Case No: 2202286/2019

EMPLOYMENT TRIBUNALS

Claimant: Ms A Plaza

Respondents: 1 Trevor-Roberts School
2 Intercontinental Facility Services Ltd

Heard at: London Central **On:** 19, 20 & 21 February 2020

Before: Employment Judge H Grewal
Ms J Griffiths and Mr I McLaughlin

Representation

Claimant: Mr A Lukomski

First Respondent: Ms J Bann, Solicitor
Second Respondent: Mr R Slack, Director

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The complaint of failure to inform and consult under regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is not well-founded;

2 The complaint of unfair dismissal is not well-founded;

3 The complaint of breach of contract is not well-founded;

4 The complaint of race discrimination is not well-founded;

5 The complaint of sex discrimination is not well-founded;

6 The claim for holiday pay under regulation 14 of the Working Time Regulations 1998 is well-founded and the Respondent is to pay the Claimant the sum of £385.57 (gross)

REASONS

1 In a claim form presented on 11 June 2019 the Claimant complained of unfair dismissal, failure to inform and consult in respect of a TUPE transfer, race and sex discrimination and failure to pay notice and holiday pay. Early Conciliation ("EC") was commenced against the First Respondent ("R1") on 16 May 2019 and the EC certificate was granted on 7 June 2019. EC was commenced against the Second Respondent ("R2") on 10 June 2019 and the EC certificate was granted on 11 June 2019.

The Issues

2 The issues to be determined had been identified at a preliminary hearing on 12 November 2019. We agreed at the outset of the hearing that the issues that we had to determine were as follows.

Failure to inform and consult

2.1 It was not in dispute that there was "a relevant transfer" (as defined in Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE Regulations 2006") on 1 or 3 June 2019 and that the Claimant was assigned to the organised grouping of employees that was subject to the transfer and an "affected employee" under regulation 13(1);

2.2 Whether Regulation 13A(1) applied and, if it did, whether R1 had complied with the requirements of Regulation 13A(2);

2.3 If Regulation 13A(1) did not apply whether R1 complied with the requirements of regulation 13(2)-(7) and, if it did not, whether regulation 13(9) applied in this case;

2.4 If not, to what compensation is the Claimant entitled;

2.5 Whether any compensation awarded should be paid by R1 or R2.

Unfair Dismissal

2.6 Whether the Claimant's employment terminated and, if so, when it terminated;

2.7 How did the Claimant's employment terminate – was she dismissed, did she resign or was her employment terminated under regulation 4(7) and (8) of the TUPE Regulations 2006?

2.8 If the Claimant was dismissed, whether the sole or principal reason for the dismissal was the transfer;

2.9 If the Claimant was dismissed, whether the reason for the dismissal was an economical, technical or organizational reason ("ETO reason") entailing changes in the workforce of either R1 or R2;

2.10 If not either of the above, whether the sole or principal reason for the dismissal was a potentially fair reason under section 98(1) and (2) of the Employment Rights Act 1996 ("ERA 1996");

2.11 If the reason for dismissal was as set out in paragraph 2.9 or 2.10 (above) whether the dismissal was fair under section 98(4) ERA 1996;

Race Discrimination

2.12 The Claimant describes herself as of Polish national origin. Whether R1 directly discriminated against or harassed her by doing any of the following:

(a) On or around 20 May 2019 Amanda Trevor-Roberts laughed at her because she wanted a written explanation;

(b) On 21 May Wendy Burton shouted at the Claimant and said, "Don't you understand English?";

(c) On 21 May the Claimant was told that she had to sign a contract or she would not be paid.

2.13 Whether the Respondents applied to the Claimant and others not of Polish national origin the following provisions, criteria or practices ("PCPs"):

(a) Providing explanations about the proposed TUPE transfer only orally and not in writing;

(b) Providing explanations about the proposed TUPE transfer in English;

(c) Providing explanations about the proposed TUPE transfer in a format which did not allow her to obtain a translation of it later.

2.14 If they did, whether the PCPs put persons of Polish national origin at a particular disadvantage when compared with persons not of Polish origin;

2.15 Whether they put the Claimant at that particular disadvantage;

2.16 If they did, whether the Respondents have shown that they were a proportionate means of achieving a legitimate aim.

Sex Discrimination

2.17 Whether R2 applied to the Claimant and men the PCP of refusing to allow employees to be accompanied to work by children;

2.18 If it did, whether it put women at a particular disadvantage when compared with men;

2.19 Whether it put the Claimant at that particular disadvantage;

2.20 If it did, whether R2 has shown that it was a proportionate means of achieving a legitimate aim.

Breach of contract

2.21 Whether the Claimant was dismissed without notice.

Holiday pay

2.22 Whether the Claimant is owed any holiday pay under the Working Time Regulations 1998 for accrued but untaken holiday.

The Law

3 Regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE Regulations 2006") provides,

> "*(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*
>
> *(2) Without prejudice to paragraph (1) … on the completion of a relevant transfer –*
> *(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and*
> *(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.*
>
> *…*
>
> *(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.*
>
> *(8) Subject to paragraphs (9) and (11), where an employee objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.*
>
> *(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.*
>
> *…"*

4 In **Hay v George Hanson (Building Contractors Ltd) [1996] IRLR 427** the EAT was dealing with regulations 5(4A) and (4B) of the TUPE Regulations 1981 which are almost identical to regulations 4(7) and (8) of the 2006 Regulations. Lord Johnston said, at paragraph 10,

> "*We, therefore, construe the word 'object' as effectively meaning a refusal to accept the transfer, and it is equally clear from reg. 5(4A) that that state of mind must be conveyed to either the transferor or transferee. But we do not consider it necessary to lay down any particular method whereby such a conveyance could be effected. In our opinion. It could be either by word or deed, or both, and each case must be looked at on its own facts to determine whether there was a sufficient state of mind to amount to a refusal on the part of the employee to consent to the transfer, and that state of mind was in fact brought to the attention of wither the transferor or the transferee. Furthermore, it must be brought to their attention before the date of the transfer because, under regulation 5 (4B), the transfer itself automatically terminates the contract. Accordingly, if the terms of reg. 5(4A) are not satisfied in fact, there is an automatic transfer on the appropriate date"*

5 In **Ladies' Health & Fitness Club Ltd v Eastmond & others (EAT/0094/03)** the EAT held that there was no basis in law for the objection in regulation 4(7) to be informed and that it had to amount to a refusal. Burton J said, at paragraph 47,

> "*We have read the contents of the Regulation, and it appears to us clear that if there is an objection within the Regulation, the fact that it may be high-handed, ignorant, over-reactive or simply misconceived would not affect the position, although of course it might be that on analysis what occurred did not amount to an objection if someone in fact did not know what they were doing."*

6 In **Tapere v South London and Maudsley NHS Trust [2009] IRLR 972** the EAT held that the phrase "working conditions" in regulation 4(9) applied to contractual terms as well as physical conditions and in order to determine whether the change was "substantial" the tribunal would need to consider the nature as well as the degree of the change. In the sense that the employee would not be the arbitrator of whether the change was substantial, it could be said that the approach was objective. The character of the change was likely to be the most important aspect of determining whether the change was substantial. When considering whether the change was to the material detriment of the employee being transferred, what had to be considered was the impact of the proposed change from the employee's point of view. The questions that ought to be asked are whether the employee regarded the change as detrimental and, if so, whether that was a reasonable position for the employee to adopt.

7 Regulation 7 of the TUPE Regulations 2006 provides,

> *"(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 dole 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 section 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.

…"

8 Regulation 13 of the TUPE Regulations 2006 provides,

"*…*

(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 of the proposed 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.

…

(3) For the purposes of this regulation the appropriate representatives of the affected employees are –
(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or
(b) in any other case, whichever of the following employee representatives the employer chooses –

> *(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who 9having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;*

(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

…

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(6) An employer of an affected employee who envisages that he will take measures in relation to an effected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

…

(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.

…"

9 Regulation 13A of the TUPE Regulations 2006 provides,

"*(1) This regulation applies if, at the time when the employer is required to give information under regulation 13(2) –*

(a) the employer employs fewer than 10 employees;
(b) there are no appropriate representatives within the meaning of regulation 13(3); and
(c) the employer has not invited any of the affected employees to elect employee representatives.

(2) The employer may comply with regulation 13 by performing any duty which relates to appropriate representatives as if each of the affected employees were an appropriate representative."

10 Section 95 of the Employment Rights Act 1996 ("ERA 1996") provides that an employee is dismissed if the contract under which he is employed is terminated by the employer (with or without notice) or the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct. Section 98(1) provides that for the purposes of determining whether the dismissal is fair or unfair it is for the employer to show the sole or principal reason for the dismissal and that it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason falls within subsection (2) if it relates to the capability or conduct of the employee or is that the employee was redundant. Section 98(4) provides that the determination of the question whether the dismissal is fair or unfair (having regard to

the reason shown by the employer) depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee and should be determined in accordance with equity and the substantial merits of the case.

11 Section 13(1) of the Equality Act 2010 ("EA 2010") provides that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Race and sex are protected characteristics (section 4 EA 2010). On a comparison of cases for the purposes of this section, there must be no material difference between the circumstances relating to each case (section 23).

12 Section 19(1) EA 2010 provides that a person (A) discriminates against another (B) if A applies to B a provision, criterion or practice ("PCP") which is discriminatory in relation to a relevant protected characteristic of B's. Section 19(2) provides that a PCP is discriminatory if –

> "*(a) A applies, or would apply, it to persons with whom B does not share the characteristic;*
> *(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with person with whom B does not share it;*
> *(c) it puts, or would put, B at that disadvantage, and*
> *(d) A cannot show it to be a proportionate means of achieving a legitimate aim."*

13 Section 26 provides that a person (A) harasses another (B) if A either engages in unwanted conduct related to a relevant protected characteristic or engages in unwanted conduct of a sexual nature and, in either case, that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Race and sex are relevant protected characteristics.

14 If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred unless A shows that A did not contravene the provision (section 136). Proceedings on a complaint under the Equality Act 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable (section 123(1)). Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)).

15 Under the Working Time Regulations 1998 ("WTR 1998") a worker whose employment commenced after April 2009 is entitled to 5.6 weeks' (28 days) annual leave. If the leave year is not specified in the contract for such a worker, her leave year runs from the date on which her employment started and each subsequent anniversary of that date (regulations 13 and 13A). Where the worker's employment is terminated in the course of the leave year the worked is entitled to be paid for the leave that she has accrued but not taken. That is worked out by multiplying the leave to which she is entitled by the proportion of the leave year that has expired at the date of terminate, and subtracting from that the amount of leave that she has taken (regulation 14).

The Evidence

16 The Claimant and Marta Matias (former School Estate Manager and Administrator) gave evidence on behalf of the Claimant. The Claimant gave evidence through a Polish interpreter. Amanda Trevor-Roberts (Headmistress), Wendy Burton (senior management team) and Thiers Brandao da Silva (caretaker) gave evidence on behalf of the First Respondent. James Godsell (Managing Director), Robert Slack (Director) and Efigenia Nunes Vieira de Frietas (cleaner) gave evidence on behalf of the Second Respondent. There was a limited amount of documentary evidence (approximately 140 pages) before us. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

17 The First Respondent ("R1") is a small independent school in North-West London located in two separate adjacent buildings. It had 35 employees at the relevant time.

18 The Second Respondent ("R2) is a small cleaning company which specialises in the provision of cleaning services to the education sector. It had at the relevant time about 130 employees, 98 of whom were women. None of its female employees had ever asked to be allowed to bring her child to work.

19 R1 employed two cleaners – Ms de Frietas and the Claimant. Ms de Frietas had worked at the school since 1996. The Claimant commenced employment at the school on 1 September 2009. They worked fours a day Monday to Friday. During term-time they worked from about 3.30 or 4 p.m. to 7.30 or 8 pm. During the holidays they could choose the hours that they wanted to work. Each of the cleaners was responsible for cleaning one building. If either of them was absent, the other one had to cover her and to clean both buildings. They were paid about £19 per hour.

20 The Claimant's contract provided that she was entitled to four weeks' holidays which had to be taken outside term-time – one week at Christmas, one week at Easter and two weeks during the summer holidays. In addition, she was entitled to take public holidays that arose during the term-time.

21 The Claimant had lived in London since 2002. Between 2002 and 2006 she had worked as an au pair for and lived with an English family and looked after their two sons aged 4 and 8. In the CV which she used when she started work for R1, she described her English as "good." She communicated with Ms de Frietas and the others at the school in English. Ms Matias commenced employment with R1 in January 2016 as Estate Manager and Administrator. She was responsible for supervising the cleaners. She is also of Polish origin and she spoke to the Claimant in Polish. The others did not use her as a translator when they spoke to the Claimant. The Claimant's ability to speak and understanding English on a day to day basis was good.

22 In July 2017 the Claimant's son was five years old. Between July 2017 and April 2019 on a limited number of occasions when the Claimant had childcare difficulties during the holidays she sought Ms Trevor-Roberts' consent to bring her son to work with her. Ms Trevor-Roberts normally agreed to it in order to assist the Claimant. That happened about three to four times in that period. Occasionally, Ms Trevor-Roberts saw him at school when she popped in during the holidays and the Claimant

had not sought her permission to bring him in. On those occasions Ms Trevor-Roberts queried why she had brought him in and the Claimant provided her with an explanation. The Claimant knew that neither Ms Trevor-Roberts nor her brother (who was the joint Head) came into the school during the half term holidays. She normally took her son into work with her during the half-term holidays. That, however, was done without the knowledge or approval of Ms Trevor-Roberts or her brother.

23 Both the Claimant and Ms Matias said in their witness statements that on 10 July 2017 Ms Trevor-Roberts had expressly agreed with the Claimant that she could bring her son into school during the half-term holidays. That was denied by Ms Trevor-Roberts. When they gave evidence, they both changed their evidence to say that the agreement had been for the Claimant to bring her son into school for all the holidays. There was no satisfactory explanation why they had not said that in their witness statements. We found Ms Trevor-Roberts' evidence on this issue to be credible and that of the Claimant and Ms Matias not credible.

24 In early 2019 Ms Trevor-Roberts and the other two directors of the school decided to contract out the cleaning of the school. They considered that that would be in the best interests of both the school and the two cleaners. In March 2019 they contacted the Second Respondent ("R2") who had been recommended by other schools in the area. Following a meeting between R1 and R2 on 2 April 2019 it was agreed that the transfer would take place on 1 June 2019. R2 advised R1 of its obligations to consult with its employees and expressed a desire to be present at any such consultations. R2 also sought information from R1 about the employees who would transfer and, in particular, their contracts of employment and the Employee Handbook. The Claimant and Ms de Frietas were the only two employees who were to transfer to R2.

25 A few days before 7 May 2019 Ms Trevor-Roberts had a conversation with the Claimant in the Science Laboratory about the impending transfer. She did not formally invite her to a consultation meeting and did not make a note of the meeting. It was a friendly and open discussion. She explained to her that her employment would transfer to a company called IFS Ltd but that nothing else would change in respect of her employment. She would continue to work at the school on the same pay with the same holidays and the working conditions. She explained that under the new arrangement there would be another cleaner working with the Claimant in her building. That would make her life easier and she would not have to work alone in the building. She also explained that there would be someone there to say "well done" when she did a good job and to give her advice when she required it. She assured her that there was nothing to worry about and that there would be a meeting with people from the new company on 7 May to discuss the move, which would take place at the end of the month. The Claimant did not raise any concerns with her.

26 The Claimant and Ms de Frietas were asked to attend a meeting with representatives of the new company (Messrs Slack and Godesll) on 7 May 2019. They were asked to bring with them to the meeting their passports, a utility bill and details of the bank account into which they wanted their salary to be paid. Neither of them brought the documents. At the meeting Messrs Slack and Godsell introduced their company as Intercontinental Facility Services Ltd (although they thereafter referred to it using the shortened version "IFS") and explained the TUPE process and, importantly, that it would not lead to any changes in their terms and conditions. They said that they were not proposing any measures that would impact on their employment other than to put in a supervisor and to provide training and support.

They gave the Claimant and Ms de Frietas a pack that contained a number of documents, including the following - a document with R2's full name on it entitled "Employee questions and answers guide to TUPE", a right to work checklist, a training manual, a form to record details of next of kin and an application form. The application form was a one page document and required minimal information, such as name, address, limited details of two previous jobs, bank details. It was made clear to them that they were not being required to apply for their job, which would transfer automatically, but that it was the easiest and most accurate way of getting the information that R2 needed about their new employees. Their evidence was that on previous occasions, the information that they had been given by the transferor had not always been correct. Ms de Frietas asked why they needed the passport and she was told that as the employer they had to satisfy themselves that she had the right to work in the UK and any failure to do so could lead to them being fined. The Claimant said that her passport was due to arrive that week. It was made clear to them that they had to produce the documents requested and to fill in the application form by the next meeting, which would be on 21 May.

27 At the end of the meeting the Claimant asked whether she would be able to bring her son to work with her during school holidays and Mr Slack responded that she would not because of concerns about his health and safety and because there would be issues relating to insurance cover for it. The Claimant also asked whether she would be allowed to take unpaid leave and Mr Slack responded that she would need to take paid leave first and that any application for unpaid leave would be considered after she had taken all the paid leave to which she was entitled.

28 The Claimant's evidence was that she looked briefly at the documents in the pack, did not understand them and left the pack in a cupboard at work and did not look at it again. We do not understand why, if the Claimant did not understand the documents, she did not ask either of the Respondents to get them translated for her, or did not ask her sister (who she said spoke good English and wrote some of the letters for her), Ms Matias, Mr Lukomski (who wrote some of her letters to the Respondents) or someone else to translate them for her. The Claimant also said in evidence that she had heard some gossip that after a year R2 would send them to work somewhere else.

29 On 14 May 2019 the Claimant wrote to Ms Trevor-Roberts and her brother. She said that on 7 May, without any previous consultation, Ms Burton had introduced her to Robert Slack and another man. They had suggested that she should apply to work for their agency called "Intercontinental" and had even had the nerve to ask her to fill in an application form for employment. She said that she had not received any information from the school and asked whether she had been dismissed from the school. She said that she was appealing against any decision to dismiss her and gave them notice that she would be contacting ACAS to protect her interests. She said in evidence that she made no reference to the agreement to bring her son to work during the holidays in that letter because it was not her priority.

30 Ms Burton responded the following day. She said that it was not true that the Claimant had not been told about the meeting before it happened because Ms Trevor-Roberts had spoken to her about it. She said that the two men had explained very carefully to her that her employment contract was being transferred to IFS Ltd but that all her employment rights under her contract with the school would be

protected. She pointed out that she had been given the information pack. She said that the Claimant was not being dismissed and that that had been made clear to her.

31 On 15 May 2019 the Claimant started the Early Conciliation process with ACAS with R1 as the prospective respondent.

32 On 16 May the Claimant wrote again to Ms and Mr Trevor-Roberts. She referred to the email from Ms Burton on the previous day and said, among other things,

> "*Wendy also said that I was given "an information pack" from IFS Ltd which Is also NOT TRUE. I received an Application for a job!?! … Why would I need to fill in an Application for another job, particularly at some security company in Cambridge?!?*
> *… I am reassured by Wendy that I am not being dismissed from the Trevor-Roberts School because I wish to continue working for the school. However as you have failed to consult me about what Wendy described only on 15 May as an "employment contract transfer" I wish to assert my right to 13 weeks' pay which please transfer to my account within 7 days.*
> *… I await the money transfer and an apology for your behaviour and that of Robert Slack and the unidentified man who demanded my private utility bills and an Application form filled in."*

33 The Claimant had done a Companies House search for IFS Ltd which had shown that it was a company dealing with security with a registered office in Cambridge. It was not clear why the Claimant had done the search for IFS Ltd when the information pack that she had been given (which she claimed in her letter that she had not been given) clearly showed that the name of the company to which her employment was being transferred was Intercontinental Facility Services Ltd. The Claimant's evidence was that prior to writing this letter she had sought advice from Mr Lukomski, who represented her at the hearing. As a result she believed that she was entitled to 13 weeks' pay.

34 The letter was sent by post and Ms Trevor-Roberts received it on 20 May. Ms Trevor-Roberts went to speak to the Claimant about it when she came into work on that day. The Claimant said that she did not want to talk about it and that she just "wanted everything on the list". Ms Trevor-Roberts repeated that they were happy to talk to her about it and that it would be a good idea if her lawyer contacted them so that they could discuss things with him. The Claimant said that the lawyer was on holiday. Ms Trevor-Roberts reminded the Claimant that she needed to bring her passport and utility bill to the meeting on the following day. The evidence of Messrs Slack and Godsell was that they needed those documents, not only to ascertain that the employees had the right to work in the UK, but also to verify that they were who they claimed to be and lived at the address which they gave.

35 On 21 May the Claimant gave Ms Burton a typed note addressed to her and Ms and Mr Trevor-Roberts in which she said,

> "*Please explain to me in writing:*
>
> 1. *What right do you have to force me to make a fresh application for a job in the new company or demand my private utility bills?*

2. *If, as Wendy Burton claims, the school is transferring my contract I demand to know:*
   a. *EXACTLY WHEN*
   b. *Full details IN WRITING*
3. *I expect a full EXPLANATION and an apology for failing to consult me IN WRITING."*

36 The second meeting between Messrs Slack and Godsell and the Claimant and Ms de Frietas took place at 4 pm on that day in the headmistress' office. Ms Burton was present at the meeting. She gave the Claimant the following written response to her earlier note,

"*Anna – in answer to your questions:*

1. *We have the right to transfer the benefit of your employment contract to another company as long as all of your rights under your contract of employment are protected, which they will be.*
2. *The contract is being transferred on 1st June 2019. You have already been given details of the new contract in writing."*

The last part was a misunderstanding on Ms Burton's part. She believed that the information pack contained a new contract but it did not. However, it had been made clear to the Claimant on a number of occasions that her contract would not change in any way.

37 Ms de Frietas produced all the relevant documents and a completed application form. The Claimant arrived late at the meeting and was clearly angry. She said that she was not going to produce any of the documents which she had been asked to bring. She said that the school had all those documents when she started work there and she did not see why anyone should ask for them now. Messrs Godsell and Slack tried to explain why they needed the documents but the Claimant was not prepared to listen. She said that the school had agreed that she could bring her son to work with her during the holidays and it was in her contract. When Ms Burton said that it was not in her contract, she called her a liar. She also called Ms Trevor-Roberts a liar and said that she had been laughing at her and not showing her any respect. She stormed out of the meeting saying that she wanted everything in writing. She said that she did not want to transfer to IFS and that she had legal advice that the school would have to pay her.

38 Ms Burton was concerned that the Claimant was jeopardising her employment by refusing to engage with the transfer. She followed the Claimant when she stormed out saying to her that the school was going to stop paying her at the end of the following week (Friday 31 May) and she needed to listen to what the men were saying to her. Ms Burton repeated that a few times. The Claimant took the vacuum cleaner, put on her earphones, and started cleaning and ignored Ms Burton. Ms Burton was exasperated and wanted the Claimant to listen to her and raised her voice. Ms Burton saw Ms Matias standing nearby and asked her to explain to the Claimant what she was saying, but Ms Matias shrugged her shoulders and did nothing to help.

39 On 22 May the Claimant again wrote to R1 and repeated what she had said before about not being given any information in writing and about Ms Burton having

given her untrue information in her email of 15 May. She complained again about having to fill in an application form and the transferee being a security company in Cambridge. She concluded by saying that unless they dealt with all the outstanding issues in writing and provided an explanation for their behaviour and an apology by 24 May, she would have no option but to bring a claim in the Employment Tribunal.

40 On 23 May R2 wrote to Ms de Frietas. They thanked her for providing the required documentation for verification purposes and informed her that her employment would transfer to R2 under a TUPE transfer on 3 June 2019. The transfer in effect took place on 1 June but 3 June would be the first date on which Ms de Frietas would attend work for R2, 1 June being a Saturday. The letter confirmed that her hourly rate of pay, scheduled hours of work and holiday entitlement would remain unchanged and that her continuity of service would be preserved. A similar letter was not sent to the Claimant because she had said at the meeting on 21 May that she did not want to transfer and she had not provided the documents requested for verification purposes.

41 On 30 May Ms Burton responded to the Claimant's letter of 22 May. She said that it had been explained to the Claimant very carefully at the meeting on 7 May and in her email of 15 May that her employment contract was being transferred to IFS Ltd and that the terms of her contract of employment with the new company would be exactly the same as terms of her contract of employment with the school. She had been given the application form so that her employment contract with R2 could be set up and transferred to R2. Her refusal to co-operate by providing the documents requested was unreasonable. The school would stop paying her the next day and R2 would pay her thereafter but she could not start working for R2 until she provided the documentation which they had requested on 7 May.

42 The Claimant responded on 31 May and repeated what she had said earlier. She concluded the letter by saying,

> "*I reiterate. I am NOT refusing to co-operate and I want to continue working but* ***I WON'T ALLOW YOU TO CONTINUE BULLYING ME, SHOUTING AT ME AND DISCRIMINATING AGAINST ME!!!***
>
> *… in any event I was told that my future contract will be completely different to the current one. For starters given that I had nowhere where to leave my son on 10-07-2017 Amanda and I have contracted that since the school needed my service I can come with my son to work but the new contract will not allow for this. I was told that other clauses of my contract will change too so please stop lying and write to me once and for all and* ***stop laughing at me!!!"***

43 Ms Burton responded on 31 May that it was pointless going over old ground again and said that no one was laughing at, bullying or discriminating against the Claimant. She also said that it was not true that the Claimant was permitted to bring her son into the school under the terms of her contract. She was allowed to bring her son in very occasionally and she sought permission each time to do so.

44 On 31 May R1 sent to both the Claimant and Ms de Frietas a P45 with Parts 2 and 3 that had to be given to a new employer. It showed that their employment with R1 had come to an end on 31 May 2019. On 3 June Ms Burton sent the Claimant an email that her employment with R1 had terminated but the offer of continuing to work

at the school on the same terms and conditions had been, and was still being made, by R2. If she wished to continue working at the school, she needed to provide the necessary documentation by the end of that day.

45 The Claimant did not attend work on 3 June. She sent an email to Ms Burton and Ms Trevor-Roberts on that day. She said that what Ms Burton had said in her email of 31 May was "*DISGUSTING LIES".* She said that she would not be coming into work on that day and would be sending a medical certificate by post. She accused them again of lying and bullying and discriminating against her. She then continued as follows,

> "*I say it again and again: I want to continue working ON THE SAME CONDITIONS AS I WAS WORKING UNTIL NOW!"*
>
> *I urge you to STOP LYING, START TREATING PEOPLE WITH RESPECT and send me a letter by post SIGNED BY BOTH OF YOU with an APOLOGY*
>
> *You two should not be working in a school, AROUND CHILDREN. I am seriously considering reporting you. The letter of apology can help but it must be delivered by SPECIAL DELIVERY NO LATER THAN TOPMORROW although I think it is in the public interest that people like you should not work at schools, with children. Pls confirm whether you are thinking of resigning.*
>
> *I want to work in an environment free of bullying, discrimination, shouting and lies.*
>
> *Remember that the letter of apology must be signed by both culprits and it must contain a firm undertaking that this behaviour will not be repeated. I hope you learn your lesson and START TREATING PEOPLE WITH RESPECT!*

The content and tone of that letter was gratuitously offensive and inflammatory. The Claimant's evidence was that Mr Lukomski wrote that letter. The Claimant had a medical certificate dated 3 June 2019 which certified her as unfit to work for 4 weeks until 30 June 2019.

46 Ms Burton told the Claimant not to send any medical certificate to the school as her employment with the school had terminated on 31 May and she should let her know if she wanted to provide the documents requested by IFS Limited so that she could continue to work at the school on the same terms and conditions.

47 R2 wrote to the Claimant on 4 June. They said that at the second consultation meeting on 21 May she had declined to provide any documentation for verification purposes to R2. The meeting had ended abruptly when she had left and prior to leaving she had stated her unwillingness to transfer to R2 on 3 June. They said that it had been accepted that as of that date her employment would transfer to R2 and that her hourly rate of pay, scheduled hours of work and holiday pay would have remained unchanged and that her continuity of service would have been preserved. The letter concluded by saying,

> "*At this time, due to the circumstances surrounding your non-compliance with our requests for sight of verification documentation and failure to notify IFS Ltd as to your non-attendance at Trevor-Roberts School, (your place of work) on 3 June*

2019. We consider in line with the previous statement made by you on 21st May 2019 that you have not accepted a Transfer of Employment to this company."

48 The Claimant was granted the Early Conciliation certificate on 7 June 2019. On 10 June 2019 the Claimant commenced Early Conciliation with ACAS in respect of R2 and the certificate was granted on 11 June 2019. On the same day the Claimant presented her claim form to the Tribunal against both Respondents.

49 On 12 June the Claimant wrote to Mr Slack in response to R2's letter of 4 June 2019. She said that the letter of 4 June was full of untrue statements and made the same complaints that she had made in hear earlier letters to R1. She complained about having to fill in an application form, to provide documents, about IFS being a security company in Cambridge, about it being a term of her contract that she could bring her son to school during half-term holidays. She concluded the letter by writing in bold,

"***Your statement is MALICIOUS AND UNTRUE, Robert, and I demand an immediate apology!"***

Mr Slack considered that the letter was full of baseless allegations and offensive and did not merit a response.

50 There was further correspondence with R1 in which the Claimant continued to be offensive and unreasonable.

51 The Claimant took the following holidays from 1 September 2018 to 31 May 2019 – 1 day on 12 December 2018, 5 days in the Christmas holidays, 1 day on 1 January 2019 and 7 days' holidays in the Easter holidays and two bank holidays in May (6 May and 27 May). That is a total of 16 days' holidays.

Conclusions

Failure to inform and consult

52 Regulation 13A did not apply because R1 employed more than 10 employees at the time when it was required to give information under regulation 13(2). Neither R1 nor R2 envisaged that it would take any measures in connection with the transfer in relation to the affected employees. Hence the duty to consult in relation to any such measures did not arise. As there were no employee representatives of the two cleaners, R1 was obliged under regulation 13(3)(b)(ii) to give the affected employees the opportunity to elect employee representatives and then to provide to them the information set out at regulation 13(2). There were, however, only two affected employees at R1 – the Claimant and Ms de Frietas. The Tribunal considers that the fact that there were only two affected employees were special circumstances that rendered it not reasonably practicable to hold elections for the two of them to choose one of them to be the representative of the two of them or a third person who was not affected to represent them. It would have been ludicrous to do so. As there were only two of them, it made far more sense for R1 to give the relevant information to both of them. Regulation 13(9) applied and it was reasonable for R1 to provide the relevant information to them rather than to employee representatives.

53 R1 was obliged under regulation 13(2) to inform the Claimant of the fact that the transfer was to take place, the date or proposed date of the transfer, the reasons for it, any legal, economical or social implication of the transfer for her and that it was envisaged that no measures would be in connection with the transfer in relation to her. The Claimant was provided with all that information several times. Ms Trevor-Roberts informed her at the beginning of May of the fact of the transfer, the fact that it would take place at the end of the month, that her terms and conditions would not change but that the new arrangement would be better because she would have another cleaner working with her and more support and training. The same information was provided again by the representatives of R2 at the meeting on 7 May and she was also given an information pack which explained what a TUPE transfer was and gave her some information about the transferee. Some of the information was repeated in writing by Ms Burton on 15 May 2019. Ms Trevor-Roberts tried to speak to the Claimant again about it on 20 May and Ms Burton repeated some of it in writing on 21 May 2019 and yet again on 30 May. R1 gave the Claimant the information it was required to give to her employee representatives under regulation 13(2) many times before the transfer. There was no failure to inform or consult under regulation 13.

Unfair Dismissal

54 We considered first whether the Claimant's employment had terminated and, if so, how and when it terminated. The Claimant's evidence to the Tribunal was that at the meeting on 21 May she never agreed to the transfer. We have accepted the evidence of other witnesses that at that meeting she said that she did not want to transfer to R2. That is consistent with her own evidence that she did not agree to it. Not only did she say that she did not want to transfer, but she also made it clear by her actions that she did not. She refused to provide to R2 the documents that it required to verify her identity and to enter all the relevant information on its personnel files, to satisfy itself that she had the right to work and to be able to pay her, despite it being explained to her may times why that information was required. The reasons that the Claimant gave for not co-operating and providing that information did not stand up to scrutiny. She kept complaining about IFS Ltd being a security company. She had been provided with documents which had R2's name on them. If she wanted to do a Companies House search on the transferee, she should have used the name on those documents. She kept complaining about having to apply for her job although it was repeatedly made clear to that the purpose of filling in the application form was that it was the best way for R2 to get the information that it required about her for their personnel files. What emerges from all the communications between R1 and R2 prior to the transfer is that the Claimant was looking to construct reasons to obstruct the transfer because she did not want to transfer to R2. R2 clearly understood at the meeting on 21 May that the Claimant did not want to transfer to R2, and hence it did not send her a letter identical to the one it sent Ms de Frietas on 23 May.

55 The Claimant refused to accept the transfer to R2 and she conveyed that clearly to both R1 and R2 by both her words and her actions before the date of the transfer. They clearly understood that communication and both of them attempted to persuade her to co-operate with them so that her employment could transfer. It was not entirely clear to us why the Claimant took the stance that she did. It might have been because she was ill-advised about her rights by Mr Lukomski or someone else or that she believed the rumours that she had heard that after a while she might be sent to

work somewhere else. It might have been because she had been bringing her son to the school with her during the half-term holidays, without her employer's knowledge and approval, and she felt that that would no longer be possible if she was working with another cleaner in the building. But what is clear is that she did not want to transfer and she made that known to R1 and R2.

56 The only change that the transfer involved in the Claimant's working conditions was that there would be another cleaner working with her in the same building as her and there would be more training and support. Those changes were not substantial and were certainly not to her detriment. It meant that she would not have to work alone in the building and would not have to clean the two buildings on her own if Ms de Frietas was absent. The Claimant might have regarded that change as being to her detriment because she could no longer secretly bring her son to work with her during the half-term holidays. No reasonable person would have considered such a change to be to his or her detriment. The purpose of the regulation is not to prevent changes that make it impossible for employees to flout the rules at work.

57 There was no substantial change to her working conditions in respect of being allowed to bring her son to work with her during the holidays. The position with R1 was that she was not entitled to bring her son to work with her. If a problem with childcare arose and she wanted to bring him to work, she had to seek her employer's permission to do so. As an exception she was very occasionally permitted to do so. The fact that she did bring him to work during half-term holidays without the knowledge and permission of her employer does not mean that it became part of her working arrangements. It means that she acted outside the working arrangements and was not caught doing so. R2's position was the same as that of R1 – it was not allowed. The fact that R2 would not have permitted it even as an exception once or twice a year does not amount to a substantial change in her working conditions.

58 Regulation 4(9) did not apply because the transfer did not involve a substantial change in working conditions to the material detriment of the Claimant. In those circumstances, because the Claimant objected to the transfer, the transfer on 1 June 2019 operated so as to terminate her employment with R1 under regulations 4(7) and (8). However, she was not dismissed by R1.

Breach of contract (notice pay)

59 As the Claimant was not dismissed, it follows that her breach of contact claim fails.

Race Discrimination

60 We have not found that Ms Trevor-Roberts or Ms Burton did any of the acts alleged by the Claimant. We have found that on 21 May 2019 Ms Burton did raise her voice when she followed the Claimant out of the meeting and told her that the school was going to stop paying her at the end of the following week and she had to listen to what the men were saying. What she said was a fact. The Claimant's employment was going to transfer on 1 June and R1 would cease paying her on that date. Ms Burton raised her voice because she thought that the Claimant was acting unreasonably and risked losing her livelihood. It had nothing to do with the Claimant's Polish origin and her conduct did not amount to a detriment or harassment.

61 The Respondents supplied information about the proposed transfer both orally and in writing. It was provided in writing in the letters and emails that R1 sent to the Claimant and in the information pack that R2 gave the Claimant at the meeting on 7 May 2019. The Claimant could have asked others to translate the written documents for her. Hence, the Respondents did not apply the first and third PCPs which the Claimant says that they did. It is correct that the information was provided in English. Providing the information in English only would have put workers of Polish origin who did not speak and understand English at a particular disadvantage. It did not put the Claimant at a particular disadvantage because she spoke and understood English. She did not say at either of the consultation meetings that she could not understand what was being said to her and/or that she required an interpreter. Furthermore, the information was also provided in writing and, if the Claimant did not understand it, she could have got others to translate it for her.

Indirect Sex Discrimination

62 R2 applied a PCP that cleaners could not bring their children to work with them, and they would have applied that PCP to the Claimant had she transferred to R2. We were not satisfied that that PCP put women at a particular disadvantage when compared with men. 75% of R2's cleaners were women. None of them had ever asked if she could bring her child to work. Nor do we accept that it put the Claimant at a particular disadvantage. The Claimant was able during term-time and the long holidays to arrange childcare for her son. There was no evidence that she could not arrange childcare during the half-term. The cleaners had flexibility as to when they worked during the holidays. Hence, we concluded that it did not put women in general and would not have put the Claimant at a particular disadvantage. In case we are wrong in that conclusion, R2 has in any event shown that it was a proportionate means of achieving a legitimate aim. The legitimate aim was to ensure the health and safety of the children of their employees.

Holiday Pay

63 The Claimant's holiday year began on 1 September. She was entitled to 28 days' (5.6 weeks) annual leave every year. By 31 May 2019 she had accrued 21 days' annual leave (9/12 x 28). She had taken 16 days' annual leave. She is entitled to be paid for the 5 days that she has accrued but not taken. The Claimant was paid £385.57 per week gross, and she is entitled to be paid that for one week's holiday.

_____

Employment Judge Grewal

Date 06/04/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

07/04/2020

.....
FOR THE TRIBUNAL OFFICE