Neutral Citation Number: [2024] EAT 88

Case No: EA-2022-001114-DXA

IN THE EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 May 2024

Before:

HIS HONOUR JUDGE AUERBACH

- -

Between:

MRS WENDY DRAKE	**Claimant**
- and -	
CHURCHILL CONTRACT SERVICES LTD	**Defendant**

- -
- -

Will Young (instructed through **Advocate**) for the **Claimant**

The **Respondent** did not appear and was not represented

Hearing date: 22 May 2024

- -

JUDGMENT

SUMMARY

Transfer of Undertakings

Practice and Procedure

The claimant in the employment tribunal worked for the respondent as a cleaner, having transferred into its employment pursuant to the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (TUPE). The respondent consulted with the claimant about proposed changes to her terms and conditions but no agreement was reached. The respondent then dismissed the claimant on notice and re-engaged her on new terms.

The claimant claimed unfair dismissal, acting as litigant in person. At the full merits hearing the tribunal, adopting the list of issues in the minute of an earlier case management hearing, considered and decided the claim as one of ordinary unfair dismissal and dismissed the claim.

The claimant appealed, contending that the tribunal should have identified that her claim form, in substance, also raised a complaint of automatically unfair dismissal contrary to regulation 7 of TUPE, which had not been abandoned.

The appeal succeeded. This was having regard to the fact in particular that the claimant had stated in her claim form that the transferor had written to her prior to the transfer indicating that the respondent may carry out an organisational review leading to changes in terms or redundancies, she later sent an email to the tribunal stating that she had received such a letter, and also referred to it in the agenda form for the case management hearing.

This put the tribunal on notice that the claimant at least may be seeking to bring what amounted to a regulation 7 claim. Bearing in mind that she was a litigant in person, it was incumbent on the tribunal proactively to raise and seek clarification of that at the case management hearing. As it was not apparent that it had done so, and given that the claimant's email which began with a reference to that letter was also before the tribunal at the full merits hearing, it was incumbent on the tribunal at the full merits hearing proactively to raise the issue for clarification. Recording that the parties had confirmed the issues as stated in the minute of the case management hearing was not, in this case, sufficient.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal appeals from the decision of Employment Judge Cowen, sitting at Watford, arising from a full merits hearing, dismissing her claim of unfair dismissal. The claimant was a litigant in person in the tribunal. At a preliminary case management hearing, and the full merits hearing, she represented herself. The respondent was represented at both hearings by a consultant.

2. In the EAT the claimant's notice of appeal was drafted and presented by her then representative, but she subsequently became unrepresented. However, she has been represented at the hearing of the appeal today by Mr Young of counsel, instructed via Advocate. The respondent resists the appeal. However, its representatives notified the EAT in advance of today's hearing that it would not be attending or represented today. It relies upon its written Answer to this appeal, which, I interpose, was drafted by counsel, and upon its further written skeleton argument submitted for today.

Factual Background

3. The facts as found by the tribunal can be summarised as follows.

4. The claimant was employed by the respondent's predecessor, ISS, as a cleaner. On 1 November 2018 her employment transferred to the respondent pursuant to the **Transfer of Undertakings (Protection of Employment) Regulations 1986** (TUPE).

5. In or around March 2019 the claimant's then manager, Zara, began a consultation process with her and other colleagues about changes to their terms and conditions. She was told that the client wanted to reduce the number of hours of cleaning per week. Further consultation meetings with the claimant followed in April, but no agreement was

reached. The matter was not followed up after that and the claimant continued to work six-and-a-half hours per day including a thirty-minute break.

6. In August 2019 Tracy McDonald, who had become the claimant's Account Manager, "recommenced the consultation process which had previously been abandoned". There were consultation meetings in August and September in which proposals for different working times and paid hours were discussed. The claimant at one point mentioned that if she was offered redundancy, she would take it. She also, "indicated that she felt that the process had been going on too long as she did not make the distinction that the respondent did between the process with Zara and this process".

7. There was further correspondence and meetings through October and November 2019. The claimant was told that the respondent did not propose to make redundancies. Ultimately, no variation to her contractual terms was agreed. The respondent gave the claimant twelve weeks' notice of dismissal and then reengaged her on the final proposed new terms, which involved her working six hours per day without a paid break, and entailed a net reduction in her salary. An internal appeal was unsuccessful.

8. The tribunal recorded that the claimant had continued to work for the respondent on the new terms since February 2020 and indeed I have been told at this hearing that she continues to do so today.

The Tribunal's Decision

9. Under the heading "The Issues", the tribunal said this:

> **"6. These were identified by EJ Maxwell in an earlier PH and confirmed with the parties at the start of the hearing:-**
>
> **Unfair Dismissal**
>
> **1. The parties agree the claimant was dismissed.**

> **2. What was the reason or principal reason for dismissal? The respondent says the reason was:**
>
> **2.1 a substantial reason capable of justifying dismissal, namely the need to vary the Claimant's terms;**
>
> **2.2 alternatively, redundancy.**
>
> **3. Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?**
> **Redundancy**
>
> **4. If dismissed for redundancy, whether the Claimant is entitled to a redundancy payment."**

10. In its statement of the law, the tribunal began with the following:

> **"7. Where an employee has been TUPE transferred to a new employer, their terms and conditions are maintained, as they were with the transferor. Contractual changes can occur if both parties agree to them. Where the employee refuses to agree to a contractual change, the transferor can make the change they require by terminating the existing contract, by giving contractual notice and combining this with an offer of re-engagement on the revised terms and conditions to come into effect on the day after the old contract expires. In these circumstances, there will be no breach of contract as proper notice has been given."**

11. The remainder of the self-direction as to the law identified that there will be no breach of contract by an employer giving an employee contractual notice and offering to reemploy them on new terms and conditions. It also set out that for the purposes of an unfair dismissal claim, such a dismissal may potentially be defended as being for a substantial, fair reason and/or, depending on the facts, by reason of redundancy; and the tribunal set out relevant principles emerging from the authorities as to when a found factual reason will be sufficient to amount to a substantial fair reason.

12. After setting out its findings of fact, in its dispositive reasoning the tribunal started not with the reason for dismissal but with its consideration of the process that had been followed. It considered that the respondent had followed a fair process from August onwards, and that the fact that the previous process had "faltered and stopped" did not

make that later process unfair. The tribunal went on to find that there was no redundancy situation, in law, and so the reason for dismissal was not redundancy.

13. However, the tribunal had directed itself that the reason would amount to a substantial, fair reason if the employer reasonably considered that it had a sound business reason for wanting to change the terms. Applying that approach the tribunal said this:

> **"30. In order to decide whether the dismissal was fair, I must consider whether there was a sound business reason for the change in terms. The Respondent must prove that there are 'clear advantages' to the changes proposed. In this case the Respondent says that the changes resulted from a demand by the client to reduce the total hours of work within the contract. This has also been said in correspondence to be the requirement of the client for cleaners to work only 4 hours per day. I have seen no evidence of the request from the client, as this was not contained in the bundle and the Respondent's witness did not refer to it in detail.**
>
> **31. However, on a balance of probabilities I accept that the Respondent was asked by the client to reduce the overall hours provided. To go through the whole process of re-negotiating a large number of contracts would seem churlish, if there were not a business need to do so. I therefore accept that the Respondent had such a sound business reason. The reason for dismissal was therefore SOSR."**

14. The tribunal went on to consider whether the respondent acted reasonably in treating that as a sufficient reason to dismiss. It considered why the claimant had resisted the changes, and the perspective of the respondent. In doing so, it said, at [33]:

> **"The evidence of Mrs. McDonald that she was trying to find a way to allow the Claimant to continue to work as much as possible while conforming to the requirements of the client is reliable".**

15. As against that, the tribunal found that the claimant, for her part, perceived this to be all one process, not distinguishing between the stages involving Zara and, later, Mrs McDonald. The tribunal also found that at one point it appeared that a compromise solution acceptable to both parties had been reached, but then the claimant changed her mind and thereafter both parties became more entrenched. It concluded, at [36]:

> **"Having tried, and almost succeeded in gaining an agreement with the Claimant and having a requirement of the client to reduce the number of**

hours, I am of the view that it was reasonable for the Respondent to treat the SOSR as a reason for dismissal. I therefore find that the Claimant's dismissal was fair and dismiss her claim."

The Relevant TUPE Regulations, Grounds of Appeal, Authorities

16. The relevant parts of TUPE regulations 4 and 7 are as follows:

"4.(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

… …

(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—
(a) the transfer itself; or
(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(5) Paragraph (4) does not prevent a variation of the contract of employment if—
(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or
(b) the terms of that contract permit the employer to make such a variation.

… …

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

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

(3) Where paragraph (2) applies—
(a) paragraph (1) does not apply;
(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—
(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or

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

17. The original grounds of appeal prepared by the claimant's then representative were lengthy and discursive. There were three numbered grounds. However, in the run-up to the present hearing Mr Young indicated, and he confirmed this morning, that ground 3 is no longer pursued. Ground 2 is also subsidiary to ground 1.

18. The nub of the challenge now mounted by this appeal can be shortly stated. It is that the tribunal erred because it failed to consider and decide whether the reason or principal reason for the claimant's dismissal was the TUPE transfer from ISS to the respondent and, if so, whether the dismissal was also for an economic, technical or organisational (ETO) reason within regulation 7(2), and hence whether this was an automatically unfair dismissal pursuant to regulation 7. It is contended, that, instead, the tribunal wrongly treated the complaint as being solely of ordinary unfair dismissal.

19. This is said to be an error because the case that the claimant had been dismissed by reason of the TUPE transfer was being advanced by her in her original claim form and was never abandoned. The tribunal had wrongly failed to capture this in the list of issues produced at the case management hearing. It had then erred at the full merits hearing by slavishly following that list of issues and failing proactively to enquire and clarify whether the claimant was advancing what amounted to a claim of automatically unfair dismissal by reason of the transfer in addition to her claim of ordinary unfair dismissal.

20. The authorities cited to me included the following.

21. In **Mensah v East Hertfordshire NHS Trust** [1998] EWCA Civ 954; [1998] IRLR 531, the claimant had, in her claim form, raised a complaint of discrimination regarding her treatment with respect to vacancies in both the maternity and the neonatal units at one of the respondent Trust's hospitals. Thereafter, the references by both the respondent and the claimant in the course of the litigation were only to the issue of vacancies in the maternity unit. The claimant did not advance any evidence or argument at the full hearing on the question of vacancies in the neonatal unit. The tribunal decided her claim solely by reference to the issue of vacancies in the maternity unit. The Court of Appeal held that the tribunal had not erred by failing to consider the question of vacancies in the neonatal unit, in circumstances where the claimant had not put forward any evidence or argument with respect to that aspect at the full merits hearing.

22. In **Parekh v London Borough of Brent** [2012] EWCA Civ 1630, the claimant was a litigant in person claiming unfair dismissal. The respondent's case was that the dismissal was by reason of capability. However, the list of issues produced by the tribunal at a case management hearing did not identify any issue as to the reason for dismissal, but only referred to issues going to the fairness or not of the claimant having been dismissed for that reason in all of the circumstances of the case. In an oft-cited passage, Mummery LJ, said the following:

> **"30. Thirdly, the list was described by the employment judge as the issues 'definitively recorded' by him. He recorded them following the discussions at the PHR by Mr Parekh and Mr Ross, appearing for the Council, with him. The list was not the product of any adjudication, let alone any binding adjudication, of a dispute of substantive fact or law between the parties, such as whether capability was the reason for the dismissal, or of a procedural application or dispute.**
>
> **31. A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimal. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive**

> **hearing to those in the list: see Land Rover v. Short Appeal No. UKEAT/0496/10/RN (6 October 2011) at [30] to [33]. As the ET that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: see Price v. Surrey CC Appeal No UKEAT/0450/10/SM (27 October 2011) at [23]. As was recognised in Hart v. English Heritage [2006] ICR 555 at [31]-[35] case management decisions are not final decisions. They can therefore be revisited and reconsidered, for example if there is a material change of circumstances. The power to do that may not be often exercised, but it is a necessary power in the interests of effectiveness. It also avoids endless appeals, with potential additional costs and delays."**

23. In **McLeary v One Housing Group Ltd** UKEAT/0124/18, the claimant, who had resigned, had claimed that she had been the victim of a number of incidents of discriminatory treatment during employment and that she had been unfairly constructively dismissed. Reading the particulars as a whole, it was clearly her case that the various alleged acts of discrimination during employment had contributed to the undermining of trust and confidence and her decision to resign. At [88], I said this:

> **"I have also considered whether it might be said that it would not be appropriate for the Tribunal, as it were, to invite a claimant to add a wholly new complaint. Indeed, it would not. However, what was necessary here, starting with the Case Management Hearing, was simply to clarify the substance of what the Claimant was saying and the claims that she was seeking to bring. A margin of appreciation should indeed be allowed to the Judge below, as to how such matters are managed; but when, as in this case in my judgement, it shouts out from the contents of the Particulars of Claim that it is being alleged that there have been a number of acts of disability discrimination that have, along with other acts, contributed to an undermining of trust and confidence that has driven an employee to resign. and the employee is effectively a litigant in person and has no professional representation, this is a matter that should, at the very least, be raised at the Case Management Preliminary Hearing so that clarification can be sought."**

24. I concluded that the tribunal had erred by not, at least, proactively enquiring and seeking clarification of whether the claimant was, in substance, also claiming that there had been a discriminatory, as well as an unfair, constructive dismissal.

25. In **Mervyn v BW Controls Ltd** [2020] EWCA Civ 393; [2020] ICR 1364 the factual account given in the claim form would have potentially supported a complaint of constructive unfair dismissal on the footing that the claimant had resigned. However, at a case management hearing, the case she advanced was that she had been actually dismissed and had not resigned. The respondent's case was that she had resigned, and so her claim should fail. The tribunal which heard the case found that the claimant had resigned, and dismissed her claim.

26. Bean LJ, after referring to the tribunal's general case management powers, and authorities including **Parekh**, also considered **Scicluna v Zippy Stitch Ltd & Ors** [2018] EWCA Civ 1320, a case in which both parties were represented throughout, and the discussion there of the circumstances in which an earlier agreed list of issues might be revisited at a full merits hearing. At [38] Bean LJ said:

> **"I do not read the last sentence of the judgment of Underhill LJ in *Scicluna* as imposing a requirement of exceptionality in every case before a tribunal can depart from the precise terms of an agreed list of issues. It will no doubt be an unusual step to take, but what is 'necessary in the interests of justice' in the context of the tribunal's powers under Rule 29 depends on a number of factors. One is the stage at which amending the list of issues falls to be considered. An amendment before any evidence is called is quite different from a decision on liability or remedy which departs from the list of issues agreed at the start of the hearing. Another factor is whether the list of issues was the product of agreement between legal representatives. A third is whether amending the list of issues would delay or disrupt the hearing because one of the parties is not in a position to deal immediately with a new issue, or the length of the hearing would be expanded beyond the time allotted to it."**

27. Bean LJ went on to consider the matter of striking a balance between the need for the tribunal to avoid stepping into the arena and the need, where appropriate, to make proactive enquiries in order to clarify the basis of the claim being advanced. In the course of this he considered a number of authorities including **Mensah**, **Muschett v HM Prison Service** [2010] IRLR 451 and **McLeary**. His overall conclusion was as follows:

> **"43. It is good practice for an employment tribunal, at the start of a substantive hearing with either or both parties unrepresented, to consider whether any list of issues previously drawn up at a case management hearing properly reflects the significant issues in dispute between the parties. If it is clear that it does not, or that it may not do so, then the ET should consider whether an amendment to the list of issues is necessary in the interests of justice.**
>
> **44. In this case (putting to one side the claim for alleged discrimination) the pre-reading of the essential material (in particular the ET1 and ET3) which no doubt occurred should have indicated to the tribunal that it was in truth far more likely than not that the Claimant had resigned, and that the real issue between the parties was (or should be) why she did so.**
>
> **45. Against that background, and with the Claimant appearing once again in person, I do not think, with respect, that it was enough for the Tribunal simply to ask at the start of the substantive hearing whether the parties confirmed the previous list of issues. It would not have amounted to a 'step into the factual and evidential arena' for the tribunal to have said that it seemed to them that there was an issue as to whether Ms Mervyn has been dismissed or had resigned and that the list of issues ought to be modified accordingly, perhaps on the lines suggested in the Respondent's agenda form produced for the case management hearing. The Respondents had suggested these questions:**
> **i) Was the Claimant dismissed, if so, what was the reason for the dismissal, and did the Respondent act reasonably in treating it as a reason for dismissal?**
> **ii) If the Claimant was not dismissed but resigned, why did she resign? Was the resignation in response to any behaviour by the Respondent amounting to constructive dismissal?**
>
> **46. Such a course of action would of course have required the tribunal to ask both parties whether they were in a position to proceed immediately. But, as was fairly accepted by Mr Shepherd in argument, in this case no adjournment would have been necessary, save possibly until the afternoon of the first day of the hearing. The Claimant had set out her case, including what a lawyer would describe as allegations of repudiatory conduct, in her witness statement. The Respondent had eight witnesses available to deal with the contents of that statement. In Mr Fowler's witness statement he had said that, in view of the case management order that it would not need to hear evidence about his alleged mismanagement, he would not address 'Marion's misplaced claims' but added that they were untrue and irrelevant to the employment relationship in any event. He could almost certainly have given evidence about the disputed facts without significant delay or disruption of the hearing."**

28. Singh LJ agreed. Asplin LJ, in a short concurring speech, said this:

> **"51. Although it would have been most convenient and appropriate had the matter been clarified at the case management hearing, in the circumstances of this case, there was nothing to prevent the tribunal from making the amendment. Obviously, the tribunal must take care not to**

> **step into the factual and evidential arena and not to be perceived as favouring one party over another. However, in order to do justice to all parties, it is equally important, where at least one of those parties is unrepresented, to clarify the issues which arise on the pleadings and to seek to confirm whether any and, if so, which claims have been conceded."**

The Prior Course of the Litigation and Basis of the Tribunal's Decision

29. In the present case, the claimant presented her Claim Form as a litigant in person. In section 8.1, she did not in fact tick the box for, "I was unfairly dismissed" but ticked the box for, "I am making another type of claim which the Employment Tribunal can deal with". She wrote there:

> **"My claim is to do with TUPE, unfairly treated, being dismissed unfairly, not get proper notice and now losing £100 a month and being treated unfairly by company as on different hours to everyone else".**

30. In box 8.2, for the background and details of the claim, she wrote the following:

> **"A recap of all the relevant points of my situation are as follows.**
>
> **1) I was TUPE'd over from iss to churchill.**
>
> **2) once TUPE'd over in Nov 2018,churchill informed me of the decision to change my working hours to which I refused, as a result they began a consultation process that lasted u til January 2020, which included a 6 month gap (from may-August)with no communication at all regarding the process, Their justification for this was that the site manager replaced and new manager took over my consultation period was effectively reset.**
>
> **3) my hours were stated in my previous contract and therefore fall under TUPE regulations when chruchhill took this position on.**
>
> **4) prior to being TUPE'd I received a letter stating the terms and condition of the TUPE as stated by churchill, in which states chruchhill may intend to carry out an organization review regarding the number of operational hours, the structures, posts and roles required across the site with in the contract that may result in redundancy should the review result in possible redundancies, we are hopeful we will be able to redeploy staff with in the churchill group, therefore limiting the need for compulsory redundancies.**
>
> **5) churchill offered me an alternative positions in different locations but not possible for me to take due to other commitments.**
>
> **6) churchill argue the position within the company still exists and also that the hours per shift changing from 6.5hours to 6per hours per shift did not constitute a redundancy situation.**

> **7) therefore they have decided to terminate my contract and reengage me on a new contract with the amended hours and loose of pay. I have stated I will change my hours for a1 months trial and also stipulate I am working under protest. I have worked at NIBSC for 14 years with the same hours 5-11.45 this suit me they are forcing me in to do 6-12.30 this is not suitable for me but will not listen ."**

31. The Grounds of Resistance put in by the respondent included the following:

> **"At some point following the TUPE transfer, the Respondent's client, NISBC, requested a revision to hours of work of the cleaning service offered".**

32. In concluding paragraphs, the respondent maintained that the reason for dismissal was some other substantial reason or, if not, then redundancy; and there was a denial that the respondent had breached any legislation including TUPE.

33. The matter was listed for a case management preliminary hearing (PH) in the tribunal to take place on 25 October 2021. In the usual way, the parties were given agenda forms to complete in preparation for that hearing. Box 2.1 of the agenda form asks, "What are the complaints (claims) that are brought?" The claimant wrote there:

> **"The TUPE went on far too long and loss of earnings of £100 per month as well as discrimination due to my age, 64".**

34. There is a section of the form headed "The issues" which asks, "What are the issues or questions for the Tribunal to decide?" The claimant wrote:

> **"You were advised by ISS that Churchill would be amending your working hours when you were TUPE'd over. Include the letter. Hence, the consultation started in February and not September as indicated by the Respondent. The letter/email from Zara indicates this. The consultation went on for 26 months. I believe that I am also being discrimination due to my age (64) and that I am slower than the other workers".**

35. In the run-up to that hearing, on 30 September 2021, the claimant also sent an email to the tribunal, copied to the respondent, which began:

> **"I am 64 and work at NIBSC with 20 years' service. On 1st November 2018, I was TUPE'd over from ISS to Churchill. I received a letter from**

> **ISS explaining that Churchill will be changing hours. The letter stated that if the new hours did not work for you, then they would try to redeploy staff and if not voluntary redundancy would apply (letter attached)".**

36. This email went on to give the claimant's account of the consultation meetings in March and April, the impact of the lack of further communication for some months and then what happened following the resumption of the consultations by Mrs McDonald in the autumn. It also gave an account of other matters of which she wished to complain. It referred to the letter from ISS explaining that the respondent will be changing hours as being attached. The image of the email in my bundle shows that there was indeed an attachment, although I did not have a copy of that attachment in my bundle.

37. I come to the PH on 25 October 2021, which was before EJ Maxwell. As I have noted, the claimant was in person and the respondent was represented by a consultant. The first part of the minute consisted of case-management orders that plainly follow a standard format. They include, at [8], under the heading "Claims and Issues":

> **"The claims and issues as discussed at this preliminary hearing are listed in the case summary below. The age discrimination issues will only apply if permission to amend is granted. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side by 8th November 2021. If you do not, the list will be treated as final unless the Tribunal decides otherwise".**

38. In the section headed "Case summary", the tribunal included, at [38] and [39]:

> **"38. The Claimant says:**
>
> **38.1 she was in employment as a cleaner from 2001;**
>
> **38.2 her employment TUPE transferred to the Respondent in November 2018;**
>
> **38.3 the Respondent then sought to vary her working hours;**
>
> **38.4 when she refused, the Respondent commenced a consultation process;**
>
> **38.5 she was offered alternative positions at other locations, which were not suitable;**

38.6 the Respondent contended that reducing her hours from 6.5 to 6 did not amount to a redundancy;

38.7 the Respondent dismissed and then re-engaged her on reduced hours and pay;

38.8 she said she would take this as a 1-month trial and thereafter worked under protest;

38.9 she was required to change her working pattern from 5-11.45, to 6-12.30;

38.10 whereas she works 6-hour shifts, her colleagues work 4 hours;

38.11 she was 63 years of age and does not work as fast as younger colleagues.

39. The Respondent defends the claim and contends:

39.1 the Claimant TUPE transferred to it on 1 November 2018;

39.2 their client sought to revise the hours of cleaning;

39.3 there was consultation with the Claimant on various dates;

39.4 the Claimant did not accept the alternatives offered;

39.5 the Respondent gave the Claimant 12 weeks' notice and following the expiry of this agreed to re-engage her on revised terms, with effect from 3 February 2020;

39.6 the Claimant's appeal against dismissal was not upheld;

39.7 she was dismissed for SOSR;

39.8 alternatively, if dismissed for redundancy, no payment is due as she remained in employment;

39.9 her dismissal was fair."

39. Further on, under the heading "Claims", the tribunal wrote this:

"48. During the hearing the Claimant's claims were clarified. She brings an unfair dismissal claim relating to her dismissal and reengagement, in particular because this involved the removal of a paid 30-minute tea break and a change in her start time from 5am to 6am. She also believed that her dismissal may have been a redundancy situation."

40. I pause to note that the claimant was applying to amend to introduce a claim of age discrimination, but it appears that, one way or another, that was not a live issue before the tribunal at the full merits hearing. That aspect is not the subject of this appeal.

41. Further on, in a section headed "The Issues", the tribunal included the following:

> **"2. Unfair dismissal**
> **2.1 The parties agree the claimant was dismissed.**
> **2.2 What was the reason or principal reason for dismissal? The respondent says the reason was:**
> **2.2.1 a substantial reason capable of justifying dismissal, namely the need to vary the Claimant's terms;**
> **2.2.2 alternatively, redundancy.**
> **2.3 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?"**

42. I pause to observe that the tribunal therefore identified there being an issue as to the reason or principal reason for dismissal, but solely identified the respondent's position on that question, being that it was a substantial reason capable of justifying the dismissal or, alternatively, redundancy. It did not identify any case on behalf of the claimant, that the reason was the TUPE transfer, in which case the dismissal would be unfair.

43. As I have noted, at the start of its decision arising from the full merits hearing, at [6], the tribunal said that the issues were "identified by EJ Maxwell in an earlier PH and confirmed with the parties at the start of the hearing". It then reproduced EJ Maxwell's rendition of the issues in relation to unfair dismissal that I have already set out.

44. At [7], the opening sentence effectively identified the principle embodied in regulation 4(1) of TUPE. The next sentence, reading, "Contractual changes can occur if both parties agree them" is accurate as a starting point. It does not extend to what the position would be if regulations 4(4) and (5) of TUPE were said to be in play; but this is not a case in which those regulations were ever invoked. However, it *is* a case in which

the claimant says that the tribunal should have considered whether *regulation 7* applied. That regulation was also not considered in the tribunal's statement of the law.

45. The tribunal's statement of the law in the full merits hearing decision was consistent with the fact that, taking its steer from the minute of the case management hearing, the tribunal considered the claimant's claim solely as being one of ordinary unfair dismissal and, as its substantive decision reflects, decided and determined it solely on that basis.

Arguments

46. The main points of Mr Young's submissions in his skeleton and orally this morning for the claimant may be summarised as follows.

47. Firstly, he says that the claim form included a number of statements that made it clear that the claimant was, in substance, advancing a case that she had been unfairly dismissed by reason of the TUPE transfer. He relied on what she wrote in section 8.1 but particularly on point 4 of what she wrote in section 8.2, where she referred to the letter that she said she had received prior to being TUPEd stating that Churchill may intend to carry out an organisation review regarding the number of operational hours, structures, posts and roles required across the site. He said that that plainly showed that she was asserting that there was contemplated at the time of the transfer a change in terms being initiated by Churchill following the transfer, and that this indeed had come to pass.

48. Mr Young submitted that this was a **McLeary** type of case where it shouted out from the claim form that a claim of this type was, in substance, being advanced, and not merely one of ordinary unfair dismissal. He acknowledged that the mere invocation of TUPE might not be sufficient to make good that argument, because it was clearly at least part of the claimant's case that the respondent had inherited the contractual terms on which she had been employed by ISS, in lawyer's terms, pursuant to regulation 4; and

she was objecting in substance to the respondent having imposed, by dismissing her, a change in those inherited terms. That would not in and of itself necessarily entail that she must *also* be contending that the dismissal was unfair *by reason of* the transfer, contrary to regulation 7. However, he submitted that the inclusion of this paragraph raised at least the possibility that this *was* in substance a further part of the claimant's argument. That possibility needed to be proactively explored by the tribunal.

49. Secondly, submitted Mr Young, this was not a case where it could be said that it was clear that such a claim had been withdrawn before, or at, the PH. On the contrary, the email that the claimant sent in September 2021 referred once again to the letter that she said she had received from ISS pre-transfer, explaining that Churchill will be changing hours; and it stated that that letter was attached to the email.

50. In addition, in the PH agenda at [4.1], the claimant referred to having been advised by ISS that the respondent would be amending her working hours. Although Mr Young acknowledged that this sentence, being written in the second person, might give the impression that the words had been provided to the claimant by an advisor, that did not mean that they did not accurately capture the case that she was seeking herself to advance. Again, these matters put the tribunal on notice that this needed to be confronted by it and explored at the PH. Mr Young suggested that even the judge's own summary of how the claimant put her case, including, at [38.2] and [38.3], that her employment TUPE transferred and that the respondent then sought to vary her working hours, suggested at least the possibility that she was asserting that this was not merely a case where one event followed the other in point of time, but that there was a causal link.

51. Mr Young submitted that, in all these circumstances, the tribunal should have proactively raised the question of whether the claimant was seeking to bring what amounted to a regulation 7(1) claim; but it was not apparent that it had done so.

52. Mr Young submitted that the authorities show that, whilst it would have been better for this matter to have been bottomed out by the tribunal at the PH, it was not too late to do so at the full merits hearing. So the tribunal, at the full merits hearing, simply adopting the issues as set out in the minute of the PH, and stating that these were confirmed with the parties at the start of the hearing, was not sufficient.

53. Mr Young also relied on the fact that the claimant's email of September 2021 was before the tribunal at the full merits hearing and indeed, because she had not prepared a witness statement, was treated as her evidence-in-chief (see the decision at [3]). This further put the tribunal on notice that the claimant at least might be seeking to advance what amounted to a regulation 7 claim, given what she wrote in that email.

54. In its Answer and skeleton argument, the respondent makes the following particular points. First, this is not a case where it was obvious from the original particulars of claim that the claimant was seeking to advance a regulation 7 complaint, rather than merely relying upon the fact that, pursuant to regulation 4, the respondent had inherited her former terms and conditions with ISS, in support of her ordinary unfair dismissal claim.

55. Secondly, it submits that the words at the start of [48] of the PH minute show that the judge *did* take steps to clarify with her the basis on which she was advancing her claim. It is also apparent from the minute of that hearing and the communications leading up to it that the claimant was capable of putting articulating a new complaint if she wanted to, as she did by seeking to raise an age discrimination claim. The respondent also relies on the fact that the minute indicated that if the parties considered that the list of issues

included in it had not accurately captured the issues between them, they could and should raise the matter with the tribunal. The respondent also relies on the tribunal, at the full merits hearing, recording that the issues were considered and agreed at the start.

56. In all these circumstances, submits the respondent, relying on **Mensah** and **Muschett**, the tribunal did not have a duty to go back and consider every matter that might be said to have been raised in the claim form. In any event, on a fair reading, submits the respondent, a regulation 7 complaint was *not* raised in the claim form.

57. The respondent maintains that the September email preceding the PH showed no more than that the claimant was seeking to rely on the fact that the respondent had inherited her contractual terms with ISS, as part of her claim of ordinary unfair dismissal. The respondent also argues, referring to the discussion in **Mervyn** at [38], that this is a case where to allow the claimant, at the full merits hearing, to introduce a regulation 7 argument would have necessitated the hearing being adjourned, as it would have then required further evidence to be marshalled, certainly by the respondent.

58. In response, Mr Young submitted that the claimant could not, as a litigant in person, have been expected to realise, reading the minute from the PH, that the tribunal would not be considering whether she had been dismissed by reason of the transfer, and to have raised this as a correction. He also did not accept that the regulation 7 point could not have been accommodated within the trial as listed, bearing in mind that the respondent had the relevant witnesses present. In any event, he submitted, if necessary, the tribunal should indeed have adjourned the hearing in accordance with the overriding objective.

Conclusions

59. This appeal revolves around a distinction between two different legal implications of a TUPE transfer with which lawyers in the field are very familiar. The first is that, by

virtue of regulation 4(1), the starting point is that the transferee inherits the employee on the contractual terms and conditions that they enjoyed with the transferor. The second is that, pursuant to regulation 7, a dismissal by reason of the transfer will be automatically unfair unless it is also for an ETO reason within the scope of regulation 7(2).

60. It is, in principle, perfectly possible for an employee to advance a case, that relies upon regulation 4 as essential background on the basis that she was employed by the employer which dismissed her on contractual terms that had been inherited from the predecessor employer, that the dismissal to bring about a change in those terms and conditions was not a fair one according to ordinary unfair dismissal law principles. It is not necessarily or intrinsically inherent in such a case being advanced, that the employee must also be saying that the dismissal was itself *because of* the transfer.

61. In that sense, as Mr Young acknowledged, the present claimant's argument is not as obviously unanswerable as was that of, for example, the claimant in **McLeary**, where the claim that was not identified by the tribunal inherently and logically flowed from the factual claim that the claimant had put forward. However, on the other hand, a claim which says that there has been a TUPE transfer, and relies on that merely for the effect of regulation 4, and one which goes further and asserts that the dismissal which later followed was unfair as being contrary to regulation 7, will have a significantly overlapping factual matrix. This is not factually a case, for example, like **Mensah**, where the claimant was, in her original claim form, complaining about two, in principle, quite separate matters, but then only pursued her claim in relation to one of them.

62. In addition, employment tribunals have experience over many years, of cases in which employees in certain sectors, such as cleaning, are TUPE transferred, sometimes more than once, as contracts change hands from one employer to another. They are

familiar with seeing claims of unfair dismissal which rely purely on regulation 4, as background, and, on occasion, those which rely also on regulation 7. But the difference in law between the two may not be so obvious or apparent to the layperson. I consider therefore that, as a starting point, if there was material before the tribunal which might be construed as indicating that the claimant was, in lawyers' terms, seeking to rely upon regulation 7 and not merely regulation 4, then it was incumbent upon it to seek to ensure that the position was clear, either way. If there was sufficient material to raise that possibility, clarifying that would not involve the tribunal in descending into the arena.

63. In this case, at the PH, there was material before the tribunal which raised the possibility that the claimant was, in substance, arguing that her dismissal was not merely ordinarily unfair but was because of the transfer, and hence unfair contrary to regulation 7. That is, in particular, because of the reference in the particulars of claim to her having received a letter from ISS *prior* to the transfer indicating that the respondent may intend to carry out a review of terms and conditions *following* the transfer. That raised, potentially, a scenario in which it might be said that the review that did indeed follow in point of time was because of the transfer. That was also raised, and effectively maintained, by what the claimant wrote, in particular, at [4.1] of the case management agenda, and in her September 2021 email, both of which again referred to such a letter.

64. The references to that letter did not necessarily, by themselves, demonstrate that it *was* her case that the reason for the dismissal that ultimately took place was the transfer; but they raised the real possibility that it was, and put the tribunal under a proactive case-management duty to confront that possibility and to bottom the matter out.

65. I do not consider that what is recorded in the minute of the PH is sufficient to demonstrate that the tribunal did that at that hearing. There is no reference there

specifically to the claimant having referred to such a letter in any document; and no reference to there being any consideration of what significance she attached to it, nor of whether she was, in substance, seeking to advance a claim that a lawyer would describe as a regulation 7 claim. The tribunal's account of the claimant's factual case at [38] does not convey that such matters were proactively raised and considered.

66. All of that being so, the statement at [48], that during the hearing the claimant's claims were clarified, is not sufficient to provide reassurance on this point. I also agree with Mr Young, that it is not realistic to rely in *this* case on the paragraph in the minute of the case management hearing indicating that the parties should proactively raise with the tribunal if they have any issue about the way the issues in the case have been captured in the minute. I do not say that the inclusion of that paragraph in a case management hearing minute is otiose, or could not be relied upon in other cases; but given the nature of this particular point, it is not something that can be relied upon in the present case.

67. I therefore consider that this was also a case in which the tribunal, at the start of the full merits hearing, needed to confront this issue, having regard to the claimant's various references to a letter from ISS pre-transfer raising the possibility of post-transfer changes being made by Churchill. I note that the September email certainly was before the tribunal and indeed was adopted as the claimant's witness statement. All of that being so, I do not regard it as sufficient in this case that, as recorded at [6], the issues as identified in the minute of PH were confirmed with the parties at the start of the hearing.

68. As I have described, the tribunal, in its substantive decision, made findings of fact that the reason why the respondent was seeking to introduce changes to the claimant's terms was because of the requirements of its client. I raised with Mr Young whether that amounted *de facto*, to a finding that the claimant's dismissal was *not* by reason of the

transfer. Mr Young submitted that the two were not necessarily mutually exclusive, as a dismissal could come about in order to bring in changes required by the respondent's client, but still *also* be because of the transfer. Indeed, he told me, on instructions from the claimant, who is here today, that it is her case that the changes were introduced not because of some *ad hoc* request for changes, made by the respondent's client at some point following the transfer, but because of things that the respondent's *contract* with the client required of it. He submitted that, if that was found to be right, then the tribunal might conclude that the dismissal was because of the transfer.

69. It is, of course, not part of my role in deciding this appeal to make findings of fact. But I am persuaded by Mr Young's general submission that the findings of fact so far made by the tribunal about the reason for dismissal, which cannot now be revisited, as such, do not necessarily preclude the possibility that it might, if the matter returns to it, make *further* findings of fact that could lead to the conclusion that the dismissal was *also* because of the transfer. I add, of course, that, if so, the tribunal would also need to consider whether regulation 7(2) applied, and that a finding that regulation 7(1) applied, would not necessarily lead to the final conclusion that the dismissal was unfair. However, for present purposes, I am persuaded that, although the findings of fact so far made will be a given, it would therefore not be otiose to remit this matter to the tribunal.

Outcome

70. For all of these reasons, I am persuaded that the tribunal, at the full merits hearing, did err by not giving proactive consideration to the question of whether the claimant was seeking to advance a claim that she had been automatically unfairly dismissed, in lawyers' terms, contrary to regulation 7, being a claim that was raised by her original claim form and had not, at any point, been abandoned by her. Because the tribunal did

not do that, in the circumstances of this particular case, it erred. I will therefore allow the appeal and remit the matter to the tribunal so that it can give further consideration to whether and, if so, on what basis, a regulation 7 claim is indeed being advanced.

71. Although I have allowed the appeal on the basis that it was not too late to consider this issue at the start of the full merits hearing, there will be the opportunity now, on remission, for a further case-management hearing to take place, so that, if the claimant confirms that she is indeed maintaining what amounts to a regulation 7(1) claim, she can further identify the precise basis for it, and appropriate case management directions can be given, before the matter then proceeds to a fresh substantive hearing.

72. I have heard a further submission from Mr Young as to terms of remission. This matter was heard first time around by the judge sitting alone and, indeed, potentially the same judge could deal with further case management and a further full merits hearing. Mr Young indicated that he would not object to that course, and it seems to me desirable. That is particularly bearing in mind that if the matter does go all the way to a further full merits hearing to consider the regulation 7 issue, whoever hears it will, as a starting point, have the findings of fact made by this judge; and this judge will herself bring to the matter her prior familiarity with the case. I will therefore direct that it should return for further consideration by her unless, for some reason, that is not practically possible.