EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
MR JASON RUMSEY		(1) MPS HOUSING LTD (2) LONDON BOROUGH OF HAMMERSMITH AND FULHAM

Heard at: London Central

On: 7 - 12 October, 2020

Before: Employment Judge O Segal QC
Members: Ms G Carpenter; Mr S Ferns

Representations
For the Claimant: Mr I Ahmed, Counsel
For the First Respondent: Ms K Shields, Counsel
For the Second Respondent: Mr B Amunwa, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:-

(1) The claim of unfair dismissal, pursuant to regulations 4(9) and 7(1) of TUPE succeeds.

(2) The alternative claim of constructive unfair dismissal is rejected.

(3) The claim pursuant to s. 15 Equality Act 2010 is rejected.

(4) The basic award is reduced by 20%, pursuant to s. 122(2) ERA 1996.

(5) The parties have agreed remedy, by way of COT3.

REASONS

1. The Claimant brings claims arising out of his decision not to accept a job with the Second Respondent (R2) following a process whereby his employer, the First Respondent (R1), had lost its contract to perform certain repair and maintenance work for R2 and the Claimant was offered a job with R2 on the basis of a relevant transfer pursuant to TUPE.

2. All parties were represented by counsel. We express our gratitude for the way in which they conducted the proceedings.

Evidence

3. We had an agreed bundle. We had witness statements and heard live oral evidence from:

   3.1. the Claimant and his wife, Susan Rumsey;

   3.2. for R1: Ms Jackie Edmonds, HR Business Partner at the time;

   3.3. for R2: Darren Smith ("DS") Interim Managing Director of the DLO at the time; and Ms Mary Lamont, Head of HR Operations, People and Talent.

Facts

4. There were, in truth, very few disputed primary facts (and of those, the majority were in relation to the issue of whether the Claimant was disabled, which in the event proved academic). We are therefore able to set out the relevant facts fairly shortly.

5. The Claimant was employed from 1 March 2015 by Mitie Property Services Ltd ("Mitie") as a Multi-Trade Operative. In that role he was required to go out to various properties owned by R2 and deal with issues of repair or maintenance which had arisen at those properties. He was transferred, in the same role and with the same terms and conditions, from Mitie to R1 in November 2018.

6. The Claimant is qualified in particular as a carpenter/joiner, but also had qualifications in property maintenance including plumbing and in basic electrics. He

owned and used his own tools to perform works in those areas at R2's properties, some of which were valuable (worth up to £3,000 in total) and could not sensibly be left overnight in a vehicle and collectively the tools were numerous and heavy.

7. The Claimant had an offer letter from Mitie which stated that *"You are entitled to the use of the following type of vehicle during your employment: Vauxhall Vivaro. Your choice and use of a Company vehicle is subject to the Company's vehicle policy from time to time in force"*. The tribunal was not provided with a copy of the vehicle policy, but Ms Edmonds confirmed that there was such a written policy and that it provided for the employee to take the van home and use it to drive to and from work but prohibited other personal use – which the Claimant had told us was his understanding of his entitlement and the invariable practice while he worked for Mitie/R1. The Claimant was provided by Mitie/R1 with such a van, which was fitted with a tracker. He used it to drive to and from work and between jobs, generally travelling and working alone. He was supplied with a petrol card by R1. He transported all of his tools and ladders on the van, together with necessary stock belonging to his employer; but after work he removed his valuable tools and kept them within his home.

8. The Claimant had suffered from poor mental health since childhood and during his time with Mitie/R1 he had what Ms Shields, we think accurately, described as "bouts" of depression/anxiety following a very unfortunate series of bereavements in 2015, 2017 and 2018, as well as a period of in-patient treatment inter alia for alcohol/drug misuse in 2016. For a significant period (although R1 did not admit this), we accept the Claimant's evidence he was put on light duties because of mental health concerns; and on one occasion Mitie referred him to a psychiatrist following a complaint by a colleague about his behaviour.

9. The Claimant was depressed from October/November 2018 and was prescribed anti-depressant medication from November 2018 until the end of March 2019. He was off sick from February 2019. Throughout the period 2015 to 2019, the Claimant was frequently referred for counselling or CBT and would have had even more sessions if NHS resources had allowed.

10. The Claimant met his wife in 2016 and they moved to Norfolk together (selling the house in East London they had been living in) in February 2019. They married on 18 April 2019. The Claimant's intention was to commute every Sunday to stay with his wife's mother in Surrey and commute from there to work each weekday, returning to Norfolk at the end of each week. He implemented this arrangement for a very short time in April 2019.

11. By the end of 2018 R1 had lost its contract with R2. This meant that some 150 of its Operatives, including the Claimant, were due to transfer **on 17 April 2019** to one of three other private contractors who won the contracts to deal with maintenance and repairs of R2's properties (the work the Claimant had been doing throughout his employment with Mitie/R1), or to R2's DLO where they would be deployed to deal with planned maintenance and repair work to the communal areas on housing estates owned by R2.

12. The Claimant had a good relationship with his line manager Andrew West ("AW") and whilst he was off sick the two exchanged texts, the Claimant using his private phone number which AW had, but R1's HR did not. The Claimant sent AW his new address in Norfolk, but AW did not pass that on to HR. The Claimant should, according to R1's procedures, have also informed HR directly of his change of address, filling out a form in hard copy or online, but did not do so.

13. The Claimant was aware that R1 had lost the contract with R2 and that the transfers were happening in a general sense. Various materials were sent out by R1 to him at his old address in that context, which he did not receive – it appears that he and his now wife did not arrange for mail to be forwarded from their old address.

14. There appears to have been a proper and meaningful consultation process set up by R1, involving elected employee representatives, who attended consultation meetings in February, March and April 2019. The Claimant's representative was not in contact with the Claimant during this period.

15. It was decided, by a process which unfortunately remained rather obscure to the tribunal, that the Claimant's employment would transfer to R2's DLO, rather (as might have been assumed) to one of the private contractors. At some point, it appears that DS was given an anonymised list of operatives with their primary and secondary

trades listed and he picked a team of those he needed. He recalled the Claimant's primary trade being listed as "multi-trade" and his secondary trade listed as "plumbing". We were never provided with that document; but after conclusion of oral evidence Ms Lamont provided us with a copy of the list of those R1 employees who had been selected for transfer to the DLO, on which the Claimant (one of about 20) is listed as a multi-trade operative, primary trade carpentry and secondary trade plumbing.

16. The Respondents organised, jointly, individual "consultation meetings" with each employee who was to transfer to R2, which it referred to (somewhat loosely) as "1-2-1's". Those meetings were (as recorded in the minutes of a collective consultation meeting) *"purely to check the right to work documents … and also capture the required information for [R2] payroll …"*. Each employee had been sent various documents to complete and bring with him/her to that meeting. The Claimant had not received those in the post, as explained above.

17. The Claimant's 1-2-1 was initially scheduled for 15 March, but that had to be re-scheduled because the Claimant remained off sick at that time. The Claimant returned to work on Monday 1 April 2019 – though he told us he was not sufficiently well to do so, but could not afford to remain off work any longer. He was due to have the 1-2-1 on 4 April, but requested and was permitted by AW to take 4 and 5 April as "emergency [annual] leave".

18. The Claimant also requested and was permitted by AW to take two weeks' further "emergency [annual] leave" between 15 and 26 April, to accommodate his wedding and honeymoon; this despite the fact that AW knew and told the Claimant that he (AW) was not entitled to permit this amount of additional leave at that time.

19. The 1-2-1 was re-scheduled for 15 April, then, at the Claimant's request, for 16 April (the last day before the transfer) and the time on that day moved to accommodate the Claimant.

20. At the 1-2-1 on 16 April, the Claimant met with DS and Ms J Cometson of R1, who reported to and worked closely with Ms Edmonds. We have Ms Cometson's and DS's notes of that meeting. It is agreed that they are not complete and, in one respect, omitted a significant part of the dialogue; but they are sufficient – supplemented by

the oral evidence of the Claimant and DS – to give the tribunal a fairly clear understanding of what transpired at that meeting.

21. The Claimant was asked to fill out, and began doing so, the forms he had not received by post. During the discussion the Claimant asked when he would be getting his new van and was told he would not be getting a van for his own use; rather R2 would require its DLO employees to share vans. In any event, Ms Cometson insisted, the Claimant had no contractual right to sole use of a van. The Claimant became upset at this, asking where he was supposed to keep his tools and how was he supposed to transport them. DS replied that, given the rather different work he would be doing (and, he told us in oral evidence, given also that R2 would be providing its DLO employees with certain tools), the Claimant would not need so many of his own tools. This led on to the Claimant querying what work he would be doing (which is where the notes appear materially incomplete). It is agreed by the Claimant and DS that DS told him at this point that he would be doing mainly plumbing work, generally dealing with blocked (communal) soil stacks. The Claimant became even more upset and angry and terminated the meeting by tearing up some of the documents he had been given and telling DS and Ms Cometson they could stick the job "up your arse".

22. At the time, and in a subsequent letter dated 24 April 2019, the Respondents told the Claimant they were treating that conduct as an objection to the transfer and as a resignation, such that his employment terminated on that day.

The Law

23. Para 2 of Sch 2 EqA 2010 (the Act) provides that

(1) The effect of an impairment is long-term if—

(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

24. The Guidance relating to the Definition of Disability provides:

Recurring or fluctuating effects

C5. The Act states that, if an impairment has had a substantial adverse effect on a person's ability to carry out normal day-to-day activities but that effect ceases, the substantial effect is treated as continuing if it is likely to recur. ... Conditions with effects which recur only sporadically or for short periods can still qualify as impairments for the purposes of the Act, in respect of the meaning of 'long-term' (Sch 1, Para 2(2), see also paragraphs C3 to C4 (meaning of likely).)

C6. For example, a person with rheumatoid arthritis may experience substantial adverse effects for a few weeks after the first occurrence and then have a period of remission. ... If the substantial adverse effects are likely to recur, they are to be treated as if they were continuing. If the effects are likely to recur beyond 12 months after the first occurrence, they are to be treated as long-term. Other impairments with effects which can recur beyond 12 months, or where effects can be sporadic, include Menières Disease and epilepsy as well as mental health conditions such as schizophrenia, bipolar affective disorder, and certain types of depression, though this is not an exhaustive list. Some impairments with recurring or fluctuating effects may be less obvious in their impact on the individual concerned than is the case with other impairments where the effects are more constant.

'A young man has bipolar affective disorder, a recurring form of depression. The first episode occurred in months one and two of a 13-month period. The second episode took place in month 13. This man will satisfy the requirements of the definition in respect of the meaning of long-term, because the adverse effects have recurred beyond 12 months after the first occurrence and are therefore treated as having continued for the whole period (in this case, a period of 13 months).

In contrast, a woman has two discrete episodes of depression within a ten-month period. In month one she loses her job and has a period of depression lasting six

weeks. In month nine she experiences a bereavement and has a further episode of depression lasting eight weeks. Even though she has experienced two episodes of depression she will not be covered by the Act. This is because, as at this stage, the effects of her impairment have not yet lasted more than 12 months after the first occurrence, and there is no evidence that these episodes are part of an underlying condition of depression which is likely to recur beyond the 12-month period.

However, if there was evidence to show that the two episodes did arise from an underlying condition of depression, the effects of which are likely to recur beyond the 12-month period, she would satisfy the long term requirement.'

25. Section 15 of the Act provides that

A person "A" discriminates against a disabled person "B" if

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the detriment is a proportionate means of achieving a legitimate aim.

26. We note ***Basildon v Thurrock NHS Trust v Weerasinghe*** **[2016] ICR 305** (not referred to by the parties), which confirms that a tribunal must address two separate questions: was there something which arose from the claimant's disability, and was that 'something' the reason for the unfavourable treatment.

TUPE

27. Regulation 4(9) of the 2006 Regulations provides:

(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.

28. We were referred by the parties to three cases involving employees refusing to transfer because of an imposed change in their place of work: ***Tapere*** **[2009] ICR**

1563, EAT; ***Musse*** **[2012] IRLR 360**, EAT; and ***Cetinsoy*** **EAT 0042/14**; and to one case involving roles and responsibilities being downgraded on transfer and a less favourable bonus scheme: ***Benn*** **[2010] IRLR 922**, EAT. These cases established the following propositions, we find:-

28.1. "working conditions" is wider than contractual terms; and thus an employee may rely on a change to his working conditions even where there does not amount to a change to his contractual terms.

28.2. What is "substantial" is a matter of fact for the tribunal; it must be (at least) more than trivial. A significantly increased commuting time or a downgrading to job duties would qualify.

28.3. Whether there has been a "material detriment" is to determined from the employee's subjective perspective, and "material" means something like "more than trivial".

29. As the editors of the IDS Employment Law Handbook, Transfer of Undertakings, ed. December 2015, rightly comment: *"[these cases have] made it relatively easy for an employee to establish a Reg 4(9) dismissal"*.

30. Regulation 7 provides:

(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; …

Unfair dismissal

31. We have well in mind the statutory language of sections 95(1)(c), 122(2) and 123(6) ERA; as to the law relating to which, there was no dispute between the parties.

Discussion

40. Mr Amunwa provided written submissions and supplemented those orally. Ms Shields adopted those submissions and made a few additional oral submissions; she also provided written submissions on the issue of disability. Mr Ahmed for the Claimant made detailed oral submissions.

41. We have taken those fully into account and refer to them as is appropriate.

The s. 15 EqAct claim

Was the Claimant disabled?

42. We dealt with the issue of whether the Claimant was disabled as a preliminary issue at the request of the parties, hearing evidence from the Claimant and his wife

43. Given our findings in relation to causation (below), we summarise our conclusion briefly. We found the Claimant was disabled:-

43.1. It was effectively agreed that the Claimant suffered substantial adverse effects on his ability to perform day to day activities during the "bouts of depression/anxiety" referred to above.

43.2. The issue was therefore whether there was an "underlying condition". The Claimant said yes, the Respondents no.

43.3. We took into account paras C5 and C6 of the Guidance. We found that the Claimant suffered from a long-term underlying mental impairment, based on his medical history and his oral evidence; noting in particular:

43.3.1. The frequency and severity of those episodes, especially in 2016 and 2018/19,

43.3.2. The very regular counselling and CBT treatments the Claimant had during this period, and our finding that he would have had such treatment almost continuously had it been available on the NHS.

43.3.3. The fact that he was put on light duties during some of the time he was well enough to work during this period.

Did the Respondents have knowledge of that disability?

44. R2, it is agreed, did not have knowledge of the disability. We find that R1 did have such (constructive) knowledge, given what it knew of the Claimant's state of health in the period 2015-2019, as set out in the Facts section above, and given that it put him on light duties for a period by reason of mental ill health.

The something arising

45. It is agreed that the Claimant's absence by reason of sick leave in February and March 2019 arose from the disability we found.

Was the Claimant treated unfavourably because he was off sick

46. The Claimant relied on the following alleged unfavourable treatment: *"R1 and R2 seeking to vary his terms and conditions of employment without speaking to him directly whilst he was off work due to his disability"*.

47. In fact, we make no finding (see below) that the Respondents did seek to vary the Claimant's terms and conditions. But even if the changes in duties and/or the more restricted use of a van did amount to a change in terms and conditions, those were imposed equally on transferring employees who were not disabled (apparently without objection). Thus, the only alleged unfavourable treatment could be: not speaking directly to the Claimant about those intended changed.

48. We reject this claim for the following reasons:-

48.1. First, it is not clear that the Respondents spoke to any employees directly about those matters, although they did consult collectively at meetings where those matters could have been discussed.

48.2. More fundamentally, the Respondents made every reasonable effort to speak directly to the Claimant, in the same forum and during the same period, as they spoke to other individual employees. As the Claimant insisted more than once, his employer should not be trying to engage with him, let alone meet with him, whilst he was off sick. It was that period of sickness, then the Claimant's annual leave and own convenience, which meant that the eventual 1-2-1 was so late.

48.3. The failure to send the Claimant certain written information and forms in the post was partly due to the Claimant's own omission; but in any event those documents did not address the issues which caused the Claimant concern.

48.4. Finally and in any event, if the Claimant had any legitimate complaint in this context (which, we find, he does not), that would, we consider, have been a complaint of a failure to make reasonable adjustments pursuant to ss. 20, 21 and not a complaint under s. 15.

<u>The TUPE Reg 4(9) claim</u>

49. We uphold this claim.

50. It is not clear to us whether the changes in duties from multi-trade work to predominantly communal plumbing work and/or the more restricted use of a van did amount to a change(s) in the Claimant's contractual terms and conditions.

50.1. As to the van, the term in the offer letter, as all parties agreed, is ambiguous; and it might be that the vehicle policy could only be unilaterally amended in so far as the employee had continued use of the van to commute. On the other hand, the term might be interpreted so that, provided the employee had use of the van whilst at work, the policy could be amended unilaterally by the employer.

50.2. As to the changes to the Claimant's duties, the Claimant's contract provided for his work schedule to be amended according to changing needs; but it is arguable that this does not entitle the employer to require him to do only one type of work (plumbing) on a permanent basis.

51. In the event, however, we find that we do not need to reach a conclusion on that issue, because we are clear that, collectively – and, at least as regards the loss of sole use of a van, severally – those changes did amount to substantial changes to the Claimant's working conditions.

    51.1. Losing the van, at least for a significant proportion of the time, to commute, would have meant the Claimant either (a) having to drive to work, with significant parking costs as well as less significant petrol costs; or (b) using public transport also with significant additional costs in the form or train/tube fares and with the not inconsiderable inconvenience of having to carry any tools which could not safely be left overnight in a van.

    51.2. The changes in duties were certainly not trivial and there is some force in Mr Ahmed's submission that a multi-trader who does not use most of his skills for a long period might become 'de-skilled'.

52. There is no question that, collectively and severally, those changes represented, subjectively and not unreasonably, a material detriment to the Claimant; they would have entailed inconvenience, a less congenial set of duties and significant additional expenditure.

53. It is clear (and agreed) that the Claimant resigned because he did want to continue working with those changes imposed on him.

54. It is not argued by the Respondents that the transfer was not the sole or principal reason for the changes in working conditions, subject to an argument pursuant to reg. 7(2), that the dismissal was for an *economic, technical or organisational reason entailing changes in the workforce of ... the transferee ... after [the] transfer* – "namely, the re-organisation of the service being provided which meant that C's old job role did not exist anymore and therefore he was being matched to the closest available role".

55. That argument cannot be accepted.

    55.1. First, as the Respondents conceded, we were given no reason why the Claimant was not transferred to one of the three private contractors who took

over from R1 the contract for repairs and maintenance to the properties of R2' tenants (the work he had previously being doing). It is simply not right to say that the Claimant's "old job role did not exist anymore".

55.2. Secondly, we were given almost no evidence as to whether and if so why, even within R2's DLO, the work could not have been organised so that the Claimant continued to perform multi-trade duties.

55.3. Finally, and in all events fatally, the only evidence as to why the Claimant could not retain use of a van for commuting, was that R2 (quite naturally) wanted to save money and reduce vehicle emissions. However, those are not reasons which entail changes in the workforce within the meaning of reg. 7(2).

The constructive dismissal claim

56. In the circumstances, there is no need for us to consider the alternative constructive dismissal claim.

57. For completeness, we find that the only basis on which that claim could have succeeded was if we found that the changes in working conditions discussed above constituted also changes to the Claimant's contractual terms and conditions. As we have said, that is certainly arguable but is not obvious.

58. The question of the fairness of the dismissal would then have arisen, which again is not a matter the determination of which is obvious.

Reductions to any awards by reason of the Claimant's conduct

59. Having heard submissions for the Claimant and R2, the tribunal considers that the conduct of the Claimant before the dismissal (his resignation) was such that it would be just and equitable to reduce the amount of the basic award, pursuant to s. 122(2) ERA.

60. Given the circumstances, we find that the Claimant behaved unreasonably in not cooperating to achieve an earlier 1-2-1 meeting and in rejecting the transferred role so peremptorily at the meeting on 16 April – although we accept that the Claimant was not fully recovered (despite no longer being signed off sick after 31 March). Had the

Claimant been more cooperative and more willing to listen and to discuss the situation – and DS, we find, was willing to accommodate individual employees in the DLO in so far as was practicable and that he indicated that to the Claimant on 16 April – it is possible (no more than that) that some of the Claimant's concerns might have been met.

61. In all events, we consider that it would be just and equitable for those reasons to reduce the basic award by 20%.

62. A similar argument made by R2 in relation to the compensatory award must fail. As a matter of causation, we do not find that *"the dismissal was to any extent caused or contributed to by any action of the [Claimant]"* pursuant to s. 123(6) ERA. As Mr Amunwa fairly conceded, the evidence was such that we were bound to conclude that R2 would not have allocated a van for the Claimant's sole use however much additional dialogue there had been. That being so, the Claimant was entitled to resign, pursuant to reg. 4(9) TUPE.

Remedy

63. The parties were able to agree remedy by way of COT3. This claim is therefore finally disposed of.

_____

Employment Judge - Segal

12/10/2020

JUDGMENT & REASONS SENT TO THE PARTIES ON

12/10/2020.

…….....

FOR THE TRIBUNAL OFFICE -