EMPLOYMENT TRIBUNALS

Claimant: Mrs J Lamont
Respondent: Owl Cleaning Services Limited

Heard at: Watford **On:** 14 & 15 May 2024

Before: Employment Judge Dick

Representation
Claimant: Mrs J Kaur (solicitor)
Respondent: Miss V Hall (litigation consultant)

JUDGMENT UPON RECONSIDERATION

1. The complaint of failure to make a redundancy payment is dismissed upon withdrawal.

2. The complaint of unauthorised deductions from wages is well-founded. The respondent made an unauthorised deduction from the claimant's wages. The respondent shall pay the claimant £ 234.45.

3. The complaint of breach of contract in relation to notice pay is well-founded. The respondent shall pay the claimant £ 521 as damages for breach of contract.

4. The complaint in respect of holiday pay is well-founded. The respondent was in breach of contract in failing to pay the claimant for holidays accrued but not taken on the date the claimant's employment ended. The respondent shall pay the claimant £ 263.78 as damages for breach of contract.

5. The complaint of unfair dismissal is well-founded. The claimant was unfairly dismissed. The respondent shall pay the claimant the following sums:

    (a) A basic award of £ 781.50.

    (b) A compensatory award of £ 6733**.**

6. The Employment Protection (Recoupment of Benefits) Regulations 1996 apply:
    a. (1) The total monetary award (i.e. the compensatory award plus basic award) payable to the claimant for unfair dismissal is £ 7514.50.

b. (2) The prescribed element is £ 4758.65.
c. The period of the prescribed element is from 12/5/23 to 15/5/24.
d. The difference between (1) and (2) is 2755.85.

REASONS

INTRODUCTION

1. On 14 and 15 May 2024 I heard evidence and submissions and then delivered a judgment on liability, giving oral reasons. I then heard further evidence and submissions and delivered a judgment on remedy, again giving oral reasons. The following day, I realised that I had made two errors in the oral judgment on remedy and so, before preparing a written record of my judgments, I asked that the parties were written to seek their views on reconsideration to correct the errors. Unfortunately, that request was not immediately acted upon, and in the meantime a request on behalf of the respondent for written reasons was received. I therefore requested another letter be sent to the parties, proposing that I would deal with reconsideration on the papers at the same time as preparing my written judgment and reasons unless they objected in writing. That letter was sent (on 17 June 2024) and I understand that no such objections have been received. I therefore deal with judgment upon reconsideration and reasons in this document.

CLAIMS AND ISSUES

2. This claim arose out of the respondent's dismissal of the claimant on 12 May 2023. The claimant become an employee of the respondent on 2 May 2023 by virtue of a TUPE transfer. It was the respondent's case that it dismissed the claimant because it was unable to satisfy itself that the claimant had the right to work in this country, since upon request the claimant had not provided documentation the respondent required. The claimant's case was that she provided all the documents which she had and which she needed to provide, and that she was therefore unfairly dismissed. She also sought payment for the days that she had worked for the respondent before she was dismissed, notice pay, and accrued holiday pay.

3. There was no dispute that the claim was in time. There was no dispute that there been a TUPE transfer. As to the holiday pay and the days worked, there was no dispute that the claimant had been entitled to the money; it was the respondent's case that it had sent the claimant a cheque which the claimant said she had never received. I was presented with an agreed figure for the wages (£ 234.45 gross); there was no agreed figure for the precise number of days of holiday pay which had been accrued.

4. So far as the unfair dismissal was concerned, it was for the respondent to prove the reason for dismissal, which it said was some other substantial reason,

namely its genuine belief that the that the claimant could not prove her identity and right to work. It was not the claimant's case that the reason for the dismissal was the TUPE transfer (which would render the dismissal automatically unfair – see TUPE reg 7(1)). Rather, the claimant's case was the respondent had failed to show that there was a fair reason, meaning the dismissal was unfair. Should the respondent prove that there was such a potentially fair reason, I would go on to consider whether the dismissal was fair or unfair, i.e. whether the respondent acted reasonably or unreasonably in all the circumstances in dismissing the claimant. Should I find that the dismissal was unfair, I would go on to consider remedy, including whether or not a *Polkey* reduction (see below) would be appropriate.

5. Should liability be established, The issues on remedy for unfair dismissal to be decided were as follows:

    a. The amount of the basic award for unfair dismissal.
    b. The amount to be awarded for loss of statutory rights.
    c. The period of loss for which the claimant should be compensated.
    d. The financial losses over that period caused by the dismissal.
    e. Adjustment (*Polkey*).

PROCEDURE, EVIDENCE etc.

6. At the start of the hearing the respondent's name was amended by consent to include the word "Limited" at the end. A claim for redundancy pay was withdrawn at the start of proceedings.

7. Before the evidence was called I explained to the parties that I would read the witness statements but that they should be sure to refer me to any documents of relevance in the agreed bundle during the course of the evidence or submissions. Both advocates helpfully referred me to some documents in the bundle which I should read in advance and I did that. I also discussed the issues with the parties (see paragraph 4 above). I indicated that I would not need to hear evidence about remedy at this stage (save for *Polkey*) – if necessary I would hear more evidence after making findings on liability.

8. After taking time to read the statements, I heard evidence from the witnesses. In each case the usual procedure was adopted, i.e. their written statements stood as their evidence-in-chief and they were then cross-examined. The respondent called Mr Ruslan Malakov and Mr Viktor Bochar. The claimant also gave evidence.

9. At the conclusion of the evidence I heard oral submissions from both advocates on liability, which concluded on the first day. On the morning of the second day I was provided with the claimant's employment contract with the transferor (i.e. her previous employer) as well as some payslips and a terms and condition document. The parties agreed that despite the late stage I could take that evidence into account and, having concluded that it would be in the interests of justice to do so, I took it into account. With the agreement of the parties, I heard further evidence from the claimant to deal with the issues that were raised in

those new documents, before delivering an oral judgment and reasons on liability. I then heard further evidence from the claimant and further submissions before delivering an oral judgment and reasons on remedy.

LAW

Unfair dismissal

10. Although it is customary to do it the other way round, in this case it makes more sense for me to set out the law before setting out my findings of fact.

11. S 94 of the Employment Rights Act 1996 ("ERA") confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that they were dismissed by the employer (see s 95), but in this case the respondent admits that it dismissed the claimant.

12. S 98 ERA deals with the fairness of dismissals in two stages. First, the employer must show that it had a potentially fair reason for the dismissal within section 98 (1) and (2). Second, if the employer shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

13. So far as the first stage of fairness is concerned, S 98 ERA provides, so far as is relevant:

> (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—
>
> (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.…

14. In this case the respondent did not argue that the claimant in fact did not have the right to work in this country; in other words it did not argue that the reason was illegality under s 98(2)(d). Rather, it argued that its inability to confirm whether the claimant had the right to work (i.e. its belief in illegality, or perhaps more accurately its lack of belief in legality) was some other substantial reason ("SOSR") under s 98(1)(b). So in this case it is for the respondent to prove that the principal reason for the Claimant's dismissal was SOSR.

15. The second stage of fairness is governed by s 98 (4) ERA:

> (4) … 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.

16. In deciding fairness, I therefore must have regard to the reason shown by the respondent and to the resources etc. of the respondent. In general, the assessment of fairness must be governed by the band of reasonable responses test set out by the EAT in *Iceland Frozen Foods Ltd* v *Jones* 1983 ICR 17. In applying s 98(4), it is not for me to substitute my judgment for that of the employer and to say what I would have done. Rather, I must determine whether in the particular circumstances of this case the decision to dismiss the claimant fell within the band of reasonable responses open to a reasonable employer.

17. An employer may be liable to pay a "civil penalty" where it employs someone who does not have the right to work. It is a defence to such a penalty for an employer to show that it undertook specified checks about the employee's right to work (a "statutory excuse"). Failing to conduct such checks is not, however, an offence itself – it is not illegal merely to employ someone without doing the specified checks. That is why the respondent in this case does not rely upon illegality under s 98(2)(d) – if (as I in fact find was the case below) the claimant had the right to work in this country, it would not have been illegal for the respondent to have employed her without doing the specified checks.

18. There are a number of authorities which deal with the situation where an employer mistakenly believes that an employee does not have the right to work, i.e. another situation where an employer cannot rely upon illegality under s 98(2)(d) but instead relies on SOSR. Although this case is slightly different – in that the respondent says it didn't know one way or the other whether the claimant had the right to work – those authorities will clearly be of some relevance. At the start of the proceedings I referred the parties to Volume 14 Chapter 9 paragraph 9.87 of the IDS Employment Law Handbooks and I take the following principles from the authorities dealt with there. A genuine but erroneous belief that an employee does not have the right to work could constitute SOSR for dismissal; the key question will be whether the employer's belief was genuine and reasonably held. (*Hounslow London Borough Council* v *Klusova* 2008 ICR 396, CA). Where, however, the employer fails to do enough to verify the employee's right to work, dismissal is likely to be unfair, either because it indicates that the mistaken belief was not genuine or because it indicates that the decision to dismiss was not reasonable in the circumstances (*Sanha* v *Facilicom Cleaning Services Ltd* ET Case No.3200292/18; *Counday* v *Asda Stores Ltd* ET Case No.2302120/16). I note that these last two authorities are decisions of Employment Tribunals so I am not bound by them, but it was not suggested to me that the statement of the law I have just set out was inaccurate.

19. I was provided with a copy of the October 2013 Home Office document *Full guide for employers on preventing illegal working in the UK* ("the Home Office Guidance"), which the parties agreed was the version which applied at the material time. It sets out the relevant checks which I refer to above. So far as is relevant, it provides:

> You will only have a [statutory] excuse if you correctly carry out checks on acceptable documents… by following the 3 step process.
> …
> Step 1: You must ask for and be given an acceptable document or combination of documents. You must only accept original documents.
>
> Step 2: You must take all reasonable steps to check that the document is genuine and to satisfy yourself that the holder is the person named in the document… For each document given to you must: check any photographs are consistent with the appearance of the person.. [A number of other checks are mandated, none of which are asking for photographic ID.]
>
> Step 3: You must take and retain a copy of the document…
>
> …
>
> *List A: Documents which show an ongoing right to work*
>
> Any of the documents, or combination of documents described in List A below show that the holder has an ongoing right to work in the UK. They will provide you with [a statutory excuse if you correctly follow the three-step process].
>
> … [List Items 1 to 10 are not relevant to this case]
>
> 11. A letter issued by the Home Office to the holder which indicates that the person named in it is allowed to stay indefinitely in the UK together with an official document issued by a previous employer or government agency with the person's name and national insurance number.
>
> Until March 2004 individuals granted indefinite leave to enter or remain in the UK were usually issued with a Home Office status letter [sample pictures of which then appear in the guidance].

20. It was also not in dispute that in the case of a TUPE transfer, guidance provides that the transferee should carry out a fresh right to work check, but has a 60-day "grace period" in which to make the check for the purposes of the statutory defence.

21. In the event that the dismissal was unfair, I would go on to consider whether any adjustment should be made to the compensation on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's

case, the claimant might have been fairly dismissed, in accordance with the principles in *Polkey* v *AE Dayton Services Ltd* [1987] UKHL 8.

Remedy for unfair dismissal

22. The award for compensation for unfair dismissal is assessed under two heads on the principles set out at ss 118 to 126 of the Employment Rights Act 1996 ("ERA").

23. The first head is the basic award, which is calculated on a formula based on age, length of service and gross weekly pay. A week's pay is subject to a statutory maximum.

24. The second head is the compensatory award, generally calculated net of tax. It is intended to compensate for loss actually suffered and not to penalise the employer for its actions. The relevant questions will be: was the loss caused by the dismissal; whether it was attributable to the employer's actions; and whether it is just and reasonable to award compensation.

25. The compensatory award may include: past and future loss of earnings, loss of pension and fringe benefits, expenses incurred in looking for other work, and compensation for loss of statutory rights. The award for loss of statutory rights reflects the fact that the claimant would have to work for 2 years in new employment to reacquire the right not to be unfairly dismissed and may also reflect that the claimant has lost the statutory notice period built up during the length of their employment. It will be a nominal sum, usually of the order of few hundred pounds.

26. Because the award is intended to compensate for actual loss, the amount of wages etc. lost by the claimant will have deducted from it any amounts the claimant has made, or should have made, by way of mitigation – the most obvious example being earnings from a new job. An employee who has been unfairly dismissed must mitigate their loss by taking reasonable steps to reduce their losses to the lowest reasonable amount. This does not mean they have to take all possible steps. The burden of proving a failure by a claimant to mitigate lies on the respondent. The compensatory award may also be the subject of certain other adjustments, for example to reflect contributory fault on the part of the claimant or where the Tribunal finds that the claimant might still have been dismissed had a fair dismissal procedure been conducted (applying the principle in *Polkey* above).

27. ERA s 124 places a cap on the compensatory award for unfair dismissal of the lower of 52 weeks' pay or the prescribed amount applicable on the date of the EDT.

28. It is for the claimant to prove their loss and that the loss was caused by the unlawful act of the respondent. Though the claimant is obliged to take reasonable steps to mitigate their loss (see above), it is for the respondent to prove that the claimant failed to do so.

Notice pay and holiday pay

29. In this case the claimant relies upon a contractual right to notice pay (the minimum period being determined by operation of s 86 ERA) and accrued holiday pay. The Tribunal has the jurisdiction to consider claims for damages for breaches of employment contracts which arose or were outstanding on the termination of employment under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994/1623.

Unpaid wages

30. Under s 13 ERA, a worker (which includes an employee) has a right not to suffer unauthorised deductions from their wages. A failure to make a payment that is due will constitute a deduction for the purposes of s 13. The right may be enforced by way of complaint to the Tribunal under s 23.

FACT FINDINGS

31. I find the following facts on the balance of probabilities. Where I have needed to resolve disputed facts I make that clear. I have not made findings on every disputed fact presented to me, but merely on those which assist me to come to a decision bearing in mind the issues to be decided.

Introduction, pre-transfer, transfer

32. The claimant worked as a cleaner/supervisor at a school. She had been employed since 7 June 2018 by At Your Service Cleaning Company "AYSCC", which provided cleaning services to the school. (This was the date the claimant recalled and the date on the contract; the respondent had no direct knowledge of the date, though I note that the information provided to them by AYSCC had the date as 8 June 2018; the difference of one day is not material in this case.) AYSCC was owned and run by a Mr John Evans.

33. It was the claimant's case, which the respondent did not take issue with, that she in fact had the right to work in the United Kingdom. This was confirmed by a Home Office letter (at page 86 of the bundle). The letter, dated 23 January 2004, stated that the claimant had indefinite leave to remain in the United Kingdom and could work without restriction. It carried a stamp, bearing the same date, from the Home Office Immigration Department.

34. At page 99 of the bundle was a document issued by AYSCC, headed "PAYE - Notice to Employer of Employee's Tax Code", which included the claimant's national insurance number – I call this "the PAYE notice". At page 91 of the bundle was a table headed "Confidential employee information", which the parties agree was provided to the respondent by Mr Jones during the course of the transfer. I refer to this as "the spreadsheet". It contains information about

the claimant such as her then-current hourly rate of pay (£10.42), annual holiday entitlement (28 days) her accrued holiday to date and also her national insurance number.

35. As I have said, it was not in dispute that the respondent took over the services provided by AYSCC, and that the claimant became their employee by way of TUPE transfer from 2 May 2023. The respondent's director was Mr Ruslan Malikov and its operations manager was Mr Viktor Bochar. A Mr Yuriy Yuzvak worked as an area manager for the respondent.

36. It was the respondent's case that the prior to the transfer it participated in TUPE consultations with the transferor and with the claimant, during which the managers introduced themselves, explained the respondent's procedures, and assured the claimant that her terms and conditions of employment would remain unchanged. In her oral evidence the claimant accepted that such a conversation had taken place and I find that it did.

37. Mr Malakov's evidence was that in a conversation prior to the transfer with Mr Evans, he asked Mr Evans to provide the documents the respondent required for the TUPE transfer. Mr Evans told him, he said, that he (Mr Evans) had never seen any photographic ID from the claimant and that he only had an old Home Office letter. I accept that evidence. Mr Malakov's statement was not specific about what documents were asked for although I note that in an email at page 89 of the bundle (which does not carry a date but clearly predates the transfer) a number of documents were requested such as a "TUPE template" detailing hours and rates of pay, written employment particulars for each employee, information on any disciplinary procedures, contract of employment template, staff handbook etc. ID documents and documents relating to immigration status or right to work are not included in the list. In his oral evidence Mr Malakov maintained that all he had been given by Mr Evans was the spreadsheet and the Home Office letter. He denied that he had been given anything else, and in particular the PAYE notice. In her oral evidence the claimant said that she was sure that she had seen that document in Mr Malakov's hand at some point when they had met. Whilst I do not doubt that the claimant was being honest about this, in light of the evidence I heard from her about the circumstances of that meeting, I consider that it is more likely than not that she is mistaken about seeing the PAYE notice – it was not clear to me how she would have had the opportunity, in the circumstances which she set out in her evidence, to have seen it. I therefore accept that the respondent was not provided with the PAYE notice by Mr Jones in advance of the TUPE transfer. I accept that the only information concerning the claimant which the respondent was provided with before the transfer was the spreadsheet and the Home Office letter.

38. Mr Malakov's written evidence was that before the transfer the claimant participated in TUPE consultations with the respondent. His written evidence then went on to refer to discussing right to work documentation with Mr Evans and the school caretaker (but not with the claimant). I therefore accept the claimant's evidence that she was not told about any requirement to provide identification documents before the transfer took place.

Post-Transfer – The claimant's employment with the respondent

39. The claimant's written evidence was not specific about when or how many times she met Mr Malakov. She said that when the respondent took over the contract she was asked for photo ID. She informed the respondent [i.e. Mr Malakov] that she did not have and had never had photo ID but the respondent insisted on having ID and she was dismissed despite the respondent having the Home Office letter. Mr Malakov's evidence was that the conversation about ID documents took place on the first day of the new contract i.e. 2 May 2023. I find that such a conversation did take place. Mr Malakov said that he had asked the claimant for various documents including a passport and had specifically told her that the documents were required for the TUPE transfer and for DBS (Disclosure and Barring Service) checks. I do not accept Malakov's recollection is accurate in that regard (i.e. about precisely what documents he asked the claimant for and why) – it is contradicted by the claimant's evidence and is not corroborated by the respondent's records. At page 93 of the bundle are minutes of a work meeting between the claimant, Mr Malakov and Mr Yuzvak, dated 2 May 2023. So far as is relevant it records simply: "[Mr Malakov] asked [the claimant] to bring any ID."

40. During the course of cross-examination it was put on the claimant's behalf to Mr Malakov that this meeting in fact took place on 4 May rather than 2 May. It may be that the witnesses' recollections genuinely vary on this point but whether it was the second or fourth does not seem significant to me. What is significant is that, as in fact both parties agree, the claimant was asked to provide photographic identity documents and she did not do so. She did not do so, I find, because she did not have any.

41. Mr Malakov said that as the claimant did not provide the identity documents, he emailed Mr Evans but received no response. He referred specifically to the email at page 89 of the bundle, but as have already said, that email was clearly sent before the transfer. He then explained that he asked Mr Evans for the documents at a meeting they had arranged, having got no response to the email. But it is clear from all of the evidence that any such meeting also took place before the transfer. Mr Malakov said that Mr Evans said they had no ID documents for the claimant and that they paid her in cash. It may be that Mr Malakov somehow understood Mr Evans to be saying the claimant was paid in cash, but I accept the claimant's evidence that she was not paid in cash and was regularly provided with payslips. Nobody appears to have asked her for payslips on the respondent's behalf. Nor does anybody from the respondent in fact appear to have tried to contact Mr Evans again after the transfer – I consider Mr Malkov's recollection in this regard to be incorrect.

42. Mr Malakov's evidence was that there were three more meetings after 2 May between the respondent and the claimant where she was asked for the documents. The claimant denied this. None of those meetings are minuted. I noted on the part of Mr Malakov (and indeed the claimant) a tendency to use

the word meeting in a rather loose sense, to include short conversations rather than formal work meetings. Ultimately I did not find it necessary to make factual findings on precisely how many times Mr Malakov met the claimant over the course of her brief employment with the respondent.

43. At page 92 of the bundle is a letter to the claimant from Mr Malakov dated 4 May 2023. The letter refers to the claimant's failure to produce "satisfactory evidence of her eligibility to work in the UK". It makes no particular mention of photographic ID, nor of DBS checks. The letter says that the claimant is to be placed on authorised leave from 12 May and says that until the claimant is able to prove she is legally allowed to work in the UK no payments will be made under her contract of employment. It invites her to a formal meeting on 11 May, the purpose being "to discuss [her] status in the UK and provide [her] with a further opportunity to produce the required evidence". It advises the claimant that she may be accompanied and that if she is unable to provide satisfactory proof of her right to work that the respondent may have to terminate her employment. The claimant accepted in her evidence that she had received that letter but had not actually opened it until she met Mr Malakov on 12 May 2023 (not the 11th – see below). Her explanation, which I accept, for not opening it was due to personal reasons which I need not set out here.

The dismissal

44. At page 94 of the bundle there are very brief minutes of a meeting dated 11 May 2023, again between the claimant, Mr Malakov and Mr Yuzvak. All that is recorded is: "[Mr Malikov] asked her to bring any ID. She told me that she doesn't have any ID." In his oral evidence Mr Malakov explained that the date on those minutes was wrong because although the meeting had been scheduled for the 11th it in fact took place on the 12th. There was a difference between the parties about who had failed to attend the meeting on the 11th. I did not regard this is significant given that all were agreed at the meeting did in fact take place on the 12th. It was also agreed that on that date – the 12th – the claimant was formally told that she was being dismissed. This clearly demonstrates that the meeting minutes are not a reliable record, since they make no mention of the dismissal, which was plainly an important event at that meeting. I think it reasonable also to infer that the minutes from 2 May are similarly unreliable given their brevity.

45. In a letter dated 18 May 2023 Mr Malakov wrote to the claimant saying that despite his repeated requests "dated 2.5.2023" (i.e. despite it saying repeated requests it specifies only one date) the claimant had failed to produce satisfactory evidence of her eligibility to work in the UK. The claimant, the letter continued, had been invited to a formal meeting which she attended on 12 May 2023 which had been arranged to allow a final opportunity to produce satisfactory evidence of her eligibility to work in the UK (again, there was no reference here to providing evidence for DBS checks). As she had still failed to produce the relevant documentation, it said, the respondent had formed "the reasonable belief that [the claimant was] not eligible to work in the UK". Her

employment was therefore terminated "with immediate effect" and the claimant was not entitled to notice or pay in lieu of notice. The letter offered an opportunity to appeal the decision by emailing Mr Malakov within five days.

46. Mr Malakov's evidence was that he decided to terminate the claimant's employment because without the requested documents the respondent could not verify the claimant's identity, or work status, or check if she had a criminal record (the DBS check). He therefore decided to terminate her employment to ensure compliance with employment and immigration laws, particularly concerning the employment of individuals "in a children's environment". It was clear from his answers in cross-examination that Mr Malakov had not accepted the claimant's explanation that she had never been issued with photo ID by the Home Office. Mr Malakov had come to that conclusion on the basis of his own personal experience in or around 2003, when he personally had been issued with a photo ID documents by the Home Office. I accept that he was telling the truth about that. However, in his oral evidence he confirmed he had been aware of the Home Office guidance, and he had, I find, failed to take account of the following clear statement in the guidance: "until March 2004, individuals granted indefinite leave to enter or remain in the UK were usually issued with a Home Office status letter". The claimant's Home Office letter (i.e. a status letter) predated March 2004. I find therefore that Mr Malakov had a genuine but mistaken belief that the claimant was wrongly claiming not to have photo ID issued by the Home Office.

47. When Mr Malakov was asked during the course of cross-examination whether he had attempted to contact the Home Office to verify the claimant's right to work, he explained that the online form to be filled in for that process required information which he did not have. That may be so, but I was not presented with any reason why the respondent could not for example have written to the Home Office, although I accept that realistically they may have had to wait longer for a response than might have been covered by the grace period.

48. Mr Malakov accepted in the course of his evidence that the Home Office letter with which he had been provided was of the sort referred to in paragraph 11 of the guidance. This was clearly a realistic concession. Therefore, following the guidance, if the respondent had also had an official document issued by a previous employer or government agency with the claimant's name and national insurance number then the respondent would have had the information which it needed about the claimant for the purposes of right to work checks. Whilst I have accepted that the respondent was not provided with the PAYE notice by the transferor before the transfer, I am satisfied that the respondent made no effort to obtain such documents after the transfer. There is no record of the respondent ever having asked the claimant for such a document. On the evidence I also find that they did not contact the transferor to make any such request after the transfer. Had, they done so, just as the claimant's representatives were able to do (see below), the respondent would have received the document that they required. The respondent might also simply have asked the claimant for a payslip, but did not. It is clear to me that Mr Malakov was concerned with seeking the photographic ID which he believed was required rather than anything else. Mr Malakov continued to ask for

photographic ID from the claimant, in the mistaken belief that it was required by the guidance. While Mr Malakov sought to fall back, during the course of his evidence, on the point that the claimant had not provided the original Home Office letter rather than a copy, nobody at any point suggested to me that the claimant had actually been asked to provide the original.

49. The only written record of a DBS check with which I was provided is at page 88 of the bundle. This was issued on 17 June 2011. However the claimant in her oral evidence said that she had a more current DBS check, which would have expired in 2023. I accept that evidence. It was not challenged in cross-examination and in any case it appears to me most unlikely that the claimant would have been able to work for four years in a school without such a check being carried out. I therefore infer that it is possible to carry out a DBS check without photo ID, because the claimant does not have photo ID. (One clarification to this was given by the claimant in oral evidence when she said she did have a passport – and in the context it was clear that she meant very many years ago – but that it had been lost and the loss had been reported to the police. I accept that evidence.)

50. I mean no disrespect to Mr Bochar when I say that he had his evidence added little to Mr Malakov's. Mr Bochar said that he was present during multiple meetings with the claimant where she was required to provide photo ID. He also said that because the claimant did not possess any identification documents aside from the Home Office letter the respondent contacted her former employer but again he referred to the email at page 89 which in my judgment clearly predates the transfer. He also confirmed in his oral evidence that where in his written evidence he said that the transferor had paid the claimant in cash, that information had in fact come from Mr Malakov. Mr Bochar also said in his evidence that he had not personally spoken to Mr Jones and had not seen any of the documents that we were concerned with in this case.

Post-Dismissal

51. On 19 May 2023 the claimant wrote to Mr Malakov noting that she had been asked to attend a meeting on 11 May and that neither Mr Yuzvak or Mr Malakov had turned up for that meeting. So far as is relevant to this case, in her letter the claimant noted that she had been asked on 2 May 2023 for evidence of her eligibility to work in the UK. She pointed out that evidence of right to work can be provided by the transferee by official notification of her NI number. This is not phrased particularly clearly but is, in the context of the other evidence, plainly a reference to the part of the guidance which says that a Home Office letter (of the sort which the respondent accepts she had given it) is acceptable proof of work status if accompanied by an official document issued by a previous employer with the person's name and national insurance number. She also explained the 60 day grace period for right to work checks to be carried out.

52. On 22 May 2023 the claimant wrote to Mr Malakov suggesting again the evidence of her right to work could be provided by the company she worked for the past five years. Neither of the two letters I have just mentioned refer to an

appeal, though clearly they were written challenges to the decision to dismiss her.

53. At page 98 of the bundle was a letter from Mr Evans to the claimant's representatives at Hillingdon Law Centre. In the letter Mr Evans described a meeting with Mr Malakov on 14 April and said that he provided the Home Office letter to Mr Malakov along with an "HMRC notice to employer of employees tax code document" (clearly referring to the PAYE notice) and TUPE information (which I take to be the spreadsheet). He said he had no discussions or contact from Mr Malakov or the respondent since that 14 April meeting. I was not provided with a statement from Mr Evans, nor did he give evidence. In the absence of any explanation as to why he could not give evidence, I do not consider it fair to rely upon what he says in the letter. I do however consider it appropriate to take into account that it is clear from the letter that the claimant's representatives were able to easily contact Mr Evans, very shortly after the time we are concerned with, and clearly were able also to obtain from him the PAYE notice.

54. At page 104 of the bundle is a Home Office right to work checklist. I was not taken to this during the course of the evidence or submissions but so far as is relevant it appears broadly to mirror the parts of the Home Office guidance which I have already set out.

CONCLUSIONS - LIABILITY

55. I now apply my findings of fact to the particular points to be decided.

Unfair dismissal

56. First, what was the reason or principal reason for dismissal? The respondent says the reason was a substantial reason capable of justifying dismissal, namely that respondent had a genuine belief that the claimant could not prove her identity and right to work. On the basis of my findings, the respondent has proved that – Mr Malkov clearly had such a belief, and that belief was genuine. I also accept that such a belief is a substantial reason capable of justifying dismissal. Whether it did in fact justify dismissal is to be considered at the next stage, in particular in the context of whether that belief was reasonable.

57. Second, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? In short my answer to that question is no. I come to that conclusion having considered the band of reasonable responses and concluded that no reasonable employer could have dismissed the claimant in the circumstances. I find that Mr Malakov's mistaken (albeit genuinely held) belief that the claimant needed to provide photographic identification was unreasonable, particularly in light of the clear wording of the Home Office guidance. The Home Office letter which the claimant provided would have been sufficient, according to the guidance, if accompanied by a formal document either from the transferor or from HMRC containing the claimant's name and national insurance number. It seems to me that the

spreadsheet could have qualified as such a document and there was not dispute that the respondent had had that. Even if the spreadsheet did not amount to an official document, the respondent did not ask the claimant for such a formal document. If it had, she could easily have provided a payslip. The respondent also could have, but did not, seek such a document from the transferee after the transfer – in other words once it should have been clear from the guidance that that document was all that was required – and had it done so, on the basis of my findings, it could have been provided with such a document by the transferor, just as the claimant's representatives were provided with one when they asked at around the material time. The respondent's size and administrative resources plainly did not prevent Mr Malakov from being able to read and follow the guidance, and they have no bearing on whether the simple enquiries I have just mentioned could have been raised. Those enquiries, and at least some initial enquiries with the Home Office, could easily have been conducted within the grace period allowed by the guidance. In all the circumstances then, taking account equity and the substantial merits of the case, no reasonable employer would have terminated the claimant's employment in the circumstances on the basis of the uncertainty as the claimant's immigration status. The same applies to the concern about the provision of ID for DBS checks, for the reasons given at paragraph 49 above.

58. I do not accept that any failure by the claimant to follow the respondent's appeal procedure renders an otherwise unfair dismissal fair, particularly given that she did in substance challenge the decision to dismiss in writing.

59. It follows from the facts I have found, that if a fair process had been followed, the claimant would have remained in her job. A fair process would in my judgment have concluded that the claimant had the right to work in the UK and had the documents necessary to prove it. A *Polkey* reduction therefore would not be appropriate.

60. I have also considered whether, as the respondent argued, the claimant contributed to her own dismissal on the basis of my finding that the situation could have been resolved by her providing a payslip. On my findings she was not ever asked for such a document. It also would clearly not have been possible for her to obtain the photographic ID which the respondent wanted within the 12 days she was given. The claimant did not contribute to her own dismissal in my judgment.

Notice

61. So far as notice pay is concerned, the respondent now accepts that the claimant was entitled to notice. The only issue is how much. While during the course of submissions the respondent and the claimant variously submitted that the period was one or two weeks, after I queried the point both parties accepted that the claimant would be entitled to her statutory notice period, calculated by reference to the period for which she had been employed, which of course would not be affected by the TUPE transfer. The claimant had therefore been employed for 4 full years and was entitled to 4 weeks' notice,

the respondent not having argued that she had committed gross misconduct (which, on my findings, was not an argument that would have succeeded in any event). The claimant was not given notice nor was she paid in lieu.

Holiday/Wages

62. So far as accrued holiday and pay for the 11 days for which she worked for the respondent, there was no dispute that the claimant was entitled to payment. The respondent's case was that it sent her a cheque, but as Mr Malakov confirmed in evidence, the respondent had neglected to sign the cheque. The claimant's evidence was that that cheque did not reach her, and I accept that evidence. On either view however the respondent did not in fact pay the claimant for her accrued holiday, or for the 12 days which she worked. I find that the respondent is liable to pay her for those things.

63. The precise amounts are addressed in my reasons on remedy below, but I make the following findings here. Although the claimant's payslips from AYSCC show no accrued holiday, they also show that the claimant had not taken any holiday – both of those things cannot be right. I accept the claimant's evidence that from 1 January 2023 – which was the start of the holiday year according to her contract with AYSCC, the terms of which carried over by virtue of the TUPE transfer – until the end of her employment she had not taken any holiday.

64. Finally, it was pointed out during the course of the hearing that although the contract with AYSCC is dated 7 June 2018 in its printed text, a handwritten amendment to the hourly rate of pay (from £ 10.42 to £ 11.44) is dated 6 April 2023. As the respondent points out, the national minimum wage (which it appears was intended to apply to the claimant) was less than £10.42 in 2018. As the claimant explained, she would be given an amended version of the contract whenever the wage changed, so I conclude that this was a genuine copy of the claimant's contract, as amended on 6 April 2023.

CONCLUSIONS (AND RECONSIDERATION) – REMEDY

Initial Conclusions

65. The claimant's weekly pay under the contract was, the parties agreed, £ 130.25, there being no need to distinguish between net and gross as the claimant did not earn enough to be subject to tax.

66. The claimant told me in evidence that she had two other cleaning jobs at the material time and that she still has them now. She produced written evidence from the Department of Work and Pensions which shows that she has attended 14 appointments since May 2023, during which they discussed her "job search activity". As the respondent points out that does not mean that she applied for 14 jobs. But the letter does also say that the Department has never had any concern about the claimant's efforts to find further work. I am satisfied on that basis and on the basis of the claimant's oral evidence that she has been making reasonable efforts to replace the work which she lost. In particular I accept her explanation that, as a result of the other two jobs which she does have and her

personal circumstances, the work she has looked for would have to be at particular hours meaning it is not necessarily easy to come by. I also accept the claimant's estimate that it may take 4 to 6 months to replace the work that she has lost – if anything in my judgment that is somewhat generous to the respondent. The claimant thought that she might be able to pick up some more work over the summer, but that was speculative and given what I have said about the generosity of the 4 to 6 months estimate I do not take that potential work into account.

67. I take the date until which to award future losses as 15 October 2024, i.e. 5 months or 21.9 weeks from the decision on remedy, that being in my judgment the mid-point on balance of probabilities at which the claimant will find work on the basis that she continues to make reasonable efforts to mitigate her loss. The period for which I award future loss is therefore 153 days.

68. So far as holiday pay is concerned the parties were agreed that the contract provided for 5.6 weeks' annual leave to accumulate pro rata. From 1 January 2023 to 12 May 2023 is 132 days. Holiday pay calculation:

    (132/365) * 5.6 = 2.0252 weeks' accrued leave

    2.0252 * 130.25 = £ 263.78

69. Notice pay (wrongful dismissal) calculation:
    a. 4 weeks pay: 130.25 * 4 = £ 521

70. Original calculations for total award (i.e. before reconsideration):

    Basic award:

    Claimant's age at termination was 57 years

    Number of qualifying weeks * Gross weekly pay

    6 * 130.25 = **£ 781.50**

    Compensatory award

    Immediate loss

    Loss of earnings to point of judgment:

    48.7 weeks * 130.25 = £ 6343.18

    Loss of statutory rights £ 300

    300 + 6343.18 + 300 = **£ 6643.18**

    Future loss

    21.9 weeks * 130.25 = **£ 2852.48**

    Total award for unfair dismissal

    781.50 + 6643.18 + 2852.48 = **£ 10277.16**

    Add damages for holiday pay and wrongful dismissal

    10277.16+263.78+521= **£ 11061.94**

71. I also dealt with recoupment in the original decision, which, it was agreed, applied to this award. See below for the correct figures upon reconsideration.

Reconsideration

72. Applying rules 73 and 72(2), given the lack of objection to my proposed course, I reconsidered the above calculations without a further hearing. In the letter to the parties, I explained:

> On reflection it occurs to me that there are two errors in the oral judgment on remedy which I delivered on 15 May 2024. First, I did not apply the statutory cap of 52 weeks' pay to the compensatory award. Second, I did not deduct the award for notice pay from the compensatory award in order to avoid double recovery.

73. I then set out the revised figures as follows:

Notice pay (unchanged) £ 521
Holiday pay (unchanged) £ 263.78
Basic award (unchanged) £ 781.50
Compensatory award
Immediate loss (unchanged) 48.7 weeks x £ 130.25 = £ 6,343.18
Loss of statutory rights (unchanged) £ 300
Future loss (unchanged) 21.9 weeks x £ 130.25 = £ 2852.48
Total loss (unchanged) 6343.18+300+2852.48 = £ 9495.66
Total loss less award for notice pay 9495.66-521= £ 8974.66
This amount exceeds the statutory cap of 52 * 130.25 = 6,773
So total compensatory award is £ 6733

74. Regarding recoupment, I set out the following revised figures:
    a. The prescribed element will be 6343.18, as reduced by the proportion by which the compensatory award was reduced by the statutory cap. The statutory cap reduced the award by a factor of 6733/8974.66=0.7502, so the prescribed element as reduced by the same factor will be 6343.18*0.7502= £ 4758.65.
    b. The prescribed period will be 12/5/23 to 15/5/24.
    c. The balance will be 8299.28[*this figure is incorrect – see judgment above*]-4758.65= £ 3540.63 [*ditto*].

75. As I prepared these reasons I realised that when giving judgment I may have omitted to announce the figure for 11 days' wages owed. Since the amount owed was agreed during the course of the hearing, I did not need to invite further submissions to correct my judgment to include that.

76. Finally, I wish to repeat the apology I made to the parties in the letter for the errors I made initially in the oral remedy judgment.

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Employment Judge Dick
19 July 2024

REASONS SENT TO THE PARTIES ON

23/7/2024

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FOR THE TRIBUNAL OFFICE – N Gotecha

ANNEX TO THE JUDGMENT

Recoupment of Jobseeker's Allowance, income-related Employment and Support Allowance, universal credit and Income Support

The Tribunal has awarded compensation to the claimant but not all of it should be paid immediately. This is because the Department for Work and Pensions (DWP) has the right to recover (recoup) any Jobseeker's Allowance, income-related Employment and Support Allowance, universal credit or Income Support which it paid to the Claimant after dismissal. This will be done by way of a Recoupment Notice which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment should state the total monetary award made to the claimant and an amount called the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the recoupment Notice has been received. The difference between the monetary award and the prescribed element is payable by the Respondent to the Claimant immediately.

When the DWP sends the Recoupment Notice, the respondent must pay the amount specified in the Notice by the department. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the Respondent must pay the balance to the Claimant. If the Department informs the respondent that it does not intend to issue a Recoupment Notice, the Respondent must immediately pay the whole of the prescribed element to the Claimant.

The Claimant will receive a copy of the Recoupment Notice from the DWP. If the Claimant disputes the amount in the Recoupment Notice, the Claimant must inform the DWP in writing within 21 days. The Tribunal has no power to resolve such disputes which must be resolved directly between the Claimant and the DWP.