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THE EMPLOYMENT TRIBUNAL

BETWEEN

Claimant

and

Respondent

Johanna Ditton

Firefly Properties Limited

Held at London South (By Cloud Video Platform) On 29 October 2020

BEFORE: Employment Judge Siddall (Sitting Alone)

Representation

For the Claimant: Mr F Wildman

For the Respondent: No attendance and no representation (save for Mr Marshall who attended the start of the hearing).

JUDGMENT

The decision of the tribunal is that:

1. the claim for unfair dismissal is well founded and it succeeds.
2. The Claimant is awarded a basic award of £4,446.72 and a compensatory award of £16,669.06. The total award is £21,115.78.
3. The claim for wrongful dismissal in relation to notice pay does not succeed.
4. The application by the Claimant to add Firefly Homes Kent Limited as a second respondent to the claim is refused.

REASONS

1. The Claimant claims that she was unfairly dismissed on 4 July 2019. I heard evidence from the Claimant and read a witness statement provided by Carol Ann Prier on behalf of the Respondent. I was also provided with a bundle containing 80 pages of documents.
2. On 26 October 2020 DMB Law Solicitors who are on record as acting for the Respondent wrote to the tribunal to inform them that the respondent company had ceased to trade and that a request had been made for that company to be struck off the register of companies. An application for an adjournment of today's hearing was made. On the same day, the Claimant applied for Firefly Homes Kent Limited to be added as a respondent to the claim under the TUPE regulations.
3. At the start of the hearing, Mr William Marshall of DMB Solicitors was in attendance. Ms Prier did not attend and nor did any other director or employee of the Respondent. Mr Marshall made it clear that he did not have instructions to represent the respondent but was attending as an officer of the court. Mr Marshall was asked to make enquiries as to whether the business of the respondent continued and if so, under what company name. When the hearing reconvened, Mr Marshall advised that he had taken instructions from his client. He had been advised that 'no formal transfer had taken place and no payment had been made'. An application had been made to strike the respondent company off as the directors considered it was no longer a going concern. He stated that he believed that Firefly Homes Kent Limited continued to trade, although he was not sure which premises they were trading from. That company had previously been called Firefly Properties Sevenoaks Limited.
4. I refused the Respondent's request for an adjournment. The Respondent company is still shown as 'active' on the register at Companies House although as indicated by Mr Marshall there is a proposal to strike the company off. No

insolvency proceedings have been initiated. It was not in the interests of justice to delay the hearing of the claim any further in these circumstances.

5. Mr Marshall made it clear that he would not cross-examine the claimant or make a closing submission and that he would take no part in the proceedings. I invited him to withdraw unless he wished to remain as an observer, and he chose to do so. I then heard evidence from the Claimant and a closing submission from Mr Wildman.
6. The facts I have found and the conclusions I have drawn from the evidence of both parties is as follows.
7. The Claimant started work for the Respondent, an estate agency, on 1 March 2010. She worked first of all as Office Manager and then as Sales Director.
8. It is not in dispute that a client whom I shall refer to as H requested a valuation of his house from the Respondent. H is an old friend of the Claimant. He later decided not to market the house with them but to sell his house privately.
9. It is also not in dispute that the Respondent provided H with a floor plan and Energy Performance Certificate for which there was a charge of £156.25.
10. In or around May 2019 it is agreed that H came to the Respondent's premises and delivered a sum of £480 in cash to the Claimant. The Claimant says that she did not know what the money was for, but later realised it was to pay her husband for some work he had done for H as the amount matched the invoice. The letter dated 4 July 2019 suggests that the Claimant said that the money was for helping H with his private sale, but she disputes this. I give greater weight to the Claimant's evidence on this point as Ms Prier did not attend the hearing. I find that it was not clear on the day why H had brought in the money. Ms Prier suggested that the Claimant pay the outstanding money that H owed to the Respondent out of the cash, but this did not happen.
11. On 4 July 2019 Ms Prier called the Claimant to a meeting and handed her a letter of the same date. The letter referred to the cash payment made by H.

The letter suggested that the receipt of cash related to the assistance that the Claimant had provided to him and was a breach of money laundering regulations.

12. The letter also refers to other 'concerns' about the Claimant's actions but these are not set out in detail. The Claimant says, and I accept, that she had not received any disciplinary warnings prior to 4 July 2019.
13. The letter ends: 'In the circumstances and with regret I am forced to conclude that your employment contract with the company should come to an end with immediate effect. This can be achieved in one of two ways: either you resign with no prejudice or in the absence of resignation you cause me to formally terminate your contract of employment'.
14. The Claimant left the office and did not return to work again.
15. On 15 August 2019 the Respondent wrote to the Claimant about a proposed disciplinary hearing (although no hearing ever took place). The Respondent enclosed emails sent by the Claimant from her work email address as follows:
 - a. An email to a solicitor dated 25 February 2019 asking for a conveyancing quote for sale of H's property to be sent to H;
 - b. An email to H the same day offering to go through any forms with him and to write to his buyer with information about the agreed price and any special conditions. At the bottom of this email the Claimant says that this is something she will do for H 'outside working hours' as the sale was not going through the Respondent 'and to be fair to Carol who pays my wages';
 - c. A second email to the solicitors dated 29 May 2019 stating that the Claimant had been in contact with H's buyer to check what was happening.
16. Page 79 contains a transcript of a text message from the Claimant to H indicating that she had arranged for a surveyor to come to his house to carry out a mortgage valuation.

17. The Claimant did not attend a disciplinary hearing and never went back to work. She was paid until the end of July 2019 and received a payment for accrued holiday in November. Her gross annual salary with the Respondent was £25,692.18.
18. In September the Claimant started work for a company selling new homes on a much lower salary than she received from the Respondent. She was placed on furlough for a period but is now back at work. She has continued to look for other work at a higher salary and has just had an interview for a job which would have a salary of £30,000.
19. She claims her notice pay and compensation for unfair dismissal.

Decision.

20. I have no hesitation in concluding that the letter dated 4 July 2019 amounted to constructive dismissal of the Claimant. Although she is ostensibly given a choice, it is clear that the Respondent had already decided to dismiss her summarily. This amounted to a repudiatory breach of contract which the Claimant accepted by leaving the premises and never returning to work. She was entitled to treat herself as having been dismissed.
21. I find that the dismissal was unfair. The Respondent had not carried out an investigation into what had happened prior to handing the letter dated 4 July 2019 to the Claimant and she was not given a chance to provide an explanation concerning, for example, the cash payment from H. The letter also refers to other concerns about the Claimant's conduct without specifying any details, and with no prior disciplinary warnings having been given. The Respondent has not satisfied the **Burchell** test.
22. I find that the letter sent to the Claimant by the Respondent dated 15 August 2019 amounted to an effort to put a proper disciplinary process in place 'after the event'. This letter does not affect the fairness of the dismissal because it was sent out well after the Respondent had formed an intention to dismiss the Claimant and notified her of that intention. It appears also that the Respondent

had only discovered the emails and text messages about the work the Claimant was doing for H sometime after it had sent the letter dated 4 July 2019. As that letter amounted to constructive dismissal, the contents of the letter dated 15 August do not assist the Respondent so far as liability is concerned.

23. However I take into account the fact that following the Claimant's departure from the office on 4 July, the Respondent uncovered evidence showing that the Claimant had assisted H, who had been a prospective client of the business, by instructing solicitors on his behalf, arranging a mortgage valuation and speaking to his private buyer. I also take into account the fact that H owed money to the Respondent for the services provided to him.
24. Every employee owes their employer an implied duty of fidelity or loyalty and I am not satisfied that these actions are consistent with that duty. The Claimant was effectively providing H with services for free, using her office facilities to do so, and in circumstances where he was a former prospective client and a debtor to the business. She states that Ms Prier was aware of what she was doing. Ms Prier's statement states that she had specifically been told not to assist H with his private sale. I give little weight to Ms Prier's statement as she was not present to be questioned and I do not find that the Claimant was specifically prohibited from assisting H. However I conclude on the balance of probabilities that Ms Prier was not fully aware of what assistance the Claimant had given to H. It is not in dispute that Ms Prier was suspicious about the cash payment and wanted the Claimant to settle H's debt out of the money. I have also noted that the Claimant stated to H she would provide assistance outside working hours as 'Carol pays my wages' (although the emails seem to have been sent within working hours). This does not seem to be consistent with a suggestion that the Claimant's manager was fully aware of what was happening and had no problem with it.
25. The Claimant's conduct in relation to these matters was only discovered after she had been dismissed. There is no evidence that these matters were in the Respondent's mind before they wrote the letter dated 4 July. As such, these issues do not affect my finding of unfair dismissal. However they are relevant

to the question of compensation. (see **W Devis and Sons Limited v Atkins** [1977] ICR 662). The tribunal must award such compensation as is 'just and equitable'. Had the Claimant continued in employment after 4 July the matters raised in the letter of 15 August may have led to her dismissal. That outcome is not a foregone conclusion. The Respondent's main concern seemed to have been the receipt of cash from H. Had a fair disciplinary process been convened, she would have been able to present evidence to support her claim that the money represented a sum owed to her husband. That evidence might have been accepted, and cast a different light upon the Respondent's concern that the Claimant was making a private profit from working with H. There is also a chance that they would have rejected her assertions about this and dismissed her in the genuine belief that she had acted inappropriately. In all the circumstances I find that there is a 25% chance that the Claimant could have been fairly dismissed after 15 August and that her compensatory award should be reduced by an equivalent amount.

Compensation

26. I award the Claimant her Basic Award of £4446.72.
27. In terms of Compensatory Award, the Claimant has suffered a net loss of earnings from her employment with the Respondent of £29,203.28 from date of dismissal to date of this hearing. I award her a sum of £500 for injury to feelings making a total of £29,703.28. From that figure I deduct the sum of £7477.87 which represents her net earnings from her new employment. That gives her a total of £22,225.41.
28. I make no award for future loss of earnings. Whereas I am satisfied that the Claimant has made genuine efforts to mitigate her losses by applying for other jobs with a better salary since dismissal, at this point it seems her prospects are much brighter and she has a good chance of achieving a job with a much higher salary. I have also taken into account the size of the Respondent's business and have considered an amount that is just and equitable in all the circumstances.

29. I make a reduction of 25% from the net loss figure of £22,225.41 and make a compensatory award of £16,669.06.
30. The Claimant also claims wrongful dismissal although Mr Wildman does not include damages for this on the Schedule of Loss. The Claimant had been employed for nine years and claims nine weeks' notice pay. Although her employment ended on 4 July she was paid her July salary in full.
31. I take into account that the Respondent discovered, following dismissal, conduct that amounted to a breach of the duty of fidelity which may well have led them to dismiss the Claimant summarily in any case. (See **Boston Deep Sea Fishing v Ansel** (1888) 39 Ch D 339). In these circumstances the claim for wrongful dismissal does not succeed and I make no award under this heading.
32. **Application to add a Second Respondent**
33. Mr Wildman advised me that he only learned of the proposal to strike off the Respondent from the Companies House register three days before this hearing. He asserts that the business continues to trade from the same premises. He asserts that if the Respondent has transferred its business and assets to a new company and proposes to strike the first company from the register, this is a 'Phoenix company' situation and an attempt to avoid liability for any judgment debt. He seeks to add Firefly Homes Kent Limited as second respondent to the proceedings under rule 34 and he relies on the TUPE regulations.
34. I am sympathetic to the Claimant's concerns. However I am not sure that TUPE assists her. Regulation 4 has the effect of transferring rights and liabilities to a transferee where there is an existing contract of employment with the transferor. At the point of transfer (which is unclear but is suggested to be at some point during the summer of 2020) the Claimant did not have a contract of employment with the Respondent. Regulation 7 would be relevant if the Claimant had been dismissed and the sole or principal reason for the dismissal was the transfer of the business. However this is not alleged and I have noted

that the Claimant was dismissed well over a year before any purported transfer took place.

35. In any event, having heard from Mr Marshall, it is not clear that there has been a transfer of an undertaking, as he states that 'no formal transfer has taken place and no payment made'.
36. I am therefore not satisfied that a relevant transfer of the business has taken place. Even if there has been a transfer, the TUPE regulations do not assist the Claimant here. She was dismissed well before any possible transfer date for reasons unconnected with the transfer. Mr Wildman has not convinced me that in this situation regulation 4 has the effect of transferring any liability to meet a tribunal judgment to the potential transferee.
37. Mr Wildman also asks me to consider the tribunal's overriding objective to deal with cases justly and fairly. I acknowledge his concern that the Claimant may have problems enforcing her judgment if by the time it is enforced the Respondent has no assets. That is unfortunately a situation that many claimants find themselves in. However I have not been advised of any legal basis on which Firefly Homes Kent Limited could become liable for any award made to the Claimant. In all the circumstances the application is refused.

Employment Judge Siddall
Date: 29 October 2020