EMPLOYMENT TRIBUNALS

Claimant: **Mr Gary Lewis**

Respondent: **Dow Silicones UK Limited**

Heard at: **Cardiff and CVP** **On: 14 and 15 June 2022**

Before: **Employment Judge R Brace**
(Sitting alone)

Representation:
Claimant: Mr O Prys Lewis (Counsel)
Respondent: Mr C Howells (Counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that the complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Introduction

1. The original tribunal issued their reserved judgment in this claim on 24 December 2022 when all claims were dismissed following the final liability hearing heard on 24 and 25 September 2019 ("Reserved Judgment").

2. This hearing was listed remitted by the Employment Appeal Tribunal ("EAT") to consider again the Claimant's complaint of unfair dismissal based on regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) ("TUPE") following the judgment from the EAT of HHJ Shanks, handed down on 4 March 2021 (UKEAT/0155/20/LA), the EAT having substituted a decision that, by reason of the changes to working conditions in relation to standby/call out duties and safety, the Claimant was entitled to treat his contract of

employment as terminated and is to be treated as having been dismissed by the Respondent ("EAT Judgment").

3. The Claimant asserts that he has been automatically dismissed under Regulation 7(1) TUPE.

4. The Respondent asserts that the transfer was not the sole or principal reason for the dismissal but, in any event, the reason for the dismissal was an economic, technical or organizational reason ('ETO') reason under Regulation 7(2) TUPE was some other substantial reason of a kind justifying dismissal (Regulation 7(3)(b)(ii) TUPE).

5. At the commencement of this hearing, it was also agreed that both liability and remedy would be heard at the same time but, after further consideration of the Claimant's Schedule of Loss, and as a result of limited information of the Claimant's net losses, it was agreed with the parties that any judgment, if given in favour of the Claimant, would not include a calculation of any financial compensation and that the parties would, in such a case, be directed to agree figures and for there to be a further remedy hearing on any financial compensation, if necessary, if no agreement could be reached.

6. The Claimant also confirmed that he seeks a reinstatement order only and expressly does not want a re-engagement order, if I determined not to make a reinstatement order.

7. I had before me bundle of documents (the "Bundle") which contained all the documents that had been before the original tribunal as well as additional documents that had been prepared and/or disclosed for the EAT appeal hearing and this hearing, which the parties selectively referred me to.

8. The Respondent had been directed to provide an electronic bundle, prepared in accordance with the Presidential Guidance on remote and in-person hearings (paragraph 24.4). The electronic Bundle had not been prepared in this manner and the numbering of the pagination and the PDF numbering system did not correlate. References to the hearing Bundle appear in square brackets [ ] below. These are references to the hard copy pagination of the Bundle and not electronic PDF automated numbering.

9. In advance of this hearing, the parties had corresponded with the tribunal regarding the Bundle and had been directed to try to resolve any issues of dispute. They had been able to do so but whilst the Claimant's representative maintained that the Bundle was excessive, he also confirmed that any issues with the Bundle did not need to be addressed

by me as a preliminary issue and that the Claimant was content for the hearing to proceed on the basis of the electronic Bundle that had been prepared and uploaded to the Document Upload Centre.

10. I had before me the original witness statements from the final merits hearing, together with additional witness statements for this remitted hearing which the parties had been permitted to adduce by REJ Davies on 16 September 2021, on the practicability of reinstatement from:

    (a) Lisa Bohun, the Respondent's HR Site Service Leader;
    (b) Mike Wilson, the Respondent's Utilities Operation Leader; and
    (c) the Claimant, Mr Gary Lewis.

11. All witnesses relied on these witness statements, which were taken as read and all were subject to cross-examination, Tribunal's questions and re-examination.

12. I had read in advance of this hearing copies of the documents contained in the Claimant's and the Respondent's Reading Lists and any documents referred to in the witnesses supplemental witness statements prepared for the purposes of this remitted hearing. I made it clear to the parties that I had not read any documents referred to in the witness statements that had been prepared for the final merits hearing in September 2019 (or indeed the subsequent Reserved Judgment) as document reference numbers, to documents in those original witness statements, did not correlate with the documentation in the Bundle before me for this hearing, and that if a party wished to refer to them they would need to take me to them.

13. The parties had also not agreed the list of issues for this hearing, despite Judge Davies directing that they do so. As a result I had before me two separate list of issues which were discussed at the outset of the hearing and before hearing evidence.

14. The Claimant's representative accepted that both the Claimant's list of issues and written submissions incorrectly contained reference to the provisions of TUPE pre-2014 amendment, and agreed that the list of issues as drafted by the Respondent was appropriate [45cl]. This was adopted as the agreed list of issues as follows:

    Automatic unfair dismissal

    1. Was the sole or principal reason for the Claimant's dismissal:

        1.1. The transfer (Regulation 7(1) TUPE)?; or

1.2. An economic, technical or organizational reason entailing changes in the workforce of wither the transferor or transferee before or after the relevant transfer (Regulation 7(2) TUPE)?

2. In determining whether the dismissal of the Claimant was unfair, it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal (s.98(1)(a) Employment Rights Act 1996).

Ordinary principles

3. If the dismissal falls outside Regulation 7(1) TUPE, or falls within Regulation 7(2) TUPE, was there a substantial reason of a kind such as to justify the dismissal of the Claimant, holding the position which the Claimant held (Regulation 7(3)(b)(ii) TUPE)?

4. If a substantial reason exists, did the Respondent act reasonably in the circumstances (including the size and administrative resources of the employer's undertaking) in treating that as a sufficient reason for dismissing the Claimant (s.98(4) Employment Rights Act 1996)?

Remedy

5. If the Claimant was unfairly dismissed, should he be re-instated (section 114, applying the factors under s.116(1), (5) and (6) Employment Rights Act 1996)?

6. If the tribunal decides not to order re-instatement and instead award compensation, in respect of the compensatory award:

6.1. For ordinary unfair dismissal only, should the award be reduced to reflect the possibility that the Claimant would have been dismissed had a fair procedure been followed? If so, what is the appropriate reduction?

6.2. Did the Claimant fail to take steps to mitigate his loss following his dismissal? If so, how long would it have taken him to find comparably remunerated employment?

Schedule of Loss

15. A Schedule of Loss to 5 March 2022 appears at [404] in which the Claimant claims losses to reinstatement and a compensatory award of 10 years' salary and benefits from the date of any reinstatement.

16. The Claimant claims an uplift of 25% on any compensatory award for failure to follow the ACAS Code of Practice on Disciplinary and Grievance in that the Claimant asserts that the Respondent failed to provide the Claimant with the true reason for his dismissal and failed to inform him that he had a right of appeal.

Facts

17. As this was a remitted hearing on a discrete point, there was no interference with the findings of fact from the tribunal of September 2019, as set out in the Reserved Judgment.

18. The supplemental witness statements for this remitted hearing dealt exclusively with the claim for re-instatement being made by the Claimant.

19. The Respondent's witnesses were not cross-examined by the Claimant's Counsel on their evidence in relation to re-instatement or remedy at all, but on issues relating to imposition of overtime and the safe-working permits.

20. The following findings of fact from the Reserved Judgment, were particularly relevant to my deliberations on the unfair dismissal claim, although no limited to them.

    (a) in relation to the date of the announcement by the Respondent in March 2017, that it would be contracting back the running of the CHP plant in March 2018 and that this would involve TUPE (§10 Reserved Judgment);

    (b) the system of overtime at Engie prior to the TUPE transfer had been voluntary (§13 Reserved Judgment);

    (c) in relation to the Engie audit report prepared by Engie Health and Safety Officer, DR [226] which found that there was a lack of concentration and attention to detail by the authorised person/safety controllers which had led to omissions being made when completing permits to work and that the authorized person/safety controllers appeared to be unsure as to what set of Safety Rules there are were expected to follow (§11 Reserved judgment);

    (d) in relation to the changes to the Claimant's role and responsibilities/Safe Work Permit and the transfer of the site engineer duties being transferred to the operations/technician (§41 and 47-49 Reserved Judgment);

(e) in relation to standby/call out (§12-14 and 18-19 Reserved Judgment); and

(f) in relation to the consultation and changes to standby/call out and safety (§18, 20-48 Reserved Judgment).

21. Additional findings, supplemental to those reached at the original final merits hearing were also made.

Standby/overtime

22. The original tribunal had dealt with the new standby/call-out arrangement at §69-76 of the Reserved Judgment. The new system involved compulsory standby arrangements and this had the potential to impact on the Claimant's domestic plans and arrangements (§14 EAT Judgment).

23. It had been put to Lisa Bohun on cross-examination at this hearing, that at least 12 months prior to the TUPE transfer there had been 'arguments' between Engie and the Respondent for imposition by Engie of mandatory overtime and that it was the Claimant's position that, as a result, it had been the TUPE transfer that had caused the system of voluntary overtime at Engie to 'fall apart' pre-transfer. Lisa Bohun was unable to give any evidence on how the contract had operated prior to the transfer, but confirmed that there had been no changes to the overtime model until after the transfer and rejected any suggestion that the Respondent had interfered with shift patterns of Engie, and in particular overtime, prior to and in anticipation of the TUPE transfer.

24. Whilst I accepted the Claimant's evidence, that for 18 years there had been a good working operation of the overtime system at Engie and that this had broken down or 'fell apart' as the Claimant termed it, in the year prior to the transfer, I also accepted the evidence of the Respondent's witnesses denying that the assertion by the Claimant, that the Respondent had somehow interfered with Engie's shift patterns including overtime in anticipation of the TUPE transfer.

25. Whilst no doubt the Claimant holds a belief that there had been such interference, there was no evidence to support that belief and assertion as put to the Respondent's witnesses.

26. The Claimant's representative had drawn Mike Wilson to comment on a series of emails dating back to November 2017, between Engie personnel, headed 'TUPE representative – nomination outcome and election process', in which concerns of poor levels of health and safety on site including safe systems of work were raised [217-219], submitting that this demonstrated the link with the TUPE transfer.

27. This was an entirely new suggestion from the Claimant, that had not been raised at the original hearing, and I did not find that the Respondent had somehow orchestrated or interfered with the Engie system, as had been suggested to the Respondent witnesses. I was not persuaded that the emails, which simply referenced safety concerns under the umbrella of an email related to election of TUPE representatives, supported the assertion made by the Claimant that the breakdown in voluntary overtime was related in any way to the TUPE transfer. Rather I found that they simply reflected that there were such concerns about Engie's systems of work and no wider.

28. The Claimant had given evidence in the original hearing on the cover system that had operated and findings of fact had been made at §14 Reserved Judgment. In this hearing on cross-examination, the Claimant agreed that those findings were accurate and again agreed that:

    (a) overtime at Engie had been voluntary;
    (b) that cover, and in turn the overtime system at Engie, had broken down in the last 6 months of the contract because of shortage of goodwill from the Engie operatives and because the new engineer operations manager lacked training to provide the cover.

29. He also confirmed that if Engie could not cover a shift, then the CHP plant which operated 24 hours a day/7 days a week, would need to shut down, and that, as at the date of the TUPE transfer, he held the view that the Engie system of cover, to ensure that the CHP plant operated safely, was unacceptable.

    Safe Work Permit

30. The original tribunal had dealt with the Safe Work Permit at §77 to 82 of its Reserved Judgment.

31. The Respondent wished to change the system of operation, changing the operatives responsibilities in relation to safety:

    (a) From the position at Engie, which had failed, where engineers (not Operations Technicians) issued Work Control Documents to confirm that it was safe for work to be carried out on a piece of equipment; to

    (b) A system at the Respondent, where 'Safe Work permits' would be issued by the transferring Operations Technicians.

32. This new system required training over a period of 6 months and gave those transferring employees, including the Claimant new responsibilities, responsibilities that the Claimant had no wish to take on.

33. Given the nature of the new responsibilities and the training involved, it was a substantial change (§16 EAT Judgment).

34. The Claimant agreed on cross-examination, and I further found that:

    (a) if an accident had arisen at the CHP Plant that could have 'catastrophic consequences', not just for those at the site but also those living in the wider community; and
    (b) that the November 2017, Engie Audit Report had identified that having three sets of safety rules in operation was of concern.

35. The Claimant also gave evidence at this hearing that:

    (a) the CHP Plant, a heat and power plant was, by reason of the transfer, being integrated into a chemical site i.e. the Respondent's operation, with two different ways of working;
    (b) He was opposed to integration of the systems and believed that the Engie system of operation was safer than that proposed by the Respondent, in that it was a higher level of employee, an engineer, who had responsibility for issuing the permits and that he did not believe that he was the type of person that could carry out the responsibilities of signing off the Safe Work Permit; and
    (c) That it would be a 'good idea' for the Respondent's safety rules to be applied across all of its operations to inter-connect people

Consultation

36. No additional findings of fact are made in relation to consultation, these having been set out in the original Reserved Judgment.

Resignation

37. After the Claimant resigned on 5 March 2018, he was asked to empty his locker and escorted off the premises. He was not provided with a right of appeal as a result of the termination arising as a consequence of his resignation, or requested to attend a meeting to discuss his resignation despite the Claimant emailing on 9 March 2018 to confirm that his intention was still to claim constructive dismissal but that he 'was willing to come to an amicable agreement to prevent a tribunal' [347]. He received no response to that email.

Replacement

38. The unchallenged evidence from Lisa Bohun, which I accepted, was that following the Claimant's resignation, the team was one member down and that it was necessary to train someone to replace the Claimant for the CHP plant to continue operating and at safety standard; that it had, in 2018, taken the Respondent a number of months and considerable financial investment to train someone to replace the Claimant after his resignation.

39. I further found that such a replacement, had been trained as a Senior Technician and had been be carrying out duties of the Senior Technician and not an operations technician, and that this role contained the additional safety duties that had not formed part of the Claimant's position prior to the TUPE transfer, i.e. that is with the site engineer duties.

40. Since the Claimant's departure 4 years' ago, whilst there has been some natural turnover, leavers have too been replaced in the interim and, in effect, the team at the CHP plant is now at the current time, and has been since the Claimant resigned, to capacity with Senior Technicians and not operations technicians.

Working relationship

41. The further evidence from Lisa Bohun, which was unchallenged by the Claimant's representative on cross-examination, was also that the relationship between the Claimant and the Respondent had now irretrievably broken down and any attempt to integrate the Claimant back into the workplace would be 'hostile' and make for an unpleasant working environment; that it was 'certain to fail'. Similar views were expressed by Mike Wilson in his statement evidence[1].

42. The Claimant had maintained on cross-examination, that if he could return to work, there would be no problems and that the problems only arose as he had been forced to undertake the changed role. He accepted that there needed to be mutual trust and confidence in the employment relationship but repeated that he had no issue going back to work for the Respondent as he would be returning to his old role if reinstated. He asserted that he would have no issues returning to work at the CHP plant working for Lisa Bohun and Mike Wilson, essentially working under the same people that he had been critical of in these proceedings.

43. However, the Claimant accepted that he still held the Respondent criminally responsible for contempt of court, in withholding documents he considered relevant to his claims, and which he believed could lead to the Respondent deliberately fabricating '*another Perverse Judgement'* [44c], a

[1] LB Supplemental Witness Statement §para 8 and Mike Wilson Supplemental Witness statement §para 11

comment he had made as recently as February 2022. He spoke of how, once the Reserved Judgment was 'corrected', he would be '*more than happy to move on'* but that the wrongdoing had to be addressed and that his unhappiness lay with the Respondent's legal representatives and that he had no issues with those that he would have to work with.

44. I did not accept that evidence as credible. I did not accept the Claimant's evidence, given in cross-examination that he would be '*more than happy to return to work'* as he put it, or that he would have *'no issues with the people he worked with'.*

45. Rather, I found that the Claimant maintained the view that the Respondent had breached TUPE provisions in respect of other transferring employees who had agreed new terms and working arrangements and also maintained the view still that they should not be 'forced' to work in breach of those regulations. This was despite evidence in the Bundle from one of the transferring employees that he had been happy with the changes [312]. He did not accept that his reinstatement would lead to more friction as if reinstated, the Respondent would have to follow UK law.

Mitigation

46. It was not disputed by the Claimant, that since his resignation on 5 March 2018, he had made no attempt to look for alternative employment. His position is that no other employer would employ him as he would be bound to tell them that he was seeking reinstatement with the Respondent which would have led to lack of job offers. This is no more than a belief however as the Claimant has not in fact applied for any alternative employment since his departure from the Respondent.

47. The Claimant gave evidence that he has not been in receipt of any social security benefits since his resignation. The Claimant was over 55 years' old on resignation and gave evidence that he retired from a previous employer's pension scheme at 55 and had been living on that annuity and savings. Whether that pension was from previous employment entirely or from a scheme operated by the Respondent's predecessor(s) was unclear, but this did not appear to be a relevant consideration. His partner has also retired from employment.

48. Despite being out of employment for the last 4 years, he did not accept that he would have to receive re-training to return to work, only refresher re-training, or that he had de-skilled.

49. Prior to working for the Respondent's predecessors the Claimant was a gas engineer for residential and commercial usage.

50. Within the Bundle there were a considerable number of job adverts for management roles. The Claimant did not accept that these would have been suitable as he had never been employed as a manager and had no desire to become one. There were also a considerable number of production operative roles. Again the Claimant did not consider that these would have been suitable as a production operative at national minimum wage, or marginally above that rate, would also not have been suitable due to the salary. He did not consider the roles to be comparable. His role at Engie had serious safety aspects and there was, in his view, no comparison with the production operative roles within the Bundle and the role previously held by the Claimant at Engie. I agreed. The roles within the Bundle were more akin to factory line workers/fork lift truck operatives and were not comparable with the skill-set of the Claimant

Submissions

51. The Claimant's Counsel had presented written submissions dated 22 May 2022, comprising 7 pages (18 paragraphs). The Tribunal incorporates them by reference. Save for referencing **Tapere v South London & Maudsley NHS Trust** [2009] ICR 1563, no other case law was relied on.

52. The Respondent's Counsel had also presented written submissions dated 13 May 2022, comprising 11 pages (55 paragraphs) and again, these are incorporated by reference.

53. He also referenced the following case law:

(a) **Kuzel v Roche Products Ltd** [2008] IRLR 530 with regard to burden of proof on automatic unfair dismissal claims where technically the burden of proof on the employer to show the reason for dismissal:
(b) **Berriman** v **Delabole Slate Ltd** [1984] 394 in relation to 'changes in the workforce' meaning a change in the overall numbers or functions of the employees and **Nationwide Building Society v Benn** [2010] IRLR 922 that the change need not entail the entire workforce – it is enough that a section of employees are effected, which would include the group of transferring employees;
(c) **Miles v Insitu Cleaning Co Ltd** UKEAT/0157/12) that a change in the function of the employees will have to be a significant or substantive change, as opposed to minor or minimal, for it to entail a change in the workforce; and
(d) P. Bork International A/S, in liquidation v Foreningen af Arbejdsledere I Danmark, acting on behalf of Birger E. Petersen, and Jens E. Olsen and others v Junckers Industrier A/S EU Case 101/87 as applied in **Hare Wines Ltd v Kaur and and or** [2019] IRLR 555 CA**,** a case decided under the current

wording of Reg 7(1), where the Court of Appeal took the ECJ's decision in **Bork** to mean that although proximity of the dismissal to the transfer is not conclusive, it is strong evidence in the employee's favour.

The Law

54. The applicable law is set out at Regulation 4(9) TUPE provides as follows:

"…….. 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.

55. The relevant paragraphs of Regulation 7 TUPE provide:

(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—

(i) paragraph (1) does not apply;
(ii) 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).

Employment Rights Act

56. Section 98(4) ERA 1996 provides that:

"[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."

57. Section 123 Employment Rights Act 1996 provides (so far as relevant):

(1) ……..the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

(2) The loss referred to in subsection (1) shall be taken to include—

(a) any expenses reasonably incurred by the complainant in consequence of the dismissal, and
(b) subject to subsection (3), loss of any benefit which he might reasonably be expected to have had but for the dismissal.

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

58. The provisions of s.113-116 ERA 1996 are applicable in relation to the Claimant's wish to be reinstated in the event that the complaint of unfair

dismissal is well-founded, in particular s.116 ERA 1996 which provides as follows:

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account

(a) whether the complainant wishes to be reinstated,

(b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account

(a) any wish expressed by the complainant as to the nature of the order to be made,

(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.

(4) Except in a case where the tribunal takes into account contributory fault under subsection (3)(c) it shall, if it orders re-engagement, do so on terms which are, so far as is reasonably practicable, as favourable as an order for reinstatement.

(5) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining, for the purposes of subsection (1)(b) or (3)(b), whether it is practicable to comply with an order for reinstatement or re-engagement.

(6) Subsection (5) does not apply where the employer shows

(a) that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or

(b) that

(i) he engaged the replacement after the lapse of a reasonable period, without having heard from the dismissed employee that he wished to be reinstated or re-engaged, and

(ii) when the employer engaged the replacement it was no longer reasonable for him to arrange for the dismissed employee's work to be done except by a permanent replacement.

Conclusions

59. The EAT having found that Regulation 4(9) TUPE applied and that the relevant transfer involved or would involve a substantial change in working conditions to the material detriment of the Claimant and that the Claimant should be treated as having been dismissed by the Respondent, I must consider whether Regulation 7 TUPE applies such that the dismissal was unfair.

Regulation 7(1) TUPE

60. I considered whether this was a case, whereby the 'sole or principal reason' for the dismissal was the transfer itself under regulation 7(1) TUPE.

61. Whilst Mr Howells, counsel for the Respondent, submitted that the test under regulation 7(1) TUPE, was more stringent than the test pre-2014 amendment, referring to matters as 'incidental' to the transfer and not falling within regulation 7(1), I considered the CA decision in **Hare Wines Ltd v Kaur,** the only case progressing as far as the Court of Appeal since the 2014 amendment to TUPE, and approached the question of what was the sole or principal reason for dismissal in the circumstances, as a question of causation.

62. I was persuaded that the Respondent had satisfied me that the transfer was neither the sole or principal reason for the dismissal for the following reasons:

(a) Whilst the timing of the dismissal was in very close proximity to the transfer itself, and did remind myself that this was an important consideration, I did not find the timing of the changes was determinative in this case. Rather, whilst the transfer was not

wholly irrelevant in that the new employer, the Respondent sought to address existing problems that Engie had not, I was persuaded that the principal reason for the changes to the working conditions (resulting in the termination of the Claimant's employment,) was that the Respondent had a need to resolve an ongoing situation as soon as possible, to ensure the constant running of the plant and to ensure the safety of workers at, and those in close proximity to, the CHP plant;

(b) I was also not persuaded that the reason for the changes to working conditions was to harmonise terms and conditions, a matter which had been referenced by the Claimant in his evidence and by his Counsel in submissions. Rather, whilst this was one of the effects of the change in respect of overtime management, I did not conclude that the fact that the overtime aligned with the Respondent's system and/or the safety rules may have aligned with the Respondent's system of management, was the purpose or reason, or even the principal reason, for the change of working conditions;

(c) I concluded that the real reason or cause for the changes to the Claimant's working conditions, and in turn for the termination of the Claimant's employment, was the need to:

(i) resolve problems in covering shifts at the CHP plant, albeit problems which had been ongoing for some time at Engie prior to the transfer but had not been addressed by Engie at point of transfer;

(ii) in turn, impose a rigid primary cover system which would then encompass a system of compulsory overtime, to replace the ad hoc cover whereby employees could choose to agree to cover or refuse to cover those shifts; and

(iii) ultimately ensure safety and continuous operation at the CHP plant.

Regulation 7(2)

63. The Respondent had also satisfied me that the reason for the change in working conditions, and in turn the dismissal of the Claimant, fell within regulation 7(2) TUPE.

64. In reaching this conclusion, I first considered whether there was an 'economic, technical or organisational reason' for the dismissal under Reg

4(9) TUPE, before considering whether that reason 'entailed changes in the workforce'.

65. The definition of 'organisational' reason covered situations where a transferee decides to re-organise job functions in order to carry on the business and I accepted the Respondent's arguments that there were organisational reasons for the changes in relation to:

    (a) The Engie voluntary system of cover and overtime - I concluded that this Engie system was essentially no longer 'fit for purpose' or acceptable, prior to and as at the date of transfer. That it was in that position prevailed for the reasons put forward by the Respondent, which I found to be accepted by the Claimant, namely that cover, and in turn the overtime system at Engie, had broken down in the last 6 months of the contract because of shortage of goodwill from the Engie operatives to provide that cover on an overtime basis, and because the new engineer operations manager lacked training to provide the cover; and

    (b) The introduction of the Safe Work Permit - I accepted the submissions by the Respondent that having two sets of safety rules operating in the same workplace was unacceptable as a result of the inherent problems and risk to safety and needed to change as a result.

66. I then considered whether these organisational reason entailed 'changes to the workforce' within the Respondent and concluded that they did on the following basis:

    (a) The description 'changes to the workforce', did not have to necessitate changes in numbers, as had been submitted by the Claimant's representative (although a change in the numbers of the workforce overall would have met this test,) but that a change in the functions could also amount to 'changes in the workforce' (**Berriman v Delabole Slate Ltd** and **Nationwide Building Society v Benn**);

    (b) When considering whether there had been changes in the functions of the members of the workforce as an entity, it was agreed by the Claimant, and I concluded, that the 'workforce' in this case was the body of transferring employees only and not the Respondent's workforce as a whole;

    (c) I concluded that the introduction of a system of compulsory overtime, the Respondent's Primary Cover System, was a change in the function of the employees; that the function of the employee

changed, from one whose function was to cover set shifts only, to one whose function it was to cover set shifts and work overtime on a compulsory basis to ensure that the operation of the CHP plant was safe and continuous;

(d) Whilst the Claimant had not been given an entirely new job to do, the functions of the Operations Technicians had substantially changed in that with the changes to the Safety Work Permits, the Claimant was to become responsible for some of the functions that had previously been carried out by the site engineers. I did not consider this a minor job role change, neither did the Claimant, as he had confirmed on cross-examination. The transfer of functions would have required the Claimant to acquire additional training and skills. This was more than a minor change in my view (**Miles v Insitu Cleaning Co Ltd**);

67. In light of regulation 7(3A) TUPE, I accepted the Respondent's arguments that there were organisational reason entailing changes in the Respondent's workforce for the purposes of regulation 7(2) TUPE.

68. In accordance with regulation 7(3) TUPE, there being no argument that this was a redundancy situation, I concluded that the dismissal of the Claimant under regulation 4(9) TUPE, was to be regarded as having been for a potentially fair reason, namely 'some other substantial reason of a kind justifying dismissal'.

Section 98 Employment Rights Act 1996

69. I then turned to the final question of whether the Respondent acted reasonably in dismissing the Claimant for that reason. Again I concluded that it had.

70. In relation to both the introduction of the standby/overtime/primary cover system and safe work permit/transfer of duties, I was satisfied that there were substantial reasons for introducing the changes to the Claimant's working conditions that led to the regulation 4(9) TUPE termination of employment, for the reasons set out in the Reserved Judgment and repeated in §62 of these written reasons; essentially that the Respondent was entitled to apply a different safe system of working. I did not consider that the Respondent had to show that the reorganisation, or rearrangement of working patterns was essential, but was satisfied that the Respondent management had demonstrated that they thought they had sound good business reasons for the changes and that the changes had not been imposed for arbitrary reasons.

71. In relation to the manner of the implementation of the change, I concluded that the Respondent had acted reasonably in that the Claimant had been informed and consulted about the changes to the system of working, both in terms of the primary cover and safe work permits:

    (a) at the consultation meetings, in particular on 10 January 2018, when explaining the primary cover system, the Claimant confirmed that he would not pick up his phone (§22 and 23 Reserved Judgment); and

    (b) at and following the consultation meeting 19 February 2018, when the Claimant was informed that his role and job function would require participation in the Respondent shift and annualized hours system which would include call out and standby (§36-39 Reserved Judgment);

72. He had received training on the Safe Work Permit on 21 and 22 February 2022 (§40 Reserved Judgment) .

73. These discussions and the training had taken place before the Respondent sought to impose any change on the Claimant.

74. The Claimant resigned on the evening of 5 March 2018 (§47 Reserved Judgment) before the changes could be brought into effect, by way of agreement, imposition or by way of dismissal and re-engagement although I did further conclude that, taking into account the findings made regarding the Claimant's clear resistance to those changes, that agreement would have been unlikely in the event that the Claimant had not resigned.

75. I did not consider that the manner in which the Claimant was escorted from the site once he had resigned, or the correspondence between the parties that followed, to be relevant considerations when determining whether the Respondent had acted reasonably, a matter which the Claimant had relied on, as these events had followed the resignation and in turn, termination of his employment.

76. Given that the Claimant was clearly indicating that he was not going to agree to the changes, the Respondent's conduct as at the point of the Claimant's resignation, in seeking to agree to put those changes in place was reasonable in all the circumstances of the case.

77. When reaching that conclusion I took into account not, just the reasonableness of the employer in seeking to introduce those changes which was to seek agreement through consultation and discussion, but also the reasonableness of the Claimant in rejecting them, which included

a refusal by the Claimant from the outset to pick up the phone when rostered on primary cover (§22 Reserved Judgment).

78. What might have happened if the Claimant had not resigned on 5 March 2018 was far from clear to me, but I concluded that in the circumstances, in the context of the consultation that had taken place, the fact that all other transferring employees had agreed to the new systems (, both standby and Safety Work Permits (§46 Reserved Judgment),) whilst the changes were to the Claimant's detriment, I did not consider that the employer had acted unreasonably in the circumstances.

79. On that basis, the claim for unfair dismissal is not well-founded and is dismissed.

80. Finally, and whilst there is no requirement for me to do so, even if I had concluded that the Claimant had been unfairly dismissed (which I did not,) I would not have found it appropriate to make an order for re-instatement or re-engagement.

81. Whilst the Claimant had an unequivocal wish to be reinstated, and it appeared unarguable that the Claimant had not contributed to his dismissal, taking a broad and common sense view of this case, I considered that reinstatement was not capable of being carried into effect with success in light of the circumstances of the case a whole as it could not be said that it would have been practicable for the Respondent to comply with an order for reinstatement as:

    (a) In my judgement, the relationship between the Claimant and the Respondent, and in particular the individuals who continued to be responsible for the CHP site where the Claimant would be reinstated (both operational and business support/HR,) had irretrievably broken down; and
    (b) the Respondent had shown to me that the CHP was to capacity. When considering that the Respondent had engaged a permanent replacement, I was satisfied on the evidence from the Respondent (which was unchallenged) that the Respondent had shown that it was not practicable for the Claimant's work to be done without engaging that permanent replacement, a replacement having been in place for the last four years.

82. I would not have made any order for re-engagement as an alternative in light of the Claimant's clear and unequivocal wish *not* to be re-engaged in another capacity.

Employment Judge R Brace
Dated: 21 June 2022

JUDGMENT SENT TO THE PARTIES ON 22 June 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS