



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Charles

Respondent: HTC Group

Heard at: London Central by video in public **On:** 10th June 2021

Before: Employment Judge Bronwyn McKenna (sitting alone)

Representation

Claimant: Miss B Charles

Respondent: Mr. Edward Nuttman, solicitor

REASONS

1. The decision was delivered orally on 10th June 2021. The respondent made a request for written reasons by email on 28th June 2021. I apologise for my delay in completing the written reasons.
2. By a claim form received on 20th December 2020, the claimant brought a claim for unlawful deductions from wages. Her claim related to the respondent's failure to pay nationally negotiated cost of living pay increases for 2019 and 2020 and to pay progression on the NJC pay spine. She said that the Transfer of Undertaking (Protection of Employment) Regulations (TUPE) 2006 entitled her to have her pay increased in this manner. She sought arrears of pay in the sum of £2954.44.
3. The respondent said that it had paid the claimant the pay she was due. It said that it did not participate in national collective bargaining. It further said that she was on the correct spinal point for her role.

This hearing

4. This was a remote hearing. The parties did not object to the hearing being heard remotely. The form of remote hearing was video conducted using Cloud Video

Platform (CVP). It was not practicable to hold a face-to-face hearing because of the COVID-19 pandemic. I considered it just and equitable to conduct the hearing by video. All parties could hear and be heard and seen throughout the hearing. The clerk advised the parties that it was an offence to record the hearing. The claimant was represented by her daughter and the respondent was represented by Mr. Nuttman.

5. Members of the public were able to observe the hearing in accordance with Rule 46. No members of the public attended.
6. I was satisfied that the witnesses were able to give evidence without being assisted by any third party. The claimant and her daughter were at the same location for the hearing. I was satisfied that the claimant was able to give evidence freely.
7. The claimant complained at the start of the hearing that the respondent had provided particular documents namely pages 181- 189 of the bundle late. These documents were variously the claimant's payslips and a schedule setting out the basis on which the claimant's pay had been calculated by the respondent. I decided that the start of the hearing should be delayed in order to allow the claimant to read these documents. The claimant and her daughter agreed that 45 minutes was adequate to read these documents and I therefore delayed the start of the hearing. This was in accordance with the overriding objective. The claimant and her daughter confirmed at 10.55 am that they were ready to begin the hearing.

The issues

8. The claimant says that her contract provides for annual increments along spinal points within a pay range in addition to any cost-of-living increase which were agreed by the National Joint Council for Local Government Services (NJC) negotiating machinery in 2019 and 2020 and that the respondent has failed to increase her hourly rate accordingly. She asserted that she was entitled to be on NJC spinal point 25 rather than on her current spinal point of 18.
9. The respondent resists the claim and says that it has paid the claimant the correct amount and has taken account of the claimant's entitlement to increments. It says that her pay is capped at a maximum of £18,708 following a pay and grading review carried out by her previous employer.

Evidence

10. I heard oral evidence from the claimant. For the respondent, I heard from Ms. Sian Williams, HR Business Partner since April 2016. While I found both to be credible witnesses their understanding of the claimant's pay under her council contract, the respondent's pay determination system and the effect of the application of the TUPE Regulations differed greatly.

11. There was an electronic bundle of 189 pages. There was a separate bundle of witness statements consisting of eight pages.
12. Miss Charles, the claimant's representative made oral submissions. I had oral submissions from the respondent. I have considered all submissions whether or not expressly referred to in my written reasons.

Findings of fact

The claimant's role

13. The claimant is a bus driver for adult social care. She is also a steward with Unite the Union. The claimant is clearly committed to her job. She provided copies of commendations. In 2014, she received a long service award. The citation said that she had made a significant contribution. She also provided a copy of a letter of praise from the mother of a service user. The claimant rightly believes that she performs a valuable role for the community.
14. Her employment with the respondent began on 28th May 2016. This followed a service provision transfer for purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1981.
15. Her career within this sector began on 7th October 1983 when she began work for the London Borough of Hammersmith and Fulham as a passenger assistant for adults with special needs. She later changed roles to work as a driver of children with special needs.
16. On 4th September 2002, she became a driver attendant starting on spinal point 18 under the National Joint Council for Local Government Services pay scales. At this point she was still directly employed by the council and worked 25 hours per week on a part time, term time only basis; p.33. Although she is employed on a term time only basis, her pay is spread over 12 months to ensure that she has income throughout the year.

Statement of particulars of employment

17. The claimant's most recent statement of her particulars of employment is with the London Borough of Hammersmith and Fulham and is dated 4th September 2002; pp. 30 - 38. It was counter signed by her. The document stated that she was based at the Bagley's Lane depot. Paragraph 1 reads as follows:

"During your employment with the council your terms and conditions of employment including your rate of remuneration, over time, standard hours of work, entitlement holidays, sick leave, sick pay and maternity pay will be in accordance with National joint Council for local government services as set out in the scheme of conditions commonly known as the Green book, as supplemented by local collective agreements reached with the trade unions recognised by the council and as amended from time to time."

18. Paragraph 4 states that her commencing salary will be £17,067 per annum and is scale 4, spinal column point 18 on the inner London pay spine of the Greater London Whitley Council. This clause also advises that was undertaking a pay and grading review which may result in her salary being changed. It further states that her salary “will rise by annual increments as applicable, until new arrangements are in place”. This was a reference to the pay and grading review. Increments were to be paid on first April each year “subject to a current maximum of the part-time, pro rata equivalent of £18,708 per annum.”; p.33. In fact, the outcome of the pay and grading review was that the claimant’s role remained on spinal point 18 and therefore subject to this salary cap. There was no incremental progression within this spinal point.
19. The statement at paragraph 19 refers to the value which the council places on collective bargaining and trade union membership thus; p.39.

“The council, as your employer, supports the system of collective bargaining and believes in the principle of solving industrial relations problems by discussion and agreement. For practical purposes, this can only be conducted by representatives of the employers and of the employees. If collective bargaining of this kind is to continue and improve for the benefit of both, it is important that the employees’ organisation should be fully representative. Your counsel is associated with other local authorities represented on the national and provincial councils dealing with local authority services.”

TUPE transfer

20. Following a tendering exercise in 2014, the claimant was transferred, under TUPE, from the council to IHS Corporation Ltd. She remained employed on her council contract of employment. IHS Corporation Ltd then lost the contract and the service returned briefly in house.
21. In 2016, the council awarded its contract for community transport (school services) to the respondent which was then known as CT Plus. The claimant received a letter on 28th May 2016 from the respondent’s Head of People and Talent advising her that all her current terms and conditions would transfer and that it did not envisage taking any measures post transfer; p.101.

Employer liability information

22. As part of the arrangements for the TUPE transfer, the claimant’s former employer, the London Borough of Hammersmith and Fulham, provided information about the claimant’s terms and conditions of employment; p.93-100. This documentation confirmed that the claimant was a permanent driver/attendant with 32.08 years’ service on an hourly rate of £10.32 per hour. Her contracted hours per day were five hours but she was paid for 7.2 hours per day; p.96. At this point she was on the top hourly rate for her spinal point because of the cap placed on her salary in her London Borough of Hammersmith and Fulham contract.
23. At the time that the claimant transferred to the respondent’s employment, she was contracted to work five hours on a split shift. This required her to collect children from their homes and take them to school. In the afternoon, she had to

collect the children from school and return them to their homes. In between, She did not have to work. The respondent paid her for 7.2 hours per day despite the fact that she did not work between her shifts. This reflected her existing contract.

Claimant's change of roles in 2017

24. The claimant moved by agreement to work on the respondent's adult services contract for the London Borough of Hammersmith and Fulham on 1 August 2017; page 105. Her hours were 30 per week. Her pay increased to £19,016.40 which was equivalent to an hourly rate of £12.19. This was slightly above the salary cap contained in her council contract.

Collective bargaining machinery and pay determination

25. The London Borough of Hammersmith and Fulham was and remains part of collective bargaining negotiating machinery. For relevant purposes this is the National Joint Council for Local Government Services. This is the forum for negotiations between national local government employers and the trade unions recognised for collective bargaining purposes. London local authorities also take part in the Greater London Provincial Council. This is the forum for negotiating pay and conditions of service applicable to the London Boroughs such as Inner and Outer London weighting.

26. Pay increases were agreed by the NJC in 2017, 2018, 2019 and 2020 (2.75%). The amount of these pay increases varied. For example, the 2018 percentage pay increases ranged from 9.77% to 2.88% and were weighted towards lower earners; p.108.

27. Ms Williams' evidence was that the respondent has limited recognition arrangements. It recognises Unite for its TfL contracts and for staff at its Wandsworth depot. The claimant works in a section of the business for which the respondent does not recognise a union. The respondent, for those parts of its business for which no union is recognised, conducts an annual pay review and considers pay awards on a discretionary basis.

28. It honours collective agreements which have been transferred to it but does not take part in any pay bargaining arrangements referred to in those agreements except where it recognises the relevant union for pay bargaining purposes. Annual pay reviews are conducted. The respondent awarded pay increases to its relevant staff including the claimant in 2017 (1%) and 2018 (2%). No pay increases were awarded in 2019 and 2020 save where necessary to bring staff on its London Borough of Hammersmith and Fulham contract staff up to the level of the London Living Wage. By this time, the respondent was making a financial loss and so gave no cost of living pay increases.

Dispute about pay

29. As early as 8th December 2016, the claimant formed a belief that she was not being paid the correct pay. She wrote a series of letters to the respondent. First,

she wrote to HR admin claiming that she had not received the correct pay for the preceding six months; p.103. She did not specify the precise amount by which her pay fell short saying only that it was a few pounds. The respondent acknowledged that it had made an error in relation to the claimant's pension contributions during two initial pay periods. A further error was made by the respondent in August 2017 when it wrongly made a deduction for unpaid leave. This was corrected in the next month's pay.

30. The claimant wrote again to Miss Williams on 6th August 2017 saying that her basic pay was being lowered every month. She also said that she was due a pay increase:

“Also my 1% pay rise which was negotiated between the government and the trade union in May 2015 which was agreed in a meeting in the West Way office with Mr. Lange, Steve, Jay Austin regional officer from Unite the union and myself, in which payroll backdated the pay rise.”

31. On 1st August 2017, she voluntarily transferred to work on the respondent's adult social care contract for the London Borough of Hammersmith and Fulham. Her hours of work were 30 per week. Her salary equated to an hourly rate of £12.19; p.105. The letter confirming her revised terms and conditions was sent by Mr. Phil Stockley, the Respondent's Interim Operations Manager. The letter confirmed that there were no other changes to her terms and conditions of employment which remained “in accordance with your London Borough of Hammersmith and Fulham contract as provided by TUPE regulations”;
32. She was asked to raise any concerns with the Operations Manager, Mr. Kemoy Scott.
33. On 22nd January 2018, the London Councils, which was the employer side of the Greater London Provincial Council wrote to the recognised trade unions including Unite (p.107-112) to make a two year pay offer from 1st April 2018. Staff on particular spinal points were given a 2 % pay increase while others were given better than 2 % pay increases. All staff were to receive a minimum of a 2% pay increase over two years.
34. Tim Rampling, the respondent's Operations Manager, wrote to the claimant, in her capacity as a Unite steward, on 15th August 2018. He confirmed that all the respondent's staff had received “the agreed annual 2% pay increase and any back pay associated with that raise”; p.113. He also confirmed that staff working on the LBHF contract had received an increase to the London Living Wage as this was a requirement of its contract with the borough.
35. The claimant spoke to Mr Kemoy Scott on 17 January 2019 regarding her pay. She followed this up in an email sent on 20 January 2019; p.148. She reiterated that she had given 35 years' service to the council and three years under TUPE to HCT. She was unhappy that her hourly rate was £12.43 per hour while other drivers with shorter service were getting £13 per hour. She said that her yearly

pay rise also needed to be addressed. Mr Scott sent a holding reply on 22nd January 2019; pp.147-8.

36. On 7th February 2019, the claimant met with Ms Sian Williams, Mr. Kemoy Scott and Mr Tim Rampling at Bagley's Lane Depot to discuss her pay.

37. On 16th February 2019, the claimant wrote to Ms Sian Williams to protest about her pay; p.114. She complained that her pay had not increased since becoming a driver in 2002 when she was placed at spinal point 18. She said that other drivers who had worked less long than her were getting £13.43p an hour. She said that her contract entitled her "to an annual rise which I am not getting as I am still on the same spinal point 18 is when I started in 2016". She said that she worked 30 hours per week and did not understand why her were divided by 36 hours per week.

38. Ms Williams wrote to the claimant on 18 February 2019 to confirm the matters discussed at the meeting. She wrote as follows:

"You have provided a contract which indicates that you are on spinal point 18 – below is a table issued showing the salaries applicable to pay spines for 2018 – £22,377 for your spinal point.

As you are no doubt aware the quoted salaries are FTE salaries and as you work 30 hours per week and not the 36 hours which is the FTE hours for this spinal point – the salary of £22,377 is divided by 36 then multiplied by 30 to give you your salary £18,647.49.

Your current salary is £19,390.80 as such you are being paid more than your spinal point entitlement and we would not be looking to make any further increase to your salary at this time."

39. On 21st February 2019, the claimant emailed Mr Kemoy Scott to remind him to speak to Ms Williams. She also said that there were employees working 25 hours per week with 15 years' service who earned £13.43 per hour in comparison to her work of 30 hours per week for 35 years on the rate of £12.43 per hour. She said that the matter would be escalated to a grievance with the council and or to the employment tribunal.

40. The claimant wrote to Ms Williams on 31st of March 2019; p.115. Her email was headed "wages under pay an hourly rate". She said that she was still waiting for her pay situation 'is to be resolved fairly' stop. She said that Mr Scott had promised on 29th of March 2019 that the issue would be dealt with in April 2019. The claimant sent a chasing letter on 14 April 2019.

41. Ms Williams sent a holding reply on 15th April 2019 saying that she needed information on her overtime rate of pay and asked to provide details of her contact at LBHF; Ms Williams apologised for her delay in responding due to her workload. p.116. The claimant acknowledged this email on 16th April 2019 and reminded Ms Williams that her hours were no longer pro rata; p.117.

42. The claimant had sent a second email to Ms Williams on 15th April 2019 writing;

“My rate of pay is £13.00 plus the 43 I received as a pay increase (which was 1% and 2%) and not £12.43. Since 2002 one cannot expect to get the same £12 for 18 years’ service as a driver. My service as a driver and as a passenger assistant total 35 years of loyal service to the council and CT plus. If you need any more information, you can contact HR of LBHF chair.

Dominic Ward is the only person I can give you.

Also this April’s pay rise needs to be added to my hourly rate as well”

43. The claimant sent an email to Ms Williams on 16th April 2019 to point out that were no longer pro rata; p.117. Ms Williams asked her for Mr Ward’s email address. The claimant replied:

“I am not sure about Dominic Ward’s email. I may have had it but I cannot find it. I give Mr Scott to give to his HR, the email the council sent me asking CT plus HR to deal with my hourly rate of pay. It should be in your files are Mr Scott may have it in the paperwork”.

44. She sent another email to Ms Williams on 17th April 2019:

‘The mistake is that I am still being paid as a passenger assistant and not as a driver.... If you look at the paperwork I am still listed as a driver or attendant (passenger assistant). My increments have not gone up since 2016 when I was TUPEd over to CT plus. My contract says I get an annual increment. So, I should be backdated, this would make it £13 an hour plus my 43 pay rise and my April pay rise for this year (2019)”.

45. There does not appear to have been a response to this correspondence.

46. On 25th September 2019, the claimant was in touch with her union regarding lodging a collective grievance relating to her pay and that of a colleague. A collective grievance was lodged on 29th November 2019; p.126. A copy of the grievance appears on pages 127 to 129. The grievance states:

“We the undersigned request a meeting under the HCT collective grievance procedure to discuss changes regarding our wages, hourly rate in recent months, without explanation or consultation.

We the drivers for the HCT group would like to have rectified our hourly rate of pay, underpayment of wages and backlog of wages which have not been paid to us. This includes the following discrepancies in pay:

- 1) the 2% pay increase for April 2018 and April 2019 increase which none of us have received.
- 2) Some drivers are getting a pounds 50 while some of us are getting £9.86 and some £10.55; this not taking into account their years of service. Also, some LBH&F employees who were TUPE over to HCT group where their former pay was £12.55, they are now receiving 1155. A decrease in wages.
- 3) Passenger assistants are getting the same rate of pay as drivers and some PAs are getting more than some drivers.
- 4) There are discrepancies in starting dates for some employees.
- 5) Would like our rate of pay to be shown on all of our wage slips as before the TUPE transfer.

Despite having raised this issue on numerous occasions and our union representative requesting for a meeting to discuss the above-mentioned pay issues, nothing has been addressed. We call for a meeting to receive an explanation regarding the points above, and for a formal confirmation from the employer that this will be addressed. We wish to be represented by our trade union official and local representatives at any future meetings.”

47. The claimant wrote on 4th December 2019 to Ms Sian Williams to say that her emails had not been acknowledged; p.122. She had held a meeting with Miss Christine Ryan who attended on behalf of Mr Kemoy Scott. Ms Ryan told her that Human Resources were dealing with her pay issues. The claimant told her that despite sending numerous emails the issue had still not been sorted out; p.123. She said:

“Since 2016 when I started working for HCT group, my yearly increments have not been paid and my hourly rate of nearly £14 per hour has not been paid to me. My hourly rate, my increments and April 2019 pay rise which I have not received means I should be getting over £14 per hour.

Please can this be resolved by the end of this year as this has been going on for over three years.

Thank you very much for your time.

I'm waiting for a positive response.

PS I have given you a copy of my contract but if you need another copy, I am happy to send it to you.”

48. The claimant wrote to her Unite full-time representative and various managers at the respondent on 9th February 2020 asking for the pay issues including the collective grievance to be resolved; p.134. The collective grievance was resubmitted on 14th February 2020. On 3rd March 2020, the Unite full-time representative wrote to Tim Rampling, the respondent's Head of Operations – South-West London, to arrange a meeting on 14th April 2020.
49. Tim Rampling emailed the claimant and her Unite full-time representative on the morning of 14th April to cancel the meeting fixed for that day. This was due to restrictions on travel and meetings as a result of the pandemic. He declined the union's request to have a virtual meeting. The collective grievance meeting has not yet taken place.
50. On 4th September 2020, the Greater London Provincial Council published the agreed salary increases between the National Employers and Union sides for the National Joint Council for Local Government Services Employees with effect from 1st April 2020; pp. 139-143. Although Unite had rejected the pay offer, the other two local government unions had agreed the offer. The constitution of the pay bargaining body meant that a majority decision prevailed and the pay increases would come into effect.

51. The claimant wrote to Miss Williams on 1st November 2020; p.144. The email was headed September 2017 pay issues. In the email, the claimant said that she was awaiting the resolution of her pay issues which have been ongoing since September 2017. On 16th November 2020, the claimant wrote to Ms Williams and to other managers of the respondent asking for the formal grievance to be acknowledged and for her pay issues and hourly rate to be resolved; p.145. This did not elicit a response.
52. On 8th April 2021, the claimant wrote to Mr Dottin at the London Borough of Hammersmith and Fulham; p.151. She wrote:

“Dear Mr Dottin,

I have worked for 37 years for Hammersmith and Fulham Borough Council, transporting vulnerable children and adults as a bus driver.

In 2016 I was TUPE over but my contract remained a Hammersmith and Fulham contract under TUPE transfer regulations.

My contract states that I receive yearly increments and pay rise.
My hours are 30 hours per week at a rate of £12.43 p per hour including a 3% pay rise.
My rate of pay since 2014 was £12.06 p per hour since this time I have not been receiving my yearly increments, despite this I am looking at only the past four years.

My HCT group employers' human resources Department are having trouble working out the increments for my Hammersmith and Fulham contract.

I would like to get a hold of my pay scale and my increments in 2017 to 2021.

I would very much appreciate if you could help me with this....”

53. Mr Dottin responded on 12th April 2021; p.150. He said that he was enquiring about the pay scales for the periods in question and attached copies of the “NJC pay scales for previous years” noting that he thought these are the pay scales you were on at the point of transferring “. The claimant replied on 18th April 2021; p.150. She said:

“I still have some confusion over my increments which according to my contract should be due to the yearly.

My contract is for 25 hours a week. Since then, my hours have increased to 30 hours a week. Since 2014 I have not had my increments and also my hourly rate of pay is wrong. I have been a driver for 19 years and an escort for 18 years before this. My contract relates to the escort role not a driver role.

My hourly rate at present is still £12.07 p per hour +3% pay increase equals £12.43 p. I have attached the page of my contract showing scales and grades.

Please could you let me know what or what you think of this and what my hourly rate with increments should be”.

54. Mr Dottin replied on 27th April 2021; p.150. He said that he could not comment on the matters raised by the claimant as the London Borough of Hammersmith

and Fulham were no longer her employer. He said that her current employer should be able to see the increase in her grade since 2014 from the NJC pay scales and apply the percentage to her salary. He wrote that it appeared that she had not received her cost-of-living increases and suggested that she speak to her HR department.

Relevant law

Unauthorised deductions from wages: s. 13 Employment Rights Act 1996

55. S.13 provides that no deductions may be made from a worker's wages unless either the deduction is required by a statutory or contractual provision or the worker has given their prior written consent to the deduction. A complete failure to pay wages will amount to a deduction; **Delaney v Staples [1991] ICR 331**. In order to decide whether there has been a deduction, it is necessary to calculate the amount properly payable to the worker; **section 27 ERA 1996**. Section 27(1) defines wages as any sum payable to the worker by his employer in connection with his employment.

TUPE

56. The 2006 TUPE regulations govern relevant transfers. Regulation 3(1) defines relevant transfers in the following way:

3.— (1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

(b) a service provision change, that is a situation in which—

(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,

57. So far as service provision changes are concerned, some additional requirements must be met. Firstly, there must be an organised grouping of employees which has as its principal purpose of carrying out the relevant activities. Secondly, the client must intend that the activities are to be carried out other than in connection with a single specific event or a task of short-term

duration. Finally, the pre and post transfer activities must be fundamentally the same; **Regulation 3(2A)**.

58. The effect of a relevant transfer on contracts of employment is that the employees employed by the transfer or immediately before the transfer and who were assigned to the organised grouping of employees that is subject to the relevant transfer automatically become employed by the transfer on the terms and conditions which they enjoyed with the transferor; **Regulation 4**. Regulation 11 requires the transferor to notify the transferee of “employee liability information”. This includes information on particulars of employment; **Regulation 11 (2)(b)**.
59. Collective agreements made between the transferor and a union recognised by the transfer or automatically transfer to the new employer; **Regulation 5**. Collective agreements are, however, presumed unenforceable as a matter of English law.
60. Regulation 4A which was introduced by the Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) act Regulations 2014 modifies those transferred contractual terms which incorporate provisions of collective agreements. The purpose of this amendment was to give effect to the decision of the Court of Justice on 18th July 2013 in ***Alemo-Herron v Parkwood Leisure Ltd [2013] ICR 1116***. In this case, the Court of Justice considered the effects of what are known as dynamic clauses. A dynamic clause means that the contract is automatically amended to reflect new collective agreements including collectively bargained pay increases. It was held, however, that dynamic clauses can only operate where the transferee can effectively participate in the bargaining process. Where a transferee does not take part in collective bargaining, those transferred in employees will no longer benefit from collectively agreed pay increases.

Submissions

61. The claimant argued that the purpose of the TUPE regulations is to protect employees. Her contract of employment with the London Borough of Hammersmith and Fulham entitled her to pay progression. She said that it was unfair that, after so many years’ service with the council, that her pay had not increased. She also relied upon the statement in her contract of employment that the London Borough of Hammersmith and Fulham valued trade unions and took part in negotiations with the NJC and GLPC as evidence that the recognition of Unite had transferred to the respondent. She noted that she was provided with trade union facilities including a room, computer and telephone landline by the respondent. She also placed weight on her exchange of emails with Mr. Dottin of the London Borough of Hammersmith and Fulham as evidence that she should have had cost of living pay increases since 2018.
62. Mr Nuttman for the respondent, said that the claimant, at the point of transfer to the respondent, was on the maximum hourly pay for her spinal point. This meant that she was only entitled to cost of living pay increases. The respondent had

paid a cost of living pay increase of 1% in 2017 and 2% in 2018 but that this had been as a matter of discretion. The respondent did not play any role in pay determinations on the NJC or GLPC. That role had been carried out by the London Borough of Hammersmith and Fulham. The effect of Regulation 4A of the TUPE Regulations was that the claimant could not lay claim to any pay increases agreed by the NJC or GLPC.

Discussion and conclusion

63. Ms Williams' evidence, which was supported by the relevant documents, was that the claimant had been on spinal point 18 of the London Borough of Hammersmith and Fulham's pay bands when she transferred to the respondent. This was not a progressive pay band and, accordingly, incremental pay progression did not arise. Additionally, the pay for spinal point 18 was based upon a 36-hour working week. The greatest number of hours worked by the claimant was 30 hours per week and her pro rata pay was logically less than the whole time equivalent specified for this spinal point.
64. The claimant was not able to point to any documents which established that she should have been on a higher spinal point. Although she cited her contract (p.34) as evidence that she should be on spinal point 25, scale 5, after 10 years' service, I did not read her contract in this way. The section relating to incremental progression which incidentally appears on p.33 rather than p.34 of the digital bundle has to be read subject to the following paragraph. That paragraph clearly states that the claimant's incremental progression is subject to a ceiling of £18,708. She reached that ceiling very shortly into her employment with the London Borough of Hammersmith and Fulham. The claimant was informed by the respondent on a number of occasions that she was being paid at a level above the salary for her spinal point; p.114.
65. The claimant also relied upon the annual leave provisions in her particulars of employment which entitled her to increases in annual leave after 6 years and then 10 years of employment; 34. She said that this reinforced her claim to incremental progression. I found no basis for this argument. The annual leave provision is self-contained and has no bearing on the entitlement to have incremental progression.
66. While she may have felt under remunerated for the important role that she performed and given her long years of service, the claimant's council contract of employment did not legally entitle her to be paid at a higher spinal point. It follows that the transfer of that contract under the TUPE Regulations to the respondent also did not give rise to any right for her to be paid at a higher spinal point.
67. On the question of collective agreements, Ms. Williams said that the respondent honoured existing collective agreements on a TUPE transfer. It did not however participate in national or London level collective bargaining machinery.

68. The claimant maintained that her 2017 and 2018 pay increases arose from national and local negotiations with the local government trade unions and that she was therefore entitled to be paid the subsequent 2019 and 2020 pay increases. She also relied upon the fact that her trade union, Unite, continued to have the same trade union facilities as it had before the transfer. These included an office, a computer and telephone land line. The provision of facilities and recognition of Unite by the respondent are not matters which have any legal bearing on the contract of employment between the claimant and the respondent.
69. So far as the 2017 and 2018 pay increases were concerned, Ms. Williams's evidence was that those pay increases followed HTC Group pay reviews and did not derive from any NJC or GLPC negotiations. She said that the respondent would only have paid cost of living increases in line with NJC or GLPC negotiations had it been required to do so by its client, the London Borough of Hammersmith and Fulham. The respondent would then have sought additional funding from its client to meet the additional salary costs. No such requirement was made of the respondent by its client.
70. The claimant asserted that the 2017 and 2018 pay increases were given as a result of those negotiations but she did not provide any documentary evidence to support this apart from an email exchange with Mr. Rampling on 15th August 2018; p.113. This email refers to "the agreed annual 2% pay increase". I found that the reference to the "agreed" pay increase to be ambiguous. It might refer to HTC Group pay determinations and equally it might denote the NJC and GLPC pay negotiations.
71. This document might also appear to suggest that there was some link between the 2% awarded by the respondent and those negotiations as there was a reference to a London Living Wage increase. The London Living Wage features in GLPC pay determinations. I found however that this document did not assist the claimant. The reference to the London Living Wage related to the requirement by the London Borough of Hammersmith and Fulham that the respondent ensure that all its staff engaged on council contracts receive at least the London Living Wage. At all material times, the claimant's salary exceeded the level of the London Living Wage.
72. It is entirely open to the respondent to mirror or track the NJC and GLPC pay awards at its discretion. It would be surprising, indeed, if the respondent took no account of wider pay developments in carrying out its pay reviews. Reflecting those negotiated pay increases does not however give rise to any legal entitlement on the part of the claimant to automatically receive those the full value of those negotiated pay awards each time.
73. I did not find the claimant's reliance upon her email exchange with Mr. Dottin of the council to be persuasive. I regarded his letter as being politely worded and couched in rather generic terms. It does not indicate a particular knowledge of his part of the claimant's terms and conditions with the respondent. He does not

confirm that her pay is linked to NJC or GLPC terms and, in any event, he is not a party to the Claimant's contract with the Respondent.

74. In *Alemo-Herron v Parkwood Leisure Ltd [2013] ICR* 1116, the Court of Justice decided that a transferee whose employees have contracts of employment which incorporate collective agreements only has to abide by the provisions in force at the date of the transfer. The Court of Justice applied Article 16 of the European Union's Charter of Fundamental Rights, that is the right of freedom to conduct a business, to hold that an employer should not be bound to honour collective agreement terms which were agreed after the transfer when it had played no role in determining those new terms. This was because the freedom to conduct business requires a contracting party to be able to assert its interests in a contractual negotiating process.
75. It further held that the purpose of the Acquired Rights Directive – the parent Directive of the TUPE Regulations – is to seek a fair balance between the interests of the employees and those of the transferee.
76. Regulation 4A of the TUPE Regulations applies to transfers taking effect on or after 31st January 2014. The Regulation provides that TUPE does not operate to transfer any rights arising from collective agreements where the provision of the agreement is agreed after the transfer date and the transferee is not a participant in collective bargaining for that provision. The transfer of the claimant to the respondent took place after this date and Regulation 4A therefore applies.
77. Ms Williams confirmed that the respondent has not been invited to and nor does it play any role in either NJC or GLPC negotiations. The claimant could not produce any evidence to show that it participated in those negotiations. The effect of Regulation 4A is that the claimant is not legally entitled to have the benefit of automatic NJC and GLPC pay increases.

Employment Judge **B. McKenna**

Date: 13th August 2021

JUDGMENT SENT TO THE PARTIES ON

14/08/2021

FOR THE TRIBUNAL OFFICE

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