**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4100903/2020**

**Final Hearing Held remotely on 14 and 15 June 2021**

**Employment Judge A Kemp**
**Tribunal Member M McAllister**
**Tribunal Member J McElwee**

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|---|---|
| **Mr D Cornish** | **Claimant**<br>**In person** |
| **City Facilities Management (UK) Ltd** | **Respondent**<br>**Represented by:**<br>**Ms J Brunton**<br>**Solicitor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The unanimous Judgment of the Tribunal is that

1. **The claimant was dismissed by the respondent as a result of a substantial change in his working conditions to his detriment under Regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, the principal reason for that dismissal was the transfer to the respondent, and the dismissal was unfair as a result.**

2. **The claimant's claim of unfair dismissal under section 94 of the Employment Rights Act 1996 is dismissed.**

3. **The claimant is awarded the sum of TWENTY THREE THOUSAND ONE HUNDRED AND THIRTY TWO POUNDS FIFTY FOUR PENCE (£23,132.54) payable by the respondent.**

## REASONS

### Introduction

1. The claimant made what is normally referred to as a claim for constructive dismissal against the respondent. He also made claims that the dismissal was in breach of the Transfer of Undertakings (Protection of Employment) Regulations 2006, usually known as TUPE. The Claim was denied. The claimant confirmed that he did not make a claim for holiday pay. The claims were therefore for unfair dismissal, and separately for a redundancy payment. The respondent alleged that there was no dismissal, but that if there was the reason for that was some other substantial reason, and that it was fair. The respondent relied on an economic, technical or organisational reason for any dismissal in relation to arguments over Regulations 4 and 7 of TUPE. It was accepted that a relevant transfer to the respondent had taken place.

2. There had been two earlier Preliminary Hearings in the case on 29 June 2020 and 25 February 2021 the latter date having been intended as the Final Hearing but becoming one in effect for case management.

### Issues

3. The Tribunal identified the following issues:

   (i) Had the respondent dismissed the claimant under section 95(1)(c) of the Employment Rights Act 1996 ("the Act")?
   (ii) If so, what was the reason or principal reason for that dismissal?
   (iii) If the reason was potentially fair under section 98(2), was that dismissal unfair under section 98(4) of the Act?
   (iv) Did the transfer of employment to the respondent on 1 April 2019 involve a substantial change in working conditions to the material detriment of the claimant under Regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006?
   (v) If so, was any dismissal for the sole or principal reason of an economic, technical or organisational reason entailing changes in the workforce after the transfer?

(vi) Is any variation of the terms of the claimant's employment void under Regulation 4(4) of the Regulations?

(vii) Was the claimant redundant?

(viii) If there was an unfair dismissal, would a fair dismissal have resulted from a different procedure, and if so what reduction in compensation should be made for that?

(ix) Had the claimant contributed to any dismissal?

(x) If there was an unfair dismissal, what was the extent of the claimant's losses, and had he mitigated his losses?

## Evidence

4. Evidence in the case was given remotely by Cloud Video Platform. The Tribunal was satisfied that the method of doing so was effective, and that a decision could be reached from it, although there were several occasions when the audio quality was not good, and there was a need from time to time for those participating to re-connect. The hearing ended early on the first day because of difficulties in hearing the evidence, but was better on the second day. Whilst the quality of the audio made conducting the hearing more difficult it was managed by the Tribunal and parties.

5. The Tribunal heard evidence from the claimant, and from Mr Ross Henderson formerly of the respondent. Documents were spoken to from a single Bundle the respondent had prepared. The claimant tendered a written witness statement from Mr Gregor Smith, who did not give evidence. Before the hearing started the Judge explained that such written evidence could be tendered but may have limited if any weight as the person was not available to be questioned. Not all documents in the Bundle were spoken to in evidence.

6. The claimant had complained that not all the documents he had sought to be included were in that Bundle, and the respondent provided after a break a copy of an additional Bundle with such documents, some but not all of which were then spoken to in evidence. The respondent also provided a written skeleton submission they had been ordered to provide earlier but which it appeared had not been done.

7. In addition the claimant produced further documents, being the full terms of the contract he had with the transferee (the Bundle only having the first page of it), and wages information from his subsequent employer. The parties had also concluded a Statement of Agreed Facts.

8. There had not been compliance with the terms of case management orders by either party. The Bundle of Documents had not been produced by the respondent timeously, as it was sent to the claimant five days before the hearing, not 21 as required. As a result the claimant said that he had not had time to prepare a written witness statement, although that had been ordered. He gave his evidence orally. Mr Henderson of the respondent had prepared a written witness statement. The Schedule of Loss did not have full vouching, and further details were produced by the claimant during the hearing. The respondent also provided details of the claimant's income in the last three months of his employment with them.

9. Before the hearing commenced the Judge outlined to the claimant, who represented himself, how the hearing would be conducted, about the giving of evidence, cross examination of a witness to challenge the evidence given where disputed, and raise an issue not covered by that witness where he was anticipated to have knowledge of it when raised in the claimant's evidence, and as to re-examination. There was an explanation as to concluding the evidence and having all matters that the party wished to be considered included as the opportunity to add evidence later was extremely limited, and as to submissions once the hearing of evidence was concluded.

**Facts**

10. The Tribunal found the following facts to have been established:

11. The claimant is Daniel Cornish. His date of birth is 15 January 1975.

12. The respondent is City Facilities Management (UK) Limited.

13. The claimant was initially employed by a company named Wessex on 3 December 2012. There was a relevant transfer from that company to another company called Westway Services Limited ("Westway") on 1 April 2015. The claimant preserved continuity of service.

14. The claimant initially worked as a Quoted Works Engineer. That involved doing higher level repairs to air conditioning units. In November 2016 he commenced a role with Westway as a Combustion Engineer. That involved carrying out maintenance and repairs on gas boilers and associated systems, for which particular training and qualifications in gas safety were required. A contract was entered into between the claimant and Westway at that time, the material terms of which were –

1.6 Job Title – Combustion Engineer

1.8 Hours – 40 per week

4.1 Duties "You are employed under the job title stated at clause 1.6 of this agreement. You may be required to undertake other duties from time to time as the Company may reasonably require."…..

6.1 Hours of Work "Your normal hours of work will be as stated in clause 1.8 of this agreement with a 1 hour unpaid break for lunch. You will be expected to work such hours as are reasonably necessary for the proper performance of your duties and responsibilities…..The Company reserves the right to ask you to change your normal hours of work whether temporarily or permanently according to the needs of the business and it is a condition of your contract of employment that you agree to any such request when reasonably made…..

8.1 Overtime – "You may be asked to work additional hours beyond your normal hours. There is no obligation on you to work overtime where it is offered….."

24. Changes to terms of employment. "The Company reserves the right to make any reasonable changes to any of your terms of employment. You will be notified in writing of any change as soon as possible and in any event within one month of the change. Such changes will be deemed to be accepted and agreed by you unless you notify the Company of any objection in writing before the expiry of the notice period."

15. When working at Westway the claimant carried out reactive maintenance work on gas boilers, Planned Preventative Maintenance ("PPM") work on

such boilers, and reactive maintenance work on air conditioning units. Reactive maintenance work is not planned, but responds to an event or circumstance that arises without notice. It takes varying lengths of time to respond to, ascertain the fault, and effect a repair to it. He had the qualifications to undertake such work, which is described as Heating, Ventilation and Air Conditioning (HVAC). The work he carried out was in the South West area of England, and on premises of Marks and Spencer plc with whom Westway had a contract. About 90% of his work was in reactive maintenance, and about 10% for PPM work on gas boilers. He did not carry out PPM work on air-conditioning units, work known as FGAS PPM. The FGAS PPM was carried out by Air Conditioning Engineers employed to do so by Westway. In order to carry out that work access to the computer system used for it was required, which the claimant did not have as his role was a different one.

16. FGAS PPM work can be undertaken by someone with two days of relevant training. The works carried out by the claimant require far more substantial training and relevant work experience.

17. On 27 February 2019 a meeting was held between the claimant, his colleagues, and the respondents with regard to the forthcoming transfer of their employment to the respondent after Westway lost the contract for maintenance to the respondent. The claimant was told that the transfer would operate smoothly.

18. The transfer from Westway to the respondent took place on 1 April 2019. The claimant retained continuity of service.

19. At the time of transfer a number of employees of Westway did not transfer to the respondent, one of whom was in the area in which the claimant worked, and others in other areas. The respondent had decided to operate the contract from Marks and Spencer plc differently to the manner in which Westway did so. It did not have separate Combustion or Gas Engineers to Air Conditioning Engineers as Westway had, but wished to have multi-skilled engineers. It intended that it would have 39 engineers in total, and three supervisors, but had only 29 engineers and two supervisors. About

10 of its engineers were qualified to do both Gas work, and Air Conditioning including FGAS work.

20. In May 2019 the claimant was asked by the respondent to carry out some FGAS PPM work. He attended properties and certified that no inspection was required but did not carry out work other than that.

21. The respondent wrote to the claimant on 29 May 2019 to confirm certain of his employment details. It stated normal hours of 8.30 am to 5.00 pm. The document did not specify job title or duties.

22. On 20 June 2019 the respondent wrote to the claimant to offer him a transfer to standard terms and conditions on which the respondent operated. He did not accept that offer.

23. The claimant continued initially to carry out reactive maintenance work. The respondent in or about July 2019 started discussions about changing the way of working such that it may sub-contract FGAS PPM. It later decided not to do so.

24. The respondent issued the claimant and other engineers they employed with a list of stores that each would be responsible for on 10 September 2019. The claimant was allocated 20 such stores. The claimant would be responsible for the FGAS PPM work for those stores, as well as Gas PPM work for them and some gas reactive maintenance works. The majority of the work that the claimant would have been performing was in FGAS PPM.

25. The claimant was concerned that he would only be carrying out FGAS PPM, which he considered low skill work which was mundane, and that he would lose skills in gas work. He raised that issue with Mr Ross Henderson then of the respondent. The claimant told Mr Henderson that he was concerned that his role was as Combustion Engineer, also called a commercial gas engineer, and that if he spent most of his time working on FGAS PPM he would be “de-skilled” such that the skills he was seeking to build up would reduce. The carrying out of FGAS PPM work did not reduce the claimant’s income.

26. Mr Henderson told him that he required to carry out the FGAS PPM work, that he was qualified to do that, and that there was no other alternative

role. Mr Henderson could not say how long the arrangements would last, and there was no end date to that arrangement.

27. The claimant was qualified to do both heating work on gas boilers, and ventilation and air conditioning work, and was one of few engineers the respondent had in the South West area who could do so. It was financially more effective for the respondent to seek to utilise the respondent on FGAS PPM work, which was planned for, and to sub-contract the reactive gas work which was both difficult to predict, and could be charged to the client. Mr Henderson was concerned to ensure that the work was completed within the terms of the contract with Marks and Spencer plc. There was a shortage of engineers that had existed since the transfer from Westway. The respondent had attempted to recruit new engineers without sufficient success. It had sub-contracted the reactive maintenance work and some of the PPM Gas work to CMS and other sub-contractors.

28. On 18 September 2019 the claimant emailed Mr Henderson to make a complaint about what he perceived to be a change to his role, which the respondent treated as a grievance. An acknowledgement was sent on 20 September 2019

29. On 18 September 2019 the claimant was contacted by an agent for one of the sub-contractors appointed by the respondent called CMS to carry out reactive maintenance works for Marks and Spencer properties, and invited to apply for a role there.

30. On 23 September 2019 CMS offered the claimant a position, which he accepted and that same day the claimant emailed Mr Henderson and intimated his resignation.

31. Following that resignation the claimant carried out three FGAS PPM works, during which he worked at night until about 4am each time, and was paid overtime to do so.

32. On 26 September 2019 the parties agreed that the claimant's last day of employment would be 30 September 2019.

33. On 1 October 2019 the claimant commenced to work for CMS. He worked in a role of reactive maintenance. The work he did involved less overtime than he had worked at the respondent.

34. The claimant's grievance was subsequently heard on 11 October 2019 and dismissed by letter dated 7 November 2019. An appeal against that decision was taken by the claimant on 14 November 2019, and was subsequently heard on 16 December 2019. At the end of that meeting the appeal hearing manager refused to answer the claimant's questions. The appeal was dismissed by letter dated 7 January 2020.

35. When employed by the respondent the claimant had average net monthly income in his last three months of £4,198.60, the equivalent of £968.91 per week.

36. When employed by CMS in the year following the commencement of his employment with them the claimant had an average net monthly income of £2,640.70, the equivalent of £609.39 per week.

37. In both employments the claimant had pension provision, the full details of which were not provided in evidence.

38. The claimant commenced Early Conciliation on 19 December 2019. The Certificate for the same was issued on 14 January 2020. The present Claim was presented to the Tribunal on 13 February 2020.

**Submissions for claimant**

39. The claimant did not wish to make a detailed submission and sought a finding in his favour.

**Submissions for respondent**

40. Ms Brunton provided a skeleton written submission which she spoke to orally and the following is a basic summary only. She argued that there was no breach of contract or dismissal. She argued that there was no substantial change to working conditions, and no material detriment. She referred to an ET case of ***Donovan v JD Services HVAC Ltd and others***

***case number 1102114/2012*** which she argued was similar to the circumstances of the present claim. She referred to BEIS Guidance on whether the reason for a change was the transfer. She said that there were staffing issues, and a variety of reasons for the change to arrangements. If the transfer was the reason for the change, she submitted that there was an economic, technical or organisational reason for that. The change was a temporary one because of shortages of staff, and the intent was to change when the staff were recruited. What had been done was reasonable. On the issue of de-skilling she referred to ***Land Securities Trillium Ltd v Thornley [2005] IRLR 76*** and sought to distinguish that case. There had not been a breach of contract, and even if there had the claimant had waived any breach of contract. The claimant had not met the legal test for a dismissal and the claim should be dismissed.

**Law**

41. Section 95 of the Employment Rights Act 1996 provides, so far as material for this case, as follows:

> "**95 Circumstances in which an employee is dismissed**
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—
>
> ……..
>
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

42. Section 98 of the Act provides, so far as material for this case, as follows:

> **"98 General**
>
> (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—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(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.”……..

43. The onus of proving such a dismissal where that is denied by the respondent falls on the claimant. From the case of ***Western Excavating Ltd v Sharp [1978] IRLR 27*** followed in subsequent authorities, in order for an employee to be able to claim constructive dismissal, four conditions must be met:

(1) There must be a breach of contract by the employer, actual or anticipatory.

(2) That breach must be significant, going to the root of the contract, such that it is repudiatory.

(3) The employee must leave in response to the breach and not for some other, unconnected reason.

(4) She must not delay too long in terminating the contract in response to the employer's breach, otherwise she may have acquiesced in the breach.

44. In every contract of employment there is an implied term derived from ***Malik v BCCI SA (in liquidation) [1998] AC 20***, which was slightly amended subsequently. The term was held in ***Malik*** to be as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

45. In ***Baldwin v Brighton and Hove City Council [2007] IRLR 232*** the EAT held that the use of the word "and" following "calculated" in the passage quoted above was an error of transcription of the previous authorities, and that the relevant test is satisfied if either of the requirements is met such that the test should be "calculated or likely". That was reaffirmed by the EAT in ***Leeds Dental Team Ltd v Rose [2014] IRLR 8, EAT:***

> "The test does not require a Tribunal to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence, then he is taken to have the objective intention spoken of…"

46. The law relating to constructive dismissals was reviewed in ***Wright v North Lanarkshire Council [2014] ICR 77***, which in turn referred to ***Meikle v Nottinghamshire Council [2004] IRLR 703*** on the issue of causation. The reasonableness or otherwise of the employer's actions may be evidence as to whether there has been a constructive dismissal, although the test is contractual: ***Courtaulds Northern Spinning Ltd v Sibson and Transport and General Workers' Union [1988] IRLR 305***, ***Prestwick Circuits Ltd v McAndrew [1990] IRLR 191***. There is in general no *contractual* right to observance of statutory rights, especially where the statute itself provides a remedy: ***Doherty v British Midland Airways [2006] IRLR 90,*** where an employee left because of alleged

victimisation on trade union grounds which was held not to be a constructive dismissal. In ***Green v Barnsley Metropolitan Borough Council [2006] IRLR 98*** it was held that a failure to make reasonable adjustments for disability over a period of time was a constructive dismissal because it constituted a breach of trust and respect. Where, however, the alleged breach of trust and confidence consists solely of an exercise of a discretion granted to the employer by the contract of employment, an employee who is disadvantaged by it can only challenge it by showing that no reasonable employer would have done so ***IBM UK Holdings Ltd [2018] IRLR 4*** (applying ***Braganza v BP Shipping Ltd [2015] UKSC 17, [2015] IRLR 487***).

47. The employer's conduct subsequent to a resignation cannot convert that resignation into a constructive dismissal *(**Gaelic Oil Co Ltd v Hamilton [1977] IRLR 27***). There is however no need to specify the reason for the employee leaving as a constructive dismissal ***Chemcen Scotland Ltd v Ure UKEAT/0036/19***.

48. Where it is argued that there was a final straw, being a last act in a series of acts that cumulatively lead to repudiation, that last straw must not be entirely trivial – ***Kaur v Leeds Teaching Hospitals NHS Trust [2018] IRLR 833.*** The five matters summarised above may arise.

49. If there is held to be a dismissal, there must then be consideration of what the reason, or principal reason, for that dismissal was, and if it was a potentially fair reason under section 98(2) whether or not it was fair under section 98(4) of the Employment Rights Act 1996 ***Savoia v Chiltern Herb Farms Ltd [1982] IRLR 166*.** It is possible, if somewhat unusual, for a dismissal under section 95(1)(c) to be fair.

50. The relevant provisions on transfers are in the 2006 Regulations, which apply the Acquired Rights Directive 2001/23/EC into UK law (although the Regulations extend the protection beyond simple implementation of the Directive) and require to be construed purposively (the Directive and case law of the Court of Justice of the European Union being retained law following the UK's withdrawal from the European Union under sections 2

- 4 of the European Union (Withdrawal) Act 2018). Regulation 4 provides as follows:

> "**4 Effect of relevant transfer on contracts of employment**
>
> (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.
>
> [(4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.
>
> (5) Paragraph (4) does not prevent a variation of the contract of employment if—

(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or

(b) the terms of that contract permit the employer to make such a variation.

(5A) In paragraph (5), the expression 'changes in the workforce' includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).

(5B) Paragraph (4) does not apply in respect of a variation of the contract of employment in so far as it varies a term or condition incorporated from a collective agreement, provided that—

(a) the variation of the contract takes effect on a date more than one year after the date of the transfer; and

(b) following that variation, the rights and obligations in the employee's contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation.

(5C) Paragraphs (5) and (5B) do not affect any rule of law as to whether a contract of employment is effectively varied.]

(6) Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(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) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or

would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer."

51. Regulation 7 provides as follows:

"**7 Dismissal of employee because of relevant transfer**

(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 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) does not apply;

(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—

(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or

(ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(3A) In paragraph (2), the expression 'changes in the workforce' includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

(5) Paragraph (1) shall not apply in relation to the dismissal of any employee which was required by reason of the application of section 5 of the Aliens Restriction (Amendment) Act 1919 to his employment.

(6) Paragraph (1) shall not apply in relation to a dismissal of an employee if the application of section 94 of the 1996 Act to the dismissal of the employee is excluded by or under any provision of the 1996 Act, the 1996 Tribunals Act or the 1992 Act."

52. The terms of Regulation 4 operate to restrict, to an extent, the ability of an employer to change terms of employment after a transfer, where the transfer is the reason for that change. That was considered by the House of Lords in ***Wilson v St Helens Borough Council and others [1998] IRLR 706***, in which the court held that where there is a termination of a contract on notice and offer of new terms that is successful, in that the employees are then only entitled to the new terms, albeit that they are eligible to claim unfair dismissal. The court also said *obiter* that a variation of terms sought to be achieved without a termination of the existing contract which is due to the transfer may be invalid, but that once the causal link between the transfer and the reason for the change is broken there can be a valid consensual variation.

53. The effects of the terms of Regulation 4(9) are not determined by the terms of the contract of employment, such that even if the employer has the contractual power to require the change in question, the employee can still argue that it is a substantial one to his or her detriment, and if the employer did not have the contractual power to make the change that does not mean that there must in law have been a substantial change: ***Cetinsoy v London United Busways Ltd* UKEAT/0042/14**, ***Musse v Abellio***

***London Ltd* [2012] IRLR 360.** Whether there is a substantial change to material detriment is a question of fact and degree, which has been considered in cases such as ***Tapere v South London and Maudsley NHS Trust [2009] IRLR 972*** in which the EAT said that the test of whether the 'substantial change' is to the 'material detriment' of the employee under reg 4(9) is whether the treatment is of such a kind that a reasonable worker could or would take the view that in all the circumstances it was to his or her detriment.

54. The validity of a variation of terms was addressed in ***Credit Suisse First Boston (Europe) Ltd v Lister [1998] IRLR 700*** in which a transfer-related attempt to add a restraint of trade clause to the transferred employee's contract was held ineffective. Not all changes of contract after a transfer are subject are ineffective. For example ***Smith v Brooklands College (2011) UKEAT/0128/11*** (in which rectification by the transferee employer of a pay mistake existing before the transfer was held to be valid) and ***Tabberer v Mears Ltd UKEAT/0064/17*** (in which the transferee employer removed 'outdated and unjustified' allowance no longer having a basis in reality was upheld). The issue is dependent therefore at this stage on whether the transfer was the sole or principal reason for the change of terms. If it was not, Regulation 4 is not engaged.

55. If it is, there is then the issue of whether there was an economic, technical or organisational reason for the change (usually called the ETO defence). It is not defined in the Regulations, and the words come from the Acquired Rights Directive itself. There are limits to it - it does not include a desire to rationalise the terms and conditions of the newcomers on to the transferee's existing terms and conditions: ***Delabole Slate Co v Berriman [1985] IRLR 305***. If, however, there is a change in whole job contents (not just terms and conditions) that *may* constitute a 'change in the workforce' and so come within the defence: ***Crawford v Swinton Insurance Brokers Ltd [1990] IRLR 42***. It has been held that the reference to 'the workforce' does not mean the entire workforce, so that it may be enough if there are qualifying changes for only part of the workforce (and even if that 'part' is only those employees being TUPE transferred): ***Nationwide Building Society v Benn [2010] IRLR 922*.**

56. An employee cannot waive rights conferred by the Directive - ***Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1988] IRLR 315.*** In ***Regent Security Services Ltd v Power [2008] IRLR 66*****,** it was held that a TUPE-related change that was in the employee's favour would not be void and could be relied on at that employee's election. In ***Ferguson v Astrea Asset Management Ltd [2020] IRLR 577***, the EAT distinguished that case on the basis that the present terms of Regulation 4(4) are in mandatory terms (any purported variation is void) and any variation which is caused by the transfer, whether in the employer's or the employee's favour, is not effective in law.

**Observations on the evidence**

57. The claimant represented himself, and introduced matters of which he wished to complain but were not relevant to the issues before the Tribunal. He had a tendency on occasion not to answer the question asked. There was however little dispute over the facts of what happened, rather whether what happened was lawful, or reasonable, given the circumstances.

58. Mr Henderson is no longer an employee of the respondent and appeared on witness order. Generally the Tribunal considered that he was an honest witness. He did candidly accept that he did not have a good understanding of the law relating to transfers, and that he was not aware of the terms of the contract for the claimant which transferred to the respondent. He was not employed by the respondent at the time of transfer, and came in later. He thought that the claimant was an HVAC Engineer, and did not appear to appreciate that his role was Combustion Engineer, and that to change the work that the claimant performed was potentially an issue. It is perhaps for that reason that he did not handle matters as effectively as he could have, and surprisingly there was no evidence of assistance to him from anyone in Human Resources.

**Discussion**

59. The Tribunal answers the issues before it as follows;

**(i) Had the respondent dismissed the claimant under section 95(1)(c) of the Employment Rights Act 1996 ("the Act")?**

60. This issue is whether the claimant has proved either that there was a repudiatory breach of the explicit terms of contract or of the implied term with regard to trust and confidence. The Tribunal was clear that the claimant had not proved such a dismissal. The terms of the contract allowed both a change to duties where that was reasonable, and a change to the terms of contract where that was reasonable. The respondent had an issue with lack of staff resource to carry out the duties under the contract it had secured with Marks and Spencer plc. It was reasonable for the respondent to require the claimant to carry out work which he was qualified to do and which was more efficient for the respondent financially. There was no breach of any express terms. So far as the implied term is concerned that includes a provision with regard to reasonable and proper cause, and the Tribunal considered that the respondent did have reasonable and proper cause for the requirement for the claimant to carry out FGAS PPM work, even if he did not like doing so.

**(ii) If so, what was the reason or principal reason for that dismissal?**

61. Not now applicable.

**(iii) If the reason was potentially fair under section 98(2), was that dismissal unfair under section 98(4) of the Act?**

62. Not now applicable

**(iv) Did the transfer of employment to the respondent on 1 April 2019 involve a substantial change in working conditions to the material detriment of the claimant [under Regulation 4(9)]?**

63. The Tribunal considered that it did. The claimant had been carrying out mainly (in the sense of about 90%) reactive work prior to the transfer. His role was as a Combustion Engineer, otherwise known as a Gas Engineer. He did not carry out FGAS PPM at all, and only a small amount of air conditioning reactive work. He sought to progress his career as a Combustion Engineer. Mr Henderson was not aware of that background. He assumed, wrongly, that the claimant was an HVAC Engineer. In his witness statement he said that the respondent did not have a role as

Combustion Engineer, but that ignores the fact of transfer, and the role that the claimant did have prior to that transfer. The respondent then sought to change that. Mr Henderson's evidence was that about 50% of the claimant's role would be FGAS PPM, and the balance a mixture of gas PPM and reactive air conditioning work. That was, the Tribunal considered, an under-estimate of the amount of FGAS PPM work that the claimant would have been undertaking. The Tribunal concluded that a large majority of the claimant's work would be FGAS PPM work after the 10 September 2019 email set out 20 stores for the claimant. That work was less skilled, and less interesting, for the claimant than that which he had been carrying out and wished to carry out. The claimant's evidence of FGAS work being conducted at night outside operating hours was not accepted, although it did involve an increased likelihood of out of hours working as Mr Henderson accepted.

64. The Tribunal considered that the work required of the claimant by the 10 September 2019 email was a substantial change from the working conditions that existed at the transfer. It involved an increase in the FGAS PPM work from nil to over 50%. The reactive maintenance work that he had been doing was very substantially reduced from 90% or thereby to a small percentage of the work he would do, as most of it was sub-contracted as Mr Henderson also accepted.

65. The Tribunal considered that that change was to his material disadvantage as it was not what he wished to do which was to be a reactive Combustion Engineer, diagnosing and remedying faults, it did lead to a measure of reduction in his skills as he would carry out little of that work, the majority of work was FGAS PPM which was mundane, it had an increased level of night work (which although involved overtime was part of the role and within the terms of contract to require) and it was also not temporary as that term is normally understood. Temporary implies for a limited period of time, in contrast to permanent when there is no such limit of time, but the end point of the arrangements was not communicated to the claimant. Mr Henderson accepted that he was unaware of when such an end date would be at that time, and also accepted that it had not changed by the time he left the respondent's employment in January 2021. The change

was not therefore communicated as being for a short and fixed period of time, but in effect until further notice.

66. Those circumstances were sufficient for a reasonable person to conclude that they were a material detriment, in the Tribunal's judgment. The Tribunal did not consider that the Employment Tribunal case on which the respondent founded of was of assistance, as its facts were materially different to those of the present case. In any event as an Employment Tribunal decision it is not binding on this Tribunal. Separately the case of ***Land Securities Trillium Ltd*** indicated that a change of role which involved de-skilling can amount to a constructive dismissal. That is a different test to that of a substantial change in working conditions, but does tend to support the position of the claimant that a role that reduces the level of work carried out such as to reduce the level of skills can be a substantial matter.

67. The respondent also argued that there had been a waiver. It was not clear in what context that issue was raised in relation to the claim under the 2006 Regulations, but if it was intended to be raised in that context it does not survive the terms of Regulation 4, and the case law referred to.

**(v) If so, was any dismissal for the sole or principal reason of an economic, technical or organisational reason entailing changes in the workforce after the transfer?**

68. There are two matters under this issue. The first is in relation to the reason for the changes. The respondent argued that there were a variety of reasons for the change in working conditions, but the Tribunal concluded that the principal reason was the transfer. It did so for the following reasons. Firstly, Mr Henderson's evidence was that the respondent considered that there were staff shortages at the time of transfer. They had not arisen after transfer. Secondly the respondent changed the way that they carried out the contract from the manner in which their predecessor Westway had done so. In particular they did not operate the same system of having separate Engineers for Gas and Air-Conditioning work. They wished to make that change from the time of transfer as they had a different business model they wished to apply. Thirdly, although

their model was based around multi-skilled engineers only 10 of them were qualified to do so, and no training was provided to change that. That meant that the staff who were not qualified to do both Gas and Air Conditioning work could not do so both at transfer and subsequently. Fourthly the respondent was not successful in recruiting additional engineers, such that the position of staff shortages present at transfer on 1 April 2019 continued, indeed it was still present in January 2021 when Mr Henderson left the respondent's employment. Fifthly the respondent in June 2019 offered the claimant a transfer to its own terms and conditions of employment, which the claimant rejected. Sixthly the respondent sought to introduce their different business model, partly by the email on 10 September 2019 and partly by sub-contracting out most of the reactive works that the claimant had formerly been carrying out prior to the transfer to the respondent. The BEIS Guidance the respondent's representative referred to does not directly assist in ascertaining what the reason for the change is. Whilst the respondent argued for a variety of reasons they did not specify what those reasons were, and why it was that the principal reason for the change was not the transfer. The Tribunal concluded that the transfer, based on the award of contract by Marks and Spencer plc, was the principal reason for the respondent seeking to change the claimant's working conditions.

69. The second matter is whether there was an economic, technical or organisation reason entailing changes in the workforce, the ETO defence, in which event the respondent is not in breach of the Regulation. On this, the Tribunal concluded that the circumstances of the case did not engage the ETO defence. Whilst those words appear of wide import, their effect is restricted by case law. In particular the case of ***Delabole*** held that it did not extend to an attempt to "harmonise" terms and conditions to those of the transferee, in this case the respondent. The Tribunal concluded that that attempt at harmonisation is what in effect happened in this case. The respondent did not appreciate what had transferred. Mr Henderson was unaware (as already stated) of the terms of the contract the claimant had, or the role he performed. He wished the claimant to work to the structure the respondent operated, and he said in his witness statement that the respondent did not have a Combustion Engineer in that structure. But that

is the role the claimant performed, which transferred to the respondent. The respondent sought to change that so that the claimant would fit within their structure. They made him an offer of new terms on 20 June 2019 which he rejected. They then sought to achieve a similar result by in effect requiring him to spend most of his time of FGAS PPM work, which was work he had not done at all when at the transferor Westway, for an indefinite period. It was not a wholescale change of working conditions, as some of what he had been doing continued, in particular Gas PPM work and some reactive gas work. The Tribunal did not consider that there were changes to the workforce established in the terms of that Regulation. The Tribunal considered that the respondent had not established that the circumstances fell within the ETO defence. It follows that the dismissal is unfair under Regulation 7.

**(vi) Is any variation of the terms of the claimant's employment void under Regulation 4(4) of the Regulations?**

70. This issue does not arise as the terms of contract permitted a variation as set out above. The issue is not one of contract, but change to working conditions as referred to in authority explained above.

**(vii) Was the claimant redundant?**

71. No. There was no reduction in the number of staff required, indeed the requirement was for more staff as there was a shortage. Whilst the claimant was required to carry out work he did not wish to, there were some elements that remained that were those that he had performed at Westway in particular Gas PPM work.

**(viii) If there was an unfair dismissal, would a fair dismissal have resulted from a different procedure, and if so what reduction in compensation should be made for that?**

72. This issue would have arisen had there been held to be an unfair constructive dismissal, which has not been the decision. In any event the Tribunal did not consider that there would have been a fair dismissal from a different procedure, the central issue was the lack of understanding of

the effect of TUPE with regard to the claimant, on the part of Mr Henderson.

**(ix) Had the claimant contributed to any dismissal?**

73. The Tribunal did not consider that there was any basis to find that the claimant had contributed to the dismissal.

**(x) If there was an unfair dismissal, what was the extent of the claimant's losses, and had he mitigated his losses?**

74. The Tribunal first considered the issue of a basic award under section 119 of the Employment Rights Act 1996. Given the claimant's age at dismissal, 44 and his six years of continuous service, and his wages capped at the statutory figure of £525 per week, the sum due is £3,937.50.

75. The Tribunal then considered the issue of a compensatory award under section 123 of the Employment Rights Act 1996. It considered that it was just and equitable to award the claimant losses for the period of one year from the date of the dismissal. Those losses were quantified by the difference in earnings between those of the respondent, and those at CMS. That difference was £968.91 net per week from the respondent less £609.39 per week when employed by CMS, a difference of £359.92 per week. For a period of one year the loss is £18,695.04. The claimant had pension provision at each employer but no evidence of that was given to the Tribunal and it does not have a basis to calculate any loss of pension from that. The Tribunal was satisfied that the claimant had mitigated his loss. It was satisfied that he had worked the overtime at CMS available to him, and not deliberately sought to reduce his income. It accepted the claimant's evidence that he was seeking to develop his career as a Gas Engineer, and noted that he had left CMS and moved to a new employer. Whilst the base salary at the respondent and CMS was similar, it was the amount of overtime that was worked and paid for that created the differential in net pay received. The Tribunal also awards the sum of £500 for loss of statutory rights.

76. The Tribunal considered whether to reduce the award as the claimant had presented a grievance, but resigned prior to it being heard and decided. It

concluded that it should not do so, firstly as the claimant had at least intimated his grievance and the respondent could have dealt with it more quickly than in fact they did, secondly as Mr Henderson had told him that there was no alternative to the work required of him, and was not likely to change his mind (as in fact later happened given the outcome of the grievance which refused it both initially and on appeal) and thirdly as the claimant had been offered a post with CMS involving the work he wished to do, and although it involved less income he accepted that. His moving to a role for less income was indicative of his view that he wished to keep his skill levels properly maintained if not improved for the benefit of his career overall. The Tribunal also took account of the fact that the breach held to have occurred took place in relation to the 2006 Regulations not the terms of the 1996 Act, and those Regulations are for the purpose of protecting the employee.

77. The total compensatory award is £19,195.04. The total of both awards is £23,132.54.

78. This Judgment refers to authorities not referred to by the parties. If the respondent considers that it has been prejudiced by not commenting on any such authority it may apply for a reconsideration of the Judgment and set out the arguments in relation to the same that it wishes to.

Employment Judge: Sandy Kemp
Date of Judgment: 18 June 2021
Entered in register: 26 July 2021
and copied to parties