EMPLOYMENT TRIBUNALS

Claimant:	**Ms C Marshall and others**
Respondent:	**KGB Cleaning & Support Services Ltd.**
Heard at:	**Cardiff** **On: 7, 8 and 9 February 2018**
Before:	**Employment Judge A Frazer**

Representation:
Claimants: Mr Bromige
Respondent: Ms Phillips

JUDGMENT having been sent to the parties and reasons having been requested by the Respondent in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

Liability

1. The Respondent provides commercial contractual cleaning services. The Claimants are employed as cleaners and historically their place of work has been the Caerleon campus of the University of South Wales. In 2014 the Respondent acquired the Cleaning Services Contract for the University of South Wales following a tendering exercise and the Claimants' employment was transferred to the Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006. In this regard there was correspondence which took place between Jill Dodds, HR Director for the Respondent, and Malcolm Dacey, Regional Director of OCS Group, in the context of the consultation and information process which took place as between transferor and transferee Mrs Dodds sent a spreadsheet to Mr

Dacey outlining the data for the affected employees. The Claimants' site was the Caerleon campus. On 9th July 2014 Mrs Dodds wrote to Mr Dacey again. She outlined that her understanding was that the employees were expected to transfer on 1st August 2014. She also highlighted a number of intended measures that the Respondent anticipated to take. They included the following:

> *'Transferring employees will be required to complete a new starter pack showing documentary proof of their eligibility to work and reside in the UK. The KGB starter pack will identify written statement of particulars of employment including terms and conditions of employment. All documentation must be provided and declarations signed as required.'*

2. The letter went on to say;

> *'In view of the entire cleaning services provision being awarded solely to KGB; all of the university campuses and cleaning terms shall now amalgamate under one umbrella for the company; thus we shall expect staff to work together unanimously as 'One Large Team' and where necessary work in other areas of the campuses as selected……'KGB have the rights to reserve to change a KGB employee's place of work within the company. This may be due to a number of reasons; through disciplinary action, a formal request by the client or any other justifiable reason deemed appropriate and would be discussed in full prior and agreed with the employee in writing.' This provision would be initiated only within reasonable distance (under a ten mile radius) and that the employee suffers no financial impact.'*

3. Mrs Dodds asked Mr Dacey to confirm that the letter was issued to all staff and she confirmed that a copy of the letter would be issued to the regional TU representative.

4. Prior to the transfer taking place and further to the letter sent to Mr Dacey by Mrs Dodd, employees were in fact issued with a KGB starter pack. An example that has been referred to in evidence is that of Christine Marshall. The starter pack front sheet is at page 75 and at it says 'manager to complete'. One of the tick boxes was 'terms and conditions of employment signed'. The document that was completed by Mrs Marshall is at page 66. At the bottom of p.67 'acceptance of the contract of employment' is signed by both Mrs Marshall and Rebecca Williams, Manager. The written terms and conditions were also signed by Mrs Marshall on p.70. I am satisfied that these were Mrs Marshall's terms and conditions with KGB at the point of transfer. Similarly Mrs Saunders' is at page 76. Mrs Edwards is at page 86. Mrs Mattan's at page 96. The location for all claimants was at the Caerleon

site. In my finding the claimants signed up to the addition of the mobility clause. Therefore the claimants were required to work at Caerleon subject to the ability of the Respondent to relocate them within a ten-mile radius.

5. In January 2016 the Respondent was notified that the University of Wales intended to close the Caerleon site at the end of July 2016. There ensued a consultation period between the January and the July, employees having been warned that they were at risk of redundancy. There was collective consultation in February 2016 and individual consultation meetings on 7th and 8th June. These meetings were conducted by Beryl Molyneaux, Operations Director, and Joanne Heaven-John, Contract Manager. The questions were around whether the employee had a secondary job, how the employee travelled to work, how long the journey was and what the weekly cost was.

6. On 8th July 2016 the Respondent offered the Claimants redeployment at City College Campus in Newport. In reality, since this was within the 10 mile radius it the Claimants were merely being requested to change their place of work in accordance with Clause 5 of their terms and conditions and therefore they were not being made redundant after all. The Respondent had determined that this was a reasonable alternative location having taken into account the information gathered by employees during the consultation. The managers involved had not suggested City Campus during the consultations and gleaned employees' feedback accordingly.

7. On 15th July 2016 Joanne Heaven-John emailed Jill Dodds. She had met with the staff and they had aired various concerns about the proposed relocation option. They were concerned about how the relocation would affect their hours of work and they were also concerned about the extra travel costs. Some employees felt that working in that area of Newport could potentially be dangerous for them given the early starts and it was also pointed out that staff at Caerleon started work any time from 5 but this campus was in fact not open till 6.30. The employees were then advised that there was to be a further meeting to take place between themselves, Beryl Molliner and Joanne Heaven-John. This in fact took place in fact on 27 July and Mr Seb Cooke of Unison was present to represent the Claimants.

8. Beryl Molliner told the Claimants that the move would now not happen because of their concerns with accommodating shift start times. I didn't have the benefit of evidence from her as she has now left the Respondent. I did have the benefit of Mr Cooke's evidence and the evidence of Joanne Heaven-John. Mr Cooke's evidence was that staff were told that they would not be working at City Campus but would be working at another site, the details of which were yet to be given to them. He said that they were advised by Miss Heaven-John that they would be transported in their working time

to the new site and that they would face no disruption to their working patterns or to their shift patterns. This is the large area of dispute. The Respondent disputes that it ever agreed to pay employees for time spent travelling. Unfortunately Mrs Heaven-John could not remember the meeting on 27 July although she was present. She did not have a good recollection of events and she has since been away from the company on maternity leave. She was asked whether she could confirm or deny Beryl Molliner saying that the company would provide transport and that employees would be paid for travelling time. She could neither confirm nor deny that. She said that she would not have agreed that time spent travelling should be paid at any point, whether during that meeting or subsequently, but I could not attach significant weight to her evidence on the basis that she could not in fact recall anything that was said.

9. On 29 July, some two days after the meeting Sebastian Cooke wrote to Beryl Molliner copying in Joanne Dodds and that letter is at page 124(d)(2) of the bundle. At the bottom of the letter it is recorded as follows:-

> "*KGB have agreed to fund the travel to and from the Caerleon site within the working hours so that staff affected see no detriment. While this is applauded it cannot be sustained. Christine has a unique set of circumstances arising out of the management of the Caerleon Campus closure*".

10. Pausing there the main body of the letter was surrounding Christine's individual circumstances and was not a letter focused on anything that was agreed arising out of the meeting of 27 July. However it is pertinent that Mr Cooke referred to the payment of travel time having been agreed and it seemed to me as though he wasn't putting that forward as something he was advocating: that was a genuine reflection of his understanding of what had been agreed at the meeting. The reply to that was from Miss Dodds on 29 July and it is the penultimate paragraph of her letter which is relevant:

> "*as for the future we shall be committed to securing employment for them all and we shall endeavour to supply a vehicle full time for this purpose of transportation to any of the other sites deemed apparent under the umbrella of the USW contract of which they have been a part since their transfer to KGB*".

11. There are no formal meeting minutes of the meeting on 27 July and there is no record of Beryl Molliner's understanding by way of email or any other document. There is nothing from the Respondent to suggest that that agreement at the time was not the correct understanding of the Claimants.

12. On 29 July the Respondent provided the Caerleon employees with a finishing buffet at the student union and the Claimants' evidence was that

Joanne Heaven-John had told them that the Respondent was proposing to locate them to Treforest and Cardiff. Prior to that point they were not aware of where they were going to go and they were told that they would be provided with transport. I find that they were also told in accordance with what had been discussed on 27th that they were going to be paid the travel time since those locations were outside of the 10 mile radius. Again although Mrs Heaven-John denied that she would have had the power to authorise this, Beryl Molliner would have done and in the event I have heard nothing from her regarding the agreement. I take into account when considering this that by 29 July there were only two days left before the closure of the site and by that time, nothing had been agreed by the Respondent in terms of redeployment location. A solution needed to be found which would have resulted firstly in the Respondent being able to continue to operate the contract and secondly in relation to the employees being redeployed. I find that the hasty nature of the agreement resulted in a negotiation which resulted in the Respondent agreeing to fund travel time to the new site.

13. On that basis therefore the agreement which was then commenced was that the employees would be paid for their travel time and that they would be provided with a minibus from the Caerleon site which would then take them to Atrium. They would then be picked up from Atrium and taken back to Caerleon after they had been working at Atrium.

14. Surprisingly in this case despite the fact that the Claimants were relocated, which was a significant change to their working conditions (they were relocated to a site which was 18 miles away from what had been their normal place of work), the Respondent did not issue them with new particulars of employment or a statement of changes pursuant to 4(1) of the Employment Rights Act 1996.

15. It has been advocated on the Claimants' behalf that in fact they remained located at the Caerleon site, however my finding is that there was a variation of the contract such that their place of work was now to be Atrium and that the agreement was that they were going to be paid for travelling time from Caerleon to their new place of work. The Respondent, in my finding, failed to provide them with a statement of changes in accordance with section 4(1) of the Employment Rights Act 1996 and failed to provide them in particular with those particulars of variation.

16. Having made those findings it also follows that having regard to section 13 of the Employment Rights Act 1996 the Respondent then decided from 1 March 2017 to withdraw payment for time spent travelling and this is not in dispute. The Respondent decided to withdraw payment for travelling time from Caerleon to Atrium. By so doing it reneged on the agreement that had been reached in July 2016. Consequently the Claimants suffered an

unauthorised deduction of wages in that the total amount payable ought to have been the amount of money including the travelling time as per the agreement. What has in fact been paid has been the wages minus the travelling time and therefore they haven't been paid the amount properly payable to them. I also find that this is a series of deductions in accordance with section 23(3) of the Employment Rights Act 1996 and therefore having made that finding, the amount properly payable to them will be from when that deduction first arose from 1 March 2017 to the date of presentation.

17. Having regard to the National Minimum Wage Regulations 2015, because I have made those findings effectively there is a debt claimed for the hours that have not been paid during travel time. The claim under the National Minimum Wage Regulations necessarily falls away.

Reconsideration under Rule 70

18. The Claimant's claims under the National Minimum Wage Regulations having been dismissed, the Claimant requested a reconsideration of that decision under Rule 70 of the Employment Tribunals Rules of Procedure 2013. This was on the basis that two of the Claimants namely Gillian Pember and Janet Strong, ought to have been entitled to payment for time spent after they had clocked off from working at Atrium and before getting on to the bus, which would then transport them from Atrium to Caerleon. The Tribunal found that the agreement that had been reached between the Respondent and the Claimants in July 2016 was that the Respondent would pay for travelling time. The argument made on behalf of the Claimants was that they should be paid for 'dead time' waiting for the bus, in particular they finished their shifts at 10.00 o'clock but the bus did not leave the Atrium site until 10.30. There was no particular dispute about that as a matter of fact and having considered the application the issue, it seems, was not reasonably apparent from the pleaded case or from the Schedule of Loss. However Gillian Pember did in fact refer to the time being unpaid in her witness statement, which included necessarily travel and also waiting for the bus. I did not hear any evidence on this point but there is no dispute about it and therefore I am content that I can go on and decide that application.

19. The Claimants contend that the waiting time should count as travelling time for the purposes of Regulations 34 and 20 of the National Minimum Wage Regulations 2015 and in relation to the unlawful deductions claim it is also contended that this is an unlawful deduction because what was properly payable to those two Claimants ought to have been the time that they spent waiting for the bus after they had clocked off. The Respondent contends that waiting time was not covered by Regulation 34 as they were not mobile workers and it also contends that it was not possible to imply a term into the express agreement, as was put by the Claimants representative and found

by the Tribunal, that the time spent waiting for a bus must necessarily have been part of the agreement or should at least have been implied on the basis of the officious bystander test.

20. Dealing first with the issue of the National Minimum Wage Regulations my findings are these. The Claimants were salaried workers under Regulation 21. They are paid an hourly rate of the National Minimum Wage which is now £7.50 an hour. Regulation 34 falls within Chapter 3 of the Regulations which applies to time work and time work under Regulation 32(1) includes hours when a worker is available and required to be available at or near a place of work for the purposes of working unless the worker is at home. I am not satisfied that the Claimants meet that definition in the circumstances. They are not required to get the bus for the purposes of working and in fact they are at liberty to do what they wish after they have clocked off, which might be that they could find some other means of transport to get home. That in my finding puts the matter at an end because Regulation 34 relates to time work and I find that their work is not time work for the purposes of Regulation 32.

21. Having regard to the way that the case is put on a contractual basis, I do not find that on an application of the officious bystander test it would be so obvious that an employee waiting for the minibus home would be paid for time waiting. I do not find having regard to the agreement that it was necessary to imply a term to that effect. This was not working time and in theory the Claimants were free to do with that time what they wished.

22. Given that I have found that the employees or Claimants were salaried workers, the finding that I make having regard to Regulation 27 is that the time spent waiting was not travelling time and accordingly those claims are dismissed.

23. Having considered the application, I do not vary my decision or change it or re-make it. The claims under the National Minimum Wage Regulations are dismissed.

Remedy

24. Having regard to the findings that I have made, as I have indicated earlier, I award 2 weeks pay to each Claimant for the Respondent's failure to provide written particulars under s.4 ERA 1996. The unpaid wages from 1 March to 4 August are as follows, the parties having reached agreement that travel time was 65 minutes a day.

Christine Marshall £323.05.
Gillian Pember £780.65
Janet Price £751.40

Janet Strong £748.15
Linda Mattan £691.28
Magdalena Zeliszczak £821.93
Maria Saunders £716.63
Wendy Baker £774.80
Julie Edwards £741.98

25. In relation to the 2 weeks pay the awards are as follows:-

Christine Marshall £450.00
Gillian Pember £262.50
Janet Price £300.00
Janet Strong £262.50
Julie Edwards £300.00
Linda Mattan £300.00
Magdalena Seliszczak £300.00
Maria Saunders £450.00
Wendy Baker £300.00.

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Employment Judge A Frazer
Dated: 13th March 2018

JUDGMENT SENT TO THE PARTIES ON

……14 March 2018……..

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS

NOTE:
This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.