Case No: 2600754/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Adama Nije	**-v-**	Aspro Security Services Limited

Heard at: Nottingham **On:** 13 November 2018 & 22 January 2019

Before: Employment Judge Evans, Mr C Tansley, Ms C Hatcliff

Representation
For the Claimant: in person
For the Respondent: Ms Murphy, Legal Representative(Counsel)

JUDGMENT

1. The Respondent did not discriminate against the Claimant because of race.

2. The Respondent did not wrongfully dismiss the Claimant.

3. The Respondent did not make unlawful deductions from the Claimant's wages.

4. The Respondent is ordered to pay the Claimant £621.52 in respect of accrued but untaken holiday due under Regulation 14 of the Working Time Regulations 1998.

REASONS

Preamble

1. The Claimant was employed by the Respondent as a security guard. He was dismissed on 23 February 2018. On 27 March 2018 he presented a Claim Form to the Employment Tribunal in which he brought complaints of race discrimination, for wrongful dismissal, for a failure to pay holiday pay and for arrears of pay. He also presented a claim of unfair dismissal but that was not a claim which the Tribunal had jurisdiction to hear because the Claimant had not completed two years' employment when he was dismissed.

2. Those complaints came before the Employment Tribunal in Nottingham on 13 November 2018. There was insufficient time to complete the Hearing on that day and so it concluded on 22 January 2019.

3. Before the Hearing the parties had agreed a bundle of documents running to 256 pages. Pages 257 to 285 were added to the bundle during the first hearing day. Pages 257 to 281 were additional documents provided by the Respondent comprising documents relevant to its vetting of the Claimant. The Claimant had no

objection to these being included except from page 272; however this had already been included elsewhere in the agreed bundle. Pages 282 to 285 were provided by the Claimant.

4. A supplementary bundle running to 25 pages was prepared prior to the second hearing day as a result of orders made by the Tribunal on the first hearing day. All references to page numbers in these reasons are to the main bundle page numbers unless otherwise stated.

5. The Claimant provided a witness statement and a rebuttal witness statement for himself and gave oral evidence. The Respondent provided witness statements for the following individuals who also gave oral evidence: Andrew Thomas (a manager), and Gina Cullen (the Respondent's vetting officer)

6. The Tribunal did not have sufficient time to both deliberate and to give an extempore judgment following submissions on 22 January 2019 and therefore reserved its judgment.

The discussion at the beginning of the Hearing and the issues

The Issues

7. At the beginning of the Hearing on 13 November 2018 there was a discussion of the issues which the Tribunal would need to decide and a list of issues was agreed. That list was further refined at the beginning of the second day of the Hearing on 22 January 2019 and they were then agreed to be as follows.

Wrongful dismissal

8. The parties agreed that the Claimant was entitled under the terms of his contract to one week's notice of dismissal. The parties agree that the Claimant was dismissed without notice but the Respondent had made a payment in lieu of notice ("PILON") of £400. The Claimant accepted that he had received a PILON of £400.

9. **Issue:** The Tribunal will decide whether the Respondent paid the correct amount. The Respondent contends that £400 was the correct amount. The Claimant contends that he should have been paid £408.

Holiday pay

10. The parties agreed that the Claimant's employment began on 12 September 2017 and ended on 23 February 2018 (a period of 165 days).

11. The parties agreed that the Claimant was entitled to a payment under Regulation 14 of the Working Time Regulations 1998 ("the 1998 Regulations") calculated as follows: 5.6 weeks' pay x 165/365 = 2.53 less the number of weeks holiday taken. The Respondent accepted that the effect of Kreuziger v Land Berlin and Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu was that it could not argue that the Claimant's holiday entitlement from 2017 did not carry over to 2018.

12. The Respondent concedes that it did not pay the Claimant all that was due to him under Regulation 14. It contends that the gross amount due to him is £307.60. The Claimant does not accept that that is the correct amount.

13. **Issue:** The Tribunal will decide the amount due to the Claimant under Regulation 14 in light of any payments already made to the Claimant by the Respondent in respect of accrued but untaken holiday pay following the termination of his employment.

Wages (unlawful deductions)

14. The Claimant contends that he was underpaid by 45 minutes (£6) on each day he worked, that 45 minutes comprising: (a) 30 minutes when he was taking a rest break; and (b) 15 minutes between 10.00 and 10.15 p.m., and that accordingly the Respondent unlawfully deducted £6 from his wages on each day that he worked.

15. The Respondent denies that any deductions were made. The Respondent contends that the Claimant was not entitled to be paid for his rest break and that he was not required to work past 10p.m. Further the Respondent contends that there was no evidence that the Claimant had actually worked past 10 p.m.

    Issue: the Tribunal will decide whether the Respondent unlawfully deducted £6 from the Claimant's wages on each day that he worked.

    Race discrimination (liability only)

    Dismissal

16. Did the Respondent treat the Claimant who is black less favourably than it treated Stefan Maties and Malgorzata Stachula (referred to by the Claimant as "Stefan and Magi"), two security guards who are white, by dismissing him because of race?

    Other complaints

17. Did the Respondent treat the Claimant less favourably than it treated Mr Maties and Ms Stachula because of race by:

    17.1. Not allowing the Claimant to take holiday on three occasions in December 2017, January 2018 and at the end of January 2018?

    17.2. Requiring the Claimant to work 13 hour shifts despite being told that he was suffering from migraines and needed more rest when others only had to work 8 hour shifts?

    17.3. Requiring the Claimant to prove or send letters showing that he had been in the British army, confirming the injury he had suffered and the compensation he had received?

18. The Claimant had not clearly identified comparators prior to the Hearing. The Tribunal therefore notes that the Employment Judge spent some time explaining the concepts of actual and hypothetical comparators. The Employment Judge queried with the Claimant whether in fact some of his race discrimination arguments should be made by reference to hypothetical comparators as well as or instead of Mr Maties and Ms Stachula but the Claimant was adamant that his two comparators were Mr Maties and Ms Stachula.

The Law

Race discrimination

19. Section 13 of the Equality Act 2010 ("the 2010 Act") provides that an employer discriminates against an employee if it treats him less favourably than it treats or would treat others because of a protected characteristic. Section 4 of the 2010 Act provides that race is a protected characteristic.

20. Section 23 provides that on a comparison of cases for the purpose of section 13 there must be no material difference between the circumstances relating to each case.

21. Section 39(2) of the 2010 Act provides that an employer must not discriminate against an employee by dismissing him or by subjecting him to a detriment.

22. Pursuant to section 136 of the 2010 Act, it is for the Claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful. These are referred to below as "such facts".

23. If the Claimant does not prove such facts he or she will fail. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

24. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

25. It is important to note the word "could" in section 136 of the 2010 Act. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

26. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

27. The Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

28. Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably because of a protected characteristic, then the burden of proof moves to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.

29. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

30. That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the treatment in question was not because of a protected characteristic.

31. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof.

Notice period

32. Section 86 of the Employment Rights Act 1996 ("the 1996 Act") provides that the notice required to be given to a person who has been continuously employed for one month or more is not less than one week if the period of continuous employment is less than two years and one week for each year of continuous employment if the period of continuous employment is two years or more but less than twelve years. If the period of continuous employment is twelve years or more, twelve weeks' notice is required.

33. If an employer fails to give the period of notice required by section 86, it will act in breach of contract unless the employee has committed a repudiatory breach of contract and so the employer is entitled to accept that repudiatory breach and terminate the contract without notice.

Unlawful deductions from wages

34. Section 13 of the 1996 Act provides that an employer may not make a deduction from the wages of a worker unless the deduction is required or authorised by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

35. Section 23 of the 1996 Act provides that an employee may complain to an Employment Tribunal that an employer has made deductions from their wages in breach of section 13.

Holiday pay

36. Regulation 14 of the 1998 Regulations gives a worker whose employment is terminated during the course of a leave year a right to a payment in lieu of accrued but untaken leave calculated in accordance with Regulation 14(3). A claim for a failure to pay the amount due under Regulation 14 may be brought under Regulation 30.

Findings of Fact

37. We are bound to be selective in our references to the evidence when explaining the reasons for our findings. However, we wish to emphasise that we considered all the evidence in the round when reaching our conclusions.

General background

38. The Claimant was employed by a company referred to during the Hearing as Kings Security from 12 September 2017. However, on 4 December 2017 the Claimant's employment transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") to the Respondent.

39. The business of the Respondent is the provision of security guards to its clients. The employment of the Claimant had transferred to it as a result of it obtaining the contract to provide security guards to the Aldi supermarket. Throughout his employment with the Respondent the Claimant worked at the Aldi supermarket in Mansfield Road, Nottingham.

40. The Respondent dismissed the Claimant after just 12 weeks' employment. The letter of dismissal (page 143) explained that he had been dismissed because the Respondent had been unable to obtain from him "sufficient vetting information".

General credibility findings

41. The Tribunal makes the following findings in relation to the general credibility of the various witnesses:

42. **The Claimant:** the Tribunal did not find the Claimant to be a credible witness. This was for a number of reasons but in particular because his evidence in a number of respects was simply not reconcilable with documents which were contained in the bundles. For example:

    42.1. He continued to insist that he was the only security guard required by the Respondent to work 13 hour shifts (that is to say 12 hours plus a break of one hour in the middle) notwithstanding the fact that the timesheets between pages 16 and 25 of the supplementary bundle showed that other security guards, including his comparator Mr Maties, had also worked such shifts. In addition, rather than accept that his case in this respect was not supported by the evidence, the Claimant instead tried to change the basis for his argument in relation to less favourable treatment in respect of shift length in his closing submissions.

    42.2. In his witness statement the Claimant suggested that the termination of his employment had come as a surprise to him and that the first he knew of it was when he did not receive a rota of work for the following week on Friday, 22 February 2018. This is inconsistent with the email that Ms Cullen sent to him on 15 February 2018 (page 139) in which she stated that if she had not received the information relevant to his vetting that she had previously requested then "we would not be able to Rota you on to further Shifts after the 23/02/2018". The relevant information had not been provided and so it would have been no surprise to the Claimant that he did not receive a rota on Friday, 22 February 2018 and that his employment was then terminated.

    42.3. In his witness statement the Claimant stated that the Respondent had told him that it would not pay for dental treatment required as a result of an assault he had suffered during his employment. However the email at page 142 indicated that the Respondent required a crime reference number and a dental bill to consider making any payment. In his witness statement the Claimant referred to providing the crime reference number but not to providing the dental bill. When cross-examined about this the Claimant accepted that he had not provided a dental bill and had no reasonable explanation for this. He rhetorically asked how he could have provided the bill after his employment had been terminated. There was of course no reason why he could not have provided the Respondent with a bill following the termination of his employment. The Tribunal formed the view that the Claimant's witness statement was materially misleading in relation to this issue and that the Claimant must have known this.

43. In addition, certain parts of his evidence were simply not plausible. For example, Ms Cullen first asked the Claimant for the documents which she needed to complete his vetting on 28 November 2017 (page 137). The Claimant never provided a substantive response to all the points raised in that email and did not provide any response which engaged with her questions at all until 20 February 2018 (page 141). The Claimant's explanation for this delay in his witness statement is implausible: "I was unable to reply to Gina soon as I was busy working long hours and didn't have the time". Whilst the Claimant was working long hours, it cannot seriously be suggested that he could not have found time to reply until 20 February 2018, especially given the very brief nature of his response on that date.

44. Further, his failure to raise the question of paid lunch breaks during his employment or immediately following its termination was inconsistent with this matter subsequently being raised when the Claim was begun. It is clear that the Claimant was sufficiently confident to raise matters which were of concern to him with the Respondent during his employment. Consequently, one would have expected him to

have raised with the Respondent the fact that he had been paid for a 30 minute lunch break by Kings Security, if indeed he had, given that the Respondent did not provide a 30 minute paid break.

45. Further, his oral evidence was at times inconsistent. For example, when he first began to work for the Respondent he worked five shifts a week. He asked for this to be reduced to 4 shifts a week and it was. In his oral evidence the Claimant initially stated that he had been compelled to work five shifts a week but then later said that he had been asked to do this until a replacement could be found.

46. **Mr Thomas:** the Tribunal found him to be a credible witness. His evidence was internally consistent and also consistent with the documentation. He demonstrated knowledge of the Respondent's policies and procedures. He was able to satisfactorily explain issues arising from the documentary evidence. For example, the Tribunal was concerned that the Respondent had not provided holiday requests forms for the Claimant's comparators. Mr Thomas explained that this was because their employment had ended and the relevant documents had not been retained because the relevant information had been uploaded to the payroll system. He was able to identify how this was demonstrated by the documentation contained in the bundles.

47. **Ms Cullen:** the Tribunal found her to be a credible witness. Her evidence was internally consistent and also consistent with documentation. She demonstrated a clear understanding of the vetting process necessary to comply with the BSI 7858 Standard ("the Standard") and had also produced documentation demonstrating the dismissal of other employees who had not completed the vetting process successfully.

Contractual terms, hours worked, wages and

48. The Claimant was employed under the terms of a contract with Kings Security (page 24) ("the Contract") and the terms contained in the Contract continued to apply after the transfer of his employment under TUPE to the Respondent.

49. Clause 1.11 stated that the first three months of employment was a probationary period and that "during this period you must be screened to BS 78:58 standards".

50. Clause 2.1 stated "you will be paid only for the hours you have worked". Clause 4.3 stated "you are entitled to all rest breaks required by law, and you will receive the same break periods provided to other employees where applicable". The Contract did not contain any provision stating that rest breaks would be paid.

51. The Claimant worked five days a week from Monday, 4 December 2017 until the end of December 2017 (with some seasonal anomalies around the Christmas and New Year period and some absences due to illness). From 4 January 2018 he worked a 13 hour shift from 9 AM to 10 PM on each of Monday, Tuesday, Wednesday and Thursday.

52. The Claimant was paid £8 an hour. He was not paid for his 1 hour lunch break. As at the date of the termination of his employment his gross weekly pay was therefore £384.

53. The Claimant contended that during his employment with Kings Security he was paid a 30 minute rest break each day, that he was contractually entitled to receive such a payment, and that therefore he should have continued to receive such a payment after the transfer of his employment under TUPE to the Respondent. The Tribunal does not accept that the Claimant was paid for a 30 minute rest break each day by Kings Security for the following reasons:

53.1. That is not what the Contract says. There is nothing in it to suggest that rest breaks are paid.

53.2. The Claimant was not able to produce evidence that one would have expected to be readily available in support of this contention. In particular he was unable to provide any payslip from Kings Security indicating that he had been paid a 30 minute rest break.

53.3. The Tribunal took the view that if the Claimant had been paid a 30 minute rest break during his employment with Kings Security, but this had stopped following the transfer of his employment to the Respondent, then he would have raised it with the Respondent. He did not however do so.

53.4. Finally, in light of the Claimant's damaged credibility, the Tribunal gives only limited weight to his assertion that he was paid for the rest break in the absence of any corroborating documentary evidence.

54. The Claimant contended that although his hours of work were 9 AM to 10 PM in fact he was required to work until 10:15 PM each day. He explained that this was because the Aldi supermarket where he worked did not shut its doors to customers until 10 PM and therefore his presence was required for a further 15 minutes until the store was properly closed.

55. The Claimant's evidence was in effect that he was required to remain until 10:15 PM by the store manager and that Mr Thomas was aware of this. The Claimant said that he would have been sacked or removed from the store if he had just left at 10 PM.

56. The evidence of Mr Thomas was that the Claimant had raised with him that it would be sensible for him to work until 10:15 PM with the result that Mr Thomas had spoken to the store manager. The store manager had said that he did not need the services of the Claimant after 10 PM and that he should leave at that time. This has been relayed to the Claimant. Mr Thomas explained that he believed that it would have suited the Claimant to work until 10:15 PM because the bus that he had to catch in order to return home was at 10:20 PM. He also explained that some supermarkets did require the security guard to remain for a brief period after the closing time and that such supermarkets often asked that the security guard's shift began 15 or 20 minutes after the opening time in the morning so that the overall length of the shift was not increased. However this was not something which the manager of the supermarket where the Claimant worked had wished to do. Mr Thomas said that he had therefore told the Claimant that he did not need to remain after 10 PM.

57. The Tribunal preferred the evidence of Mr Thomas to that of the Claimant in relation to this issue and finds that there was no requirement on the Claimant to work after 10 PM and, indeed, that this was not something which occurred. The Tribunal prefers the evidence of Mr Thomas for the following reasons:

57.1. The Tribunal found Mr Thomas to be a more credible witness than the Claimant;

57.2. The documentary evidence provided corroboration for the accounts of Mr Thomas. In particular, the timesheets between pages 190 and 201 signed by the store manager never show the Claimant as having worked after 10 PM. Equally the weekly emails sent to the Claimant with details of his shift times never recorded a finish time of after 10 PM.

The events resulting in the dismissal of the Claimant

58. The Contract required the Claimant to be vetted in accordance with the Standard. A Code of Practice relating to the Standard was included in the bundle (page 94 et seq). At paragraph 4.3.3 the Code of Practice sets out the information which the employer should obtain in order to carry out the screening process. This provides at paragraph 4.3.3 b):

> *Details of the individual's education, employment, periods of self-employment (see 4.7), unemployment and gaps in employment (including career breaks, etc) throughout the security screening period.*

59. The "security screening period" is a defined term (page 99):

> *Period of not less than five years immediately prior to the commencement of relevant employment or transfer to relevant employment, or back to the age of 16 if this date is more recent.*

60. We find that the screening of the Claimant had not been completed by Kings Security. We make this finding despite the assertion by the Claimant that it had been completed for the following reasons:

    60.1. Ms Cullen said in her evidence that the documentation she had received from Kings Security in relation to the Claimant did not show that his vetting had been completed. The Tribunal give considerable weight to this evidence because it was consistent with the way in which Ms Cullen subsequently acted (the details of which are set out below) in seeking the missing information and documentation.

    60.2. By contrast, the Claimant was unable to produce any significant documentary evidence supporting his assertion. This was of note because Ms Cullen indicated in her evidence which the Tribunal accepted as true that she wrote to employees of the Respondent to confirm that the screening process had been completed when it had. It is quite likely that Kings Security did the same thing.

    60.3. Because the Tribunal found Ms Cullen to be a more credible witness than the Claimant for the reasons set out above.

61. Around the time of the transfer of the Claimant's employment to the Respondent, Mr Thomas visited him at the supermarket for the purpose of getting him to complete various forms completed by all new starters. This included the form at page 276 which required amongst other things that the Claimant set out details of his previous employment. The Tribunal finds that Mr Thomas is well aware of the vetting requirements and that after the Claimant had completed his employment details Mr Thomas noticed that there was a gap in his employment record between August 2012 and June 2016. The Tribunal finds that Mr Thomas asked the Claimant about this and that in general terms what the Claimant said is recorded (in the handwriting of Mr Thomas) on page 279:

> *Injured in British army. Unable to work. Received medical payment through army as lump sum. Received payment 2014 approx.*

62. In making this finding the Tribunal preferred the evidence of Mr Thomas to that of the Claimant who denied either that he had been asked about the gap by Mr Thomas or that he had given the information which Mr Thomas had recorded.

63. The Tribunal preferred the evidence of Mr Thomas for the following reasons:

63.1. Given that he was familiar with the vetting process, it was unsurprising that he had raised the four year gap with the Claimant because he knew that this was something which Ms Cullen would raise when the form was sent to her.

63.2. The Claimant put forward no plausible reason why Mr Thomas would have made up the information recorded at page 279. Nor could the Tribunal think of one.

63.3. For the reasons set out above, the tribunal found Mr Thomas to be a more credible witness than the Claimant.

64. Because the information which she had received from Kings Security did not show that the Claimant's vetting had been completed, Ms Cullen wrote to the Claimant on 28 November 2017 asking for certain information (page 137). She did not receive any reply and therefore she emailed the Claimant again on 9 January 2018 (page 137) warning him that he would "FAIL" if she could not complete the vetting procedure. Again the Claimant did not reply and so Ms Cullen wrote to him more formally on 31 January 2018 (page 138). Again the Claimant did not reply and so Ms Cullen emailed him on 15 February 2018 warning him that if she did not receive the relevant information then he would receive no further shifts after 23 February 2018 (page 139).

65. The Claimant did reply to this last email on 20 February 2018. Ms Cullen had asked him whether he had any documentation from the army in relation to the period 2012 to 2016 and explained that she could not accept a statutory declaration to cover a four year period (which is in accordance with the Standard – para 4.7 h) at page 108). In relation to this query he said "if the statuary declaration is not allow, what can I Do? Or what's Allow?" (Errors produced as in original.)

66. Ms Cullen replied nine minutes later stating:

> *Unfortunately there is nothing we can do as you have had over 12 weeks to respond to my request and have never once replied or submitted any paperwork to backup you being in the Army or receiving Compensation or receiving Benefits despite numerous emails I sent you and writing to you requesting documents and information from you*

67. The Claimant replied, again on 20 February 2018:

> *I can only Do what I can, went I have time. I do work 13hrs a day and travel miles so if i don have time for myself and family don think I will have time for mails or reply so do whatever please you… At the end of day I haven't got time..* (Errors produced as in original.)

68. There was no further correspondence between Ms Cullen and Claimant. Mr Thomas wrote to the Claimant dismissing him on 26 February 2018 (page 143). The letter explained that this was as a result of the Respondent having received insufficient vetting information.

69. In his oral evidence which the Tribunal accepted as true, Mr Thomas explained that he had on several occasions explained to the Claimant the need to provide the vetting information when he had visited the supermarket at which the Claimant worked. Mr Thomas said that he had also recruited the supermarket manager to his efforts to get the Claimant to obtain this information: the Claimant got on well with the supermarket manager and Mr Thomas had hoped that he might listen to him.

70. The Claimant's comparators in relation to his dismissal were Ms Stachula and Mr Maties and so the Tribunal makes the following findings in relation to their employment.

71. The employment of Ms Stachula began on 21 January 2018 and ended on 30 April 2018 when it transferred to another employer under TUPE. The employment of Mr Maties began on 4 December 2017 and ended on 30 April 2018, again because it transferred to another employer under TUPE.

72. The only evidence before the Tribunal which suggested that there might have been some reason for of Ms Stachula or Mr Maties to not pass the vetting process was that the Claimant stated that he had been asked to provide a reference for Ms Stachula, he had not done so, and therefore she could not have passed her vetting.

73. The comparators relied upon by the Claimant had not been identified before the Hearing began. The result of this was that the witness statement of Ms Cullen did not deal with the vetting of either Ms Stachula or Mr Maties. In addition, their vetting was not something which was dealt with in her oral evidence (either by supplemental questions or in cross examination).

74. However, in light of the evidence which Ms Cullen gave generally, the Tribunal is satisfied that she undertook the vetting process in relation to Ms Stachula and Mr Maties. There is simply no evidence which suggests otherwise. Indeed the only evidence that there is in relation to this issue is that of the Claimant which suggests that Ms Cullen approached him in relation to Ms Stachula and asked for a reference. This points towards vetting having been undertaken in relation to Ms Stachula.

75. The Tribunal therefore finds on the balance of probability that Ms Cullen did undertake vetting in relation to both Mr Maties and Ms Stachula. The Tribunal accepts the evidence of the Claimant that he was approached for reference in relation to Ms Stachula but did not provide it. However the Tribunal does not find as a result of this that the vetting process was not concluded in relation to Ms Stachula. In light of her experience with the Claimant when she asked him for information concerning his own position, Ms Cullen is likely to have concluded quite quickly that he would be unlikely to reply and provide the reference requested in relation to Ms Stachula. The Tribunal finds that in these circumstances Ms Cullen will have sought the necessary information elsewhere. The Standard does not suggest that the failure of the Claimant to provide Ms Stachula with a reference will have meant that it was impossible for Ms Cullen to have completed the vetting process in relation to her.

76. Further, the Tribunal notes that there is evidence that the Respondent did dismiss employees who were unable to complete the vetting process satisfactorily. Evidence in this respect was contained between pages 247 and 251 of the bundle. This showed that two white employees, Mr London and Mr Gault, were dismissed as a result of not passing the vetting process.

77. Overall, therefore, the Tribunal finds on the balance of probabilities that Ms Cullen completed the vetting process successfully in relation to Mr Maties and Ms Stachula having properly applied the normal procedures to them.

Other relevant issues

78. The Claimant raised as an issue the fact that he was required "to prove or send letters showing that he had been in the British Army, confirming the injury he had suffered in the compensation he had received". The Tribunal finds that this is not an accurate characterisation of the information which he was asked to provide. What he was actually asked was as follows (page 137):

> *While you are unable to work for four years how did you support yourself (were you claiming Benefits" or did you receive Sick pay from the Army until you were paid out in 2014*
> *Also do you have some documents from the Army to support this information*

79. The Tribunal finds that neither Ms Stachula nor Mr Maties will have been required to provide such information because there is absolutely no reason whatsoever to suppose that the employment histories which they provided suggested that they had been unemployed for a period of four years following a period of service in the British Army. However, in light of its findings above about the vetting process, the Tribunal also finds that both Ms Stachula and Mr Maties were required to provide details of their employment for the five year period prior to their employment with the Respondent.

80. Turning to the issue of the 13 hour shifts, the evidence of the Claimant was that he had told Mr Thomas that he was suffering from migraines and that he needed more rest (with the consequence that he no longer wished to work 13 hour shifts). Mr Thomas denies that any such conversation took place: he says that the only conversation in relation to the reduction of hours of the Claimant took place towards the end of 2017. The Claimant asked that his number of weekly shifts be reduced from 5 to 4 and this was agreed with effect from the week commencing 8 January 2018. The Tribunal prefers the evidence of Mr Thomas to that of the Claimant in this respect. This is for the following reasons:

    80.1. The Tribunal found Mr Thomas to be a more credible witness than the Claimant;

    80.2. The documents do demonstrate (and the Claimant did not deny) that his hours of work were reduced from five shifts to 4 at the beginning of 2018. This points towards Mr Thomas engaging with requests by the Claimant that his hours be reduced and makes it less likely that he would have simply refused a requests for shorter shifts if the Claimant had made one;

    80.3. There was no evidence to support the Claimant's contentions in this respect.

81. The Claimant also contends that he was the only employee required to work 13 hour shifts. The Tribunal finds that this was quite clearly not the case. The timesheet documentation included between pages 16 and 25 of the supplementary hearing bundle show quite clearly this other employees worked 13 hour shifts. It also shows that those other employees included Mr Maties, one of the Claimant's comparators. Nevertheless, the Tribunal accepts that the Claimant's shift pattern involved working 13 hours more regularly than that of Ms Stachula.

82. The Claimant also raised arguments in relation to how holiday requests had been dealt with. We turn first to the number of such requests. The Claimant said in his oral evidence that he had made three requests: one in December around Christmas, one in January and the third in March. He said that the first two requests had only been oral requests. The third had been a written request. The evidence of Mr Thomas was that the Claimant had only ever made one request for holiday. That had been to take holiday in February. Mr Thomas said that that request had been refused because the Claimant had failed to give four weeks' notice as required by the Respondent's Handbook. Instead he had asked for holiday for the following week and it had not been possible to arrange cover.

83. Before making findings in relation to this issue the Tribunal make findings in relation to a related issue which concerns what was said and by whom about the holiday entitlement which the Claimant had accrued with Kings Security. The Tribunal finds that the Claimant had understood as a result of something said to him by Kings Security that he would receive a payment in respect of accrued but untaken holiday pay following the transfer of his employment from Kings Security to the Respondent. The Tribunal rejects the contention of the Claimant that in fact it was Mr Thomas who told the Claimant that his accrued holiday entitlement did not transfer under TUPE. In

making these findings the Tribunal prefers the evidence of Mr Thomas to that of the Claimant for the following reasons:

83.1. The Tribunal heard oral evidence from Mr Thomas in relation to his understanding of TUPE. It was clear to the Tribunal that Mr Thomas is very familiar with the day-to-day consequences of employees transferring under TUPE because this is a very regular occurrence in the security industry. It was clear to the Tribunal that Mr Thomas understood that accrued untaken holiday transferred with an employee on a TUPE transfer. This suggests that Mr Thomas would not have said what the Claimant alleges he said unless he was trying to deprive the Claimant of his accrued but untaken holiday entitlement.

83.2. However this would have been inconsistent with Mr Thomas subsequently arranging (as he did) for a payment to be made to the Claimant for 39 hours' holiday (page 207).The Tribunal considers that this payment is most consistent with the account of Mr Thomas: it was made in respect of 2017 holiday entitlement which Mr Thomas believed the Claimant had lost as a result of not having taken it before the end of 2017 because the Claimant had believed that he would receive a payment from Kings Security in relation to it. The Tribunal finds that the payment was in effect a goodwill payment because the Claimant was useful to Mr Thomas because he sourced other security guards for him.

83.3. In addition, for the reasons given above, the Tribunal found Mr Thomas to be a more credible witness than the Claimant.

84. The Tribunal finds that only one holiday request was ever made (although there may well have previously been discussions about holiday). In so finding the Tribunal prefers the evidence of Mr Thomas for the following reasons:

84.1. There is a text message a page 180 the bundle sent on 22 January 2018 about holiday. This suggests by its contents that the Claimant had <u>not</u> previously tried to book holiday.

84.2. In response to that message Mr Thomas explained that four weeks' notice had to be given of holiday and explained which form needed to be completed for holiday to be booked. That resulted in a request for holiday being made which was rejected by a message from Mr Thomas on the grounds that four weeks' notice had not been given (page 185). That request was the <u>one</u> request in writing to which the Claimant referred.

84.3. The Tribunal found Mr Thomas to be a more credible witness than the Claimant for the reasons given above.

85. The Claimant contends that Ms Stachula and Mr Maties by comparison were permitted to take holiday when they wanted even though they had less service than he. He claimed that Mr Maties had taken eight days' holiday and had told him that he had not given notice. He also claimed Ms Stachula had also been able to take holiday without giving appropriate notice.

86. The Tribunal had the following significant documentary evidence in relation to the holidays taken by Ms Stachula and Mr Maties:

86.1. A message (page 164) from Ms Stachula to the Claimant in which she stated:

> *Well, I can't remember really Adam, maybe I didn't give him notice, that company was shit anyways and that Andy a joke, lol…*

The Tribunal understood that this was in reply to a message (which was not included in the bundle) from the Claimant asking Ms Stachula if she had given notice before taking holiday.

86.2. The payroll records of Ms Stachula and Mr Maties in relation to absences (including holiday) (page 5 of the supplementary bundle). These showed that the only holiday Ms Stachula had had during her employment was two days on 4 and 5 April 2018. Mr Maties was shown as having taken just one day on 21 April 2018.

87. The Tribunal also had the benefit of the evidence of Mr Thomas in relation to this issue. He said that the holiday taken by Ms Stachula and Mr Maties during their employment was as set out in the payroll records. He said that they had had to complete the relevant form and give the appropriate notice before taking holiday.

88. The Tribunal finds that Ms Stachula and Mr Maties took holiday during their employment as set out in the payroll records and had to give notice as required by the Respondent's holiday procedures. In making this finding the Tribunal prefers the evidence of Mr Thomas to that of the Claimant for the following reasons:

88.1. The evidence of the Claimant in relation to the holidays taken by Ms Stachula and Mr Maties was vague and imprecise;

88.2. The message from Ms Stachula a page 164 did not lend any positive support to the Claimant's contentions;

88.3. By contrast, the documentary evidence contained in the payroll records was clear and precise and contradicted the evidence of the Claimant in that it suggested that neither Ms Stachula nor Mr Maties had taken holiday as described by the Claimant;

88.4. It seemed unlikely to the Tribunal that the Respondent would have agreed prior to the end of February 2018 to Mr Maties taking eight days' holiday given that his employment had only begun on 4 December 2017;

88.5. The Tribunal found Mr Thomas to be a more credible witness than the Claimant for the reasons set out above.

Conclusions

Wrongful dismissal

89. The Tribunal finds that the Claimant's normal hours of work on the termination of his employment were 48 per week and that accordingly a week's pay for him was £384 (gross).

90. The Claimant accepted that he had received a PILON of £400. The Respondent was entitled under his contract of employment to make a PILON rather than requiring him to work his notice (clause 9.3 of the Contract).

91. Accordingly the Respondent did not act in breach of contract when it dismissed the Claimant without notice. The Respondent was entitled to make a PILON rather than requiring the Claimant to work his notice and the amount of the PILON was not less than that required by the Contract.

92. The Claimant's claim for breach of contract (wrongful dismissal) therefore fails and is dismissed.

Holiday pay

93. The parties agreed that the Claimant was entitled to a payment under Regulation 14 of the 1998 Regulations of 2.53 week's pay. In the case of the Claimant this amounted to £971.52 (gross) (2.53 x £384).

94. The Respondent made payments of £312 (39 hours) to the Claimant in respect of holiday pay in January 2018 (prior to the termination of the Claimant's employment) and of £350 (43.75 hours) on 15 June 2018 (following the termination of his employment).

95. The Tribunal concludes that the payment made in January 2018 could not have had the effect of reducing the Claimant's accrued holiday entitlement as of that date (because a payment in lieu of holiday due under the 1998 Regulations is not permitted except *following* the termination of employment). Further, it cannot have had the effect of reducing the liability of the Respondent under Regulation 14 of the 1998 Regulations because there is no provision in that regulation for the payment due under it to be reduced by an amount paid in lieu of holiday during the employee's employment.

96. The Tribunal therefore concludes that the amount due to the Claimant under Regulation 14 of the 1998 Regulations is £971.52 less the £350 paid following the termination of his employment = £621.52 gross and the Respondent is ordered to pay the Claimant that amount.

Unlawful deductions from wages

97. As a result of the findings of fact made above the Tribunal concludes that the Claimant:

    97.1. had no contractual right to be paid for 30 minutes of his daily rest break;

    97.2. was not required to work (and did not work) between 10 PM and 10.15PM

    and that accordingly no deductions were made unlawfully from his wages.

Race discrimination

Dismissal

98. In light of its findings of fact above the Tribunal concludes that the reason that the Claimant was dismissed was because he had failed to pass the vetting procedures operated by the Respondent as required by the Standard within the required period.

99. Because the Claimant had identified Ms Stachula and Mr Maties as his comparators for this part of his claim, he needed to prove that he had been dismissed when Ms Stachula and Mr Maties had not **and** that there was no material difference between the circumstances of his case and those of each of Ms Stachula and Mr Maties. This would have required him to prove either that they had not been dismissed although they had failed the vetting or that they had "passed" the vetting when they should not have done so. The claim therefore fails at this first hurdle: the findings of fact above are to the effect that Ms Stachula and Mr Maties both passed their vetting and that Ms Cullen applied the procedures properly to them. As such there is a material difference between their circumstances and those of the Claimant.

100. However for the sake of completeness the Tribunal also records the following conclusion. The Tribunal concludes that the only reason for the Claimant's dismissal was that he did not pass the Respondent's vetting process and that the reason for his dismissal was in no sense whatsoever because of race. In reaching this conclusion the Tribunal has taken into account the fact that there was evidence

before it showing that the Respondent has dismissed other employees who are white for essentially the same thing and, further, that not only had the Claimant not passed the vetting process but also that he had been extremely uncooperative with it. In particular, his email of 20 February 2018 to Ms Cullen (page 140) can only reasonably be read as the Claimant saying that he does not intend to take any further steps to obtain the information and documentation which the Respondent reasonably required.

Other complaints of race discrimination

101. **Holiday**: the Tribunal has found above that the Claimant was refused holiday on one occasion. It has also found above that each of Ms Stachula and Mr Maties was allowed to take holiday on one occasion. However, the Claimant needed to prove that there was no material difference between the circumstances of his case and that of each of Ms Stachula and Mr Maties. The Tribunal finds that he has failed to do this in light of its findings of fact above: Ms Stachula and Mr Maties were permitted to take holiday having complied with the relevant procedural requirements of the Respondent. The Claimant was refused holiday because he had not so complied. In order to establish Ms Stachula or Mr Maties as appropriate comparators he would have had to have proved that they had been allowed to take holiday even though they had not complied with the relevant procedural requirements. He has not done this.

102. However for the sake of completeness the Tribunal also records the following conclusion. The Tribunal concludes that the only reason for the Claimant being refused holiday was his failure to comply with the Respondent's procedural requirements and that the refusal was in no sense whatsoever because of race.

103. **13 Hour shifts:** in light of the findings of fact made above the Tribunal concludes that the Claimant has failed to establish that he was required to work 13 hour shifts when he had asked to work shorter shifts. The Tribunal also concludes that he has failed to establish that he worked longer shifts than his comparator Mr Maties. However the Tribunal has concluded that he worked longer hours than Ms Stachula.

104. The Tribunal concludes that the Claimant did not wish to work shorter shifts – if he had, he would have raised this at the same time that he asked Mr Thomas if he could work 4 days a week instead of 5 and the Tribunal has found that he did not do this. Consequently, the Tribunal concludes that the Claimant was not treated less favourably than Ms Stachula in this respect.

105. However, in case the Tribunal is wrong about this, and in fact the Claimant was treated less favourably because he worked longer shifts than Ms Stachula, the Tribunal has considered the reason for that less favourable treatment. The Tribunal has concluded that the reason for that treatment was simply that the Claimant working 13 hour shifts reflected the requirements of Aldi and also the hours he had been working prior to the TUPE transfer. Ms Stachula's employment had begun at a later date and insofar as her hours were worked at the same store they fitted around the hours already worked by the Claimant. The difference in the hours they worked was in no sense whatsoever because of race.

106. **Requiring the Claimant to prove or send letters showing that he had been in the British army, confirming the injury he had suffered and the compensation he had received:** The Claimant's argument in this respect fails because he has not established that he was required to do what he alleges. Further, even if he had, the claim would inevitably fail at the next hurdle. The Claimant needed to prove that there was no material difference between the circumstances of his case and those of each of Ms Stachula and Mr Maties. The Claimant has failed to do this. There is no evidence that there was a four year gap in the work history of

either Ms Stachula or Mr Maties that needed to be explained, let alone a four year gap allegedly caused by an injury suffered whilst serving with the British Army.

107. However for the sake of completeness the Tribunal also records the following conclusion. The Tribunal concludes that the only reason for the Claimant being required to provide further information in relation to the four year gap in his work history (which is in fact what the Respondent required) was the requirements of the Standard. The Respondent requiring the Claimant to do this was in no sense whatsoever because of race.

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Employment Judge Evans

Date: 24 February 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS