THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS (sitting alone)**

BETWEEN:

Ms M Rodrigues

Claimant

and

Julius Rutherfoord & Co Ltd (1)

PCS Group Ltd (2)

Respondents

ON: **18-20 September 2019**

Appearances:
For Claimant: **Ms D Keyms, union representative**
For First Respondent: **Mr R Scuplak, consultant**
For Second Respondent: **Mr J Isherwood, consultant**

REASONS FOR THE JUDGMENT DATED 20 SEPTEMBER 2019
PROVIDED AT THE REQUEST OF THE SECOND RESPONDENT

1. In this matter the claimant complains that she was unfairly dismissed and that there had been breaches of the right to information and consultation pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). The issues arising out of those claims were clarified at a case management discussion before Judge Nash on 21 November 2018.

Evidence

2. For the first respondent I heard evidence from:
   a. Mr R Bresciani, Divisional Director; and
   b. Mr A Habbouchi, HR Manager.

3. A former HR manager of the first respondent, Mr S Berrill, was not present. Taking the evidence of the claimant and Mr Bresciani (about what he was told by Mr Berrill - recognising that that is hearsay), and the contemporaneous emails to Mr Berrill, I am satisfied that I am able to make the findings of fact below without hearing directly from him.

4. For the second respondent I heard evidence from:
    a. Ms E Hill, Business Development Manager;
    b. Mr R Starykiewicz, Area Manager; and
    c. Ms C Scully, HR Director.

5. I also heard from the claimant and considered an agreed bundle of documents.

Relevant Law

6. In this case there is no dispute that there was a transfer of an undertaking from the first to the second respondent on 31 July/1August 2017 pursuant to TUPE.

7. Where there is a relevant transfer, then the effect of that on any employee of the transferor is set out in regulation 4. The material parts of that regulation are as follows:

(1) 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which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—
(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

…
(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

8. I was also referred to case of Jakowlew v Nestor Primecare Services Limited t/a Saga Care & anor (UKEAT/0431/14/BA) on the issue of assignment which I considered as discussed below.

9. Regulation 7 deals with the consequences of a dismissal effected either by the transferor or the transferee where the reason or principal reason for the dismissal was the transfer. The material parts of regulation 7 read:

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—
(a) paragraph (1) shall not apply;
(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

10. The legal requirement to inform and consult with employees in respect of a transfer is set out in regulation 13. The key provisions for the present purposes are:

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—
(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;
(b) the legal, economic and social implications of the transfer for any affected employees;
(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and
(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

(3) For the purposes of this regulation the appropriate representatives of any affected employees are—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or
(b) in any other case, whichever of the following employee representatives the employer chooses—
(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;
(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall—

(a) consider any representations made by the appropriate representatives; and

(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

11. The claims and remedies available in respect of a breach of the duty to inform or consult appear at regulation 15 and 16 as follows:

Reg 15:

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—

(a)in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees; …

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a)that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b)that he took all such steps towards its performance as were reasonably practicable in those circumstances. …

(4) On a complaint under paragraph (1)(a) it shall be for the employer to show that the requirements in regulation 14 have been satisfied.

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings. …

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a)order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b)if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

Reg 16:

(3) "Appropriate compensation" in regulation 15 means such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

12. Case law has confirmed that such an award is intended to be punitive and therefore the amount of the award should reflect the nature and extent of the employer's default. The maximum award is regarded as the starting point but is always a matter of discretion in all the circumstances of the case.

13. Quite separate to TUPE are the provisions regarding unfair dismissal. By section 94 of the Employment Rights Act 1996 ("the 1996 Act") an employee has the right not to be unfairly dismissed by his or her employer.

14. It is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the 1996 Act. If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

15. The potentially fair reasons include 'some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held' (SOSR).

16. In determining whether the dismissal was fair, the Tribunal's task is to consider all of the relevant circumstances including any process followed by the respondent. There is conflicting authority on whether the ACAS Code of Practice on Disciplinary and Grievance procedures applies to SOSR dismissals. The principles of the ACAS code may however still be a useful guide as to a reasonable approach to be taken in a non-disciplinary situation.

17. In coming to these decisions, the Tribunal must consider whether the (relevant) respondent acted reasonably by the standards of a reasonable employer.

Findings of Fact

18. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

19. The claimant commenced employment with the first respondent on 28 August 2013. Her employment ended on 31 July 2017. The first respondent is engaged in contract cleaning in the Greater London area. It has many client contracts mainly comprising schools and offices with contracts of varying sizes. They are very used to the operation of TUPE; winning and losing contracts is part and parcel of their business.

20. In March 2017 the first respondent decided not to retender for the contract they had with Lambeth Academy School ('the school'). The contract was due to end 31

July although the last day of service provision was 21 July - the last day of term time and their staff would not be working beyond that date. All parties agree that the employees assigned to work on that school contract constituted an undertaking for the purposes of TUPE.

21. On 26 April the claimant was appointed by the first respondent as site manager at the school as the previous site manager had resigned. From 6 - 26 April the claimant had been on paid leave because she had been removed, at the client's request, as site manager from a previous contract. Her contractual entitlement was to be paid £11 per hour for a 45-hour week, 52 weeks per annum. At the school however she was only required to work 25 hours per week, Monday to Friday, during term time only (39 weeks). This was clearly not a sustainable position for the first respondent in the long term but was one that they had tolerated for some time as they had already decided not to terminate her and had in mind that she would be deployed on to a contract they were expecting to acquire at Battersea power station. The claimant was notified informally of that by Mr Sobral - her line manager - but in fact the Battersea contract was not confirmed until October with a start date in December, both after the end of the claimant's employment.

22. Mr Bresciani's evidence - which I accept - was that overall the claimant was well regarded despite some interpersonal issues and they did not want to lose her. That is why she was deployed to the school contract despite the mismatch in hours between her employment contract and the commercial contract with a resulting ongoing cost to the first respondent which they had to absorb.

23. In all the circumstances I find that when the claimant was assigned by the first respondent to the school contract it was on an indefinite basis albeit that they may have redeployed her in the future. Unless and until she was redeployed, however, she was assigned to that undertaking.

24. There were issues between the school and the first respondent as to the quality of the service provided. Both the claimant and Mr Bresciani described a situation where Mr Green, for the school, complained, in their view unreasonably, from day one. Certainly very soon after the claimant's appointment to the role, Mr Green emailed the claimant on 3 May to that effect and again on the next two days. The claimant's oral evidence was that there were no more complaints until a third-party notice was served on 26 July. On balance I do not find that to be the case. The tenor of her and Mr Bresciani's evidence - together with the emails in March 2017 as to the reasons for the first respondent deciding not to retender - suggest that there were ongoing complaints throughout the contract. I find it unlikely that they stopped between 5 May and 26 July.

25. The claimant and Mr Berrill met on 23 June, at her request, to discuss her position in the company. At that meeting Mr Berrill confirmed to the claimant that the first respondent would not be continuing the service to the school after the end of the contract and that although they would try to find an alternative role for her, if they did not then she would transfer to the new supplier pursuant to TUPE. The claimant stated that she would prefer to stay with the first respondent. On 6 July the claimant chased Mr Berrill for answers to questions she had raised during that meeting. He replied the following day confirming that unfortunately they still had no opportunities

to offer her, that he had been pushing the school to reveal what company was taking over and that he would provide further information the following week.

26. Also on 7 July (several hours before his email to the claimant) Mr Berrill emailed Mr Green at the school making him aware that they had not received any information regarding the new cleaning contractor and asking for that so he could liaise with them regarding the transfer of the operatives. Mr Green replied quickly saying they would be in touch over the coming weeks to go over the details.

27. Mr Berrill chased Mr Green again for details of the new provider on 17 July. He said 'we really need to commence consultations now'. Mr Green replied that the incoming supplier had their details and would follow up at the end of the week. Mr Berrill again chased on 19 July following a request from the claimant.

28. Unbeknownst to the first respondent the school had notified the second respondent, it is not clear exactly when, that they had been successful in the tender process and issued a provisional notification to that effect. In accordance with the relevant regulations there was a mandatory standstill period of 10 calendar days effective from 10 July - thus expiring 21 July - with an intention that the contract would commence on 1 August.

29. Also unknown to the first respondent, on 21 July at about 4pm the claimant was given (by the school) a letter from the second respondent introducing Mr Starykiewicz as the manager at the company taking over the cleaning contract (the second respondent) and asking her to get in touch so that they could talk about her employment transferring. The claimant telephoned Mr Starykiewicz as requested and arrangements were made for him to come and meet her and the staff.

30. At 15.30 on 21 July (the last day of term and a Friday) Ms Hill of the second respondent contacted Mr Berrill confirming that they were the new contractor for the school and requesting TUPE information. Mr Berrill replied at 17.24 attaching employee liability information and asking that the second respondent commence consultation as soon as possible and advise if they would be taking any measures. Ms Hill forwarded that email on the same day to Mr Starykiewicz and Ms Scully. On 24 July Mr Starykiewicz forwarded it to Ms Sturt, senior operations manager. No reply was received by the first respondent from the second respondent to their question about possible measures.

31. The employee liability information showed, in respect of the claimant, that she had weekly hours of 45 although she only worked five hours per week day and her pay rate was £11 per hour. In the further information box it was also expressly confirmed that the school only paid for 25 hours per week.

32. In the meantime, the first respondent had contacted the claimant at 16.34 on 21 July by email formally confirming that they had lost the contract, her last day of service would be 31 July and that the second respondent would take over responsibility for the assignment. Further, that TUPE applied and that her employment would automatically transfer and that they had not been advised of any intended measures. This was a standard communication that the claimant and all the others working on the contract received.

33. On 25 July Mr Starykiewicz and Ms Sturt of the second respondent met the claimant and other employees to conduct the TUPE consultation. Mr Starykiewicz said, and a copy page from his diary seems to support this, that he also met other employees at the school on the evening of 24th. The claimant says that that meeting did not happen and she would have known if it had happened because those other employees would have told her as she took the lead in managing communications as their English was such that they required her assistance in interpreting. I have no reason to doubt Mr Starykiewicz's evidence. He struck me as an honest and credible witness. I also have no reason to believe that the claimant is being untruthful in her evidence although perhaps she is simply mistaken in her belief that if the meeting happened she would have known about it. It must be possible that some employees met Mr Starykiewicz that evening and she was unaware of it. In any event whether the meeting took place on the evening of 24th or not, does not help me in deciding liability on any of the issues before me other than going to the credibility of witnesses generally. For the reasons I have said I do not find that this difference in evidence between the claimant and Mr Starykiewiczs materially affects the credibility of either.

34. There is also a dispute between the parties as to what was said by the claimant during her one-to-one meeting with Mr Starykiewicz and Ms Sturt at the very beginning of 25 July.

35. The claimant's witness statement states that at that meeting they said they could only offer her 5 hours per day for 39 weeks per annum, she said she wanted her full contractual hours and that Ms Sturt said she should not worry and she would sort it out. In her cross examination, the claimant said she was asked if she was happy to transfer and she said she was but only if on her contractual terms. She said that she did not reject any transfer but made it clear it had to be on her full terms whether all 9 hrs were at the school or the extra 4 were on 'another contract' which she told me meant with the second respondent.

36. Mr Starykiewicz's witness statement did not give detail of what was said at the meeting other than that the claimant said she worked 5 hours per day at the school and 4 hours elsewhere. In answers to supplementary questions, he said that the claimant had said it was not worth her while doing the job just for 5 hours per day and that she would not accept that. He said, which I accept, that he was not aware of the third-party notice at that stage. He also confirmed in cross-examination that he believes the reason she did not transfer was because she would not accept 5 hours per day. He absolutely denied that he had asked Mr Green to request the claimant's removal from the contract because of her hours.

37. In an email from Ms Sturt sent straight after meeting, she writes that the claimant said that she worked 4 hours per day at another of the first respondent's contracts and that she had been told the second respondent had to take over her 9 hours. Ms Sturt expressed the view that the first respondent wanted the claimant out of her other job and to push liability on to the second respondent.

38. The other document that can help me form a view on what was said at this meeting, is the notes of a meeting between the claimant and the first respondent on 31 July. The claimant said that the second respondent had asked her if she wanted to transfer and she said it would depend on the conditions, that the second

respondent would only pay her for 5 hours per day and had said that the first respondent had to pay the balance.

39. Having considered all this evidence, I find that the second respondent's representatives said to the claimant at the meeting on 25 July that they were only liable to pay her for 5 hours per day as they mistakenly believed that she had another role within the first respondent for the balance of 4 hrs. This is what Ms Sturt said immediately afterwards and accords with the note of what the claimant said on 31 July.

40. On 25 July at 15.46 Mr Green of the school contacted the first respondent. He said that they needed to address the issue of the claimant and that they had many problems with her which had been previously discussed. He said he had not been impressed with her appointment as supervisor and gave details of the reasons for his dissatisfaction. He concluded by saying 'I am extremely annoyed with Manuela's management of the site over the recent months, and thus do not wish to see her return.' In the body of the email he said that he needed to 'request' that she was removed from the contract.

41. The first respondent did not respond to that email nor take any action with regard to it although they did discuss it within their management team. Their view was that they did not have time to go through any process to remove the claimant as term had already ended and the contract was due to expire in 6 days

42. At 15.07 on 26 July Ms Hill emailed the first respondent, with a copy to the second respondent, stating that they would not be accepting the claimant as part of the transfer. The first respondent replied at 15.53 stating that TUPE did not allow the option to pick and choose who to accept. Ms Hill replied on the same day saying they believed she had been removed from the entity by the contract provider and therefore could not transfer. Mr Berrill replied on 28 July that there had been a request by the client for her to be removed but there was a process to follow and there was insufficient time 'for the SOSR process to be fairly completed' and that as no action had been taken and she was still an employee and part of the grouping of employees, that process passed to the second respondent to conclude post transfer.

43. The first respondent's position is that if there had been any other opportunities for the claimant within their organisation they would have discussed them with her but there were none and the legal position was that she was assigned to the contract and therefore was entitled to transfer with it. They informed the claimant, also on 28 July, that she would be transferring as no alternatives had become available but they did not tell her about the third-party notice.

44. Also on 26 July the second respondent says that Ms Sturt sent a letter to the claimant (as she did to all the affected employees) confirming that TUPE applied, that she was transferring to them on her present terms and conditions and inviting her to a meeting on 8 August. The claimant says that she did not receive this letter but she found out about the 8 August meeting through a what's app group with her colleagues. Given that the decision had been made by the second respondent on 26 July not to accept the claimant as part of the transfer, I find that it must be possible at least - though I heard no evidence to this effect - that although this letter

was prepared it was not in fact sent to the claimant. In any event, I accept her evidence that she did not receive it. She has struck me as an honest witness.

45. Ms Scully emailed Mr Berrill on 31 July saying 'the law is the law, he (sic) is not part of the entity immediately before transfer and will not be accepted with no further comment to be made'. Mr Berrill replied on the same day noting the position and informing the second respondent that the claimant accepted her employment with them ended that day.

46. Mr Berrill and Mr Bresciani met the claimant on 31 July together with her union representative. She was informed that her employment with the first respondent was terminating that day under TUPE. Based on what she said to them in that meeting, they formed the view that the second respondent were in fact in discussion with her about her employment continuing.

47. The claimant contacted the first respondent and second respondent by email on 6 August asking for clarification regarding her position. as the first respondent was telling her she was transferred and the second respondent telling her they did not accept the transfer. The first and second respondent then exchanged emails where they each restated their position. On 7 August Mr Berrill emailed the claimant confirming the position. He said 'I have not come [across] any other company who are so brazenly willing to flout the TUPE rules!'

48. The claimant's union also wrote to the second respondent on 14 August seeking clarification of their reasons for rejecting the claimant's transfer. Ms Scully's reply the following day, was curt in the extreme.

Conclusions

49. It is uncontroversial that there was a TUPE transfer of employees assigned to the school contract from the first to the second respondent.

50. The claimant was assigned to that contract immediately before that transfer. Although a third-party notice had been served, it was not actioned. In the case of Jakowlew cited above, on similar facts - i.e. a third-party notice issued but not acted upon by the transferor - the EAT decided the claimant was assigned to the relevant grouping at the time as it was for the transferor, not the client, to assign its employees and on the facts the claimant was still assigned immediately before the transfer. Mr Isherwood for the second respondent says that Jakowlew is distinguishable. I accept that in Jakowlew the transferor formally challenged the notice (although here the first respondent did notify the second that they would not be actioning it) but they also had more time available to them before the transfer was due to take place. In the case before me, there was a much shorter time period between notice and transfer. In my view the principle stands that the question of assignment is a matter for the transferor not the client.

51. As to whether that notice was served for genuine reasons or was at the instigation of the second respondent to avoid the claimant transferring, I find on balance - especially given the history of the relationship - that it was genuine and due to concerns regarding the claimant's performance (whether those concerns were well founded or not).

52. Accordingly the claimant should have transferred as a matter of law into the employment of the second respondent on her full contractual entitlement. When the second respondent refused to accept her she was dismissed and liability for that dismissal lies with the second respondent.

53. The next question is what was the reason for the second respondent's refusal to accept the claimant into their employment. Mr Starykiewicz said he thought the claimant was transferring until a few days before 8 August when he became aware of the third-party notice and he then handed the matter over to HR i.e. Ms Scully. Ms Scully said it was because of the third-party notice. The chronology of events could strongly suggest that the second respondent finding out about the claimant's contractual terms was the reason they decided not to accept her - although as I have found above Mr Starykiewicz and Ms Sturt mistakenly believed she was only entitled to 5 hrs per day in term time. Ms Scully's very curt response adds to that suspicion as does her reference in her evidence to an email she had received apparently from the school regarding the claimant which had not been disclosed. On balance however I find the reason for the refusal to accept the claimant was the third-party notice as stated by Ms Hill on 26 July. Consequently the transfer was not the sole or principal reason for the dismissal. If the transfer had not happened the indications are - given the history of complaints/tacit dissatisfaction from the school - that Mr Green may well have made the same request. Accordingly the dismissal of the claimant was not automatically unfair. It follows that the ETO defence is not relevant.

54. Mr Isherwood also sought to run an argument that the claimant had objected to transfer to the second respondent because of what she said at the meeting on 25 July. I do not agree. At that meeting the claimant simply sought to ensure her legal rights were observed i.e. she transferred on her existing terms. That is not the same as an objection.

55. Therefore the fairness or otherwise of the dismissal falls to be considered according to ordinary section 98 principles. I am conscious that my findings and analysis leads to a different conclusion to that apparently conceded by the second respondent at the earlier case management discussion where it was recorded that if the claimant was transferred it was not in dispute that she was automatically unfairly dismissed. In practice, I do not think this makes any difference as we still end up in a position where the claimant was unfairly dismissed. A TUPE dismissal is not, for example, one of those categories of automatically unfair dismissal where the limit on the compensatory award is removed.

56. On ordinary principles this was clearly an unfair dismissal of the claimant. Although I accept that the reason for the dismissal was SOSR, there was absolutely no appropriate process followed with her - whether strictly following the ACAS guide or even its principles - and consequently she did not have the opportunity to present her case at all. Furthermore, it is not enough for either respondent to say that it was only a procedurally unfair dismissal rather than substantively, because of receipt of the third-party notice. Even if her employer acted on the third-party notice and removed her from that particular contract, they still clearly had an obligation to consider other contracts to which she could be moved and that was not done. I therefore find that the dismissal was unfair both procedurally and substantively.

57. Furthermore, the obligations to inform and consult with employees pursuant to TUPE applied.

58. As far as the obligation to inform (reg 13(2)) is concerned, this fell upon the first respondent as the employer of the affected employees. In some ways the first respondent did what they could in that they received very late information from the second respondent, despite chasing for it more than once. In this situation it does not seem that the second respondent was particularly at fault because they were only notified by the school that they were successful on or about 10 July and they were then subject to a standstill period. As soon as that standstill period ended they contacted the first respondent.

59. The first respondent was, however, at fault in that the decision to not retender for the contract was made as early as mid-March and the first indications of that were not given to the claimant until 23 June (and only then at her request for a meeting). Mr Bresciani said the reason for that was not wanting to make their decision public. Whilst I understand that there can be commercial sensitivities around such decisions, in the context of an employer's obligations under TUPE, that is not really a good enough explanation. It is my finding that the first respondent would reasonably have given information as to the fact that a transfer was to take place, with the date and the reasons for it in mid-April (allowing a month from the decision in mid-March to organise themselves). At that stage they would also have been able to inform the employees of the legal implications of the transfer i.e. that the contracts of employment would be transferring. I recognise that at that stage they would have been given very little information beyond those basic facts but that is the statutory requirement. Beyond that breach of the information obligation, I consider that the first respondent did what it could and there were special circumstances preventing them from being able to do more due to delays in them receiving the necessary information that they could pass on. When they did receive it they did pass it on.

60. The first respondent was also, however, in breach of the obligation to invite affected employees to elect representatives. It seems that this was simply an oversight and I am told by the current HR manager, and accept, that they now comply with that on a contract by contract basis. In all the circumstances it is likely that the failure did not make any difference as all the indications are that if the affected employees had been asked to elect a representative they probably would have elected the claimant. She already took the lead in ensuring communication between the first respondent and its employees who were largely Spanish speakers. However, there was a breach and that breach needs to be reflected in an award of compensation. Clearly the fault for those breaches described thus far lie solely with the transferor and although the first and second respondents will be jointly liable for the compensation awarded, I would expect that culpability to be reflected in any decision they make between themselves as to apportionment. If no agreement can be reached between them then formally the question of apportionment has to be taken to the civil courts. It is not a matter I can deal with.

61. As for the consultation obligations, this relates to measures that an employer envisages will be taken with regard to the employees with a view to seeking their agreement to those intended measures. This is why the first respondents

expressly asked the second respondent if there were any intended measures but unfortunately the second respondent failed to reply.

62. On these facts, the first respondent had no obligation to consult with the claimant because it was not intending to take any measures in relation to her. Nor did it have any obligation to consult her regarding any measures to be taken post transfer by the second respondent. As far as the second respondent is concerned, the only obligation to consult arises where it intends to take measures in respect of its own employees and therefore that obligation can only arise post transfer. Accordingly, in this case because the claimant did not transfer into the second respondent's employment, the duty to consult never arose and there was no breach by the second respondent.

Remedy

63. The parties were able to reach agreement as to the appropriate remedy to be paid to the claimant in respect of all her successful claims as set out in the Judgment dated 20 September 2019.

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Employment Judge K Andrews
Date: 15 October 2019