Case Number: 1303221/2017 (V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs G Cole	v	Elders' Voice

Heard at: Watford, via CVP **On**: 9 April 2021

Before: Employment Judge Hyams, sitting alone

Appearances:

For the claimant: Mr B Gray, of counsel
For the respondent: Mr C McDevitt, of counsel

RESERVED JUDGMENT

The claim as it now stands has not been comprised and may accordingly continue.

REASONS

Introduction; the claim, the parties, and the procedural history

1 In these proceedings, the claimant originally claimed that she was discriminated against because of her race, contrary to the Equality Act 2010 ("EqA 2010"), and unfair dismissal. Her claim was originally made against "Brent Floating Support Services Sanctuary Group" but the name of that respondent was later (in the manner which I record in paragraphs 4 and 5 below) changed to "Sanctuary Housing Association". I refer to that employer as "Sanctuary".

2 The claimant's contract of employment with Sanctuary was transferred to Elders' Voice ("EV") at (it appears; the precise time is not material) midnight on 31 August 2017. The claim form was presented on 2 October 2017. The claim is about what happened before 1 September 2017. The claim form referred to the claimant's employment with Sanctuary as having started on 7 November 2011 and ended on 31 August 2017. A response to the claim was presented by

Sanctuary. That response was not included in the bundle for the hearing before me of 9 April 2021, but there was a copy in the tribunal's file for the case. Sanctuary's ET3 response form was received by the tribunal on 22 December 2017. The form was accompanied by a document entitled "Grounds of Resistance", in which it was stated that the claimant's contract of employment had transferred on 31 August 2017 to EV "by means of a TUPE transfer". However, nowhere in the Grounds of Resistance was it said in terms that Sanctuary was as a result not liable to meet the claim, and that as a result EV was. Rather, Sanctuary responded to the claim on the facts in considerable detail.

3 The claimant's dismissal for redundancy was proposed by EV shortly after the claimant had presented her claim form, i.e. after 2 October 2017, and a COT3 compromise agreement was entered into by the claimant with EV in December 2017 in the circumstances to which I refer below.

4 On 22 March 2018, the tribunal wrote, at the direction of Employment Judge ("EJ") Heal, asking the claimant whether she agreed that the correct name of the respondent was "Sanctuary Housing Association" and whether she proposed to add EV as respondent. EJ Heal also, in an order dated 22 March 2018, ordered the claimant to provide further particulars of her claim. On the same day, the claimant sent such particulars (entitled "Particulars of Claim"), but not because of that order. Rather, she sent them because, she wrote in the email enclosing them:

> "It was brought to my attention on 21 March 2018, by the legal representative of the Respondent, that information about the claims that I am pursuing, is required from me, and that they have been requesting this information from my former legal representative, with no avail."

5 On 4 April 2018, the claimant wrote to the tribunal by email in response to the letter of 22 March 2018 referred to in the first sentence of the preceding paragraph above. In the email, the claimant wrote (1) that she agreed to the change of the respondent's name, and (2) this:

> "I do not propose to add Elders Voice as a respondent unto my claim."

6 However, on the following day, 5 April 2018, the claimant sent a further email to the tribunal, in these terms:

> "I refer to your letter dated 22 March 2018, sent by email.
>
> In regards to part b (part a, has been answered in email below), which asked if I propose to add Elders Voice as a respondent, I propose to add Elders Voice as a respondent to the present proceedings, only insofar as they may be held legally responsible for any potential liability of Sanctuary to me.

The legal representative of the Respondent is copied into this email."

7 There was then a preliminary hearing on 26 April 2018. It was conducted by EJ McNeill QC. Sanctuary was not present or represented at the hearing. At the hearing, EJ McNeill QC ordered the addition of EV as a respondent. The written record of the hearing was sent to the parties on 19 May 2018. In the case management summary, EJ McNeill QC wrote this:

> "By a claim form presented on 2 October 2017, the claimant brought complaints of unfair dismissal and race discrimination. The claim for unfair dismissal was particularised in an email dated 22 March 2018 and described as a claim for constructive dismissal. At the preliminary hearing, the claimant clarified that in fact her unfair dismissal claim was wrongly labelled constructive dismissal: the unfair dismissal claim was in fact a claim against the second respondent that she had been unfairly dismissed by reason of redundancy."

8 In paragraphs 3-5 of her case management summary, EJ McNeill QC stated that the claimant's claim was now of direct race discrimination and harassment within the meaning of section 26 of the EqA 2010, the relevant protected characteristic for that purpose being race. In paragraph 8 of that summary, EJ McNeill QC said this:

> "In addition to her race discrimination claim, the claimant wishes to bring a claim for unfair dismissal against the second respondent. She must particularise that claim and send it to the second respondent if she wishes to pursue it in in [sic] order for the second respondent to be able to respond to that claim, in addition to the race discrimination claim, and object to the amendment if so advised."

9 Order number 1.2 of those made by EJ McNeill QC was in these terms:

> "The claimant is permitted to amend her claim by adding Elders Voice as a second respondent to the claim on the basis that Elders Voice is a TUPE transferee and alleged employer of the claimant post-transfer and may be legally responsible for any compensation that results from any findings of liability."

10 In fact, the effect of a transfer within the meaning of TUPE, i.e. the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246 (as amended), is that the liability to meet a claim in respect of anything that occurred before the transfer to an employee who was, immediately before the transfer, employed by the transferor, transfers to the transferee. That liability is automatic in that the parties have no choice about the matter. The contract of employment of the employee is (by virtue of regulation 4(1)) treated as having been made with the transferee. Regulation 4(1) is in these terms:

> "Except where objection is made under paragraph (7) [i.e. regulation 4(7), which is not relevant here], 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 resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."

11 On 20 May 2018, the claimant sent by email to the tribunal and both respondents a set of Amended Particulars of Claim, addressing the case as clarified by EJ McNeill QC and on the basis that there were now two respondents. The Amended Particulars of Claim started in this way:

> "1. The Claimant's continuous employment started on 7 November 2011, and was transferred to the 1st Respondent in January 2014, by means of TUPE transfer.
>
> 2. The Claimant's last day of employment with the 1st Respondent was 31 August 2017, when her employment was transferred to the 2nd Respondent, by means of a TUPE transfer.
>
> 3. The Claimant's employment with the 2nd Respondent has also ended following a redundancy process, with her last working day being on 30th November 2017."

12 The Amended Particulars of Claim did not claim that the claimant had been dismissed unfairly by EV. On the final page of the document, this was said:

> "**Proposal to add Elders Voice as a Respondent**
>
> 30. In a letter addressed to the Claimant, dated 22 March 2018, Employment Tribunal asked whether the Claimant proposes to add Elders Voice as a Respondent.
>
> 31. The Claimant responded on 5 April 2018 that she proposes to add Elders Voice as a respondent to the present proceedings, only insofar as they may be held legally responsible for any potential liability of Sanctuary to her."

13 On 1 August 2018, the claimant sent to the tribunal (apparently for the second time) the correspondence address of EV. On 19 September 2018, EV's solicitors, Ellis Whittam, sent to the tribunal an ET3 form, enclosing some "Grounds of Resistance". Those grounds of resistance did not deal with the details of the claim in so far as they concerned what happened before 1 September 2017. Ellis Whittam said that no document stating the amended details of the claim had been sent to EV, but in any event the grounds of

resistance defended the claim on the basis that it had been compromised by the COT3 to which I refer in paragraph 3 above.

14 On 27 September 2018, EJ Manley conducted a further preliminary hearing. The claimant was present in person and was not represented. Sanctuary was represented by Mr R Hignett of counsel, and EV was represented by Mr McDevitt. EJ Manley's case management summary was sent to the parties on 2 October 2018. In paragraph 3 of that summary, this was said:

> "It was agreed by all parties that there had been a TUPE transfer from the first respondent to the second respondent in September 2017. The second respondent also stated that an agreement had been reached between it and the claimant and a COT3 signed. This is a preliminary matter which must be determined before the claim can progress and notice needed to be given of that issue. The second respondent has not responded to the amended particulars of claim but need not do so until the preliminary issue is decided."

15 EJ Manley made orders for the preparation for the further preliminary hearing which was now necessary, and ordered that

> "The first respondent is dismissed from these proceedings."

16 There was then a hearing before EJ Henry on 15 October 2018 to decide the "preliminary issue" to which EJ Manley referred in paragraph 3 of her case management summary, namely whether or not the claim had been validly compromised so that it could not be pressed against EV. The claimant attended in person and without representation. Mr McDevitt appeared for EV at that hearing. At the hearing, EJ Henry declined to look at the correspondence which preceded the COT3 on the basis that it was covered by without prejudice privilege, and he struck out the claim. On 6 November 2018 a judgment recording that decision was sent to the parties.

17 The claimant sought a reconsideration of that judgment. EJ Henry declined to reconsider the judgment. The claimant then appealed EJ Henry's judgment to the Employment Appeal Tribunal ("EAT"), and the appeal was successful. The appeal was determined by Griffiths J (the EAT reference for that judgment being UKEAT/0251/19/VP). Griffiths J's judgment was reserved: the hearing took place on 17 November 2020 and judgment was handed down on 26 November 2020. Griffiths J allowed the appeal and remitted the matter to be determined by a freshly-constituted tribunal. In the circumstances, that meant that the case was remitted to be determined by a different judge, considering the matter afresh. That was the hearing which I conducted on 9 April 2021, and this is my judgment on the remitted preliminary issue.

18 The judgment of Griffiths J was a model of clarity and Mr Gray (appearing before me, as he did before Griffiths J, *pro bono*) relied on what was said in it about the arguments which could be advanced on behalf of the claimant in support of the

proposition that the COT3 did not preclude the claimant from pressing her claim about the manner in which she was treated by Sanctuary before 1 September 2017. The summary of the outcome of the appeal included (in paragraph (5)) this:

> "The Claimant's submission that the COT3 should be set aside, or not enforced, by reason of misrepresentation, or that the Respondents were estopped from relying on it, or that it should be construed to exclude settlement of claims arising before the TUPE transfer, was not precluded by the involvement of a person holding himself out as a barrister (although disbarred) on her behalf."

The COT3 compromise agreement and the events which preceded it

19 The latter statement was about the representation of the claimant at the time of the entering into of the COT3. Griffiths J described the situation which preceded the entering into of the COT3 in paragraphs 71-82 of his reserved judgment. He did so having concluded that he was bound to look at the correspondence which preceded the signing of the COT3 on behalf of the claimant. One of the effects of his judgment was that I was required to take that correspondence into account in deciding whether or not the COT3 precluded the claimant from pressing her claim of race discrimination and harassment within the meaning of section 26 of the EqA 2010 as it now stood, i.e. against EV.

20 As far as the description of the events which preceded the COT3 being signed is concerned, I cannot do better than set out paragraphs 71-82 of Griffiths J's judgment. They are as follows:

> '*Mrs Cole's representative, Mr Anoom*
>
> 71. At the time of the without prejudice correspondence, Mrs Cole was represented by Mr Joseph Anoom ("Mr Anoom"), who signed himself (for example in his letter to EV's solicitors dated 26 October 2017) "Joseph Anoom Barrister" and described himself on the letterhead as "Joseph Anoom, LLB, LLM, PgDipLaw, barrister".
>
> 72. It has since emerged, however, that, whatever his training and qualifications may have been, he was not at that time a practising barrister, having been disbarred. According to the judgment of Rose J in *Anoom v Bar Standards Board* [2015] EWHC 439 (Admin):
>
> i) Mr Anoom's first career was as a police officer, but at the age of about 33 in 1990 he was made bankrupt and was convicted of the offence of obtaining a pecuniary advantage by deception (para 6).
>
> ii) He then studied for his LLB and LLM at Buckingham University and was called to the Bar in 1998 (para 8).

iii) During his practice at the Bar, he was subject to five adverse disciplinary findings (para 8).

iv) In 2007, he admitted three charges of professional misconduct (and three charges of inadequate professional service) at a disciplinary hearing and was disbarred and expelled from his Inn of Court, the Middle Temple (paras 9-12).

v) In 2013, he applied for readmission (para 13). This was refused, after a hearing before an Inns of Court Conduct Committee panel in 2014, at which Mr Anoom was represented by Leading Counsel (paras 22 and 38).

vi) He applied for a review of this decision by the Qualifications Committee of the Bar Standards Board, which upheld the decision of the Conduct Committee (para 40).

vii) He appealed to the Administrative Court, which dismissed his appeal in January 2015 (para 63).

73. There is no evidence that either Mrs Cole or EV and its representatives were aware of these facts, although the judgment in *Anoom v Bar Standards Board* [2015] EWHC 439 (Admin) is a matter of public record.

The without prejudice correspondence

74. The correspondence began with a letter from EV to Mrs Cole dated 15 October 2017 marked "Without Prejudice and Subject to Contract". In this letter, EV indicated that Mrs Cole had been "one of the lower scorers" in a redundancy selection process, and said "…in these circumstances, one option is to offer you a settlement agreement to bring our employment relationship to an end…" They proposed payment of outstanding holiday entitlements, payment in lieu of 10 weeks' notice, a statutory redundancy payment, an ex-gratia payment, and an agreed reference.

75. Mr Anoom responded on behalf of Mrs Cole on 26 October 2017, saying as follows:-

> "There are a number of issues that would need to be Clarified in order for this distressing matter to be resolved amicably.
>
> 1. The issue of the relationship between Sanctuary and Elders Voice? The recent ETl was sent, quiet [sic] properly, to the Sanctuary group which in turn was sent to Elders Voice does this mean Sanctuary and

Elders Voice are both culpable in terms of liability for damage caused to Mrs Cole?

2. If Sanctuary are going to accept liability for damage caused to Mrs Cole then this must be reflected in an admission from them with a formal letter from Elders Voice.

3. If points 1 and 2 above are left in any doubt then the claim against Sanctuary must persist to a Tribunal Hearing early next year

4. The grievance appeal would proceed to its natural conclusion forcing Mrs Cole to resign and pursue a claim for constructive dismissal against Elders Voice.

5. I am confident these matters can be resolved as soon as possible then, of course, Mrs Cole can properly and equitably negotiate further terms of settlement. I look forward to hearing from you in due course?"

76. EV's solicitors, Ellis Whittam, responded by email on 2 November 2017 which said, in part, as follows:-

> "I have responded to each of your points contained in your letter dated 26th October below:
>
> 1. There is no relationship between Sanctuary Housing and Elders Voice.
>
> Elders Voice successfully tendered for the Floating Support Service to which Gloria was assigned at Sanctuary Housing and Gloria transferred under TUPE to Elders Voice on 1st September 2017.
>
> Elders Voice accepts no liability in terms of any claims that Gloria may have that occurred before 1st September 2017.
>
> 2. Elders Voice cannot comment on Sanctuary Housing's liability and it would be inappropriate for Elders Voice to write any letters on their behalf. We do not represent Sanctuary Housing.
>
> 3. My client are attempting to settle any claims Gloria may have against Elders Voice only and they feel the offer made is a reasonable one. As a reminder, in return for settling any claims against Elders Voice, they are prepared to offer: a payment for outstanding holiday entitlements, subject to tax and NI; a payment of £4,953 in lieu of 10 weeks' notice period subject to tax and NI; a lump sum payment of £7,226 free of tax and NI which is comprised of: • £2934 as a statutory redundancy payment • £4292 as an ex-gratia payment an agreed reference an agreed termination date

Subject to final agreement of full terms

None of he [sic, presumably 'this'] would affect any potential claim against Sanctuary Housing..."

77. Mr Anoom responded to this by email on 13 November 2017 which said in part:

> "I had a lengthy conference with Gloria Cole and I am pleased to say she agrees in part to your proposed settlement detailed in your email of 7th November subject to the following points:
>
> Points 1 to 2 are accepted subject to any litigation that might ensue with Sanctuary Housing
>
> Point 3 is accepted subject to the ex-gratia payment which must reflect the trauma and psychological hurt suffered and the amount ought to be £8292. (My client Gloria Cole has sought Counsel's advice and attended 3 case conferences and has been put through expenses she would otherwise not have incurred these all amount to £1500).
>
> Subject to the above we are prepared to accept your proposals and bring this matter to an amicable conclusion. ..."

78. Ellis Whittam replied on 14 November saying:

> "I have taken instruction from my client and unfortunately it seems that we have come to an impasse.
>
> My client refutes that they have caused any trauma or psychological hurt towards Gloria and therefore are unable to increase the ex-gratia payment which they feel is a reasonable goodwill payment in relation to her exit from the charity.
>
> Elders Voice is a registered charity and unfortunately the funds are not as freely flowing for these matters as they may be in other organisations.
>
> Furthermore, any legal fees that Gloria has incurred are in no way related to my client.
>
> My client's settlement offer is still open until 16th November; I look forward to hearing from you."

79. Mr Anoom emailed on 15 November 2017 to say "my client has rejected your offer dated 2nd November".

80. However, it seems that negotiation did continue, leading eventually to the COT3 which was signed on behalf of Mrs Cole on 11 December 2017 and on behalf of EV on 21 December 2017. Before that, on 4 December 2017, an ACAS conciliator emailed EV's solicitors on 4 December 2017 saying:

> "The Claimant's rep [i.e Mr Anoom] has asked if two points can be clarified in the COT3;
>
> 1. [not relevant]
>
> 2. In clause 3b can it be clarified that your client has no connection with Sanctuary Group (the other Respondent) for the avoidance of doubt?
>
> I look forward to hearing from you."

81. To this, EV's solicitors replied on 5 December 2017:

> "Thank you, point 2 will be fine and I will add some wording to that effect."

82. The "wording to that effect" which was added to the COT3 as the last sentence of clause 3(b) was, as quoted in para 12 above:
"For the avoidance of doubt, Sanctuary Group is not an associated company of the Employer."'

21 Griffiths J's judgment continued:

"83. Does the without prejudice material set out above arguably include:

i) misrepresentations entitling Mrs Cole to have the COT3 set aside?; or

ii) statements relied upon by Mrs Cole creating an estoppel against EV which prevents them from relying on the COT3 to exclude claims in respect of Mrs Cole's employment by Sanctuary?; or

iii) statements which, when included as part of the factual matrix or surrounding circumstances known to both sides, support a construction of the COT3 which excludes claims in respect of Mrs Cole's employment by Sanctuary on the true construction of the COT3?"'

What occurred at the hearing before me of 9 April 2021

22 On 9 April 2021, Mr McDevitt cross-examined the claimant, including about a statement which she had made to the tribunal in a document which she had sent in the immediate aftermath of the striking out by EJ Henry of her claim: she sent it to the tribunal at 00:28 on 17 October 2018 having written by email in similar terms early in the morning of 16 October 2018 (at 05:39). The document was in the bundle before me at pages 181-186. (The email was not, but it was, of course, in the tribunal's file, and it had, according to the evidence in the file at least, including what the claimant had written in subsequent emails, been sent by the claimant to Ellis Whittam.) In paragraph 3 of the document, the claimant had said this:

> "The settlement negotiations started on 11th October 2017 with a phone call, and ended on 17th November, when the negotiations failed, because the respondent refused to increase the amount. The last communication that was had with my legal representative of which I was made aware of, was on 17th November 2017."

23 That was plainly incorrect. I suggested that it had to be read with paragraph 9 of the document, but the reality was that the document was misleading in so far as it asserted that the COT3 had not been approved by the claimant, and Mr McDevitt's initial cross-examination was (as I understood it) aimed at demonstrating that.

24 Nevertheless, Mr McDevitt also cross-examined the claimant on the basis that she had not in fact authorised Mr Anoom to sign the COT3 agreement. She said that she had done so by sending Mr Anoom a text in response to an email of which there was a copy in the bundle at page 146, which was dated 11 December 2017, in which Mr Anoom invited the claimant to text him if she was "happy with" the terms of "the amended agreement and terms and reference from ACAS" which appeared to be enclosed with the email. Mr McDevitt submitted to me that the claimant's evidence was unreliable, and that I should conclude that Mr Anoom had "gone off on a frolic of his own" (Mr McDevitt's words) in signing the COT3 on 11 December 2017. I found that a difficult proposition to accept, since the most likely reason for the signature by Mr Anoom of the COT3 on that day, especially given the terms of the email at page 146, was that he had done so because the claimant had authorised him to do so. In any event, Mr Anoom appeared to have apparent authority to act on the claimant's behalf, since she had, it appeared, plainly held him out as her agent.

25 Mr McDevitt in addition relied on the claimant's evidence given in cross-examination in submitting to me that the claimant had not relied on the representations made by Ellis Whittam which it was now claimed were misrepresentations.

26 The claimant did accept that she was aware that TUPE applied to transfer the contract of employment of an employee of a transferor where the employee was,

immediately before the transfer, employed by the transferor in the undertaking or part of an undertaking which was transferred. She did not accept, however, that she understood fully the impact of that transfer and she denied knowing that it applied to transfer the liability to meet a claim in respect of something that had occurred before the transfer.

A discussion; the terms of the COT3

27 As I said to Mr McDevitt during the hearing on 9 April 2021 I was going to do, I approached the issues before me completely afresh. As I was writing this judgment, it occurred to me (without remembering what Griffiths J had said in paragraph 88 of his judgment) that it was quite wrong to say that there was "no relationship" between Sanctuary and EV. It occurred to me that by reason of regulations 4 and 11 of TUPE, and in any event by reason of the application of TUPE, there was a very important relationship of transferor and transferee within the meaning of TUPE between Sanctuary and EV.

28 As I said to the parties when I had read their skeleton arguments, and before hearing oral evidence from the claimant, one argument that had not been advanced on behalf of the claimant, but could be, was that here, EV had taken advantage of a known mistake of law on the part of Mr Anoom, which meant that the doctrine of mistake might well be applicable so that the claimant would be able to rely on it in support of the proposition that the COT3 was avoidable.

29 However, the claimant's primary position was that the COT3 merely compromised her claims in respect of the termination of her employment by EV, and not her claims in respect of what had occurred before 1 September 2017. Under clause 1 of the COT3, the respondent was obliged to pay certain sums of money. The following two clauses were as follows.

> "2. The Parties further agree that the Employee has left her employment with the Employer on 30 November 2017.
>
> 3. The payments referred to in clause 1 is [sic] in full and final settlement of:
>
> a) the claim(s) referred to ACAS during the Early Conciliation (EC) process by the Employee against the Employer under EC number R177201/17 ("the Claim(s)"); and
>
> b) all and any claims which the Employee has or may have at the time of this Agreement and in the future against the Employer or any of its associated companies or its or their officers or employees whether arising from her employment with or appointment by the Employer or otherwise. For the avoidance of doubt, Sanctuary Group is not an associated company of the Employer."

30 There were two early conciliation certificates, one relating to each respondent. The one relating to Sanctuary showed that ACAS was approached by the claimant on 10 July 2017 and the early conciliation certificate was issued on 24 August 2017. The early conciliation certificate relating to EV had the reference number quoted in the COT3 as set out in the preceding paragraph above, and it was issued on 4 September 2017, ACAS having been approached on 1 September 2017. The contact details recorded for the claimant in both of the early conciliation forms were those of the claimant and not those of Mr Anoom. Those factors indicated that the claimant had been aware of the impact of TUPE before the COT3 was entered into. However, the facts that (1) the claim in these proceedings was made originally only against Sanctuary and (2) the claimant did not initially want to join EV as a party, pointed quite strongly the other way, i.e. towards the conclusion that the claimant did not know about the full impact of TUPE.

31 In any event, I found Griffiths J's analysis of the situation, set out in paragraphs 85-105 of his judgment in the EAT in this case, to be completely apt (and I set out paragraph 105 in paragraph 32 below). In essence, Mr McDevitt's submissions to me repeated his submissions to Griffiths J as recorded there, but for the reasons given by Griffiths J in those paragraphs as possible reasons for rejecting those submissions, I did indeed reject them. I note here, however, that it appears that the internal cross-reference in paragraph 95 of Griffiths J's judgment should probably be read as a reference to paragraph 74 and not to paragraph 73. For convenience and the sake of clarity, it is helpful to set out paragraph 95 here and, since it needs to be read with paragraph 94, that paragraph also. Those two paragraphs are as follows:

> '94. In context, the gist of Representations A, B and C, as a response to Mr Anoom's questions, was that EV had nothing to do with Mrs Cole's claims against Sanctuary. But now they say that the settlement with EV settled precisely those claims, the very point that Mr Anoom was trying to clarify. This misrepresentation is (arguably) reinforced by para 3 of their email of 2 November, which immediately follows Representation C:
>
> > "3. My client are attempting to settle any claims Gloria may have against Elders Voice only and they feel the offer made is a reasonable one." ("Representation D").
>
> 95. I note "against Elders Voice only". That appears to be a clear exclusion of the ET1 claims against Sanctuary – but now EV says that those claims having passed to EV under TUPE, they were not excluded at all. Moreover, the offer which was then recapped in the remainder of para 3 was entirely in respect of Mrs Cole's rights against EV after the transfer; it was broken down in a way which demonstrated that there was nothing in it which reflected (with or without admission of liability) her ET1 claims against Sanctuary in respect of her employment before the transfer (para 73 above).'

32 In addition, I agreed completely with the following further passage in Griffiths J's judgment:

> '119. EV's reference to the TUPE transfer in their solicitors' email of 2 November 2017 (para 76 above [which I have set out in paragraph 20 above]) may have been regarded as a word to the wise, but it was not addressed to the wise. The effect of the representations which surrounded that reference (Representations A-E) was to render Mr Anoom and Mrs Cole none the wiser; indeed, at least arguably, to mislead them.
>
> 120. The reference to TUPE was notable, when taken with the questions to which Representations A-E responded, for what it did not say about TUPE and its effect.
>
> > "Elders Voice successfully tendered for the Floating Support Service to which Gloria was assigned at Sanctuary Housing and Gloria transferred under TUPE to Elders Voice on 1st September 2017."
>
> This made it clear that "Gloria was transferred under TUPE to Elders Voice". It did not even mention, let alone make clear, that another effect of TUPE was that all her claims against Sanctuary were also transferred, although they had arisen before the transfer.
>
> 121. The COT3 did nothing to correct Representations A-E. Instead, it added Representation F to the tally.'

My conclusions

33 What was the effect of those representations? During the hearing on 9 April 2021, I said that it was distinctly possible that all of the three possible results of the application of the law to the situation pointed in the same direction because there was an underlying principle, and that the law of mistake was probably to the same effect since it was based on that same underlying principle. When I re-read paragraph 105 of the judgment of Griffiths J, that view was fortified. What he said in that paragraph was this:

> "I have concentrated my discussion on whether Representations A-F can arguably support a claim that the COT3 was based upon misrepresentations which made it invalid or unenforceable, because misrepresentation was the focus of Mr Gray's submissions to me. However, I should not overlook Mrs Cole's argument to the ET in paras 3-8 of her Second Speaking Note. Representations A-F are also, in my judgment, capable of supporting arguments based on estoppel, which were noted in para 21 of the Respondent's Hearing Note, and also arguments about the true construction of the COT3, which were in paras 7-8 of her Second Speaking Note."

34 It is sometimes the case that a (mis)representation which induces a contract becomes a term of a contract. That possibility is discussed very helpfully in paragraph 8.05 of the fifth edition (2019) of Cartwright, *Misrepresentation, Mistake and Non-disclosure*. Here, that possibility was not relied on by the claimant, and in any event, the COT3 itself when read against the factual background which preceded it, as set out in the passage of Griffiths J's judgment set out in paragraph 20 above, in my judgment was to the effect that the compromise in it applied only to the circumstances in which the claimant's employment was terminated and the losses caused by that termination, and not to what had occurred before 1 September 2017. I came to that conclusion on the basis that the claimant plainly thought (as shown by Mr Anoom's communications to EV) that she was compromising only her claim in respect of her dismissal for redundancy, and EV, via its solicitors, knew that and positively encouraged that understanding of hers by the things that it said to her via Mr Anoom.

35 On that basis the issue of whether or not the claimant relied on the representations that were made to Mr Anoom did not arise for determination. However, I concluded that she did indeed rely on those representations, at least to a significant extent.

36 In any event, the claim against EV in respect of acts and/or omissions of Sanctuary concerning the claimant was in my judgment not compromised by the COT3. Accordingly, that claim (i.e. the claim as it now stands, not including a claim of unfair dismissal) can proceed. I add, however, that it appears to me at present (without having heard any observations on the matter from or on behalf of the claimant, so this is necessarily a provisional view) that the compensation payable to the claimant in the event of the success of her claim could be only for (1) injury to her feelings, and personal injury if that is proved to have been caused by any breach by Sanctuary of the EqA 2010, and (2) any loss of pay occurring before 30 November 2017 as a result of such breach.

_____
Employment Judge Hyams
Date: 14 April 2021

JUDGMENT SENT TO THE PARTIES ON

26/04/2021
.....
J Moossavi
.....
FOR THE TRIBUNAL OFFICE