EMPLOYMENT TRIBUNALS

Claimant:	**Mr G Lewis**	
Respondent:	**Dow Silicones UK Limited**	
Heard at:	**Cardiff**	**On: 25 & 26 September 2019**
Before:	**Employment Judge Harfield**	
	Members	**Mrs P Palmer**
		Mr P Charles

Representation:
Claimant: In Person
Respondent: Mr C Howells (Counsel)

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

(a) the complaint of unfair dismissal under Regulation 4(9) TUPE is not well founded and is dismissed;
(b) the complaint of constructive unfair dismissal is not well founded and is dismissed;
(c) the complaint of detriment for raising health and safety concerns is not well founded and is dismissed;
(d) the complaint of failure to inform and consult under the TUPE Regulations is not well founded and is dismissed.

REASONS

Introduction

1. By way of a claim form presented on 9 May 2018 the claimant brought complaints of breach of the TUPE regulations, constructive unfair dismissal and a complaint that the respondent had failed to address safety concerns. The claimant resigned on 5 March 2018 with immediate effect, shortly after

a TUPE transfer to the respondent on 1 March 2018. Acas conciliation took place between 25 March 2018 and 25 April 2018. The respondent defended the claims by way of a response form presented on 19 July 2018.

2. At a case management hearing on 10 December 2018 before Employment Judge Frazer the claimant clarified that his health and safety complaint was brought under section 44(1)(c) of the Employment Rights Act 1996. The case management order records:

> "He claims that he brought health and safety concerns to the Respondent's attention during the first and third consultation meetings. He claims that the detriments that he was subjected to were that the issues he raised were not addressed; that he was threatened with dismissal and that he was told to carry out other duties that he had not had any adequate training for."

3. We received a bundle of documents in two lever arch files running to 922 pages. The claimant also provided a supplemental bundle running to 31 pages. We heard evidence from the claimant who provided a witness statement and a supplemental witness statement. For the respondent we heard from Lisa Bohun, HR Site Service Leader in Barry, and Mike Wilson, Utilities Operations Leader in Barry, who both provided a witness statement and two further supplemental statements each.

4. An issue arose during the proceedings as to the disclosure of the transferor's "Work Control Document." The claimant had been seeking it and the respondent stating they could not locate it. During the course of the hearing we had a brief adjournment and the claimant was able to make some calls that resulted in the document being found and disclosed.

5. We received oral closing submissions from both parties and the respondent's counsel also provided written submissions. Judgment was reserved. The Tribunal met in chambers at a later date for deliberations prior to the preparation of this written judgment. Numbers in brackets "[ ]" are references to page numbers in the tribunal bundles.

Findings of Fact

6. The Tribunal only needs to make findings of fact on those points which are relevant to the issues in the case and not on every factual dispute that was before us. To this end, and applying the balance of probabilities, the Tribunal makes the following findings of fact.

7. The claimant worked at the Combined Heat and Power (CHP) plant in Barry as an Operations Technician from June 1999 until his resignation on 5 March 2018.

8. The claimant was initially employed by Npower until the respondent bought the plant in 2013. On purchasing the plant the respondent outsourced the workforce to COFELY who later became Engie. The claimant's employment therefore transferred under TUPE from Npower to COFELY (latterly Engie) [106 – 108]. His contractual terms and conditions remained the same.

9. In October 2016 the claimant raised some health and safety concerns with Engie [185 – 187].

10. In March 2017 the respondent announced they would be contracting back in the running of the CHP plant in March 2018. That would involve the TUPE transfer of 12 employees including the claimant.

10. On 28 March 2017 the claimant raised a complaint about safety on the respondent's site following an instruction from the respondent that vehicles were no longer to be used to transport staff around site [193 – 210]. He raised concerns that the requirement to walk across site was unsafe which was supported by colleagues, including the Engie health and safety manager. Dialogue on the issue, which included Mr Wilson, continued until 21 April 2017 when the claimant confirmed that the respondent had said they could keep the site car for the time being [210].

11. On 2 November 2017 the claimant met with DR, heath and safety officer for Engie, about Engie's safe system of work. DR produced an audit report at [226 – 229] which found there was a lack of concentration and attention to detail by the authorised person/ safety controllers which had led to omissions being made when completing permits to work and that the authorised person/ safety controllers appeared to be unsure as to what set of Safety Rules they are expected to follow.

12. At the time of the transfer to the respondent the claimant was one of a team of 10 Operations Technicians. Two individuals worked on each shift working a rotating shift pattern across a 5 week cycle. The claimant accepted in evidence that he was contracted to work 37 hours a week, which over a year would be 1924 hours. He accepted that across each 5 week shift pattern he worked 168 hours which would total 1747 across the year. He accepted that meant that across the shift pattern he would in theory work 177 hours less a year than he was paid for. The claimant explained that these hours were termed "spares remaining" and the practice that had arisen at Engie was that these "spare" hours would be drawn down each month by offsetting 17 hours holiday a month. He explained that this meant by the end of the year there were no "spares remaining" left as they had, in effect, been neutralised by taking less holiday. The claimant at the time was entitled to 31 days annual leave a year and 8 days bank holidays.

13. All overtime worked at Engie was voluntary. The claimant explained that if one of the team wanted to take a shift off (for example holiday), then they would sort it out between themselves and arrange the cover. He said that the team would get together and whomever was next on the list was asked if they wanted to provide the cover. They would be paid an overtime rate of either double time or time and a half (if it was hours worked on after a shift). They could claim the overtime rate even if the "spares remaining" had not been exhausted. The claimant explained that if short notice cover was required (for example sickness) then they would ring round and see if someone could cover on a voluntary basis and that cover was provided voluntarily/ as a matter of goodwill as they could not be compelled to work. He said that as a last resort it may be covered by an engineer or manager or even area manager on occasion. The claimant at various times worked substantial amounts of overtime. For example, in 2017 he worked some 400 hours, although he said it was an exceptional year.

14. The claimant candidly explained in evidence that the cover system had worked well for about 18 years of his career but that a system based on goodwill was falling apart towards the end as there were shifts that were not being covered. He had worked so much overtime in 2017 because of the difficulties with cover. He explained that the new engineer/operations manager did not have the expertise or training to provide backup cover or that shifts were being covered by individuals who were not fully trained. He agreed, given the nature of the work involved, that it was unacceptable to have a system in place where no one was contractually obliged to provide cover albeit he said that was the system that Engie had in place and was for them to resolve.

15. In the run up to the transfer Engie ran a process for the nomination and election of TUPE representatives. RC was appointed on 28 November 2017 and Engie confirmed this to RH, the respondent's then Senior HR Manager, on 29 November 2017 [223]. RH responded [224] to ask for copies of all employees' contracts and benefit policies, saying that he would prepare a measures letter to be shown to RC and the employees before the first consultation meeting. He said he would like to hold the first consultation meeting with all employees present to review the measures in a presentation format with additional questions from employees then channelled through RC.

13. On 4 December 2017 YS informed RH that Engie did not have all employee data on file and she was able to provide the respondent with most of the employee's contracts but not the claimant or RC [230]. She gave some information about sick pay and overtime.

14. On 14 December 2017 RH sent the measures letter to YS [234-235]. It notes that the respondent did not have a full understanding of all the information for the 12 employees and therefore the situation may change. It set out its intention to ask the employees to sign up to the respondent's standard contract terms and conditions after the transfer takes place. It stated that they believed the total rewards offering was a higher value than the current contractual offering with comments on holidays, notice periods, bonus, life assurance, private medical insurance, sick scheme details, company cars, overtime, callout pay, work schedule and pensions.

15. On 20 December 2017 YS sent the claimant and his colleagues an email with information about the proposed transfer [238]. The email confirmed that consultation meetings would take place in January 2018 to give further details about the proposed transfer and any measures that the respondent intend to take in connection with the transfer. On 4 January 2018 YS emailed RH to confirm that details of the intended measures had been provided to RC [240]. She stated that she intended to hand over to the respondent at the forthcoming meetings to set out the measures.

16. On 9 January 2018 the claimant attended a 2 hour group consultation presentation also attended by RH, Ms Bohun and Mr Wilson for the respondent. The slides are at [245 – 256]. A slide at [247] headed "the path forward" includes a section on TUPE over "as is" or the alternative option of a TUPE transfer on 1 March with immediately thereafter the staff signing up to a new standard Dow Contract following the transfer. The other slides then set out comparative information on topics such as income, annualised hours, holidays, medical plans, performance awards and other matters based on the respondent's understanding at that time.

17. The claimant alleges that RH was abrupt if any questions were asked during the consultation meeting about transferring "as is" and that it was covered in less than 5 minutes with the predominant focus being on getting the employees to sign up to the respondent's terms and conditions. He says that nothing was said about any changes to the job itself. Ms Bohun states her recollection is that it was the claimant who was abrupt and that RH politely told the claimant that if an employee wanted to transfer over "as if" he would need to go away and work out "if and how we could operate these correctly." She states that the claimant continued to ask the same question a few more times in a more discourteous manner. Ms Bohun states that during a break a colleague apologised for the claimant's behaviour saying not to take offence and that it was the claimant's way. The Tribunal finds it likely that the claimant's colleague did say words to this effect. The claimant does have a direct manner about him and he takes issues that are of importance to him seriously.

18. Ms Bohun says, and the Tribunal accepts, that RH also explained that if any of the operatives wanted to transfer "as is" (on their current terms and conditions) there would have to be a further discussion about how overtime would operate and the amount the operatives would undertake because the respondent had no system in place to record overtime hours. RH also explained the respondent's annualised hours policy. The meeting concluded with the attendees being told that individual meetings would now be set up.

19. The respondent wanted the transferring staff to move on to their standby and call out arrangements. They operate a system of "banked hours" where every year each employee is paid a £9000 flexibility premium for providing 150 hours primary cover. They are paid it whether or not they are actually called upon to provide cover on a particular shift or not. The shift rota identifies an employee for each shift who is not in work and who can be called upon to provide primary cover if needed. Employees are not forced to provide primary cover if circumstances prevent them doing so. For example, if they cannot attend work straight away but can do a few hours later then that is acceptable. Sometimes employees may not be able to provide the primary cover at all due to, for example, sickness or childcare difficulties. But the system is monitored and if an employee is regularly unable to provide primary cover there will be discussions and could ultimately be disciplinary action. Failure to honour primary cover could also affect performance related pay.

20. The claimant attended his first individual consultation meeting on 10 January 2018 with RH and Ms Bohun. The claimant says he was the only one of the affected employees who did not have a "one to one." Ms Bohun said in evidence, which the Tribunal accepts, that she did attend other consultation meetings. In any event the Tribunal finds that the attendance of RH and Ms Bohun at the consultation meeting was proper and it did not have the intention or effect of intimidating or pressurising the claimant.

21. The claimant alleges that at the start of the meeting RH told him that his hours of work were 42 at Engie and that when the claimant said they were 37 that RH said unless the claimant had something official in writing then RH would treat it as 42 because that was what Engie said. The claimant also alleges that the meeting was about getting him to sign the new contract and that he was told on 3 occasions by Ms Bohun that if he did not sign the respondent's contract it would be seen as negative, that the respondent dismissed negative people and that he would be dismissed.

22. Ms Bohun's evidence was that it was explained that the purpose of the meeting was to ascertain the claimant's existing terms and conditions because very little contractual information had been provided by Engie in relation to the claimant. She says that part of the meeting also explained

the benefits package to the claimant of transferring to the respondent's terms and how the annualised hours and primary cover arrangements worked. Her evidence is that the claimant's attitude during the meeting was antagonistic. She denies commenting that the claimant could be seen as negative or that he would be dismissed. She states that RH was explaining to the claimant the respondent's primary cover systems and that the claimant had said in response "well I just won't pick up my phone then." She states that she explained to the claimant that such a statement was not in the spirit of how the respondent operated and that if the claimant did refuse to pick up his phone when rostered on primary cover it could have a detrimental impact on performance related pay and, if he continued in such a manner, could lead to disciplinary action being undertaken. She states that RH did not make the alleged comments about the working week as they already knew the Engie shift pattern was a 37 hour week.

23. The Tribunal prefers the account of Ms Bohun as to what was said at this first consultation meeting. Our conclusion was supported by the fact the claimant agreed in evidence that he said he would not pick up his phone and that Ms Bohun said that was not in the spirit of how Dow did things. The Tribunal does not find that the claimant was told or threatened with dismissal if he did not sign the respondent's contract. The Tribunal accepts that the consultation meeting was a difficult one, not least because the respondent had been given little information by Engie about the claimant's terms and conditions and what information it had been given was not always correct. The claimant was upset that this had happened and upset that the respondent was asking him to consider signing up to their terms and conditions which they were selling to him as being beneficial when in fact they were not in all regards. However, the Tribunal accepts that this was not a deliberate tactic by the respondent but was because they had incomplete, and in some respects, incorrect information from Engie. The Tribunal accepts that the respondent wanted to get the correct information from the claimant but because he was upset, and because he felt it should not be for him to provide it, he did not always engage with the respondent in a constructive way.

24. The claimant also told RH and Ms Bohun that he had concerns about safety within the CHP plant. The claimant was concerned about 3 accidents that had all occurred on 14 December 2017 involving steam and caustic. He felt they were a result of not having adequate safety measures in place and a lack of safety rules and procedures. The claimant says that RH ignored him and showed no concern. Ms Bohun states that they did confirm that the respondent took safety seriously and that the claimant was asked to talk to Mr Wilson and the utilities team about his concerns. The Tribunal finds it is likely that the claimant was asked to speak to Mr Wilson about his concerns. He said himself in evidence that he told RH and LB that Mr Wilson already knew his concerns. Whilst issues of plant safety are clearly

fundamentally important, Ms Bohun and RH worked in HR and this was a TUPE consultation meeting. The Tribunal did not see anything improper in the approach that RH and Ms Bohun took to the issue raised.

25. The claimant also complains that he was told by RH that he was not allowed union representation as the respondent did not recognise unions on these matters. Ms Bohun could not recall that as a topic of conversation but states that any response would have been that the respondent has a model of direct partnership between managers and employee but that Unite did have some representatives on site and the claimant could become a member if he wished to do so. She says that if asked neither she nor RH would prevent an individual attending with a union representative if they asked to do so. The claimant confirmed in evidence that he was not actually a member of a trade union and had not made contact with a Union to join to get representation. Taking this into account the Tribunal does not find, on the balance of probabilities that RH refused the claimant trade union representation at the meetings. The claimant was also not accompanied by RC. He said that RC was reluctant to get involved. It was not, however, something that the respondent could enforce.

26. At the meeting the claimant asked RH if there was a redundancy package available. RH told the claimant there were no redundancies but that he would look into it.

27. At RC's own individual first consultation meeting he provided the respondent with the Npower company grade agreement [50 – 94] which he felt was likely to cover the claimant too. RH sought to confirm this with YS [263]. In these proceedings it is not in dispute that those collective terms did apply to the claimant and were incorporated into the claimant's pre-transfer contract of employment.

28. On 29 January 2018 RH emailed the claimant attaching a summary of his draft offer saying, "should you decide to consider it" [264]. RH said he would set up some time for them to review it together in February and "at that time we can also formally review other elements of measures that the company is taking such as shift changes to support the business etc". The same day RH sent a group email to all affected employees asking them to indicate if they plan to re-engage under a Dow contract or not, and to "work as a team with Mike Wilson to decide on the date of a shift schedule change and who would be on what shift (a,b,c,d,e)." RH also said he was sending some pre-employment paperwork for them to complete regardless of each individual's contract intentions to get them into the payroll system etc [265]. On RH sent a final adjustment to the claimant's draft offer [269], saying "please let me know if you need any further clarity as you make your decisions" [269].

29. On 2 February 2018 RH sent a group email to affected employees with various documents to complete and return so that they could access the respondent's systems. He said "obviously there is no contract attached as you will all TUPE over on existing terms and conditions. Lisa and I will set up meetings with you for the first day to sign new contracts if you are choosing that option" [270]. The claimant completed and returned that paperwork on 10 February 2018.

30. On 10 February 2018 the claimant emailed RH and Ms Bohun to say he wished to remain on his current employment contract and TUPE over "as is" [308].

31. On 12 February 2018 Ms Bohun emailed RH to state "We need to review how we will proceed with Gary as he has filled out membership enrolment for BUPA etc – so we need to review what is suitable and comparable to his current conditions" [309]. The same day RH emailed Ms Bohun about other steps that were needed in light of the claimant's decision saying "He already has single cover on medical, lets clarify with Yvonne whether he pays that or they do. If he does… then we deduct the cost from him each month. Not sure how we give him 1 x life coverage, but we should. We will also have to override GPP each year to not give bonus. He'll have to turn in an overtime sheet each month sign by Mike for payroll. He should be the last person called for any overtime in reality, as this is not a sustainable process to pay OT for us" [310].

32. On 13 February 2018 Mr Wilson sent a group email asking each employee to indicate whether they intended to sign a Dow contract on day one and asking them to confirm they would switch to the Dow shift pattern on 1 March [311]. The claimant responded to state it was his intention to remain on his current terms and conditions and he had a further meeting coming up with RH [313]. Mr Wilson responded to ask whether the claimant's "as is" position also applies to the shift rota [314]. The claimant stated he need to finalise his discussions with RH before giving definitive answers [315].

33. On 14 February 2018 RH emailed the claimant [316] about setting up their next meeting. He referred to the company grade agreement saying "it does give the company the right to modify schedules based on business need, so we do plan to move forward with the change in shift schedule to Dow's standard business schedule as planned. During our meeting we will want to talk about the timing of the change for you. We will also need to speak about some sort of a manual paper system for overtime, as we do not have a sustainable way to record this today given that the entire site operates on annualised hours. Although overtime is not guaranteed and should be very limited in the new schedule, its important we agree a process with Mike in case he ever does ask that you work OT."

34. On 16 February 2018 Mr Wilson then sent a group email with a proposed primary cover rota [318 – 319].

35. On 19 February 2018 the claimant met with RH for the second meeting also attended by Ms Bohun and Mr Wilson. The claimant complains again that this was not a one-to-one meeting. The Tribunal does not consider that the arrangements had the intention or effect of intimidating the claimant and that Ms Bohun and Mr Wilson attended in an attempt to make sure they could address any issues or questions the claimant wanted to raise. The claimant complains that he again was pressurised to sign a new contract and that Ms Bohun stated that not signing a new contract would be seen as negative. He says that the respondent told him that the new shift pattern would include standby and call out and that when he said that was not part of his existing contract he was told he could be made to carry out additional duties, and failure to do so would result in disciplinary action.

36. Ms Bohun states that she and RH had explained how the annualised hours system operated and how it was similar to the overtime and callouts that the claimant had completed many times for Engie and that they explained the difficulties that the claimant transferring on his existing terms could cause including creating a manual overtime template and that they were not clear on how it would work or whether it could work. Mr Wilson agrees that RH told the claimant it was not possible to accommodate him on his existing terms and conditions permanently because it could not be supported by Dow systems which did not allow for the processing of overtime, and the Engie shift system inherently generates overtime.

37. Ms Bohun states that the claimant again stated he would refuse call out and any overtime and that she again explained this could be regarded as a performance issue. Ms Bohun accepts that the claimant asked about roles and responsibilities. She states that the respondent does not outline specific responsibilities in a job description but have a job catalogue to categorise roles based on salary and experience. She states that while at the respondent the job title may change that was just to align the role within the job catalogue. She states the responsibilities under the new job title were similar to those that the claimant was already undertaking. The Tribunal again prefers Ms Bohun's account as to what was said at the meeting.

38. The claimant says he felt that his contract would not be adhered to by the respondent and that his position as an Operations Technician appeared to no longer exist and therefore he again asked RH about a redundancy package. RH explained that the role still existed and agreeing an exit was not an option.

39. After the meeting the claimant emailed RH asking him to confirm that although the shift pattern is changing he would not be a party to the callout/standby requirements [321]. RH responded to state: "For organisational and operational reasons your role and job function will require your full participation in the Dow shift and Annualised Hours system which will include the callout and standby requirements contained within the system. These are critical to the proper functioning of the site and operations. Your contract does allow for the implementation of annualised hours systems. These organisational reasons will need to apply to your employment following the TUPE transfer on 1 March 2018" [322].

40. On 20 and 21 February 2018 the claimant attended training, prior to the transfer, about the respondent's "Safe Work Permit."

41. On 23 February 2018 the claimant emailed RH to state that whilst annualised hours could be implemented under his contract he had to be carried out through negotiations, including union negotiations. He stated that callout and standby were not part of annualised hours but an additional element which could not be contractually enforceable and would also be unenforceable as the change was connected to a TUPE transfer. The claimant also complained that it was becoming clear his role and responsibilities would change with the most significant change being the "Safe Work Permit" with site engineer duties being transferred to the operations/technician. He said this change was connected to the TUPE transfer and would not be enforceable. He also complained that the training was not adequate compared to the training that Npower gave to engineers. He also stated that he was finding out about other changes that may occur which had not been communicated to him as part of the TUPE negotiations. He asked to be provided with his current role and responsibilities under Engie and the role and responsibilities after the transfer to the respondent [324].

42. On 27 February 2018 the claimant emailed RH with additional concerns about changing working conditions, including taking away paid breaks, having to walk across site before and after each shift (which a vehicle had been provided for previously and again expressing his safety concerns), and the stopping of showering in work time before the end of the shift [328].

43. Ms Bohun responded to state that they did not have a copy of the roles and responsibilities for either company and asked the claimant to outline any significant potential changes to his roles and responsibilities which they would then review with him after the transfer. She also sought to arrange a further meeting [329].

44. On 28 February 2018 the claimant responded to state he considered his previous emails were clear. He said the respondent was contravening

TUPE by not making available his roles and responsibilities and working conditions, by making significant changes and by not fully consulting. He stated he was seeking a guarantee that no changes, including standby/ callout changes would be made once he transferred. He said that if no guarantee was provided before 1 March 2018: "I will have no alternative but to refuse to transfer over, resign from my position and claim constructive dismissal" [330].

45. RH responded to state that they were simply seeking to formally understand all of the claimant's concerns before having a conversation about them and proposing a meeting on the Friday [331]. RH asked the claimant to confirm whether he was willing to discuss his concerns or whether he was officially refusing the TUPE transfer. The claimant responded to state that his concerns were changing because he was learning of new changes as the days go by and that his 9 colleagues were being asked to sign a new contract with a job title of "Senior Technician" and may therefore have different roles and responsibilities. The claimant agreed to the Friday meeting and did not resign at that time or refuse to transfer. His employment therefore transferred under TUPE on 1 March 2018. The claimant's colleagues on transfer signed an agreement whereby they terminated their employment and were immediately re-engaged by the respondent on new terms. The exceptions were the claimant and one other colleague, PS, who stayed employed by Engie.

46. The meeting was in fact postponed from 2 March to 5 March because of snow. The claimant lived in walking distance of the plant and provided night shift cover due to difficulties with staff getting in. Mr Wilson emailed RH to tell him saying "I do not know if this is a sign that he is warming up to joining us or if he will somehow use this against us? I spoke to him this morning at 06:30hrs about the CHP status and he was helpful. Hope this doesn't put a spanner in the works." RH replied to say "Happy he helped out. Technically, he is our employee now. If he decides that he does not want to work here based on all of his concerns, we'll make sure he gets paid his old rate for that time worked" [340].

47. On 5 March 2018 the claimant met with RH and Ms Bohun. The claimant states that he raised safety concerns about the safe work permits and safety controller status including that no one takes responsibility for signing a person off as a safety controller and there was no training for a safety controller. He states he also expressed concerns that the respondent was going to make night shift isolations standard when they were dangerous due to historic fatalities. The claimant states his role was redundant as the new position had been upgraded in breach of his contract. The claimant states that RH told him that the role had new duties for business and operational reasons and that if he did not carry them out, including standby and callout, he would be dismissed. The claimant states he felt he had no alternative

other than to resign and claim constructive dismissal and that RH replied to say that they would use "ETO for making the changes." The claimant states that he was forced into resigning as he would otherwise have the threat of dismissal hanging over him and would be dismissed on his next shift if it adhered to his existing contract. He states he had no representation and felt isolated and threatened for wanting to keep his existing terms and conditions.

48. Ms Bohun's typed notes are at [342]. She states the claimant raised concerns about significant changes to his job functions in the standby/call out arrangements and in having to issue Safe Work Permits. She states that he also raised concerns about having to walk from the gate to the workplace and back that would be unpaid. The notes record that RH "stated job as it is today as per the group consultation, we cannot change the organisation structure for one person."

49. That evening the claimant sent written confirmation of his resignation [344]. Within it the claimant said that he had been told that not signing the new contract would be seen as negative and that the respondent dismiss those with a negative outlook. He complained about significant changes to the role that he would be forced to work under a new role of Senior Technician. He complained that the respondent had refused to discuss, provide information or acknowledge his present role and responsibilities or discuss the changes. He referred in particular to the changes to the shift rota, standby/callout, annualised hours, the responsibility of the safe work permit, the removal of the site vehicle (as it added 30 minutes of unpaid walk time each shift, and safety concerns), the removal of being allowed to shower in work time, and that milk was no longer provided. He said he was resigning due to the lack of correct TUPE negotiations, the limited information on changes to role, responsibilities and working conditions, and being forced to carry out new duties.

50. RH replied at [346] to accept the claimant's resignation and refuted the claimant's version of events stating the claimant had given a clear impression that he had no real intention or desire to work for the respondent and would be looking to resign and take legal action as soon as possible. RH stated "clearly we are unable to change our work and operations processes and organisational structure for one person when we have 500 others all operating the plant on another structure and procedures. " The claimant says this shows that the intention was always to get the transferring employees to sign new terms and conditions and transferring "as if" was never a genuine option.

The legal principles

Detriment for raising Health and Safety Concerns s44 Employment Rights Act 1996

51. Section 44 of the Employment Rights Act 1996 ("ERA") states:

"44 Health and safety cases

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that-

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee (i) in accordance with arrangement established under or by virtue of any enactment, or (ii) by reason of being acknowledged as such by the employer, the employee performed (or proposed to perform) any functions as such as representative or member of such committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),

(c) being an employee at a place where—
(i) there was no such representative or safety committee, or
(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means, he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to a detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) . . . this section does not apply where the detriment in question amounts to dismissal (within the meaning of [Part X]).”

Constructive Unfair Dismissal

TUPE Regulations

52. Regulation 4(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 [“TUPE Regulations”] provides for a special kind of constructive unfair dismissal right in a TUPE context. The relevant provisions state:

“4(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer…

53. Regulation 7 also provides protection where there is a dismissal of an employee because of a relevant transfer. It states:

“7(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the

purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—
(a) paragraph (1) does not apply;
(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—
(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
(ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(3A) In paragraph (2), the expression "changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).]

(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…"

Employment Rights Act

54. The claimant also qualified for the right to bring an "ordinary" constructive unfair dismissal claim under the ERA. The relevant sections state:

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

… (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct…

98(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held…

98(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

55. Case law has established the following principles:

(1) The employer must have committed a repudiatory breach of contract. A repudiatory breach is a significant breach going to the root of the contract. This is the abiding principle set out in Western Excavating v Sharp [1978] ICR 221.

(2) A repudiatory breach can be a breach of the implied term that is within every contract of employment that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

(3) Whether an employer has committed a breach of that implied term must be judged objectively. It is not enough to show merely that an employer has behaved unreasonably. The line between serious unreasonableness and a breach is a fine one. A repudiatory breach does not occur simply because an employee feels they have been unreasonably treated nor does it occur when an employee believes it has.

(4) The employee must leave because of the breach.

(5) The employee must not waive the breach or affirm the contract by delaying resignation too long.

(6) There can be a breach of the implied term of trust and confidence where the components relied upon are not individually repudiatory but which cumulatively consist of a breach of that implied term.

(7) In appropriate cases, a "last straw" doctrine can apply. This states that if the employer's act which was the proximate cause of an employee's resignation was not by itself a fundamental breach of contract the employee can rely upon the employer's course of conduct considered as whole in establishing that he or she was constructively dismissed. However, London Borough of Waltham Forest v Omilaju [2005] IRLR 35 tells us that the "last straw" must contribute, however slightly, to the breach of trust and confidence. The last straw cannot be an entirely innocuous act or be something which is utterly trivial.

(8) In Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978 the Court of Appeal set out the questions that the tribunal must ask itself in a "last straw" case. These are:

(a) What was the most recent act (or omission) on the part of the employer which the employee says caused or triggered his or her resignation?

(b) Has he or she affirmed the contract since that act?

(c) If not, was that act (or omission) by itself a repudiatory breach of contract?

(d) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which viewed cumulatively amounted to a (repudiatory) breach.

(e) Did the employee resign in response (or partly in response) to that breach?

53. If it is established that the resignation meets the definition of a dismissal under section 95(1)(c), the employer has the burden of showing a potentially fair reason for dismissal before the general question of fairness arises under section 98(4).

TUPE consultation

56. The claimant complains there has been a breach of the consultation provisions under the TUPE Regulations. These state:

*"**13 Duty to inform and consult representatives***

(1) In this regulation and regulations [13A] 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the

transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

…

(3) For the purposes of this regulation the appropriate representatives of any affected employees are—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(b) in any other case, whichever of the following employee representatives the employer chooses—

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

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

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives

of a trade union) sent by post to the trade union at the address of its head or main office.

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

(7) In the course of those consultations the employer shall—

(a) consider any representations made by the appropriate representatives; and
(b) reply to those representations and, if he rejects any of those representations, state his reasons.
(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.
(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances…

15 Failure to inform or consult

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;
(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
(c) in the case of failure relating to representatives of a trade union, by the trade union; and
(d) in any other case, by any of his employees who are affected employees."

Discussion and Conclusions

The alleged failure to inform and consult

57. The Tribunal does not consider that the claimant has standing to bring a complaint under Regulations 13 and 15 of the TUPE Regulations. This is a case in which employee representatives were appointed and in such circumstances the standing to bring a claim under Regulation 15(1)(b) lies with the employee representative; see *Hicking t/a Imperial Day Nursery v Marshall* UKEAT/0217/10/CEA). In the circumstances the claimant was in

the duty to inform and consult is owed to the employee representatives under Regulation 13 and not directly to the affected employees. As such the claimant's claim for an alleged failure to inform or consult under the TUPE Regulations cannot succeed.

Section 44 Employment Rights Act 1996

58. The Tribunal has found as a matter of fact that the claimant did raise circumstances connected with his work which he believed were harmful or potentially harmful to health and or safety at the first and third consultation meetings. However, the section 44(1)(c) requires the circumstances to be brought to the "employer's attention." The respondent was not the claimant's employer at the time of the first consultation meeting as the transfer had not, at that time, happened.

59. The respondent was the claimant's employer by the time of the third consultation meeting. Here, however, the Tribunal agrees with the respondent that bringing concerns to the attention of HR representatives at a TUPE consultation meeting was not a "reasonable means" by which to bring the claimant's concerns to his employer's attention. The Tribunal was unconvinced by the claimant's evidence that, for example, he did not know there were noticeboards around site with health and safety information. The Tribunal was satisfied that there were other more appropriate means known to the claimant by which he could raise health and safety concerns other than at a TUPE consultation meeting, including with Mr Wilson. The claimant had found the means by which to raise concerns during his previous employment with Engie.

60. In any event the Tribunal does find that the claimant was subjected to any detriment by any act or deliberate failure to act by the respondent done on the ground that he raised health and safety concerns at either consultation meeting. One detriment that the claimant relies upon is that he was threatened with dismissal. The Tribunal has, however, found as a matter of fact that this did not occur.

61. The claimant also complains that he was subject to a detriment as the issues he raised were not addressed. The Tribunal has doubts as to whether that can properly amount to a detriment. Section 44 gives the right not to be subject to a detriment by an employer on the ground that the employee has raised qualifying health and safety concerns. It is, in effect, a type of victimisation claim. It does not provide an entitlement to have those health and safety concerns investigated or personally responded to unless it could be said that the failure to do those things was to deliberately victimise the employee because the complaint was made. The Tribunal found no evidence to suggest the respondent had engaged in a practice of deliberately not responding to or answering or dealing with the claimant's

health and safety concerns as a means to cause him harm because he had raised them. In relation to the first consultation meeting the Tribunal has found as a matter of fact that the claimant was told to speak to Mr Wilson about any concerns and Mr Wilson was then present at the second consultation meeting. In relation to the third consultation meeting, the claimant then immediately resigned at that meeting and confirmed it in writing later that day at which point he then ceased to be an employee. There was therefore no timescale in which the respondent could have victimised him for having raised those concerns. Further, the claimant's concerns related to matters such as the Safe Work Permit in respect of which the Tribunal accepts that the respondent had an ongoing training and assessment process that the claimant would have continued on if he had not resigned. The Tribunal is satisfied that had the claimant not resigned and had he raised concerns directly with Mr Wilson that Mr Wilson would have responded to them. It may not have been with the answers that the claimant was seeking, but that is not the right that section 44 ERA provides.

62. The claimant also complains that he was subject to a detriment in being told to carry out other duties he had not had adequate training for. As stated, the training for Safe Work Permits was ongoing. The claimant had some initial training prior to the transfer and prior to his resignation. In any event any alleged inadequacies in training or being required to issue Safe Work Permits cannot be a detriment on the ground that the claimant had raised health and safety concerns. The claimant was not singled out. All of the Operations Technicians were required to issue Safe Work Permits including those colleagues who had not raised health and safety concerns. There is therefore no causal link between the claimant's health and safety concerns and the claimed detriment.

63. That addresses the claimant's section 44(1)(c) ERA claim that he clarified at the case management hearing before Judge Frazer and which the claimant further confirmed at the start of the full hearing was the basis on which the claim was brought. However, during the currency of the hearing the claimant's claim appeared to potentially shift. The claimant referred to other health and safety complaints he made during his employment with Engie (summarised above). He also argued that as his concerns had not been responded to, he had a right under section 44 to withdraw his labour. This was not the claimant's pleaded case. But in any event the Tribunal does not consider that such a claim could succeed. In short form, the respondent was not the claimant's employer at the time the earlier health and safety concerns were raised and moreover the Tribunal could find no evidence that the respondent subjected the claimant to any detriment, as already dealt with above, on the grounds that he had raised any such earlier concerns.

64. Section 44(1)(d) protects an employee from being subject to a detriment on the ground that (in qualifying circumstances) the employee has left or refuses to return to a dangerous place of work. Section 44(1)(e) protects an employee from being subject to a detriment on the ground that (in qualifying circumstances) the employee has taken or proposed to take steps to protect himself from danger. These sections do not, however, assist the claimant. The claimant did not leave work or refuse to return; he resigned terminating his employment. Further, in relation to section 44(1)(e), for reasons similar to those already set out above, the Tribunal does not consider that informing two HR representatives of health and safety concerns at two TUPE consultation meetings is an appropriate step by the claimant to protect himself or others from danger. There were other more appropriate facilities available to the claimant. Moreover, the activity of leaving work or taking steps to protect oneself is the act which qualifies for protection; it is not the detriment. There is no evidence that the claimant was subject, as a matter of causation, to a pleaded detriment by the respondent as a result of him saying he would no longer work for them. As he was not employed there was no timeframe in which he could be subject to such a detriment as a result of the alleged protected act. The detriments he otherwise identified otherwise all pre-dated the alleged withdrawal of the claimant's labour. The claimant's complaint under section 44 ERA is therefore not well founded.

Constructive Unfair Dismissal Claim

65. At the start of the hearing the respondent's counsel set out his understanding of the allegations of breach of contact/ substantial change in working conditions to the material detriment of the claimant that were being complained about. The claimant confirmed that this was a fair summary:

- The claimant was threatened with dismissal if he refused to sign the contract and was told that not signing the contract would be seen as negative and he did not understand the consequences of not signing it.

- The claimant would be required to undertake standby/call out duties which the claimant says was a breach of contract.

- The claimant would be required to issue Safe Work Permits which the claimant says was a breach of contract.

- The Job title was being changed to "Senior Technician" instead of Operations/Technician which was a breach of contract.

- The claimant's safety concerns had been ignored.

66. As the case progressed it became clear that the claimant was also complaining:

- it was unlawful not to offer overtime fairly and equally.
- There was no intention to let him transfer “as is” / to respect his existing contract.
- Ms Bohun saying she did not have roles and responsibilities was a breach of contract.
- The respondent was trying to get him to sign up to other terms and conditions which were less favourable than his existing entitlement including the shift allowance payment, sick pay and holiday pay.

Standby/ call out duties

67. The claimant’s company grade agreement states:

“**4. HOURS OF WORK**

Working Hours

4.1 Thirty seven working hours, worked on a Monday to Friday basis, constitute a normal working week for employees. For some staff working hours may be averaged over the length of the work cycle.

4.2 Management will determine work patterns by reference to operational requirements. These work patterns could include annualised hours schemes, full continuous shift working, Monday to Friday day working or any other pattern appropriate to the needs of the business.

4.3 Within these work patterns normal start and finish times, attendance days and normal days off should be agreed locally to meet operational requirements and be clearly identified for individual employees.

Shift and unsocial hours allowance

4.4 In Appendix E is a table which sets out the current basis for the calculation of shift and unsocial hours allowance for the three most common shift/stagger patterns worked by employees of the company.

4.5 In the case of shift/stagger patterns, which differ from those detailed in the table, the appropriate allowance will be determined locally.

4.6 The shift and unsocial hours allowance also incorporates payment for shift handover and the requirement to change attendance hours either within or between work rosters, at reasonable notice, as determined locally…

5. REMUNERATION

Company grading

5.1 In Appendix D there is a table which sets out the Company's current grading and scheduled salary arrangements for Company Graded staff.

5.2 Employees shall be appointed to a company grade on the basis of the duties and responsibilities that they are required to undertake. Allocation to a salary within that grade shall be at the discretion of the manager, in discussion with Human Resources to ensure consistency with Company norms. Employees will be expected to undertake duties and responsibilities commensurate with their grade and competency."

68. Appendixes D and E set out, as of 2012, pay rates and shift and unsocial hours payments for different grades of employee. It is not necessary to set it out here.

69. Notwithstanding the claimant transferring to the respondent on his existing terms and conditions the respondent wanted the claimant to move to their shift rota and to provide primary cover. The claimant states that this was a breach of contract as his overtime was voluntary and the respondent was imposing a compulsory system of overtime. He says that alternatively it was a substantial change to his working conditions to his material detriment.

70. The Tribunal does not consider this complaint well founded. The total working hours for both Engie and the respondent on their standard patterns was 168 hours. The claimant on his existing terms and conditions was being paid to work an additional 177 hours/spares remaining a year which, if he did not provide primary cover, he would end up not working back. He accepted that the practice of swapping these spare hours each month for holiday was not working prior to the transfer and that he did not expect it to continue. The respondent's primary cover was 150 hours a year, less than the 177 hours that the claimant owed. The Tribunal therefore did not find that the claimant was being required to work overtime. These were working hours he was paid for in his salary and shift and unsocial hours allowance and hours that he contractually owed to the respondent. To require him to work the 150 hours he was already being paid for was not a breach of contract or a substantial change to working conditions to the claimant's material detriment.

71. The claimant says that primary cover system incorporates rigidity in the cover arrangements that did not apply before. There was an expectation that he would be available when rostered as primary cover as opposed to providing adhoc cover that he could choose to agree or refuse. He points out that it can affect domestic plans and homelife. The Tribunal finds, however, that the respondent had the contractual right to change the claimant's working plan to incorporate primary cover. Clause 4.2 of the collective agreement gives a discretion to management to determine work patterns by reference to operational requirements which can be a pattern appropriate to the needs of the business. Clause 4.6 confirms that the respondent can require employees to change their attendance hours within or between work rosters at reasonable notice, as determined locally. The Tribunal finds that these clauses gave the respondent the contractual power to make the change.

72. Further, the Tribunal does not consider that the change was implemented in a way that was a breach of the implied duty of trust and confidence. The respondent made it clear that it would transition to the arrangements over time and, as set out in the findings of fact above, there is not an absolute expectation that employees would always instantaneously provide the primary cover.

73. The Tribunal also finds that imposing a structured primary cover roster was not a substantial change to the claimant's working conditions to his material detriment. They were hours that the claimant owed the respondent to work and he already regularly worked additional hours for Engie.

74. The claimant also argued that the respondent's system ignored his holiday entitlement. The Tribunal does not agree. The claimant still had his full holiday entitlement to take. The Tribunal does not find that the respondent was intending to deprive the claimant of his existing holiday entitlement; it was simply one of the matters in respect of which there had been some confusion as to the claimant's pre-existing entitlement.

75. The claimant further argued that the respondent's primary cover arrangements infringed clause 4.6 of the company grade agreement as attendance hours had to be changed at reasonable notice. He said that reasonable notice could not be a phone call because at Engie the standard practice was 2 months' notice of a change in hours on a shift pattern. The Tribunal does not agree. Clause 4.6 envisages a work roster being in place with planned hours and an employee then being required to change their attendance hours either within or between work rosters at reasonable notice. There is no infringement of this. The claimant would be given reasonable notice of his work roster incorporating when he would be providing primary cover. The Tribunal does not consider that the actual phone call to come in to provide cover on a particular occasion, if and when

it happens, was a change to attendance hours as they were already allocated on the primary cover rota. In any event, in the particular circumstances of being called in for a known primary cover requirement a phone call at short notice would not be unreasonable notice.

76. The claimant also argued there was an infringement of clause 4.3 of the company grade agreement as normal start and finish times in a work pattern should be clearly identified for each individual employee. Again the Tribunal does not agree. The primary cover days themselves would have normal start and finish times that are identified; which is the purpose of clause 4.3.

Safe Work Permit

77. Engie operated a system of "Work Control Documents" to ensure safe systems of work. It required, for example, confirmation that a task risk assessment had been undertaken, that a safety controller was consulted and consideration given to whether a safety document was required, and that a work area risk assessment was completed. A nominated person for the issue of Work Control Documents would sign to confirm that the person in charge of the work in question is authorised to do so. At Engie this authorisation was provided by the engineers. The respondent intended to train the claimant and his colleagues to undertake similar work under their "Safe Work Permit".

78. Having had sight of Engie's Work Control Document at the hearing the respondent conceded that the Safe Work Permit did represent a change to the previous system of work at the plant but denied that it was a fundamental breach of contract or a substantial change in working conditions to the claimant's material detriment.

79. The claimant accepted in evidence that an Operations Technician could, if appropriately trained, perform the work. He felt, however, that changing his duties in such a way was in breach of his contract and that he had not received appropriate training to safely carry out the work.

80. The Tribunal finds that the requirement to complete Safe Work Permits was not a substantial extension to the claimant's existing duties and responsibilities. As stated, he accepted that with appropriate training he could do the work. The respondent had provided some training prior to the transfer. The claimant disputes this was adequate. However, the evidence of Mr Wilson was that this was just the start of the training programme which the claimant did not stay in employment to see through and which the claimant's former colleagues had been able to fulfill without problem. Given that the claimant did not see the training programme through the Tribunal preferred the evidence of Mr Wilson in that regard and finds that the training

was in place to support the alteration in the Safe Work Permit responsibilities.

81. The Tribunal does not find in such circumstances that proposing to extend the claimant's responsibilities placed the respondent in fundamental breach of contract. The claimant relies on clause 5.2 of the company grade agreement which says that employees shall be appointed to a company grade on the basis of the duties and responsibilities they are required to undertake and that employees will be expected to undertake duties and responsibilities commensurate with their grade and competency. The clause is about remuneration and the Tribunal does not find that it means that the employer cannot change or extend an employee's duties such that they are fixed in some way. The claimant accepted that with training he would be competent to perform the duties of the Safe Work Permit. The Tribunal has found a training programme was in place. The Tribunal therefore does not consider that the requirement was outside the duties commensurate with the claimant's grade and competency. Further, the Operations Technician Contribution Statement at [189] gives a key accountability of "Application of safe systems of work…"; it does not limit those to one particular safe system.

82. For the same reasons the Tribunal does not find that extending the claimant's responsibilities to Safe Work Permits was a substantial change in the claimant's working conditions to his material detriment.

Job Title

83. The claimant asserts that the change in job title to "Senior Technician" was a breach of contract. In particular, he relies on clause 5.2 of the company grade agreement.

84. The claimant accepted in evidence that other than the Safe Work Permit (addressed above) the change of title was of no consequence to him. The Tribunal accepts that the change in title was to slot the claimant and his colleagues into the respondent's job catalogue structure. It did not materially change the substance of the work that he would undertake. The Tribunal does not find that this was a fundamental breach of contract or that there was a substantial change to the claimant's working conditions to his material detriment.

Safety Concerns

85. The Tribunal also does not find that the respondent breached trust and confidence by ignoring the claimant's health and safety concerns. The respondent was not the claimant's employer when the earlier concerns were raised. In any event, the Tribunal has found that Ms Bohun and RH did not

ignore the claimant and did act appropriately in referring him to Mr Wilson and that they were not matters for a TUPE consultation meeting. The claimant had the opportunity and facilities to raise his concerns in an appropriate forum. The Tribunal accepts the evidence of Mr Wilson that health and safety was taken seriously and that he had, after the transfer, started a rolling programme of safety training.

Other Contractual Changes

86. The claimant states that the respondent was intending or was trying to effect other contractual changes including increasing the notice period the claimant had to give if he wanted to resign, reducing his holiday and sick pay entitlements, changing the overtime arrangements and the rate of overtime pay together with the standby /on call arrangements and a lower shift allowance.

87. The Tribunal does not agree. The overtime and standby/ on call arrangements have already been dealt with above which the respondent had the contractual right to change. In relation to the other issues, the Tribunal accepts the evidence of Ms Bohun that there was some misunderstanding or confusion as to the claimant's entitlements in some regards because of the lack of initial accurate information forthcoming from Engie. That was not the respondent's fault. The Tribunal accepts the evidence of Ms Bohun that once the claimant's entitlements issues such as notice period, holiday and sick pay came to light that that would have been honoured by the respondent. The respondent was still in the process of clarifying these kinds of points with the claimant when he resigned. There was no fundamental breach of contract or a substantial change to the claimant's working conditions to his material detriment.

Threats to the claimant if he did not sign the new contract /pressure to sign the new contract which had less favourable terms

88. As set out above, as a matter of fact the Tribunal does not find that the respondent threatened the claimant that he would be seen as negative, or threatened him with dismissal if he did not sign the new contract or otherwise placed the claimant under undue pressure to sign up to the new contractual terms or that there was inappropriate or improper pressure in that regard.

89. Certainly, the respondent's preference was for the claimant to sign the new contract however the Tribunal considers, and accepts the evidence of Ms Bohun on this point, that the respondent ultimately would have accommodated the claimant transferring under TUPE on his existing terms and conditions.

90. As set out above in our findings of fact, the respondent was uncertain as to what the claimant's existing terms and conditions were because of the lack of information or incorrect information provided by Engie.

Offering overtime equally

91. The claimant explained that a Government website stated that it was unlawful not to offer overtime fairly and equally between employees. There is no Equality Act discrimination claim in this case. Mr Howells confirmed he had checked the website himself and it was potentially misleading as it appeared to oversimplify the impact of discrimination law. There is no fundamental employment law that directly requires an employer to offer overtime fairly and equally between employees. The Tribunal has already found that the respondent was entitled to require the claimant to provide the 150 hours primary cover as these were base hours that the claimant already contractually owed.

92. The Tribunal finds that RH's reticence about providing the claimant with overtime was in part based on a misunderstanding at that time as to the hours that the claimant already owed which were not strictly overtime. The Tribunal is satisfied that the true situation would have become apparent if the claimant had not resigned but had engaged in constructive dialogue with the respondent. Overtime on top of that was likely to be rare because of the primary cover arrangements. The claimant did provide some emergency cover when it snowed and he was paid for this. It is clear that the respondent did not want to engage in a system of manual overtime logs and payments as they had no system to undertake this and it fell on Ms Bohun in HR to administer which she or the respondent did not wish her to continue to do. The Tribunal considers that ultimately, overtime would have been offered fairly and equally. The primary cover system would have been in place which covered all Operations Technicians. Thereafter, as stated, overtime opportunities would be rare, but if it was on offer (such as the snow example) the Tribunal does not find that the claimant would ultimately have been excluded. There was no fundamental breach of contract or anticipatory fundamental breach of contract or a substantial change to the claimant's working conditions to his material detriment.

Ms Bohun saying she did not have roles and responsibilities for either job

93. The claimant says that under his company grade agreement he had a contractual entitlement to clearly defined role and responsibilities and that when Ms Bohun said they did not have specific role and responsibilities this was a breach a contract. As set out above, the respondent was not given a great deal of contractual documentation by either Engie or indeed by the claimant about his existing role; that was not the respondent's fault. In relation to the respondent's systems, Ms Bohun was seeking to explain their

job catalogue system. The Tribunal can see no fundamental breach of contract or substantial change to the claimant's working conditions to his material detriment. The position in relation to Safe Work Permits has been dealt with above as has the finding that there was not a substantial change to the claimant's role post transfer. The Tribunal can find no evidence that the claimant had a contractual entitlement to some immutable list of job responsibilities. Clause 5.2 of the company grade agreement is somewhat circular in content, but says that employees will be expected to undertake duties and responsibilities commensurate with their grade and competency.

Pressure on the claimant to sign up to less favourable terms and conditions/ no intention to let him transfer "as is"

94. As stated, the respondent's preference was for the claimant and his colleagues to sign up to their terms and conditions post transfer. However, the Tribunal does not find that there was undue or inappropriate pressure on the claimant to do so. As already stated, there was some confusion and misunderstanding as to the claimant's existing terms and conditions because of a lack of information available from Engie, or indeed from the claimant. However, the Tribunal is satisfied that had the claimant engaged with the respondent in a constructive manner and had he not resigned these are issues which would have been ironed out and the respondent would have accommodated and honoured the claimant's pre-existing contractual entitlements (other than for example standby/callout etc which they inherited the contractual right to change). The Tribunal is likewise not satisfied there was an intention on the part of the respondent to not let the claimant transfer "as is". Whilst RH appears to have made some comments about not being able to accommodate existing terms and conditions permanently and that he would have to consider "if and how" an "as is" transfer could be accommodated, on balance the Tribunal finds that an "as is" transfer would have been accommodated. RH's concern was principally about the roster, overtime and standby/ call out arrangements which it transpired the respondent had the contractual power to alter in any event. The willingness to accommodate an "as is" transfer is also evidenced by the dialogue that Ms Bohun and RH had, for example, about finding ways to mirror the pre-existing death in service benefits and the way in which the offer was framed to the claimant in the written paperwork. There was no fundamental breach of contract or anticipatory fundamental breach of contract or a substantial change to the claimant's working conditions to his material detriment.

Other matters and final conclusions

95. For completeness the Tribunal considered other matters raised by the claimant such as the removal of milk, removal of showering in work time and the requirement to walk across site at the start and end of work. The

Tribunal did not consider these were contractual entitlements but in any event did not find they were a fundamental breach of contract or a substantial change to the claimant's working conditions to his material detriment. The site car/ walking across site had been subject to change and discussion previously and could be subject to change. There was no evidence the respondent would not be willing to listen to any safety concerns in that regard as they had done so previously (indeed the removal of the site car was itself mooted as a change needed for health and safety reasons to reduce traffic on site).

96. Whilst this decision addresses the issues the claimant raised on an issue by issue basis the Tribunal also took a step back and considered the overall picture. The Tribunal did not consider that any of the acts relied upon by the claimant, once objectively analysed, on any individual basis demonstrated that the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee or otherwise amounted to a repudiatory or anticipatory repudiatory breach of the contract of employment. Furthermore, when assessed cumulatively, on an objective analysis, there was no course of conduct by the respondent where the respondent without reasonable and proper cause conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee or otherwise amounted to a repudiatory breach of the contract of employment, whether by applying the "final straw" doctrine or otherwise. Likewise assessed overall there was no substantial change to the claimant's working conditions to his material detriment.

97. The claimant resigned and was not dismissed either under Regulation 4(7) of TUPE or section 95 of the ERA. It follows there was no unfair dismissal whether under Regulation 7(1) TUPE or section 98 ERA. The claimant was also not redundant or in a redundancy situation.

98. The claimant's complaints are not well founded and his claim is dismissed.

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Employment Judge Harfield
Dated: 23 December 2019

JUDGMENT SENT TO THE PARTIES ON

……24 December 2019…….

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS