Case Number: 3335385/2018V

EMPLOYMENT TRIBUNALS

Claimant: **Mr E Morales**

Respondent: **Atalian Servest Group Limited**

Heard at: **East London Hearing Centre**

On: **4 November 2020 and**
8 January 2021 (in chambers)

Before: **Employment Judge O'Brien sitting alone**

Representation:

Claimant: Ms H Khullar, legal trainee acting for the FRU

Respondent: Mr K Wilson of Counsel

JUDGMENT

The judgment of the Tribunal is that

1. **The claimant's complaint of unfair dismissal pursuant to s98 of the Employment Rights Act 1996 succeeds, and he is awarded £ 3,900 (comprising a basic award of £3,900 and a nil compensatory award).**

2. **The claimant's complaint of wrongful dismissal fails and is dismissed.**

3. **The claimant suffered unauthorized deduction of wages between 3 March and 5 July 2018, and is awarded £6,864.**

4. **The claimant's claim for accrued but untaken holiday pay succeeds and he is awarded £569.40.**

5. **The claimant's complaint under s93 of the Employment Rights Act 1996 fails and is dismissed.**

6. **The Respondent shall pay the sums awarded above within 28 days of the date on which this judgment is sent to the parties.**

REASONS

1 ***This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of approximately 180 pages, the contents of which I have recorded. Both parties were content with the way in which the hearing was held.***

2 On 14 December 2018, the claimant presented claims for unfair dismissal, wrongful dismissal, unlawful deductions from wages, holiday pay, and failure to provide a written statement of reasons for dismissal. The respondent resisted the claims by response dated 4 February 2019.

ISSUES

3 The issues were discussed at a preliminary hearing before Employment Judge Laidler on 26 April 2019. Save for the concession made today by Mr Wilson that the claimant was suspended from 3 March 2018 and ought to have been paid during that suspension, it was agreed that the issues (at least insofar as they relate to liability) remained as recorded in Judge Laidler's note of that hearing. Consequently, the issues of liability I have to determine are as follows:

3.1 Was the claim submitted in time?

3.2 Was there A fair reason for dismissal?

3.3 Was a fair dismissal procedure followed in the alternative?

3.4 Was there. in the case of a fair dismissal, a lawful reason not to provide notice pay?

3.5 Was there, in the case of a fair or unfair dismissal, a lawful reason not to pay wages during the period from 16 February to 2 March 2018?

3.6 Was there, in the case of a fair or unfair dismissal, a lawful reason not to pay accrued leave once the claimant was dismissed?

3.7 Did the respondent provide a written statement of reasons to the claimant upon dismissal or otherwise, within 14 days of request from the claimant?

3.8 If not, was there any lawful reason not to do so?

4 As far as remedy is concerned, the following issues were expressly raised in the grounds of resistance:

4.1 If the respondent followed an unfair procedure, the likelihood that the claimant would have been dismissed in any event.

4.2 The extent to which the claimant contributed to his dismissal.

5 The claimant made clear today that he had taken no steps to find alternative employment. Therefore, I might also need ultimately to consider whether the claimant had thereby failed to take reasonable steps to mitigate his loss.

EVIDENCE, SUBMISSIONS AND APPLICATIONS

6 Over the course of the one-day hearing, the Tribunal heard evidence from the claimant on the basis of a written witness statement. The claimant was assisted by a Filipino interpreter, and no interpretation problems were apparent or raised with me. The respondent relied on the witness statement of George Borg (former night cleaning manager with the respondent); however, he was not called to give evidence and so I was only able to give limited weight to his evidence where it conflicted with that of the claimant, particularly if unsupported by contemporaneous documentary evidence.

7 The parties both relied on a bundle of documents comprising approximately 180 pages. I had also been provided with an email from the respondent giving details of the claimant's leave year and entitlement. It was also agreed at the end of the hearing that I should also take into account the Home Office publication, 'An Employer's Guide to Right to Work Checks', dated 29 June 2018.

8 The parties each made oral submissions. The representatives had both also prepared written submissions. I took into account the entirety of the parties' written and oral submissions when determining the issues in the case.

FINDINGS OF FACT

9 In order to determine the issues as agreed between the parties, I made following findings of fact, resolving any disputes on the balance of probabilities.

10 I believe that the claimant was trying to assist me; however, it became clear that he did not have a reliable recollection of events and on a number of occasions failed to answer (perhaps even avoided answering) Mr Wilson's clear and fair questions. Consequently, I was best assisted by the contemporaneous documentary evidence, and was not able to accept unquestioningly the claimant's evidence.

11 The claimant was employed by the respondent as a cleaner. His employment transferred to the respondent from Group Clean on 1 January 2018, his continuous employment having commenced on 1 July 2008. His age at date of termination was 37.

12 The claimant is Filipino and, at the time of the transfer, held a valid Filipino passport valid from 15 August 2014 to 14 August 2019. He had been granted indefinite leave to remain in the United Kingdom (ILR) on 12 September 2006; however, only a previous passport (valid from 23 October 2003 to 22 October 2008) had been endorsed with a vignette confirming that status.

13 As part of the transfer process, the respondent wrote to the claimant on 14 December 2017 inviting him to a group presentation followed by a consultation meeting on the evening of 18 December 2017. The claimant was asked to bring with him certain documentation including one of the following: a full British certificate; an in date British passport; an in date EEA passport; an in date EEA ID card; or an in date passport with an in date visa.

14 The respondent wrote to the claimant again on 29 December 2017. Amongst other things, the claimant was asked again to provide the above documentation if he had not already done so. The letter also offered a support loan of two weeks' wages to be paid on 19 January 2018 and recovered on the pay dates of 2 March and 3 April 2018. The attached application form and supporting documents had to be returned by 12 January 2018.

15 The letter further notified the claimant that his leave year would be brought into line with that of the respondent – 1 October to 30 September – in order 'to ensure that holiday can be managed effectively and consistently with the rest of our business'. His leave year with Group Clean had run from 1 April to 30 March. The claimant was reassured that holiday would be 'pro-rated after the end of your current holiday year to ensure Transferring Employees suffer no loss of benefit.'

16 At some point between receipt of that letter and 31 January 2018, the claimant provided the respondent with all of the required documentation, save that the in-date passport he provided had no ILR vignette in it, and so he also provided the expired passport which contained his ILR vignette. He tells me that he applied for the support loan but was unable to say with complete confidence that it had been submitted in time. Certainly, it was never paid to him.

17 On 31 January 2018, the respondent wrote to the claimant notifying him that the documents he had provided did not appear to be sufficient to prove his right to work in the United Kingdom. The letter required the claimant to provide copies of the following documents: an in date visa; an in date passport; a current Biometric Residence Permit (BRP); a certificate of Naturalisation and proof of NI; a Home Office application letter containing a case ID reference less than 5 months old; a current Immigration Status document; Proof of National Insurance (NI) number.

18 The letter contained the following instruction and warning:

> Please ensure that you take your original documents along to your Line Manager so that they can sign the copy to say they have seen the original. This information is very important to us and must be received within 14 days. Non receipt may result in you being stopped from working with immediate effect.

19 The claimant was on holiday between around 16 January and 10 February 2018 and emailed the respondent on 7 February 2018. He had not received his pay as expected, and was told that it would be paid by 6pm that night.

20 The claimant returned to work on 11 February 2018 and worked every night between then and 15 February 2018. On each night he was asked to provide suitable proof of his right to work in the United Kingdom and told repeatedly that the documents he had provided were inadequate. He may well have been told something along the lines of 'if you don't provide the correct documentation, you will not be able to work'; however, he was never told that he was suspended or instructed not to report for further shifts. Nevertheless, the claimant did not attend work after 15 February 2018.

21 On or around 17 February 2018, the claimant's wife was contacted by his night cleaner team leader, Mr Choi, who was also the couple's pastor. Mr Choi asked whether the claimant was going to attend work and was told that the claimant thought he had been suspended. Mr Choi said that the claimant should go to work anyway and sent him a BRP

application form on 18 February 2018. The claimant completed the application and borrowed money to pay the relevant fee but did not submit it because he was subsequently told that the form he had been given was for the wrong application.

22 In the latter regard, the claimant went to Community Links, a social action charity in East London, towards the end of February 2018 for free legal advice. Community Links referred the claimant to Toynbee Hall which arranged for him to see one of its advisors on 12 March 2018.

23 On 3 March 2018, the respondent wrote again to the claimant, stating in particular:

> Following on from our letter dated 31/1/18 giving you 14 days to provide us with the proof of ID required, we have still not received the requested documents. Due to this reason we are unable to allow you to continue working for Servest Group with immediate effect.

24 The respondent accepts that the effect of this letter was that the claimant was suspended without pay from 3 March 2018.The letter also contained the warning:

> Please ensure that you take your original documents along to your Line Manager so that they can sign the copy to say they have seen the original. This Information is very important to us and must be received within 28 days Once received, your Line Manager will brief you on returning to work. If these documents have not been received within 28 days we will assume you no longer wish to work for the company and will process you as a leaver.

25 That same day, the claimant was paid £146.93 net

26 On 12 March 2018, the Toynbee Hall advisor gave the claimant a form to make a 'no time limit application'. I have not been provided with and so am unable to say exactly which BRP application form had previously been provided by Mr Choi to the claimant; however, the 'no time limit' application would also have led to the claimant's ILR status being recorded on a BRP. Nevertheless, the claimant did not submit the application despite having again borrowed sufficient funds to pay the fee.

27 On 3 April 2018, the claimant was paid £848.94.

28 On 16 April 2018, the claimant had another appointment at Toynbee Hall, this time, it would appear from the appointment slip, with an employment law advisor. He was advised on this occasion not to submit the NTL application but instead to inform his employer that he was entitled to work because of his immigration status.

29 Indeed, the Appellant, with the assistance of his advisor, then wrote to the respondent on 20 April 2018 asserting that he appeared to have been dismissed in its letter dated 3 March 2018 and continuing:

> 'If I have not been dismissed, I would like to return to work as soon as possible. As you have proof of my indefinite leave to remain, you have proof of my legal right to work in the UK. There is therefore no good reason to stop me working and I ask that you allow me to return immediately.'

30 The claimant also asked for written reasons for his dismissal. However, the respondent replied on 27 April 2018 confirming that the appellant had not been dismissed

but that, because he had still not provided 'compliant right to work proof and documentation', he was invited to an investigatory meeting on 1 May 2018. He was told he would be required to provide an explanation for the allegation of:

> 'Statutory Duty- specifically in relation to a failure to provide suitable evidence to support your right to work within the UK, as specified above.'

31 At the investigation meeting with Ramazan Daskin, the claimant confirmed that he still had not obtained the requested documents but that he 'would apply today and bring it as soon as possible.' The claimant refused to sign the notes and claims that they are inaccurate but, when challenged to be more specific today, suggested only that other things he had said were missed out. He admitted saying that he would apply for the necessary documentation that day.

32 The claimant did not tell Mr Daskin that he had already filled out the form but decided not to submit the application on advice from Toynbee Hall. He did not submit the application and did not provide any further right to work documentation to the respondent.

33 Consequently, the respondent wrote to the claimant on 8 May 2018 inviting him to a disciplinary meeting on 21 May 2018 to deal with the alleged failure to provide suitable evidence of his right to work in the United Kingdom. He was notified of his right to be accompanied by a work colleague or trade union representative and was warned that a possible outcome could be his summary dismissal. Attached to the letter were the notes of the investigation meeting, the respondent's letters dated 31 January and 3 March 2018, and a copy of the respondent's disciplinary policy.

34 The disciplinary policy amongst other things gave the following as examples of behaviour which would be considered gross misconduct and which might lead to dismissal with or without notice:

> 34.1 'Failure to maintain and present to the Company up-to-date documentary evidence of your right to work in the UK'.
>
> 34.2 Failure to carry out any reasonable management instructions including any acts of serious insubordination.

35 The disciplinary hearing was held by Graeme Jones, Operations Director. The claimant agreed to proceed with the hearing without a companion and did not complain at any time that he was thereby disadvantaged either because of language problems or otherwise. At the hearing, the claimant was asked about telling Mr Daskin that he would provide proof of a BRP application. He said that he had received legal advice that he did not need to provide Mr Jones with proof. He said that he had applied for a BRP but had been told he did not need to show Mr Jones. However, after complaining that he had been given inadequate time to make the necessary application, the claimant eventually showed Mr Jones a blank NTL application form and asserted that he had no money to make the application.

36 On 23 May 2018, Mr Jones wrote to the claimant in the following terms:

> Further to my letter dated 8th May 2018 in which you were invited to attend a hearing on 21st May 2018 to allow you to opportunity to provide an explanation for the following alleged matter of concern:

> Contravention of a Statutory Duty- specifically in relation to a failure to provide suitable evidence to support your right to work within the UK, namely, your in date visa, your in date passport, proof of your National Insurance (Ni) number.
>
> At the hearing on the above date, where you chose to be unaccompanied, you explained that you had made valid attempt to comply with the required right to work process and submit your application but it transpires that you only completed the relevant form but could not process this due to insufficient funds.
>
> This is not an acceptable reason for failure to comply with the companies [sic] right to work process after sufficient opportunity to meet this requirement was provided.
>
> As you have been unable to provide us with any further information with regards to your current right to work status I have drawn the reasonable conclusion that you do not have valid documentation to support your right to work in the UK. As a result of this please be advised that I have made the decision to terminate your employment for contravention of a statutory duty, as detailed above, with immediate effect.
>
> Due to the nature of the case, namely your failure to provide evidence of your right to work in the UK, you are not entitled to notice or pay in lieu of notice.
>
> You have the right of appeal against my decision and should you wish to do so, you should write to in the first instance to Millie Royal —-Senior HR Advisor, within 7 calendar days giving the full reasons as to why you believe your dismissal was either inappropriate or too severe.

37 Regrettably, and for reasons no-one has been able to explain, the letter was sent to the claimant at an address entirely unconnected with him, and so never arrived.

38 Therefore, the claimant wrote to the respondent on 28 June 2018 complaining that he had received no outcome from the disciplinary hearing, and asserting again that he had the right to work without the need for providing any further proof. The letter suggested that the respondent make use of the Employer Checking Service.

39 In the latter regard, the Home Office publication, An Employer's Guide to Right to Work Checks', issued the following day said:

> 'You are responsible for conducting the visual inspection of the documents presented to you. You are only required to verify someone's right to work with our Employer Checking Service (ECS) in specified circumstances.'

40 Those circumstances were set out on p20 of the publication and were:

> '1. You are presented with a Certificate of Application which is less than six months old and which indicates that work is permitted; or
>
> 2. You are presented with an Application Registration Card stating that the holder is permitted to undertake the work in question. This will be restricted to employment in a shortage occupation; or
>
> 3. You are satisfied that you have not been provided with any acceptable documents because the person has an outstanding application with us which was

made before their previous permission expired or has an appeal or administrative review pending against our decision and therefore cannot provide evidence of their right to work; or

4. You consider that you have not been provided with any acceptable documents, but the person presents other information indicating they are a long-term resident of the UK who arrived in the UK before 1988.'

41 The publication also contained a list of those documents which an employer may accept for a person who has a permanent right to work in the United Kingdom (see page 29). Materially, these included (in each case, the emphasis being that of the Home Office document):

41.1 A **current** Biometric Immigration Document (Biometric Residence Permit) issued by the Home Office to the holder indicating that the person named is allowed to stay indefinitely in the UK, or has no time limit on their stay in the UK.

41.2 A **current** passport endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the UK, has the right of abode in the UK, or has no time limit on their stay in the UK.

42 In respect of transfers of undertakings, the publication said (at pages 26 & 27):

Transfer of Undertakings (Protection of Employment) (TUPE) Regulations 2006 provide that right to work checks carried out by the transferor (the seller) are deemed to have been carried out by the transferee (the buyer). As such, the buyer will obtain the benefit of any statutory excuse acquired by the seller.

However, if the seller did not conduct the original checks correctly, the buyer would be liable for a penalty if an employee, who commenced work on or after 29 February 2008, is later found to be working illegally. Also, a check by the buyer may be the only way to determine when any follow-up check should be carried out in respect of employees with time-limited permission to work in the UK.

For these reasons, employers who acquire staff in cases of TUPE transfers are advised to undertake a fresh right to work on those staff they have acquired. Employers are not required to have a statutory excuse in respect of employment which commenced before 29 February 2008, where the individual has been in continuous employment since before that date. This includes where employment has continued as part of a TUPE transfer.

We recognise that there may be practical problems in undertaking these checks before employment commences for workers acquired as part of a TUPE transfer and for this reason a grace period has been provided during which you should undertake the check. This period runs for 60 days from the date of the transfer of the business to correctly carry out fresh right to work checks in respect of these those TUPE employees acquired. There is no such grace period for any subsequent follow-up checks.

43 The claimant's letter of 28 June 2018 appears to have prompted the generation of a P45 for the claimant on 3 July 2018. Receipt of the P45 on or around 5 July 2018 was the first time the claimant had been put on notice that he had been dismissed.

44 The claimant wrote to the respondent on 14 September 2018 reiterating that he had received no outcome letter from the May disciplinary hearing but, having understood from the P45 that he had been dismissed, indicating his intention to appeal against that decision. The claimant requested that his wife be permitted to accompany him to the appeal hearing, so that she could assist him to understand and be understood by those present.

45 No response was received to that letter. The respondent asserts in its grounds of resistance that the letter was not received; however, no evidence has been provided to that effect. It is correctly addressed and I accept that it was posted by the claimant. On balance, I find that it was delivered to the respondent but that for some reason it was not properly actioned.

46 The claimant commenced early conciliation on 2 October 2018 and was issued with the necessary certificate on 16 November 2018.

47 On 11 December 2018, Citizen's Advice Newham wrote to the respondent on the claimant's behalf indicating that a claim would be presented to this Tribunal but that he would still be interested in resolving the matter without the need for a full hearing. The letter requested written reasons for the claimant's dismissal. It made reference to certain matters discussed during early conciliation; however, no concession was made today by the Respondent to the contents of these discussions, and no consent given to admit as evidence anything it said to ACAS.

48 The claimant's ET1 was presented to the Tribunal on 14 December 2018.

<u>Facts Relevant to Remedy for Unfair Dismissal and to the Other Claims</u>

49 The claimant refused to provide any evidence of his right to work in the United Kingdom beyond his national insurance number, his 2003 passport endorsed with a residence permit issued on the basis of his ILR, and a current passport without any such endorsement. However, he did that from 16 April 2018 on the basis of legal advice.

50 He would have continued to refuse to provide any further evidence at any appeal hearing.

51 After his dismissal, the claimant did not search for alternative employment. He was hoping for success in this claim, and did not want to pay for a BRP. He had, however, been told by his legal representatives about his obligation to mitigate his losses.

52 The claimant has nevertheless generated some income buying and selling fish. He has given no details of the amounts earned despite Judge Laidler having ordered that the parties' evidence deal with matters of remedy.

53 On 1 April 2018, the claimant's leave year changed to run from then to 30 September, and would thereafter have spanned 1 October to 30 September had he remained employed by the respondent. The claimant had taken all of his leave entitlement to 31 March 2018, but took no leave thereafter, instead being placed on unpaid

suspension. The respondent accepts that the claimant accrued the right to paid leave throughout his period of suspension.

54 The respondent accepts that the claimant should have been paid during his period of suspension. From the ET1 and ET3, I note that the parties agree that the claimant's monthly pay was £1,690 gross (£1,431 net).

THE LAW

Right to Work

55 Section 15 of the Immigration, Asylum and Nationality Act 2006 provides:

> (1) It is contrary to this section to employ an adult subject to immigration control if –
>
> (a) he has not been granted leave to enter or remain in the United Kingdom, or
>
> (b) his leave to enter or remain in the United Kingdom –
>
> (i) is invalid,
>
> (ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or
>
> (ii) is subject to a condition preventing him from accepting the employment.
>
> (2) The Secretary of State may give an employer who acts contrary to this section a notice requiring him to pay a penalty of a specified amount not exceeding the prescribed maximum.
>
> (3) An employer is excused from paying a penalty if he shows that he complied with any prescribed requirements in relation to the employment."

56 Section 25 of the 2006 Act provides:

> 25. Interpretation
> In sections 15 to 24 –
>
> (a) "adult" means a person who has attained the age of 16,
> …
> (c) a person is subject to immigration control if under the Immigration Act 1971 he requires leave to enter or remain in the United Kingdom, …"

57 Section 1(2) of the Immigration Act 1971 provides:

> (2) Those not [in this Act expressed to have the right of abode in the United Kingdom] may live, work and settle in the United Kingdom by permission and subject to such regulation and control of their entry into, stay in and departure from the United Kingdom as is imposed by this Act; and indefinite leave to enter or remain in the United Kingdom shall, by virtue of this provision, be treated as having been given under this Act to those in the United Kingdom at its coming into force, if they are then settled there (and not exempt under this Act from the provisions relating to leave to enter or remain).

58 The circumstances in which an employer can avail themselves of the provisions of s15(3) for a statutory excuse are prescribed in the Immigration (Restrictions on Employment) Order 2007.

59 Article 3 of the Order describes how an employer will be excused from paying a penalty under section 15 of the 2006 Act for either the duration or the remainder of the employment. Articles 4, 4A and 4B describes how an employer will be excused from paying a penalty under section 15 of the 2006 Act for limited or specific periods, albeit that article 4B was not in force at the material time.

60 The Schedule to the Order prescribes the various types of document which must be provided by the employee to the employer to satisfy the requirements of the aforesaid Articles. For the purposes of Article 3, the relevant documents are set out in List A and include:

60.1 A current biometric immigration document issued by the Home Office to the holder which indicates that the person named in it is allowed to stay indefinitely in the United Kingdom, or has no time limit on their stay in the United Kingdom.

60.2 A current passport endorsed to show that the holder is exempt from immigration control, is allowed to stay indefinitely in the United Kingdom, has the right of abode in the United Kingdom, or has no time limit on their stay in the United Kingdom.

61 For the purposes of Article 4, the relevant documents are set out in List B, part 1, and include:

61.1 A current passport endorsed to show that the holder is allowed to stay in the United Kingdom and is allowed to do the type of work in question.

61.2 A current biometric immigration document issued by the Home Office to the holder which indicates that the person named in it is allowed to stay in the United Kingdom and is allowed to do the work in question.

62 The remaining documents in Lists A and B are irrelevant to the present case.

63 Article 4A provides for a statutory excuse where the employer uses the Employer Checking Service. However, the excuse lasts only for the 6-month period beginning with the Home Office issuing a Positive Verification Notice.

64 Article 5 provides that an employer is only excused from paying a penalty if the initial right-to-work checks are carried out prior to the commencement of employment, although Home Office guidance informs TUPE transferees that they have a grace period of 60 days from the date of the transfer to carry out work checks on transferring employees.

65 When an employee's employment is transferred pursuant to TUPE 2016, the right to work checks necessary to avoid breach by the employer of immigration legislation carried out by the transferor are deemed to have been carried out by the transferee.

Unfair Dismissal

66 Pursuant to s94 of the Employment Rights Act 1996 (ERA), an employee is entitled not to be unfairly dismissed by his employer.

67 Section 98 ERA provides:

> (1) *In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
> *(2) A reason falls within this subsection if it—*
> *…*
> *(b) relates to the conduct of the employee,*
> *…*
> *(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."*
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*
> …

68 It is for the employer to prove its reason for dismissing the claimant and that it is a potentially fair reason. Thereafter, the Tribunal will determine the question of fairness pursuant to s98(4) ERA with no burden of proof on either party.

69 A reason for the dismissal of an employee is a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee (**Abernethy v Mott, Hay and Anderson [1974] IRLR 213**).

70 Where the reason for dismissal is conduct, the Tribunal will consider whether the employer held a genuine belief in the employee's guilt, reached on reasonable grounds following a reasonable investigation. As said in **British Home Stores Ltd v Burchell [1978] IRLR 379**:

> 'What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further. It is not relevant, as we think, that the Tribunal would itself have shared that view in those circumstances. It is not relevant, as we think, for the Tribunal to examine the quality of the material which the

> employer had before him, for instance to see whether it was the sort of material, objectively considered, which would lead to a certain conclusion on the balance of probabilities, or whether it was the sort of material which would lead to the same conclusion only upon the basis of being 'sure' as it is now said more normally in a criminal context, or, to use the more old-fashioned term, such as to put the matter 'beyond reasonable doubt'. The test, and the test all the way through, is reasonableness; and certainly, as it seems to us, a conclusion on the balance of probabilities will in any surmisable circumstance be a reasonable conclusion.'

71 The question in each respect, and in respect of the sanction of dismissal, is whether the employer acted within the range of reasonable responses (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**); the Tribunal must not substitute its own view of what the employer should have done (**Iceland Frozen Foods Ltd v Jones [1983] ICR 17**). The dismissal process must be considered in its entirety. To that end, a defective appeal might in all the circumstances render unfair a dismissal which to that point had fallen within the range of reasonable responses (**West Midlands Co-operative Society v Tipton [1986] AC 536**); alternatively, the appeal might cure a dismissal which to that point had been unfair (**Taylor v OCS Group Ltd [2006] ICR 1602**).

72 In **Baker v Abelio [2018] IRLR 186**, the EAT considered whether an employee's refusal to provide documentary evidence of him right to work fell within s98(2)(d) ERA and concluded it did not. At paragraphs 25 and 26, Slade J said:

> 25. The Employment Judge plainly erred in holding at paragraph 45 that an employer was obliged under the IANA 2006 to obtain specific documentary evidence that the Claimant had the right to work in the United Kingdom. The Employment Judge relied on section 15. Section 15 provides liability to a penalty for an employer if he employs a person subject to immigration control as defined in section 25. The Employment Judge failed to refer to the all-important section 25. In accordance with section 25, a person is subject to immigration control if, under the IA, he or she requires leave to enter or remain in the United Kingdom. It was agreed by the parties that the Claimant was not such person. Section 15 did not apply to the employment of the Claimant by the Respondent, as he was not subject to immigration control within the meaning of the Act.
>
> 26. Even if the Claimant had been subject to immigration control, section 15(3) does not impose a requirement on an employer to obtain certain documents. It gives the possibility of excusal from penalty if certain documents are obtained from the employee. The Employment Judge erred in holding that the reason for the dismissal fell within ERA section 98(2A)(d).

73 However, a genuine but erroneous belief that it was impermissible to continue to employ a person of an enactment prohibiting further lawful employment could be 'some other substantial reason' for a dismissal (**Bouchaala v. Trusthouse Forte Hotels Ltd [1980] ICR 721**). Slade J confirmed, therefore that, if the Respondent believed it would be a contravention of the law if they employed the Claimant without being provided with the documents which they believed to be required, this can amount to some other substantial reason for dismissal within section 98 (**Baker** paragraph 29).

74 The question remains however whether the employer acted fairly in all of the circumstances in treating that reason as sufficient to justify dismissal. In addition to following a fair procedure, the employer will have to carry out such enquiries as are reasonable in all of the circumstances.

75 Pursuant to s118 ERA, where a tribunal makes an award for unfair dismissal it shall comprise a basic award and a compensatory award.

76 The Tribunal may nevertheless reduce both basic and compensatory awards to reflect the employee's culpable and blameworthy conduct. In respect of the compensatory award, the conduct must have caused or contributed to the dismissal (s123(6) ERA), and in respect of the basic award the conduct must have occurred prior to dismissal or notice of dismissal (if given) and it must be just and equitable to make a consequential reduction (s122(2) ERA).

77 If an employee is unfairly dismissed by reason of a procedural defect, the Tribunal may make a reduction in compensatory award to reflect the chance that he would have been dismissed in any event, pursuant to s123(1) ERA and **Polkey v AE Dayton Services Ltd [1988] AC 344**.

Date of Dismissal

78 In **Gisda CYF v Barratt [2010] IRLR 1073**, the Supreme Court held that the EDT is when the claimant actually received and read the dismissal notice, or at least had a reasonable opportunity of doing so. Moreover, the question of whether the claimant 'had reasonable opportunity' it is to be construed subjectively to the individual claimant in his or her personal circumstances, and 'mindful of the human dimension in considering what is or is not reasonable to expect of someone facing the prospect of dismissal from employment'. In response to employer arguments about uncertainty, it was pointed out that this can be avoided by reversion to 'the prosaic expedient of informing the employee in a face-to-face interview that he or she has been dismissed'.

Breach of Contract

79 Pursuant to article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, a claim may be brought in the Employment Tribunal for damages in respect of a breach of contract arising or outstanding on termination of employment.

80 An employer is only entitled to dismiss an employee without sufficient contractual notice (or pay in lieu, the contract so permits) if dismissing in acceptance of a repudiatory breach on the part of the employee.

81 Whether misconduct is sufficient to justify summary dismissal is a question of fact; conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment (**Neary v the Dean of Westminster [1999] IRLR 288**).

82 The burden lies on the employer to prove that the employee was in fundamental breach of contract.

Unauthorised Deductions from Wages and Holiday Pay

83 Pursuant to s13 ERA, an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made 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.

84 Unless the employee's contract provides for a more generous entitlement, an employee is entitled to 5.6 weeks' paid leave every year (regulations 13 and 13A of the Working Time Regulations 1998). The employee is entitled on termination of employment to payment in lieu of accrued but untaken holiday (regulation 14).

Written Statement of Reasons for Dismissal

85 An employee is entitled to be provided by his employer with a written statement giving particulars of the reasons for the employee's dismissal (s92(1) ERA). However, save for certain circumstances (none of which apply to the claimant), an employee is entitled to a written statement under this section only if he makes a request for one; and a statement shall be provided within fourteen days of such a request (s92(2) ERA).

86 Pursuant to s93(1) ERA, a complaint may be presented to an employment tribunal by an employee on the ground that the employer unreasonably failed to provide a written statement under section 92, or the particulars of reasons given in purported compliance with that section are inadequate or untrue.

CONCLUSIONS

87 Consequent to my findings of fact above, I have reached the following conclusions.

88 The claimant was purportedly summarily dismissed by letter dated 23 May 2018. However, that letter was erroneously addressed and unsurprisingly was never received by the claimant. Instead, as submitted on the claimant's behalf, I find that he was first placed on notice that he had been dismissed when he received his P45. Given that the P45 is dated 3 July 2018 (a Tuesday), I find that it was received two working days later on 5 July 2019. Early conciliation was commenced on 2 October 2018, within the 3-month period beginning on 5 July 2018, and the claim was presented within one month of the EC Certificate being issued. The claimant has, therefore, brought all of his claims in time.

89 Whilst no witness has been called by the respondent to deal with the point, it is not seriously challenged that when he made the decision to dismiss the claimant, Mr Jones had in mind his continued failure to provide the documents requested of him to prove his right to work in the United Kingdom. In any event, I am satisfied from the contemporaneous documentation that that was the reason for the claimant's dismissal.

90 As Mr Wilson conceded, this is not s98(2)(d) case because the respondent is not alleging (and has not proved) that the claimant did not in fact have valid leave to remain in the United Kingdom, nor that that was the reason for his dismissal.

91 Instead, the reason for dismissal was the claimant's failure to provide satisfactory evidence his right to work. As confirmed in **Baker**, provision of such documents is not a statutory obligation but rather gives rise to a statutory excuse. However, it is clear from the dismissal letter that Mr Jones believed that the respondent was thereby placed in breach

of a statutory obligation, and so his reason for dismissing the claimant is capable of constituting some other substantial reason for dismissal.

92 Furthermore, a careful reading of Mr Jones's letter discloses that he believed the claimant had failed without good reason to comply with the company's right to work process, which was a matter relating to the claimant's conduct. Consequently, I find that the respondent has established a potentially fair reason for dismissing the claimant. The question is, however, whether the dismissal was fair in all of the circumstances.

93 The documents provided by the claimant were not amongst those prescribed in the 2007 Order to establish a statutory excuse for the respondent . By the time of the dismissal decision, the claimant had been told on numerous occasions that the documents he had provided were unsatisfactory and that he should obtain a BRP.

94 It is clear that Mr Jones did not accept the claimant had been given insufficient time to apply for a BRP. Given that nearly 5 months had passed from the transfer date, by which time the issue of right to work documentation had already been raised with him, and nearly 4 months since the suitability of a BRP had first been raised, this was a conclusion reasonably open to Mr Jones.

95 It has been suggested that Mr Jones should have taken into account the disadvantage caused to the claimant because he was not a native English speaker. However, that was not raised at the time and I am satisfied in any event that the claimant was able to articulate satisfactorily the points he wished to raise.

96 There does however appear to have been little consideration given to the claimant's assertion that he could not afford a BRP. He had been clear that there had been delays in his pay, and that he had earned comparatively little since the transfer. Given Mr Jones's apparently key conclusion that this was an inadequate excuse, any reasonable employer would have investigated this matter further.

97 There is also no evidence of what enquiries Mr Jones or Mr Daskin had made of the Home Office or otherwise to check for themselves the claimant's right to work.

98 In any event, the claimant was not ultimately afforded any right of appeal. The dismissal letter in which the claimant was informed of that right was sent to an incorrect address. The claimant's subsequent letter asking to appeal against his apparent dismissal went unanswered. Whilst Mr Wilson argued that a lack of appeal did not render the claimant's dismissal unfair because any appeal would have been futile, clearly the respondent did not think so when writing the dismissal letter. Also, as HHJ Richardson said in another right to work case, **Afzal v East London Pizza Ltd [2019] IRLR 119**:

> "In my judgment, it is good employment relations practice for an employer in circumstances of this kind to offer an appeal. Experience shows that it is an anxious time both for employer and employee when a limited leave to remain or work expires and a further application has to be made. Difficult technical questions may arise; relevant documents may be difficult to find; and I might add that experience shows that the Employee Checking Service is not always fully informed or up to date. Affording an appeal gives an opportunity for matters of this kind to be considered again rather more calmly than can be done as the time limit expires. There will be cases, and in my experience they are not particularly uncommon, where an employer wrongly believes that an employee does not have a continuing

right to work. The appeal process affords an opportunity for this kind of case, which can result in real feelings of injustice, to be looked at again."

99 For these reasons, I find that the claimant was unfairly dismissed.

Contribution and Polkey

100 That is not, however, the end of the matter. It is necessary to consider the extent to which any eventual award should be reduced to reflect culpable conduct on the claimant's part (contribution) and, in any event, whether (and when) the respondent could have dismissed the claimant fairly had a fair procedure been followed (per **Polkey v AE Dayton Services Ltd**).

101 Whilst I know nothing of the enquiries made by Mr Daskin or Mr Jones into the claimant's right to work, I have seen the applicable Home Office guidance dated 29 June 2018. This would have been the guidance available to the respondent at the time of the claimant's appeal. Moreover, I have not been told that it differs in any material respect from the earlier published guidance available to Mr Daskin and Mr Jones. That guidance makes clear that the documents provided by the claimant were inadequate for establishing a statutory excuse. None of the circumstances in which the guidance requires an employer to use the ECS applied to the claimant. Even if the respondent had called the Home Office, I find it highly unlikely that it would have been given any advice other than already given in the extant guidance, in other words to require production of documents prescribed in Schedule to the 2007 Order. I have been provided with no evidence that the respondent would have been told to use the ECS, let alone that it would have been able to use it successfully to confirm the claimant's right to work.

102 The claimant's claim not to have been able to afford to apply for a BRP would have been explored further and, while the respondent would have discovered that he had wanted but not received a loan and had experienced delays in receiving his pay, it would also have established what he confirmed to me – that the claimant had nevertheless been able to borrow the money to pay for the application.

103 The claimant's complaint about not having been given sufficient time to make the application might have highlighted the fact that the respondent's letter of 31 January 2018, warning him that he needed to have provided his documents within 14 days and that failure to do so may result in him being stopped from work, was slightly premature given the 60-day period of grace given by the Home Office to TUPE transferees. However, it would also have been clear that he was not in fact stopped from working until 3 March 2018, after the end of that grace period.

104 Whilst an appeal would have given the claimant an opportunity to raise these matters fully with the respondent, ultimately he would not have applied for a BRP and so would have continued to rely on his existing, inadequate, documentation. In other words, even had the respondent fully investigated the claimant's points and even had an appeal hearing been held, I am satisfied that he would still have inevitably have been dismissed.

105 I might well have found that the additional enquiries (in particular regarding the claimant's ability to pay for a BRP application) would have taken proceedings beyond the date on which the respondent intended to dismiss him. However, this would have been only a modest delay, and well before the time on which dismissal actually took place. Therefore, I reduce the claimant's compensatory award by 100%.

106 Even if I had not considered it appropriate to make a 100% Polkey reduction, it remains the case that the claimant had decided that he did not want to find alternative employment, because he did not want to pay for a BRP. What he did do was earn money from buying and selling fish. He has provided no evidence of the amount he thereby earned. Consequently, the claimant has not proved that he has suffered any financial loss as a result of his dismissal. I would have found in any event that any losses arose from a failure to take reasonable steps to mitigate those losses by looking for alternative employment.

107 As for any reduction to the basic award, the respondent was entitled to consider the claimant's failure without good excuse to comply with its right to work process as a matter of conduct. However, by the time that failure became material, he was acting on the advice of his legal representatives. In the circumstances, I do not consider that it would be just and equitable to reduce his basic award.

Wrongful Dismissal

108 It was nevertheless the claimant's failure to comply with the respondent's right to work process which caused it to dismiss him. He had been told repeatedly which documents he needed to provide, and in particular that a BRP would suffice. Contrary, to Ms Khullar's submissions, the claimant was able to afford the application, having borrowed the money to make it, but had in fact chosen not to. The potential consequences to the respondent of continuing in the circumstances to employ the claimant having concluded that he had failed to show evidence of his right to work were very serious. Whilst criminal sanctions are relatively rare, civil penalties of up to £20,000 can be imposed on employers of illegal workers.

109 Asking the claimant to provide satisfactory proof of his right to work was a reasonable management instruction, with which the claimant refused to comply. Moreover, the claimant had been placed on notice in advance of the disciplinary hearing that failing to maintain and present to the respondent up-to-date documentary evidence of his right to work in the UK was considered an act of gross misconduct.

110 I am satisfied that the claimant by failing to provide satisfactory proof of his right to work acted in fundamental breach of contract, entitling the respondent to dismiss him without notice.

Unauthorised Deductions and Holiday Pay

111 The claimant was not suspended prior to 3 March 2018 and so the respondent was entitled to withhold pay for the period before then when he failed to attend work. He was, however, suspended without pay from that date and so suffered unauthorised deductions (comprising his normal pay) from then until his dismissal took effect on 5 July 2018, a period 2 days short of 18 weeks. Therefore, the claimant suffered unauthorised deductions from wages constituting 17.6 weeks' pay.

112 The claimant's final leave year ran from 1 April 2018. He took no leave between then and the end of his employment on 5 July 2018, a period of 13 weeks and 4 days (95 days). Consequently, the claimant was entitled on termination to pay in lieu of 1.46 weeks' holiday.

Written Statement of Reasons for Dismissal

113 On the admissible evidence before me, I find that the claimant first requested a written statement of reasons for his dismissal in his representatives' letter of 11 December 2018. However, he brought his claim on 14 December 2018, only three days later. Therefore, whilst the respondent had not by that time provided any written statement of reasons, the 14-day timeframe had not by then expired. Therefore, the respondent's failure was not unreasonable and no award can be made under s93 ERA.

Calculation of Remedy

114 The claimant was employed by the respondent (and its predecessors under TUPE) for 10 continuous whole years. Throughout his employment, the claimant was aged under 41. Consequently, he is entitled to a basic award of 10 weeks' pay. The claimant's monthly gross pay was £1,690, making his weekly pay £390, and his basic award £3,900.

115 Similarly, for the 17.6 weeks over which the claimant was suspended without pay he is entitled to £6,864.

116 The 1.46 weeks' pay in lieu of holiday comes to £569.40.

Employment Judge O'Brien
Date: 19 January 2021