EMPLOYMENT TRIBUNALS

Claimants: 1 Mr I Greenfield
2 Mrs T Greenfield

Respondents: 1 Canaltime Management Ltd
2 ABC Leisure Group Ltd

Heard at: Bristol **On:** 25, 26 and 27 March 2019

Before: Employment Judge Walters

Representation
Claimants: Mr Bromige, Counsel
Respondents: 1 No appearance
2 Mr Lomas, Consultant

JUDGMENT

Mr I Greenfield (the First Claimant)

As against the First Respondent

1. The First Claimant's claim for redundancy payment, unfair dismissal, wrongful dismissal and holiday pay are all dismissed.

2. The claim in respect of a failure to consult and inform is upheld pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006. The First Respondent is ordered to pay £1492.38

As against the Second Respondent

3. The First Claimant's claim that he was entitled to a redundancy payment is dismissed.

4. The First Claimant was unfairly dismissed and the Second Respondent is ordered to pay the following compensation:

a. a basic award of £11,736

b. a compensatory award of £1,487.08

5. The First Claimant was wrongfully dismissed and the Second Respondent is ordered to pay damages in the sum of £5,969.52.

6. The First Claimant's claim for a compensation payment for unpaid holiday entitlement under regs. 14 and 30 of the Working Time Regulations 1998 is upheld in the sum of £240.80

7. The claim in respect of a failure to consult and inform is upheld and the Second Respondent is jointly and severally liable by reason of the joint and several liability provisions contained in Regulation 15(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The Second Respondent is ordered to pay £1,492.38.

Mrs T Greenfield (the Second Claimant)

As against the First Respondent

8. The Second Claimant's claim for redundancy payment, unfair dismissal, wrongful dismissal and holiday pay are all dismissed.

9. The claim in respect of a failure to consult and inform is upheld pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006. The First Respondent is ordered to pay £387.

As against the Second Respondent

10. The Second Claimant's claim that she was entitled to a redundancy payment is dismissed.

11. The Second Claimant was unfairly dismissed and the Second Respondent is ordered to pay the following compensation:

a basic award of £2,644.50

b. a compensatory award of £567.60

12. The Second Claimant was wrongfully dismissed and the Second Respondent is ordered to pay damages in the sum of £1548.

13. The Second Claimant's claim for a compensation payment for unpaid holiday entitlement under regs. 14 and 30 of the Working Time Regulations 1998 is upheld in the sum of £232.20

14. The claim in respect of a failure to consult and inform is upheld and the Second Respondent is jointly and severally liable by reason of the joint and several liability provisions contained in Regulation 15(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The Second Respondent is ordered to pay £387.

REASONS

1. These are the written reasons requested by R2. I gave full oral reasons at the conclusion of the case and gave judgment accordingly.

2. At the outset of the hearing on 25 March 2019 I rejected an application by counsel for the claimants that the matter should proceed under Rule 21 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. R1 had been barred from taking any further part in these proceedings and its response was struck out on 19 March 2019 by Employment Judge Harper because of R1's failure to participate in these proceedings from about September 2018.

3. In my judgment, Employment Judge Harper rightly did not consider it appropriate to enter judgment under Rule 21 of the above rule because there were two respondents and that meant that the question of who was the correct respondent in respect of the claims (other than the duty to inform and consult under the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE) impossible to determine without a hearing.

4. The evidence in the witness statements of both claimants appeared to place responsibility for their dismissals entire at the door of R2 although they naturally hedged their bets in the sense that they asserted that if they were incorrect about what they said in respect of R2 then they sought judgment against R1. In my view it would not have been appropriate in the light of that evidence to have entered a judgment against R1 who it seemed might not be the correct respondent in respect of what I shall term 'the dismissal' claims. I decided that it was necessary to hear the evidence at the full hearing even though R1 did not attend and played no effective part in the case.

5. I now turn to the substantive hearing. In reaching my judgments in these cases I read the bundle of documentation which had been agreed between the claimant and R2, the pleadings, the evidence contained both in the

written statements of the witnesses presented to me i.e. the claimants and Mr. Onens and Mr. Baldwin and, of course, given orally at the hearing. I had regard to the submissions delivered both in writing and verbally at the hearing and to the authorities cited to me by counsel for the claimants. He cited three cases: **Duncan Webb Offset (Maidstone) Ltd v Cooper and Others [1995] IRLR 633**. The decision of Lady Smith in the Employment Appeal Tribunal in the case of **Edinburgh Home Link Partnership and Others v City of Edinburgh Council and Others UKEATS/0061/11/EI** and the decision of Her Honour Judge Eady QC in the Employment Appeal Tribunal in the case of **Costain Ltd v (1) Armitage (2) ERH Communications Ltd reported UKEAT/0048/14DA**.

The issues

6. In essence, the claimants alleged that either R1 or R2 were responsible for their dismissals because, they say, either their employment with R1 ended or their employment contracts were TUPE transferred across to R2 on 6 November 2017. In either case they were dismissed unfairly and wrongfully by R1 or R2. The reality is that pretty much all of the losses allegedly sustained by the claimants flow from the outcome of what is a relatively narrow liability issue.[1]

7. It is not disputed that on 6 November 2017 a relevant transfer under TUPE occurred. It was a service provision change[2] and it is not disputed that two of R1's employees transferred to R2 who fairly shortly thereafter made them redundant. The question is whether the claimants' employment also transferred to R2. They contend that they were part of an 'organised grouping of employees' and that their employment, therefore, should also have transferred on 6 November 2017 with their colleagues. R2 denies that they formed part of any organised grouping of employees albeit it concedes that the claimants were employed by R1 immediately before the transfer. R2 contends that if there was a transfer then they are entitled to rely on an ETO reason under Regulation 7 TUPE to justify their dismissals and they assert that the dismissals, therefore, were not unfair. The claimants make the point that R2 has conflated the subsections of section 7. They contend that the dismissals were in fact unfair under Regulation 7(1) because at the time of dismissal there was no ETO reason and, they say, the dismissals occurred, in effect, on the date of transfer when R2 declined to accept the employment of the claimants.

8. In respect of the dismissals R2 wishes to rely upon section 7(2) in the alternative in order to support its contention that even if the dismissals were unfair that the dismissals would have taken place very shortly thereafter and in those circumstances the level of compensation should be reduced substantially.

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[1] Indeed, after announcing the judgments on liability the claimants and R2 agreed the heads of compensation and the levels of that compensation bar the information and consultation compensation to which I shall return in due course
[2] Under reg 3(1)(b)(ii)

9. In respect of the information and consultation obligations in TUPE 2006, R2 asserts that as there were no transfers the provisions do not apply but even if there were transfers then there was no failure to consult with the claimants.

10. In reality, however, C1 and C2 (as per their schedules of loss) claim that the failure to consult was that of R1 only and, if they are right about that then irrespective of the position of R2 there is no issue but that it is jointly and severally liable for the failure of R1.

Legal principles

11. I should set out the relevant parts of TUPER 2006 which govern relevant transfers:

"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.
…
(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.
(4) Subject to paragraph (1), these Regulations apply to -
…
…

(c) a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.
…
4. Effect of relevant transfer on contracts of employment
(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee"."

12. I refer to authorities on the question of assignment to an organised grouping of employees. In **Duncan Webb Offset (Maidstone) Ltd v Cooper and Others [1995] IRLR 633** at paragraphs 21 – 23 of that decision Mr Justice Morrison stated:

> "*Unquestionably the industrial tribunal put considerable weight on the fact that the applicants were employed by Maidstone. They are quite entitled and sensible to do so. It would take some persuasive evidence to suggest that an employee was not assigned to the business of his employer where his employer's only business was transferred. As was accepted in argument such evidence would have to have shown the very least, that the bulk of the employee's time and responsibilities were devoted to other entities within the group. The facts were against that suggestion*".

13. I should state that it is not disputed by either party that in light of the above authority questions of assignment are matters of fact for the tribunal.

14. Further guidance is provided by Lady Smith in **Edinburgh Home Link Partnership and Others v City of Edinburgh Council and Others UKEATS/0061/11/EI**. In considering the situation where the only client of a business is lost and the work is transferred to another organisation Lady Smith said this, "*whilst at first blush it might be thought that all employees of the transferor in a "single client" case would be assigned to the carrying out of the activities the client requires, it may, on closer examination, be found that that is not the case. If, for instance, an employee's role is strategic and is principally directed to the survival and maintenance of the transferor as an entity, it may then not be established that that employee was so assigned.*"

15. Yet further guidance was provided by Judge Eady QC in **Costain Ltd v (1) Armitage (2) ERH Communications Ltd UKEAT/0048/14DA**. I refer to paragraphs 30 – 41 of the Judgment.

16. As indicated above, the claimants were dismissed by either R1 or R2. It is not disputed that if their employment did not transfer then the dismissals were by R1 and if an employer does not advance a potentially fair reason for the dismissals the dismissals will be unfair because the burden of establishing a potentially fair reason for dismissal is on the employer see s. 98 (1) Employment Rights Act 1996. If the claimants should have been part of a relevant TUPE transfer, then it is not disputed that the transferee who does not accept those employees inevitably dismisses them by not accepting them as their employees.

17. Furthermore, an employer is obliged to give notice of termination and that notice period is determined either by contract or by statute under section 86 Employment Rights Act 1996.

18. On the termination of any contract of employment any outstanding untaken holiday must be the subject of a compensation payment under regulation 14 of the Working Time Regulations 1998. The right to that payment also transfers on a relevant transfer.

19. I set out here regulation 7 of TUPER 2006:

"Dismissal of employee because of relevant transfer

7.—*(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—*
(a) the transfer itself; or
(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.
(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.
(3) Where paragraph (2) applies—
(a) paragraph (1) shall not apply;
(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.
(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred. …."

20. R2 contends that the dismissals were fair an ETO reason. However, I accept the submission of counsel for the claimants that if a dismissal occurs because the transferee does not accept the transferred employees no ETO reason exists at the time of that dismissal.

21. Nevertheless, that does not preclude a transferee who has dismissed an employee in a particular set of circumstances from arguing that it would have dismissed the employee fairly in due course for an ETO reason or some other potentially fair reason under Section 98 ERA 1996. The decision of the House of Lords in **Polkey v A E Dayton Services 1988 ICR 142** is applicable.

22. Some helpful guidance on the approach to that issue was given in the case of **Software 2000 Ltd v Andrews 2007 ICR 825.**

23. The matter having been raised the tribunal needs some evidence on which to base its findings. I accept that in reaching my conclusions there will inevitably be a degree of speculation involved.

24. In respect of consultation and information then Regulation 13 and 15 TUPE 2006 apply I need not set them out here.

25. The duty to inform consists of a number of requirements. Firstly, the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for the transfer. Then, the legal, economic and social implications of the transfer for any affected employees. In addition, the measures envisaged in connection with the transfer taken in relation to any affected employees or if envisaged that no measures will be taken to that fact and if the employee in question is the transferor the measures in connection with the transfer which envisaged the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of Regulation 4 or if envisaged that no measures will be taken to that fact.

26. It is no defence for R2 to say that it did not fail to inform or consult if in fact R1 breached its obligations because liability is jointly several.

Factual Findings

27. Before reciting the facts as found I should wish to make it entirely clear that I accept the evidence of both claimants as being truthful. I do so notwithstanding the obvious failure to give proper disclosure to R2. It is regrettable that for reasons which are unknown to me either questions have not beebn asked of them by their legal advisors or they have simply not volunteered the information that they have documents in their possession. It is impossible for me to embark upon a detailed investigation of the reasons for non-disclosure because of the difficulties I have in respect of

matters of legal privilege but notwithstanding the above I accept the evidence that was given primarily by C1 that in their office at home they do have a substantial number of documents which would have assisted their respective cases. I do not accept that they have lied about that fact. There would be no motive to lie. They will succeed in this case whether against R1 or R2 and, in fact, it might be that they would find success against R1 more financially beneficial not least because that company is still in existence and has assets and it has not asserted a fair reason for dismissal in the context of this hearing. Nor has it asserted a Polkey argument. Indeed, I am satisfied that that was why counsel for the claimants attempted to obtain judgment against the R1 at the outset of these proceedings rather than proceed against R2.

28. Furthermore, C1 readily and freely accepted that he had a number of documents in his possession which would be of relevance and this did not emerge as a result of it being forced out of him by detailed cross-examination. In my judgement he voluntarily, openly and readily volunteered that he had that information in his possession.

29. I now proceed to make the relevant findings of fact. R1 initially many years ago was a company which had two functions: an operational one and a managerial one. The operational one in so far as I can discern is set out by C1 in his witness evidence. It involved the acquisition of boats and the construction of them. The second part of its business concerned an involvement in canal boat timeshare holidays. In about 2005 there was a severance of the two parts of the business. R1 thereafter became a management company involved in the management of canal boats and holiday administration in connection with those canal boats. It was that part of the business which Mr Hill (JH) became the sole proprietor of in or about 2005.

30. R1 retained the operation of a number of marinas. C1 had had a considerable amount of involvement from very early on in the development of that company and apart from a period of time when he went to New Zealand, he was very much involved in it at about the time of the severance of the functions of R1.

31. JH had also set up another company called Hire a Canal Boat. This was set up in order to market and sell holidays as an additional income stream in cases where there were timeshare voids i.e. where there were unsold weeks of holiday.

32. In about 2009 Club La Costa (CLC) began sending guests to R1's marinas which increased the revenues of R1 substantially. As a result, the business of Hire a Canal Boat began to 'wither on the vine'.

33. In the summer/autumn of 2013 R1 sold its assets to CLC. They included the transfer of ownership of canal boats. There were a number of members of the timeshare aspect of the business and their timeshares became the responsibility of CLC. However, R1 continued to provide management

facilities to CLC. For example, training, call out cover, weekly servicing, maintenance, cleaning and compliance with legislation particularly safety legislation. In respect of those services R1 was then paid a management fee by CLC and indeed there was a service level agreement which was continued on a one year rolling basis between R1 and CLC. I am satisfied on the evidence I have heard that R1's main business from October 2013 was to provide management services to CLC as set out by C1from initially the Sawley and Whixall Marinas, Festival Park and Chirk but that the latter two marinas were closed shortly after the involvement of CLC with R1. It was this service contract with CLC which transferred to R2 on 6 November 2017.

34. As for JH and his other businesses there was an engineering facility provided by JBJ Marine Services but I accept the evidence of C1 that in effect that they became subsumed into the business of R1 in about August 2014. In 2015 I am satisfied on the evidence of both claimants that Hire a Canal Boat stopped taking any further guests as the boats it had owned or operated were sold off.

35. A Companies House search as referred to by Mr Baldwin who gave evidence on behalf of R2 reveals that JH had in effect resigned from both of the above businesses by April 2013 but he clearly was still having some involvement with them notwithstanding that fact as late as May 2015.

36. By November 2017 there were just two sites being managed by R1. At Sawley I accept there were twenty boats which operated five days a week: maintenance would be carried out on boats if they were not on the canal or being used. At Whixall there was maintenance carried out to ten boats. It was a weekend service but maintenance would be carried out on days when boats were not out on the canal being utilised.

37. I accept that in effect the income stream of R1 appears to have been derived from the operation of its business with CLC. R1 had four employees on permanent contracts they were C1 and C2, Genadi Korudov who was an Engineer and Amanda Brown/Edwards who had a part-time role of reception and some administrative functions. Both the latter two transferred to the employment of R2 on 6 November 2017.

38. I am also satisfied that CLC had become entirely disenchanted with JH and R1 on the basis that its fees were excessive and that the fleet of boats appeared to be poorly maintained. JH, in discussions with CLC, was entirely intransigent about these matters and he refused to modify his charging structure.

39. CLC Management visited the marinas about twice a year. On those visits they met with JH, Genadi Korudov and Amanda Brown/Edwards and various other "employees". I am satisfied that those employees were in fact either casual labour or self-employed contractors. I am also satisfied that Mr Baldwin of CLC had no real idea of the employment structure or organisational structure of R1 for perfectly understandable reasons and one

of those reasons is that JH appears something of a charlatan (although not able to defend himself by his non-appearance). He has been described as a slippery character and untrustworthy. He is someone who tells tall stories and someone who kept his business dealings very much to himself. I am satisfied he did not reveal the existence of C1 and C2 to Mr Baldwin and CLC during the operation of the service contract.

40. However, on the original service level agreement drawn up for the CLC acquisition in late 2013 C1 was identified therein as the Operations Manager of R1. I am entirely satisfied that in the four years of CLC's contract JH was in effect the sole or principal point of contract with CLC as far as R1 was concerned.

41. In June 2017 CLC served notice of termination of the service level agreement on R1 and it was indicated that the contract would therefore expire and terminate on 5 November 2017. From that time onwards, JH would have known that TUPE was potentially engaged for at least some of his staff.

42. It is not disputed by R1 or R2 that both C1 and C2 were employed by R1. They received wages pursuant to employment contracts on a consistent basis. I am satisfied that JH would not have been paying their wages if they were providing no services to R1.

43. I have found that from perhaps 2015 or even earlier the only work R1 did was in fact for CLC. It is not disputed that there was an 'organised grouping of employees': the parties are in agreement that there was a service provision change and it affected two employees of R1.

44. I find that on the evidence I have heard that the organised grouping was all the employees employed by R1 who provided services for the benefit of the contract with CLC under the service level agreement. In my judgement there was only one contract and only one piece of work for R1 and its employees.

45. I now propose to consider whether C1 and C2 belonged to that organised grouping.

46. C1 has a long history of association with JH as set out in his witness statement. C1 was the creator of many of R1's policies and procedures and I refer to paragraph 10 of his witness statement. C1 charts the decline of R1 in vivid terms in this statement. He sets out what he did for R1 bearing in mind that as of the first year of the contract with CLC he was described in documentation as being the "operations manager."

47. Paragraphs 17, 18, 20 and 21 of C1's witness statement are directly relevant. I find the following facts:

> "Paragraph 17. My role remained answerable to the 1st Respondent's managing director Jamie Hill and involved managing maintenance plans, compliance issues and safety whilst closely

> supporting the Resort Manager for the Sawley site (Paul Hewitt) where about 12 staff were employed on a variety of different contracts with different employment status….."
>
> Paragraph 18. I also provided support to a lesser extent to the resort manager for the Whixall site Amanda Brown. In 2017 this was done remotely although in previous years I had visited regularly.
>
> Paragraph 20. I can confidently say about 98% of my working hours were spent on the CLC contract. From 2014 to 2017 I had done several feasibility and costing studies for a number of special projects they CLC wanted done including upgrades to the interior of the boats, new engines, new hydraulic gear boxes and painting. I did the welcome pack with new material and detail cruising notes which took a long time to research and collate.
>
> Paragraph 21. Beyond these special requests my role continued to consist of all aspects of statutory compliance, boat safety scheme certification, fire certificates, gas certificates, condition audits and maintenance programmes and overall responsibility for the delivery of guest and trainer training and all HR staff issues which arose. The resort managers managed the process of incoming guests, daily maintenance of boats and provision of utilities."

48. C1 continues at paragraph 22 to set out examples to the work carried out in the last year. I accept he did the work he refers to in his statement at paragraph 22 a) to v).

49. I accept that in the final months if his employment the work was as follows:

> "In June 2017 in addition to my normal duties I organised two follow up sites safety meetings with the safety advisor. One for Sawley on 21st and the other for Whixall on 28th. I researched and see 22(i) then compiled a utility wharf method statement (gas, water, sewage) and circulated that to staff and (see 22p) continued getting CoSHH data sheets together.
>
> In July I wrote and circulated a Canaltime Hazard Policy and reporting procedures (see 22k). There was a complaint from a Whixall guest which I investigated and made a judgement. I also researched smoke alarms for the boats and did a fire risk assessment for Sawley. I had previously done one for Whixall in 2015. I organised PAT testing for Sawley site (see 22d). I began work on a painting risk assessment for the boats. Investigated risk surrounding lifting by a cleaner (Ms.Hall) who thought she was pregnant. Sourced and distributed fire safety and carbon monoxide warning leaflets. Took on a cleaner. Instigated driving license and vehicle checks. Dealt with two more complaints.

In August 2017 I dealt with a complaint from a member of the public about Canaltime boats at Derwent mouth which came through BWML. I also dealt with an incident at Whixall."

50. I find that the duties that C1 did were those one might have expected an employee in a very small company to undertake. It consisted of a number of services which were provided to only one client. He worked exclusively for R1 as part of a team which serviced the management agreement with CLC. There was no higher status role: no strategic duties for him as part of a much wider entity. I do not consider that the fact that he was not visible to CLC to be of much importance: their personnel visits to the marinas were very few in number. It is significant that JH operated as the chief point of contact and had complete say in what went on. In relation to the absence of the disclosure documents C1 readily stated that he had a number of documents in his possession and there was no motivation to lie about that. I also accept that when he and C2 met with R2 in October 2015 they acted very much under the instructions of R1. I find that C1 was part of the organised grouping of employees and to find otherwise on the overwhelming evidence would be perverse

51. C2 is the wife of C1 and a part-time home worker. Her employment commenced with R1 as an Operations Administrator on 2 January 2001. Her contractual documentation is contained in the hearing bundle. From 2 February 2009 she worked sixteen hours per week until 6 November 2017. She reported to her husband as the Operational Manager. She also liaised with JH from time to time and with various other members of staff and customers as needed. She readily accepts that she did some work for Hire a Canal Boat but asserts that those duties ceased in May 2015 meaning that the only duties that she did for R1 were in relation to the contract with CLC as its only means of income. It is inconceivable that JH would have continued to pay her a salary if she had done no work at all for R1. As R1's work was solely for CLC it is a reasonable conclusion to draw that she in fact did work to service the agreement with CLC on behalf of R1. She must have been working for R1 in order to service that contract. There was no other work for her to undertake for R1. I accept the work that she did as she described at paragraph 25 of her written statement. I find that she sometimes visited the yard at Sawley in which case she would do a ten-hour shift in one day or if she was spending time in the Ops office it would normally be four days per week of four-hour shifts. She provided support to the C1 in his involvement in the day-to-day running of the CLC contract. She wrote holding letters for guest complaints, she requested references from previous employers for potential new employees, she would destroy training documents, arrival agreements and bank information collected for guests during check in procedures".

52. In my judgement by far the most important aspect of her role was as administrative support to the Operation Manager. I am satisfied that would have been a substantial amount of work bearing in mind the substantial

amount of work in fact undertaken by C1. I am also satisfied that in the latter months as set out in paragraphs 26 and 27 of her statement she did additional work which was required to close down the contract with CLC. I am satisfied that the work she did was directly related to the management of the CLC contract. She was, therefore, part of an organised grouping of employees involved in the operation of R1's agreement with CLC.

53. Turning now to the events which occurred once it became known to JH that the contract was lost. It was not until 4 August 2017 that JH bothered to inform C1 about the loss of the contract with CLC. C1 on behalf of R1 contacted Peninsula and obtained advice to the effect that there was potentially a TUPE transfer. C1 wrote to staff on JH's behalf on 5 August 2017 pointing out the loss of the contract. I accept the evidence of C1 in paragraphs 28 and 29 of his witness statement as to what he was doing in September and October 2017.

54. I find that JH no later than September 2017 was under the impression that TUPE would apply to C1 and C2. Eventually he provided liability information. He gave advice to C1 that he and C2 needed to prepare personal statements which are in the bundle. They did so on 10 October 2017 which was by now a matter of three weeks before the date of transfer. On 25 October 2017 both claimants attended a meeting with R2 to discuss their work and their duties. R1 was present during this meeting I am satisfied he told them just to answer the questions asked of them.

55. On 27 October 2017 JH wrote indicating the TUPE would apply. On 31 October 2017 JH told the claimants that R2 was refusing to accept that there was a TUPE transfer and that they asserted that C1's work was more concerned with running the marina.

56. On 3 November 2017 R1 told both of the claimants that their contracts would transfer.

57. I find that the information the claimants were provided with was extremely limited and they were really kept in the dark by R1 as to the implications for them of the transfer. They were dismissed on 6 November 2017 without notice by R2 not accepting them as employees.

58. The employees who transferred to R2 were dismissed for redundancy. There was no vacancy for managers at the time of transfer. There was no vacancy for C2 either. There was a planned relocation of the boats from Whixall and Sawley to inter alia Worcester, the closest to the home of the claimants. Had C1 indicated that he wanted to transfer to work at Worcester there would probably have had to be a competitive redundancy exercise.

59. I find that the claimants would not have transferred to work in Worcester. I accept the evidence of R2 that the both claimants would have been made redundant had they transferred to their employment. There were no jobs vacancies as such. As to Worcester I find that there would have been a redundancy competition for a role there in respect of C1 but not in respect

of C2. I accept that in fact there was nothing available for her. However, I am satisfied that even if Worcester had been suggested as an alternative there was no prospect at all of C1 accepting the role at Worcester. In fact, both C1 and C2 all but ruled out consideration of either of them working there on their own evidence. I am satisfied that bearing in mind their personal circumstances the reality is that the claimants would not have moved to work at Worcester and the reasons I so find are (1) they had a child of school age (2) they had an elderly dependant relative living with them (3) it was sixty miles away: more than an hour commute. There was no realistic prospect of that occurring and I accept their own evidence to the effect that they probably wouldn't have wanted to have taken up any position at Worcester. I am satisfied that had R2 accepted the claimants as their employees they would have been dismissed by R2 but not until at least 23 November 2017. It would have taken R2 until that time to have followed a fair redundancy procedure involving consultation and meeting with the claimants.

CONCLUSIONS

60. I am satisfied that there was a relevant transfer under TUPE 2006. It was a service provision change. The claimants belonged to an organised grouping of employees. Their employment should have transferred to R2. The reason the claimants were dismissed was because R2 refused to accept them as their employees and that was for a reason directly related to the transfer under Regulation 7(1) of TUPE 2006. The dismissal was not for redundancy or any other fair reason. The dismissal was unfair.

61. They were given no notice of the termination of their employment. No notice pay was paid to them. The dismissal was in breach of contract and wrongful.

62. The claimants did not receive their holiday pay under regulation 14 of the Working Time Regulations 1998. They were entitled to payments of outstanding sums.

63. All of the findings of fact set out above were made ex tempore and after indicating the above I invited counsel for the claimants to make submissions on whether there was a percentage chance of the claimants taking up a role at Worcester but he indicated that in light of my findings there was no need to do so.

64. Accordingly, I found that as of 23 November 2017 that a notice of termination would have taken place and the employment of both claimants

would have come to an end at the end of the notice periods that they were entitled to. They are entitled to their loss of earnings to 23 November 2017.

65. During the period from June until November 2017 there was no mention made to the claimants that their positions would be redundant if they transferred over to R2 or what the impact of that would be upon them.

66. I invited the parties to consider whether in light of the findings I had made they could agree the level of compensation. They did so in respect of the dismissal component but they could not agree on the level of compensation for the failure to inform and consult.

67. The claimants submitted that they should be awarded six weeks' pay as a result of the breaches by R1. R2 submitted that the blame lay with R1. It was pointed out that did not provide a defence to the claim but could be relevant to the level of the award which is meant to be punitive in nature because the breaches would be more limited. I took the view that this was a course of conduct by R1 worthy of condemnation because of the failure to provide all the information as set out above required under the regulations. However, it was far from the worst case and at least both claimants were made aware of the loss of the contract and that there were issues about their own status. I considered that the appropriate award should be towards the lower end of the scale and three weeks' pay in both cases was therefore awarded. Such an award reflects the severity of the conduct of R1.

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Employment Judge Walters

Date: 15 May 2019