RM

EMPLOYMENT TRIBUNALS

Claimants: **(1) Mrs S Singh**
(2) Mr A de Simmone
(3) Mrs R Masioniene
(4) Ms C Sullivan
(5) Ms R Madondo
(6) Mrs N Tetteh
(7) Mr A Angeli

Respondents: **(1) People Plus Limited**
(2) Ixion Holdings Limited

Heard at: **East London Hearing Centre**

On: **15 – 16 August 2018**

Before: **Employment Judge Goodrich**

Representation

Claimant (Mrs N Tetteh) Mr O Ofori (Lay representative)

2nd Respondent: Mr M Palmer (Counsel)

JUDGMENT

The judgment of the Tribunal is that:-

1. **The sixth Claimant, Mrs Tetteh, was unfairly dismissed.**

2. **The sixth Claimant having been paid £6,999.99 agreed compensation in respect of the failure by the second Respondent to comply with its duty to inform and consult representatives in relation to a relevant transfer of undertaking, by consent this complaint is dismissed on withdrawal by the sixth Claimant.**

3. **In respect of the sixth Claimant's unfair dismissal the Respondent is ordered to pay the sixth Claimant £18,806.50. The Recoupment Regulations do not apply.**

REASONS

Background and the Issues

1 My judgment with reasons was given orally to the parties on 16 August and full written reasons were requested.

2 This hearing follows on from a Preliminary Hearing from 13 – 15 March 2018.

3 Seven Claimants brought TUPE related claims against the two Respondents.

4 The second Respondent, Ixion Holdings Limited, was awarded a contract by the Department of Work and Pensions ("DWP") described as the NEA2 contract.

5 The case of the first Respondent, People Plus Limited, was that TUPE applied so that the Claimants' contracts of employment transferred to the second Respondent; and that they had done what they reasonably could to comply with their obligations to inform and consult representatives in relation to a relevant transfer of undertaking.

6 The second Respondent's case was that TUPE did not apply; and that they had complied with their obligations to inform and consult.

7 On 12 October 2017 a Preliminary Hearing was conducted by Employment Judge Brown. She directed that two separate hearings should be listed.

8 The first hearing she listed was for a Preliminary Hearing on the issue of whether there was a "TUPE" transfer of the Claimants from the first to the second Respondent; and whether there was afailure to inform and to consult on TUPE. The second was a final hearing on outstanding issues of unfair dismissal, wrongful dismissal, redundancy pay, unlawful deductions from wages, holiday pay and failure to give written reasons for dismissal.

9 Judge Brown directed that there be a Preliminary Hearing (Open) for three days from 13 – 15 March 2018 before a full Tribunal; and set out the issues to be determined at that Preliminary Hearing.

10 Judge Brown also directed a final hearing to be listed for two days in front of a Judge sitting alone.

11 At the hearing from 13 – 15 March 2018 the Tribunal's judgment was that:

11.1 The transfer of undertaking regulations applied so as to transfer the Claimant's contracts of employment to the second Respondent.

11.2 The second Respondent failed to comply with its duty to inform and

consult representatives in relation to a relevant transfer of undertaking.

12 Full reasons were given for the judgment, which was reserved.

13 In the final paragraph of the Tribunal's judgment the parties were encouraged to seek to settle the outstanding claims.

14 Efforts have been made by the parties to do this. Six out of seven of the Claimants, I was informed, have settled their claims.

15 The one case that has not been settled is that brought by the sixth Claimant, Mrs Tetteh. She is represented here, as at the Preliminary Hearing, by Mr Ofori. In addition to being the Claimant's representative Mr Ofori is the Claimant's current employer.

16 At the outset of this hearing I clarified with the parties' representatives what the issues were that I was required to decide.

17 In the course of my doing so Mr Ofori raised a preliminary point. He said that it was incorrect that, as recorded in paragraph 107 of the Tribunal's judgment, that Mrs Tetteh had refused a job offer from Ixion, the second Respondent. He wanted this to be corrected. The sentence in question was the finding made by the Tribunal, in paragraph 107 of its judgment, "Mrs Tetteh decided not to accept the offer made to her".

18 Mr Palmer objected. The sentence in question was the finding made by the Tribunal, in paragraph 107 of its judgment, "Mrs Tetteh decided not to accept the offer made to her."

19 I notified Mr Ofori that I did not consider that I had any power to change that element of the judgment, even if I were to consider it appropriate to do so. The judgment was the judgment of the full Tribunal, not mine on my own. Any reconsideration would have to be done by a full Tribunal. I also pointed out that, if he was seeking to make an application to reconsider the judgment, there was a time limit to do so, namely within 14 days of the date the judgment had been sent to the parties, so that his application would be a long time out of time.

20 I asked Mr Ofori whether Mrs Tetteh, his client, wished to continue with this hearing, rather than to adjourn it (if I were to decide that it had sufficient prospects of success for a full Tribunal to reconvene). Mr Ofori notified me that his client wished to proceed.

21 The parties had settled the Claimant's claim of failure to inform and consult and I entered the judgment to that effect as set out above.

22 The Respondent accepted that, in view of the Tribunal's judgment at the Preliminary Hearing, the second Respondent had unfairly dismissed the Claimants. This hearing has been, therefore, a remedy hearing.

23 The Claimant produced a schedule of loss for this hearing. Some elements in the

schedule were agreed by the second Respondent. Where the parties were in agreement I have adopted that agreement. The Claimant notified me that she did not obtain benefits whilst unemployed so as for the Recoupment Regulations to apply.

24 The dispute as to remedy between the parties was (apart from a relatively minor issue about holiday pay) essentially as to whether the Claimant had mitigated her losses. There were three disputed elements as to mitigation, as follows:

24.1 The Respondent's case is that the (sixth) Claimant failed to mitigate her losses by refusing a job offer to her by the second Respondent.

24.2 Their case is also that the Claimant unreasonably failed to apply for other positions with the second Respondent that were available at the time of the commencement of the NEA2 contract and subsequently.

24.3 Alternatively or additionally the Respondent contends that the Claimant had failed to take reasonable steps to mitigate her losses in her steps to find alternative employment or work elsewhere.

24.4 The Claimant disputes that any refusal to accept a position within the second Respondent amounted to a failure to mitigate her losses; and also says that she asked Natasha Church for written confirmation of the offer which was not provided.

24.5 The Claimant also disputes that failing to apply for further positions with Ixion, the second Respondent, amounted to a failure to mitigate her losses.

24.6 The Claimant also disputes that she had failed to take reasonable steps to mitigate her losses in failing to find alternative employment or work elsewhere.

The Relevant Law

25 Section 123(1) Employment Rights Act 1996 ("ERA") provides as follows:

"Subject to the provisions of this section and sections 124, 124A and 126, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer."

26 Section 123(4) Employment Rights Act 1996 provides that, in calculating the employee's loss following an unfair dismissal, "the tribunal shall apply the same rule concerning the duty to mitigate his loss as applies to damages recoverable under the common law …"

27 It is for the employer, not the injured employee, to establish that there has been a

breach of the duty to mitigate and the extent of that breach. The duty upon an employee is to act reasonably to mitigate his loss "as a reasonable man unaffected by the hope of compensation from … his former employer". The test is an objective one based on the totality of the evidence, taking into account all relevant circumstances. The Tribunal must not be too stringent in its expectations of the injured party.

28 In the case of *F & G Cleaners Ltd v Saddington [2012] IRLR 892 (EAT)* it was held that there is no principle that an alternative offer from the same employer, made after dismissal, must be accepted or that it was unreasonable to reject such an offer. Each case depends on its own facts. The essential question when considering an employee's duty to mitigate loss is not whether it was reasonable for an employer to make the offer in question, but whether it was unreasonable for the employee to refuse that offer.

29 Employment Tribunals have been recommended to take a three step approach to determining whether an employee has failed to mitigate his/her losses namely:

29.1 Identify what steps should have been taken by the Claimant to mitigate his/her loss.

29.2 Find the date upon which such steps would have produced an alternative income.

29.3 Thereafter reduce the amount of compensation by the amount of income which would have been earned.

The Evidence

30 On behalf of the Claimant, Mrs Tetteh I heard evidence from the Claimant herself, Mrs Nana Tetteh.

31 On behalf of the Respondent I heard evidence from Mrs Janet Young, Head of Service HR for the second Respondent.

32 In addition I considered the documents to which I was referred in an agreed bundle of documents.

Findings of Fact

33 I confine my findings of fact to the issues I am required to decide as indicated at the start of this hearing.

34 This judgment needs to be read in conjunction with the Tribunal's judgment at the Preliminary Hearing. There are sections of that judgment of particular relevance to this hearing such as paragraph 107 and some of the proceeding paragraphs. More detail is required of the particular circumstances in which this Claimant refused the offer made on behalf of the second Respondent. For ease of reference I refer to the second Respondent from time to time as "Ixion". For ease of reference although there are seven Claimants I refer to this Claimant, the 6th Claimant as Mrs Tetteh; or sometimes, when referring to the

Claimant, I mean the 6th Claimant.

35 I heard two witnesses at this remedy hearing; Mrs Tetteh, the 6thClaimant, and Mrs Young. At paragraph 55.1 of the judgment at the Preliminary Hearing the Tribunal found that all Claimants gave straightforward, credible evidence. I find that Mrs Tetteh again gave straightforward, credible evidence.

36 As regards the Respondent, Mrs Young, Head of HR for Ixion, did not give evidence at the last Preliminary Hearing. I consider that she, like the Claimant, gave straightforward and credible evidence to me at this hearing.

37 I turn now to the circumstances of the job offered to the Claimant by Ixion.

38 Ms Rachel Bennett and Mrs Janet Young, the first and second Respondent's respective HR advisers, communicated with each other over the arranging of interviews for positions the second Respondent was seeking to fill.

39 Mrs Tetteh expressed a preference for a position of start up broker. An interview was arranged for her on Friday 31 March 2017. Interviews were also arranged for other employees that People Plus (the first Respondent) stated would transfer under TUPE. The second Respondent was disputing that TUPE applied but nevertheless was offering interviews for the employees that the first Respondent asserted should transfer under TUPE.

40 An interview was arranged for Mrs Tetteh on Friday 31 March 2017. The NEA2 contract was due to start on Monday 3 April.

41 Mrs Tetteh was aware by the time of the interview that the salary for the start up broker role would be £26,500 per annum which was £1,500 per annum less than the role she had with People Plus at the first Respondent.

42 The Claimant was interviewed by Mr Govett, the Chief Executive of Ixion, and by Natalie Church, the Contract Manager for the CPA4 area where the Claimant wanted to work.

43 The Claimant did not know at the end of the interview whether she had been successful in her job application because the Respondent had other interviews it was conducting both that day and on Monday 3 April.

44 Mrs Tetteh and the other Claimants were informed by People Plus that, in their belief, TUPE applied. They were informed that they should present themselves for work with the second Respondent on Monday 3 April 2017. Mrs Tetteh was told by the first Respondent to go to the second Respondent's Chelmsford office on Monday 5 April 2017 for work.

45 The Claimant duly did so.

46 On attending Ixion's premises in Chelmsford the Claimant was given a letter from

Ixion informing her that TUPE did not apply. She was sent home.

47 At this point therefore the Claimant was unfairly dismissed by the Respondent because TUPE did apply and Ixion, the second Respondent, was wrong in their assertion that it did not.

48 Later that day Ms Church telephoned the Claimant to offer her a position as a start up broker on £26,500 per annum.

49 Exactly what was said in the conversation was not made clear to me probably because after this passage of time neither would be able to remember particularly clearly. Ms Church has not been present to give evidence at this hearing although I understand that she remains in the Respondent's employment.

50 The best evidence I have as to what was said was set out in paragraphs 22 – 26 of Mrs Tetteh's witness statement prepared for the Preliminary Hearing. I find as follows.

51 Mrs Tetteh was offered the job she was seeking in her telephone call with Ms Church. The money was lower that she had earned and covered a wider area than with People Plus.

52 During the telephone conversation Mrs Tetteh was pressured by Ms Church to accept the job offer. She stated that if she did accept the offer she would start work the next day.

53 Mrs Tetteh requested to have the offer in writing so she could consider the conditions of employment but was advised by Ms Church that she needed to make a decision there and now whilst talking on the phone.

54 Mrs Tetteh attempted to negotiate the salary without success and was told that it was a take it or leave it offer and insisted that she made the decision on the telephone then and there.

55 Mrs Tetteh also explained in her evidence at this hearing that Ms Church did notify her that the mileage rate would be 25p per mile which was less than the 40p paid to her by People Plus. Ms Church was not able to answer other questions the Claimant had as to the conditions of service.

56 The Claimant therefore either decided either not to accept the offer made to her by actively saying something like "I am not going to take it unless I have more time to think about it"; or by Ms Church saying something like "take it or leave it and unless you take it and let me know now you will be refusing my offer". Either way she did not accept the offer as referred to in paragraph 107 of the judgment at the Preliminary Hearing.

57 On Wednesday 5 April Mrs Tetteh, having unsuccessfully tried to speak to Ms Church by telephoning her, sent her a text message. She informed Ms Church that she had telephoned a few moments ago and asked her to send her the offer by email. She gave her email address and ended the text message with the words "thank you".

58 The Claimant got no response to her text message to Ms Church. Neither did Ms Church forward the Claimant's text message to Mrs Young who might have been able to answer the question that the Claimant was concerned about. Ms Church should, I find, either have answered the text herself and sent the terms of the offer by email; or have asked Mrs Young or someone else able to do so to take this step.

59 Mrs Young was unaware, therefore, of the Claimant's text message. All she had by way of information was that the Claimant had refused the job offered to her. On Tuesday 11 April 2017 she sent the Claimant a politely worded text message. She thanked the Claimant for attending her interview with Ixion. She stated that the Claimant was successful at the interview stage and formally offered the role of start up broker but unfortunately declined it. She thanked the Claimant for taking the time to meet with her.

60 The Claimant did not reply to this text message. Her explanation when cross-examined on this was that she had asked for details of the offer and Mrs Young's text message showed that they did not want her to work for them. She considered, more generally, their conduct over the transfer process to have been very poor.

61 There was no subsequent communication between the Claimant and Mrs Young or, so far as I am aware, anyone else from Ixion concerning the question of any employment of the Claimant.

62 Further jobs within Ixion have become available since the end of March 2017. Ixion has advertised for jobs that the Claimant would have been capable of applying for with a realistic possibility of being accepted.

63 What has the Claimant done since her dismissal to mitigate her losses?

64 One step the Claimant has taken has been to seek to accelerate the obtaining of a top up masters programme in marketing. Whilst working with People Plus she had been working towards obtaining an MA in this subject with the University of Northampton undertaking assignments on top of her full-time job. She decided to concentrate on doing it full-time to complete all the outstanding assessments and attempt to graduate as soon as possible, rather than doing a programme through distance learning.

65 At the same time the Claimant was also trying to find other work.

66 The Claimant registered with Reed, Total Job, Indeed and Medway Job Agencies. She would get alerts from them or go online. She looked into the possibility of self employment with a number of organisations. She considered a freelance business adviser job with Virgin, having previously done similar work in the past. She inquired about the possibility of working for Barclays with whom she worked before. Between April and July 2017 the Claimant applied for about 20 jobs although she only got responses from two of them both which were to decline her application.

67 Around the end of July 2017 the Claimant was offered a job with Mental Capacity Consult on a self-employed basis of £1,500 per month gross and £1,320 per month net (both representatives agreed these figures as being correct).

68 Since being offered the job at the end of July 2017 the Claimant has stopped looking for other work and has stopped making job applications.

69 Although the Claimant was offered the job at the end of July with the intention that she would start work at the start of August her start date was in fact delayed through circumstances that were unforeseen at that time. The Claimant started work for Mental Capacity Consult on 1 November 2017. She is being paid the same sum monthly since that date although she hopes that by the end of this year her pay will increase to a rate commensurate that with People Plus.

70 As regards holiday, the Respondent's information on the holiday liabilities they had taken on was incomplete. Mr Palmer remarked in his closing submissions on behalf of Ixion that the first and second Respondents were not getting on which, having conducted the first hearing, I can readily accept.

71 The Respondent's evidence was that they believed that the Claimant had either taken or booked 8 days leave but beyond that were unable to give further details. The Claimant's evidence was that six days had accrued but not been taken. In these circumstances having, as previously stated, accepted the Claimant's evidence generally as being credible, I accept her evidence that she had six days holiday pay accrued at the date of her dismissal.

72 I turn now to key issues in dispute between the parties.

73 Did the Claimant act unreasonably in refusing to take the job offered to her by Ms Church on behalf of the Second Respondent on 3 April 2017?

74 I find that the Claimant did not act unreasonably including because:

74.1 It would have been a reasonable response to have accepted the offer and taken Employment Tribunal proceedings over TUPE as the other Claimants did. If six of the Claimants were made similar offers as were made to the Claimant and accepted on such a basis it suggests that it was a reasonable response on their part.

74.2 This is a very different question however to whether the Claimant acted unreasonably in refusing the job offered to her.

74.3 The Claimant was the wronged party. She was unfairly dismissed. She was offered a new job on less favourable pay, a lower mileage rate and would have been having to start a new employment again, thus losing her statutory rights.

74.4 Nor was the manner in which Ixion offered the Claimant a role conducive to having it accepted. She had driven from Kent to Chelmsford and been sent home with a letter telling her that TUPE did not apply. She was pressured by Ms Church to take or leave the job without having all the terms and conditions made clear to her. The Claimant's request have

these clarified and explained to her was a reasonable expectation in the circumstances; and Ms Church failed to do so.

75 Did the Claimant act unreasonably in not applying for jobs with Ixion that have become available between her dismissal and the date of this hearing?

76 I find that the Claimant has not acted unreasonably for similar reasons to my response in answer to the first question and for the following reasons. The offer made by Ms Church to the Claimant was a repudiatory breach of contract. She was being offered a drop in pay, loss of continuity of employment and less mileage. She was the wronged party. As was held by the Court of Appeal in the *Buckland* case, the wronged party has a choice of whether to treat such a fundamental breach of contract as being terminal and all the defaulting party can do is to invite affirmation by making amends. I appreciate this is not a constructive dismissal case. Nevertheless it appears to me that the Claimant had good grounds for having lost trust and confidence in the Respondent. It is well established that a pay drop alone amounts to a fundamental breach of contract. The Respondent has done nothing to welcome the Claimant back. There was a failure in communications between Ms Church and Mrs Young by Ms Church having failed to notify Mrs Young of the Claimant's text message. In the circumstances it was incumbent on the Respondent's part to make amends, particularly in the context of an employer who is seeking to state that the Claimant acted unreasonably in not going back to seek another job with them. Nothing has done by Ixion, having unfairly dismissed her, to attempt to encourage her to work for them. For example, so far as I am aware, they have not apologised for unfairly dismissing her and the stress caused to her by their actions over their refusal to undertake their "TUPE" obligations towards her after the Tribunal's judgment and to encourage her to accept a position with them.

77 Did the Claimant take reasonable steps to mitigate her losses; and if, or to the extent that she did not, what would have been the likely outcome had she taken such reasonable steps?

78 Up to the end of July 2017 I find that the Claimant did take reasonable steps to find alternative work.

79 Although part of her focus was on accelerating the obtaining of her MA she was also taking steps to find another job. She wanted another job. She made about 20 job applications. She was seeking to better her skills and qualifications and she looked into a wide range of different jobs or work. The burden of proof in showing a failure to mitigate lies on the Respondent. Ms Young stated that she did not know whether taking four months to get another job was a reasonable period of time or not. Additionally I bear in mind that the Claimant has reduced her level of losses by accepting lower paid work. In my experience employees that have lost jobs are often criticised for reluctance to accept lower paid work.

80 I find that after the end of July the Claimant has failed to mitigate her losses by stopping looking for alternative work, to the following extent.

81 In the context of the Claimant being offered a lower paid position she had a continuing duty and has a continuing duty to reduce that gap. It was about three months

longer than anticipated for the Claimant to start work at Mental Capacity Consult. As time passed without her being able to start work for them, it would have been a reasonable step for her to have taken to keep looking for alternatives. As she had accepted the position offered, she might have felt that she would be letting Mr Ofori down, by taking another position. The length of the delay in starting at Mental Capacity Support would, however, have given the Claimant a good explanation if she had succeeded in finding a better paid job elsewhere. It might also have been a negotiating tool for the Claimant with Mr Ofori to seek to negotiate better pay.

82 Once the Claimant started with Mr Ofori it was not unreasonable for the Claimant to stick with the position she held at least for a reasonable period of time rather than walking out into another job immediately. By the latest however within a few months of starting work with Mental Capacity Consult she should have been looking for other work, if her pay was not being increased where she was.

83 I then go on to the question of considering whether if the Claimant had taken reasonable steps to mitigate her losses in the way as described above, would she had been able to match the terms and conditions she enjoyed with People Plus?

84 This is an issue that is not particularly easy to answer. I do not have the benefit of any experience that lay members sitting with me it might have. I have been given generalised information from the Respondent about jobs available currently as well as jobs that had been available over the past 15 months within the Respondent and other workplaces, but no detailed analysis as to which particular positions would have been best suited to the Claimant and what she might have obtained. There are a range of possibilities as to what would have occurred if the Claimant had carried out the additional mitigation I have outlined. She may or may not have been able to obtain better paid work or, even if better paid than at present; and, if better paid, it may still have been less than her position with People Plus.

85 I have considered and apply section 123(1) ERA. I award the Claimant one years pay from her unfair dismissal, less the net pay she has received from her position with Mental Capacity Support.

Closing Submissions

86 Both representatives gave oral closing submissions. I do not set them out in detail, helpful although they were and I have borne them in mind.

Conclusions

87 I conclude, for the reasons given in my findings of fact, that it would be just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer to award the Claimant the losses she sustained for a period of one year from the effective date of the termination of her employment with the second Respondent.

88 Thereafter I asked the parties' representatives to calculate the sums that arose from the decisions I had made and the sums that they had agreed between themselves.

89 Mr Palmer submitted that the losses should be calculated on net figures as the Claimant was entitled to £30,000 without deduction of tax. I accepted this submission with the proviso that should it prove to be incorrect and the Claimant have tax deducted from the sum concerned I will expect the second Respondent to pay the Claimant the difference, or would be willing to reconsider the sum to be awarded.

90 The sums that were the agreed figures were as follows:

One year's net earnings the Claimant would have received if employed by the Respondent on the terms on which the Claimant was employed with the First Respondent (52 weeks at £427.14 per week): £22,211.28.

Loss of employer's pension contribution (52 weeks x £430 per week = £223.60)

Basic award (agreed) £2,155.50

Loss of statutory rights £450

Six days holiday pay (£61.02 per day: £366.12)

Less £6,600 earnings with Mental Capacity Consult: £6.600

Grand total the Respondent is ordered to pay the Claimant £18,806.50

Employment Judge Goodrich

5September 2018