employment by the Respondent on the 21 March 2018.

7. The case was listed for a final hearing on 13 December 2021, before Employment Judge Dawson. The Claimant required a Portuguese interpreter. The Claimant and interpreter had attended by video, with the Respondent attending in person. The technology was inadequate, and it was difficult for those attending by video to hear what was being said. Additionally, the Claimant had not served a witness statement and she said she had misunderstood the directions and believed that she only needed to submit statements of witnesses who were to be called and did not consider that she was a witness. Employment Judge Dawson considered that the Claimant's lack of realisation was to some extent understandable. The hearing was postponed and re-listed. It was confirmed by the parties that

the only issue to be determined was whether the Claimant's dismissal in 2019 was discriminatory.

8. On 30 December 2021 the Claimant sought to include additional issues for the final hearing. The application was considered by Employment Judge Livesey on 1 March 2022. It was concluded that three of the additional issues (1.unfairly treated compared to other colleagues, 2. discriminated racially and 3. false accusations of taking money by unworked hours) appeared to be part and parcel of her complaint of dismissal, however the other four matters were not capable of being pursued at the hearing.

9. At the start of the final hearing it was again agreed that the issue to be decided was whether the Claimant's dismissal in 2019 was direct discrimination on the grounds of race. The Claimant clarified that she was not saying the dismissal was because she was Portuguese, but because she was not British.

10. The Claimant was assisted by an interpreter, Mr Pinto, throughout the final hearing.

11. The Claimant was reminded during the hearing that she could not seek to go behind the Judgment of Employment Judge Gray, in relation to continuity of service.

12. In order to assist the Claimant, it was agreed that closing submissions would be provided in writing and if necessary additional oral submissions could be provided. The Claimant provided written and oral submissions. During her oral submissions she referred to her predecessor and the person who replaced her being British, however she accepted that she had not referred to that in her oral evidence. Other matters were also referred to which had not been adduced evidence and no account was taken of them in reaching our decision.

The evidence

13. We heard from the Claimant and from Mr Alves for the Respondent. We were also provided with a bundle of documents consisting of 170 pages and the bundle for an earlier preliminary hearing consisting of 210 pages, which we classed as a supplemental bundle. Any reference with a 'p' or 's' in square brackets in these reasons is a reference to a page in those bundles respectively.

The facts

14. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after

reading and listening to the factual and legal submissions made by the parties.

First period of employment

15. The Claimant's first period of employment with the Respondent started on 10 November 2017 as an in store cleaner manager at Tesco's store in Portland.

16. In December 2017, there were issues with pay for all employees on site. Tesco e-mailed the Respondent with concerns. It was noted that the Claimant had provided spreadsheets from payroll and no payments had been made to most of the names on the sheet. Ms Hurrion said, in an e-mail dated 23 December 2017, that she believed that the Claimant had been paid all her wages, although the pattern of hours on the spreadsheet did not reflect the shifts she had worked [s 185].

17. On 20 March 2018 the Claimant was invited to a probation review on 23 March 2018 to discuss concerns about her conduct and performance, with dismissal being one of the possible outcomes. The author of the letter mistakenly said that the date of the meeting was on the 23rd, when it should have been the 21st of March.

18. On 21 March 2018, the Claimant was asked to attend a meeting with Peter Soames, Regional Manager, who was accompanied by Mr Jaynes, Area Manager, who took notes. In the meeting the Claimant was challenged as to why she was logged in as being present on site on two occasions the previous week, when she was not on site. The note by Mr Soames following the meeting, dated 22 March 2018, recorded that the Claimant admitted not being on site for 7 hours per day for which she had been paid and was told that it was falsification of time records and claiming wages by deception. The Claimant's witness statement said that she was accused of stealing, which in effect what was being said by Mr Soames. The Claimant was dismissed.

19. The Claimant asked Mr Soames about Mr Siqueira, who spoke Portuguese. The Claimant's witness statement said that the response was that 'people like you is not needed he is been dismissed and others.' In oral evidence the Claimant said Mr Soames told her that he had a list of others like her. He said Mr Siqueira and some others had been dismissed and others were also on the list. The Claimant referred to being dismissed for stealing from the company and that she knew that there were accusations about other people. It was likely that Mr Soames was referring to other people who had been accused of clocking-in irregularities.

20. The Claimant sent an e-mail to the Respondent following the meeting [s.137-138], it made no mention of referring to Mr Siqueira or the alleged response. There was an assertion that she had been discriminated against because she was not English.

21. On 28 March 2018, the Claimant received confirmation that she had failed her probationary period. She was told her last working day was 23 March 2018 and she would be paid a weeks' notice.

22. On 6 April 2018, the Claimant appealed against the decision to end her probationary period, it made no mention of referring to Mr Siqueira on 21 March 2018 nor the alleged response by Mr Soames.

23. An investigation was carried out. On 9 May 2018, Mr Jaynes was questioned about the meeting. He said that the Claimant had openly admitted to claiming for hours she had not worked and not been at the store and had done so for others. On 17 May 2018, Mr Soames was questioned, and he said that the Claimant had admitted claiming the hours and that she had also done it for a family member. Mr Soames also said that he had been present at the site the weekend before the probation meeting and that the Claimant was signed in as being present, but she was not there.

24. The Claimant's oral evidence was that she did not admit to having been logged in when she was not present at work. It was likely that Mr Soames and Mr Jaynes considered that the Claimant had made such an admission and we did not accept the Claimant's assertion.

25. The Claimant was informed on 23 May 2018 in a letter from Ms Gott, HR business partner, that she would not be reinstated. It was confirmed that there had been a widespread timesheet investigation concerning several employees across the region and in some instances formal action had been taken. It was confirmed that there was justifiable evidence to support a serious accusation against her which made her continued employment unsustainable.

<u>Second period of employment</u>

26. Mr Alves, who is Brazilian and a Portuguese speaker, was one of the area managers covering stores across the south coast of England and was responsible for the Portland store in 2019. He was familiar with the Claimant from a previous role, when he and the Claimant worked for TCFM.

27. In February 2019, Mr Alves needed to fill a store cleaning manager vacancy at the Portland Tesco store. Mr Alves contacted the Claimant and asked if she was interested in the Portland store position, which she was. The Claimant confirmed that they got on well.

28. There was a factual dispute between the Claimant and Mr Alves as to whether he was aware of the circumstances which led to her departure from the Portland store in March 2018. The Claimant's evidence was that she had told him that she had been dismissed for clocking-in irregularities. Mr Alves denied he was told this and said that the Claimant told him she was still employed. Mr Alves made enquiries of the Respondent's HR team to see if there were any records of the Claimant's work history and whether she was still an employee. It was confirmed that her log-in could be reactivated and she could re-join the business, however Mr Alves was not given any information about the circumstances of her dismissal. We did not accept that the Claimant told Mr Alves that she had been dismissed for clocking-in irregularities. We accepted that he had no knowledge of her prior dismissal until after her second period of employment started.

29. Prior to the Claimant starting work in 2019, the Portland store operated well and there were minimal issues.

The Claimant's first days of employment

30. The Claimant's employment started on 23 February 2019 and she attended work with Mr Alves and another manager. When the Claimant arrived at the store cleaning team members, with whom the Claimant had previously worked, saw her and were not happy that she was returning. The team members left within a few minutes of her arrival. An incident occurred in the car park in the presence of Mr Alves. The Claimant's evidence was that the team members were abusive to her, Mr Alves and their colleague, and were shouting at her to go back to her own country. We accepted Mr Alves' evidence that the team members were far away, and he did not think she was told to go back to her own country. His recollection was that they asked why the Claimant was back, given what she had done in the past. For the reasons set out below, we rejected the Claimant's evidence and accepted the evidence of Mr Alves.

31. The Claimant said in cross-examination that the reason why she was not received well was because previously the team members were not being paid and she did not hand in her hours to the company. It was also notable that the Claimant changed her evidence to say that the incident occurred on 28 February 2019 and that Mr Alves was present and later that it occurred on 23 February 2019. She was therefore inconsistent.

32. On 24 February 2019, the Claimant e-mailed Mr Alves about the day before and said that the team did not like her or felt upset about her entry to the store and had reported her to Tesco Manager without talking to her or Mr Alves. When Mr Alves had left the store PJ Holloway and D Henderson refused to talk to her. Mr Bradshaw also came into the store and started

talking loudly and discussing her and Mr Alves' decisions. Mr Bradshaw was not in charge and had been in the staff area for 2 hours and when she asked him to withdraw, he started yelling at her that she was not the owner of the store. The Tesco manager asked him to leave and Mr Bradshaw used heavy language. The Claimant asked for action to be taken against them. There was no reference to being told to go back to her own country. The Claimant suggested that this e-mail was sent because Mr Alves had indicated he wanted to dismiss those individuals from the company, this was not put to Mr Alves and the way in which the e-mail and the subsequent e-mail was written did not convey such an impression and we rejected the Claimant's evidence.

33. On 25 February 2019, the Claimant e-mailed Mr Alves and said that on that day all members (P Holloway, D Henderson, S Bradshaw and T Hatton), met and spoke to the Tesco manager and said they were not happy with her and the decisions of the Respondent. She said, "I want to make it clear that I have not had any conversation with any of them yet and they refuse to talk to me." She said that they did not collaborate with the work and good environment and she thought that it was best their contracts were not renewed and they were dismissed as soon as possible. There was no reference to being told to go back to her own country.

34. In the Claimant's e-mail dated 28 February 2019, there was no reference to being told to go back to her own country.

35. The reference to being told 'go back to your own country', did not appear in the claim form nor the application to amend. It did not feature in the Claimant's e-mails and Mr Alves disagreed with the assertion. We were not satisfied that the team members said such a thing and rejected the Claimant's evidence. We accepted that the team members were hostile to the Claimant returning to the workplace, that they refused to talk to her and complained to the store manager. We accepted that they questioned why the Claimant had returned given what she had done before. It was likely that this related to previous pay issues in 2018, when the Claimant had been paid and her colleagues were not, and the circumstances of her previous dismissal in relation to clocking-in times.

<u>28 February and 1 March 2019</u>

36. On 28 February 2019, Ms Cookman, operations support manager, attended the Portland store and spoke to the catering team about issues with the Claimant. On her arrival the hygiene team asked to speak to her. It was reported that the Claimant was being abrupt and rude, and Ms Cookman queried whether it was due to a language barrier. She was informed by a team member that the Claimant would leave at 11am, but that the Ezi Tracker (the clocking-in system) showed her being pinned in until at least

1600. Ms Cookman asked the store manager to check the CCTV and he told her that the Claimant left at 11am, not to be seen again. The store manager told her that there was a close-knit community where everyone is family and it was causing problems with colleagues and asked if she could be removed. The Claimant submitted that this was a 'family like' environment and we concluded that this was what was meant.

37. Mr Alves arrived at the store and Ms Cookman informed him as to what she had been told. He was also told by PJ Holloway about the past incidents of clocking-in. Mr Alves spoke to the store manager, who explained the communication problems between the claimant and her team members and suggested to Mr Alves that the Claimant was moved to another store. Mr Alves informed the Claimant of this.

38. On 28 February 2019, the Claimant e-mailed HR at 1447, which set out the following matters: That she never had the results of the investigation by Mr Soames in 2018. She said that on restarting in 2019 she was met with extreme aggression and the team abandoned their work and went to eat in the store canteen, she did not make any allegations of racially related words being used. A catering manager had said she stole from the company. Mr Alves had spoken to the store manager and was asked to transfer her to another store because the Respondent's staff members and some of the Tesco staff did not like her. She said she introduced herself and did not argue with anyone. She did not have any problems with anyone, and they asked her to leave because they did not like her. She said in her e-mail that she did not understand what was happening.

39. The Claimant's evidence was that Mr Alves dismissed her on 28 February 2019, whereas, Mr Alves' evidence was that he dismissed her the following day and he relied on an e-mail dated 9 March 2019. The Claimant's e-mail of 28 February did not say that she had been dismissed, rather that she did not understand what was happening. We accepted Mr Alves' evidence that he decided to dismiss the Claimant and orally communicated that decision to her on 1 March 2019.

40. On 28 February 2019, Mr Alves received an e-mail [p99-100] at 1923 from the operations support manager, Ms Cookman. It was reported to Mr Alves that she had visited the Portland store that day. The store was dirty. The team spoke to her and said that the Claimant was rude and abrupt. She was approached by a Tesco member of staff, who provided a written statement saying that they had seen the Claimant's husband threatening a team member with a piece of wood and the Claimant and her husband threatened a team member with dismissal if they did not obey. One team member had their hours cut from 30 to 12 without consultation. She was also informed by a team member that the Claimant leaves at 11am but the tracker said she was in store until after 4pm. Ms Cookman asked to see the CCTV and

the store manager informed her that the claimant left at 11am and was not seen again. She considered that there was an issue between the Claimant and the team. Ms Cookman also said that when she arrived at the store the Claimant was in the building. The Claimant left the building at 1045 and was still pinned in as if she was on the premises. She considered if the claimant did this on Monday and Tuesday, she was over-pinned for 10 hours that week.

41. After receiving Ms Cookman's e-mail, Mr Alves was informed by Ms Gott, of HR, that the Claimant had been dismissed in 2018 for accusations relating to her being clocked-in and not being on site.

42. Mr Alves also checked the clocking-in records and they showed the Claimant clocking-in first thing in the morning and clocking-out at 6pm.

43. On 1 March 2019, Mr Alves spoke to the Claimant and dismissed her from her employment. He told her that the store manager had nothing against her, but was concerned about the situation between her and the team and had advised that she was moved for the mean time. Mr Alves said he did not know about the Claimant's past with the company and she had not disclosed that to him. The Claimant was told she was not logging into the system correctly. She would clock-in in the morning and leave the store without clocking-out and come back in the afternoon, accumulating extra hours to be paid without working.

44. On 14 March 2019, Mr Alves confirmed in writing that her employment had been terminated [p102]. The reasons given were that he was unaware of her previous employment history and she did not declare her prior termination in March 2018. He was now aware of a justifiable evidence to support a serious accusation against her in 2018. Her reintroduction to the store had created relationship issues with colleagues and the client, and there were discrepancies concerning her time and attendance.

45. The Claimant, during evidence, said that what tended to show that the reason was due to race was that: the team members were always in a group and they would not include her; that it was because the team members had previously not been paid and she did not hand her hours in to the company; it was due to the way she had been received on the first day; and she had been through the same discrimination when she was dismissed in 2018.

46. Mr Alves' gave evidence, which we accepted, that the reason why the Claimant was dismissed was because other employees were unsettled by her return and were aggrieved at the way she chose to manage them and it was causing disruption to effective operations at the site and the provision of the service to the client and the clocking-in issue. We accepted Mr Alves' evidence, in cross-examination, that he did not transfer the Claimant to

another store because all he would do would be to move the issue. When the Judge asked what that issue was, Mr Alves said that the main issue was the clocking-in issue, which we accepted. It was not accepted that the Claimant's race had any influence in the decision.

The law

47. The claim alleged discrimination because of the Claimant's race under the provisions of the Equality Act 2010 ("the EqA"). The Claimant alleged there had been direct discrimination. Direct discrimination is defined in section 13(1) of the EqA as, 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.

48. A claim of direct discrimination will fail unless the Claimant has been treated less favourably on the ground of her race than an actual or hypothetical comparator. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

49. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

50. We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

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

51. In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic

needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. As to the treatment itself, we had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

52. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

53. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

54. In every case the tribunal has to determine the reason why the Claimant was treated as he/she was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

55. "Could conclude" means that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

56. The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072).

57. We needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

58. Where the Claimant has proven facts from which conclusions may be drawn that the Respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

Conclusions

59. The appropriate comparator must be a person whose circumstances are not materially different to that of the Claimant. That person would be an in store cleaner manager, who had previously failed a probationary period due to clocking-in irregularities, who had difficult working relationships with their subordinates and was further suspected of clocking in irregularities and on the Claimant's case was British.

60. The Claimant referred in closing submissions to a timesheet [S184] which had fewer hours than she was paid in the payslip dated 22 December 2017, which she drew to the attention of the Respondent. She submitted that there was not evidence beyond reasonable doubt that she claimed for unworked

hours in 2018. The test for the Respondent to apply was not whether it was beyond reasonable doubt, but whether it had a reasonable belief that the Claimant had claimed for unworked hours on the balance of probabilities. The documentary evidence demonstrated that Mr Soames believed that the Claimant had made such a claim and he also relied upon his own observation.

61. The Claimant relied upon her previous dismissal and that Mr Soames had said 'people like you are not needed'. The Claimant did not adduce any evidence that there had been things said which were overtly related to race or that she was not British. The comment was made in the context of a list of people who were accused of clocking-in irregularities and that other people had been dismissed. Staff, in particular managers, must be trusted to accurately record their working times and where time is claimed that is not worked it is essentially a fraud upon the employer. We were not satisfied that the Claimant adduced primary facts that tended to show that her previous dismissal was because she was not British.

62. The Claimant also relied upon that the team members in the second period of employment were always in a group and she was not included. It was agreed that there was hostility towards the Claimant when it became known that she was returning to the store. The Claimant said, and we rejected, that she was told to go back to her own country. The Claimant's colleagues questioned why she had returned, and this related to their pay issues, when the Claimant had been paid, and that she had been dismissed in relation to clocking-in irregularities. The Claimant was returning to a position of authority, when her previous employment had ended in circumstances in which the Respondent considered that there were serious irregularities with her clocking-in. There was no evidence adduced by the Claimant of any other improper racially related remark. Their behaviour could be considered unreasonable, however unreasonable behaviour on its own is insufficient to infer discrimination. The colleagues were voicing an opinion because of the behaviour of the Claimant during her previous employment.

63. The claimant's e-mails dated 24, 25 and 28 February 2019 do not refer to any incident which she describes as racially related.

64. The Claimant submitted that her colleagues abandoned the workplace and her complaints about them were not investigated. However, her colleagues were also complaining about her. Mr Alves attended the store on 28 February and therefore acted promptly to investigate. The Claimant submitted that her colleagues were causing the disturbance and that she was removed to keep the British employees happy. This was a general assertion and was not supported by racially motivated comments or other incidents. The reason why the Claimant's colleagues were unhappy related to previous pay issues and the reason for the end of her previous

employment. The Respondent had to, among other things, ensure that it provided the service to Tesco as per its contractual obligations.

65. The Claimant submitted that Ms Cookman only looked at the CCTV to see if she had left the premises and had not looked to see if her colleagues were disruptive, and that this tended to show a racial motive. We rejected that submission. Ms Cookman was checking if there was corroboration of a serious allegation that the Claimant was leaving the premises whilst clocked-in, giving the impression that she was still at work.

66. The Claimant was dismissed by Mr Alves, who is a Brazilian national and a Portuguese speaker. He was unaware of the circumstances of the Claimant's previous dismissal, when he re-appointed her. There was no suggestion that Mr Alves had made any derogatory remark or comment about the Claimant's race or that she was not British. The store manager, who was not an employee of the Respondent, had referred to there being a 'close knit community and everyone is family' and it was causing problems with colleagues. We understood this to mean that the workers at the store were close knit and they got on like a family and that their resistance to the Claimant's return was causing problems to the cleaning. We did not accept that this remark tended to show that the Claimant was excluded because she was not British, but it was because of what she had done in her previous employment. Mr Alves was presented with a situation in which he was being told that the Claimant's working relationship with her team members was extremely poor, the store manager suggested she was transferred and that it was reported, and supported by clocking in records, that the Claimant was clocked-in when she was not at work.

67. The Claimant said that she was not given an opportunity to respond to the allegations or shown logging in records, however she was employed for one week and in that time the Respondent was faced with a virtually non-existent working relationship. Mr Alves discovered that the Claimant had not told him about why her employment ended previously and that checks strongly suggested that she was clocked-in when she was not working, and this was also witnessed by Ms Cookman. Whilst it might be unreasonable not to ask the Claimant to respond, that of itself is insufficient, in the context of very short period of employment, to infer that the reason was anything other than the matters drawn to the attention of Mr Alves.

68. In the circumstances we were not satisfied that the Claimant had adduced primary facts which tended to show that a British in store cleaner manager would have been treated more favourably.

69. In any event we were satisfied that the reason why Mr Alves dismissed the Claimant was because the working relationship at the store was untenable due to the pay issues for the team members during the Claimant's previous

employment when she was paid, and that they were aware that she had been considered guilty of serious clocking-in irregularities. We also accepted that Mr Alves considered that the Claimant had not told him about the reason why her previous probationary period failed which misled him. Further he considered that the evidence showed that the Claimant had been keeping herself clocked-in when she was not at work. Mr Alves did not consider a transfer was appropriate because it would simply move the clocking-in issue to another store and that this was the reason why she had been dismissed previously. We rejected the Claimant's contention that Mr Alves felt under pressure to dismiss her. We accepted that the Claimant's dismissal was in no sense because of her race or that she was not British, the reason was her untenable relationship with her colleagues and the serious clocking-in irregularities.

70. Accordingly, the claim of discrimination on the grounds of race was dismissed.

Employment Judge Bax
Date: 28 April 2022

Judgment sent to Parties: 17 May 2022

FOR THE TRIBUNAL OFFICE