EMPLOYMENT TRIBUNALS

Claimants: **(1) Mrs Marie Fletcher**
(2) Mrs Frances Morrison

Respondent: **Dr Bright Ighorodje**

Heard at: **East London Hearing Centre**

On: **Thursday 22 August 2019**

Before: **Employment Judge Tobin (sitting alone)**

Representation

Claimants: **Mr J Grocott (FRU)**
Respondent: **In person**

JUDGMENT having been sent to the parties on 23 October 2019 and reasons having been requested in accordance with Rule 62(3) of Schedule 1, The Employment Tribunal Rules of Procedure of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013.

REASONS

The claims and the response

1. The claims in these consolidated proceedings surrounded an alleged shortfall in redundancy payments and the contended non-payment of notice pay (i.e. a breach of contract or wrongful dismissal).

2. The Claim Forms for the first claimant and second claimants were issued on 13 March 2019 and were in substantially the same terms. The first claimant was employed by Dr Malcolm Flasz at the Cecil Avenue Surgery as a receptionist from 1 May 2003. The second claimant also worked as a receptionist at the surgery from 18 October 2005. The claimants contended that the respondent joined the surgery as a partner on 1 April 2013 and following the retirement of Dr Flasz on 1 April 2018, the respondent then became the sole employer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). The claimant contended that in September 2018 they were called to a meeting and informed by

the respondent that the surgery would be closing, with effect from 31 December 2018. The claimant contended that they were not given any information regarding redundancy or notice. Both claimants contended that on 31 December 2018 they were told by the respondent that they would not be paid the full amount of the redundancy payments due to them as the respondent had been the sole owner for 9 months only and he was not responsible for the whole amount of the redundancy. He directed the claimants to the former GP, Dr Flasz, for their outstanding redundancy payments. On 4 January 2019 the respondent paid redundancy payments of £1,000.53 and £1,143.08 to the first claimant and the second claimant respectively. The claimants claimed a shortfall in their redundancy pay plus their notice pay.

3. The Response was received by the Employment Tribunal on 19 April 2019. The grounds of resistance stated that all staff members were formally informed, in a practice meeting, of the surgery's closure and the date that all operations would stop and redundancy. The respondent said that he helped the second respondent get a job in his colleague's surgery where she is currently working and that the first respondent opted not to work. The grounds of resistance refer to a letter to the first respondent, which reiterated that the practice staff were informed, in a meeting in September 2018 that the surgery was closing and that the last day of operation was 31 December 2018. The letter also referred to the first claimant's redundancy payment been worked out using an official online calculator and that the respondent also added over £200 as an ex gratia payment. The respondent finally referred to the partnership starting with £0 and that there was no transfer of money or valuables. The respondent said that he was busy with the surgery and clinical work and that his former partner was doing management duties including payroll and that the claimant should contact him for payment covering the time that they worked for him as he was the claimant's sole employer before the partnership started in April 2013.

The hearing

4. The claimants attended the hearing and gave evidence. Both claimants provided signed statements, dated 22 August 2019, which they confirmed in evidence. The claimants were cross-examined by the respondent and I (i.e. the Employment Judge) asked a number of questions for clarification.

5. The respondent provided a short statement for both claims in substantially the same terms, which he signed and dated before giving his evidence. The respondent also produced an additional statement, marked "R1" and 2 other documents: a letter from the first claimant, dated 28 December 2018 and a single-page printout from Gov.UK in respect of redundancy rights and notice periods. The respondent was cross-examined by Mr Grocott and (as was the case with the claimants) I asked questions to clarify matters.

6. I read all of the statements before commencing the hearing. The parties also provided me with a joint Hearing Bundle, which ran to 92 pages, and which all parties referred to during the course of their evidence.

The issues to be determined

7. At the outset of the hearing, I went through the claims and identified the issues to be determined.

8. There was no dispute that the claims had been made in time, that the claimants were employees, or that (in respect of the claims for redundancy payment) the claimants had 2 years continuous employment. We discussed the figures and calculations proffered by the claimants in respect of the joint Updated Schedule of Loss. The respondent said that the redundancy pay calculation was agreed and that he did not dispute the hours, or calculation in respect of the wrongful dismissal/payment in lieu of notice claims.

9. So far as the issues in dispute, I explained the legal position and identified the issues to determine as follows:

   Redundancy payment

   a. Were the claimants employed by the respondent at the time of their dismissal?
   b. The respondent accepted that the claimants have been dismissed. The reason for dismissal was the respondent ceasing to carry on business.
   c. The respondent did not contend that he had offered the claimants suitable alternative employment.
   d. Was the respondent responsible for the full amount of the redundancy payment, i.e. from the date that the employment commenced?

   The claims for notice pay

   a. In addition to the issues identified above, what was the notice period that the claimants were entitled to?
   b. What is the shortfall in respect of notice pay?

The Law

10. The statutory definition of redundancy is technical. Broadly speaking redundancy occurs in 3 situations: (1) where there is a closure or cessation of the business; (2) where there is a closure of the employees' particular workplace; and (3) where there is a cessation or diminution in the requirements for employees to do work of a particular kind. The relevant statutory definition is under section 139 Employment Rights Act 1996 ("ERA") as follows:

> (1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to–
>
> (a) the fact that his employer has ceased or intends to cease –
>
> (i) to carry on the business for the purposes of which the employee was employed by him, or
> (ii) to carry on that business in the place where the employee was so employed, or…
>
> (b) the fact that the requirements of that business –
>
> (i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminished.

…

(6) In subsection (1) "cease" and "diminish" mean cease and diminish either permanently or temporarily and for whatever reason.

11. The amount of statutory redundancy pay an employee is entitled to depends upon her age, her length of service and her pay. According to s162(2) ERA, an employee is entitled to:

- ½ weeks' pay for each completed year of service below the age of 22;
- 1 weeks' pay for each completed year of service between the ages of 22 and 40; and
- 1½ weeks' pay for each completed year of service after reaching the age of 41.

12. Where an employer has terminated the contract of an employee (or worker) with no notice or short notice, the claimants will have a claim for damages against their employer. This breach of contract claim is called *wrongful dismissal*. The term is confusing as the contract claim has nothing to do with the wrongfulness or unreasonableness of the dismissal itself; it merely relates to whether or not the correct notice period has been given or if there had been any shortfall in a payment in lieu of notice.

13. If a contract of employment contains an express term stating the period of notice to be given by either party, then a party giving short notice to terminate the employment will be in breach of contract. If an expressly agreed period of notice is shorter than the statutory minimum period required by s86 ERA, then the longer statutory minimum period must be given. The statutory minimum period of notice required to be given by an employer under s86(1) ERA is: 1-weeks' notice for continuous employment between 1 month and 2 years; and 1-weeks' notice for each full years' service, thereafter, up to a maximum of 12-weeks' notice.

14. For a notice of dismissal to be valid, it must either specify the date of the termination of the employment, or contain material from which the date of termination can be positively ascertained, e.g. "your employment will end the day after your last annual leave day in August 2019". Mere intention to give notice or a statement of intention does not amount to a valid notice of dismissal. In *Burton Group Limited v Smith, 1977 IRLR 351*, the Employment Appeals Tribunal held that letters stating that a dismissal for redundancy would take effect "no later than 26th December" were insufficiently certain to constitute notice of dismissal, even though the dismissals did actually take place on 26 September.

15. A notice of dismissal must be clear and unequivocal, sufficient to bring the employment to an end. It must be irrefutable such that the agreement of both parties is required to alter the dismissal. Both parties must be able to rely upon a notice of dismissal, so inferring that an employee's employment will come to an end on a particular date because the business may close falls short in providing the

level of certainty required. Unless the contract of employment specifies otherwise, notice of dismissal does not need to be put in writing; however, oral notices are usually expressed in an ambiguous way that does not reflect a clear intention to bring the employment to an end. It is therefore prudent for a notice terminating an employee is employment to be in writing so that this satisfies the requirement that the notice is crystal clear and shows beyond doubt that it is intended to terminate the contract.

16. In respect of the claimant's employment with Dr Flasz: at common law, the transfer of an undertaking, for example a medical practice, by one employer to another automatically terminated the employees' contracts of employment, i.e. there was a dismissal. In this situation the reason for the dismissal will generally be redundancy (as the employer's requirements for employees to do work of a particular kind has ceased or diminished). Should the undertakings new owner require the employees' services, he will offer a new contract of employment, and can do so on whatever terms he likes. Depending on the timing of the dismissal, the employee may still retain continuity of employment in this situation (see s218(2) ERA and *Clark & Tokely Ltd (t/a Spellbrook) v Oakes [1998] 4 All ER 353*. However, TUPE altered the legal position by providing that where there is a "relevant transfer" there will not be an automatic termination of the contracts of employment. There will not be any dismissals simply because there is a transfer. In that situation, the employees will transfer with the undertaking and will be employed by the new owner (the transferee) under their original contracts of employment. This overrides the common law position. If there are any dismissals either before or after the transfer, then if those dismissals are connected with the transfer, they will be automatically unfair unless, effectively, there is a genuine redundancy situation.

17. Regulation 3 of TUPE includes business transfers: Reg 3(1)(a). Under Regulation 3(1)(a), a business transfer 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*". Regulation 3(2) defines "*economic entity"* as "*an organised grouping of resources which has the objective of pursuing an economic activity, whether or not the activity is central or ancillary*".

18. Regulation 4(2)(a) states that on completion of a relevant transfer all of the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred to the transferee. This applies to contractual liabilities, such as notice, and individual statutory rights, such as an accrued right to redundancy pay.

Findings of fact

19. I made the following findings of fact. I did not resolve every dispute between the parties merely those that would assist me in determining the issues in dispute as set out above. Where I considered it appropriate, I set out our reasons for making such findings. In making my findings of fact, I placed particular weight on contemporaneous or near-contemporaneous documents and correspondence as a more accurate record of events. I also drew inferences from the non-production of contemporaneous correspondence or documents, in circumstances where such contemporaneous documents should have been made. The statements of the

parties and witnesses were, of course, central; however, I applied a degree of caution as these statements were written sometime after the events in question and through the prism of either advancing or defending the appropriate claims.

20. The first claimant (i.e. Mrs Fletcher) started working for Dr Malcolm Flasz on 1 May 2003 as a receptionist at his practice known as "Cecil Avenue Surgery". This is an economic entity as defined by Regulation 3(2) TUPE. The first claimant referred to a contract of employment which was subsequently signed by Dr Flasz some 2 years and 3 months after her employment commenced [Hearing Bundle pages 48-51]. This contract identified the "Date of commencement of Employment" as 1st May 2003.

21. The second claimant commenced work for Dr M H Flasz, Cecil Avenue Surgery on 18 October 2005. The second claimant provided a copy of her unsigned and undated contract of employment [page 52-55]. She could not remember when she signed her contract of employment, but I accepted this document as an accurate record of her employment and her terms and conditions of work. The contract identified the "Date of commencement of Employment" as 18th October 2005.

22. Both claimants had a notice period of 4 weeks in their contracts of employment, which is supplanted by s86 ERA, as stated above.

23. On 1 April 2013 the practice became a partnership between Dr Flasz and the respondent. The first claimant said that the respondent had already been working at the practice before this date, which I accept. There was no formal notification to patients, the patient lists did not change, the buildings remained the same, as did the surgery equipment and furniture. The claimant's said that the front desk staff remained the same, which I also accept.

24. The second claimant said that she received a P60 and a P45 from Dr Flasz sometime around 1 April 2013 [pp56 and 57]. The second claimant referred to a post-it note fixed to her P60 as follows:

> P60 – end of year certificate
> P45 – do not be alarmed!
> This is technical, because I am not the employer now, the partnership is. Your employment rights still go back to your original start date so nothing has changed.
> Malcolm

25. In evidence, the first claimant said that she received a P60 at the same time with a note in the same terms from Dr Flasz. I accept this evidence.

26. Both claimants said that they did not receive a new contract of employment and that their terms of employment remained the same and they carried on work as normal, although over the years that followed the first claimant changed her hours of working.

27. On 1 April 2018, Dr Flasz retired and ceased to become a partner in the practice. There was no formal notification of this change to the patients, the patient lists did not change, the buildings and equipment remained the same, as did the front office staff. The respondent continued as a single-handed GP.

28. Both claimants referred to rumours that the practice would be closing because the Care Quality Commission was making lots of demands for changes at the surgery and the respondent was getting fed up with the rigours of running a single-handed surgery. At a regular staff meeting, in September 2018, the respondent informed both claimants that the surgery would close on 31 December 2018. The second respondent took minutes of this meeting [p58]. The respondent did not mention redundancy or notice or specify what the claimants last working day would be. During this meeting, the respondent informed the claimants that another receptionist, Mrs Ward, would be leaving the practice on 19 October 2019 and that both claimants were required to cover Mrs Ward's hours and duties between them. The first claimant said that there was some tension between her and the respondent as she asked him at least 4 times for a letter to confirm the redundancy situation and the respondent refused to discuss this.

29. The second claimant said informing patients and moving patients to other surgeries was much more time consuming than the respondent anticipated. The first claimant contended that there was no certainty as to when their employment would come to an end. The first respondent said that she assumed some or all of the staff would be working past the surgery closure date as the practice still needed clearing out, computers needed to be disposed of, the fridge was full of vaccines and furniture needed moving out. There were files on this shelves that needed to be destroyed. None of these tasks and other administrative duties were completed by 31 December 2018.

30. Indeed, the second respondent was approached by another GP who offered her work but because of the uncertainty of when she would be required, the claimant deferred starting this employment until later in January 2019.

31. On 28 December 2018 the first claimant wrote to the respondent in respect of both her statutory redundancy pay and her notice period:

> I am writing further to our verbal conversation regarding redundancy and understand that my contract is due to come to an end 31/12/2018.
> …
> To date, I have not been provided with any written notice of my pending redundancy, which I should have received no later than 30/09/2018. Therefore, I am entitled to 12 weeks payment of written notice from the date I am provided with the letter of redundancy in lieu.

32. I quizzed the first claimant about why she stated that she understood her contract would be coming to an end. The first claimant said that by 28 December 2018, she "presumed" her contract would end on 31 December 2018. The first claimant said in evidence that there was little doubt that the surgery closure meant that her employment would come to an end, but she was never sure when her last day of work would be. Initially, the claimants thought that there might be a successor GP appointed for the Cecil Avenue Surgery, but this was dispelled as time went on. The first claimant said that she was upset by the respondent's behaviour in refusing her requests to confirm when the redundancies would take place or even talk about it. There was much work to be done in winding down the practice and, it was obvious to the claimants, the practice manager and the respondent that all of the work would not be completed by 31 December 2018. The first respondent said she felt messed around by not knowing her end date so relations with the respondent gradually deteriorated.

33. On 31 December 2018, at around 7pm, the first claimant finally got some clarity from the respondent in respect of her questions. In answer to the first claimant's further enquiry, the respondent finally gave the first claimant a "Letter of Redundancy" from Cecil Avenue Surgery. This letter was brief:

> Dear Mrs Fletcher
> Further to the discussions at a practice meeting in September 2018 and other conversations, we confirm that the practice will end all its operations by 31/12/2018.
> We shall continue our discussions with you about your redundancy.
> Meanwhile, we thank you very much for your great service and support for the practice over the years.
> Kind regards
> Practice Management

34. Whilst this letter was not in itself an express notification of dismissal, the first claimant said that the respondent also gave her a P45 and conveyed that her employment was at an end. He said that he would pay her up to £1,000 as goodwill so this claimant now concluded that her employment had come to an end.

35. Following the first claimant's dismissal, the second claimant went to see the respondent to asking what was going on. The respondent gave her a P45 and said that he would make a small ex gratia payment for goodwill. The second respondent was also upset that she was not paid her full entitlement in respect of redundancy pay and notice and told the respondent. The respondent asked the second claimant if she would be working the following week and, as she was upset with the way that the respondent had treated her, she said she would not be working past that day, i.e. 31 December 2018.

36. The Cecil Avenue Surgery closed on 31 December 2018. The practice manager, Mr Ashraff continued working past this date, although the respondent said that he could not remember for how long in total.

37. The claimants' payslips from at least June 2018 and the claimant's final P45s quote their employer as "Cecil Avenue Surgery".

38. The letter quoted in the grounds of resistance to the first respondent was sent on 12 January 2019, which was after the claimants' employment had ended.

Determination

39. The dispute in respect of this claim is quite narrow. The respondent accepted that the claimants were employed by him/the practice at the time of their dismissal.

40. The business entity that was the Cecil Avenue Surgery went from a sole practitioner to a partnership in April 2013 and from a partnership to a sole practitioner in April 2018. The transfer of money or other financial arrangements between the Dr Flasz and Dr Ighorodje does not negate the transfer of a business entity. At no time were the claimants advised that their employment continuity was broken, indeed, in 2013 Dr Flasz advised the claimants to the contrary. The claimant's terms and conditions remained unchanged through the business transfers of 2013 and 2018, as did the work they did. There was no change to the patient lists, the physical location or their physical workplace. The claimants were not given any redundancy payments in 2013 or 2018, nor were they given any notice of dismissal. The P45s issued in 2013 had no legal effect because, as a

matter of fact the claimants' employment did not come to an end. Furthermore, this contrasted with Regulation 4(2) of TUPE, which preserved their terms and conditions of employment. Most importantly, the claimant's continuity of employment was not broken because Regulation 4(2) specifically preserved the continuity of their employment. The Cecil Avenue Surgery was an economic entity that retained its identity from, at least, 2003 to 31 December 2018.

41. The claimants were due redundancy payments as of 31 December 2018. The respondent did not think that, as the dismissing employer, he should pay the redundancy payment for the full period of the claimants' whole employment. However, s162 ERA set out the statutory redundancy calculation, and that is the redundancy payments that were due to the claimants. The respondent's argument that he should pay less, and Dr Flasz should pay a proportion, is not a valid legal argument that the Tribunal can recognise.

42. Neither claimant received written notice of dismissal. The respondent contends that he gave the claimants oral notice at the September 2018 meeting. The respondent contends that this was "formal" notice, but I reject this contention because, where it is disputed what was said, formal notice can only be accepted if it is in writing. That said, an oral notice is every bit as valid as a written notice; however, where such a notice is disputed, the employer will inevitably struggle to prove that such a notice of dismissal was clear, unequivocal and, most importantly, irrevocable. If it was unable to be repealed or altered, then notification of dismissal should have been in writing.

43. I am persuaded by the claimants' argument that the respondent did not confirm the dismissals because he was not sure when he wanted the claimants' employment to come to an end. As in *Burton v Smith* the mere intention to dismiss an employee at some stage in the future does not constitute notice of dismissal. The claimants required an express notification that their employment would end on a specific date. They did not receive this so any notice of dismissal is not valid. I accept the claimants' evidence, indeed it seems obvious, that there was work that needed to be done following the closure of the surgery. Even if there was not, the respondent should have given both claimants clear and express notification as to when their employment would end, which is significantly different from when the surgery would close.

44. Having heard the witness evidence, I prefer the evidence of the claimants supported by Mrs Morrisons minute of the September 2018 meeting and Mrs Fletcher's account of persistently pressing the Dr Ighorodje for confirmation as to when their employment would end. The letter of 31 December 2018 given to Mrs Fletcher is not a notice of dismissal in any event and this further and strongly corroborates the claimants' contention that they were not provided with a clear date that their employment would end. "*We shall continue our discussions with you about your redundancy*" indicates that Mrs Fletcher, at least, was not given any clear indication about when her employment was to end. Mrs Morrison was clear about her meeting with Dr Ighorodje on 31 December 2018 and I prefer her account as the more reliable. She was expected to work into January 2019. A discussion about the practice closure in September 2018 is not sufficient to indicate a clear and irrevocable notice of termination of employment set for 31 December 2018 had been given.

45. The claimants were dismissed without being given any proper or valid notice of termination of employment. Their notice period runs from the date that their employment commenced as set out in my findings of fact above, subject to s86 ERA. Consequently, their claims in respect of wrongful dismissal (i.e., breach of contract) succeeds also.

46. As there is no dispute in respect of the calculations for the schedule of loss provided by the first and second claimants, I award these figures.

Employment Judge Tobin
Date: 7 April 2020