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EMPLOYMENT TRIBUNALS

Claimant		***Respondents***
Mrs F James-Blair	**AND**	Premier Carewaiting Ltd

Heard at: London Central **On**: 3 September 2020

Before: Employment Judge Goodman

Representation
For the Claimant: Mr. S. Brittenden, counsel
For the Respondent: Mr W. Lane, Peninsula Business Services Ltd

JUDGMENT having been sent to the parties on 7 September 2020 and written reasons having been requested under rule 62(3):

REASONS

1. This is a claim for unfair dismissal claim where the sole remaining item in dispute is whether the Claimant was dismissed by the Respondent.

2. By way of background, the claim is the last remaining of multiple claims brought by home support assistants for clients of Haringey Borough Council against three transferee employers, following a service provision change. Claim for a protective award against the transferees were heard by a full panel, and were unsuccessful on a finding that the claimants had already settled and withdrawn their protective award claims with the transferor. Money claims under the national minimum wage for travel time,

living care allowance, holiday pay and other unfair dismissal claims have been settled since the hearing began yesterday morning.

Evidence

3. In order to decide the dismissal issue, I have the five volumes of documents approaching 2000 pages prepared for the hearing of the multiple claims, and have heard evidence from the Claimant. I read a witness statement from Sean Fox, an official of her trade union, UNISON, and another from the Respondent's Director, Mrs Augustina Agyeampong. For generic facts about the circumstances of the transfer, I rely in part on the witness of Mr Fox, in part on contemporary documents, and in part on the factual findings of Employment Judge Lewzey in the 2017 preliminary judgment on whether there was a relevant transfer.

Findings of Fact

4. The Claimant was one of around 168 home support assistants, that is, care workers employed by Sevacare Limited to provide care at home for clients of London Borough of Haringey.

5. In 2015 there was an adverse report from the regulator, the Care Quality Commission, and also national media publicity of Sevacare shortcomings, including exposure by an undercover reporter that she had been paid less than the national minimum wage, contrasted unfavourably with the earnings of the chief executive. For a period in 2016 Haringey allocated no more new clients to Sevacare, and in June 2016 Sevacare gave one month's notice to Haringey to terminate the contract. Many Unison members were affected, though the union was not formally recognised by Sevacare. The union corresponded with Sevacare and the borough to find put what would happen to the workers. It is common ground that there was no consultation with employee representatives under TUPE, and it was only a week before Sevacare's contract ended that employees were told that they would be transferring to one of a number of other providers. In many cases, but not all, they were to continue with the same clients. A

letter of 28 June 2016 from Sevacare to its staff just said: “we have brought our contract to an end the Council is to identify a new provider”.

6. The Claimant was employed from 12 June 2010. Her own contract of employment is not in the bundle, but in the bundle is a contract for her colleague Felicia Kwame-Osei, who was employed around the same time and who also transferred to Premier Care, and in the absence of information I assume these contracts were in standard terms. Paragraph 6.1 says that the place of work was at “premises and locations to be determined appropriate and suitable by the employer from time to time”. Paragraph 7.1 said that she was to work an unspecified number of hours per week - that is, it was a zero hours contract - which were not to exceed 48, “unless varied to meet the needs of the service”. Paragraph 7.2 said the employer reserved “the right to alter upon reasonable notice, which may mean immediately in certain circumstances” the hours of work. The salary was effectively the national minimum wage, it was £6.40 on Ms Kwame-Osei’s contract; according to Mrs James-Blair she was employed at £7.70 an hour. In practice she had regular work attending specific clients allocated to her so that they would benefit from continuity of carer.

7. As noted, she learned from Sevacare at the end of June 2016 that there was to be a new provider, and she was told by someone at Sevacare that her new employer was to be Premier Carewaiting, a company based in Ilford. The claimant worked in Wood Green. She was told that someone would come to see her in Wood Green, but no one came, and she was never contacted by Premier Carewaiting.

8. The Claimant needed to work to be paid, and she asked Sevacare to help her find some other work. She did find work with another provider called London Care, and also worked for a number of others. On her evidence she ended up about 8 hours a week down on the pre-transfer position.

9. The Sevacare contract with Haringey ended on 26 July 2016. It is fair to say that during the period between 28 June and 26 July there was much muddle and confusion, and extensive intervention on the part of the trade

union, a number of whose officials tried to find out what was happening to their members' employment.

10. On 19 August 2016 Unison submitted claims to the Employment Tribunal on behalf of seventeen Claimants (including this claimant) against twelve Respondents (including Premier Carewaiting) for claims including failure to pay the national minimum wage, unlawful deductions under the Employment Rights Act (and breach of contract for those whose employment had ended), relating to payment of travel time between appointments, working time, waiting time, live-in work, and the consequential effects on holiday pay as well as failure to inform to consult about a transfer, and in some cases, unfair dismissal.

11. Paragraph 14 of the grounds of claim said "in the case where the hours of work for each Claimant have been allocated between more than one provider and only one provider has been prepared to accept them to work under TUPE the dismissal by the other providers is automatically unfair pursuant to regulation 7 of TUPE".

12. The case advanced by Premier Carewaiting in respect of this Claimant (and one other) is that they had no knowledge of her. The Claimant however relies on the schedules in the bundle sent to Premier Carewaiting by the union in July 2016 which list on a spreadsheet, client by client, the hours worked, and against them the name of the carer allocated. The Claimant's name appears against three clients, with their hours, and in the absence of dispute about these lists, the Tribunal concludes that if Premier Carewaiting did not know about Mrs James-Blair, then they ought to have known.

Relevant Law

13. Section 95 of the Employment Rights Act 1996 defines dismissal:

> "For the purpose of this Part (meaning part X, on unfair dismissal) an employee is dismissed by his employer if and, subject to subsection 2, only if -

(a) the contract under which he is employed is terminated by the employer whether with or without notice … 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 employees conduct"

14. What kind of conduct qualifies an employee to terminate the contract has been defined in a series of cases. In short, there must have been a fundamental breach of a term of the contract, one which goes to the root of the contract and entitles the employee to treat the contract as repudiated and at an end.

15. Turning to the Transfer of Undertakings (Protection of Employment Regulations (TUPE) 2006, the relevant section is 4, headed "Effect of Relevant Transfer on Contracts of Employment", and states:

4.1 "except where an objection is made under regulation 7, a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that are subject to the relevant transfer which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the persons who are employed and the transferee".

4.9 "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".

16. Regulation 7, headed "Dismissal of Employee because of Relevant Transfer" provides at 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 X of the 1996 Act as unfairly dismissed if the sole or principal for the reason for the dismissal is the transfer"

17. There is some case law on what happens when nothing explicit is said at the time about ending or continuing a contract, and whether the facts may speak for themselves. Conduct can establish a termination of employment, as illustrated in **Hogg v Dover College (1990) ICR 39**, where a teacher was told that he was no longer to be head of department and his hours to be cut; that was found to be a termination. There are relevant observations of the Employment Appeal Tribunal in **Sandle v Adecco 2016 IRLR 941** to the effect that termination can be by word or deed (conduct) and conduct should be judged as what an objective observer would have understood had happened. In that case the Claimant was employed by an agency and placed on an assignment which was later terminated, there was no further contact between her and the agency about other assignments. It was argued that there had been no dismissal. In that case it was held she had not been dismissed, but it was observed that dismissal does not have to be communicated; communication might be by conduct, and conduct might be capable of being construed as a direct dismissal, or as a repudiatory breach. It has to be something of which the employee was aware, otherwise there is no dismissal.

18. The Respondent argues that there is no dismissal because it did not terminate her employment either with or without notice; on their case they could not have done, as they were not aware of her existence. They also argue that there was no resignation, and that had been possible for the Claimant to have contacted Premier Carewaiting to ask what was happening through her trade union. The trade union could find her an address to write to and draft a letter for her. They argue she was a zero hours contract worker, with no expectation of work, so there was no

breach entitling her to treat herself as dismissed, and that she waited only 26 days before presenting a claim to the Employment Tribunal, and in that period was no breach of contract by not providing her with work.

19. The Claimant argues that the Third Respondent took none of the steps characteristic of an employer, as would be expected on a transfer under regulation 4.1, and so in effect they repudiated her contract. It is also argued on her behalf that the complete cut in her working hours was a substantial and material change in her working conditions.

Discussion and Conclusion

20. The Tribunal concludes that there was a dismissal.

21. The respondent made no contact at all with the Claimant, although they should have been aware of her as her name had appeared on a schedule of hours and clients that had been sent to them. In effect, she was a ball dropped in this complex transfer carried out without the usual consultation. There was a substantial change in her working conditions to her material detriment, in that although she had no contractual right to any hours at all, she was accustomed to regular attendance on named clients. Even if these were not guaranteed by her contract, the regulation does not speak of contractual arrangements but of a material change in working conditions. To her knowledge these clients still required care, with the ending of the employment by Sevacare someone still had to provide it. She was not given work, with the important consequence that she was not being paid, and that is especially important for a low-paid worker who is unlikely to have a substantial cushion of savings.

22. Further, while the Claimant already knew from an email the month before that Sevacare no longer employed her, she had only been informed verbally that Premier Carewaiting were expected to take her over, and she had no contact from them at all, despite being told by Sevacare of a meeting, even to say that her clients were being allocated to another. In

the finding of the Tribunal the criticism that she should have contacted them is not realistic: she had no letter, text or email from them with which to find out how to make contact. She would have had to conduct some research to do so, and the trade union itself, as the correspondence shows, was extremely busy with complex and fast moving changes involving several correspondence with Sevacare, the London Borough of Haringey, and the several new providers, to find out what was happening to a large number of workers. In these circumstances it is not reasonable to expect the Claimant to trace Premier Carewaiting herself for confirmation before concluding that the contract was at an end. The fact that she was told that Premier Carewaiting were to contact her, but she had no contact, would have told her, in the context where other colleagues had identified new employers and were working, that she did not have an employer. The tribunal observes that it is normal for a new employer on a TUPE transfer to make contact with the new employee, if only to find out their pay details, or to tell them who to contact about notifying absence, holiday and so forth. The complete silence on the part of Premier is not characteristic of an employer. Even if the claimant had no contractual entitlement to hours if work, she had an implied right to be informed by her employer about its existence, and its requirements for work. It was not unreasonable to expect that the new employer would make contact with her by 26 days after the transfer.

23. The question remains whether termination which is the word used in section 95 defining dismissal requires some notification or communication. In Hogg there was the change in hours and status was communicated. In this case there was no communication at all. What was it reasonable for an employee in these circumstances to conclude? The employer's conduct has to be viewed in the context of the TUPE transfer where the Claimant was aware that she no longer had an employer with Sevacare but was unaware of any new employer beyond a promise of a meeting. She heard nothing about her ongoing work schedule. There was no one she could inform or contact. The Respondent however could have contacted her, having her name on the schedule, and their omission was

the lack of any contact with her, apart from ceasing to provide work, as a result of which she was without pay. In contrast to **Sandle**, where the claimant was a lawyer and knew who her employer was, but failed to make contact for some months, this Claimant did not know who her employer was, and in the context of a TUPE transfer where employees had not been consulted or informed as required by the regulations it is not reasonable to expect her to undertake research to find out. There are circumstances where an employee can conclude from conduct that she has been dismissed, for example where an employer locks up the premises and disappears without an address. This case is one where objectively an employee can conclude from the lack of any information about the employer's identity, let alone hours of work, that in practice she no longer has an employer, whatever the statutory position – and in this case the employees had to await an employment tribunal judgment that there had been a relevant transfer. Her employment was terminated by the employer's conduct, here, omission.

24. In the alternative it is held that this is conduct entitling the Claimant to treat her contract as at an end. Although she was not contractually entitled to any hours at all, there was under the terms of TUPE a material change in her circumstances, meaning she was no longer being provided with work after regular hours caring for three individuals. If that is not the case, it might also be said that there was a breach of the implied duty of trust and confidence in the failure to make any contact with her at all after the date when Sevacare ceased to be her employer. This was repudiatory conduct, and if the Claimant did not resign explicitly, it was clear that she had treated this as repudiatory by the date I August that she presented a claim to the Employment Tribunal. Whether this was a termination by conduct on the part of the employer, Premier Carewaiting, or the Claimants treating herself as having resigned as the contract had been repudiated, either way this is a dismissal within the meaning of section 95 of the Employment Rights Act and the TUPE regulations.

25. I understand from the parties that if the tribunal finds there was a dismissal, it is not disputed as it was an unfair dismissal. The parties have also agreed the amount of the award if a dismissal finding is made.

Employment Judge Goodman

Dated: 07/09/2020

Sent to the parties on:
07/09/2020...

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For the Tribunal Office