EMPLOYMENT TRIBUNALS

Claimant: Miss A E Carr

Respondents: 1. Image Cleaning Services Limited
2. Intercity Cleaning Services Limited

HELD AT: Manchester **ON:** 24 October 2017

BEFORE: Employment Judge Holmes

REPRESENTATION:

Claimant: In person
1st Respondent: Mrs M Hughes
2nd Respondent: Mr P Barton, Director

JUDGMENT

It is the judgment of the Tribunal that:

1. The claimant's employment with the first respondent did not transfer to the second respondent pursuant to any transfer of undertaking, and the claims against the second respondent are accordingly dismissed.

2. The claimant was unfairly dismissed by the first respondent.

3. The claimant is entitled to remedy. The Tribunal awards the following by way of remedy:

Basic Award – 6 x £75 =	**£450.00**
Compensatory Award – 2 weeks @ £75	**£150.00**

4. The first respondent was in breach of its obligation under section 1 of the Employment Rights Act 1996 to supply a written statement of particulars of employment, and the Tribunal makes an additional award of four weeks' pay, being 4 x £75 = **£300.00**.

5. The recoupment regulations do not apply.

REASONS

1. In this claim the claimant complains of unfair dismissal, and potentially seeks damages for breach of contract, arising out of the end of her employment, to use a neutral term, on 28 February 2017. Amongst the issues that arise is whether the claimant was dismissed at all, and , if so, from employment with which respondent, she having brought claims against two respondents: Image Cleaning Services Limited who were her original employers, and Intercity Cleaning Services Limited who were allegedly a transferee of that employment.

2. The claimant has appeared in person and given evidence. The first respondent has been represented by Mrs Hughes and called Alan Hughes as a witness, and the second respondent has been represented by, and evidence has been heard from, Mr Philip Barton, its director. There have been three bundles of documents, largely overlapping in content because of disagreement between the parties as to an agreed bundle. There are many documents which are common to all the parties but are a few are to be found only in one of the relevant bundles. In addition to those documents the Tribunal has received during the course of the hearing some further documents from the second respondent, in the form of an email of 19 January 2017 with an attachment which was a quotation in relation to cleaning services for a potential client.

The Facts

3.1 The claimant was originally employed by the first respondent in October or November of 2010, and the post to which she was employed at that time was as a cleaner providing ten hours' cleaning services for the first respondent's client, Forbo Siegling UK Ltd ("Forbo"), at its offices in Dukinfield. The agreement was for ten hours' cleaning per week at the appropriate hourly rate at the time, but there was no documentation produced at the time in relation to the making of that contract of employment, there is no letter or email or anything of that nature, there is only basically the arrangement made between the parties entirely verbally in relation to how that employment started. But start it clearly did, and there was no problem with it to start with, and thereafter, in fact, the claimant obtained further work from the first respondent actually carrying out a further six weeks of cleaning a week for the first respondent, four hours at VCL Vans, and an additional two hours at PH Installations, so consequently she was working up to 16 hours at the time that her employment came to an end.

3.2 In relation to these further employments, again there was no documentation produced at the time or indeed subsequently, and there are no written details of these employments, but they effectively were on the same terms in terms of the hourly rate. The difference was only the organisations for which the services were provided, and the locations involved. That was the basis on which the claimant was employed by the first respondent, up until early 2017 when the following events occurred.

3.3 In January 2017 the second respondent sent, by email of 19 January, a quotation to Forbo in relation to the provision of cleaning services. It is unclear on the evidence as to how that came about, whether Forbo were seeking actively to

replace the respondent with whom they had their existing contract, or if this was an unsolicited proposal, but however it came about by email of 19 January 2017 Mr Barton sent to Forbo, the potential client, a quotation for the provision of cleaning services at its Dukinfield site. In that proposal it was proposed that there would be three hours' daily cleaning provided, and in the details contained in it the staffing level was to be two cleaning operatives working 1½ hours Monday to Friday. In the costings and breakdown of charging there appear again two cleaning operatives, 15 hours per week at £7.50 per hour.

3.4 In terms of the first respondent's contract with Forbo, no written contract has been produced, but under the arrangements that they had with Forbo the claimant was one of two operatives, and they were providing four hours' cleaning per day. So the quotation from the second respondent was for a reduction in fact of an hour per day, but it was based upon there still being two operatives as indeed was the case when the first respondent had that contract.

3.5 At some point prior to 26 January probably, but again this is not identified because there is no documentation produced in relation to it, Forbo must have accepted that proposal, because by a letter of 26 January 2017 they wrote to the first respondent effectively giving it notice from 1 February, a month's notice, that its contract with the first respondent would come to an end at the expiry of that month, i.e. on 1 March 2017. The circumstances were such that it was anticipated by the second respondent, which has some experience in this field, as one would expect with contract cleaning services, that the relevant provisions of the TUPE regulations (to give them their shorthand) would apply, and consequently the second respondent sought information in relation to the existing incumbent of the provision of cleaning services, which information was provided to the second respondent on 30 January 2017. Indeed thereafter there was contact made between the second respondent and the first respondent seeking necessary information in relation to the current employees used by the first respondent on the contract with Forbo.

3.6 Thereafter, on 3 February 2017 , or around about the same time, there was an incident whilst the claimant was at work at Forbo on 3 February when she comforted a Forbo employee who was visibly upset, and about whom the claimant was concerned, in circumstances where that employee made some reference to "Lynn" ("Lynn" being Lynn Bosley, the Operations Manager of Forbo), and indeed it was her that wrote to the first respondent giving them notice of termination of their contract , and it was her who was dealing with the second respondent's quotation. In this incident this employee known as "Dawn" was visibly upset, and the claimant comforted her in circumstances which apparently came to the attention of Lynn Bosley, because subsequently, on 6 February 2017, Mrs Hughes received a phone call from Lynn Bosley and in that phone call Lynn Bosley alleged that the claimant had called her a bully.

3.7 Nothing further was said at that time, and no further action was taken in relation to that, but around this time, of course, the first respondent was on notice that there was to be a potential TUPE transfer and so it was that on 6 February 2017 Mr and Mrs Hughes of the second respondent went round to see the claimant. On that occasion their purpose was twofold: one was to inform her of the impending TUPE transfer and its potential effects upon her being transferred to

another employer; but also to mention to her what had been said on the telephone in relation to this allegation that the claimant had called Lynn Bosley a bully. The evidence is agreed between the first respondent and the claimant that that is exactly what happened in that meeting. The potential transfer was mentioned first, and the bullying allegation was mentioned second, but in relation to that allegation nothing happened at that time ,and consequently the claimant went into work at Forbo on 7, 8 and 9 February 2017.

3.8 On 10 February, however, the first respondent had another phone call from Lynn Bosley and on this occasion she referred to a problem with another (it seems, though it could be the same person) Forbo employee, who was allegedly a friend of the claimant, and as a result of the problem that arose Lynn Bosley requested, or rather instructed, that the claimant must not attend the site any further. Mr Hughes, who gave evidence in relation to this matter, took that to mean that this would be until the situation was rectified, indeed he puts it that way in paragraph 10 of his witness statement, and in terms of how long he thought this may take , in evidence he said "about a month", but he accepted that there was nothing that was said by Mrs Bosley in that conversation expressly to that effect; that was his estimate of how long it may take. Consequently the claimant was instructed and indeed did not further attend the Forbo site, although she continued to be paid in respect of the ten hours' cleaning that she would normally do there.

3.9 In relation to this instruction the first respondent in the person of Mr Hughes did not accept that initially in the sense that there was some email communication about it and indeed at page 8 of the first respondent's bundle there is an email from Lynn Bosley to Mr and Mrs Hughes in which she says this:

> *"I have spoken again with HR and the request on removing Angela from the Forbo Dukinfield site must stand. This is not anything against Angela but as a protection against her being implicated in any further issues as were discussed. Please can you sort this out and confirm."*

Mr Hughes replied to that email later the same day (page 9 of that bundle) in which he says this:

> *"In receipt of your email I have asked Angela not to come to Forbo this evening. You say this is nothing against Angela so can you please elaborate on what implication she needs protecting from."*

There was a reply then to that at 16:00 the same day from Lynn Bosley in which she says this:

> *"As I explained to Marion yesterday, we have a major problem with an employee on site that we have dismissed. She has been known and seen to go and discuss things about me with Angela. The problem is that she is threatening to take us to a Tribunal. We have a concern that if something is removed from the site, which she could use as she was concealing emails and paperwork, then Angela could be considered as a possibly person who may have helped. If she is not on site then it could not be her. Due to this HR have told me the course of action that I have to take is to inform you. It is very clearly about protecting Angela as Marion stated in out conversation Angela*

knows this person from her schooldays. I have not made this decision, it is Forbo. Please do not communicate the details of this to Angela. It is of course not for her to be told of the facts as she may discuss this with interested parties."

3.10 So in terms of what the explanation was for the request or instruction that the claimant not attend site any further, Ms Bosley elaborated considerably in that email of 10 February, and the first respondent did not thereafter raise any further issues in relation to that and that remained the position up until the events that then unfolded at the end of February and the claimant did not thereafter return to work at Forbo. As I have indicated already, the first respondent carried out their contract with Forbo by providing four hours' cleaning services per day which were provided by the claimant and another lady called Gina, and she continued in the meantime to attend at Forbo on her own.

3.11 Consequently the position with the second respondent was that having agreed at some time, probably in January, that the quotation would be accepted and that the second respondent would then provide the cleaning services for Forbo from 1 March 2017 , events went along without further incident until Mr Barton became aware of an issue with the claimant, and indeed as far as the second respondent was concerned, Mr Barton's understanding was that the claimant had been removed from the site, that she was no longer part of the team providing the cleaning services and so his view was that she would not be someone who would transfer over upon the TUPE transfer, as there was only one remaining employee who would be so effected, and the claimant no longer had a role in that part of the provision of the service. That is the basis upon which he was proceeding and consequently when, on 1 March 2017, the claimant telephoned him to inform him that as far as she was concerned she would be attending at Forbo, he disputed that and set out, which he does in paragraph 19 of the claimant's witness statement , which has not been challenged but perhaps does not greatly matter, in the sense that it is clear that in that conversation Mr Barton made his understanding clear, which was that the claimant was no longer working at the Forbo site and effectively she was the responsibility of the first respondent and they therefore had to deal with her and that she would not be transferring upon the transfer.

3.12 The claimant did not accept that and indeed sent him an email later that day at 14:18 in which she set what she had been advised in relation to her position under the TUPE provisions, and indeed later than day she turned up for work at Forbo. She could not, however, gain access and indeed she had, when suspended in effect, or asked no longer to attend Forbo by her employer, she handed back her keys, and when she attended to try to get into work on 1 March she was unable to do so. She had a conversation with Lynn Bosley about that, who said it had not been her decsion. That was the position as at 1 March, and on 2 March the second respondent, Mr Barton, late that night, sent an email to the claimant setting out again the position as he saw it, that the claimant's employment continued with Image Cleaning.

3.13 Around about this time the second respondent contends that the agreement made with Forbo whereby it would then become the provider of the cleaning services to that company ended, or certainly was not proceeded with, and the

second respondent's position is that at that point the contract went no further, in fact was terminated. There was no transfer and the second respondent did not at that point accept any transfer of any undertakings. The first respondent, and perhaps the claimant also, dispute that, but in terms of what actually occurred on 3 March 2017 there was email communication between the two companies, the first and second respondents. The first in that series is from Mr Barton to the first respondent, timed at 12:09 on Friday 3 March, where he says:

> *"Further to my conversation with Marie yesterday I write to confirm our decision not to commence cleaning services on 1 March 2017 for Forbo Siegling and therefore TUPE does not apply."*

3.14 There was a response to that from Alan Hughes at 16:23 that day in which he informed Mr Barton, having taken advice, that as far as his company and his solicitor was concerned, the TUPE transfer took place on 1 March at one minute past midnight, after which the first respondent had fulfilled all statutory requirements, and that as the first respondent had not been informed until after the date of the transfer that the second respondent no longer wished the transfer to go ahead, any employees named on the transfer document were now the second respondent's employees and not those of the first respondent. He went on to say that Forbo had informed him that employees named on the transfer form apart from the claimant were on the premises on 1 and 2 March working under the second respondent's management. He ended with saying that basically any issues or further concerns were no longer the responsibility of the first respondent.

3.15 Thereafter there was an email at 16:42 that day where Mr Barton replies further:

> *"I informed the client before we were due to commence that we were not starting and at no point were the cleaning staff under our management."*

3.16 That in effect was his position, and the email train then ends with a further email from Mr Hughes at 17:00 that day saying, basically, that arrangements with Forbo were of no concern to him and setting out the first respondent's position again, in effect, which is that there had been a transfer and any obligations to the employees were now the second respondent's responsibility.

3.17 Other than that email exchange and Mr Barton's own evidence there is no direct evidence of the alleged termination of the contract whereby the second respondent was to take over the cleaning contract, and indeed in terms of documentary evidence there is virtually none in relation either to the formation of the contract in January 2017 or its alleged termination in March 2017, and indeed the subsequent making of an agreement, which the second respondent accepts was then made on or about 17 March 2017, whereby from 20 March 2017 the second respondent did in fact provide cleaning services, and Mr Barton has accepted in evidence that the terms of that agreement are virtually identical to those of the quotation, in relation particularly as to the hours to be delivered, and he also accepts that only one operative has been providing those services since that contract was put in place.

3.18 In terms of the position of Gina, whose second name eludes the tribunal, but who was the first respondent's employee, there is considerable doubt as to her position between 1 March and 20 March 2017. Mr Barton accepts that from 20 March she has been the second respondent's employee but has suggested that in between 1 March and 20 March she may have been employed by Forbo, but in terms of any evidence in relation to her status between those two dates, there is not a single document in the bundle, or adduced in evidence. So her position in the interim is very unclear.

3.19 That, in essence, is the evidence in terms of the witness evidence and the documentary evidence that has been before the Tribunal, but there is another important piece of evidence in the form of a letter dated 17 July 2017 which was in fact appended to the second respondent's response but has been included in the bundle, and it is a letter from Lynn Bosley of that date. It's headed "Statement for Employment Tribunal – Angela Carr" and it is a two page document in which she says at various points in the statement as follows:

> *"I was informed by HR that we needed to remove Angela from the Forbo Dukinfield site as we were experiencing problems with her and a company employee. Angela was communicating with the Forbo employee sand causing conflict within Forbo which is not what we expect from an external cleaning company. Original date of verbal discussion with Marion Hughes was 9 February 2017. I confirmed this in writing to Image Cleaning on 10 February requesting that Angela be removed from the site and asked for this to be sorted and for Image to confirm this to us. Alan Hughes wrote back on 10 February asking for more information on the problem. Response from Forbo again on 10 February was to clarify these issues, letter included. At this point Angela, I believe, was informed that she was not to come to site and did not come to the Forbo site again for the role on Friday 11 February 2017. Image Cleaning did not communicate to Forbo in any way that they had informed Angela of this decision. One cleaner only was sent to the Forbo site from that date onwards until the end of the contract with Image Cleaning. The closing invoice was received by Forbo and at that point we were charged for two cleaners even though we only had one on site. Forbo never agreed at any time the return of Angela to the Forbo site. It was expected that Image Cleaning would either provide another cleaner for the final two weeks or not bother to support the contract as Forbo was closing the contract down with them."*
>
> She then continues over the page:
>
> *"The contract with Image Cleaning ended on the date as per the one month notice agreement letter. At this point Forbo did not take up any contract with Intercity Cleaning or any other contractor. As discussed with Intercity City Cleaning we did not want to take anyone in at that time. As Forbo no longer had a cleaning service the cleaning was to be completed by our internal staff. Further discussions then took place on 17 March 2017 with Intercity Cleaning to see if they could again support the cleaning at Forbo as it was proving difficult to maintain fully on site ourselves. A new contract was then agreed between Intercity Cleaning and Forbo for them to provide one person only beginning 20 March 2017."*

3.20 That is signed by Lynn Bosley and is the letter that she wrote and is entitled "Statement". She has of course not been called by any party to give evidence and has not been cross examined and that evidence, of course, remains untested.

4 Those then are the tribunal's findings of relevant facts. In terms of the issues that arise and appreciating that no party is legally represented it might be helpful to set out at this stage what the Tribunal considers those to be:

4.1.1 Was there a TUPE transfer at all?

4.1.2 If so, when?

4.1.3 Was the claimant's employment transferred at the time of the transfer, and in particular was she assigned to the undertaking or resource grouping that was so transferred?

4.1.4 If not, did the claimant remain employed by the first respondent?

4.1.5 If so, did the first respondent dismiss her?

4.1.6 If so, was there a potentially fair reason for that dismissal?

4.1.7 If there was, was it in fact fair?

4.1.8 If it was not, to what compensation is the claimant entitled?

5 Those are the issues as I see them and I hope the parties agree, appreciating that they have not been formulated previously in any previous hearing and they do not have lawyers, but those seem to me to be what I have to decide. All parties made brief closing arguments, but, not being lawyers, had little to add to their positions as stated in the documents and their evidence to the Tribunal. The claimant's position, unsurprisingly, was that she was not overly concerned as to which respondent was liable to her, she just wanted some closure and the issues determined. For the respondents, both considered that they had acted appropriately in the circumstances as they saw them, and as they were advised, or understood the circumstances to be, which the tribunal fully accepts.

Discussion and Findings.

(i)Was there a transfer, and if so, when?

6 The first of them is whether there was a transfer and if so, when? In terms of those possibilities it seems to me there were two: the first is that there is a straightforward transfer between the first and the second respondent; the second is that there was in fact a series of two transfers, one from the first respondent into Forbo if they took the service back in-house, and then another out again to the second respondent. Either way the crucial thing is whether there was a transfer at the time when the claimant was employed by the transferee. She never was , it is agreed, employed by Forbo so this will only be relevant if it was a transfer between the first respondent and the second respondent.

7 The second respondent has argued that there was not in fact a transfer on 1 March 2017 . Although there was clearly an agreement that there was going to be a transfer on that occasion, and indeed that is the basis upon which the quotation was provided to the client, and the client gave notice to the first respondent that its service provision contract would end on 1 March 2017 . All the indications were that there would be a transfer occurring on 1 March, everything was in place for that, but the second respondent says no such transfer in fact took place on 1 March. There was no relevant transfer then, and in fact no subsequent agreement was made for almost another three weeks.

8 In relation to that contention, the evidence is somewhat scant. The evidence that there was to be a transfer on 1 March is substantial and everything looked like that would happen. In the terminology used by Mr Barton in evidence, I did note that he referred to "starting the contract" on a number of occasions, and it seemed to me that there was a difference, which I put to him, between starting a contract i.e. the contract remains in place but the start date is changed, and what he was effectively contending for, which was that the agreement that was made in or around January 2017 between his company and Forbo in fact was "torn up", as it were, and ended on or before 1 March.

9 As I say, there is scant evidence of this, and that is surprising given that, particularly from the point of view of Forbo who appear to have dealt with matters in a relatively formal manner, having had a written quotation which they somehow accepted, albeit there is no documentary evidence, and having written to the first respondent and terminated its contract, as one would expect with a degree of formality, when the contract that had been made between the second respondent and Forbo in January 2017 was effectively terminated by the second respondent on or before 1 March 2017 it is odd that there would be no written record whatsoever of that. I find it very surprising particularly from the point of view of Forbo that there is no communication, at least acknowledging that that was the position. It is appreciated that these things often are done verbally, particularly initially, but one would expect a company like Forbo to at least record that a proposed agreement, or indeed a concluded agreement made with the second respondent, was not proceeding. That is particularly so when, on the evidence, they would not have known on 1 March that they were then going to try to muddle through themselves for the next three weeks or so, and that it would take three weeks or shorter before having to go back to the marketplace and consider getting another contractor in. So at that point they would not have known that within three weeks they would be going back to the second respondent, and indeed there is no evidence that they sought tenders from anybody else at that time, or that they had decided to keep matters in-house. There is a complete silence in terms of documents from Forbo of anything acknowledging that this contract which had been concluded was then not to proceed, and I do find it hard to accept that that was the position.

10 Similarly, in relation to the contract that then allegedly arose on 20 March 2017, there is nothing other than the letter from Lynn Bosley and Mr Barton's evidence as to how that came about, and no documentation about that either. It seems to me more likely than not that this is not a new contract at all, and that all that really happened was that the start date of the original contract was delayed, and consequently, given that there was going to be a transfer on 1 March 2017, it seems to me most likely that what happened is that, for reasons I can well understand, the

second respondent did not want to get involved in actually starting it, and consequently did suspend the initial operation of it until the dust had settled.

11 A further missing piece of this jigsaw is the position of Gina, and some evidence as to what happened to her in the meantime might have helped fill it in. The suggestion is that she either did not work at all as Mr Barton says, although she was then available for him when he needed her on 20 March, or that she went in-house to Forbo , in which case one would expect some documentation from Forbo to that effect, but there is absolutely nothing as to what her position was in the meantime.

12 All of that leads me to conclude that the contention that there was no transfer until 20 March 2017 is not a sustainable one, and I find on the balance of probabilities that there was a transfer of the undertaking or service provision of cleaning to Forbo from the first respondent to the second respondent on 1 March 2017. That is the first issue I have to determine.

(ii)Did the claimant's contract of employment transfer to the second respondent?

13 The next issue, though, is in relation to the claimant's position and whether or not at the time of that transfer she was assigned to the undertaking, if that is the right term, but more probably is "group of resources", this being a service provision change rather than a transfer of undertaking, which provided the services to the client; in other words, did she fall within the definition of a regulation 4(1) of the 2013 Regulations: was she "assigned", to use the terminology, at the time of the transfer?

14 In terms of the facts, there was really very little dispute about them and in terms of where the significant decisions lay at that time they actually lay, it seems to me, with Forbo. The second respondent had nothing at all to do this, I am quite satisfied, but clearly this was something that Forbo was in charge of because it was they who were telling the first respondent , who were still their contractors, what the position would be and what they wanted. Of course it was made clear rightly or wrongly, because it is not my task to decide whether it was fair or not, but rightly or wrongly the evidence is clear that Lynn Bosley instructed, and it seems to me that it is as strong as that, it is not just a polite request, it is clearly an instruction, she uses the words that the first respondent "must sort this out", and so this was not an option it seems to me for the first respondent, their client was making it clear from 10 February 2017 that the claimant could not attend their premises any further. In terms of the reasons for that, whilst initially they were not very clear it seems to me the email exchange makes it very clear, and again whether those are good, bad or indifferent reasons, they are clearly the reasons that Ms Bosley set out as to why the client, Forbo, did not want the claimant present on the premises at that time or, I find, for the foreseeable future.

15 Whilst understanding Mr Hughes' interpretation of particularly the initial approach from Forbo and Ms Bosley in terms of what was said at that time, and that this may have been something that perhaps would blow over within a month or so, it seems to me when one reads the email of 10 February, the one at 16:00 from Ms Bosley in which she goes into detail about the reasons why the claimant could no longer attend because of the risks to Forbo , as a potential respondent in a Tribunal claim, and indeed the claimant, because she does make it clear that part of the reason for

this is to prevent any allegations being made that the claimant, whilst working as a cleaner on that site might be removing material that could be of assistance to an ex employee bringing a Tribunal claim. So the rationale is, as it were, from both sides, but it is clear from that email that those were the reasons that the client was advancing as to why the claimant could not continue to provide those services at that site.

16 In terms of the duration of that situation, it seems to me that that has to be somewhat indefinite, in particular when one notes that the employee was threatening to take Forbo to a Tribunal. That itself could have taken several weeks if not months. One does not know, of course, at what stage that was, but even if a potential claimant had not even issued proceedings at that time and was close to the time limit for doing so, as anyone involved in these proceedings will have appreciated, that could have taken some time, during which time of course the claimant would not have been able to attend at Forbo whilst those proceedings were going on. So, far from being a relatively short lived matter it seems to me the likelihood was, and certainly Forbo was saying, that this was, as it were, for the foreseeable future. This was not necessarily some temporary and short lived matter that would simply go away, for example when the employee left, because the employee of course had already gone, and these concerns would remain as long as her potential Tribunal claim remained. So in terms of the explanation given by Ms Bosley, it seems to me that the client, Forbo, was saying that the claimant could not resume those duties on site for the foreseeable future, and not just on a very temporary basis that would be short lived.

17 Of course one appreciates that from Mr Hughes' point of view this may have been a less pressing matter, because of the impending transfer, and it is in no way derogatory of him to say that that was entirely appropriate and understandable because, as Mr Barton has said perhaps slightly more cynically but equally validly, that it would not be Mr Hughes' problem a few weeks after that. One can understand how he would take the perfectly understandable view that this was a matter that would, as it were, be passed over to the incoming transferee. Unfortunately, as a matter of law and in relation to the application of regulation 4 (1), I have to decide whether or not, at the time of the relevant transfer, which I found was indeed 1 March 2017, the claimant was assigned to that undertaking or group of resources.

18 In relation to that issue there has been some case law which the parties will be wholly unaware of I am sure, but which is important because it assists Tribunals in approaching this issue, because there have been instances, particularly in relation to suspension of an employee, where this issue has arisen before, and in relation to one of those cases ***Robert Sage v O'Connell [2014] IRLR 428***, an employee was contractually designated to provide care for X, a particularly vulnerable individual user of the employer's car services. She was suspended and was informed that it would be inappropriate for her to return to work caring for that individual. The employer had also received a specific request from the Local Authority for whom the services were provided that she was not to be placed with the service user going forward. The employer then lost the contract for care services to another provider.

19 The Employment Tribunal regarded the matter as essentially a contractual one, and considered where the claimant was assigned under the terms of the contract. Reference was made to another decided case, ***United Guarding Services v St***

James Security Group, but the Employment Appeal Tribunal considered that the contractual position was not the wholly determinative factor. It pointed out that in the ***United Guarding Services*** case the individual was not allowed to work at a contractual place of work by the employer. Accordingly the EAT held that the claimant in that case was not assigned to that part which was part of the business transferred. Technically under the contract the employer .could have required to work on the care package for X, but the facts were that she would not have been required to care for X due to her suspension and the views of the council. The employer had therefore prevented her from being assigned to the care package concerned and consequently the claimant in that case did not transfer under the TUPE regulations.

20 By contrast a case called ***Jakowlew v Nestor Primecare Services t/a Sage Care [2015] ICR 1100*** went the other way in relation to a care manager in relation to a contract with a local authority. There the claimant had been the subject of a disciplinary suspension and at the time of the transfer was still subject to that suspension, and the argument was whether that suspension meant that she was no longer assigned to the relevant undertaking providing that care. The difference, however, with the ***Robert Sage*** case was that in the ***Robert Sage*** case the employer accepted the request and informed the employee that it would not be appropriate for her to return to work providing those services. In the ***Jakowlew*** case, however, the employer itself carried out an investigation and a disciplinary process, at the end of which the claimant could have been expected to be returned to the work that she was previously doing. Consequently in that case, because the reaction of the employer was different and the employer was carrying out its own investigation and would come to its own conclusions as to where the employee would then ultimately work, the Employment Appeal Tribunal drew a distinction with the ***Robert Sage*** case.

21 Those are two illustrations of the two possible bases upon which the Tribunal could approach this case, and it seems to me that it is more analogous to the ***Robert Sage*** case. This is a case where upon receiving the complaint from the client, Forbo, and the instruction that the claimant was not to attend any further for the reasons given, which were not, of course, disciplinary matters: it was not being suggested that the claimant had done anything wrong, it was merely said by Forbo that she could not remain in that role because of the issues with their own employee, so this is not a disciplinary or suspension type case, it is where the instructions come for a different reason. In this case, rather like the ***Rober Sage*** case, and again entirely understandably, the first respondent, Mr and Mrs Hughes, whilst initially and quite properly raising the question with Forbo as to why this was necessary, when they got that answer , they effectively accepted it and the claimant thereafter was not required or expected to go to Forbo again, and they did not press the matter any further with their client. That seems to me to fall on the ***Robert Sage*** side of the line and consequently, as at the date of the transfer notwithstanding, that I find that it was 1 March, as of that date, and indeed since 10 February 2017 when the matter was first raised and the instruction given, the claimant was no longer assigned to that undertaking or service provision, and so as at the date of the transfer she did not, or her employment did not, transfer to the second respondent. That means, notwithstanding that there was a relevant transfer, that the second respondent has no liability to her, any dismissal was not by the second respondent and there is no

liability on the part of the second respondent for any dismissal that had occurred prior to that date. The claims against the second respondent therefore must fail.

(iii) Was the claimant dismissed by the first respondent?

22 That leaves the position of the first respondent, and given that the claimant I found was still employed by the first respondent, the letter of 22 February at page 11 of the first respondent's bundle under which the claimant was told that her employment with the first respondent would cease on 28 February 2017, was a dismissal. It was a dismissal, of course, because the first respondent felt that she was transferring to the second respondent, but they make it crystal clear that her employment with the first respondent ceases on 28 February 2017, and that consequently must be a dismissal. Given that there was no transfer of the employment that is the only conclusion to which the Tribunal can come.

(iv)Was there a potentially fair reason for the dismissal?

23 Having found that there was a dismissal the Tribunal's next task is to decide whether there is a potentially fair reason for that dismissal, and as I ventilated with Mrs Hughes in submissions, it is open to a respondent who is found to have dismissed an employee to advance in the alternative, and having initially argued, of course, that they did not dismiss, they are entitled to argue in the alternative that any dismissal was for a potentially fair reason, being one of those set out in s.98 of the Employment Rights Act 1996. Mrs Hughes has not done so but the Tribunal in the case of all unrepresented parties, of course, has to put forward and consider arguments that they may have, even if they do not appreciate that they do have them. It seems to me that the first respondent could advance a potentially fair reason for dismissal, namely redundancy. Redundancy, of course, occurs when either there is a cessation of business at a particular place or a diminution in the requirement for employees to carry out particular work in a particular place. Indeed Mr Hughes explained how redundancy had clearly been canvassed, and advice was sought upon it. Of course when an employee loses ten hours of their employment in circumstances where the reason is effectively the withdrawal of that work by the client, the Tribunal would find that that is a potential redundancy situation. So the Tribunal would find that there is a potentially fair reason here in terms of redundancy that the first respondent could potentially rely upon.

(v)Was the dismissal fair in all the circumstances?

24 Having decided that there is a potentially fair reason, however, the Tribunal then has to consider if it was actually fair in the circumstances, and unfortunately for reasons that the Tribunal can understand, given that effectively the dismissal was by letter of 22 February 2017, and that, other than to consult in relation to the potential TUPE transfer, which the Tribunal accepts did happen, there was no further consultation in terms of redundancy, or alternatives to it and things of that nature. If there is to be a fair redundancy dismissal, of course, the minimal obligation is for a respondent to consult with the potentially redundant employee about alternatives, and to explore those with him or her to taking the decision to dismiss, which clearly did not occur in this case but for the obvious reason that the expectation was there would be a TUPE transfer. That, I am afraid, cannot make it fair and so whilst there is the potentially fair reason of redundancy in fact I cannot find that this was a fair

dismissal in the circumstances, and so consequently the claim for unfair dismissal against the first respondent will succeed.

25 In terms of the question of redundancy and the advice the first respondent received, (and whilst this is really by the by and not necessary for the decision but it might assist), the Tribunal could understand how it may be felt that if a person has three jobs, in effect, but are arguably one that if she is redundant from one of those she would have to be made redundant from all three. One can see that, in the sense that, if she was employed under one contract if she loses two thirds of the work under that contract the claimant is nonetheless potentially redundant but she would fall to be made redundant from her job as a whole, and any redundancy payment would be based upon that position. That may be the basis on which the advice was given.

26 The alternative analysis, however, may be, and this is where having contracts of employment is very useful, that there was not one contract, but two or possibly three, in which case there would only be a redundancy situation in relation to one, and there would only be a redundancy payment in relation to that contract, but that is perhaps a refinement, and a gloss upon the advice given as far as I can understand it. But in terms of the Tribunal's decision, whilst potentially for a fair reason, the unfair dismissal nonetheless did occur and the claimant succeeds in relation to that against the first respondent.

(vi)Remedy.

27 In terms of what that entitles her to, looking at her Schedule of Loss and subject to anything that the first respondent would wish to say, but I do not understand these to be disputed figures, that that would entitle her to a basic award which coincidentally is the same as a statutory redundancy payment, and that will be based on ten hours at £7.50 an hour, £75, and six weeks at that would be £450, so the basic award will be that sum.

28 In the alternative, if the Tribunal was wrong to find unfair dismissal, but were to find that the claimant was dismissed by reason of redundancy she would be entitled to that sum in any event as a statutory redundancy payment, the basic award and statutory redundancy being calculated on the same basis. So either which way she would be entitled to that award.

29 The claimant is also entitled to a compensatory award, however, in relation to the loss of earnings. There were two weeks when she was without the additional ten weeks, and in each of these cases, of course, the losses are based upon the ten hours only. The Tribunal has taken the view that the proper analysis is that she was employed under three contracts, and so it is only in relation to the contract for the Forbo work, the ten hours a week work, that it makes its awards in relation to the basic award, and of course the loss of earnings, but in any event the loss of earnings is reduced by the continuing six hours' work in any event, so that would be £150 in terms of the compensatory award.

30 In terms of the wrongful dismissal as I explained at the beginning of the case, that probably does not matter now because the first two weeks of loss under the compensatory award take care of that. In the alternative, if the claimant were to claim

notice pay, and indeed she would be entitled to notice if dismissed for redundancy, then that is the same amount as I am awarding in relation to the compensatory award, and is the first two weeks of the notice pay in any event, and so it would be the same award any which way.

(vii)s.38 Employment Act 2002 – additional award.

31 At the conclusion of the judgment the I raised with the first respondent as to whether there were any issues in relation to the calculation of the basic award and the compensatory award, and Mrs Hughes confirmed there were not. I also raised with the first respondent the provisions of section 38 of the Employment Act 2002 in relation to the failure to provide any written statement of particulars of employment pursuant to section 1 of the 1996 Act. Mrs Hughes did not advance any reasons why the Tribunal should not make such an award, or at what level, and given that this is a case where there has been total non compliance , no form of contract or written particulars were issued to the claimant at all (though the first respondent has since attended to this issue) the Tribunal does award the higher award of an additional four weeks' pay in the sum of £300.

Employment Judge Holmes

Dated: 25 October 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

27 October 2017

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2403256/2017

Name of case(s): Miss AE Carr v 1)Image Cleaning Services Ltd

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 27 October 2017

"the calculation day" is: **28 October 2017**

"the stipulated rate of interest" is: 8%

For the Employment Tribunal Office