Case No: 2302647/2018

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**
sitting alone

BETWEEN:

Mr C Duddy
Claimant

and

Securitas Security Services (UK) Ltd
Respondent

ON: **2 & 3 July 2019**

Appearances:
For the Claimant: **In person**
For the Respondent: **Mrs J Young, in house counsel**

REASONS
(for the Judgment dated 3 July 2019
provided at the request of the claimant)

1. The claimant complains that he was unfairly constructively dismissed. At a previous hearing it was confirmed that he is not claiming any breach by the respondent of their information and consultation obligations and that the breach of contract of the implied term of mutual trust and confidence as follows:

    a. The method and lack of communication with him by the respondent from 25 April 2018 through to his resignation on 8 May 2018 (he transferred into their employment pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('the 2006 Regulations') on 6 May 2018).

    b. He was sent an additional measure on the day before the transfer.

c. His work details were absent from the respondent's employee portal from the date of transfer through to his resignation.

Evidence

2. I heard evidence from the claimant and for the respondent from:
   a. Mrs G Isaac, National Account Director for OCS Group UK Limited (formerly the second respondent);
   b. Mr C Lane, Area Director;
   c. Mr M Jones, Protective Services Branch Manager;
   d. Mr G Dawood, Service Delivery Manager; and
   e. Ms E Hall, HR/TUPE Advisor.

3. I had an agreed bundle of documents before me and both parties made helpful closing submissions.

Relevant Law

4. In order to bring a complaint of unfair dismissal it is first necessary to establish that the claimant has in fact been dismissed.

5. If there is no express dismissal then the claimant needs to establish a constructive dismissal. Section 95(1) of the Employment Rights Act 1996 ('the 1996 Act') states than an employee is dismissed by his or her employer for the purposes of claiming unfair dismissal if:

> "(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

6. In Western Excavating (ECC) Limited v Sharpe ([1978] ICR 221), the Court of Appeal confirmed that the correct approach when considering whether there has been a constructive dismissal is as follows:

> "if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so then he terminates the contract by reason of the employer's conduct, he is constructively dismissed."

7. Much more recently in Kaur v Leeds Teaching Hospitals NHS Trust ([2018] EWCA Civ 978) the Court of Appeal confirmed that in a normal case where an employee claims to have been constructively dismissed it is sufficient for a Tribunal to ask itself the following questions:

   (1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

   (2) Has he or she affirmed the contract since that act?

   (3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part (applying the approach to so called 'last straw' cases explained in London Borough of Walton Forest v Omilaju ([2005] IRLR 35) of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation)

(5) Did the employee resign in response (or partly in response) to that breach?

8. The 'Malik term' referred to above is a reference to the House of Lords decision in Malik v BCCI SA (in liquidation) ([1997] IRLR 462) (as corrected by Baldwin v Brighton & Hove CC [2007] ICR 680) which confirmed that to succeed in a constructive dismissal claim the employee needs to show that the employer has, without reasonable and proper cause, conducted himself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between them. This conduct is to be objectively assessed by the Tribunal rather than by reference to whether the employer's conduct fell within the band of reasonable responses. That conduct must be assessed as a whole and the employer's subjective intention is irrelevant. It is for the Tribunal to consider objectively whether the conduct complained of was likely to have that effect.

9. If an employee has been dismissed, constructively or expressly, then it is for the respondent to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the 1996 Act. If the respondent establishes that then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test the burden of proof is neutral.

10. Further, if a TUPE transfer is the sole or principal reason for a dismissal (express or constructive), that dismissal will automatically be unfair (regulation 7 of the 2006 Regulations).

Findings of Fact

11. Having assessed all the evidence, both oral and written, and the submissions made by the parties I find on the balance of probabilities the following to be the relevant facts.

12. The claimant commenced employment with the Legion Group as a keyholder on 1 April 2008. HIs employment transferred pursuant to TUPE to OCS on 1 August 2010. Whilst employed by OCS the claimant was redeployed to a keyholder role on their Aviva contract working at Stephenson House where he was still working in May 2018 when the contract TUPE transferred again to the respondent.

13. The claimant's contractual hours comprised one hour in the morning and one hour in the evening on each normal working day, when he would unlock

the building ready for occupation in the morning and close and lock it in the evening. In order to carry out his duties he had a card, issued to him by Aviva, which he used to gain entry to the office (having been let into the building by G4S) where he would then insert a code into an alarm panel. That process was reversed in the evening. It is clear that this job was very important to the claimant, he enjoyed it and all the evidence suggests that he did it very well and conscientiously.

14. OCS wrote to the claimant on 6 April 2018, in a letter wrongly headed cleaning and horticulture, advising him that they had not been successful in retaining that contract and that it would end on 30 June 2018 which would be his last day at work for OCS but that TUPE would apply and he would transfer to the new incumbent. Unfortunately because of the error in identifying the correct service, the wrong transferee was also identified in this letter. It was correct, however, that the Aviva contract to which the claimant was assigned had also been lost to the respondent and that he would therefore transfer.

15. OCS wrote again to the claimant on 23 April 2018, this time correctly identifying the Aviva contract and that it would transfer to the respondent on 6 May 2018.

16. That letter also advised that the respondent had made OCS aware that they were proposing to implement a number of changes to current working arrangements upon transfer. These related to matters such as holiday year and pay, payroll cycle, payslip, uniform, pension and other benefits. It also included a statement that a regular review of the contract would be taken post transfer which may result in reorganisation of the contract specification. The claimant was also advised that consultation meetings would be taking place and he should raise any queries with the employee relations team. He was given a telephone number and email address for that purpose.

17. OCS provided employee liability information to the respondent. This was initially done by way of a lengthy and detailed spreadsheet supplemented by information in emails. It is apparent that the information in relation to the claimant was both late and incomplete. Mr Jones first sought further information specifically regarding the claimant from OCS on 18 April 2018. OCS emailed Ms Hall on 25 April confirming that the claimant was the 'open and lock' officer 100% dedicated to Aviva working 10 hours per week. Ms Hall forwarded that information to Mr Jones who in turn passed it to Mr Lane. Mr Lane replied, also on 25 April, saying:

> 'My stance (strong) on this would be that [the claimant] is not eligible for transfer as it is a lock and unlock service… Can we argue this one please…?'

18. Mr Savva, Mr Lane's equivalent for the mobile service, also confirmed on 25 April that he did not see this 'as a TUPE situation'.

19. Further information was given by OCS to the respondent on 1 May 2018 regarding the claimant's working history, job description, and how he travelled to the site. Later that day Ms Hall emailed Mr Savva, Mr Lane and

Mr Jones, setting out that further information and stating that the service to which the claimant was wholly assigned was transferring to the respondent and everything would suggest he would be eligible to transfer and that she could not see any grounds as to why he would not. She suggested that someone should meet with the claimant as soon as possible to arrange his on-boarding. She also stated that she understood it was the intention to include this role within the mobile branch and that therefore they would also need to declare a measure in relation to this and that she would prepare it and share it with them the next day.

20. Mr Lane confirmed in his oral evidence that he had been incorrect when he initially said the claimant would not be eligible for transfer and that when he was advised by Ms Hall that he was eligible, he accepted that and sought to make the necessary arrangements as soon as possible. Unfortunately by 1 May there was only one week before the contract transferred and one of those days was a bank holiday.

21. On 3 May at 14.08 Mr Lane contacted Mr Jones and Mr Dawood by email asking them to contact the claimant to understand what he thought his duties were and his contract was etc and to confirm that as soon as possible.

22. Also on 3 May at 15.03 Ms Hall emailed OCS informing them of an additional measure they envisaged as part of the transfer in relation to Stephenson House, namely to review the service provided with a view to integrating it into their mobile provision but that any changes would only be implemented following appropriate consultation with the claimant. OCS repeated that wording in a letter dated 4 May 2018 sent to the claimant informing him of a further measure which may affect him in relation to the transfer. The claimant received that letter on 5 May; in fact he received two copies, one having been sent by recorded delivery underlining the importance of it.

23. In the meantime the claimant had contacted his line manager at OCS, Mr Knight, and others by email on 2 May stating that his last day with OCS was Friday 4 May before he TUPE'd to the respondent but he had not heard from them yet. He asked if there were any other key holding positions available with OCS and whether he was going to be paid as usual on 10 May and that he was a bit worried about how he was going to do his job on Monday morning asking:

    'will current cards still work, etc etc and I be able to actually get into the office'

    Mr Knight replied confirming that he would TUPE to the respondent and that he was surprised they had not spoken to him as his details had been given to them already.

24. Mr Jones contacted the claimant by telephone twice on 3 May. First at 14.40. The claimant says that he knew immediately when talking to Mr Jones that there was going to be a problem with his job. He also specifically says that Mr Jones referred to it as a 'pocket money job'. Mr Jones's evidence was that he did not recall saying that and it was unlikely that he would have done. Given the claimant's very strong recollection and it being

more likely that the claimant would remember what was said in that conversation than Mr Jones (given the relative importance of it to them both), and that the claimant has not, in my view, sought to overstate his evidence elsewhere, I find it more likely than not that Mr Jones did make this comment especially as the job is not a highly paid one. I do not find however that Mr Jones intended that comment to be insulting or offensive although the claimant clearly found it to be. Mr Jones recorded in an email to Mr Lane and Mr Dawood the information he had been given by the claimant during their conversation.

25. In the second conversation, Mr Jones discussed with the claimant how to best to meet to progress the on-boarding. The claimant says that he did not want to go to London to meet Mr Jones and he made that clear. Mr Jones did not agree with that. On this occasion I prefer Mr Jones's account. I accept that it was not the claimant's preference go to London for the meeting but there is nothing to suggest that if he had strongly objected Mr Jones would have forced him to. Rather, I find he was a reasonable manager who would have made alternative arrangements if required.

26. Also on 3 May Ms Hall sent the claimant a welcome email with general information and next steps together with confirmation that he would be sent a link by email to On-Board, the respondent's online tool to access their systems. The email enclosed a link to FAQs and also a general email address for any queries that he had. A separate email on 3 May sent further information to the claimant and reminded him of that general email address. The claimant accepted that he probably did not read this document in detail.

27. The planned meeting took place on the following day at the respondent's London office early in the morning. Again I accept Mr Jones's explanation that he thought holding it at that time would be preferable for the claimant and also more logical from the business's point of view. The claimant has said that he was 'dragged up' to London for this meeting but I prefer the evidence of Mr Jones that although the meeting being in London was at his suggestion, and no doubt would not have been the claimant's first choice, he did not particularly object. I also note that the claimant was paid for his time and expense in doing so. The claimant met Mr Dawood whom he got on well with and went through a number of formalities including completing the on-boarding form that had been emailed to him the previous day. The circumstances of receiving those documents from the respondent and the claimant being unable to make the relevant links work, were unfortunate but were no more than usual, business day-to-day technological difficulties. Given the early hour of the meeting the claimant did not have the most professional or smooth welcome into the building but in the circumstances, this was not untoward.

28. At the end of the meeting the claimant asked Mr Dawood what he should do about commencing his duties on the day following the transfer. Mr Dawood told him to just carry on as normal. The claimant says that Mr Dawood was not bothered and did not seem to understand what was required by the claimant's role and was unable to give the claimant the reassurance he wanted.

29. At the end of the working day on 4 May the claimant tried to telephone Ms Hall regarding his queries as to how he should start his duty on the following Tuesday. Unfortunately and unknown to the claimant Ms Hall had left the office as she normally finished at 3pm on a Friday. However the claimant spoke to her colleague who in turn spoke to Mr Dawood and the message was again passed back to the claimant that he should attend for work as usual on the Tuesday.

30. The claimant remained worried and on Sunday 6 May he sent two emails to Ms Hall raising his concerns about the measures letter he had received on 5 May and also about how he would gain access to Stephenson House. Ms Hall was not at work and she did not receive or read those emails until she arrived at work at about 9am on Tuesday 8 May. For completeness I do not accept the claimant's suggestion that she had read one of the emails and then deliberately put on an out of office message on so that she did not have to read the second.

31. Also on 6 May the claimant accessed the online employee portal and raised concerns about how to start work and specifically that he could not see any schedule for him on the roster. Again, because it was not working day, he received no reply to that.

32. The next day, 7 May, was a bank holiday.

33. On 8 May at 04.47 the claimant sent a resignation email to respondent. He stated that the 'main fundamental' reason for his resignation was the respondent's 'intent' and the fact that they intended:

    'to ''get rid of this job/position and simply turn the duties over to your mobile team I feel is a terrible breach.'

34. He also referred to the very late contact with him, his treatment over the previous five days, the absence of his schedule on the employee portal and the attitude of Mr Jones on 3 and 4 May.

35. Ms Hall replied later that morning explaining in some detail the respondent's position on the points made by him.

Conclusions

36. As Mrs Young pointed out in her submissions, much of the behaviour of the respondent that the claimant relies upon as a breach pre-dated the formal transfer of his employment to them i.e. at 7pm on 6 May 2018. She says therefore that none of that can amount to a breach of the contract of employment as no contract then existed. That is technically correct. However any behaviour by the respondent towards the claimant pre-dating the transfer that, had they been in an employment relationship would have breached the implied term, would be - at the very least relevant background to the claimant's decision to resign when considering events after the formal date of transfer.

37. On the facts of this case, however, I do not find that the respondent or any of its employees treated the claimant before the date of transfer in such a way that could breach the implied term.

38. It is undoubtedly the case that the claimant's transfer was not handled as well and as smoothly as he was entitled to expect in particular given that both the transferor - OCS - and the transferee - the respondent, are organisations that are extremely well used to handling TUPE transfers. On this occasion, however, it seems that the fault lay principally with OCS as they gave both inaccurate and incomplete information to the respondent. In my view when the respondent received that information they, and in particular Ms Hall, did what they reasonably could to try to clarify the situation and did so promptly.

39. The claimant has a strong view that in fact the respondent had all the information they needed on 25 April and that there was no good reason for them to delay contacting him at that stage. Having considered the correspondence between 25 April and 1 May, however, and having heard Ms Hal's evidence, I accept that there were valid reasons why she did not ask the operational team to contact the claimant prior to 1 May as there was still at least a possibility that he was not eligible to transfer. I also accept that once the decision was made that he was eligible, they contacted him as quickly as they reasonably could.

40. A large part of the claimant's concerns about his treatment arises from his conversations with Mr Jones and what he saw as a lack of positivity and/or welcome from the organisation. He referred in his submissions to bad faith on their part. I do not agree that the respondent or any individuals acted in bad faith although I do agree with the claimant for the reasons I have already said, using his words, that the implementation of his transfer was not how it was supposed to be.

41. As for the conversations between the claimant and Mr Jones, I have already indicated that I find on the balance of probabilities that Mr Jones did refer to the claimant's job being a pocket money job. That was undoubtedly an insensitive thing for him to say and I understand why the claimant took offence at it even if it was not meant offensively. It is not enough in itself, however, to amount to a breach of the implied term; it falls well short of being a 'Malik breach'. The claimant has also referred to Mr Dawood, although he believes they got on well, having a slackness about his attitude and not being bothered. Although I cannot doubt that that was the claimant's impression, I do not share it. The fact of the matter was that Mr David was undoubtedly very busy at this time arranging for the transfer of about 50 employees, he was working long hours and the claimant was just one of those employees. Understandably these issues were very important to the claimant but inevitably were not as important to Mr Jones or Mr Dawood. This case is a reminder however to organisations who deal with TUPE transfers regularly as to how significant a transfer of employment can be to the individuals affected, especially to those who are not familiar with the concepts involved and the impact any uncertainty can have on them.

42. As for the claimant's complaint about the meeting in London, there was nothing about this the circumstances of that meeting that amounted to a breach of the implied term.

43. Again, it is very unfortunate that the claimant had difficulty completing the online form and the technology perhaps did not work as smoothly as it could/should have done, but he was taken through that form by Mr Dawood at the meeting.

44. Although I conclude that none of these matters amounted to a breach of the implied term, I understand why when the claimant received the measure letter from OCS on 6 May, two days before he was due to start work again, he was very worried by it. I also understand why he felt that despite what is said, he believed it meant that his job was over. The fact of the matter is, however, that the measure talked about a review with a view to integrating responsibilities into the mobile provision and that any changes would only be implemented following appropriate consultation. Ms Hall's evidence - which I accept - was that this was not a 'done deal' and what's more, it would be subject to the views of the client Aviva.

45. It must be the case that simply proposing a measure, which is reasonable in all other circumstances, no matter how unwelcome it might be to the recipient, does not amount to a breach of the implied term. As Mrs Young submitted, a business is entitled to organise itself as it sees fit - subject to the restrictions of employment legislation.

46. I also understand why the claimant was anxious to have his questions answered and that he found it disturbing when he could not get hold of Ms Hall by telephone on 4 May, did not receive a response to his emails sent on 6 May nor to the queries he posted on the employee portal. I find nothing suspicious however about the lack of replies. The respondent has perfectly adequately explained the absence of a response not least because it was a bank holiday weekend.

47. The claimant's concerns of course were compounded when he looked at the employee portal on 8 May and found that he was not rostered to perform his role. Again I understand why the claimant was concerned but from the respondent's point of view, I agree that this was an administrative task and as the claimant had been told by Mr Dawood to perform his role as business as usual, there had been no breach of the implied term. The claimant was concerned that his card or codes may not work but there was nothing to prevent him from attending at the site and at least trying them.

48. Accordingly, by the time the claimant wrote his resignation letter on 8 May at 04 47, there had been no breach of the implied term of mutual trust and confidence by the respondent.

49. Adopting the Kaur approach, my conclusion is as follows. The last act that triggered the claimant's resignation was his omission from the roster and the failure of the respondents to reply to his queries on 6 May. The claimant did not affirm the contract of employment thereafter. However there had not

been a repudiatory breach by the respondent either by a single act or a course of conduct prior to the claimant's resignation and therefore he was not constructively dismissed.

50. For completeness, I will also comment on the respondent's argument that, by reference to the email to Mr Knight on 2 May, the claimant did not resign in response to any alleged breach. I do not accept that argument. As the claimant has pointed out, that email makes it clear in terms that he expected to transfer into the employment of the respondent; simply asking whether there are any other jobs available that does not negate that.

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Employment Judge K Andrews
Date: 25 July 2019