



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Mrs M Correia

AND

**Respondent**  
Atalian Servest Ltd

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD BY VIDEO (CVP)

ON 12 March 2021

EMPLOYMENT JUDGE GRAY

### Representation

**For the Claimant:** In person and represented by her friend Mr Riberio (assisted by the Court appointed interpreter Mrs O Rouse)

**For the Respondent:** Mr K Wilson (Counsel)

### RESERVED JUDGMENT

The judgment of the tribunal is that:

- The Claimant's employment did not transfer from TCFM to the Respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 on the 21 November 2017, her employment with the Respondent, relevant to this claim, started pursuant to a contract between her and the Respondent signed on 10 November 2017.
- The Claimant was dismissed from that employment by the Respondent on the 21 March 2018.

**REASONS**

**The Background to the Claim**

1. At a case management preliminary hearing by telephone on the 25 February 2020 before myself it was noted that by a claim form presented on 14 March 2019 the Claimant brought complaints of discrimination on the grounds of race and unlawful deductions from wages / other payments all of which the Respondent has defended.
2. It was also noted that the dates of the ACAS early conciliation certificate are 6 March 2019 until 12 March 2019. An act occurring on or after the 7 December 2018 will be in time.
3. The Respondent states in its Grounds of Response that it is a provider of outsourced Facilities Management, and provides a broad range of services including catering, cleaning, security, building services and grounds maintenance.
4. From the claim and response forms it was apparent that the Claimant's employment history with the Respondent is complicated.
5. At the commencement of that hearing the Claimant had the assistance of her friend Mr Ribeiro who had offered to translate for her if things were not clear. As the hearing progressed it became apparent that Mr Riberio was having to translate a significant amount and concern was raised by me that this hearing would be better conducted in person with a court provided interpreter. The parties agreed to this so a further preliminary hearing was listed for one day in person with a Portuguese speaking Court appointed interpreter to assist the Claimant. It was listed "to determine the Claimant's amendment application, confirm the issues, fix and timetable a final hearing, consider the possibility of judicial mediation and make appropriate case management orders."
6. That further preliminary hearing took place on the 30 September 2020 before me.
7. Unfortunately, the court appointed interpreter was unable to attend that hearing at the last minute due to developing COVID like symptoms and needing to self-isolate.
8. The Claimant was though again assisted with translation by her friend Mr Riberio, so with consent, the hearing proceeded on a more limited basis focusing on case management and the following was confirmed:

- a. The Claimant is not pursuing an amendment application to add a complaint of victimisation or disparity of contractual terms that she says has arisen since she issued this claim. She instead intends to raise her concerns over contractual disparity matters as a new claim. It was noted that such matters do appear to potentially relate to issues separate from this current claim.
  - b. The Claimant confirmed that she complains that her dismissal in February 2019 was an act of direct discrimination on the grounds of race.
  - c. However, the Claimant indicated that she had also intended to claim unfair dismissal and it was google translate that led to it not being clear in her claim form. It was noted from the claim form and the previous case management hearing that it was not apparent that the Claimant was making an unfair dismissal claim, so it will require a tribunal to determine if it can be added now.
  - d. The Claimant also clarified that she was seeking to complain that the purported dismissal in March 2018 was also an act of discrimination on the grounds of race. As to this potential complaint the Respondent submits that for the Claimant to say this is a complaint of race discrimination it would require her to amend her claim and also raises a time limit jurisdictional point. The clarification of this potential complaint may or may not require an amendment to the claim form, so it was agreed that this issue would be decided along with the addition of an unfair dismissal complaint at a further preliminary hearing.
9. Having been able to clarify these matters with the parties a further preliminary hearing was then listed for one day in person, with a court provided Portuguese speaking interpreter to assist the Claimant. This is the hearing before me now.

**This Hearing**

10. The purpose of this hearing was to determine the following (as per the case management order from the previous hearing on the 30 September 2020):
  - a. Determine the duration and continuity of the employment relationship the Claimant says she had with the Respondent as a Cleaning Manager that she says she was dismissed from on the 28 February 2019. In this regard;

- i. The Claimant says she has continuous service from the 27 November 2013 because of a TUPE transfer to the Respondent on the 10 November 2017 and her service not being broken by a purported dismissal in March 2018;
    - ii. The Respondent says there are three separate employment relationships with the Claimant. The first is where the Claimant's employment relationship with the Respondent started on the 11 November 2017 and ended on the 21 March 2018. It says that the second was a new and unconnected employment that the Claimant started on the 23 February 2019 and it ended on the 1 March 2019. It also notes that there is a separate period of employment, not relevant to this claim, that is ongoing since the 27 November 2013 that arose from a TUPE transfer to the Respondent on 12 August 2019.
  - b. Determine the Claimant's application to add a complaint of unfair dismissal; and
  - c. Determine if an amendment is needed to add a complaint of race discrimination about matters in March 2018 that the Claimant refers to.
11. It was anticipated that after determining the above preliminary issues the Tribunal would then go on to consider:
- a. What the remaining issues are moving forward after the determination of the preliminary issues;
  - b. Case management, as appropriate, including timetabling the final hearing and considering whether this is a case where it is appropriate for an offer of judicial mediation to be made.
12. This preliminary hearing had been listed for one day, however the extent of evidence, the extent of the submissions that the parties wanted to make, and allowing for the necessary time for matters to be interpreted, meant the hearing in respect of the first preliminary matter (paragraph 10. a. above) continued until just after 16:10. It was therefore considered necessary and proportionate to reserve judgment.
13. It was understood from the parties that the findings on the preliminary matters set out in paragraph 10. a. above would have an impact on the further matters in that:

- a. If the Claimant does not prove on the balance of probability that she has continuous service from the 27 November 2013 because of a TUPE transfer to the Respondent on the 10 November 2017 and that her service was not broken by a purported dismissal in March 2018, then she will not be able to claim her dismissal in February/March 2019 was unfair as she will not have the two or more years of service needed to make the claim and no exception is asserted;
  - b. Further, there would not be a purported dismissal in March 2018 as asserted by the Claimant as an act of race discrimination;
  - c. In short, it was understood that the Claimant would need to prove both matters to proceed with her amendment applications as asserted by her.
14. It was agreed therefore that further directions would then be issued to deal with the amendment application and case management, as appropriate, after determination of the matters set out in paragraph 10. a. above.
15. For reference at this hearing I was presented with an agreed bundle running to 208 pages, a witness statement from the Claimant and a witness statement from Mr Gamble (currently employed as a HR Business Partner responsible for the Tesco Contract within Atalian Servest), on behalf of the Respondent. I was also provided with a skeleton argument from Respondent's Counsel.

### **The Facts**

16. I heard evidence from the Claimant and from Mr Gamble for the Respondent.
17. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

### **The alleged TUPE transfer**

18. The Claimant started employment with TCFM on the 27 November 2013 at the West Moors Tesco (this can be seen from her contract of employment, a copy of which is at pages 74 to 77 of the bundle).

19. There is an email to the Claimant from TCFM dated 13 June 2017 that says “TCFM have been informed we have been unsuccessful in our bid to retain Tesco as a client at Verwood Ringwood Express store. Whilst we will no longer be delivering the cleaning service in your store, TCFM still remain a supplier to Tesco across a large number of stores and sites.” The email gives notice to the Claimant of the potential TUPE transfer of her employment and suggests the Claimant is based at the Verwood Ringwood Express Store.
20. As confirmed by the Claimant and as can be seen from the letter from the Claimant dated 20 June 2017 (page 83), the Claimant notifies TCFM that she intends to take MAT leave from 14 August 2017 to 28 May 2018. It is agreed that the Claimant will take holiday from 24 July 2017 to 12 August 2017 before her MAT leave starts (page 84).
21. Within the bundle at page 87 to 89 there is an email amongst personnel at TCFM dated 14 July 2017 that is headed “Detail of your stores phasing over to new suppliers or new TCFM structure”. It lists a number of stores and the parties in advance of evidence confirmed that there is a missing column from the document in the bundle which shows the “Exit” dates. The Claimant had explained that she was connected to 8 stores at this time (Christchurch, Northbourne, West Moors, Glenmoor, Highcliffe, Verwood, West Parley and Bournemouth 316). Reference to her working across several stores is stated at paragraph 3 of her witness statement. It was confirmed that those 8 stores all noted an “Exit” date of 21 November 2017. The proposed transfer date is therefore not in dispute between the parties.
22. From the document in the bundle (pages 87 to 89) it can be seen that all those stores referred to by the Claimant are expected to transfer to the Respondent.
23. The expected transfer date is then confirmed to the Claimant by an email to her dated 25 September 2017 (page 92). It says “As a result of Tesco undergoing a tender process over the last few months we can now confirm that they have made their decision and it is with regret that we need to take this opportunity to confirm that with effect from **21 Nov 2017** TC Facilities Management will no longer be operating the Cleaning services at Verwood Ringwood Express. This means that as you are contracted to work at this site that your employment will be transferred to the company taking over under TUPE regulations. Your new employer will be Servest. This means that you will continue to work at your contracted place of work and your terms and conditions of employment will remain unchanged.”. In cross examination the Claimant confirmed that she worked in 8 stores but one of those was Verwood.

24. It is the Claimant's evidence, as set out in paragraphs 3 to 5 of her witness statement that on the 10 November 2017 she attended the Tesco store in Portland so that she could sign an amendment to her contract of employment to take up employment at a single store, being Portland. The Claimant says this was a job offer by her area manager Luis Henrique-Siqueira if she ended her maternity leave early. It would also require her to relocate her family to Portland.
25. The document signed by the Claimant on the 10 November 2017 is at page 133 of the bundle. It is headed up as a "New Starter Form" and is between the Respondent and the Claimant. It notes the location as Portland. It states the start date as the 11 November 2017. There are then terms and conditions on the second page of the document as contained in the bundle (page 134) but the Claimant disputed in cross examination that she saw or read those at the time. The Claimant did accept in cross-examination that the employer for that job was the Respondent.
26. There are time records in the bundle at page 182 that show the Claimant working hours for the Respondent at Portland from Monday 13<sup>th</sup> November 2017. The Claimant in her answers to cross examination maintained that she had started work for the Respondent on the 10 November 2017.
27. There are also copies of pay advices in the bundle (at pages 176 to 177) dated 24 November and 8 December 2017 that show the Claimant was paid for work at the various TCFM covered stores, and the most significant amounts of hours worked and pay earned being for work at a Morrisons store in Weymouth. In cross examination the Claimant confirmed that she continued to work with TCFM and had taken up a part-time contract based at the Morrisons store in Weymouth at that time.
28. At page 131 to 132 of the bundle there is a "TUPE" welcome letter dated as postmarked from the Respondent to the Claimant.
29. I was referred to an email in the bundle at page 94 dated 5 December 2017 from Luis Henrique-Siqueira to a lettings agency that states about the Claimant ... "0183749 is Marina das Neves Correia is a permanent contracted employee at Servest Group UK, she is the same come with a TUPE from TCFM as Cleaning Manager with annual salary of £18,720.00 with a lot over time for the next 12 months, no risk to change her contract for the next 12 months."

30. I was also referred to an email in the bundle at page 100 dated 7 December 2017 from TUPE2@servest.co.uk to Luis Henrique-Siqueira headed "RE: Nuevo Documento 2017-11-11" that states "This person is a tupe, I cannot accept a contract for them as their previous contracts are upheld from the incumbents". This appears to be an email saying the contract signed by the Claimant in November 2017 cannot be accepted as she is covered by TUPE. Unfortunately, what the outcome of this email correspondence is, is unknown from the documents presented in this case and Mr Gamble, who gave evidence on behalf of the Respondent, has no direct knowledge of this matter.
31. It was also drawn to my attention that the Claimant in an email dated 21 March 2018 to the Respondent (at pages 137 to 139) says (on page 138) "I was from maternity leave when I was invited to work in Portland. Were given good references of mine. I was a TUPE contract. I myself asked to make a new contract because I continued with the other company. So I have experience and everyone was informed of this."
32. I was also referred to page 156 of the bundle which is an email dated 6 April 2018 from the Claimant to the Respondent about her purported dismissal from the Respondent (pages 155 to 157) and in particular where the Claimant says, "Luis Henrique Area Manager and Peter Soanes invited me to sign a new contract on November 10 2017 because they had been told that I had 4 years experience and a very good record with TC Facilities Management. I explained at the time that I would need to move my family home, schools city etc and that I would have to cancel the maternity leave in order to take the new job but was reassured that my seniority etc would be safeguarded. I was TUPE contract so I believe the company had access to my record. But I signed a new contract with the Servest canceling my TUPE contract".

### **The purported dismissal**

33. The Claimant's evidence is that she was not dismissed on the 21 March 2018 as asserted by the Respondent because:
- a. She continued to receive payslips from the Respondent after the dismissal date (as at pages 111 to 121), albeit with no pay, and that the same payroll number was used when she started undertaking work for the Respondent again in February 2019 (page 122);
  - b. That as per paragraph 9 of her witness statement when she received the letter dated 23 May 2018 from the Respondent (page 162) "on that week I phoned Hr. I was told to wait".

- c. And at paragraph 10 of her witness statement she says, “Robson Alves Phoned my Husband and said that my position was available and that I could return to work...”
34. In oral evidence the Claimant confirmed that she couldn't recall who she spoke to in HR, nor when exactly it was, but she confirmed that it was after the letter dated 23 May 2018 and all that she recalled was HR telling her to wait because she was contesting the letter dated 23<sup>rd</sup> May. About Robson Alves calling her husband, the Claimant confirmed that this was in February 2019 shortly before she started working again. The Claimant explained that the reason contact was made via her husband was because he was working under Robson Alves who is his area manager.
35. The Respondent asserts that there was an express dismissal on the 21 March 2018 and the matters the Claimant submits in evidence do not alter that reality.
36. Considering carefully the contemporaneous documents from that time:
37. The Claimant in her email dated 21 March 2018 to the Respondent (at pages 137 to 139) says (on page 137) “I was fired today”. At the conclusion of the email the Claimant says, “Depending on the position of the company on this subject I will be obliged to look for acas and justice.”.
38. There is a letter dated 28 March 2018 from the Respondent to the Claimant (page 147) that states “Further to your meeting on 23<sup>rd</sup> March 2018 where issues of your performance were discussed with you, you were informed you had failed your probationary period and your employment would be terminated. I acknowledge your email expressing your concerns however the majority of the issues you have raised were discussed during your review and responses provided where appropriate and with the contents of the meeting there was sufficient grounds to fail your probationary period.”. Although the date of the 23 March is referred to this appears to be a typographical error as it does not appear to be in dispute that the meeting where the purported dismissal took place happened on the 21 March 2018. The Claimant was asked about this letter in cross examination and it was put to her that it was clear she had been dismissed. The Claimant confirmed that it was very clear, but she just did not agree with it.
39. Then at pages 155 to 157 of the bundle there is a letter from the Claimant dated 6 April 2018 where she appears to appeal against her dismissal. She says in the letter “I understand that my dismissal is **AUTOMATICALLY UNFAIR** because what happened is a clear discrimination.”. Also, the letter refers at a number of points to the Claimant being dismissed and at the end of the letter the Claimant asks for reinstatement and for compensation for loss of earnings.

40. At page 152 there is an email dated 12 April 2018 (timed at 17:46) from the Claimant to the Peter Soanes that says, "I did not receive the hours that I worked correctly besides I was unfairly dismissed that on this subject I am already looking for the legal means as you should already know."
41. Peter Soanes replies by email to the Claimant dated 12 April 2018 (timed at 19:02) (page 149) saying, "You were not dismissed unfairly you 'Failed' your probation period within Servest under your contract T&C."
42. There is then the letter dated 23 May 2018 (at page 162) from Linsey Gott the HR Business Partner of the Respondent that says in conclusion "In light of the above, I am unable to agree to your reinstatement or compensation for loss of earnings. There is no right to appeal the decision to terminate your employment." The Claimant accepted in cross examination that the meaning of this was very clear.
43. The Claimant accepted in cross examination that from April 2018 to January 2019 she did no work for the Respondent. She stated that it was because they had asked her to wait.

### **The Law**

44. Having established the above facts, I now apply the law, which was helpfully summarised in the skeleton argument of Respondent's Counsel at paragraphs 4, 5 and 9, as follows:
45. Regulation 4(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provides: "Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."
46. Regulation 4(3) TUPE makes clear that to fall within reg. 4(1) TUPE, the individual must be employed and assigned to the organised grouping of employees "immediately before the transfer". This phrase has been strictly and literally interpreted as requiring the employee to be so employed and assigned at the moment of the transfer – see *SoS for Employment v. Spence* [1986] ICR 651 CA.

47. The general rule is that unambiguous words of dismissal or resignation may be taken at their face value without the need for any analysis of the surrounding circumstances — see *Sothorn v Franks Charlesly and Co* [1981] IRLR 278, CA. Dismissal takes effect when an employee is informed of it or has a reasonable opportunity to learn of it – see *Gisda Cyf v. Barratt* [2010] ICR 1475.
48. In his oral submissions Respondent’s Counsel also referenced that the continuity of service requirement for statutory claims (such as unfair dismissal) is a matter of statute and not a matter of contract. An employer and an employee cannot turn a period of employment into a period of continuous employment for statutory purposes simply by agreeing between themselves to treat it as such. An agreement of this kind may amount to a contract that establishes enforceable private rights, but it cannot give rise to a period of continuous employment for the purpose of enforcing statutory rights if it diverges from the rules in Chapter 1 of Part XIV of the Employment Rights Act – see *Secretary of State for Employment v Globe Elastic Thread Co Ltd* 1979 ICR 706, HL.

### **The Decision**

49. From the facts found as set out above the employment relevant to this claim is in relation to the Claimant working for the Respondent at the Portland Tesco store.
50. This is an employment relationship that started pursuant to a contract signed by the Claimant and the Respondent on the 10 November 2017.
51. It cannot be a continuation of the employment relationship that the Claimant had with TCFM because it was agreed to before the relevant transfer date of 21 November 2017.
52. The Claimant’s primary work location with TCFM changed to the Morrisons store in Weymouth prior to the relevant transfer date, so the Claimant was no longer assigned to the organised grouping of resources or employees that was subject to the relevant transfer. Therefore, the Claimant was not assigned to the organised grouping of employees “immediately before the transfer”. The Claimant continued in an employment relationship with TCFM after the relevant transfer date.
53. The Claimant may have misunderstood what the Respondent, through Luis Henrique-Siqueira was offering or promising, but whatever was agreed at that time would be a matter of contract only, and it was agreed and in place between the Claimant and the Respondent directly, before any possible TUPE transfer of her employment from TCFM could have happened.

Correspondence from the Respondent on or after the relevant transfer date suggesting the Claimant had TUPE transferred does not mean that the Claimant did so as a matter of law.

54. As the Claimant herself records in her correspondence with the Respondent on the 6 April 2018, "... I was TUPE contract so I believe the company had access to my record. But I signed a new contract with the Servest canceling my TUPE contract". This does appear to accurately reflect the reality of the situation.
55. As to the purported dismissal on the 21 March 2018 from that employment, this in my view is an express dismissal of the Claimant on that date as supported by the contemporaneous documents produced at that time. As the Claimant records herself on that day "I was fired today".
56. In respect of the confirmatory letter dated 28 March 2018 from the Respondent to the Claimant, the Claimant was asked about this letter in cross examination and it was put to her that it was clear she had been dismissed. The Claimant confirmed that it was very clear, but she just did not agree with it.
57. Her not agreeing with the dismissal is then consistent with her correspondence with the Respondent where she challenged the fairness of it, but it does not mean she was not dismissed. Also, there is then the letter dated 23 May 2018 (at page 162) from Linsey Gott the HR Business Partner of the Respondent that says in conclusion "In light of the above, I am unable to agree to your reinstatement or compensation for loss of earnings. There is no right to appeal the decision to terminate your employment.". The Claimant accepted in cross examination that the meaning of this was very clear.
58. The Claimant being told to wait by HR after receipt of that letter, cannot act as a reinstatement of her employment, and the Claimant does not act in any way that would support that, by for example, pursuing hours of work with the Respondent or querying why the payslips she does receive are for no pay. It is not until February 2019 (11 months later) that indirect contact is made via her husband, and in my view, this is not enough to evidence on the balance of probability that she was not expressly dismissed on the 21 March 2018.
59. For these reasons it is the judgment of the tribunal that:

- a. The Claimant's employment did not transfer from TCFM to the Respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 on the 21 November 2017 (the relevant transfer date), her employment with the Respondent, relevant to this claim, started pursuant to a contract between her and the Respondent signed on 10 November 2017.
- b. The Claimant was dismissed from that employment by the Respondent on the 21 March 2018.

60. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 10. a. ; the findings of fact made in relation to those issues are at paragraphs 18 to 43; a concise identification of the relevant law is at paragraphs 45 to 48; how that law has been applied to those findings in order to decide the issues is at paragraphs 49 to 59.

Employment Judge Gray  
Date: 17 March 2021

Judgment and Reasons sent to the parties: 23 March 2021

FOR THE TRIBUNAL OFFICE