Case No: 2301423/2022

EMPLOYMENT TRIBUNALS

Claimant: Miss. P Rodrigues

First Respondent: D Brice and Company Ltd T/A D B Services

Second Respondent: Busy Bee Cleaning Services Ltd T/A BBCS

Heard at: London South **On: 17, 18 & 19 May 2023**

Before: Employment Judge D Wright
Ms. A Williams
Mr. J Turley

Representation
Claimant: In person, with assistance from an interpreter
First Respondent: Miss. Ibbotson, Counsel
Second Respondent: Mr. Charity, Consultant (Day one only)

1. On 24 May 2023 the Claimant requested written reasons for the judgment of the Tribunal. These are provided below.

JUDGMENT

1. The Claimant's application to strike out the First and Second Respondents' responses for failure to comply with Case Management Orders is refused.

2. The First Respondent's application to strike out the Claim for failure to comply with Case Management Orders is refused.

3. Upon the First Respondent withdrawing their allegation that the Claimant did not transfer to them under TUPE from the Second Respondent, the Claim against the Second Respondent is dismissed with the consent of all parties.

4. The Claimant was not discriminated against on grounds of her race.

5. The Claimant's claim of discrimination on grounds of race is not well founded and is dismissed.

6. The Respondent did not dismiss the Claimant, either directly or constructively. The Claimant's claims for unfair dismissal and/or wrongful dismissal are therefore dismissed.

7. The Claimant resigned from her position by way of her conduct. The claim for notice pay is therefore dismissed.

8. The Claimant's claim for unpaid holiday from 2018 is out of time and is dismissed.

9. The Claimant is owed 5 days holiday from 2021 which was accrued but unpaid.

10. The Respondent is to pay the Claimant the sum of £224.00 gross of tax to account for the unpaid holiday pay.

REASONS

Background

1. The Claimant was employed by the Second Respondent in this matter initially as a cleaner and then as a cleaner and supervisor having initially moved over on a TUPE transfer from Engie in September 2018.

2. The Claimant's employment was transferred to the First Respondent, again by way of TUPE transfer on 20 December 2021. There were disagreements over the terms of the contract and ultimately the Claimant's employment came to an end, though how is a matter of disagreement between the parties.

3. The Claimant began ACAS proceedings in March 2022 and issued an ET1 in April 2022. Initially, the claim was against three respondents, the First Respondent D Brice and Company Ltd T/A D B Services ("DBS"), the Second Respondent Busy Bee Cleaning Services Ltd T/A BBCS ("BBCS"), and the Third Respondent Optim Contract Services Ltd.

4. At the Case Management Conference before EJ Reed, the Claimant withdrew the claim against the Third Respondent, and her claims were agreed as being a loss of holiday pay, unfair dismissal, wrongful dismissal/notice pay and direct discrimination on grounds of race.

5. At the outset of the hearing before this tribunal, the First Respondents withdrew their allegation that the Claimant had objected to the TUPE transfer and accepted that she had transferred into their employment before the contract was brought to an end.

6. As such no claim remained which could succeed against the Second Respondent and the parties agreed that the claims against them could therefore be dismissed. Mr. Charity the representative for the Second Respondent was released and played no further part in the proceedings.

7. We continued to hear the claim between the Claimant and the First Respondent. The Claimant represented herself with assistance from an interpreter when required, and the First Respondent was represented by Miss Ibbotson of counsel.

8. We heard oral evidence from the Claimant and from Mrs. Albert, the office manager on behalf of the First Respondents.

Preliminary Applications

9. The claimant made an application to strike out the First and Second Respondent's responses on the basis of non-compliance with directions. In particular, the direction relating to the agreements of the hearing bundle.

10. This matter had been listed for a Case Management Conference and directions were given by Employment Judge Reed on 29 September 2022. One of those directions said "by 24 November 2022 the Claimant and the Respondents must agree which documents are going to be used at the hearing. The First Respondent must prepare a file of those documents with an index and page numbers. They must send a hard copy to the Claimant by 01 December 2022". That order was not complied with. The hardcopy bundle was not sent until about 02 May 2023 and the Claimant therefore seeks for the response to be struck out.

11. The First Respondent says that the reason for the delay was that there was a lot of back and forth. There were disputes over the contents of the bundle, and the Claimant largely agrees with that. It would appear to us that the key sticking point was whether the bundle should include recordings of telephone conversations made between the Claimant and the First Respondent as the Claimant sought or just the transcripts which the Respondent sought.

12. Ordinarily, the Tribunal very much takes the view that a transcript is more than sufficient. It's a lot easier and quicker to read a transcript of a one-hour conversation than it is to listen to a one-hour conversation. However, the Claimant indicates that she was unhappy with the transcription. In particular, there are elements where the transcription simply has "inaudible in brackets and the Claimant is of the view that that is actually audible.

13. Although the Tribunal normally expects parties to resolve disagreements between themselves on case management issues and contents of trial bundles this is a case where we take the view the Respondent possibly should have contacted the Tribunal and requested some sort of telephone Case Management Hearing, just to resolve this issue or even for a decision on the papers.

14. That being said it's clear from the wealth of emails back and forth that the Claimant has attached to her application that attempts were being made throughout this period to get this agreed. This is not a situation where the First Respondent has sat on their hands and done nothing, and we take the view that it would be draconian to strike out the First Respondent's response on that basis. Likewise, the duty was on the First Respondent to prepare the hardcopy bundle. To strike out the Second Respondent's claim would be entirely disproportionate and therefore the Claimant's application to strikeout the responses from the First and Second Respondent's was dismissed.

15. The First Respondent also made an application to strike out the Claim on the basis of non-compliance with directions and case management orders. Witness statements were required under paragraph 19 of the case management orders to be exchanged by 24 February 2023.

16. It is quite obvious that when the bundle was not finalised by that date it was impossible for the parties to comply with exchanging witness statements by 24 February. Before us we had a witness statement from the First Respondent. There was no witness statement from the Second Respondent, but they did not intend to call any witnesses.

17. There were no witness statements from the Claimant either. She said that she was unable to prepare her witness statement because she didn't get the bundle until quite recently. She has no computer at home and is reliant upon the library for access to computers. She informed us that she did have a witness statement, which was pretty much ready to go with the exception of needing to add in the page numbers from the bundle.

18. The directions do say that if the witness statement refers to a document in the fil it should give the page number. The Tribunal are also aware that on many occasions that element is not complied with, and parties are still able to go ahead with the hearing.

19. It was open to the Claimant to bring a copy of the witness statement with her without the page numbers and we would have been able to proceed. We were told that she doesn't have any hard copies of the witness statement as she didn't print it because it was not finished, and she did not want to send something that was unfinished. Instead, it was currently contained on a flash drive but that is was not at the Tribunal.

20. We also take into account that the Respondents raised the issue of the witness statements recently with the tribunal and the day before the hearing Employment Judge Victoria Wright wrote to the parties to say, “if the First Respondent has not already done so a copy of the electronic bundle should be uploaded to the document upload centre.” That was complied with. She went on to say “if the parties have not yet exchanged witness statements, they should do so forthwith. Any breach of the Tribunal’s order can be discussed at the commencement of the final hearing. The parties should be clear that a breach of the Tribunal’s order may lead to cost consequences or to the claim or response being struck out.

21. The tribunal takes the view that it is not particularly satisfactory that the Claimant failed to even bring the USB stick today with the witness statement on it. Arrangements could have been made for it to either be plugged into a computer and emailed to parties or to be printed off by court staff. We considered whether to take the evidence out of order. To hear from the Respondent’s first and allow the Claimant to bring the witness evidence the following day.

22. We decided not to proceed with that course of action. We did not have a witness statement but what we do have in the bundle are the claimants Particulars of Claim which are extremely detailed. They give dates and takes everything through in chronological order. The particulars are more detailed than many witness statements that the Tribunal sees on a day-to-day basis.

23. We found that we should proceed on the basis that there was sufficient detail there for the Claimant to give evidence using the particulars of claim as her evidence in chief and the Respondents had sufficient there to cross-

examine. Therefore, the application to strike out the claim for non-compliance with directions is also refused.

Holiday Pay

24. This head of claim was broken into two elements, one claim for unpaid holiday from the year 2018, and one for unpaid holiday pay from 2021.

25. The First Respondent accepts in principle that it would have liability for any unpaid holiday pay as this would have passed to them on the TUPE transfer from the Second Respondent.

26. In relation to the 2018 holiday pay, the First Respondent says that this claim was brought out of time. The last pay should have been made by December 2018, and therefore the ET1 in April 2022 was significantly out of time.

27. The Claimant says that the reason for the delay is that she did not get her payslips for 2018 until February 2019, and that was when she realised, she was missing holiday pay. She had various discussions with the Second Respondent over the following years chasing this back pay.

28. The Tribunal is prepared to consider some extension to the three-month time limit as there were clearly issues getting the payslips. However, we note that on 08 February 2019 (at page 90 in the bundle) the Second Respondent said no to her request to be paid the 2018 holiday pay. This was then repeated on 04 March 2019 (at page 92 of the bundle).

29. At that point, it should have been clear to the Claimant that the dispute would not be resolved and the time to bring a claim would start running from 04 March 2019 at the very latest. This means that to be in with a chance of being considered in time, or late but with reasonable grounds for the lateness, an ET1 would need to have been presented by 03 June 2019. Therefore, the claim for the 2018 holiday pay is out of time and is dismissed.

30. The Tribunal does note however, that the time limits for bringing a claim for breach of contract in the County Court is much longer than in the Employment Tribunal, in some cases up to six years rather than three months here, and the Claimant may wish to explore with a legal adviser whether she has an alternative route to make a claim for this pay.

31. In relation to the 2021 holiday pay the Claimant's contract allows for 21 days annual leave, although she says that in her original employment with Engie this was to increase to 24 days after three years' service. We therefore find that in 2021, she was entitled to 24 days annual leave.

32. The claimant said in her oral submissions that she had eight days unused holiday, in her schedule of loss she referred to six days pay. We can see from her payslips for 2021 that she received 18 days holiday pay plus one bank holiday paid. The contract makes no mention of bank holidays being on top of her allowance. Therefore, we find that she received 19 days pay out of the 24 that she was entitled to and is therefore owed five days. We note that the First Respondent agrees with this figure.

33. As to the rate that this should be paid at, the First Respondent says that we should apply the rate the Claimant was on with the Second Respondent,

£10.10 an hour, as almost all of that year was with the Second Respondent. However, the Claimant says that she should be paid at the First Respondent rate of £11.20.

34. We find that the Claimant could have saved those five days and used them all after the TUPE transfer and therefore award the rate of £11.20 an hour. She worked four hours a day so for five days this gives a total figure of £224 gross of tax, which is owed to the claimant.

Unfair Dismissal

35. We find that there was no explicit dismissal of the Claimant by the First Respondent. The Claimant says that they dismissed her in January 2022 by accepting the word of someone on the school site that she'd resigned. However, we do not accept that this amounted to an explicit dismissal, although we have considered below whether it contributed to a constructive dismissal.

36. When looking at the question of constructive dismissal, the first question we ask ourselves is “did the First Respondent fundamentally breach the Claimant’s contract by refusing to abide by the pre-transfer terms?

37. Before we can assess that we need to determine what terms the Claimant was actually on at the point of transfer. The Claimant says that she remained on the Engie terms. The First Respondent says that she was on the BBCS terms which are found at page 80 in the bundle.

38. The Claimant says that she did not receive the terms and conditions at page 80 of the bundle instead only receiving a one-page New Employee Form which we find at page 81. The First Respondent draws our attention to box seven on this New Employee Form at page 81, which says “I've read and agree to the terms and conditions of employment printed overleaf. I confirm I received a copy of this form to keep.”

39. This is signed by the Claimant and dated 03 September 2018. Our attention was also drawn to the footnotes on page 81, which says “bb 1.1 November 16. issue eight”. This is the same as the footnote on page 80.

40. We also note that at the top of page 80, it says “By signing this New Employee Form […]”. The First Respondent’s position is that originally, page 80 would have been printed on the back of page 81 and that these terms and conditions would have been provided to the Claimant. The Claimant disagrees with this saying that the contents of page 80 were never seen by her.

41. Looking at the contents of the two forms we find that we prefer the First Respondent’s position that this would have been all together on one document printed on either side. We were supported in this by the footnotes and the reference on both sides to it being a New Employee Form.

42. Additionally, we know that in these proceedings and in the TUPE discussions which took place before the proceedings were issued, the Claimant was paying very close attention to the exact terms that she was signing. We find that this is at complete odds with her case that in 2018 she signed a document saying that she'd read and agreed to the terms and

conditions of employment printed overleaf, if those terms and conditions were not actually attached.

43. Furthermore, when the claimant asked BBCS for her contract on 11 August 2019 so she could provide it to her bank, she was sent the documents at page 80 and 81. She replied to this email, which we see at page 83 of the bundle, and she did not dispute that those were her conditions of employment, which strongly suggests that she was aware of these documents prior to this point.

44. Therefore, we find that the contract with Engie had been superseded by the contract with BBCS. This is supported by the many differences between the terms in the Engie contract and her work with BBCS. This included her job title, the place she would be working, the fact that originally, she was being paid her remuneration by way of annual salary compared to moving on to an hourly wage with BBCS, the hours she was working and the rate of pay.

45. Even if we are wrong that page 80 was attached at the time of the transfer to the second respondent, we would find that in 2019 she was aware of these terms and conditions when they were emailed to her and she continued to work under them, thereby affirming them.

46. Furthermore, the original contract had been varied by promotions to supervisor, by pay rises and by increased hours from two hours a day to four hours a day. Therefore, at the time of transfer of the Claimant's employment to the First Respondent we find that the appropriate terms and conditions of employment are those found on page 80, the BBCS ones.

47. At the meeting on the 24th of November 2021, the Claimant was provided with a new starter pack and contract by the First Respondent. A brief discussion took place but it would appear that not much was dealt with other than the Claimant raising some concerns about changes in hourly rates.

48. We find that the Second Respondent did not warn the Claimant and her staff that the meeting was going to take place and therefore they were not really prepared.

49. The starter pack was the same given to all new members of staff with no further information relating to the TUPE elements and how existing terms and conditions would interact with the new contractual terms. No assurances were given that the terms were carryover. A further letter was sent to the claimant on 09 December 2021, although she says it was not received until January 2022 and we accept that.

50. There were several clauses in the contract which quite rightly caused the Claimant concern, particularly after the way she felt that BBCS had mistreated her in terms of making deductions from wages and overworking her. Therefore, she raised concerns about them with the First Respondent.

51. Following a lot of back and forth these were discussed in an hour-long telephone conversation with Mrs. Albert. This was then followed up by a letter from Mrs. Albert. We find that there is no "entire agreement clause"

in the proposed contract with the First Respondent and therefore the terms of the contract would be made up by their terms and conditions as interpreted by the offer letters and discussions which took place.

52. The Tribunal needed to conduct a comparison of the various clauses in the BBCS contract and the First Respondent's proposed contract. First of all, we considered the Claimant's job title. The offer letter referred to the Claimant's role as cleaner. In fact, she had two roles with BBCS. She was working two hours as a cleaner and two as a supervisor.

53. The First Respondent accepts this, but says that two letters were sent out, one for each role, although the Claimant had not received the second one. We accept that this was normal practice when someone had two roles, but we find that in this instance no second letter was produced. Had it been so then it would have been included in the bundle of documents. Furthermore, the letter for the cleaner role refers to a 20-hour week which is the total time the claim works over both roles. This makes it unlikely that two letters were produced, and we find that the First Respondent made a mistake here.

54. In any event, after the discussion in February, the First Respondent accepted that the Claimant should have a supervisory role and in the second letter confirmed that she will be paid for four hours as a supervisor. This is in fact a more advantageous term than originally where she was on a two plus two. Therefore, we find this is not a breach of the TUPE transfer regulations.

55. In relation to the hourly rate, the Claimant was originally on £10.10 an hour in both the cleaner and supervisory roles. She says that this was the supervisor rate, and a cleaner was paid less by BBCS. Her original offer letter from the First Respondent offered her £11.05 an hour as a cleaner.

56. However, the second letter increases this to £11.20 across the board at the supervisor rate. On the face of it, this is a better term than before and not a breach of TUPE regulations.

57. The Claimant relies on the fact that the cleaners received a larger pay rise proportionally than she did as a supervisor, meaning that the gap in the hourly pay was lower than at BBCS. Therefore, she says she has not been treated fairly and is worse off. We do not accept this argument. In real terms she was better off after the transfer than before. Whether the gap between her and her direct reports had closed or not is irrelevant for this matter.

58. Furthermore, the Claimant suggests that she should in fact have been paid more. She relies on the agreement between the First Respondent and the school trust setting out the hourly rates to be charged to the school. The bundle only has a redacted version of this contract and we do not know the rates therein contained. However, we find that the rate in that document is almost certainly going to be higher than £11.20 an hour for the simple reason that the First Respondent will like all companies be charging more for cleaning staff than they pay out. This is one of the main ways they make a profit. This model is common in all industries, including in law where solicitors are charged at a higher hourly rate than they are paid. This allows a company to cover other overheads and leave an element of profit for the shareholders. We find that any agreement between the first responders and

the School Trust is of no relevance to the question of whether the first respondent was abiding by the terms that the claimant was on at the point of transfer.

59. Perhaps the largest issue of contention between the parties is the hours that the Claimant was to work. The Claimant says that her contracted hours were 1800 to 2200, although the school allowed the cleaners to start early if they were on site, and she often started between 1715 and 1745. The First Respondents, in the offer letter, said that the hours were 1700 to 2100 and stuck by this in the letter after the discussion in February.

60. The new employee form with BBCS at page 81 in the bundle sets out the Claimants hours as being 1800 to 2000. At some point she picked up an extra two hours but nowhere in the bundle is there any evidence as to whether those hours were agreed to be after her original hours, meaning 1800 to 2200 or whether they would go either side of her original hours which would make it 1700 to 2100.

61. In the telephone meeting the Claimant was given the chance to provide this evidence to the First Respondent but did not do so. What we do have though, are the signing in books that the Claimant used when arriving at the school and leaving it. These nearly all show her arriving at 1700, occasionally 1710. There were some late finishes going on to 2300 but on the whole, she was starting at 1700 and leaving at 2100.

62. We also note that when BBCS were directly asked by the First Respondent what the Claimant's contracted hours were, the Operations Director told them 1700 to 2100. In the absence of any other evidence, the First Respondent would be bound to transfer on the conditions that the Second Respondent told them were in place. We therefore find on the balance of probabilities that the Claimant's contracted working hours were 1700 to 2100 at the point of transfer, and therefore the First Respondent has not breached the regulations by making those the Claimant's hours.

63. However, if we are wrong on that point, we note that the BBCS contract and the Engie contract both allow for the employer to alter the hours of work provided sufficient notice was given. Therefore, even if the Claimant's hours were 1800 to 2200 at the point of transfer, this condition would have transferred over with her, and sufficient notice was therefore being given of a change to her hours.

64. In relation to the deep clean which the First Respondent was expecting the Claimant to take part in, the Claimant's contract with BBCS was for 39 weeks, she says, and the First Respondent was offering 39 weeks and three days to allow for deep clean.

65. We note that the BBCS contract allows for extra time to be required of the Claimant in the holidays. In the discussion with Mrs Albert, the Claimant explained that she may not be available for those three days deep clean as she had other contractual commitments during the whole holiday period with a different employer and so it depended on her availability. In the subsequent letter, the First Respondent accepted that the Claimant was contracted for 39 weeks. It noted that she may be available for the deep

clean but may not. Therefore, we find that clause has not breached the TUPE transfer regulations.

66. The Claimant also takes issue with the requirements in the First Respondent's contract to work additional hours to cover staff on leave or when they are sick. In the letter following the discussion, this was clarified as something which would be done during normal work hours. The claimant was also told that she wouldn't be forced to do it if she was not available.

67. We note that the BBCS contract includes a clause saying that extra work may be required of you, and you will be paid at your standard hourly rates. Therefore, we find this clause is already in existence at the point of transfer, even if worded slightly differently.

68. The BBCS contract required the Claimant to sign in and out of work and said that she may not be paid if she doesn't do so. Where an electronic system was in place she would be expected to use it. In the First Respondent's contract the Claimant was expected to use an app on her mobile phone to clock in and out. The contract says that pay may be deducted from her wages if she does not clock in on the app due to not having any phone battery or data.

69. The Claimant, we find, rightly was worried by this term. Not only did she have concerns about being forced to install tracking apps on her personal mobile phone, which is something that the Tribunal finds is not good practice, even if lawful, but this is an extremely draconian term for deduction.

70. On the face of it, it goes beyond a potential deduction from wages where someone doesn't sign into a signing in book. If the tribunal were being asked to look at that clause in light of an unlawful deduction from wages claim, there is a strong possibility that the clause would be deemed to be unfair and unenforceable, particularly as it could lead to pay going below minimum wage.

71. However, in the discussion and subsequent letter, the First Respondent confirmed that they also had a sheet on site, which could be used in instances where mobile phones were not working, or data was not available. Only if neither option was used would pay potentially be deducted. We find that that brings it more in line with the BBCS clause saying that if you don't sign in, you might not get paid.

72. We have already found that the absence of an entire agreement rules that this letter is incorporated into the terms and conditions and therefore it tempers what, on the face of it, is a very draconian clause. As such, we find that the TUPE regulations are just complied with here and this is an equivalent term to that in the BBCS contract.

73. We looked next at the question of uniform. The First Respondent's contract includes a clause requiring payments upfront for uniform, DBS checks and ID badges; although these would be reimbursed after 12 months service. The Claimant took issue with this as she had been provided with a uniform for free by BBCS. We find that her contract with BBCS allowed for a charge to be made for uniform, but it seems that due to the Claimant having a

uniform when they transferred over to BBCS from Engie they did not charge her for this, rightly so.

74. In the telephone discussion with the First Respondent the Claimant was assured that she would not need to pay for the uniform and would only need to pay should she fail to return it on leaving employment and this was confirmed in the letter.

75. We also note that by virtue of TUPE transfer provisions carrying over her continuous service she had more than 12 months service at the time of transfer. This meant that even if she had been required to pay for the uniform up front, the contract would have allowed for immediate reimbursements essentially meaning no payment was needed. We find no breach of the terms there.

76. In relation to the DBS requirements, the Claimant was told she would need a DBS unless she can provide an existing one. She didn't provide one so was told she would need to get a new DBS. We find that no breach occurred here. The requirement was to hold a DBS. This was in both contracts and is standard for working in a school. If the Claimant was unable to evidence an existing DBS than the First Respondent was within their rights to request a new one.

77. Therefore, across all the points raised we find that the First Respondent did not refuse to apply the existing terms and conditions.

78. However, we also have to look at whether the First Respondent fundamentally breached the Claimant's contract in their manner of behaviour following the transfer. We find that the way the transfer began was far from perfect, and the First Respondent needs to look into how they can improve moving forwards for future transfers.

79. The initial meeting was just a quick group meeting which the Claimant was not aware of in advance. Although we find that the First Respondent had asked the Second Respondent to tell the Claimant about the meeting, they didn't rearrange when it was clear that the Claimant was not aware of it. When the Claimant subsequently asked in an email for a meeting, this was refused on the basis that it had already taken place.

80. Furthermore, the initial starter pack and the offer letter given at this meeting was a generic one used for all new starters to the company. The Claimant was not provided anything to explain how these would interplay with the two provisions. Therefore, we find that the Claimant was entitled at this point to feel worried, angry or aggrieved. We would strongly suggest that in the future the First Respondent looks at including some further information at this point, potentially something like a TUPE FAQ sheet here.

81. We then looked at the question of the Claimant's employment status. At the time of the transfer the Claimant was off work sick. Someone at the school, not the Second Respondent, told the First Respondent the Claimant had resigned. The First Respondent did not check this with the Second Respondent or make any attempt to contact the Claimant. They took the word of a third party over the transfer information provided by the Second Respondent with no further due diligence. We find that this is unacceptable.

82. The Claimant was first aware of this issue on 06 January 2022, whilst discussing her return to work following COVID isolation. She had a telephone call where she tried to set the record straight. In this call she was told that she would need to wait whilst the First Respondent checked the point with the Second Respondent. In light of the initial error, we find that this slight delay to check with the issue with the First Respondent is reasonable. However, it should not have required the Claimant to raise the issue with them. The First Respondent should have done this in December of their own accord.

83. The First Respondent sent an email to the Second Respondent on 06 January 2022 requesting clarification of the Claimant's status. The Second Respondent replied on Monday 10 January 2022 to Mrs. Albert who was unfortunately on leave for the whole of that week. In that email they confirmed that the Claimant was employed. They said that she was sick at the time and had not resigned.

84. During that week the Claimant made phone calls to the First Respondent and sent emails, which were unanswered even though the recipient of those emails was not on leave. Again, we find that this is not good practice and an acknowledgement should at least have been sent. Although we find that the delay here is not in and of itself excessive.

85. Mrs. Albert returned to work on 17 January 2022 and on 18 January 2022 an email was sent to the Claimant requesting a meeting. There was then a lot of back and forth trying to arrange a time for the meeting. The Respondent sent an email on 20 January, then a chaser on 26 January and another on 31 January with the Claimant responding on 02 February, albeit claiming to have had problems accessing the internet. We note that she does not have a computer at home and relies on the library for her email access when her phone is not working so find that this is plausible.

86. The meeting was finally arranged in a short telephone call on 05 February 2022 and took place on 09 February, with the clarification letter being sent out on 16 February. The Claimant accepts that she received but did not reply to this letter. On 04 March 2022 an email was sent requesting a response by 11 March 2022 or the First Respondent would assume that the Claimant did not want to work for them. The claim did not reply to this request and instead commenced ACAS proceedings on 18 March 2022.

87. We find that the initial process followed by the First Respondent was flawed, confusing and at times disrespectful. It would tend towards undermining the implied term of mutual trust and respect. However, once it became clear that the Claimant had not resigned, they took steps to resolve the situation.

88. The delay in January was not ideal but was explained. There were then further delays in resolving matters caused by Claimant's failure to respond to emails about arranging a meeting. The First Respondent then took part in an hour-long telephone meeting to go through the Claimant's concerns, explaining the process and writing a fresh cover letter in an attempt to assuage the Claimant's concerns. In essence, the First Respondent followed a process akin to a grievance procedure, and we find that by the

end of it the First Respondent had done sufficient work to offset the poor start to the working relationship following the transfer.

89. The Claimant wanted the First Respondent to provide an individual contract with all the changes on it. The First Respondent said they did not make changes to the terms and conditions for individuals. They had 800 staff and couldn't have separate contracts for everyone, although they did make some concessions in the offer letter, which we've already found formed part of the overall agreement. Therefore, we find that the Claimant was not dismissed but resigned by her conduct in ceasing communication after 16 February. We find that she resigned in response to the perceived differences in the contracts and in response to the First Respondent's behaviour.

90. However, we find that the First Respondent's behaviour did not quite reach the level whereby it fundamentally breached the Claimant's contract in such a way that would allow us to find the resignation amounted to constructive dismissal. Therefore, the unfair dismissal claim is dismissed.

Wrongful Dismissal/Notice Pay

91. Having found that the Claimant resigned by conduct rather than being dismissed, we must therefore dismiss the claim for wrongful dismissal and notice pay.

Direct Discrimination on Grounds of Race

92. At the Case Management Hearing, the Claimant intimated that her dismissal was an act of discrimination. Essentially, she wished to argue that she had been treated less favourably as someone of Portuguese national origin, with darker than stereotypically English white skin than a white British employee would have been. The First Respondent, she argued would have respected such white British employee's contractual entitlements and exercised greater forbearance in any disputes meaning they would not have been dismissed.

93. Having found that the Claimant was not dismissed, we would have dismissed this claim as falling at the first hurdle. But in her evidence before the Tribunal, the Claimant appeared to change the basis of her discrimination claim fundamentally. Instead, she relied on the following treatment.

    a. The letter of 09 December referring to a cleaning position when she should have been offered a supervisory position instead. It was suggested that no mistakes exist in offer letters sent to her black Ghanaian colleagues. She also relied on these colleagues getting more of a pay rise than she received.

    b. Asking for a DBS from her but not asking her black Ghanaian colleagues for one.

    c. Failing to tell the Claimant about a deep clean in September 2021.

94. The first point is that this is not the claim that the Claimant was given permission to add in the case management hearing by Employment Judge Reed. That claim was solely related to dismissal with the relevant

comparator being a white British person. Therefore, we find that the Tribunal does not have jurisdiction to hear this new or amended claim of race discrimination. Had we treated the Claimant as having made an application to amend her claim during the cross examination, we would have refused it as applying the principles in *Selkent Bus Company v Moore* and *Vaughan v Modality Partnership* we would have found that the balance of hardships would have come down in the First Respondent's favour. We would have done so after considering the extreme lateness of the application - the hearing having already begun and cross examination being partway through - and the fundamental shift in focus.

95. Notwithstanding that finding, we do consider that the Claimant has provided no evidence to support this claim. In respect to the first point, we do not have evidence of her colleague's offer letters and whether there are any mistakes therein. This was not put to Mrs. Albert in cross examination by the Claimant. In any event the error in the Claimant's letter was corrected quickly once it was pointed out. Therefore, on the Claimants evidence we would have found no discrimination.

96. In respect to the second point, although there is a message in the bundle from one colleague confirming they were not asked for a fresh DBS, we do not know what happened with them subsequently. This was not put to Mrs. Albert in cross examination, however, in general terms, she said that had the Claimant provided a valid DBS certificate, the First Respondent would have accepted this. Therefore, we would have found no discrimination.

97. In respect to the third point, we note that this took place before the TUPE transfer and no evidence has been provided to suggest that race played any part. Therefore, again, we would have found no discrimination.

98. We were shown an offer letter from the First Respondent to Anilton Sousa, a black male from an unspecified African country, relating to a TUPE transfer to the First Respondent in 2023. We find this takes us nowhere. In fact, on the face of it, it suggests that the Claimant was treated the same way in her transfer as the First Respondent is now treating a black man.

99. In summary, whilst we have a degree of sympathy for the Claimant in relation to the manner in which the TUPE transfer was initially conducted, the First Respondent did manage to redeem themselves for the meeting in February and the subsequent letter. We find that no dismissal, constructive or otherwise took place. The unfair dismissal, wrongful dismissal and notice pay claims are therefore dismissed. The race discrimination claim is inadequate in terms of evidence and particularisation and is dismissed. The claim for holiday pay from 2018 is out of time and is dismissed. The claim for holiday pay for in 2021 is partially successful and the Claimant is awarded the sum of £224.

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Employment Judge **D Wright**

Date: **3 June 2023**

JUDGMENT SENT TO THE PARTIES ON: **06 June 2023**

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FOR THE TRIBUNAL OFFICE

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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