EMPLOYMENT TRIBUNALS

Claimant: Mr A Kamara

Respondent: Kent Gurkha Company Limited

Heard at: **London South Employment Tribunal**

On: **8-9 November 2021**

Before: **Employment Judge Ferguson**

Representation
Claimant: In person
Respondent: Mr R Clement (counsel)

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

1. The Claimant was unfairly dismissed.

2. The Claimant is awarded a basic award of £2,970 and a compensatory award of £2,090.70.

Recoupment
Prescribed period: 15/1/19 to 8/11/21
Total award: £5,060.70
Prescribed element: £1,640.70
Balance: £3,420.00

REASONS

INTRODUCTION

1. The Claimant was employed as a cleaning supervisor at Coopers Technology College in Chislehurst. His employment was transferred to the Respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") on 19 March 2018. The Claimant contends that his working conditions were changed to his detriment after the transfer and he resigned as a result, with effect from 15 January 2019. By a claim form presented on 12 February 2019, following early conciliation that began and ended on 11 January 2019, the Claimant brought a claim of unfair dismissal.

2. The agreed issues to be determined are as follows:

   Dismissal

   2.1. Was the Claimant constructively dismissed pursuant to Regulation 4(9) of TUPE, i.e. did the transfer involve a substantial change in working conditions to the material detriment of the Claimant, and did the Claimant treat the contract of employment as having been terminated as a result?

   2.2. Was the Claimant constructively dismissed on ordinary principles?

      2.2.1. Did the Respondent breach the so-called "trust and confidence term", i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the Claimant?

      2.2.2. If so, did the Claimant affirm the contract of employment before resigning?

      2.2.3. If not, did the Claimant resign in response to the Respondent's conduct (to put it another way, was it a reason for the Claimant's resignation — it need not be the reason for the resignation)?

   2.3. The conduct the Claimant relies on as breaching the trust and confidence term is (per paragraphs 45-53 of the Claimant's witness statement):

      "45. …The Respondent gave me an excessive workload of supervising for two hours and get staff to meet the customer's expectations and cleaning for two hours which did not facilitate my workload and made it difficult to meet their expectations. The Respondent's conduct made me feel pressured or become stressed by the unreasonable changes to my working patterns without my prior agreement in writing.

      46. The Respondent demoting me by changing my job title from Cleaning Supervisor to Working Cleaning Supervisor without my agreement.

      47. The Respondent significantly changed my job roles, duties or responsibilities without my agreement or without first consulting me.

      48. The Respondent significantly changing my working environment to include additional areas which would make it difficult for me to meet my work expectations sometimes. This may have led to

unsatisfactory work standards, which was detrimental to my ability to carry out my work easily.

49. The Respondent's attempt to force me into accepting unreasonable changes to how I worked despite the letter of concern where the parties had agreed that my job title would remain as Cleaning Supervisor and in the act of subtle manipulation for me to volunteer in a meeting on 3 July 2018 to predominantly work on cleaning instead of the supervisory role on which I was TUPED.

50. The Respondent's harassment against me following the disrespectful comments from Sara Wilson.

51. The Respondent's embarrassing or humiliating me by Sara Wilson in front of colleagues or clients for which she had to later apologise for her conduct.

52. The Respondent failed to correctly address and investigate my grievance and permanently address to allow me to continue in my capacity as Cleaning Supervisor. In this instance, it is proven there was a breach of the implied term of mutual trust and confidence by the Respondent. I was left feeling as though I had no choice but to resign because I felt extremely uncomfortable at work. I claim a breach of trust and confidence by resigning and bringing a case of constructive unfair dismissal against the Respondent.

53. The Respondent failed to support me to do my job well by not facilitating a method through which I can submit the timesheets therefore also, setting the scene for constructive unfair dismissal by ousting Claimant and making it impossible for me to perform my task well by submitting the timesheets electronically."

Fairness of dismissal

If the Claimant was dismissed:

2.4. Was the transfer the sole or principal reason for the dismissal (Regulation 7(1) of TUPE)?

2.5. If so, was the sole or principal reason for the dismissal an economic, technical or organisational ("ETO") reason entailing changes in the workforce pursuant to Regulation 7(2) of TUPE?

2.6. If the transfer was not the sole or principal reason for the dismissal, has the Respondent shown that the dismissal was for "some other substantial reason" pursuant to s.98(1)(b) of the Employment Rights Act 1996 ("ERA"), namely a breakdown in the employment relationship?

2.7. In either case, was the dismissal fair or unfair in accordance with s.98(4) ERA?

Remedy for unfair dismissal

2.8. Subject to liability, the amount of the basic and compensatory awards are not in dispute save that the Respondent argues the amount claimed for loss of statutory rights (£450) is too high and the Claimant claims an uplift on the basis that the Respondent unreasonably failed to comply with a relevant ACAS Code of Practice.

3. I heard evidence from the Claimant and, on his behalf, from Eric Wait. On behalf of the Respondent I head from Sara Willson and Mike McKinley. There was an agreed bundle of around 230 pages.

FACTS

4. The Claimant commenced employment as a site cleaning supervisor at Coopers Technology College ("the College") in March or April 2006. He was initially employed by the College. By 2018 his employment had transferred to Town and Country Cleaners Ltd. He worked a four-hour shift, 3pm to 7pm, weekdays during term time. It is not in dispute that the Claimant was employed as a "non-working supervisor", i.e. it was not part of his duties to do any routine cleaning. He would however do some cleaning where necessary, for example if there were staff shortages. There were around 16 cleaners employed at the site. It was the Claimant's responsibility to supervise them, check their work, deal with any issues arising, check the cleaning cupboards, manage stocks of cleaning supplies and submit timesheets to head office. It is not in dispute that there were frequent staff shortages so the Claimant would regularly do some cleaning during his shift.

5. In early 2018 the Respondent tendered for the cleaning contract at the College and was awarded the contract in February 2018. Cleaning staff at the College were transferred to the Respondent's employment on 19 March 2018. The Respondent did not adduce in evidence its contract with the College but it is not in dispute that it provided for 60 hours' cleaning each day during term time, not including supervision.

6. Mike McKinley, Marketing and Bids Manager for the Respondent, gave evidence to the Tribunal that the Respondent did not realise until after the transfer that the Claimant was employed as a non-working supervisor. Once the Respondent became aware of this it took the view that the contract did not justify four hours of supervision a day, and that two hours would be sufficient.

7. On 16 April 2018 the Claimant had a meeting with his line manager, Sara Willson. She told the Claimant that due to a staff reorganisation the Respondent was "looking to review the supervisor role to become a working supervisor role". It was proposed that the Claimant's role should involve cleaning duties for two hours and supervisory duties for two hours. The Claimant objected on the basis that he had always been employed as a non-working supervisor. The meeting became somewhat heated.

8. A further meeting took place on 17 April 2018. Ms Willson apologised for the heated exchanges at the meeting the previous day. The notes of the meeting record that the Claimant said he would agree to taking responsibility for cleaning the "admin area" of the school, since he was already cleaning this area.

9. On 23 April 2018 the Respondent gave the Claimant a draft contract of employment and a document listing the cleaning duties for the admin area. The contract gave the job title as "Working Cleaning Supervisor".

10. On 5 June 2018 the Claimant submitted a formal grievance. This appears to have followed a meeting that day in which the Claimant and Sara Willson had a disagreement about the Claimant's terms and conditions. The Claimant complained in the grievance that Ms Willson had said the Respondent was entitled to change the Claimant's terms and conditions. He said he had always been employed as a non-working supervisor and alleged that he had been subjected to a "systematic campaign", pressuring him "to accept something that is practically unlawful or forcing me to leave". He said that "helping the company out by cleaning" was not him accepting a change in his contract. In a further email on 7 June 2018 the Claimant said that he was working under protest and was not accepting a change in his contract. The Claimant did not sign the contract he had been sent.

11. A grievance meeting took place, conducted by Mr McKinley, on 12 June 2018. The Claimant provided a copy of his contract with his previous employer in which his job title was given as "site supervisor". The Claimant said that he was willing to help cover the cleaning in the admin area, but objected to Ms Willson having told him he was required to do two hours of cleaning and two hours of supervision. He said Ms Willson had told him if the list of duties was not carried out he would be breaching management instructions. The Claimant also said he did not accept the new contract with the title "Working Supervisor". Mr McKinley asked the Claimant if he would be happy to consider any changes to his duties. The Claimant said he would "so long as it was done fairly, and he wasn't 'told what to do'".

12. Mr McKinley notified the Claimant of the grievance outcome by letter dated 19 June 2018. The letter states he had investigated the matter and taken advice from the Respondent's HR consultants. The grievance was upheld. The letter states:

> "I have carefully considered the available facts and evidence, including the copies of your previous contracts with Coopers School and Town and Country Cleaners which you kindly provided. It is the latter which represents the Terms and Conditions of Employment which transferred with you to the Company in March 2018.
>
> I note that the contracts provided do not state that your role was as a non-working supervisor. However, the Job Description for your role with Town and Country does not include for routine cleaning of any given areas. While your contract with them did allow for duties to be amended (page 12), I consider it likely that the changes proposed by the Company would currently represent a substantial change to your employment terms rather than an amendment.
>
> As such, my finding, based on the available information, is that the Company should not at this time enforce a change to your duties.
>
> …

> Your duties will revert to those of a non-working supervisor from the week commencing 25th June to allow time for alternative cleaning arrangements to be made. Your expected duties will be sent separately before then and will be discussed with you by the contract's managers."

13. The letter continued, however, to say that while the company would not force the amendment, the "legitimate business reasons which lay behind the proposed changes" remained. The following reasons were given:

> "1. The tender specification issued by Coopers School did not request or require a non-working supervisor. The TUPE information provided by Town and Country for the tender and subsequently did not state that the supervisor role was non-working. The Company's tender was presented to the school and accepted based on providing a working supervisor, with the budgets and cleaning schedules calculated on that basis also. This created the business requirement leading to the planned amendment of your duties.
>
> 2. The school have historically been unhappy with the cleaning standards achieved by previous contractors. Kent Gurkha were contracted to produce higher levels of productivity leading to better cleaning results. We have already increased the allocation of cleaning hours to the evening shift to achieve this. Losing two hours of cleaning each day from our tendered plans risks financial penalties if the company does not achieve the required performance levels, or ultimately the loss of the contract. The school have stated that they will support our restructuring of the working arrangements as previous approaches have been unsatisfactory.
>
> 3. Our assessment of the working patterns at the school are that four hours' dedicated supervision daily is uneconomical, not a sufficiently productive use of time and will not address the school's concerns regarding overall standards. It does not match the Company's operations in other schools."

14. The letter concluded, "As such I would request that we continue the period of consultation regarding making changes to see if it will be possible to mutually agree a solution which will enable these business needs to be met. You indicated during the grievance meeting that you would be willing to consider a change to your duties if a fair process was followed. I hope that further consultation will allow that to happen."

15. Mr McKinley accepted in cross-examination that following the outcome of the Claimant's grievance the College agreed to pay for two additional hours' cleaning a day so that the Claimant would not need to carry out any routine cleaning duties. Neither of the Respondent's witnesses mentioned this in their witness statements and there was no documentary evidence about it. Mr McKinley claimed in his oral evidence that it was a temporary arrangement to cover the period of consultation with the Claimant, until the end of the summer term only. Again, this was not covered in the witness statements and the Respondent did not produce any documentary evidence of such an arrangement. Mr McKinley could not offer any explanation for the failure to do so.

16. There is a factual dispute about whether the Claimant's duties actually changed in response to his grievance being upheld. The Claimant says that he continued to clean the admin area as he had done before. Mr McKinley initially said in his oral evidence that another member of staff was assigned to clean the area after the grievance outcome, but when the Claimant disputed this Mr McKinley said that it was the Claimant's responsibility to assign someone to clean the area. It is not in dispute that no additional staff were recruited. Mr McKinley said that the Claimant was instructed to assign another member of staff to the area during a consultation meeting on 25 June 2018, but there is no reference to such an instruction in the minutes of the meeting. On the contrary, the Claimant was asked during that meeting to clean the admin area and he agreed that he would do so "if time permitted". Nor is there any evidence in those minutes, or in any other document, of the Claimant having been informed of the client agreeing to two additional hours' cleaning. The Claimant said he heard of this later from the College.

17. The meeting of 25 June 2018 was a first consultation meeting to discuss possible changes to the Claimant's job role. The Claimant, Ms Willson and Mr McKinley all attended. Mr McKinley confirmed in the meeting that the Respondent "was not going to push through a change to [the Claimant's] role at this time". He said, however, that the business needs for change remained. He explained that "the school were currently quite happy with the cleaning standards, and the fear was that losing 2 hours cleaning from the schedule would reintroduce problems". It was in that context that the Claimant said he was "happy to help, volunteering to contribute his hours, and compromise to support the company". He was willing to clean the offices and sweep the student reception area if time permitted.

18. During that meeting the Claimant was also asked to send various reports to the office weekly, by scanning them or taking photographs. He had previously sent documentation to his employers by fax from the College office or by post in an envelope provided.

19. A further consultation meeting took place on 3 July 2018. The minutes record the following under the heading "Pupil reception/ admin area":

> "AK clarified that he is happy to clean this area as a set part of his role, not just helping when he could. MM apologized for misunderstanding this in the previous meeting. MM asked how long this took – AK said approx. 1 hr 40 – 1 hr 45."

20. The Claimant's evidence is that this is not an accurate record of the discussion. He said he maintained his position that he was willing to clean the area to help out, but was not willing to accept a change in his job role. It is not in dispute that the Claimant was sent a copy of the minutes after the meeting and did not challenge their accuracy at the time.

21. There was some further discussion during the meeting of the Claimant returning the forms to the office electronically. The Claimant did not raise any concerns about this.

22. At the meeting the Claimant was given a new version of his contract in which his job title was given as "Cleaning Supervisor", i.e. the word "Working" had been removed from the previous version. There is no mention in the contract of the Claimant being required to do routine cleaning as part of his duties. The Claimant signed it on 15 July and gave a copy to the Respondent on 20 September 2018.

23. Mr McKinley's evidence was that he took the Claimant signing the contract as confirmation that he had agreed, as indicated in the meeting of 3 July, that he accepted a change to his duties to include routine cleaning.

24. A "review meeting" took place on 20 September 2018. The Claimant's evidence was that prior to this he had been sending the timesheets and reports to the office weekly by email, but he did not have a smartphone so was only able to do this by borrowing a phone or going to an internet café in his own time and at his own expense. The Claimant did not inform the Respondent of that. No significant concerns were raised on either side at the meeting.

25. A further review meeting took place on 17 October 2018. The Claimant reported that several staff members were complaining about not having enough time to complete their cleaning duties. Mr McKinley said that management were disappointed with the events over the last month. He said the Claimant had not sent reports to the office since 2 October. Mr McKinley also expressed concern over stock management and ordering, and noted the site had run out of certain items. Mr McKinley was also dissatisfied with how the main cleaning cupboard was kept, and said that timekeeping of staff was "still a problem". The Claimant said that "because time is tight he is spending a lot of his time doing other tasks to help the individual cleaners". Mr McKinley said they would review the situation. He said "the concern was that from a site that seemed to be working well before the summer, things were now becoming problems with people being unhappy about hours and more comments from school staff".

26. On 19 October 2018 the Claimant was sent a "letter of concern" which noted areas that required improvement. This included records not being submitted weekly, stocks of cleaning supplies not being management well enough and staff timekeeping not being well managed. The Claimant was informed that if his performance did not improve over the following month disciplinary action may be taken.

27. The Claimant commenced a period of sickness absence from 5 November 2018 due to stress. There were no medical documents in the bundle, but it is not in dispute that stress was given as the reason for absence. There was some evidence during the hearing about the management of the Claimant's sickness absence. The Respondent alleges that the Claimant failed to follow absence reporting procedures, and the Claimant alleges the Respondent harassed him during his absence. It is unnecessary to make any findings about this.

28. By letter dated 9 January 2019 the Claimant resigned. The letter of resignation states, so far as relevant:

> "I am writing to resign my position as cleaning supervisor at Coopers' School with immediate effect and give you the required one week's notice, so my last working day should be Tuesday 15th January 2019…

> I have worked at Coopers' for twelve years and had always enjoyed my job and been successful at it until your company took over in April 2018. My contract was transferred to you under TUPE, and you immediately wanted to change my terms and conditions of employment. I had always been a non-cleaning site supervisor in charge of about 21 people in my team. You wanted to change this to a working supervisor so that I would clean as well as supervise. Even though I explained to you both verbally and in writing many times that this was not practical if I were to continue to successfully carry out my role, you have persisted in wanting to change my terms and conditions. I have only agreed to carry on working in this way under protest, as noted in my emails.
>
> I raised a formal grievance regarding this in June 2018 and although we had subsequent meetings this matter has remained unresolved. You cut the number of cleaners in the school and asked me to carry out many additional duties both supervisory and cleaning. I found it impossible to carry out these duties in my normal working hours and so often worked additional hours with no pay. One example of what I would consider to be an unrealistic request was the request to submit inspection records and timesheets electronically. Previously I had been provided with an envelope to send this material in manually or I could send them by fax. When Kent Gurkha took over I was told that you have no fax machine and would not be providing envelopes for posted copies of the records. I do not have a smartphone to take pictures of documents on, I also have no access to the internet at work. Therefore, in order to submit the documents I have had to pay for access at an internet café using my own time and money as you provided me with no support or assistance. You also added considerably to my supervisory duties at the same time as asking me to clean many areas which I had not been asked to do before.
>
> …
>
> I have spoken to both ACAS and Citizens Advice who have advised me that I can make a claim for constructive dismissal following my resignation, which I intend to do."

29. The Respondent convened a grievance hearing to discuss the contents of the Claimant's resignation letter on 27 February 2019. The meeting was conducted by Mr McKinley. The Claimant said he had been cleaning the student reception area "under protest". He disputed the minutes of the meeting on 3 July 2018. Mr McKinley referred to the contract and the Claimant said he was "happy to sign on basis of being a non-working supervisor".

THE LAW

30. Regulation 4(9) of TUPE provides, so far as relevant:

> …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.

31. In Tapere v South London and Maudsley NHS Trust [2009] IRLR 972 the Employment Appeal Tribunal considered Regulation 4(9) in the context of an employee whose place of work was changed following a transfer. In Lewis v Dow Silicones UK Ltd UKEAT/0155/20/LA the EAT set out at paragraph 13 the following propositions from Tapere:

> "(1) The regulation can apply even where there is no breach of the employee's contract of employment;
>
> (2) Whether there is a change in working conditions and whether it is substantial are questions of fact;
>
> (3) The nature as well as the degree of any change needs to be considered in deciding whether it is substantial; and the nature (or "character") of the change is likely to be the most important aspect in determining this;
>
> (4) The question whether a change in working conditions is to the "material detriment" of an employee involves two questions: (a) whether the employee subjectively regarded the change as detrimental and, if so, (b) whether that was a reasonable position for the employee to adopt."

32. The relevant paragraphs of Regulation 7 of TUPE provide:

> (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.
>
> (2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.
>
> (3) Where paragraph (2) applies—
>
> (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.

33. The burden is on the employer to establish an economic, technical or organisational ("ETO") reason for dismissal (Forth Estuary Engineering Ltd v

Litster [1986] IRLR 59). The Court of Appeal in Berriman v Delabole Slate Ltd [1985] IRLR 305, [1985] ICR 546, CA held that "changes in the workforce" meant a change in the overall numbers or functions of the employees.

34. Section 95(1)(c) of the ERA provides:

> **95 Circumstances in which an employee is dismissed**
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—
>
> …
>
> (c) 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.

Dismissals pursuant to section 95(1)(c) are known as constructive dismissals.

35. Four conditions must be met in order for an employee to establish that he or she has been constructively dismissed:

35.1. There must be a breach of contract by the employer. This may be either an actual or anticipatory breach.

35.2. The breach must be repudiatory, i.e. a fundamental breach of the contract which entitles the employee to treat the contract as terminated.

35.3. The employee must leave in response to the breach.

35.4. The employee must not delay too long before resigning, otherwise he or she may be deemed to have affirmed the contract.

(Western Excavating (ECC) Ltd v Sharp [1978] ICR 221 and subsequent cases)

36. An employer owes an implied duty of trust and confidence to its employees. The terms of the duty were set out by the House of Lords in Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606 and clarified in subsequent case-law as follows:

> "The employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

Any breach of this term is necessarily fundamental and entitles an employee to resign in response to it (Morrow v Safeway Stores Ltd [2002] IRLR 9).

37. Pursuant to section 98 ERA it is for the employer to show that the reason for dismissal is either a reason falling within subsection (2) (capability, conduct, redundancy, breach of statutory duty) or "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held". According to section 98(4) the determination of the question whether the dismissal is fair or unfair "depends on whether in the

circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee" and "shall be determined in accordance with equity and the substantial merits of the case."

CONCLUSIONS

38. The Claimant's case is that the Respondent imposed a substantial change in working conditions to the Claimant's material detriment by requiring him to carry out routine cleaning and thereby reducing the time available for supervision. He objected to this, including by raising a grievance, but the Respondent persisted, with the effect that the Claimant's workload increased and eventually he went off work with stress. He felt he had no choice but to resign. His resignation amounted to a dismissal by virtue of Regulation 4(9) or TUPE or because he resigned in response to the Respondent's breach of the implied term of trust and confidence. He relies on the change of duties as well as alleged harassment by Sara Willson and the Respondent's failure to facilitate a method for him to submit documents to the office.

39. The Respondent's primary case is that the Claimant was not dismissed, either by virtue of Regulation 4(9) of TUPE or pursuant to ordinary principles of constructive dismissal. As to Regulation 4(9), Mr Clement argued that there was no substantial change in working conditions to the material detriment of the Claimant because he was already doing cleaning before the transfer. He also argued that the Claimant had agreed to the change in the meeting of 3 July 2018 and by signing the contract, and that he had in any event waived the right to resign and claim constructive dismissal because of the delay of some six months before resigning. Mr Clement made no oral submissions on the reason for any dismissal or fairness. It is however part of the Respondent's pleaded case that even if the Claimant was dismissed, the dismissal was not automatically unfair under Regulation 7 of TUPE, either because the transfer was not the sole or principal reason or because there was an ETO reason. It also relies on an alternative "some other substantial reason", namely an irretrievable breakdown in the employment relationship.

40. Addressing Regulation 4(9) first, the Respondent's position that there was no substantial change to the Claimant's working conditions is somewhat surprising in view of the outcome of the grievance in June 2018. The Respondent acknowledged at the time a significant difference between having "routine cleaning" duties as part of the role, and carrying out cleaning as and when required. I consider it obvious that a requirement to carry out cleaning of a particular area every day was a substantial change to the Claimant's working conditions.

41. I also consider that such a change was clearly to the material detriment of the Claimant. The Respondent has never suggested that the Claimant's supervisory duties were reduced. The effect of the change was to reduce the amount of time he had to complete his supervisory duties by half. Mr Clement sought to argue that this was not detrimental to the Claimant because the supervisor role only warranted two hours a day and even if that was wrong, the Claimant could simply reduce the amount of work he did accordingly. I consider that to be a wholly unrealistic submission. First, the amount of supervision that was required is a subjective matter. What matters is that the Claimant had

always previously had four hours to complete all of his supervision duties, subject to any cleaning he had to carry out by way of cover. If he carried out routine cleaning for two of those hours, he would only have two hours to complete the same amount of work. Secondly, any employee who takes pride in their work would not simply leave parts of it undone and face the consequences. The Respondent made it clear that it expected certain standards to be met and the Claimant was keen to ensure that they were. In those circumstances, requiring the Claimant to carry out additional routine cleaning duties on top of his existing supervision work was to his material detriment. To the extent that there was a drop in standards, which was part of the reason for the letter of concern in October 2018, it seems likely that this was because of the increased workload. Even if the supervision duties had been reduced, the change in role had the effect of demoting the Claimant to a lower status.

42. The more difficult question is whether the Respondent actually *imposed* such a change, so that it could be said the transfer "involved" the change. The Respondent relies heavily on the Claimant having agreed to the change in the meeting of 3 July 2018. I do not consider that meeting to be determinative of the issue. First, given the Claimant's position both before and after the meeting, repeatedly saying that he did not accept a change to his duties or job title, I consider it unlikely that he said in unequivocal terms that he agreed the change to his role. Of course he should have challenged the minutes when he saw them, but I do not consider his failure to do so means that I am bound to find they are correct. Secondly, there was never any written agreement by the Claimant to change his job title or role. The only written agreement that followed that meeting was the revised contract, which had deliberately removed the word "working" from the Claimant's job title. Even if the Claimant had indicated in the meeting that he was willing to accept the change in his duties, his later agreement to the revised contract was certainly not confirmation of that. On the contrary, it affirmed that he was still a non-working supervisor.

43. Mr Clement argued that the Claimant was never forced to carry out the cleaning duties. That is correct in the sense that the matter never came to a head because the Claimant continued to clean the admin area. He could of course have refused to do it, but the Respondent had made it clear that it expected him to do so. The Respondent never put in place another member of staff to clean the area and did not inform the Claimant that there was additional budget available for cleaning the area, even on a temporary basis. If he had refused to do the cleaning, the area would simply not have been cleaned at all. Again, one would not expect anyone who has pride in their work to put themselves in that position.

44. I find that, having upheld the Claimant's grievance and said that it would not impose the additional duties without consultation, the Respondent engaged in a consultation process in order to achieve the same result and in the absence of any clear agreement from the Claimant to change his job role it effectively imposed the additional duties by failing to make any other arrangements for them to be carried out.

45. I am therefore satisfied that the transfer involved a substantial change in the Claimant's working conditions to his material detriment. That entitled the Claimant to "treat the contract of employment as having been terminated".

46. The Claimant did not resign until 9 January 2019. There is no express provision in TUPE that requires an employee in a "Regulation 4(9)" situation to resign at a particular time. Nor do the Regulations provide for the right under Regulation 4(9) to be waived, by delay or other conduct. I am not aware of any authority on this issue and neither party referred to any such authority. I consider there must be some limit on an employee's right to "treat the contract of employment as having been terminated", but there are likely to be some cases, like this one, where the substantial change in working conditions becomes apparent over a relatively long period of time after the transfer. Provided the circumstances of Regulation 4(9) are made out, and in the absence of actual agreement to the change, the employee is entitled to resign and treat themselves as having been dismissed even if it is many months after the transfer.

47. I do not consider that the Claimant's conduct in this case constituted agreement to the change. The re-imposition of the change occurred in early July 2018. The Claimant was then off work for the summer holidays until September. He then worked for around six weeks before the Respondent raised concerns about his performance and he went off sick around three weeks later. The Claimant did not return to work before his resignation on 9 January 2019. I do not consider that continuing to work during September and October 2018, notwithstanding the change to his working conditions, amounted to agreement by conduct such that the Claimant is precluded from relying on Regulation 4(9).

48. I therefore find that the Claimant was dismissed.

49. The next issue I must consider is the reason for the dismissal. The reason set out in the Respondent's amended Grounds of Resistance is as follows:

> "The client (Coopers School) wanted cleaning hours extended and moved to evening shifts. They also required improvements to the cleaning standards. To achieve this the Respondent wish to offer more hours to fewer employees. This it was believed would reduce the historically high staff turnover and improve performance. To deliver this new operating model within the current budget a working supervisor was required. It is accordingly denied that the Claimant was unfairly dismissed by virtue of the provisions of Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006."

50. The Respondent has not produced any evidence of the College wanting extended cleaning hours. One page of the tender specification document is included in the bundle, which shows the client wanted to move towards cleaning taking place in the evenings only, as opposed to mornings and evenings, but there no reference to extended hours. Nor has the Respondent produced any evidence or explained the connection between any change in the staff shift patterns and the need for a working supervisor. What is clear from the Respondent position in the grievance outcome letter and the subsequent consultation meetings is that it had budgeted for 60 hours' cleaning, which included two hours of the Claimant's time. It was purely a matter of cost. If the Claimant did not do those two hours of cleaning, either the Respondent would need to absorb the cost of another member of staff doing it or the College would have to pay for two additional hours. There is no evidence of any pressure from

the College to have a working supervisor per se. Its only interest would have been in having the site cleaned to a good standard for a satisfactory price. It was clearly willing to be flexible on the price because it permitted the two additional hours after the outcome of the Claimant's grievance.

51. I do not therefore accept that the Respondent's pleaded reason for the dismissal is made out. I find that the reason was a desire to save costs by reducing the supervision time on the contract from four hours to two. That arose solely because of the Respondent taking over the contract and not having budgeted for a non-working supervisor. I am satisfied that the sole or principal reason for the Claimant's dismissal was the transfer. As the Respondent has not established the ETO reason it relies upon, the dismissal was automatically unfair. Arguably the change to the Claimant's duties was for an "economic" reason, but it was not a reason that "entailed changes to the workforce". It was simply an attempt to save costs.

52. As the Claimant's dismissal was automatically unfair, it is unnecessary to make any findings on the Claimant's alternative case that he was constructively dismissed on ordinary principles, and/or that the Respondent failed to make out a potentially fair reason for dismissal or acted unreasonably.

Remedy

53. There is no dispute that the Claimant is entitled to a basic award of £2,970. As to the compensatory award, the only items in dispute are compensation for loss of statutory rights and an uplift for failure to comply with a relevant ACAS Code of Practice. The Respondent accepted that £400 would be an appropriate award for loss of statutory rights. I award the £450 claimed on the basis that the Claimant had 12 years' service and the amount represents two and a half weeks' gross pay. The Claimant has not identified any failure to comply with a relevant Code of Practice so I do not award any uplift. I therefore make a compensatory award of £2,090.70, consisting of £1,640.70 for 10 weeks' loss of earnings and £450 for loss of statutory rights.

Employment Judge Ferguson

Date: 15 November 2021