EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4106731/2022

Held in Glasgow on 23 August 2023

Deliberations 24 August 2023

Employment Judge D Hoey

Ms J Landels	**Claimant** **In Person**
Dan Dan Diner Ltd	**First Respondent** **Represented by:** **Not present and** **Not represented**
Mr McKay	**Second Respondent** **In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that

1. The Tribunal makes a declaration that the second respondent failed to properly comply with the obligation to inform the claimant of matters in relation to a relevant transfer in terms of regulation 13 of the Transfer of Undertaking (Protection of Employment) Regulations 2006, having communicated the relevant information verbally only (there being an obligation in terms of regulation 13(5) to communicate the information to affected employees in writing).

2. Appropriate compensation is awarded to the claimant in the sum of **two hundred and fifty six pounds and fifty pence** (£256.50).

3. The first and second respondents are jointly and severally liable to make payment of the appropriate compensation to the claimant and the sum should be paid within 14 days.

REASONS

1. The claimant raised claims for redundancy payment or compensation for failure to inform and consult in terms of TUPE. Her claim had been raised against both respondents. She claimed that she had been told prior to a transfer that she was entitled to choose to receive a redundancy payment (if she remained employed by the second respondent up to the date of employment) if she subsequently decided not to accept the terms offered by the first respondent going forward. The claimant argued that she had not received any written information as to the transfer as required by the Transfer of Undertaking (Protection of Employment) Regulations 20026 ("TUPE").

2. The second respondent disputed the claim arguing that the claimant had been told she would be retained following sale of the business as a going concern and that accordingly she was not entitled a redundancy payment and had been told this. The second respondent's position was that all the required information had been communicated to the clamant (there being no measures envisaged by the first respondent of which the second respondent was aware) albeit it was conceded that the communication was orally (and not in writing).

3. The first respondent defended the claim arguing that the second respondent had dismissed the claimant as redundant (and that the claimant had chosen to work for the respondent). The first respondent stated that their company had bought all the assets and no staff (as they were being "made redundant"), The first respondent said the claimant agreed to work for them from 1 August 2022. It was alleged that the second respondent had advised the staff would be made redundant before the sale.

4. The second respondent argued that the first respondent had made it clear that staff would transfer and the business would be sold as a going concern. The second respondent stated that they had paid the staff all sums due to the point of transfer and the claimant transferred to the first respondent on her then current terms and conditions.

Case management

5. At an earlier case management preliminary hearing the issues had been focussed. The parties had been advised by the Employment Judge as to the legal provisions set out in TUPE as to information and consultation.

6. The claimant had indicated that she was no longer seeking a redundancy payment as she accepted her employment had transferred to the first respondent. The claimant accepted that she had not been dismissed by the second respondent (and she had chosen subsequently to leave the employment of the first respondent).

7. The first respondent had not attended the hearing, and having checked, the first respondent had advised the Tribunal that the first respondent had chosen not to attend or be represented.

8. Both the claimant and second respondent indicated that the business which transferred from the second respondent to the first respondent was identical. There were no material differences between the business before and immediately after the transfer. As a consequence it was conceded that there was a relevant transfer of the purposes of TUPE. Although the first respondent had argued it was only the assets that had transferred from the evidence agreed between the claimant and second respondent, it was clear that this concession was correct on the facts. There was no doubt that there had been a relevant transfer between the second respondent and the first respondent.

Issues to be determined

9. The issue in this case was whether or not the obligation to inform the claimant in terms of regulation 13 of TUPE had been followed.

10. The claimant argued that she had not been told by the second respondent about the fact the first respondent did not intend to employ the claimant on her terms and conditions (which she said was a measure the first respondent was intending on taking post transfer). She argued that there had been no written communication as the transfer.

11. The second respondent accepted there had been no written communication but it was argued that all communication was verbal. The claimant had been

told all the required information in terms of TUPE. The second respondent's position was that the first respondent had clearly advised him that the business was being transferred as a going concern and that all staff had been advised (verbally) that there would be a seamless transfer (which was in fact what happened).

12. The issue for the Tribunal was firstly whether or not the relevant information required under TUPE had been communicated to the claimant and secondly whether oral communication was sufficient and then finally what remedy, if any, was to be ordered.

Evidence

13. The parties had a number of documents to which reference was made, having submitted these to the Tribunal. Most of the key facts were agreed but the claimant and Mr McKay both gave oral evidence and were cross examined and asked further relevant questions. There was one key dispute, namely whether the claimant had been told by the second respondent that no measures were envisaged by the first respondent post transfer.

Facts

14. The Tribunal is able to make the following findings of fact which it has done from the evidence submitted to it, both orally and in writing. The Tribunal only makes findings that are necessary to determine the issues before it (and not in relation to all disputes that arose nor in relation to all the evidence led before the Tribunal). Where there was a conflict in evidence, the conflict was resolved by considering the entire evidence and making a decision as to what was more likely than not to be the case. The Tribunal makes findings based on what it considers to be more likely than not to be the case, considering the oral evidence, the written evidence and all the paperwork that existed at the relevant time.

Findings in fact

15. The second respondent operated a van offering fast food which employed a number of staff. There were fewer than 10 employees. The claimant was

engaged by the respondent from 27 January 2017 as catering assistant. She ultimately earned £9.50 an hour and worked rotational shifts of one week of 1 shift (9 hours) the following week 2 shifts (totalling 18 hours).

16. The second respondent decided to place the business for sale. An advert was prepared making it clear that the business was being sold as a going concern.

17. The second respondent knew there were some protections in respect of staff in situations where ownership of a business transfers, but he did not make any effort to check the position as to the legal obligations with regard to what staff engaged in a business whose owner transfers are required by law to be told (or how they are to be told). It was open to the second respondent to have done so. Such information is readily available.

18. The claimant (and other colleagues) was told by Mr McKay, director of second respondent (who worked in the business along with his wife, the claimant and others) that the business was being placed up for sale.

19. Mr McKay had told the claimant that his understanding was that if a buyer was found and that buyer did not want to employ staff, redundancy payments would be due. That was his understanding at the time.

20. On 30 May 2022 the first respondent reached agreement with the second respondent to purchase the business as a going concern. A number of conditions required to be satisfied, including in relation to licence and local authority approvals. The first respondent had advised the second respondent that they intended to operate the business as a going concern with the staff remaining in place. The second respondent understood that the first respondent would continue to engage all staff the second respondent had engaged on the same terms and conditions and that there would be no measures envisaged by them to alter their employment. The second respondent understood that it would be “business as usual” following 1 August 2022. No information had been communicated to the second respondent by the first respondent in writing as to this.

21. Mr Brannigan (from the first respondent) had asked Mr McKay if the staff were happy to remain in the business and Mr McKay told him that he had understood staff were happy to retain their positions and work for the first respondent post transfer. There was no information in Mr McKay's possession that suggested staff were not happy remaining in their roles or that they did not want to work with the first respondent in their roles. Mr McKay had no knowledge of Mr Brannigan's intention to alter the terms and conditions of those engaged in the business (and this had not been communicated to the second respondent in writing or otherwise).

22. On 31 May 2022 Mr McKay advised the staff, including the claimant, verbally, that an owner had been identified and that the intention was to sell the business as a going concern. The claimant was advised that the sale could take up to 10 weeks.

23. Unknown to Mr McKay, Mr Brannigan, director of the first respondent, contacted the claimant and other staff to introduce himself as the soon to be new owner. The claimant advised Mr Brannigan that she understood she had a choice to make namely accept a redundancy payment from the second respondent or accept the terms and conditions the first respondent would offer.

24. The claimant believed that she would have to decide whether or not to take a redundancy payment from the second respondent or terms that the first respondent would offer her. The claimant's understanding was not articulated or communicated to Mr McKay who had understood the staff would transfer seamlessly to the first respondent, which was what he had understood the first respondent wanted (to ensure the business could operate).

25. There were regular discussions about the change of ownership during the time the claimant worked prior to the transfer. Customers would on occasion ask about the transfer. Mr McKay had advised customers about the same and that the business would continue to operate as a going concern, the only difference being that there would be a new owner. The claimant was present on at least one occasion where this was communicated.

26. In or around July once the terms and conditions were agreed between the first and second respondent, the claimant was told that the business transfer date would be 1 August 2022 which was the transfer date and that there would be no impact upon the claimant as to her terms and conditions as it would be "business as usual". There was no written communication as this was all communicated verbally. It was communicated on more than one occasion, but the claimant had understood that she was able to elect between a redundancy payment or terms and conditions with the first respondent (but had not mentioned this to the second respondent).

27. The claimant continued to work as she had done previously following 1 August 2022 and worked for the first respondent. She worked for the first respondent on the same basis (and subject to the same terms) as she had done when working for the second respondent until a few weeks later when the claimant was asked to agree to revied terms and conditions with the second respondent. She declined those terms and resigned.

28. On 18 August 2022 the claimant sought a redundancy payment from the second respondent, which was what she had understood she had been told she would be entitled to.

29. The business remained as was the case when it was operated by the second respondent following the transfer to the first respondent, the only change being a new owner was in place. In all other respects the business retained its identity and continued to trade as before.

Observations on the evidence

30. Both parties were clear in their recollections. There was only one material factual dispute The claimant maintained that she had never been told by Mr McKay that the business was being sold as a going concern or that the first respondent would continue to employ her on her normal terms and conditions. Her position was that she understood she would be able to choose between a redundancy payment (to compensate her for her service) or new terms and conditions the first respondent was offering.

31. The second respondent disputed the position. Mr McKay was clear that he had repeatedly mentioned the business being sold as a going concern and that staff would continue as normal with the buyer (as they had done with the seller). Mr McKay candidly accepted prior to a buyer having been obtained, just after the business had been put up for sale, he had referred to redundancy being an option for staff but only if the new buyer did not wish to retain the current staff. He accepted that was an error. He made it clear that in fact the buyer that was ultimately identified did wish to retain staff and so there was no decision to be made and redundancy was never mentioned again. His position was that the claimant had not specifically raised this with him (and had she done so, he would have made the position clear). He was clear in having told all the staff that the first respondent had bought the business as a going concern and it would be "business as usual" following the transfer.

32. The Tribunal concluded that the claimant was in error so far as she believed she had been told by the second respondent that she could choose to accept redundancy or work for the new employer once a buyer had been secured. The claimant had been told this prior to a buyer having been identified but she had not been told that this would be the position once the first respondent had been identified and the sale secured. It was more likely than not that the claimant believed that she had been told prior to a buyer having been located that she was entitled to a redundancy payment if she chose not to stay on and that this was always going to be an option for her. The communications she had received following that initial discussion were viewed by her, through that prism. In other words, the claimant continued to believe that she was entitled to decide whether or not to accept a redundancy payment even although that had not in fact been told to her and she had been told (and it was repeated) that the mew buyer would employ the staff who would transfer seamlessly post transfer. The claimant had laboured under an error. She had not raised it with the second respondent formally (or informally) and so the issue did not arise until after the transfer when the claimant sought a redundancy payment.

33. It was more likely than not that the claimant been told that the first respondent had decided to continue to engage the staff on their current terms and

conditions. The business had been advertised for sale "as a going concern". Mr McKay was clear that he wished to sell the business as a going concern and it made sense to do so, not least given the requirement for licences for those working within the business, which all the current staff had. While the new owner may wish to change the staffing going forward it was more likely than not that the first respondent had told the second respondent their intention was to continue to engage staff as they had been engaged.

34. It was unlikely the second respondent would suggest that redundancy would be available (at significant cost to the second respondent) when there was an alternative (at no cost), which was more credible, namely the purchaser deciding to purchase the business at it had been advertised, as a going concern, without the need for the second respondent to incur costs pertaining to redundancy (when such costs would not be required by law).

35. The Tribunal took into account what the first respondent had said in their ET3 even although they had chosen not to be present or represented at the hearing. The Tribunal considered that it was implausible from the evidence heard that the first respondent did not wish to engage the staff in the business, not least given the staff did in fact work for the first respondent and the business had been advertised for sale as a going concern. It was implausible that the business would not in fact be sold as a going concern given the nature of the business (including the fact those working on it required to have licences to work in it, which the existing staff had). While the first respondent may well have desired there to be fewer costs (such as staffing) it was unlikely the first respondent had specifically undertaken not to engage the existing staff given the nature of the business.

36. It was more likely than not that the first respondent had learned from the claimant that her understanding was that she had the option of receiving a redundancy payment from the second respondent if they did not wish to accept whatever terms and conditions the first respondent chose to offer (such understanding being a misunderstanding stemming from what they had been told prior to the buyer having been identified but this not having been communicated to the claimant as applicable once the first respondent had

been identified). Once the first respondent had been told that was the claimant's understanding as to what the second respondent was going to do, that would be something to the first respondent's advantage and something, if they had a choice, they would more likely agree to.

37. The Tribunal found Mr McKay to be credible in his evidence that he had not been advised by the first respondent that they intended to do anything other than purchase the business a going concern as had been advertised. No written communication as to any measures envisaged by the first respondent had been issued. There was nothing to dispute the second respondent's understanding that no measures were engaged (which is what he verbally communicated to the affected staff).

38. The difficulty arose because the second respondent had not set out the position to the claimant in writing at all. Had the position been set out in writing, there would have been no doubt and the claimant's misunderstanding would have been raised immediately and her error would have been dealt with. It was also unfortunate that the claimant had not fully understood her rights under TUPE (particular with regard to the offer of revised terms and conditions post transfer).

Law

39. The duty to inform and consult representatives is contained in the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE). Regulation 13 provides that:

(1) '…..any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it"; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives

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

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

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

40. Paragraph 8.70 of the IDS book on TUPE notes that the wording of Regulation 13(5) "*suggests that the information must always be provided in writing*." It appears that there is no clear authority confirming such a position but that is what the regulation says. Had Parliament intended communication to be otherwise than in writing (such as verbal) such a position would have been made clear. The natural interpretation is that the information must be in writing – so it can be posted or handed (ie delivered) to the individuals. Simply communicating the information verbally is not enough.

41. While it may seem unfair for small businesses to require such communication in writing, had Parliament wished to make exceptions for small business (such as it did with regard to election of appropriate representatives) the legislation could have been amended to make this clear. Absent such a clarification, a

reasonable and fair interpretation is that the informing of the relevant material should be in writing (as widely understood) but not verbal.

42. Under regulation 13 the appropriate representative is an existing trade union representative, or either an existing employee representative or one elected specifically for the purposes of complying with the duty to inform and consult: regulation 13(3). Regulation 13A was introduced in 2014 and allows employers with fewer than 10 employees to consult with employees directly without the need to carry out an election for elected representatives.

43. Regulation 15 of the TUPE Regulations sets out how the provision can be enforced and provides that:

> *'(1) Where an employer has failed to comply with a requirement of regulation 13….. a complaint may be presented to an employment tribunal on that ground— (d) in any other case by any of his employees who are affected employees.*
>
> *(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show— (a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and (b) that he took all such steps towards its performance as were reasonably practicable in those circumstances. ….*
>
> *(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) …. he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings. …*

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

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may— (a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or (b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

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

44. Regulation 15(9) makes both the transferor and transferee 'jointly and severally liable' in respect of compensation where a transferor is in breach of the duty to consult under regulation 15(8)(a). The Tribunal is not permitted to apportion liability: **Todd v Strain** [2011] IRLR 11. Whilst it may feel unfair for a transferee to be held to be jointly liable for the failures of the transferor, in fact this provision is designed to address a potential unfairness to the transferee. Under regulation 4(2), on completion of a relevant transfer, all the transferor's rights, powers, duties and liabilities transfer to the transferee. Without regulation 15(9) this would mean that only the transferee would be liable and there would be no incentive on a transferor to comply with the duty to inform and consult. This would undermine the purpose of the provisions, and for that reasons Parliament has made both the transferor and transferee jointly and severally liable.

45. In relation to the amount of compensation to be awarded under regulation 16(3), this shall be a sum 'not exceeding 13 weeks' pay …. as the tribunal considers just and equitable having regard to the seriousness of the failure of

the employer to comply with his duty.' As is noted in **Sweetin v Coral Racing** [2006] IRLR 252 (EAT), Parliament intended the awards to be penal in nature rather than solely compensatory.

46. Gibson LJ in the redundancy consultation case of **Susie Radin Ltd v GMB** [2004] ICR 893 (CA), suggested the following guidelines at para 45: '

(1) The purpose of the award is to provide a sanction for breach by the employer of the obligations... it is not compensate the employees for loss which they have suffered in consequence of the breach.

(2) The tribunal have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employers default.

(3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult;

(4) The deliberateness of the failure may be relevant, as may be the availability to the employer of legal advice about his obligations…

(5) …..a proper approach in the case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to the extent to which the tribunal consider appropriate'.

47. **Sweetin v Coral Racing** [2006] IRLR 252 confirmed the applicability of this guidance to TUPE regulation 13 cases, but considered that the tribunal also could have regard to any loss sustained by the employee cause by the employer's failure, 'so long as it recognised that the focus of the award requires to be the penal nature which governs it and proof of loss is neither necessary nor determinative of the level at which to fix the award' (paragraph 31).

48. Mitigating circumstances can include factors that were relied on in any 'special circumstances' defence.

Discussion and decision

49. It was conceded in this case that there was a TUPE transfer. That was a correct concession given the economic entity which transferred retained its identify following transfer. The business remained the same, in terms of goodwill and the offering to customers. While the first respondent argued they had purchased the assets only, from the evidence presented to the Tribunal it was clear that in fact staff did transfer and the business was clearly the same as it had been prior to transfer. The notice of sale had made it clear that the intention had always been to sell the business as a going concern.

Was the relevant information communicated

50. Given there was a relevant transfer for the purposes of TUPE the first issue which arises is what the claimant was told and whether it contained the required information in terms of regulation 13.

51. The first requirement is to confirm the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for the transfer. The claimant had been told about this in May and as soon as the date was known she was advised of this.

52. The Tribunal found that the clamant was advised as to the 'legal, economic and social implications' of the transfer for any affected employees' as she was told that it was the second respondent's intention to transfer the business as a going concern and she would continue to be engaged by the respondent. While the claimant understood that she would be offered new terms and conditions as a matter of fact she was not initially. She transferred, as the second respondent had said, to the first respondent on the terms and conditions she had with the second respondent.

53. The next item is the 'measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact'. The second respondent told the claimant what the position was understood to be, namely the first respondent was buying the business s a going concern. There were no measures the second respondent envisaged taking.

54. The final requirement was that if the employer in question is the transferor, 'the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact'. The Tribunal found that the second respondent had been advised by the first respondent that they intended to engage the staff on their current terms and conditions. It was open to the first respondent to have advised the second respondent of any measures envisaged but the absence of any communication setting out any such measures, it was more likely than not that the first respondent did not intend to take any such measures. There were therefore no measures envisaged by the first respondent that required to be communicated to the claimant.

55. In the absence of any measures being envisaged, there was no requirement to consult. The only obligation was to inform staff as to the relevant position.

Is oral communication enough?

56. The next issue is whether the communication to the claimant of relevant information orally was compliant with regulation 13, in the absence of any written communication.

57. The Tribunal considered that regulation 13(5) makes it clear that information requires to be set out in writing. It cannot be posted if the information is oral. Reference to "deliver" is to hand delivery instead of posting. The clear purpose is to require written communication and thereby avoid the situation that arose in this case, namely a fundamental dispute as to what staff were told (or not told). The Tribunal therefore finds that there was a breach of the rules as the information was not communicated in writing, as required, although all the relevant information was communicated orally.

Remedy

58. The Tribunal next considered compensation. The Tribunal should start with the maximum amount, namely thirteen weeks' pay but consider what sum the

tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

59. In **Sweetin v Coral Racing** 2006 IRLR 252 the Employment Appeal Tribunal held that the award is intended to be punitive and therefore the amount of the award should reflect the nature and extent of the employer's default. The Employment Appeal Tribunal stated that while the Tribunal is entitled to have regard to any loss sustained by the employees caused by the employer's failure, the focus of the award 'requires to be the penal nature which governs it and proof of loss is neither necessary nor determinative of the level at which to fix the award'.

60. The tribunal should consider the seriousness or gravity of the default and any mitigating circumstances. Such circumstances might exist

61. The Employment Appeal Tribunal has stressed, such as in ***Todd v Strain*** 2011 IRLR 11 that Tribunals should not approach this provision in a mechanical manner, particularly where some information has been given and some consultation has taken place. The award is therefore likely to be relatively small where the failure is not deliberate.

62. In this case the Tribunal finds that the second respondent did take steps to communicate the information to the claimant. However, the information was communicated in a relatively piecemeal fashion and only orally. The difficulty with such an approach was that the claimant did not properly understand what she had been told. She was labouring under a misapprehension from information she had been told prior to the sale being concluded which would have been avoided had the information been communicated in writing.

63. Had the information been communicated in writing the issues arising in this case would not have arisen as the claimant would have clearly understood the position. Firstly, the claimant would have understood that there was no obligation to consult, since the second respondent's position (as understood by them) was that the first respondent did not envisage any measures. Secondly, and more importantly, had the information been set out in writing the claimant would have been able to check the position with the first

respondent and deal with any discrepancies as to what she had been told in contrast to what the second respondent had been told (bearing in mind there was ongoing discussion between the first respondent and the transferring staff).

64. The Tribunal considered the approach set out in **Susie Radin** above and its application to this case.

65. Firstly, it is noted that the purpose of the award is to provide a sanction for breach by the employer of the obligations. It is not compensating the employees for loss which they have suffered in consequence of the breach.

66. Secondly it is noted that the tribunal have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default. The Tribunal considered carefully what the default was by the second respondent in context of the facts.

67. Thirdly it was noted that the default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult. In this case the default was relatively significant since it led to the issues arising in this case. It was a technical failure in the sense the required information was provided but as it was not provided in writing, the claimant had been unable to comprehend what she had been told verbally given her belief as to the position (which stemmed from a misunderstanding as to what she had been told at the outset). Had the information been communicated in writing, the misunderstanding (which was, to an extent, caused by the second respondent) would have been avoided or at least clarified.

68. Fourthly, the Tribunal took into account the deliberateness of the failure. It was open to the second respondent to have taken legal advice. The second respondent could have researched the matter himself. There was a level of understanding about TUPE, but no real steps were taken to ascertain exactly what the transferor's obligations were in this case. The failure was not deliberate but no steps had been taken to check what required to be done which materially disadvantaged the claimant.

69. In this case there was material compliance with the information requirements, but the issue was how the information was communicated resulting in the confusion that led to the case being brought.

70. Taking all of the foregoing issues into account, the Tribunal concluded that it is just and equitable to make an award of 2 week's pay. That amounts to 27 hours x £9.50 namely the gross sum of £256.50. While the failure may be seen as technical, the effect of the failure was not insignificant. The failure was not intentional but there was no good reason why the second respondent did not seek advice to ensure that the rules were followed. Had that been done, the issues arising in this case were likely to have been avoided. It is for that reason that the legislation requires the information to be in writing.

71. In terms of regulation 15(9), both respondents are jointly and severally liable for the sums ordered.

D Hoey

_____

Employment Judge

24 August 2023

_____

Date

22 December 2023

Date sent to parties _____