Case No: 3333880/2018

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EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Mrs Jean Everied	**NHS South, Central and West Commissioning Support Unit**

V

Heard at: Watford **On:** 18 and 19 June 2019

Before: Employment Judge McNeill QC

Appearances:

For the Claimant: Mr A. Line, Counsel
For the Respondent: Mr G. Graham, Counsel

REASONS for the Judgment sent to the parties on 8 July 2019

1. These reasons are provided to the parties following a request for reasons from the Claimant dated 8 July 2019, notified to the Employment Judge on 11 November 2019.

2. The Claimant brings claims for unfair dismissal, statutory and enhanced contractual redundancy payments and notice pay.

Background to the Claimant's claims

3. The Claimant was employed by the Respondent and its predecessors as an Administrator from 18 September 2000 to 29 June 2018. Between those dates, she had five different employers. On each occasion that she became employed by a new employer, it was pursuant to a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

4. The background to the Claimant's claims is the closure of the office where she worked at Premier House, Caversham Road, Reading and the relocation of employees working at Premier House to premises at Milton Park Business Park, Didcot, Oxfordshire. The Claimant was not agreeable to the move to Milton Park because she did not consider the move to be compatible with her considerable caring responsibilities for two family members living reasonably near to Premier House, one of whom sometimes

required her help on an urgent basis.

Issues

5. The tribunal dealt with liability issues first. The parties provided a draft list of issues which was not agreed. By the conclusion of the evidence and submissions, it was clear that the key issues between the parties were as follows:

   (i) At the time of the proposed relocation, did the mobility clause set out in a letter to the Claimant from West Berkshire Priority Care Services NHS Trust (West Berkshire), signed by the Claimant on 2 January 2001, form part of the Claimant's terms and conditions of employment with the Respondent? If it did, the Respondent accepted that it had no contractual right to relocate the Claimant to Milton Park under the terms of that mobility clause as the clause was limited to places of work "within the area served by the Trust", which would not include places of work in Oxfordshire.

   (ii) If the mobility clause in the West Berkshire letter was no longer part of the Claimant's contract at the time of the proposed relocation, was the mobility clause contained in standard terms and conditions of employment provided by Berkshire Healthcare NHS Foundation Trust (Berkshire Healthcare) a term of the Claimant's contract of employment?

   (iii) If so, could the Respondent relocate the Claimant to Milton Park pursuant to the terms of that mobility clause? If the Respondent could relocate the Claimant's place of work to Milton Park, the Respondent was not in breach of contract in requiring the Claimant to relocate to Milton Park.

   (iv) If the Respondent was in breach of contract in requiring the Claimant to relocate to Milton Park when it was not entitled to do so, the Respondent accepted that such breach was a repudiatory breach and that the Respondent resigned in response to that breach. In those circumstances, she was entitled to 12 weeks' notice pay.

   (v) Further, the Respondent accepted that if there was a repudiatory breach, the Claimant was constructively dismissed under s95(1)(c) of the Employment Rights Act 1996 (ERA). A further issue arose as to whether the Respondent was in repudiatory breach of contract in relation to the Claimant's hours of work when it sought to relocate her.

   (vi) If the Claimant was constructively dismissed, there was an issue between the parties as to what constituted the reason for dismissal. The Respondent contended that the reason for the Claimant's dismissal was the Respondent's attempt to relocate the Claimant from Premier House to Milton Park genuinely believing that it could do so. Its case in relation to unfair dismissal was not fully set out in its ET3 because its primary position in relation to dismissal was that the Claimant was not dismissed. This characterisation of the alleged reason for dismissal was formulated for the first time in closing submissions. The Claimant identified the reason for her dismissal as redundancy. The Respondent contended that, if the reason was redundancy, the dismissal was fair because it had offered suitable alternative employment to the Claimant.

(vii) In relation to redundancy, the Respondent denied that there was an entitlement to any statutory or contractual redundancy payment. It accepted that there was a redundancy situation falling within section 139(1)(a)(ii) but averred that it offered the Claimant suitable employment within the meaning of s141(3)(b) of the ERA. Under the contractual redundancy scheme applicable to the Claimant, the entitlement to a payment was dependent on suitable alternative employment not having been offered.

(viii) Whether the Claimant was offered suitable employment was a major issue between the parties.

Findings of Fact

6. The Claimant was employed by the Respondent as an Administrator within the Child Health Information Services Unit (CHIS). Her job included downloading new birth notifications; entering information onto child health systems; notifying areas outside Berkshire of babies born in Berkshire but living in their areas; emailing or positing copies of birth notifications to the relevant child health department; working with private midwives to create and allocate NHS numbers for babies born at home; dealing with information in relation to stillbirths; entering information in relation to screening results; and dealing with queries from families and professionals.

7. When the Claimant was first engaged by West Berkshire in 2000, she was sent a letter setting out the details of her employment. The statement referred to her terms and conditions of employment. In relation to her place of work, it was stated as follows: “You will be based at 3-5 Craven Road, Reading, but you may be required to work elsewhere within the area served by the Trust”. The Respondent accepted that if this clause (mobility clause) were applicable at the time that it became the Claimant’s employer, the Claimant could not be required to work outside Berkshire.

8. The Claimant signed the statement on 2 January 2001, confirming that she accepted the post with West Berkshire on the terms and conditions set out in the letter. She never received any document which proposed or evidenced any change to the mobility clause in her terms and conditions. Although she worked at three different premises between 2000 and 2017, all of her workplaces were situated in Reading.

9. From 1 August 2015 until 1 January 2017, the Claimant was employed by Berkshire Healthcare. During the course of due diligence in connection with a TUPE transfer from Berkshire Healthcare to the Respondent, the Respondent was provided by Berkshire Healthcare with two sets of standard form terms and conditions. The first was a document which was sent to an individual employee, based at Premier House, who was not the Claimant. It referred to 30 hours rather than the Claimant’s 37.5 hours a week. It contained a mobility clause which stated that the employee could be required to work “at or from any additional location as may be determined by the Trust from time to time”. The employer reserved the right to change the employee’s base from time to time “on a permanent basis to a location determined by it at the time that the change is made”. The second document, which was a standard form document dated November 2015, contained the same clause. There was no evidence that

the Claimant was ever provided with these documents. I accepted the Claimant's evidence that these terms and conditions were probably those provided by Berkshire Health care to new starters.

10. At the time that the Claimant's employment transferred to Berkshire Healthcare in 2015, she was employed by Thames Valley Primary Care (TVPCA). She received a letter dated 27 July 2015 confirming that, on transfer of her employment to Berkshire Healthcare, her terms and conditions of employment as set out in her contract of employment would remain the same, save that she would relocate from her then current place of work in Reading to Premier House, also in Reading.

11. The Claimant's statement of terms and conditions in the letter which she signed in January 2001 was never replaced or modified by any new terms and conditions. She received pay increases from time to time and the location of her workplace was changed to two different addresses in Reading but otherwise her terms and conditions remained as in the document signed in January 2001. The Respondent did not ask the Claimant either during the consultation process in relation to the relocation or at any other time for a copy of her terms and conditions or contract of employment.

12. From about 2008, the Claimant's working hours were 7am to 3pm. This enabled her to manage her caring commitments. The Claimant, who is aged in her early 60s, explained those commitments in detail. In order to protect the privacy and confidentiality of those for whom she was caring, those details are not set out in these written reasons, although they were referred to in detail in the oral reasons given at the conclusion of the hearing.

13. In summary, the Claimant helped one of the persons for whom she cared with domestic chores and the taking of medication. She remained in regular phone contact during the day. Since November 2017, there had been four serious incidents which required the Claimant to leave work as a matter of urgency, on one occasion having to take a taxi from work which enabled her to travel to meet her commitments after a journey lasting only 15 minutes. On other occasions, the Claimant took the bus. It was important to the Claimant to work at a location where she was able to meet her caring commitments promptly, and sometimes as a matter of urgency.

14. The other individual for whom the Claimant cares has mobility issues and the Claimant keeps in touch regularly during the day.

15. The Claimant's journey from home to Premier House took her 45 minutes to an hour. It involved a bus journey which could take up to 45 minutes and then a ten minute walk.

16. In June 2016, the Claimant learned from Berkshire Healthcare that their contract with NHS England to provide CHIS in Berkshire was coming to an end. The service was up for re-tender but the service to be provided under the procurement process was to cover Berkshire, Oxfordshire and Buckinghamshire. Remaining at Premier House was not an option.

17. The Respondent was successful in the tender process to host six CHIS teams including Berkshire, Buckinghamshire and Oxfordshire. It was agreed that the CHIS would be serviced by an East Hub, moving three sites to one. Affected employees, including the Claimant, were first told about the proposed change in November 2016. The Respondent wished to retain as many CHIS employees as possible.

18. In October 2017, NHS England and NHS Property Services approved a proposal to relocate the Berkshire, Buckinghamshire and Oxfordshire teams to Milton Park. The Buckinghamshire office was some 35 miles away from Milton Park and the Respondent took the view that it would be unreasonable to require the Buckinghamshire employees to relocate to Milton Park. As there were no alternative roles for these employees, they were made redundant, although some found alternative roles within the NHS.

19. The Respondent concluded that the distance from Premier House to Milton Park was only 23 miles and considered that it was reasonable to relocate the Berkshire employees to the Milton Park office. The question of whether employees had mobility clauses in their contracts of employment and, if so, the scope of those mobility clauses did not form part of the Respondent's reasoning. The Respondent approached the question of relocation only by reference to a general standard of reasonableness.

20. On 5 January 2018, the Claimant and other members of the CHIS team at Premier House, were informed that their office would move from Premier House to Milton Park. Employees were informed of a 45 day consultation period. Employees were told that working hours would be within CHIS standard working hours which were between 8am and 5.30pm. The Claimant understood this to mean that she would have to work between the hours of 8am and 5.30pm. It was recorded in the report of the formal consultation that there was no requirement for evening work at Milton Park and the evening team at Premier House would have to work within the hours of 8am to 5.30pm. It was therefore reasonable for the Claimant to assume at that stage that she would be required to work within those hours.

21. The Claimant did not consider that it was feasible to relocate to Milton Park. She would have to undertake longer journeys to and from work and did not think she could do this and still meet her caring commitments.

22. She attended a one-to-one meeting on 7 February 2018 but, at that time, one of the persons for whom she cared was very ill and in hospital and at that stage she had not considered the proposed move in any detail. The meeting concluded early.

23. On 21 February 2018, the Claimant and others, with the assistance of their trade union, submitted a collective counter-proposal to the Respondent. In that counter-proposal, it was stated that redundancy had been requested but that the employees had been advised that this was not an option as there were jobs in Didcot. The redundancy scheme, to which the Claimant and other eligible employees were entitled under their contracts of employment, stated that, in the event of redundancy, one month's salary would be paid for each year of employment.

24. At that time, it had been made clear to the relevant employees that their additional travel costs of travelling to Didcot would be met for a period of four years. The Claimant already had her bus pass from her home to Premier House paid for by the Respondent. If she relocated to Didcot, she would lose this benefit and would have to pay her bus fare to and from the station but her train fares would be paid by the Respondent. In practice, she would therefore be financially worse off, although this played little part in her thinking.

25. On 8 March 2018, the Respondent responded to the counter-proposal and asked for an individual statement of case from the Claimant. After closure of the consultation period, on 13 March 2018, the Claimant submitted her statement of case as requested. She explained that her hours of work were 7am to 3pm and that the journey to Milton Park would add 3 hours a day to her working day. She accepted in cross-examination that that was not a precise calculation.

26. The Claimant explained her caring commitments and that she had to be available at very short notice in case of any emergencies. She explained in detail how she had calculated her additional travelling time and stated that she felt her circumstances put her at an "at risk situation for redundancy".

27. In response to the Claimant's statement of case, on 27th March 2018, the Respondent offered the Claimant the option of working from 7.30am to 2pm. The Respondent had already decided to absorb an hour's travel time for all affected employees for a period of one year and to take on the payment of the costs of train travel for 4 years. In the letter of 27 March, the Respondent further offered "in the short term" to extend the absorbed time for travel by 30 minutes while it negotiated the provision of additional shuttle buses from Didcot Station to Milton Park.

28. The Respondent calculated that the Claimant's additional journey time was 36 minutes per day. This was not realistic. The journey time from Reading to Didcot by train was agreed by Counsel to be between 13 and 27 minutes, depending on the train; the shuttle bus took about 7 minutes; and there would inevitably be some time needed to get to a train platform and to wait for a train and then a shuttle bus. In any event, rather than looking at the Claimant's travelling time in total, the Respondent considered travelling time on the basis that she would be departing from Premier House. The rationale for this methodology was explained as involving an element of consistency as between different employees but did not seem to make much sense when looking at how individual employees would be affected by the relocation.

29. The Respondent unfairly alleged that the Claimant had not chosen to participate in an arranged 1-2-1 meeting or to take up the offer of a rearranged meeting. The Claimant had not sought a further meeting after 7 February meeting but neither had the Respondent invited her to a further meeting. The Respondent did not engage with the specific practical difficulties referred to by the Claimant in relation to her caring responsibilities, in particular the need to be available at short notice in case of emergencies, but merely referred her to a Policy known as the "Other

Leave Policy".

30. The Respondent declined the Claimant's request to be made redundant.

31. The Claimant appealed that decision but her appeal was unsuccessful. The Respondent took the view that the adjustments that had been made and offered would "largely absorb the impact of the change in location".

32. On 2 May 2018, the Claimant was told that her role would be relocated to Milton Park from 2 July 2018. She was asked for confirmation of her agreement to this by 31 May 2018.

33. The Claimant submitted a grievance in relation to her appeal outcome on 15 May 2018. The Respondent was not prepared to deal with this as it took the view that the appeal process was at an end and the grievance was essentially in the nature of a further appeal.

34. On 30 May 2018, a further Collective Grievance was submitted, to which the Claimant was a party. That Grievance contained the sentence: "While it is accepted that we have a Mobility Clause within our contract of employment we believe it is overly broad and lacks certainty". The Claimant did not draft that document and was not aware at that time what mobility clause she and others had in their contracts of employment.

35. On 31 May 2018, the Collective Grievance was rejected and the Claimant was reminded that the deadline for confirming relocation to the new office was 5pm on that day. The Claimant was told that if she did not give confirmation by that date, it would be assumed that she would not be relocating and would be tendering her resignation on 29 June 2018.

36. On 28 June 2018, the Claimant wrote a letter of resignation. She said that she was resigning "with immediate effect". She said that she understood that she was required to give one month's notice and would work her notice period at Premier house. She said that her resignation was because she believed this to be a redundancy situation and because the relocated position was not suitable alternative employment. She explained that she had not been offered redeployment and yet again referred to the reasons why she felt unable to move to Milton Park, including that Milton Park was too far to travel and she would be unable to reach those she was caring for if there was an emergency.

37. The Claimant's resignation was accepted on 29 June 2018. The Claimant was told that if she did not wish to relocate to Milton Park, she would be released from her notice period and her last working day would be 29 June 2018. That was the effective date of termination of her employment.

Analysis and Conclusions

Mobility Clause

38. Pursuant to the mobility clause which the Claimant agreed at the commencement of her employment, she could not be required to work outside Berkshire. The issue between the parties was whether the contract

had been varied so that the applicable mobility clause was the Berkshire Healthcare standard term that an employee could be required to work "at or from any additional location as may be determined by the Trust from time to time". In order for there to have been a variation in the terms of the mobility clause, there would have had to be consensus between the parties as to the variation. The Claimant would need to have known of the varied term and consented to it. Such consent may have been evidenced by her continuing to work for Berkshire Healthcare.

39. The only positive piece of evidence relied on by the Respondent in contending that the mobility clause in the document signed in January 2001 had been varied was the reference to the terms of the applicable mobility clause in the collective grievance of 30 May 2018.

40. That document has to be considered in context. It was a grievance submitted on behalf of a number of individuals and the Claimant had given no consideration to what was being said about the mobility clause or as to what the particular mobility clause in her contract of employment actually said. That evidence did not establish that the Claimant knew about the Berkshire Healthcare mobility clause and had agreed to it so as to vary the much narrower mobility clause in her contract of employment, agreed in 2001.

41. The Respondent submitted that a variation in the terms of the mobility clause agreed in 2001 should be inferred, but (apart from the evidence relating to the collective grievance) he could not point to any evidence which would support such an inference. On the contrary, such evidence as was available indicated that the Claimant was told, on being transferred from one employer to the next that her existing terms of employment would pass from one employer to the next. This was no more than a statement of the effect of TUPE on her terms and conditions of employment.

42. The overwhelming evidence was that the mobility clause that applied to the Claimant was that which was included in the terms signed for in 2001. The mobility clause was never varied but continued to apply on each TUPE transfer.

43. It followed that the requirement that the Claimant should relocate to a location outside Berkshire was in breach of the mobility clause in her contract of employment. Such breach was a repudiatory breach of the contract. It concerned the Claimant's place of work and went to the root of her contract of employment. She was entitled to resign in response to that breach, as indeed she did. The termination of her employment constituted a constructive dismissal.

44. Given that finding of repudiatory breach, I did not consider it necessary to consider whether there was a change in working hours which also constituted a repudiatory breach.

45. I accepted the Respondent's evidence that it did not know about the mobility clause in the Claimant's original contract of employment dating back to 2001. However, that lack of knowledge did not affect the contractual position, considered on an objective basis.

Reason for dismissal

46. As in any other case of dismissal, where a dismissal is a constructive dismissal the tribunal must consider the reason for dismissal and whether the dismissal was fair or unfair, applying the provisions of s98 of the ERA.

47. The Respondent relied on **Kellogg Brown & Root (UK) Ltd v Fitton and another** UKEAT/0205/16/BA in submitting that the reason for the dismissal was the Respondent's attempt to relocate the Claimant from Premier House to Milton Park genuinely believing it could do so. The Claimant submitted that the reason for dismissal was redundancy.

48. In considering the reason for dismissal in a constructive dismissal case, I should consider the nature of the repudiatory breach. Although it is possible to describe the breach in different ways, the substance of the breach was requiring the Claimant to relocate in breach of her contract of employment because the Respondent was ceasing to carry on its business at Premier House where the Claimant was employed. Whether or not the Respondent believed it was entitled to do what it could do was not material to this question. The cessation of business at Premier House, which led to the requirement to relocate, was a redundancy situation and redundancy was the reason or principal reason for the Claimant's dismissal. Pursuant to s139 of the ERA, an employee who is dismissed shall be taken to be dismissed by reason of redundancy in these circumstances. That section applies as much to a constructive dismissal as to an ordinary dismissal effected by the employer.

49. There was nothing in **Kellogg Brown** which led me to any different conclusion. In **Kellogg Brown**, it was the employer who terminated the contract. The case was not one of constructive dismissal. In those circumstances and applying the well-established test in **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, the tribunal considered what was in the employer's mind at the relevant time. The employment tribunal found that the reason for dismissal was the Claimant's refusal to obey an instruction to relocate. No such issue arose here. The Claimant resigned. She was not dismissed. The question of what was in the employer's mind was not the material question.

50. In short, in the current case, the reason for dismissal was redundancy which was a potentially fair reason for dismissal.

51. If I had found the reason for dismissal contended for by the Respondent to be correct, the dismissal would have been unfair because the Respondent would not have made out a potentially fair reason for dismissal. A mistaken belief that the Respondent could relocate an employee pursuant to the terms of a mobility clause did not amount to some other substantial such as to justify the dismissal of someone in the Claimant's position. The contract of employment underpins the employment relationship and the employee's right not to be unfairly dismissed would be considerably diluted if an employer could justify dismissal by relying on its own breach of contract as a potentially fair reason for dismissal, however innocent that breach.

52. The parties did not specifically address the tribunal on the issue of fairness, perhaps because it was unarguable that the dismissal was fair, once it had been found that the reason for the Claimant's dismissal was redundancy, as no redundancy payment had been made or redeployment considered for her. The sole argument raised on fairness related to suitable alternative employment, which is addressed below.

Entitlement to redundancy payment

53. As the dismissal was for redundancy, the Respondent was liable to the Claimant for a redundancy payment, unless the Claimant was offered suitable alternative employment.

54. The Respondent did make serious efforts to accommodate the Claimant. It was prepared to allow her to work reduced hours which broadly corresponded to her previous hours, when travelling was taken into account, for an initial period of a year. The Respondent genuinely wished to retain the Claimant's services and would have reviewed her working hours with her when the first year came to an end.

55. On the other hand, the Respondent did not engage with the Claimant's particular requirement to be reasonably available and close to home in the case of a medical emergency relating to one of the persons for whom she cared in particular. The Respondent underestimated the additional travelling time for the Claimant. Her journey would no longer be under an hour in each direction but would be nearer to an hour and a half in each direction. In the event of an emergency, a taxi ride from Milton Park back to Reading would take considerably longer than a taxi ride from Premier House.

56. In relation to the cost of travel, the cost of train fares was only guaranteed for four years. The Claimant's working hours and the absorption of travel times were only guaranteed for at best a year. Even if the Respondent would have acted reasonably after a year in reconsidering these matters, there was no guarantee that these working hours and travel time concessions would have been continued.

57. I considered the nature of the alternative employment offered on the basis of an objective assessment. The question was whether the job offered at Milton Park was suitable for this Claimant. In doing so, I took into account the terms of her contract at the time of the proposed relocation, the nature of the journey involved in her proposed relocation and her caring responsibilities which pointed to her need to work within a reasonably short distance of the location of those she cared for.

58. Taking into account all these factors, I did not consider that the employment offered at Milton Park was suitable employment. In looking at whether the Claimant acted reasonably in refusing the offer, a reasonable responses test was not appropriate. Rather, it was necessary to look at the circumstance of this particular Claimant. I concluded that the Claimant acted reasonably in refusing the alternative employment offered, taking into account her personal circumstances.

59. The Claimant was therefore entitled to a redundancy payment both on a statutory and contractual basis.

Notice Pay

60. The Claimant was also entitled to payment in respect of her entitlement to 12 weeks' notice of termination of her employment which would have been payable had the contract of employment been complied with and she had been dismissed by reason of redundancy.

Remedy

61. After I had communicated my decision on liability to the parties, they were able to agree remedy, as set out in the tribunal's judgment dated 19 June 2019 and sent to the parties on 8 July 2019.

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Employment Judge McNeill QC

Date: 25 November 2019

Judgment sent to the parties on

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For the Tribunal office