Case Number: 3304807/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondents**
Mrs G Bernard	v	1st Class Protection Ltd

Heard at: Watford **On**: 11 October 2018

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: In person

For the Respondent: Mr R Rotem, Director

JUDGMENT

(1) The claimant was not dismissed unfairly.

(2) The claimant is entitled to the sum of £215.74 by way of damages for breach of contract.

(3) The claimant had a statement of her terms and conditions, sufficient to satisfy the requirements of sections 1(1) and 4(1) of the Employment Rights Act 1996, at the time of her dismissal.

REASONS

Introduction; the claims which were before me

1 In these proceedings, the claimant claims that she was dismissed unfairly. The

claim form had the box for unfair dismissal ticked, but no other. However, in box 9.2, there was a claim for notice pay of 10 weeks' pay. There was also a claim for compensation for the fact that the claimant had not been given (as she claimed) any written terms of her employment.

2 The respondent accepted that the claimant was given notice and was therefore dismissed, but denied that the claimant was dismissed unfairly or that she was owed any notice pay. The respondent also claimed that the claimant had been given a statement of her terms and conditions when she started working for the respondent.

3 I heard oral evidence from the claimant on her own behalf and principally from Mr Re'em Rotem on behalf of the respondent, who had made a witness statement. Mr Rotem is a director of the respondent. I heard oral evidence also from Ms Olga Mordukhay, another director of the respondent. I was given or shown copies of a number of documents, some of which were appended to the witness statement of Mr Rotem, others of which were not. The parties had not complied with the directions of the tribunal in advance of the hearing in regard to the exchange of documents and the creation of a joint bundle of documents. Nor did the parties appear to have realised that it was necessary for any communication with the tribunal to be copied to the other party.

4 In addition, the claimant sought to rely on a recording of a conversation made by her, she said, on 11 December 2017. That conversation was with Mr Rotem. I permitted the claimant to rely on that recording without objection from Mr Rotem. I listened to part of it.

5 Having heard that evidence and seen those documents, I made the following findings of fact. There were several significant conflicts of evidence, and in the course of stating my findings of fact, I refer to those conflicts and resolve them.

The facts

6 The claimant worked for the respondent as a Security Officer. She started to do so in September 2015. For the whole of her employment with the respondent, she provided her services as a Security Officer at a maintained school by the name of Wolfson Hillel Primary School. That school ("the school") was at that time a voluntary aided school within the meaning of section 20 of the School Standards and Framework Act 1998, the governing body of which was (by virtue of section 36 of the Employment Act 2002) the employer of its staff.

7 Before she started to work for the respondent, the claimant worked for that governing body ("the governing body") as an employee, providing security services at the school. The length of time that she did so was the subject of conflicting evidence. I return to that evidence below. What is material for this part of my judgment is the fact that while Mr Rotem said that the claimant's employment with the respondent was continuous only from September 2015

onwards, it appeared clear to me from what he and the claimant said, and from the reference document to which I refer further below in this paragraph and in paragraph 18 below, that there was a transfer of the claimant's contract of employment to which the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 ("TUPE") applied from the governing body to the respondent at the start of September 2015. I say that because (1) the reference document, which was signed on 11 May 2016 by Ms Kristen Jowett, the head teacher of the school, stated that the claimant's reason for leaving her employment with the governing body was this: "Transferred to security company to supply service", and (2) Mr Rotem confirmed that the respondent obtained the contract for the provision of security services to the school at that time. Thus, there was, I concluded, a transfer within the meaning of regulation 3 of TUPE.

8 The claimant and Mr Rotem got on well personally while the claimant was an employee of the respondent. However, the claimant's relationships with (1) fellow employees of the respondent based at the school, and (2) parents and staff of the school, became strained during 2017. Both Mr Rotem and the claimant gave evidence that Ms Jowett on several occasions during that year asked that the claimant be removed from her post at the school, and that the respondent provided another person to provide security services in place of the claimant. On several occasions, Mr Rotem was able to persuade Ms Jowett to let him keep the claimant in her position at the school, on the basis that the situation improved, but on 8 December 2017 at 10:52, Ms Jowett emailed Mr Rotem in these terms:

> "Dear Re'em
>
> I am writing to notify you that we wish Golda Bernard to be withdrawn from Wolfsen Hillel as soon as possible. As agreed we are happy for her to stay until the end of term pending her behaviour and will pay garden leave if we feel she is being inappropriate in anyway."

9 Mr Rotem said that he went straight to the school as soon as he received that email, and spoke to the claimant, telling her that he would try to change Ms Jowett's mind again, but that if he was not able to do so then he was giving her 4 weeks' notice of the termination of her employment with the respondent unless he was able to offer an alternative post which was acceptable to her. The claimant denied that that conversation happened at that time. She said that there was a conversation of the same sort on 7 December 2017, but that during it Mr Rotem did not give her notice.

10 The claimant was paid up to and including 5 January 2018, which was 28 days from 8 December 2017.

11 The ET1 claim form referred to a meeting of 6 December 2017, at which (it was written in box 8.2):

> '[Mr Rotem] told me that the Head Teacher didn't want me to work at the school anymore, as there were complaints against me from a few parents that I had been shouting at them, which totally untrue. [sic]
>
> Following that, he told me that I'll have to leave either "nicely" or "not nicely" - I was shocked.
>
> ...
>
> During that meeting the words "leave nicely or not nicely" were repeated a few times by Mr. Rotem.'

12 There was a conflict of evidence about whether or not the claimant had been given a set of terms of her employment by the respondent. The claimant said that she had not been, but Mr Rotem was adamant that he saw the claimant being given a set of documents including such a statement of terms when she attended the respondent's offices before the start of September 2015. He said that he saw his secretary give the claimant such a set in a folder. He also said that the document which he appended as appendix A to his witness statement (entitled "Terms & Conditions of Employment between:"), in which the claimant was stated to be the employee and the start date of the employment was stated to be 28 August 2015, was in the claimant's personnel or human resources ("HR") file. It stated a notice period of 4 weeks. The claimant denied having been given such a document. However, I accepted that evidence of Mr Rotem and concluded that the claimant had been given such a document, and certainly that there was a copy of the document in her HR file.

13 Given that

13.1 the claimant's initial description (in the ET1 form) of the events was consistent with her contract of employment being ended by means of notice given at the meeting at the beginning of December 2017 which both Mr Rotem and the claimant accepted happened,

13.2 the notice period of 28 days expired 4 weeks after 8 December 2017, and

13.3 the statement of the claimant's terms and conditions stated a notice period of 4 weeks,

I concluded that the claimant was indeed given oral notice by Mr Rotem on 8 December 2017.

14 Mr Rotem also gave evidence that he wrote to the claimant the letter dated 21 December 2017 which was appendix E to his witness statement. That was in these terms:

Dear Golda,

Following our meeting from yesterday when I informed you about the request of Mrs. Kristen Jowett, the head teacher of Wolfson Hillel Primary School (our client) to remove you from the site. I am summarising our discussion and placing the following in a written document.

As you know the school asked me to remove you. This was due to disciplinary problems and after you were giving few warnings and opportunity for improvement.

I have offered you an option of working at a various different locations within London of which you have refused due to the following reasons:

- The site is too far for you to travel, although it is approximately 4 miles from Wolfson Hillel.
- There are too many shifts, although it was similar to Wolfson Hill.

This option is still available if you wish and we would like you to considering again taking one of the option. Please let me know if you have changed your mind."

15 The claimant said said that she did not receive that letter. Mr Rotem said that he had written it and given it to a member of his office staff to send in the post. Ms Mordukhay said that she had seen the letter being prepared to be posted, by being franked, using the respondent's franking machine. I accepted that evidence of Mr Rotem and Ms Mordukhay, and concluded that the letter was sent on 21 December 2017 to the claimant.

16 The claimant agreed that she had been offered alternative employment by Mr Rotem, and said that she was unable to take it because it was not offered on the only days when she would be available to work if she was not working at the school, namely Wednesdays and Thursdays, all day.

17 Mr Rotem's oral evidence was that he made two telephone calls to Ms Jowett after receiving her email of 8 December 2017 which I have set out in paragraph 8 above, but that she did not wish to speak to him about the matter and made it clear (Mr Rotem did not say how, but I accept his evidence in this regard) that she would not change her mind.

18 I return now to the question of the length of the claimant's continuous employment with the respondent. The claimant's application form for employment with the respondent, completed in August 2015, contained a statement by her that she ran her own business until 1988, and that she was not employed until 2005 when she started to work at the school. However, the respondent had sought a reference for the claimant from the school as part of the respondent's obligation as a security services supplier to procure

confirmation of what its employees stated to be their employment history. Ms Jowett had in response written the reference to which I refer in paragraph 7 above, and in it she had stated that the claimant's employment with the respondent was for the period from "01/04/11 to 31/08/15".

19 The claimant said that she had told Ms Jowett in 2017 that she had worked at the school for 10 years, and that Ms Jowett had accepted that. However, as the claimant said, Ms Jowett started working at the school much later than 2005.

20 The claimant put no documents before me relating to her employment by the governing body, and in the circumstances, I concluded that the most reliable and therefore the best evidence that I had of the period of her employment was in the reference written and signed by Ms Jowett on 11 May 2016. As a result, I concluded that the period of the claimant's continuous employment with the respondent was from 1 April 2011 to 5 January 2018.

21 The claimant's pay was calculated by the respondent to be £107 per week. That calculation was done by averaging the claimant's pay over the 6 months before the ending of her employment and appeared to me to be too low. The claimant worked or at least was paid for her time throughout the final 12 weeks of her employment with the respondent.

22 By my calculations, the claimant's pay for the 12-week period before the ending of her employment was this: £344.90 for the period from 14-31 October 2017 inclusive, plus £432 for November 2017 plus £814.50 for December 2017, plus £495 for the period 1 to 5 January 2018 inclusive. That was a total of £2,086.40. The claimant had obtained replacement work at the rate of £66 per week. That work started on 8 January 2018.

The relevant law

23 As a result of section 98(1) of the Employment Rights Act 1996 ("ERA 1996"), it is for the employer to prove to the tribunal on the balance of probabilities what was the real reason for the employee's dismissal, and that it was one of those which fall within section 98(2) of that Act, or that it was for "some other substantial reason".

24 There is a series of cases including *Dobie v Burns International Security Services (UK) Ltd* [1984] ICR 812 and *Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 466 which show that where an employer provides the services of an employee to a customer of the employer and the customer requires the cessation of such provision, the obligations in the law of unfair dismissal of the employer are relatively limited. There may well in those circumstances be "some other substantial reason", within the meaning of section 98(1)(b) of the ERA 1996, for the employee's dismissal.

25 There is nevertheless in those circumstances a need (by reason of section 98(4)

of that Act) to act within the range of reasonable responses of a reasonable employer in deciding whether to dismiss the employee, but there are in such circumstances limited options for the employer. A reasonable employer will, however, usually make efforts to find alternative work for the employee, and it may be outside the range of reasonable responses of a reasonable employer to fail to make reasonable efforts to persuade the customer to continue to accept the services of the employee.

26 As for the period of notice required to be given to an employee, that is governed by section 86 of the ERA 1996, which so far as relevant requires a week's notice for every completed year of employment up to a maximum of 12.

27 A week's pay for that purpose falls to be calculated in accordance with sections 221 to 224 of the ERA 1996. That requires (so far as relevant) that the pay is calculated by reference to the final 12 weeks during which the employee actually worked.

28 Section 38 of the Employment Act 2002 provides so far as relevant:

> "(3) If in the case of proceedings to which this section applies—
>
> (a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and
>
> (b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996,
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> the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead."

My conclusions

29 The claimant's dismissal was decided on by Mr Rotem. I accepted his evidence that the reasons for the claimant's dismissal were the circumstances which I have (in paragraphs 8, 9, 16 and 17 above) described at the school during the autumn term of 2017. In those circumstances, there was in my view some other substantial reason for the claimant's dismissal within the meaning of section 98(1)(b) of the ERA 1996.

30 In my judgment Mr Rotem made at least reasonable efforts to persuade Ms Jowett to change her mind about the need for the claimant to cease to work at the school, and he made reasonable efforts to provide the claimant with alternative work before her dismissal. Certainly, in my judgment his decision that the claimant should be dismissed was in the circumstances well within the range of reasonable responses of a reasonable employer.

31 Accordingly, I concluded that the claimant's dismissal was not unfair.

32 However, I concluded that the claimant was entitled to more notice than she was given. She should have received 6 weeks' notice, and not 4. She started her new job on 8 January 2018, i.e. the first working day after the last day of her employment with the respondent. Her weekly pay for the purposes of sections 221 to 224 of the Employment Rights Act 1996 was £2,086.40/12, which was £173.87. She had received £66 per week for the two weeks in respect of which she was owed pay. The respondent is therefore now obliged to pay her £215.74.

33 The claim for compensation for a failure to give the claimant a statement of her terms and conditions was not well-founded as I determined that she had in fact been given the document to which I refer in paragraph 12 above.

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Employment Judge

Date_____22 October 2018_____

JUDGMENT SENT TO THE PARTIES ON

.....1 November 2018.....

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FOR THE TRIBUNAL OFFICE