Case No: 2405192/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr J Boswell

Respondents: Proguard Security Services (UK) Ltd (1)
Legionnaire Security Limited (2)

Heard at: Liverpool **On:** 10 March 2017

Before: Employment Judge Wardle

Representation
Claimant: Mr J Nolan
Respondent (1): Miss L Winslade
Respondent (2): Not in Attendance

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant's complaints of automatically unfair dismissal by reason of a relevant transfer and in the alternative of ordinary unfair dismissal and of wrongful dismissal are not well-founded but that his complaint of a failure to inform and consult against the second respondent in its capacity as transferor is well-founded, which in the Tribunal's view justifies a compensation award of 10 weeks' pay in the sum of £3,000.00, in respect of which award by virtue of Regulation 15(9) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 the first respondent as transferee is jointly and severally liable.

REASONS

1. By his claim form the claimant has brought complaints of automatic unfair dismissal because of a relevant transfer pursuant to regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and in the alternative ordinary unfair dismissal, wrongful dismissal in the form of notice pay having allegedly been dismissed without his statutory

entitlement to three weeks' notice pay or payment in lieu of notice and of an unpaid entitlement to statutory holiday pay, which latter complaint was withdrawn during the course of the hearing. In addition by an amendment to his claim form he complains of a breach of the duty to inform and consult in relation to a relevant transfer contrary to regulation 13 of the TUPE Regulations.

2. By its response the first respondent admits that the claimant's employment transferred to it by a relevant transfer on 1 August 2016. However it does not accept that he has been dismissed and hence it denies the unfair and wrongful dismissal complaints. In relation to the alleged breach of the duty to inform and consult it states that it only received very limited information from the second respondent about the transferring employees.

3. By its response the second respondent contends that the case is between the claimant and the first respondent in that it informed him on 30 July 2016 that they would be paying him until the end of July 2016 and that thereafter the first respondent would be responsible. In so far as the provision of employee liability information is concerned it maintains that employees' details, holiday entitlements and benefits were supplied to the first respondent.

4. The Tribunal heard evidence from the claimant and on his behalf from Jane Boswell, his wife and on behalf of the first respondent from Alan Holmes, Operations Manager. Each of the witnesses gave their evidence by written statements, which were supplemented by oral responses to questions posed. It also had before it documents in the form of three bundles which were marked as "C1", “R1” and "R2".

5. At the close of the hearing the parties were informed that judgment would be reserved. The Tribunal has since having regard to the evidence, the submissions and the applicable law been able to reach conclusions on the matters requiring determination by it.

6. Having heard and considered the evidence it found the following facts.

Facts

7. The claimant's employment as a Security Guard with the second respondent began on 3 January 2013. He was engaged together with two colleagues on a contract that the second respondent had with Marie Curie for the provision of security services.

8. In June 2016 the first respondent was contacted by Marie Curie and asked to re-tender for the security contract at the site, at which time it was informed that no other security company would be tendering. In this connection Mr Holmes emailed Edward Hughes, Operations Director for the second respondent on 29 June 2016 stating that Hayley Hawkins, Facilities Manager for Marie Curie had given permission for them to contact him regarding a TUPE transfer. Attached to the email was a form seeking employee liability information.

9. On 4 July 2016 Mr Hughes replied by email stating that the forms should be done by the end of play that day and that he was waiting on information from accounts. He advised that there were three guards in total and that one of them was on long term sick. This was in reference to the claimant.

10. The claimant's absence was related to the birth of his daughter. His wife had been booked in for a Caesarean Section on 25 May 2016 but in advance of this the baby was born but with complications. Following an absence of four days commencing on 12 May 2016 he contacted Mr Hughes on 17 May 2016, the date of his daughter's birth and stated that he needed time off. At that point he had accrued four days holiday, which he wished to take followed by two weeks paternity leave, which according to the second respondent took him up to 6 June 2016, after which he was told that he could have additional time off but that it would be unpaid. However, on 7 June 2016 he informed Mr Hughes that he had obtained a sick note, which he would send to the office. He remained certificated as unfit for work up to and beyond the date of the relevant transfer on 1 August 2016.

11. The forms sent to the second respondent were not returned on 4 July 2016 as had been intimated that they would be by Mr Hughes and so on 5 July 2016 Mr Holmes sent a further email repeating the request, which saw some information being provided the following day the 6 July 2016 but this was far from complete and did no more than supply the claimant's name, his basic contracted hours, his shift times, his rate of pay, payment frequency and holiday and sick pay entitlements.

12. On 9 July 2016 Martin Mulholland, Managing Director of the first respondent, emailed Mr Hughes thanking him for responding but pointing out that there were no start dates for any of the transferring employees or any pension information in terms of the type of scheme and contributions to it or their dates of birth or their addresses. Mr Hughes replied by email on 10 July 2016. However, aside from stating that off the top of his head his company's contribution in respect of pensions was between 1% to 5% depending on how much the employees paid in, he did not address the specific information requested by Mr Mulholland.

13. Previously to this on 6 July 2016 the first respondent had arranged for a senior manager to visit the Marie Curie site to issue starter packs to the transferring employees as it had no home addresses for them. In the claimant's case one was left for him as the first respondent had been advised that he sometimes visited the site but it remained uncollected.

14. In relation to the outstanding employee liability information there was no evidence adduced that this was pursued further with the second respondent.

15. On the claimant's evidence the first time that he was made aware that his employment was subject to a TUPE transfer was when he received a text message from Mr Hughes on 30 July 2016 stating that his employment with the second respondent was finished at the end of the month; that Proguard

(the first respondent) were taking over; that they will be his new employer and that he needed to send all his sick notes to them, to which the claimant responded by asking if he had a contact number for them before stating that he had already sent a sick note which covered him to 8 August 2016. It is the second respondent's case that the claimant was contacted by Mr Hughes at the beginning of July 2016 and informed that it might lose the contract but that it would not affect him as he would transfer to whoever took it over. However, no reference to this earlier contact was made in its response to the claim.

16. The transfer by way of a service provision change took place on 1 August 2016. At this time the first respondent had had no communication with the claimant about the transfer because of its inability to obtain any contact details for him but on its case it was provided on 3 August 2016 with his personal mobile telephone number and his address by Ms Hawkins at Marie Curie and on this date Mr Holmes called the number and spoke to the claimant's wife, who advised that she would get her husband to call them back as he was at the hospital. It was further its case that Mr Holmes having not heard from the claimant called the number again on 4 August 2016 and left a voice message asking him to contact the office as soon as possible before catching him on 5 August 2016 when the claimant told him that he was just on his way out, which saw him asking the claimant to call him back on his return, which he never did despite his giving him the office 24 hour telephone number of 0151 431 0999. His purpose in calling was to ask the claimant to fill in an information pack to gather information in respect of his transfer.

17. On 7 August 2016 in the absence of any call back from the claimant the first respondent arranged for a starter pack to be delivered to his home address by Chris Edwards, one of its senior managers, who was unable to obtain any answer at the premises but posted the sealed letter given to him. In terms of the receipt of this letter the claimant denied ever having received it but in support of the first respondent's case was an Activity Report by Vehicle for 7 August 2016, which showed one of its vehicles calling at the claimant's address at 9.15 a.m. that day. Having regard to this corroborative evidence the Tribunal accepted that a letter had been left and found that the claimant was mistaken in his denial of its receipt.

18. In regard to the telephone calls made there was further dispute. In terms of the conversation Mr Holmes claimed to have had with his wife, Mrs Boswell whilst accepting that one had taken place with a man claiming to be from Proguard stated that this had taken place not on 3 August 2016 but on 23 August 2016 and that having explained that she was not with her husband asked if he, the caller, could ring back the next day. For his part the claimant in answer to the Tribunal's question stated that the call had been made in the first two weeks of August 2016, which contradicted both his wife's evidence and his own written evidence, in which he had referred to this call being made later in August. In relation to the voice message and the alleged conversation Mr Holmes had with him on 5 August 2016 he denied receiving the message and had no recollection of the conversation.

19. On the claimant's case according to his particulars of claim the only

conversation he had with the first respondent was on or about 8 August 2016, although he was less specific in his oral evidence stating that it was in the first two weeks of August 2016, when he says that he took a call on his wife's phone from a lady who said that she was from the new company and who having taken some details from him such as his full name and address asked him when he would be able to return to work, in response to which he stated that he was unable to give a date as his daughter was critically ill at the time, which saw the caller say to him that he sounded like a risky transfer and they would not be employing him.

20. In resolving this evidential dispute the Tribunal preferred the account of the first respondent as it was clear that it had been trying to gather information about the claimant for the purpose of his transfer to them from 29 June 2016 onwards but that it had been thwarted in this by Mr Hughes' reluctance to supply other than some basic information and by the claimant's sickness absence due to the critical nature of his baby daughter's condition. In circumstances where it had gone to the trouble on 7 August 2016, the day before this alleged conversation, to have someone call at the claimant's house to leave with him a starter pack for completion it seemed highly unlikely that it would then the very next day tell him that he was a risky transfer and that they would not be employing him especially as they were aware of his long-term absence and the reason for this.

21. The next attempt by the first respondent to contact the claimant was made on 24 August 2016, when he was sent a letter by Linda Winslade asking for the provision of documents in the form of copies of his contact of employment with his previous employer, his last three pay slips, his P45 and his sick notes together with identification documentation and two personal references and requiring the completion of a Payroll Details Form. In so far as the receipt of this communication was concerned the claimant's evidence was that he had not received it at the time it was allegedly sent and that the first time that he had seen it was at the hearing, albeit that it had been disclosed and formed part of his bundle. Once again the Tribunal accepted that the letter had been sent by the first respondent and it having been addressed correctly found that there was no good reason why it would not have been received.

22. A response was sought by 5 September 2016 but none was made by the claimant.

23. On 25 August 2016 Ms Hawkins from Marie Curie emailed Ms Winslade of the first respondent to say that she had forgotten to mention to Mr Holmes that morning that she had been told by the nurses that the claimant had taken home his daughter the previous day as there was nothing more that they could do for her and that she thought that it was only a matter of days left with her, which she suggested was maybe the reason why he was not answering calls at the moment. The email was acknowledged immediately and Ms Winslade advised that she would update Mr Homes when he returned to the office. The email in question was annotated with the following comment 'due to the sensitive issue - we will await contact from the guard'.

24. Having adopted this position of choosing not to intrude upon the claimant at this sad time and leaving it up to him to contact them when he was ready matters drifted from here. The first respondent heard nothing from the claimant either in respect of the provision of sick notes or of the information that they had previously sought from him and it covered his absence from work by deploying existing employees at the Marie Curie site..

25. A claim was later presented by the claimant on 11 November 2016 making the complaints set out above, which was responded to within the prescribed period by the first and second respondents.

Law

26. In regard to the circumstances in which a dismissal will occur section 95(1) of the Employment Rights Act 1996 provides that an employee is dismissed if (a) the contract under which he is employed is terminated by the employer (with or without notice) (b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract or (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.

27. In regard to the automatic unfair dismissal complaints by reason of the transfer the relevant law is to be found in the Transfer of Undertakings (Protection of Employment) Regulations 2006. Regulation 7(1) provides that a dismissal is automatically unfair if ‘the sole or principal reason for the dismissal is the transfer. Regulation 7(2) and (3) goes on to provide that where ‘the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce’ (ETO) Regulation 7(1) ‘does not apply’ and the fairness of dismissal is to be judged by reference to section 98(4) of the 1996 Act, which sets out the standard ‘reasonableness test’ that applies to ordinary unfair dismissal. Regulation 7(3) specifically states that an ETO dismissal will be deemed to be either by reason of redundancy (assuming it meets the statutory definition of redundancy) or for a substantial reason of a kind justifying the dismissal of an employee holding the position which the employee held.

28. In regard to the complaint of a failure to inform and consult Regulation 13 obliges transferors and transferees to inform and consult in relation to a relevant transfer in respect of affected employees. More particularly Regulation 13(2) provides that '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 the following:(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reason 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' (d) if the employer in question 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'.

29. The law in relation to the alternative complaint of ordinary unfair dismissal is contained in the 1996 Act. Section 98(1) provides that in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for the dismissal and, if more than one, the principal one and that it is a reason falling within section 98(2) or some other reason of a kind to justify the dismissal of an employee holding the position which the employee held. Section 98(4) provides that 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) 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 this shall be determined in accordance with equity and the substantial merits of the case.

30. The law in relation to statutory notice is also to be found in the 1996 Act. Section 86 sets out minimum periods of notice required to terminate a contract of employment. Where notice is given by the employer, the notice required is one week for employees who have been continuously employed for at least one month but less than two years, and thereafter one week for each complete year of service up to a maximum of 12 weeks' notice.

Conclusions

31. Applying the law to the facts as found the Tribunal considered first of all the issue of whether or not the claimant had been dismissed. As stated the definition of dismissal is to be found in section 95(1) of the 1996 Act. In the context of this claim the only potentially applicable situation is that of termination of the employment contract by the employer with or without notice as he was not employed on a limited-term contract and nor is it suggested that he resigned. In the circumstances of this case where the first respondent disputes whether there has in fact been a dismissal at all the burden of proof falls on the claimant to establish a dismissal, the standard of which is that of the balance of probabilities i.e. whether it was more likely than not that the contract was terminated by dismissal.

32. In this connection the claimant's case is that having been called by an unidentified female employee of the first respondent possibly on 8 August 2016 but if not within the first two weeks of August 2016 and having informed her that he was unable to give her a date of return to work as his daughter was critically ill he was summarily dismissed in terms that he sounded a risky transfer and that they would not be employing him.

33. As observed above the Tribunal considered it highly unlikely that such an exchange would have taken place at this time having regard to the fact that it accepted that the first respondent had as recently as 7 August 2016 visited

his home to leave a starter pack for completion by him and continued trying to obtain information from him in respect of the transfer of his employment to it as evidenced by its letter to him dated 24 August 2016. The Tribunal also found support for this conclusion in the email exchange between Ms Hawkins of Marie Curie and Ms Winslade of the first respondent on 25 August 2016 in which Ms Hawkins in her email opines as to the reason why the claimant was not answering calls at the moment, which suggested to it an awareness by her of the first respondent's ongoing attempts to contact the claimant, which would have been inconsistent with a scenario of a summary dismissal having taken place some weeks earlier. Accordingly the Tribunal concluded that the claimant had failed to discharge the burden on him to show a dismissal and that there was a continuing contractual relationship between him and the first respondent, which it is to be noted the first respondent indicated that it was willing to perform..

34. In such circumstances the Tribunal found that it had no choice but to dismiss his complaints of automatic unfair dismissal by reason of the transfer and in the alternative of ordinary unfair dismissal and of wrongful dismissal as being not well-founded.

35. It did find however that his complaint brought under Regulation 15 of TUPE in respect of his employer's failure to inform and consult in relation to a relevant transfer in breach of Regulation 13 to be well-founded. It did so because it accepted his evidence that the first notification that he received in relation to the transfer was the text sent to him by Mr Hughes of the second respondent on 30 July 2016, a mere two days before the effective date of transfer on 1 August 2016 in circumstances where the second respondent was certainly aware from 29 June 2016 of the prospect of a service provision change in respect of its contract with Marie Curie to the first respondent. The information provided in this text was minimal in that it told the claimant no more than that his employment would transfer to the first respondent at the end of the month.

36. The duty to inform contained in Regulation 13(2) requires the employer to inform the representatives of any affected employee, or if none have been appointed, the employees themselves of prescribed information as set out in paragraph 27 above. The text from Mr Hughes fell far short of what by law he was required to provide and was also indecently late and could not be said to have been given 'long enough before' the relevant transfer in order to allow for meaningful consultation even allowing for the fact according to the first respondent that no measures were proposed.

37. Having regard to the nature and extent of the second respondent's default in circumstances where it failed even to give the claimant any contact details for the first respondent in the form of a (telephone) number when requested by him the Tribunal considered that its failure to inform and consult was pretty much a complete one. As such it considered in the absence of any mitigating circumstances that an appropriate award of compensation would be towards the upper end of the scale and having regard to the maximum of 13 weeks' pay that may be awarded if thought just and equitable to award the claimant 10 weeks' pay in the sum of £3,000.00, in respect of which compensation the

first respondent, in its capacity as transferee, is pursuant to Regulation 15(9) jointly and severally liable with the second respondent in its capacity as transferor.

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Employment Judge Wardle 21st April 2017

JUDGMENT SENT TO THE PARTIES ON 21st April 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS