EMPLOYMENT TRIBUNALS

Claimant:	Ms N Mathur	(1)	("the First Claimant")
	Ms S Mukerjee	(2)	("the Second Claimant")
	Ms P Desai	(3)	("the Third Claimant")
Respondent:	Watford Way Medical Centre	(1)	("the First Respondent")
	Mrs R Datoo, as the personal representative of the estate of the late Dr S L Datoo	(2)	("the Second Respondent")

Heard at: Watford Employment Tribunal

On: **4 and 5 January 2021**

Before: Employment Judge Quill (sitting alone)

Appearances

For the First Claimant:	In person
For the Second Claimant:	In person
For the Third Claimant:	Ms Mathur (friend, and First Claimant)
For the First Respondent:	Not applicable (A dissolved company)
For the Second Respondent:	Ms G Nicholls, counsel

This was a partially remote hearing with the consent of the parties. The form of remote hearing was V: Video. The documents that I was referred to are mentioned in the reasons below. The orders made are described below.

JUDGMENT

(1) Ms Mathur's complaint of unfair dismissal against the First Respondent is dismissed upon withdrawal.

(2) The Claimants were not employed by Dr SL Datoo at the relevant times. Therefore, all remaining complaints by all Claimants against the Second Respondent are dismissed.

(3) This judgment does not affect any other claims against the First Respondent.

CASE MANAGEMENT ORDERS

(1) The First Respondent company has been dissolved. Therefore, claims against the First Respondent cannot proceed as there is no legal entity in existence against which it can be pursued. Claims against the First Respondent can only proceed if the company is restored to the Register of Companies. The proceedings are stayed until 30 June 2021, or earlier application to lift the stay.

(2) Any application to restore the company to the Register should be made to the court and not to the Tribunal. Information on how to do this is available on the Companies House website.

(3) If the First Respondent company is restored to the Register, then the claimants (or any of them) may make an application to the tribunal to lift the stay and to continue the proceedings against the First Respondent.

(4) Any claimant who does not wish their complaints against the First Respondent to be struck out must write to the tribunal by 30 June 2021, to confirm that an application to have the company restored to the Register has been made, and to give full details of the status of that application, and the stay might be extended if more time is required to restore the company to the Register.

(5) The stay is due to last until 30 June 2021, if any claimant has not written to the tribunal by that date, as mentioned in paragraphs 3 or 4, then their claim may be struck on the grounds that it has not been actively pursued.

(6) The findings of fact below are made only for the purpose of determining whether Dr Datoo was the employer at the relevant time and are not binding on the First Respondent.

REASONS

Introduction

1. The three claimants each worked in a GP surgery which closed down. There is a dispute about whether they were employed by the First Respondent (a company) or by an individual, Dr Datoo. Dr Datoo died after proceedings had commenced and therefore the claims against the Second Respondent are against his estate.

The Claims

2. The First Claimant had claimed unfair dismissal, but had sent a letter withdrawing that claim prior to this hearing. She agreed that I should dismiss the unfair dismissal claim. Her other claims were for failure to pay salary in January 2018 and up to the effective date of termination, failure to pay employer's pension contributions in December 2017 and up to the effective date of termination, failure to pay in lieu of unused holiday entitlement, failure to give notice (being 12 weeks' statutory minimum period), failure to pay statutory redundancy pay.

3. The Second Claimant did not claim unfair dismissal or for pension contributions. She claimed one month's arrears of salary (January 2018), notice pay (alleged to be 12 weeks' based on contract) and failure to pay in lieu of unused holiday entitlement.

4. The Third Claimant had claimed unfair dismissal, but had withdrawn that claim, and judgment dismissing it had been sent to the parties on 23 August 2019. Her other claims were for failure to pay salary in January 2018, failure to pay employer's pension contributions in January 2018, failure to pay in lieu of unused holiday entitlement, failure to give notice (alleging 12 weeks' entitlement, so more than the statutory minimum period), failure to pay statutory redundancy pay.

The Issues

5. For convenience, I decided that I would take the issue of the identity of the employer as a preliminary issue. Thus, as a preliminary issue:

   5.1 for each Claimant, was that Claimant employed by Dr Datoo (as an individual) at any part of the relevant time?

   [The relevant times being any date between December 2017 and the effective date of termination in the case of the First Claimant; and any date in the month of January 2018 in the case of the other two claimants.]

6. If so, then evidence and submissions in relation to remedy would be dealt with after the decision on the preliminary issue.

The Hearing and the Evidence

7. Day 1 was a hybrid hearing. I was present in the hearing centre, as was Ms Mathur ("the First Claimant") and counsel for Mrs Datoo (the Second Respondent). Ms Mukerjee (the Second Claimant) and Mrs Datoo were able to participate by video link to the hearing room (although, in Ms Mukerjee's case, there was a slight delay in having this set up). Ms Desai (the Third Claimant) did not attend, and she had supplied Ms Mathur with a letter stating that she was content for the hearing to proceed in her absence and authorising Ms Mathur to represent her.

8. On Day 1, it was noted that the First Respondent is a company which has been dissolved and that, for that reason, proceedings against that company could not continue unless and until that company is restored to the register. I therefore stayed proceedings against the First Respondent in order to give the claimants an opportunity to apply to restore the company to the register. The two claimants who were present each told me that they had not received any notification of the potential dissolution of the company. The Second Respondent's counsel did not have any instructions as to whether (a) the Second Respondent was still a director of the company at the time of the application to dissolve it had been made and/or (b) whether the Second Respondent had any information about whether appropriate notice had been given to creditors and potential creditors of the First Respondent, prior to the application to have it dissolved.

9. It was agreed by the parties who were present on Day 1 that the hearing could proceed in relation to the claims against the Second Respondent. I agreed to that

course of action because the outcome would potentially be that if the Claimants were able to prove that they were employed by Dr Datoo then claims against First Respondent would potentially fall away in any event, whereas if they failed to prove that Dr Datoo had been their employer at any relevant time, then claims against the Second Respondent could be dismissed. I converted the remainder of the hearing to a fully remote hearing, for mutual convenience and to give the Third Claimant an opportunity to participate. No-one sought a postponement and the Second Respondent wished to have the opportunity to cross-examine the Third Claimant. I took the remainder of Day 1 for pre-reading.

10. Day 2 proceeded fully remotely by video (Cloud Video Platform – CVP). In addition to the persons who participated on Day 1, Ms Desai, the Third Claimant, was also able to attend. She was temporarily in India for family reasons and because pandemic restrictions meant that it was impossible for her to be back in UK for the hearing. She did not seek a postponement and confirmed that, as per her letter, she would have been content for the hearing to proceed in her absence with Ms Mathur representing her. Ms Desai also agreed to the hearing proceeding against the Second Respondent only, notwithstanding the stay against the First Respondent. Ms Desai wished to be represented by Ms Mathur, and I agreed to that. Ms Desai was present for all of the evidence and all of the submissions, but, because of the time difference, she stated that she would not be able to rejoin for the oral judgment and reasons. I therefore stated that I would supply written reasons for the judgment.

11. I had a bundle of approximately 348 electronic pages, together with four extra pages being a document submitted to me and the Second Respondent yesterday by Ms Mathur. I also had some emails submitted to me on Day 2 by Ms Mukerjee.

12. I heard from four witnesses: each of the Claimants and Mrs Datoo. Each witness had prepared a written witness statement (and also a supplementary statement in the case of Ms Mathur) and answered questions from the other side and from me.

The findings of fact

13. A company Called Watford Way, Medical Centre Ltd was incorporated in February 2011. That company was owned and operated by Dr Datoo. It is the First Respondent.

14. Dr Datoo ran a GP's surgery, in which he was effectively the only practitioner. He had operated this surgery since at least the 1980s.

15. In around 1988, the Ms Mathur (the First Claimant) became an employee of the practice and she had a contract of employment with Dr Datoo, the individual.

16. In 2009, the other claimants, Ms Mukerjee and Ms Desai, each became employees of the practice. They also each had contracts of employment with Dr Datoo personally.

17. In around 2009, or thereabouts, Dr Datoo began referring to the practice as "Watford Way Medical Centre". Ms Mathur believes that this is because all GPs were advised by the NHS to give their surgeries a particular name (rather than just

use the doctor's/doctors' own name/names) at around this time. None of the claimants believed that the commencement of the use of this name for the surgery had any effect on the identity of their employer.

18. In 2016, there was some induction. Each of the claimants received a document which on the front page referred to Watford Way Medical Centre Ltd. On the first inside page - although there was a small typing mistake in that it said "Warford" rather than "Watford" - it said that this was the policy and on induction and foundation training for "Watford Way Medical Centre Ltd's new staff".

    18.1 As mentioned above, none of the claimants were "new" to working in the surgery as of 2016.

    18.2 The first claimant signed the document on 1 January 2016 to show that she had received the items on the checklist being the policies and procedures of the limited company. Ms Desai signed her similar document in January 2016, and Mrs Mukerjee signed hers in November 2016.

19. None of the claimants took this to either be a change of employer taking place at same time as induction or at the time that they signed the document. None of them took the induction, or the documents supplied to them as part of the induction, as notification that a change of employer had already taken place some time prior to the induction. None of them suspected that a change of employer had taken place. In particular – entirely reasonably - they saw no significance in the word "Limited" or "Ltd" being added to the name of the surgery in the documents which they received. They continued to believe that their employer was Dr Datoo (the individual) and that he simply used "Watford Way Medical Centre" as a name for the business which he ran.

20. From the start of employment, Ms Desai and Ms Mukerjee were always paid by transfer straight into their bank accounts. On the balance of probabilities, I find that the bank transfers were, at the start of their respective periods of employment, from a business bank account operated by Dr Datoo, the individual. There is no direct evidence on the point, but he was the employer at this time, and I infer that he used his own bank account. If, in fact, he used a third party payroll provider at the time to make payments, then that makes no difference to the outcome below.

21. Ms Mathur originally was paid by cheque, but starting some time (well) before 2009 this had ceased and she was paid by bank transfer into her bank account. She cannot recall the name on the cheques. However, it cannot have been the First Respondent, since that company was not incorporated until 2011. On the balance of probabilities, I find that the cheques were from a business bank account operated by Dr Datoo, the individual, and that when this arrangement changed, initially, the bank transfers were from such an account. There is no direct evidence on the point, but he was the employer at this time.

22. The evidence proves that from no later than 30 December 2016, the bank account which was making the salary payments to all claimants was the bank account of the First Respondent. This bank account was also making payments to Dr Datoo which were described on the bank statements as "wages".

23. By this stage, the claimants were also receiving payslips and P60s which named the First Respondent as their employer.

24. Although the word “Limited” / “Ltd was stated in the payslips and P60s (and is likely to also have appeared in their bank statements as the sender of salary payments), none of the claimants though that was significant or that it gave any reason to ask Dr Datoo if the identity of the employer had changed. When effecting these changes to their pay arrangements, Dr Datoo did not state to any of the claimants that the First Respondent was their employer.

25. Each of the claimants was issued with a new contract and there is a dispute about what employer name was written in these contracts when they were signed.

    25.1 Ms Mathur typed all of the documents. She is confident that the employer named in each document typed by her was Dr Datoo as an individual. She says that that was true in her case, and also in Mrs Mukerjee's and also in Mrs Desai's.

    25.2 The documents that have been included in the bundle prepared by the Second Respondent’s representatives give the name “Watford Way Medical Centre” in each case. It is notable that the documents in the bundle do not give the precise name of the First Respondent: ie the word “Limited” or “Ltd” is not included.

    25.3 On Day 1, Ms Mathur handed up a 4 page document which was identical to the corresponding document in the bundle other than the front page. A comparison of the handwritten signatures (and specifically the location of the signatures on the page in comparison to the typed part of the document) on the fourth page satisfies me that this is not a case of two different documents. Rather one is the true version signed by Ms Mathur and Dr Datoo on 1 January 2016, and the other is a doctored document in which the first page has been changed at a later date.

    25.4 The evidence proves that Ms Mathur had long since sent this document to the Second Respondent’s solicitors. It should have been included in the bundle prepared by them, especially given that Ms Mathur produced a supplementary statement highlighting the omission. However, since Ms Mathur was able to provide her version of the document to me on Day 1, nothing turns on this omission.

    25.5 In the bundle, there was an employment contract for Ms Mukerjee signed by her and Dr Datoo on 2 April 2017 which referred to “Watford Way Medical Centre” as employer. She stated in her evidence that she was in a similar position to Ms Mathur. Ie that she possessed a contract naming Dr Datoo as employer, which was the same at the one in the bundle, other than that one change, and that she had sent it to the Second Respondent’s solicitors and that they had left it out the bundle. After taking instructions, Ms Nicholls informed me and the claimants that the Second Respondent’s solictors accepted that they had received a document from Ms Mukerjee, but they

disputed that the version she supplied contained any handwritten signatures. I directed Ms Mukerjee to forward to me (and the other parties) the original email – with attachments – by which she believed that she had disclosed the signed version. Although Ms Mukerjee did send several emails, none of them were the item which I had requested, and none of them included a copy of the signed version of the contract which she had described.

25.6 In the bundle, there was an employment contract for Ms Desai signed by her and Dr Datoo on 1 April 2015 which referred to "Watford Way Medical Centre" as employer. During the discussions on Day 1, Ms Mathur suggested that when looking through Ms Desai's papers (in order to prepare to represent Ms Desai), she had come to the view that Ms Desai was in an identical position to her. ie possessing a contract naming Dr Datoo as employer, which was the same at the one in the bundle, other than that one change. I did not see this document and, in her evidence, Ms Desai did not dispute the genuineness of the version in the bundle. [In fairness to Ms Desai and Ms Mathur, I acknowledge that she was having to attempt to read the bundle on a screen. In fairness, to the Second Respondent, I acknowledge that Ms Desai's claim form – unlike that of the other two claimants – named the First Respondent as her alleged employer].

25.7 I am entirely satisfied by Ms Mathur's evidence. She is telling the truth and she is remembering accurately. The documents that she originally produced each respectively named Dr Datoo as employer for each claimant. Ms Mathur also remembers accurately that she personally only signed the version which she had produced; that is the one which named Dr Datoo and **not** "Watford Way Medical Centre" as employer. In other words, in Ms Mathur's case she has proven to my satisfaction that the correct version of what she and Dr Datoo signed on 1 January 2016 is the document she handed to me on Day 1, and – therefore – she has proved that the version in the bundle is not what she signed on 1 January 2016 (or at all).

25.8 However, Ms Mathur's evidence does not negate the possibility that Ms Desai and/or Ms Mukerjee signed the respective versions of the documents as per the bundle. Someone else could have changed the documents after Ms Mathur printed them and before they were signed. Even to the extent that she – as practice manager – might have set eyes on them after they had been signed, I am not convinced that she would necessarily have noticed a small change (small in the number of words, that is, not in the legal significance) on just one page. In any event, Ms Desai did not dispute the accuracy of the document relating to her in the bundle in her evidence, and neither Ms Mukerjee or Ms Desai supplied me with a rival version or proved that they had sent a rival version to the respondents during this litigation. Therefore, my finding – on the balance of probabilities - is that the versions in the bundle are what Ms Desai and Ms Mukerjee signed.

26. So, to sum up, Dr Datoo and Ms Mathur signed a document on 1 January 2016 (typed by her) which named him as the employer and reflected a change in hours. Whereas Ms Mukerjee (in April 2017) and Ms Desai (in April 2015) each signed a document which named "Watford Way Medical Centre" as their employer. This

was the practice name that had been used since before, or shortly after, the commencement of their employment, and neither of them thought that, by signing the contract they were agreeing to a change of employer. They each continued to believe that their employer was Dr Datoo and that he, as an individual, operated the surgery known as Watford Way Medical Centre.

27. The dispute about different versions of documents does not cause me to doubt the credibility of any of the 4 witnesses. My finding is that Ms Mathur typed the documents naming Dr Datoo as employer, and at some later stage, somebody other than Ms Mathur produced other documents with the name Watford Way, Medical Centre. I do not know who that was or when they did it. Although each of Ms Mukerjee and Ms Desai gave evidence to me, which was entirely truthful, I am satisfied that neither of them have a clear recollection as to what the front page of the contract said at the time that they signed. It was a long time ago, and – at the time – it did not seem significant to them that (as I have found) "Watford Way Medical Centre" (which they knew to be the surgery name) was stated, rather than "Dr Datoo".

28. All of the claimants and Ms Datoo have been honest and above board in relation to the handling of the documents and the submissions of those documents to the tribunal. There is a difference of opinion - which cannot be resolved given the absence of Dr Datoo – as to who made the changes (to the documents which Ms Mathur produced) or why. Nor can it be explained – in the absence of Dr Datoo – as to why a false version of the document signed by Ms Mathur came into existence.

29. The financial statements for the First Respondent for the year to 31 August 2018 – approved by Ms Datoo at a directors' meeting on 29 August 2019 – were in the bundle. There were also drafts dated 5 March 2020 for the year ending 31 August 2019. Both of these documents were produced after the litigation began. I was not provided with any explanation for why only the draft version of the more recent accounts was in the bundle, even though the company has now been dissolved (and nor, as mentioned above, was I given an explanation about why the company was dissolved without notice to the claimants, or by whom). The accounts for the year to 31 August 2018 show that from some date earlier than 1 March 2017, the First Respondent had been trading as a medical practice. I will explain my inferences from these accounts (taken together with the payslips, P60s and bank statements) in my analysis below.

The Law

Common Law

30. I have taken the following case law, into account. I have relied in particular on *Gabriel v Peninsula Business Services Ltd and anor EAT 0190/11*, which is an EAT case which included the EAT's comments about the continuing relevance of House of Lords decision in *Nokes v Doncaster Amalgamated Collieries Ltd 1940 AC 1014* and also noted the remarks of the Court of Appeal in *Denham v Midland Employers Mutual Assurance [1955] 2 Q.B. 437, [1955] 5 WLUK 89*. The effect of the authorities just mentioned is that, at common law, no contract of employment

can be transferred from one employer to the other without the employee's consent. If express consent is relied upon, then the consent would have to be clear and unambiguous; however, in appropriate circumstances, then the court might find that there was implied consent, based on the employee's conduct.

31. The mere fact alone that the organisation which handles payroll changes does not mean that there has been in a change of employer. Thus an employee's continued willingness to accept the payments does not mean that the employee's conduct implies consented to a change of employer.

32. For there to be binding consent (whether express or implied), the employee would have to be aware that there was something to consent to. In other words, the employee would have to be aware that (there was a proposal that) one person was going to cease to be their employer and a different person was going to start being their employer. Neither the old employer (Dr Datoo, in this case) nor the proposed new employer (the company, in this case) can unilaterally novate the employee's contract from one employer to the other. For the employee's conduct to amount to implied consent – at the very least - the employee would need to be aware that the respective employers were purporting that there had been a change, and/or that turning up for work after a certain date showed willingness to be an employee of the new employer.

TUPE

33. The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") define a "relevant transfer".

34. As per Regulation 3(1)(a), one type of relevant transfer occurs when there is a "transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity".

35. As per Regulation 3(2)(b), *"economic entity"* means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. As per Regulation 3(4)(a), and in accordance with the European Court of Justice decision in *Dr Sophie Redmond Stichting v Bartol and ors 1992 IRLR 366,* the concept of "economic entity" does not require that the activities in question are pursued in order to make a profit.

36. As part and parcel of identifying whether there has been a "relevant transfer" within the definition contained in Regulation 3(1)(a), it is necessary to be able to identify both the Transferor and Transferee.

37. A "relevant transfer" (if any) occurs on a specific date. In *Celtec Ltd v Astley and ors 2005 ICR 1409* the European Court of Justice specified that the date of transfer as per Article 3(1) of the Acquired Rights Directive is a particular point in time and is the date (if any) on which responsibility for carrying on the business of the undertaking moves from the Transferor to the Transferee.

38. When there is a relevant transfer, then (as per Regulation 4) the contracts of

employment transfer from the Transferor or to the Transferee. Employees have a right to object, which, if exercised, means that they do not become employees of the Transferee. However, objection does not mean that they remain employed by the Transferor, but just means that their contract of employment comes to an end as of the date of the relevant transfer. Subject to the employees right to object, the transfer of contracts of employment happens automatically by operation of law.

39. A transfer of an employment contract, by virtue of Regulation 4 of TUPE, can happen even if the employee in question does not know about the "relevant transfer". This was established by the court by the Employment Appeal Tribunal in *Secretary of State for Trade and Industry v Cook ([1997] I.C.R. 288).* Amongst the reasons given by the court was that, if the situation were otherwise, then the purpose of TUPE could be frustrated. In other words, unscrupulous employers seeking to avoid the consequences of TUPE could simply not tell the employees about the transfer.

40. Regulation 4(3) acknowledges that "where the transfer is effected by a series of two or more transactions", then the definition of an employee who is "employed by the transferor and assigned to the organised grouping of resources" immediately before the transfer applies to employees who are so employed "immediately before any of those transactions".

Analysis and Conclusions

41. Applying the law to the facts of this case, I am satisfied that there was not any express or implied consent given by any of the three claimants. They did not agree to have their employment contracts novated to the First Respondent and they did not give any agreement to becoming employees of the First Respondent. Indeed, they were not even informed.

42. However, for the following reasons, I am satisfied that there was a relevant transfer which took place on a specific date, and that date was either in 2016 or earlier.

    42.1 Even though it is not possible to be certain of the exact date of the transfer, it is possible to be sure that there was a transfer of the responsibility for the surgery from Dr Datoo to the limited company. The evidence of the payslips, the P60s and the accounts show that – by no later than 2016 – the limited company was responsible for operating the surgery, including paying the salary of Dr Datoo and each of the claimants.

    42.2 The evidence of the new contracts with each of the claimants is neutral. However, the evidence of the induction documents shows that, as far as the limited company was concerned (and also as far as Dr Datoo - the director and owner of the company – was concerned), the limited company had become the employer of the staff.

    42.3 There was, at some date in 2016 or earlier, a decision made by Dr Datoo, and implemented by him, to transfer the assets of, and the operation of, the surgery from his control to the control of another person, namely the First Respondent, and, correspondingly, there was a decision made to represent to Companies

House that the assets and liabilities belonged to the First Respondent.

42.4 The surgery was an economic entity. All of the surgery's business was transferred from Dr Datoo to the limited company. It was an economic entity which retained its identity before and after the transfer from Dr Datoo to the First Respondent: the patients were the same; the staff were the same; the premises were the same; the surgery name was the same.

43. For whatever reason, neither Dr Datoo nor the company decided to be clear and transparent with the claimants. Documents were issued to the claimants which implied that the First Respondent was their employer; however, neither the First Respondent nor Dr Datoo expressly stated the employer was going to change, or that it had changed. The Claimants were not informed that the use of "Watford Way Medical Centre Ltd" showed that a new legal person was now involved, and that the surgery was no longer being operated by Dr Datoo (as an individual human being using the business name "Watford Way Medical Centre") but was operated by a different entity. However, the fact is that a transfer did take place and it follows from that that – as per Regulation 4, and in accordance with the decision in *Cook* – the employment contracts transferred, meaning that Dr Datoo ceased to be the employer by no later than 30 December 2016 (which is the date of the earliest evidence that the company was paying employees, including Dr Datoo and all the claimants).

44. Since Dr Datoo had ceased to be the employer by no later than December 2016, he was not the employer at the relevant time for any of the claims brought by the claimants. In each case, therefore, the claimant's complaints against the Second Respondent are dismissed. As mentioned above, each claimant's claim against the First Respondent is stayed.

Employment Judge Quill

Date 1.2.2021

JUDGMENT & REASONS SENT TO THE PARTIES ON
23/02/2021

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T Henry-Yeo

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FOR EMPLOYMENT TRIBUNALS