



EMPLOYMENT TRIBUNALS

Claimant: Mr F E Obiang Mbasogo

Respondents: (1) Standard Office Cleaning Ltd (trading as “The Clean Space”)
(2) Charles M Willie & Co (Shipping) Ltd
(3) Ms Z Nicholson (trading as “Hestia Cleaning Services”)

Heard at: Cardiff **On:** 26 & 27 January 2023

Before: Employment Judge S Jenkins

Representation

Claimant: In person (assisted by an interpreter, Ms H Loveridge)
First Respondent: Mr I Pettifer (Solicitor)
Second Respondent: Ms Z Pezzack
Third Respondent: In person

RESERVED JUDGMENT

1. The Claimant's claims against the Second Respondent are dismissed by agreement.
2. A service provision change, pursuant to regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, took place between the First Respondent and the Third Respondent. That had the effect of not operating so as to terminate the Claimant's contract of employment with the First Respondent, which had effect after the transfer as if originally made between the Claimant and the Third Respondent.
3. The Claimant was then unfairly dismissed by the Third Respondent as the sole or principal reason for his dismissal was the transfer.
4. The Claimant was also dismissed by the Third Respondent in breach of contract.
5. The Third Respondent is therefore ordered to pay the Claimant the following sums:
 - a. £392.04 gross by way of damages for breach of contract relating to notice.
 - b. £588.06 in respect of the unfair dismissal basic award.
 - c. £392.04 in respect of the unfair dismissal compensatory award.

6. In total therefore, the Third Respondent is ordered to pay the Claimant the sum of £1372.14.

REASONS

Background

1. The Claimant had brought claims; of unfair dismissal, breach of contract relating to notice, and for a redundancy payment, against the First Respondent only, in a Claim Form submitted on 2 February 2022. At a hearing before Employment Judge Bromige on 8 August 2021, it was directed that the Second and Third Respondents should be added as respondents, on the basis that it was contended by the First Respondent that there had been a service provision change, for the purposes of Regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") to one or other of those companies. The final hearing was then rescheduled to 25, 26 and 27 January 2023.
2. In the event, no Spanish interpreter was available to assist the Claimant on 25 January 2023, and therefore the hearing did not take place on that day. Two days proved to be sufficient to conclude the evidence and submissions, but there was insufficient time available for me to be able to deliver my judgment orally.
3. At the commencement of the hearing on 26 January 2023, I broached with the parties that my reading of the witness statements and skeleton arguments the day before suggested that there appeared to be no contention that the Second Respondent had ever taken on the Claimant's employment, or had ever been in a position where it could, or should, have taken on his employment. The parties accepted that that was the situation, and I therefore dismissed the claim against the Second Respondent by agreement. The hearing then continued with just the First Respondent and Third Respondent, but the two witnesses due to be called on behalf of the Second Respondent did continue to provide their evidence and they were cross-examined.
4. I heard evidence from the Claimant and from his wife, Ms Maria Esomoyo, in both cases supported by a Spanish interpreter, Ms H. Loveridge, on the Claimant's behalf. I heard evidence from Mr Andrew Rowen, Contracts Manager, on behalf of the First Respondent, and from the Third Respondent on her own behalf. I also heard evidence from Mr Donald Pearson, Company Secretary, and Mr James Daly, Accounts Manager, from the Second Respondent.
5. I had anticipated that I would also hear evidence on behalf of the First Respondent from Ms Michelle Watson, another Contracts Manager, and the manager directly responsible for the First Respondent's operations involving the Claimant, and I had read a written statement from her. Mr Pettifer, on behalf of the First Respondent, confirmed that Ms Watson had left the First Respondent's employment and was not going to be present. He confirmed that the First Respondent did not wish to apply for a witness order to compel Ms Watson's attendance, and nor did it wish to apply to postpone the hearing. In the circumstances, I indicated that, as I had read Ms Watson's statement,

I would accept it, but that, as Ms Watson was not present for her evidence to be tested, there would be limited weight that I could give to it, certainly to the parts of it which were not supported by evidence from other sources. In the event, much of Ms Watson's statement recorded events that had taken place in correspondence, via emails, WhatsApp messages and letters.

6. I considered the documents in a hearing bundle spanning 344 pages to which my attention was drawn, and I also took into account the parties' written and oral submissions.

Issues

7. The issues had been set out by Employment Judge Bromige, following the hearing on eight August 2022, and were as follows:

Dismissal

1. *Was the Claimant dismissed?*
 - 1.1 *If the Claimant was dismissed, by whom and on what date?*
2. *In determining the above, was there a service provision change ("SPC") within the meaning of Regulation 3(1)(b) TUPE from the First Respondent to either the Second Respondent (on his own behalf – Reg 3(1)(b)(iii) TUPE) or the Third Respondent (a subsequent contractor – Reg 3(1)(b)(ii) TUPE)?*
3. *If there was an SPC, was the Claimant assigned to an organised grouping of employees which might have transferred?*
4. *Did the Second Respondent intend that the activities would, following the SPC, be carried out by the transferee (i.e. either the Second or Third Respondent) other than in connection with a single specific event or task of short term duration?*
5. *If there was a SPC, when did it occur?*
6. *If the Claimant was dismissed, what was the reason for the dismissal?*
 - 6.1 *Was the sole or principal reason for the dismissal either the TUPE transfer or a reason connected with the TUPE transfer that is not an economic, technical or organisational reason entailing changes in the workforce*

The Tribunal further notes that if the Claimant was dismissed but dismissal was not in fact effected prior to a relevant transfer then his contract of employment will have transferred and that the transferee will be liable for the subsequent termination. If there was no transfer, liability for the dismissal, whenever effected, will rest with the First Respondent.

7. Remedy for unfair dismissal

- 7.1 *Does the Claimant wish to be reinstated to their previous employment?*
- 7.2 *Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?*
- 7.3 *Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.*
- 7.4 *Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.*
- 7.5 *What should the terms of the re-engagement order be?*
- 7.6 *If there is a compensatory award, how much should it be? The Tribunal will decide:*
 - 7.6.1 *What financial losses has the dismissal caused the Claimant?*
 - 7.6.2 *Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*
 - 7.6.3 *If not, for what period of loss should the Claimant be compensated?*
 - 7.6.4 *Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*
 - 7.6.5 *If so, should the Claimant's compensation be reduced? By how much?*
 - 7.6.6 *If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?*
 - 7.6.7 *If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?*
 - 7.6.8 *Does the statutory cap of fifty-two weeks' pay or [£86,444] apply?*
- 7.7 *What basic award is payable to the Claimant, if any?*
- 7.8 *Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?*

8. Wrongful dismissal / Notice pay

- 8.1 *What was the Claimant's notice period?*

8.2 *Was the Claimant paid for that notice period?*

8.3 *If not, did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?*

9. Redundancy Payment

9.1 *Is the Claimant entitled to a redundancy payment under s.135(1) ERA 1996?*

9.2 *How much should the Claimant be awarded?*

8. Judge Bromige had noted that the first issue to be addressed was whether the Claimant had been dismissed. However, I indicated at the outset of the hearing that the focus of the hearing would be on whether there had been a transfer, pursuant to TUPE, of the activities carried out under a contract the First Respondent had with the Second Respondent, to the activities carried out under a contract between the Third Respondent and the Second Respondent, and, if so, whether the Claimant had been assigned to the First Respondent's contract, such that he should have transferred to the Third Respondent. It would only be once those issues had been addressed that I would be in a position to assess the scope for, and extent of, any liability of whichever Respondent had responsibility for the Claimant. The indications were that either the First Respondent did not continue with the Claimant's employment in circumstances where there was no transfer, or the Third Respondent did not take on the Claimant's employment in circumstances where there was a transfer. On either analysis, it appeared that there had been a dismissal by one or other of them.

Law

9. The TUPE Regulations govern relevant transfers of businesses of various types, having the effect, where they apply, of transferring the contracts of employment of persons employed by a transferor as part of an organised grouping of resources or employees, so that their contracts have effect as if originally made between the employee and the transferee.
10. What is a relevant transfer is governed by regulation 3 of TUPE, the material provisions of which are as follows.

3.— A relevant transfer

(1) *These Regulations apply to—*

(a) *a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;*

(b) *a service provision change, that is a situation in which—*

- (i) *activities cease to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client's behalf (“a contractor”);*
- (ii) *activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person (“a subsequent contractor”) on the client's behalf; or*
- (iii) *activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf,*

and in which the conditions set out in paragraph (3) are satisfied.

(2) *In this regulation “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*

(2A) *References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.*

(3) *The conditions referred to in paragraph (1)(b) are that—*

(a) *immediately before the service provision change—*

- (i) *there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;*
- (ii) *the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and*

(b) *the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.*

11. The contention by the First Respondent in this case was that a service provision change falling under regulation 3(1)(b)(ii) occurred to transfer the employment of the Claimant to the Third Respondent. In other words, the First Respondent contended that activities ceased to be carried out by it on the Second Respondent's behalf and were instead carried out by the Third Respondent on the Second Respondent's behalf. The focus in that regard, was on two principal areas.

12. The first was whether the activities carried out by the Third Respondent under its contract with the Second Respondent were fundamentally the same as the activities previously carried out by the First Respondent under its contract with the Second Respondent, i.e. the requirement of regulation 3(2A).

13. The second was whether the Claimant had been assigned to an organised grouping of employees i.e. falling within regulation 3(3)(a)(i). In that regard, regulation 2(1) confirms that references to an "*organised grouping of employees*" includes a single employee.
14. For completeness, there was no contention that the activities carried out by the Third Respondent under its contract with the Second Respondent were carried out in connection with a single specific event or task of short-term duration, which meant that regulation 3(3)(a)(ii) had no bearing on this case.
15. The leading case on the question of whether activities are fundamentally the same is *Metropolitan Resources Ltd -v- Churchill Dulwich Ltd and others* [2009] ICR 1380, where Judge Burke QC, noted, at paragraph 30:

"30 The statutory words require the employment tribunal to concentrate upon the relevant activities; and tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks. However, it cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A common sense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the tribunal in the present case. The tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the tribunal on the evidence in the individual case before it."

16. The question of what constitutes "*activities*" has been addressed by the appellate courts on several occasions. That has largely involved assessment of situations where a change of contract has involved a reduction from, or a "*fragmentation*" of the activities carried out by the transferor. In that context, Simler P (as she then was), in *Arch Initiatives -v Greater Manchester West Mental Health NHS Foundation Trust* [2016] ICR 607, noted, at paragraph 17, that, "*The word "activities" is not defined, and nor is it qualified in any way by words that could have been used to qualify it... There is nothing in the Regulations that expressly requires that the relevant activities should constitute "all of the activities" carried out by the outgoing contractor*".
17. In this case, the case advanced by the Third Respondent was that the activities under her contract with the Second Respondent, as well as involving a different location, had increased. In my view, the approach taken by Simler P in *Arch Initiatives* applies equally to contracts where activities have increased. The key assessment is whether, in fact, as noted by Simler P at paragraph 19 of *Arch Initiatives*, "*the activities that cease to be carried out by*

the outgoing person and are carried out instead by the incoming person after the relevant date are fundamentally or essentially the same".

18. With regard to the question of assignment to an organised grouping, the EAT, in *Eddie Stobart Ltd -v- Moreman and others* [2012] ICR 919, noted that the organisation of the grouping must be more than merely circumstantial; the employees must have been organised intentionally.
19. The EAT also confirmed, in *Amaryllis Ltd -v- McLeod and others* (UKEAT/0273/15), that the assessment of the principal purpose of the carrying out of the activities, whilst not defined in TUPE, is to be assessed by analogy with the law relating to the principal reason for dismissal in unfair dismissal cases, i.e. on the basis that the purpose of carrying out the activities on behalf of the client need not be the sole purpose, but must be the dominant purpose. The EAT in *Amaryllis* also confirmed that the assessment of whether there is an organised grouping carrying out activities on behalf of the client is to be assessed immediately before the asserted transfer.
20. If there was a service provision change, then regulation 7 of TUPE provides as follows:

7.— Dismissal of employee because of relevant transfer

- (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.*
21. If there was not a service provision change and TUPE did not apply, then the fairness of a dismissal of the Claimant by the First Respondent, as would then have taken place, would need to be assessed by reference to section 98 of the Employment Rights Act 1996 ("ERA"), involving the consideration of whether the dismissal had taken place for a potentially fair reason falling within section 98(1)(b) or (2) ERA, and then whether dismissal for that reason was fair applying section 98(4) ERA.
 22. In that regard, the First Respondent's alternative contention, if TUPE was found not to have applied, was that the dismissal had taken place by reason of redundancy, which is a potentially fair reason, falling within section 98(2)(c) ERA.
 23. With regard to the question of the reason for dismissal, I was conscious that the burden of establishing that the dismissal was for a potentially fair reason, i.e. in this case redundancy, fell on the Respondent.
 24. With regard to that, I was conscious of the need to apply the terms of section 139(1)(b)(ii) ERA, which provides that an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly

or mainly attributable to the fact that the requirements of the employer's business for employees to carry out work of a particular kind in the place where the employee was employed have ceased or diminished or are expected to cease or diminish.

25. In considering whether that state of affairs prevailed, I was conscious of the guidance provided by the EAT, in Safeway Stores plc v Burrell [1997] ICR 523, that a three stage test needed to be applied:
- (i) Was the employee dismissed?
 - (ii) If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
 - (iii) If so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?
26. If I accepted that the reason for dismissal was redundancy then, in considering whether dismissal for that reason was fair in all the circumstances, I would have to have regard to the guidelines set down by the EAT in Williams and others v Compair Maxam Ltd [1982] ICR 156. In that case, the EAT put forward four factors that a reasonable employer might be expected to consider in such circumstances, one of which, relating to consultation with a union, had no relevance for this case. The remaining three were:
- (i) Whether the selection criteria were objectively chosen and fairly applied.
 - (ii) Whether the employee was warned and consulted about the redundancy.
 - (iii) Whether any alternative work was available.
27. In relation to the Claimant's claim for a redundancy payment, the test for whether there was a redundancy situation is that set out at section 139(1)(b)(ii) referred to at paragraph 24 above.
28. In practical terms however, the Claimant would not be entitled to receive both a redundancy payment, pursuant to section 163 ERA, and a basic award for unfair dismissal, pursuant to section 122 ERA, as section 122(4) notes that the amount of the basic award shall be reduced by the amount of any redundancy payment awarded by the tribunal in respect of the same dismissal.
29. With regard to the compensatory award, section 123(1) ERA provides that the amount of the compensatory award shall be, "*such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".
30. With regard to the compensatory award generally, section 123(4) ERA provides that in ascertaining the loss sustained by the Claimant, the common law duty to mitigate loss applies. In that regard the EAT, in Window Machinery Sales Limited (t/a Promac Group) v Luckey (UKEAT/0301/14), confirmed that it "*is for the employer, not the injured employee, to establish*

that there has been a breach of the duty to mitigate and the extent of that breach. The duty upon an employee is to act reasonably in order to mitigate his loss. ... The test is an objective one, based on the totality of the evidence, taking into account all relevant circumstances. The Tribunal must not be too stringent in its expectations of the injured party".

31. The EAT went on to say that an Employment Tribunal may, "*have to decide: (1) what steps it was reasonable for the Claimant to have to take in order to mitigate loss; (2) whether the Claimant did take reasonable steps to mitigate loss; and (3) to what extent, if any, the Claimant would have actually mitigated his loss if he had taken those steps.*"
32. The EAT noted further that, "*the burden of proof is on the employer on all these questions. If the employer shows that there were many jobs available, it is easier for an Employment Tribunal to conclude that the employee ought to have engaged in a search for them. If the employer adduces no evidence at all on that question, it may well be difficult for an Employment Tribunal to conclude that an employee was required to engage in a substantial search for jobs*".
33. With regard to notice, there was no indication that the Claimant had been dismissed due to his conduct, and therefore any dismissal should have been on notice or with a payment in lieu of notice.

Findings

34. The factual background to this case was not materially disputed, and events were largely explained by the documents. However, my findings, reached on the balance of probability where there was any dispute, were as follows.
35. The First Respondent is a commercial cleaning contractor, providing services to a range of clients operating out of several offices in England and Wales.
36. The Claimant commenced work for the First respondent as a cleaner in July 2017. Although his original contract of employment was not in the bundle, the Claimant confirmed that a version in the bundle dated 25 November 2021 reflected his original terms. The contract contained the following relevant clauses:

2. Job Title and Place of Work

You will be employed as a Cleaning Operative.

Additionally, you may be required to perform other duties from time to time that The Clean Space considers necessary to meet the needs of the organisation.

Your job description is appended to this document. Amendments may be made to your job description from time to time when required.

Your normal place of work will be:

Charles M Willie & Co, 6 Ocean Way, Cardiff, CF24 5HG.

You may be required to work under your existing terms and conditions at other locations on a temporary or permanent basis to meet the needs of the business and our clients, which are within a reasonable travelling distance of your home.

You will be consulted in accordance with our legal obligations on any proposed temporary or permanent change of location that is outside of a reasonable travelling distance from your home.

....

4. Hours of Work

Your normal hours of work per week for each of your normal places of work are:

Charles M Willie & Co

Monday: 2 hours

Tuesday: 2 hours,

Wednesday: 2 hours

Thursday: 2 hours

Friday: 3 hours

Total: 11 hours per week

With an unpaid break of 20 minutes where any shift exceeds 6 hours.

Lay off and Short Time Working

In the event of a reduction/shortage of work or any other occurrence affecting normal working, the Company reserves the right to temporarily lay you off work without pay, save for guarantee payments to which you will be entitled, or alternatively, to reduce your normal working hours and reduce your pay proportionately (e.g. If a client's premises is closed on a normal working day or days and they do not require cleaning).

You may be required to work additional hours to your normal hours per week, from time to time, with reasonable notice, to meet the needs of the organisation.

It may be necessary for you to take over some duties normally performed by your colleagues or to undertake additional duties if a client has a specific cleaning request. Therefore, you are required to be flexible in terms of your working hours or duties in order to meet the needs of the business.

37. The contractual notice provisions mirrored the statutory minimum requirements set out in section 86 ERA, i.e. broadly that the Claimant was entitled to one week's notice for each complete year of service.
38. For reasons which are not clear, the Claimant's contract was reissued on 1 April 2020, again noting that that his normal place of work would be the Second Respondent's premises at 6 Ocean Way. On 28 June 2021, the Claimant was issued with an amendment to his statement of employment,

noting that the amendments would take effect from 1 April 2021. Whilst the document was stated to be an amendment to the Claimant's statement of employment, the three purported amendments only involved one actual amendment, the increase of the Claimant's rate of pay to £8.91 per hour, which reflected the increase of the national minimum wage, which took effect on 1 April 2021. The other sections referred to as amendments to sections 2 and 4 of the contract, i.e. those relating to place of work and hours of work, did not actually change. The Claimant's normal place of work was still stated to be the Second Respondent's premises at 6 Ocean Way, and his hours of work were exactly the same. The document also confirmed that, "*All other terms and conditions of employment remain unchanged*".

39. In addition to the express terms of his employment contract, the Claimant confirmed in his evidence that he primarily worked at the Second Respondent's premises from the commencement of his employment in July 2017. He did undertake work for other clients of the First Respondent at other locations, but only on an occasional and temporary basis to cover for holiday absences of other employees. In 2021 for example, between January and October the Claimant consistently worked between 44 and 50 hours at the Second Respondent's premises each month. In addition, he worked 27.5 hours for two other clients in the month of May, which were worked to cover the absence of the employee who usually worked at those locations.
40. The Claimant worked at the Second Respondent's premises at 6 Ocean Way, Cardiff, on each weekday between 6:00pm and 8:00pm, working additionally until 9:00pm on Fridays. His work covered the expected gamut of office cleaning, by hand and by vacuum cleaning. He cleaned the offices, the toilets, and the communal areas. He also loaded the dishwasher each evening and set it to run.
41. The Claimant's wife had previously worked for the First Respondent as a cleaner, including at the Second Respondent's premises at Ocean Way. Indeed, it appeared from her evidence that she picked the Claimant up from the premises from time to time when he worked there, and sometimes helped him with the work. That however appeared only ever to have been a private arrangement between the two individuals, as Ms Esomoyo, up until 2019, was employed by the First Respondent to work at a different location for a different client. The First Respondent only paid the Claimant in respect of work carried out at the Second Respondent's premises, whether by himself alone or by a combination of himself and his wife.
42. The Second Respondent is a shipping company which owns, manages and brokers merchant ships. No operational activities took place at its premises, which were used as offices, where administrative, clerical and managerial work was carried out.
43. The First Respondent had had a contract with the Second Respondent to clean its offices at 6 Ocean Way since 2013. On 29 January 2021, the Second Respondent gave 90 days' notice to the First Respondent to terminate the contract, i.e. such that it would end on 28 April 2021. The Claimant was notified of that by his then manager on 2 February 2021, at the point where she herself was being made redundant, the First Respondent, opting to have one manager covering the work of both its Bristol and Cardiff offices. Ms

Watson then became the Claimant's manager.

44. Mr Pearson, the Second Respondent's company secretary, noted in his witness statement that the decision to terminate the contract with the First Respondent was due to concerns over quality, noting that it had declined following the redundancy of the Claimant's previous manager. That cannot, in fact, have been the reason however, as the manager had not been made redundant at the time notice was served. In any event, the reason for the termination of the contract had no material bearing on this case.
45. As things transpired, the contract between the First and Second Respondents did not end on 28 April 2021, but continued for just over a further six months. The Second Respondent purchased a new office building, 11/12 Neptune Court, on 30 April 2021, expecting to move in in the Summer of 2021. However, due to the renovation work taking longer than expected, the move did not take place until 9 November 2021.
46. Ad hoc extensions of the contract were discussed and agreed, initially to the end of May, then to the end of June, the end of July, the end of September and the middle of October. On 20 October 2021, Mr Pearson emailed Ms Watson, anticipating that the move would be in the week commencing 8 November 2021, which ultimately proved to be the case. Even then, however, Mr Pearson only referred to that date as his "*latest best estimate*".
47. The First Respondent provided a quote for the cleaning of the Second Respondent's new building, as did the Third Respondent, also a cleaning contractor. In the event, the Third Respondent's quote was accepted. No evidence of the Second Respondent's procurement requirements or of the contract entered into was provided to me, but Mr Pearson confirmed that the First Respondent had quoted that cleaning the new office would take six hours' work per evening whereas the Third Respondent quoted that four hours would be sufficient.
48. The Second Respondent's new premises, at 11/12 Neptune Court, Cardiff, were situated approximately half a mile away from the old offices. The new premises served as the Second Respondent's office base in the same way as 6 Ocean Way had previously. There were however some differences. The new building is substantially larger, its square footage being some 80% bigger, and it is a recently renovated and refurbished office, whereas the old office had not been renovated for some 20 years. The number of staff working in the new office from 9 November 2021, was very much the same as the number working in the old office, although three people commenced work the week before the move.
49. The new office has additional areas to those that existed in the old office, including a boardroom, a museum and a gymnasium. It also has some additional features, including a high-tech coffee machine which had been left by the previous occupants, a sound-proofed glass boardroom wall, and marble effect terrazzo flooring. None of those had been present in the old office.
50. However, the cleaning of the offices, the toilets and the communal areas remained. In addition to the additional cleaning elements noted above, the

only services referenced by Mr Pearson as being done additionally at the new premises are the provision of consumables, i.e. janitorial supplies, which had previously been bought by the Second Respondent's employees on an ad hoc basis, and the emptying of a shredding machine, which had also been done as and when needed by the Second Respondent's staff in the old office. Mr Pearson, in his witness statement, noted that the Third Respondent "*offers to provide external cleaning services such as window cleaning and guttering cleaning*", but he confirmed that they have not, to date, undertaken any such work.

51. Notwithstanding Mr Pearson's email of 20 October 2021, in which he noted that his best estimate was that the move would take place in the week commencing 8 November 2021, no further formal notification of the moving date was given to the First Respondent. The first the Claimant, and soon after that the First Respondent, knew of the actual move was on 9 November 2021, when the Claimant attended at the old offices to clean them, but found them closed with a notice affixed to the door, noting the move to the new premises.
52. The Claimant messaged Ms Watson via WhatsApp at 6:33pm on 9 November 2021, sending a photograph of the notice on the door of the old office. A few minutes later he sent a message referring to the notice being on the door of the office and saying, "*You have not told me anything. May I have an explicación?*"¹. Ms Watson replied at 6:43pm saying, "*They have give us notice today we will work till the contract ends then we finish. So then I will have to lay you off. Till I have something else for you*". The Claimant then replied at 8:27pm saying, "*Please accept my redundancy*".
53. Ms Watson then sent a further message at 8:13am the following day, saying, "*You will be transferred over to the new company that charlie willie will be moving too you will be receiving the paper work very shortly*". The Claimant then repeated his request for a redundancy payment at 3:54pm on 10 November 2021.
54. Ms Watson sent further messages at 5:18pm and 5:19pm, saying that the Claimant "*still has to transfer over to the new company weather they change address or not*", and, "*Its law under TUPE*", to which the Claimant replied, at 5:25pm, "*is too late since you felt to give notice to your employee*". The Claimant had also sent an email to a member of the First Respondent's HR Team on 9 November 2021 at 8:25pm referring to his notice entitlement and reiterating his request for redundancy.
55. The Claimant then repeated his request for a redundancy payment by way of a letter attached to an email to Ms Watson on 15 November 2021, and he sent a further email to Ms Watson on 11 December 2021, requesting a copy of the First Respondent's handbook to make a formal grievance complaint to Ms Watson's manager with regard to his dismissal.
56. Ms Watson replied on the same day, noting that she had requested that a handbook be sent to the Claimant by post. She then went on to say, "*I am a little confused by your email saying you are dismissed from the clean space, when you was layoff from your place of work at Charlies willie on 8 November*

¹ All messages, emails and letters are recited verbatim.

2021". She went on to say that she had a new vacancy in the Cardiff area starting on 1 January 2022 and provided details of that to the Claimant.

57. On 18 December 2021 however, the Claimant submitted a grievance letter to his employer setting out his concerns that his manager had dismissed him without notice, and that he requested redundancy from the First Respondent.
58. The First Respondent then wrote to the Third Respondent on 21 December 2021, noting that they had been informed by the Second Respondent that the cleaning service contract that it had previously undertaken had been transferred to the Third Respondent with effect from 9 November 2021. The First Respondent contended that the Claimant had been wholly assigned to the contract and therefore transferred to the Third Respondent by the application of the TUPE regulations. The letter asked for the Third Respondent to confirm her understanding that the TUPE regulations applied to the service provision change, and that the Claimant had become her employee with effect from 9 November 2021, asking for any "*envisaged measures*" in relation to the transfer, and where they should instruct the Claimant to report for duty and to whom.
59. On the following day, Mr Rowen sent an email to the Claimant noting, "*After investigating your complaint of Monday 20th December we have discovered you should have moved over to Charles Willie*". He went on to refer to an attached letter of explanation, which in fact noted that it was considered that the Claimant's employment had transferred to the Third Respondent and not to the Second Respondent, as had been noted by Mr Rowen in his email.
60. The letter confirmed that the First Respondent had written to the Third Respondent to confirm that it understood that TUPE applied and that the Claimant's employment had transferred to them, and to ask whether there were any envisaged measures upon which consultation was required. The letter confirmed the automatic transfer effect of TUPE. The Claimant replied to Mr Rowen's email on 24 December 2021, again repeating his request for a redundancy payment.
61. Mr Rowen wrote again to the Claimant by email on 6 January 2022, noting that the First Respondent was still awaiting a response from the Third Respondent, but that they had written to them again asking for a response within seven days. That reminder was in fact sent the following day, 7 January 2022, with a further letter reiterating the points that had been made in the letter of 21 December 2021. On the same day, the First Respondent provided the required employee liability information relating to the Claimant to the Third Respondent.
62. The Third Respondent then replied by email on 12 January 2021, noting, "*As your site which employed Mr Mbasogo has closed, and this is a separate assignment, with different hours to what you quoted, we believe that Tupe does not apply, and will therefore not be transferring Mr Mbasogos employment to ourselves*".
63. Despite further correspondence between the parties, the situation was not resolved. The First Respondent then issued the Claimant's P45 on 28 January 2022, and then sent a letter to the Claimant on 31 January 2022,

confirming its position that the Claimant had transferred to the Third Respondent on 9 November 2021. With regard to the Claimant's grievance, the letter noted that the Claimant had asserted that he had been dismissed by the First Respondent and had been due a redundancy payment. It noted that, *"In answer to that letter, when we ceased providing cleaning services for Charles M Willie and Co Ltd you were placed on "lay off" whilst we tried to engage with any new provider of service or find you an alternative role within The Clean Space. At this point we were not aware of who was taking over the cleaning provision. Although you were temporarily laid off, at no point was your employment terminated. I am sorry if there was any misunderstanding on this point"*.

64. The letter went on to say, *"However, because the TUPE regulations apply, and your employment is protected (with Hestia), we cannot make you redundant. Redundancy would constitute an unfair dismissal, as you are in law, still employed by Hestia. Any potential redundancy, if necessary, would have to be consulted on with you and enacted by Hestia, after the transfer"*.
65. Thereafter, the Claimant was not employed by either the First or Third Respondent.
66. With regard to the Claimant's earnings whilst working for the First Respondent, it was agreed that he received, on average, the sum of £98.01 per week. Due to the low level of earnings, no Income Tax or National Insurance was deducted from that sum.
67. With regard to the Claimant's mitigation efforts, he confirmed that he did not look for work in the immediate aftermath of the closure of the Second Respondent's Ocean Way office. He did however take up a position with a new employer, as a factory operative, some distance from his home, on 28 February 2022. He confirmed that that work involved a higher rate of pay.
68. Due to the significant walking distance involved to and from his new employer's premises, which involved approximately an hour's walk each way, the Claimant gave up that new role on 9 June 2022.
69. The Claimant provided evidence of job applications in September and October 2022, although not for the months of June, July and August 2022. The First Respondent provided a list of some 25 cleaning jobs in the Cardiff area which existed on examination at the end of October 2022, contending that that reflected the usual position with regard to cleaning vacancies within the area.
70. The Claimant then commenced a new job on 1 November 2022, where he is still working. He again confirmed that he is earning more in that role than he did for the First Respondent.
71. With regard to benefits during the Claimant's periods of unemployment, he confirmed that he had applied for universal credit, but had not been granted it due to the level of overall family earnings.

Conclusions

72. Applying my findings and the applicable law to the issues I had to consider, my conclusions were as follows.
73. With regard to the question of whether a service provision change had taken place, the First Respondent had carried on activities on the Second Respondent's behalf, in the form of office cleaning at 6 Ocean Way, from 2013 to 8 November 2021, when it ceased to do so.
74. Office cleaning activities were then carried out by the Third Respondent on behalf of the Second Respondent, albeit at the Second Respondent's new offices at 11/12 Neptune Court, from 9 November 2021 onwards.
75. On the face of it therefore, the core requirements of Regulation (1)(b)(ii) of TUPE had been made out, in that activities had ceased to be carried out by a contractor on a client's behalf, and instead had been carried out by a subsequent contractor on the client's behalf. The key issue to assess was whether those activities were fundamentally the same as required by regulation 3(2A).
76. I did not consider that the change of location of the cleaning activities from 6 Ocean Way to 11/12 Neptune Court, by itself, meant that the activities were not fundamentally the same. There is nothing within Regulation 3, or indeed within the TUPE Regulations generally, which restricts a service provision change, or a relevant transfer more broadly, to circumstances in which the services are provided at the same location. I also noted that, in cases decided before service provision changes were introduced into the TUPE Regulations when revised in 2006, in assessing whether a business transfer taken place, the transfer of assets, including premises, was not a prerequisite, an example of that being the case of *Merckx v The Ford Motor Co (Belgium) SA* [1997] ICR 352.
77. The change of location therefore was only a matter to be considered as part of the overall assessment of whether the activities carried out by the Third Respondent on behalf of the Second Respondent were fundamentally the same as the activities the First Respondent had previously carried out on the Second Respondent's behalf.
78. With regard to that question, I noted the guidance provided by *Metropolitan Resources* and *Arch Initiatives* that that there was no requirement that all the activities be undertaken after the transfer in comparison with before the transfer. The focus of those cases, and indeed the focus of most, if not all, of the cases involving the assessment of activities, focused on the second contract being smaller than the first, and focused on "fragmentation" rather than "enlargement". As I have noted however, I considered that the guidance provided, i.e. that it is not a requirement that all the activities be carried out before and after a transfer, also applied in circumstances where the new contract was larger than the old. I also noted the guidance provided by the EAT in *Amaryllis* that the carrying out of the activities must be the dominant purpose.
79. Whilst, as I have noted, there were some additional features forming part of

the Third Respondent's activities on behalf of the Second Respondent, I considered that they were minor, involving only the provision of consumables and the emptying of the shredder. I did not consider that other differences involved additional activities as they simply reflected the fact that the new premises were larger, had recently been renovated and refurbished, and was differently arranged; for example, there was a high-tech coffee machine, a glass wall, and terrazzo flooring. Whilst the cleaning of those elements no doubt requires a different approach to the cleaning of 6 Ocean Way, where, for example, coffee was provided by way of a kettle and a jar of instant coffee, the fundamental activity of cleaning offices and related areas remained. In my view therefore, the activities carried out by the Third Respondent on behalf of the Second Respondent were fundamentally the same as those previously carried out by the First Respondent.

80. I then moved to consider whether the Claimant was part of an organised grouping, having as its principal purpose the carrying out of those activities. As I have noted, the TUPE Regulations themselves, at Regulation 2(1), confirm that an organised grouping of employees can be a single employee.
81. Throughout the Claimant's employment, his principal focus was on cleaning the Second Respondent's offices. He did other work on occasions, but always as cover for others. In 2021, out of the ten months prior to the cessation of the Claimant's work in November, he worked for some two to three weeks to cover another employee's holiday, and that was in addition to his duties at the Second Respondent's premises. Other than that, he worked exclusively at the Second Respondent's premises.
82. I was therefore satisfied that the Claimant had the principal purpose of carrying out the activities of cleaning the Second Respondent's offices. That was not a single specific event or task of short term duration, and therefore a service provision change existed and the Claimant had transferred to the Claimant at the point of that change, on 9 November 2021. The Claimant's claims against the First Respondent therefore failed.
83. A corollary of the existence of a service provision change and the fact of the Claimant not being taken on by the Third Respondent and therefore effectively having been dismissed, was that that dismissal was unfair, pursuant to Regulation 7. There was no question of there being an economic, technical or organisational reason justifying that dismissal. Indeed, the Third Respondent now provides additional services in terms of the hours worked, and therefore there would have been no reason for the Claimant to have been dismissed.
84. I stress that I did not consider that the Third Respondent purposely sought to avoid the application of TUPE and to take on the employment of the Claimant. Whilst she did maintain that position in correspondence in January 2022, that was some two months after the transfer had, as I have decided, taken effect, and, bearing in mind her status as a litigant-in-person, it was not unreasonable for her to continue to maintain that position in what is a very technically legal area.
85. No evidence was put before me about discussions between the Second Respondent and either or both the First and Third Respondents regarding the

potential application of the TUPE Regulations to the termination of the First Respondent's contract and the commencement of the Third Respondent's contract, possibly because of the drawn-out nature of the cessation of the former contract, with notice having been given at the end of January to expire at the end of April but ultimately not taking effect until November 2021. Even then, there appeared to be no official notification of the date of changeover.

86. Nevertheless, Regulation 7 applies automatically to make the dismissal of the Claimant, as caused by the Third Respondent's failure to maintain his employment, unfair. Also, as that termination of employment took place without the provision of notice, the dismissal also took place in breach of contract.

Compensation

Breach of contract (notice pay)

87. The Claimant should have received notice of the termination of his employment. His gross weekly pay was £98.01 and, due to the amount of that payment, was not subject to the deduction of Income Tax or National Insurance. He was employed for four complete years and therefore was entitled to 4 weeks' notice. The Third Respondent is therefore required to compensate the Claimant in respect of the breach of contract arising from the failure to pay notice in the sum of £392.04.

Unfair dismissal

Basic award

88. With regard to unfair dismissal, the Claimant's basic award, referable to four complete years' service, all whilst over the age of 41, at a weekly rate of £98.01, amounted to £588.06. For completeness, the basic award extinguishes any entitlement to a redundancy payment the Claimant may have had, by virtue of section 122(4)(a) ERA.

Compensatory award

89. In terms of the unfair dismissal compensatory award, section 122(3) ERA provides that it should be such amount as I considered just and equitable in all the circumstances, having regard to the loss sustained by the Claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the Third Respondent. Section 124(1ZA)(b) then provides that the maximum compensatory award is 52 weeks' pay.
90. The payment I have ordered in respect of notice covered the period up to 7 December 2021. The Claimant then had a period of twelve weeks of unemployment up to 28 February 2022. He was then employed for some fourteen and a half weeks up until 9 June 2022, before he gave up that employment, due to the distance he had to travel to and from work. He was then unemployed for a further twenty weeks up to 1 November 2022, before taking up the employment in which he currently remains, and which is anticipated to continue. As I have noted, in all circumstances, the Claimant's replacement jobs led to earnings in excess of those he enjoyed at the First

Claimant.

91. In total, therefore, there were approximately 32 weeks of unemployment in 2022 when the Claimant did not receive any earnings to mitigate his losses. However, as I have noted, my focus is not simply on actual mitigation, but on what steps I considered it reasonable for the Claimant to have taken in order to mitigate his loss.
92. With regard to the period from 9 June 2022 to 1 November 2022, I noted the range of possible positions available in October, and concluded that that would have been the general position throughout that period. Whilst I noted the Claimant's desire to give up his factory operative role due to the amount of travel needed to be undertaken in relation to his replacement role, I equally noted that he had undertaken that work for over three months. I therefore considered that the Claimant had not acted reasonably in terms of mitigation by leaving that job before obtaining alternative work.
93. I also considered, regardless of that, that the Claimant should, in any event, have been in a position to have mitigated his losses by obtaining other work at that time in short order. I did not consider therefore that it would be appropriate to compensate the Claimant in respect of that period.
94. With regard to the Claimant's earlier period of unemployment, from early December 2021 to the end of February 2022, I considered that obtaining an alternative position at the start of that period, i.e. in the run-up to Christmas, would have been likely to have been difficult. However, I considered that cleaning vacancies would have been available in January 2022, in the same way that they were available in October 2022, and therefore, the Claimant could, and indeed should, have been in position to mitigate his losses by obtaining alternative work in early January 2022. I therefore considered it appropriate only to award compensation in respect of the four-week period from 7 December 2021 onwards by way of a compensatory award. That amounted to £392.04.

Total

95. In total, therefore, the Third Respondent is ordered to pay the Claimant the sum of £1372.14.

Employment Judge S Jenkins

Date: 2 February 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 6 February 2023

FOR EMPLOYMENT TRIBUNALS Mr N Roche