Case No: 1401958/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Sinclair**

Respondent: **1. Shaw Healthcare (Group) Limited**
2. City and County Healthcare Group Limited
3. London Care Limited

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Judgment sent to the parties on 16 January 2020, is corrected by being replaced by the Judgment attached hereto.

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Employment Judge Reed

Date: 27 April 2020

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Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Sinclair**

Respondents: **1 Shaw Healthcare (Group) Limited**
2 City and County Healthcare Group Limited
3 London Care Limited

Heard at: **Southampton** **On: 4th and 5th December 2019**

Before: **Employment Judge Reed**
Members Dr N Thornback
Mr G Crowe

Representation
Claimant: **Ms G Nichols, Counsel**
Respondents: **1 Ms C Elvin, Litigation Consultant**
2 and 3 Ms C Jennings, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The second respondent is dismissed from proceedings.

2. The claimant was assigned to the organised grouping of employees subject to the service provision change which took place on 8th February 2018, such that she transferred to the employment of the first respondent.

3. The first and third respondent failed properly to inform and consult the claimant in connection with the service provision change and the claimant is awarded a protective award of four weeks pay.

4. The first respondent did not breach the contract of the claimant by failing to make a payment to her representing an “enhanced” redundancy payment.

5. Those declarations having been made and the first respondent conceding that the claimant was unfairly dismissed and was entitled to a payment representing holiday accrued and untaken, the following awards are made to the claimant by consent. The awards are against the first respondent only, unless indicated to the contrary.

   (a) A protective award against the first and third respondents in the sum of £1,762.76.

   (b) In relation to unfair dismissal:

      i) A basic award £13,692.

      ii) A compensatory award of £28,500, to which the Recoupment Regulations apply. The relevant period is 8th February 2018 – 5th December 2019 and the prescribed element is £28,500.

   (c) An award in respect of holiday pay in the sum of £308.49.

REASONS

1. In this case the claimant Mrs Sinclair claimed, amongst other things, unfair dismissal against three respondents. She said she had been an employee of either the second or third respondent at the time of a service provision change (SPC) to the first respondent. Her employment came to an end at that point. She said that the effect of the SPC was that she became an employee of the first respondent, such that its refusal to take her as an employee amounted to an unfair dismissal by them; alternatively, that if the SPC had not applied to her, the termination of her employment by the second or third respondent amounted to an unfair dismissal by whichever of them employed her.

2. She also asserted that there had been a failure properly to consult her in connection with the SPC; that she was entitled to payment of a sum representing an "enhanced" redundancy payment; and that a sum was due to her upon the termination of her employment by way of holiday accrued and untaken.

3. At the outset of the hearing, the parties agreed that the Mrs Sinclair was an employee of the third respondent, London Care Limited ("London Care") immediately before the SPC such that the second respondent, City and County Healthcare Group Limited, fell to be dismissed from proceedings.

4. The first respondent, Shaw Healthcare (Group) Limited ("Shaw") asserted that, while there had been an organised grouping of employees that had transferred to it at the time of the SPC, the claimant was not assigned to that grouping. Both remaining respondents asserted they were not in breach of any obligation to inform or consult Mrs Sinclair.

5. We heard evidence from Mrs Sinclair herself and, on behalf of Shaw from Mr Urquhart, Director of HR. We also took as read a statement from Mr Broom, Head of HR Services of Shaw. For London Care we heard from Mrs Aspery, Regional Manager for another company in the London Care group. Our attention was also directed to a number of documents. We reached the following findings of fact.

6. Mrs Sinclair commenced employment with the predecessor of London Care in April 1997. Her employment was then subject to a number of transfers until she became an employee of London Care.

7. The events that concerned us for the purposes of her claim occurred in 2017 and 2018.

8. From April 2017 until the termination of her employment Mrs Sinclair was employed solely in connection with the provision of Extra Care under a contract between her employer and the Borough of Poole. Extra Care is the expression used for the provision of healthcare and support to service users who occupy self contained, adapted flats. There were three locations at which that care was provided pursuant to the contract with the Borough of Poole, called Belmont Court, Delphis Court and Trinidad Village. Mrs Sinclair's work related to the first two of those sites from April 2017. Trinidad Village opened in December 2017 and she also became responsible for it then. Her job title at the time of the events that concerned us was Support Manager.

9. Towards the end of 2017, the Borough of Poole decided that the contract for the provision of Extra Care would move from London Care to Shaw.

10. On 3rd January 2018, Shaw personnel had a meeting with the employees working on the three sites in order to explain to them that there would be an SPC.

11. By 5th January 2018, Shaw had taken the view that in the light of what they knew about Mrs Sinclair's duties, she did not fall to be transferred under the SPC. That state of affairs was not disclosed to Mrs Sinclair until 16th January.

12. On 8th February 2018, Shaw took over the contract. They were not prepared to accept Mrs Sinclair as an employee but London Care considered that she transferred. Since neither company regarded her as its employee, her employment came to an end on that day.

13. Under reg 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006, a service provision change takes place where activities cease to be carried out by a contractor and are carried out instead by a subsequent contractor, provided that there is an organised grouping of

employees which has as its principal purpose the carrying out of the activities concerned and the client intends that the activities will be carried out by the transferee.

14. Reg 4 of the 2006 Regulations provides that a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of employees that are subject to the relevant transfer.

15. Under reg 13 of the 2006 Regulations, long enough before a relevant transfer to enable the employer of any affected employees to consult … the employer shall inform [the employee] of the legal, economic and social implications; the measures he envisages he will take in relation to the employee; and if the employer is the transferor, the measures he envisages the transferee will take.

16. It was common to the parties that there was an SPC on 8th February 2018. It was also agreed that there was an organised grouping of employees which had at its principal purpose carrying out of the relevant activities (the provision of Extra Care pursuant to the contract with the Borough of Poole).

17. Where the parties disagreed was as to whether the claimant was assigned to that organised grouping.

18. As we have said, the provision of Extra Care took place in three locations within the Poole area and each location had employees dedicated to it. They included the care workers who actually provided the "hands on" service, team leaders and, in respect of each site, a scheme manager. Shaw accepted that all those personnel would transfer.

19. It was Shaw's case, however, that the claimant was not assigned to that organised grouping and therefore was properly excluded from their employment.

20. It was therefore necessary for us to identify the precise range of duties undertaken by Mrs Sinclair.

21. Her job title was Support Manager and essentially her job was to support the scheme manager at each of the three locations in question. At page 257 of the bundle of documents is a list of the duties that she discharged, which we accepted as an accurate description of her role.

22. We also accepted the evidence from Mrs Aspery that that role was directly related to the performance of London Care under the contract. Mrs Sinclair supported the managers and the carers and indeed provided care herself from time to time. She dealt with complaints and ensured compliance. She dealt with the local authority and safeguarding issues. She did no work other than under the contract with the Borough of Poole.

23. In essence, there were four managers looking after the three sites in question, namely each of the scheme managers dedicated to one particular site and Mrs Sinclair who supplemented that managerial function across all three sites.

24. It was suggested on behalf of Shaw that her role was strategic and "indirect" but we disagreed. While clearly the principal thrust of her employment was not to provide "hands on" care, as a care worker would, she was in our view no less intimately involved in the provision of the management in respect of that work than the individual scheme managers.

25. To put the matter another way, there undoubtedly are cases where employees dedicate 100% of their time to the contract in question (as Mrs Sinclair did) but can nevertheless be said not to be assigned to it. For example, there might in this case have been a person employed in the head office of London Care whose sole responsibility was to administer the payroll for the three sites in question. That person would be functionally remote from the provision of care under the contract itself and might sensibly be said not to be assigned to it.

26. At the other end of the spectrum, care workers actually looking after the residents clearly would be assigned. Somewhere along that spectrum a line had to be drawn and assignment determined accordingly.

27. In our view, Mr Sinclair easily satisfied the requirement that she be assigned. Her role was very closely connected with the provision of care itself and, as we have said, she undertook no work other than in relation to the contract with the Borough of Poole. We therefore concluded she was indeed assigned and should have transferred to Shaw.

28. We then turn to the duty to inform and consult under reg 13 of the Transfer Regulations. The sole respect in which it was claimed the respondents had failed to discharge their obligations in this respect was that, although Shaw had taken the view on 5th January that Mrs Sinclair was not assigned and would not transfer, that state of affairs was not communicated to her until 16th January.

29. The legal implication of the view taken by Shaw was that Mrs Sinclair would not transfer: and the measures they therefore would take included refusing to accept her as an employee. "Implications" and "measures" such as these should, pursuant to reg 13, be communicated to the employee long enough before the transfer to allow consultation to take place. Ordinarily, a delay of that sort could not be said to seriously prejudice the employee in question. However, we remind ourselves that the entire process of communication with the employees took place between 3rd January and 8th February. This was a very short period. We considered that there had indeed been a breach of reg 13 by the delay such that it was appropriate to make a protective award. The delay in communication meant that Mrs Sinclair's opportunity to take full advice and consider her position was significantly prejudiced. In the circumstances we concluded that it was appropriate to make a protective award of four weeks' pay.

30. Mrs Sinclair considered that Shaw had breached her contract by failing to make a payment to her representing an enhanced redundancy payment.

31. In 2008 Mrs Sinclair entered into a contract with her then employer pursuant to which, in the event of redundancy, she would be entitled to a severance payment of 1.5 weeks pay for each year of service. However, in April 2015, she signed a fresh contract, which made no mention of any such entitlement.

32. It was conceded by Shaw that, given our findings, Mrs Sinclair had been dismissed by reason of redundancy. Mrs Sinclair invited us to conclude she was therefore entitled to the enhanced payment, calculated in accordance with her 2008 contract.

33. It may well have been the case that at the time she entered into the 2015 contract she made it clear that she wished to have preserved her earlier terms and conditions. However, that simply did not take place. The 2015 contract is expressly stated to supersede any previous agreement and we could not read this as meaning supersedes "insofar as it is inconsistent with the earlier document".

34. It was suggested that, given the common intention of the parties, this might have been a case of mistake. That did not appear to us to be an accurate description of what had occurred. Nor was this a case in which sensibly it could be said that the 2015 agreement was in some way void or voidable for lack of consideration. In short, our conclusion was that she was not entitled to that enhanced payment at the time of her eventual dismissal.

35. Given the position the respondents had taken in relation to dismissal, it followed that neither had taken responsibility for holiday accrued and untaken. A payment was due and was the responsibility of Shaw.

36. In the light of those declarations, the parties agreed terms as set out above.

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Employment Judge Reed

Date: 14 January 2020