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EMPLOYMENT TRIBUNALS

Claimant: Mr Ghaffar

Respondents: Islamic Mosque-Brent First Respondent
Zia UI Uloom - Second Respondent

Heard at: Watford Tribunal **On:** 20 September 2021

Before: Employment Judge Cowen

Representation

Claimant: Mr Asuelime (solicitor)
First Respondent: Ms Evans-Jarvis (representative)
Second Respondent Mr Khwaja (Board member)

RESERVED JUDGMENT

- 1 The claimant was an employee of the First Respondent, who was not provided with a written statement of terms and conditions.
- 2 The claimant was unfairly dismissed because of a relevant TUPE transfer contrary to regulation 7 TUPE Regulation 2006.
3. The second respondent must pay the claimant a total of £27,264.28 (comprising £12,600 compensation for unfair dismissal, £1200 for notice pay, £600 for failure to provide written terms and conditions and £12,684.28 for holiday pay).

REASONS

The Claim

1. By way of an ET1 dated 18 May 2020, the Claimant brings a case of failure to pay redundancy pay, notice pay and holiday pay, failure to provide written terms and conditions and unfair dismissal due to a TUPE transfer against his former employer, Brent Mosque and the charity which took over the ownership and running of the mosque, Zia UI Uloom. The First Respondent denies the claims and asserts that the claimant was dismissed for 'some other substantial reason'. The second respondent denies TUPE transfer or dismissal.

2. A case management preliminary hearing on 19 March 2021 set out some of the issues in the case and the date of the final hearing, together with the steps which the parties had to take to prepare for it. All parties attended at Watford ET and were represented.
3. The parties provided a hard copy bundle. The claimant provided a witness statement and the first respondent provided a witness statement from Mr Syedain, the managing trustee. The claimant also provided a written skeleton argument and authorities, all of which were considered. The representations in the written submissions included some submissions which were not made orally, nor were they put in cross examination of the first respondent's witness. The Tribunal therefore did not take into account submissions in relation to the unilateral variation of the claimant's contract to exclude accommodation. Oral evidence was heard from all those who provided a witness statement.
4. The first respondent's witness is a wheelchair user and is hearing impaired. Reasonable adjustments were made to the layout of the tribunal hearing room and a hearing loop provided to assist him. Where necessary steps were taken during the hearing to ensure that Mr Syedain could hear the questions put to him and to allow him to follow the case.
5. At the start of the hearing, the issues to be decided were discussed and all parties agreed that these were as set out in the case management order, with the addition of whether the claimant was an employee or worker of the first respondent, based on the cited authority of *Singh v Members of the Management Committee of the Bristol Sikh temple and others* [2012] All ER (D) 68.
6. The first respondent also conceded that if the claimant was considered an employee, then they had not complied with s. 1 Employment Rights Act 1996 by providing a written statement of terms and conditions.

The Facts

7. The claimant was engaged by Mr Syedain in approximately 1985 to act as the Imam at the mosque which he ran in Wembley, London. The first respondent is a Trust which comprises of three trustees; Mr Syedain, his brother Mr Tahir and a Mr Malik. The claimant had come to the UK from Pakistan on a visitor's visa and when the first respondent engaged him, Mr Syedain wrote to the Home Office to request to change the claimant's visa status, to allow him to remain and to work. This was allowed.
8. The claimant was provided with accommodation in a house in Wembley, London. The ground floor of the property was used as a mosque, open to the community for prayer and some of the first floor rooms were used as classrooms for the teaching of religious studies. The claimant was allowed to live with his family, in the remaining rooms of the house on the second floor. By the time the second respondent purchased the property, the claimant and his family were also using the rooms on the first floor, including a kitchen and bathroom.
9. There was an agreement between the claimant and Mr Syedain on behalf of the first respondent that the claimant would lead prayers five times per day and would provide other prayer guidance and teaching to children after

school and at weekends. Mr Syedain was respectful of the claimant and saw him as his leader. He did not provide instructions to the claimant on what to do, rather he requested him to comply with his expectations of the actions of an Imam. The requirements to carry out other tasks were therefore not expressly stated, although the claimant did provide religious counsel to the community, made prison, care home and hospital visits and did liaise with local groups to provide English speaking support (a translation service) to members of the community who required it.

10. The claimant at least initially also interacted with other Muslim and non-Muslim groups to represent his mosque within the community. He organised events in the mosque such as the birthday of the Prophet Mohammed and during Muharram to commemorate the martyrdom of the grandson of the Prophet Mohammed. He also conducted long prayers during the month of Ramadan. Mr Syedain moved to live in Scotland and therefore was not aware of the claimant's actions, other than what he was told by the other trustees and members of the community.
11. A further part of the claimant's duty was to ensure that there was a weekly financial collection for the mosque. The funds for this were collected by the claimant, who passed them to Mr Tahir to administer.
12. The claimant was paid £800 each month by a cheque, signed by Mr Syedain and Mr Tahir for the first respondent. Part of this sum (£150) was paid to the claimant's wife for her work at the mosque. The first respondent also complied with the requirements of HMRC with regard to tax and national insurance payments. The parties did not keep any record or communicate with regard to the claimant's holiday entitlement. There is therefore no record of whether the claimant took any holiday during his tenure at the mosque. The claimant has not attended the Hadj but still has the intention to do so.
13. When the claimant took over as Imam in 1984 the mosque had 10 members. By the time he left in 2020 there were 250 members.
14. Discussions occurred in 2017 with a local businessman who offered to buy the mosque from the first respondent. Mr Syedain negotiated and agreed with the businessman to sell the mosque and contracts were exchanged in November 2017. The claimant was told about the sale and he too spoke with the businessman and was assured that his position as Imam would continue after the sale, but that the whole building was to be used as the mosque and the claimant would therefore lose his tied accommodation. The claimant requested written confirmation of his employment, but none was forthcoming. The claimant was offered three months' rent by the businessman, but with no further guarantee of tied accommodation. Negotiation with the claimant continued over many months with regard to his future accommodation.
15. On 16 April 2018 Mr Syedain wrote to the claimant to set out their offer with respect to him moving out. That letter highlighted that the claimant had so far refused to agree to this. On 4 July 2018, Mr Syedain wrote to the claimant once again to ask him to agree to move out and to offer a financial settlement. The letter also raised complaint that the claimant was not attracting a sufficient number of worshippers and indicated that the sale of

the mosque was an attempt to reinvigorate it. A meeting was called to discuss “you vacating the premises and formalising your employment position”. It would appear that an agreement was made at the meeting on 12 July 2018, but was not subsequently adhered to.

16. A further letter was sent on 2 January 2019 by Mr Syedain indicating that the relationship between the parties had become strained. That attempts by others to mediate had not assisted and that accusations had been made by the claimant about Mr Syedain. The letter concluded that the claimant’s employment would TUPE transfer to the new owners and that vacate possession was required by 7 January 2019. The claimant was reluctant to vacate the premises and did not do so. The sale agreement with the businessman fell through. This meant that the claimant remained in the property, continuing his role as Imam.
17. On 5 September 2019 the claimant was sent a letter by Mr Syedain asking him to attend an investigation meeting with their advisers, face2face, about ‘some concerns we have about your conduct’. A meeting occurred on 11 September 2019 which the claimant did not attend. He had indicated that he required details of the allegations prior to the meeting, which Mr Syedain did not provide.
18. A report written by Face2face on 2 October 2019 indicated that there were a number of allegations of failing to lead prayers and failing to fulfil his duties as Imam for which the claimant ought to be brought before a disciplinary hearing. The report acknowledged that it had not spoken to the claimant and that there was no direct evidence of the allegations, except from the trustees. The report also highlighted that a new purchaser for the mosque had been found, who had ‘indicated that he does not intent to employ [the claimant]’. The new buyer referred to was the second respondent.
19. The second respondent occupied offices which belonged to the businessman who had previously attempted to buy the mosque. Some information as to the reasons why that sale did not complete were known to the second respondent.
20. On 23 December 2019 Mr Syedain wrote to the claimant inviting him to a disciplinary hearing because ‘ it is alleged that there is an irretrievable breakdown within the working relationship between yourself and the Trustees, which is unresolvable by other means’. The meeting was held on 13 January 2020 by Face2face, but the claimant did not attend. A report was written by face2face which indicated that the claimant had not collected the letter from the post office indicating the details of the hearing. However, a photo of the letter had been sent to the claimant by text message.
21. The evidence considered by Face2face was provided by the first respondent. The witnesses who were interviewed were both said to be trustees of the first respondent. No written submission was made by the claimant and therefore no evidence on behalf of the claimant was considered.
22. The Face2face report found that prayer times were not displayed and therefore prayers were not being conducted five times per day. It also found that the claimant had occupied the women’s prayer area for his family use

and therefore women were discouraged from attending the mosque. Further that no children's teaching was being carried out. It also found that the claimant had made an unfounded allegation of financial impropriety against Mr Syedain and that he did so for his own personal gain and that he has failed to assist to raise funds for the upkeep of the property. The report also set out the correspondence between the parties with regard to vacating the accommodation. The report sets out a belief that the claimant was inciting others to protest against the mosque, this is based on the evidence of one trustee. The report recommended dismissal with notice

23. On 13 February 2020 the first respondent sent the claimant a letter of dismissal, outlining the fact that the claimant had failed to engage in the disciplinary process, reply to letters or attend the meeting. He was given 12 weeks' notice to vacate the property and told of his right to appeal. A payment in lieu of notice was made which terminated his role on 15 February 2020.
24. On 18 February 2020 the claimant instructed his solicitor to write to the first respondent outlining his appeal. The letter did not outline specific grounds, but asked to see the evidence which the first respondent had relied upon. This was not sent to the claimant, but a letter dated 2 March 2020 required his attendance at a meeting on 5 March 2020. This meeting was postponed to 19 March 2020.
25. On 29 February 2020 the locks of the mosque were changed.
26. On 5 March 2020 the claimant also received a text message from Mr Syedain's son in law indicating that the premises had been transferred to the second respondent on the previous day. It outlined that the second respondent was the legal owner of the building and will now run the mosque. It indicated that the claimant could stay in the accommodation until 16 May 2020.
27. A timetable of prayers produced by the second respondent indicated that the 'Wembley Masjid is under the management of Zia Ul Uloom since end of 2019'.
28. On 19 March 2020 an appeal meeting was held, at which a further representative from Face2face attended. The claimant attended that hearing. The outcome of the hearing was to uphold the dismissal. The claimant was paid his April wage.

The

Law

Employment status

29. The claimant's status as an employee or worker is key to a number of his claims. There have been a number of cases in relation to whether ministers of religion are considered to be employees under s.230 Employment Rights Act 1996.
30. In [*Davies v Presbyterian Church of Wales 1986 ICR 280*](#), the House of Lords found that a contract of employment may exist, even if the purpose of the work was for purely spiritual duties. It said that if there was a contract of employment the parties must have clearly expressed their intention to make

such a contract. [Singh v Guru Nanak Gurdwara 1990 ICR 309, CA](#), the Court of Appeal also held that a priest at a Sikh temple was not an employee.

31. However, in *Percy v Church of Scotland Board of National Mission 2006 ICR 134*, the House of Lords found that as there was offer and acceptance of a church post for a specific period and because there was agreement about the claimant's duties, remuneration, holiday and accommodation, the agreement did create a contractual relationship between the minister and the church. The Lords said that the primary considerations in deciding whether there is a contract of service are the manner in which the minister is engaged and the character of the rules or terms governing his or her service. Albeit in that case it was as a 'limb (b)' worker. In [New Testament Church v Stewart 2008 ICR 282, CA](#) the offer and acceptance of a church post for a specific period, with specific provision for the claimant's duties, remuneration, holiday and accommodation, was capable of creating an employer/employee relationship between the minister and the church. **The court made it clear that a tribunal must analyse the particular facts to establish whether the parties intended their relationship to be governed by a legally binding contract and if the contract has the necessary constituents of a contract of employment.**
32. In *Singh v Members of the Management Committee of the Bristol Sikh Temple and ors EAT 0429/11* the EAT held that 'the threshold for a finding that the relationship between a religious institution and its officers are not intended to have legal effect is a high one'.
33. [E v English Province of Our Lady of Charity and anor 2012 IRLR 846, CA](#). Lord Justice Ward set out a summary of the points from the authorities:
 - a. each case must be judged on its own particular facts
 - b. there is no general presumption of a lack of intent to create legal relations between the clergy and their church
 - c. a factor in determining whether the parties must be taken to have intended to enter into a legally binding contract will be whether there is a religious belief held by the church that there is no enforceable contractual relationship, and
 - d. it does not follow that the holder of an ecclesiastical office cannot be employed under a contract of service.

TUPE

34. *Celtec Ltd v Astley and ors 2005 ICR 1409*, the ECJ set out that the 'date of a transfer' is the date on which the responsibility as employer for carrying on the business of the undertaking moves from the transferor to the transferee.
35. Reg 4(2) TUPE 2006; 'Without prejudice to paragraph (1), but subject to paragraph (6) and regulations 8 and 15(9), on the completion of a relevant transfer-....

(b) *any act or omission before the transfer is completed, of or in relation to the transfer in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.*

36. Reg 4(3); *'Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1),.....'*
37. Reg 7(1); *'Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.'* This sets into legislation the decision in [Litster and ors v Forth Dry Dock and Engineering Co Ltd \(in receivership\) and anor 1989 ICR 341, HL](#) which set out that although the phrase 'immediately before' means literally the moment before the transfer occurred, a purposive approach was to be taken. This resulted in reg 7(1).

Holiday Pay

38. The right to paid holiday arises from regulations 13, 13A and 16 of Working Time Regulations 1998. These set out that a worker (or employee) is entitled to a period of leave made up of 4 weeks of annual leave (as a result of the EU Directive) and an additional 1.8 weeks in accordance with UK holidays. A total of 5.8 weeks (28 days) which must be paid as a week's pay for each week of leave.
39. Where a worker has not been offered holiday, but not requested it, the case law of the ECJ suggests that domestic law should provide an effective remedy for such a failure; *Kreuziger v Land Berlin* Case C-619/16, ECJ, and *Max-Planck-Gesellschaft zur Förderung der Wissenschaften eV v Shimizu* Case C-684/16, ECJ. This resulted in the UK allowing 4 weeks of holiday to be carried over where the worker was unable to take the leave as the employer had not encouraged him to do so.
40. The ECJ decided in the case of *King v Sash Window Workshop Ltd* [2018] IRLR 142 that where the employee was prevented from taking the holiday by the employer, the holiday entitlement can be carried forward.
41. The Working Time Regulations do not set out a limit on how far back the claim can be made, but reg 30(4) refers to compensation being just and equitable in all the circumstances, including the employer's default and any loss sustained. The Working Time Directive became law in 1996.

Redundancy Pay

42. Redundancy pay is payable to an employee who is dismissed for the reason of redundancy. Neither party in this case alleges a redundancy situation.

Decision

Employment status

43. Mr Syedain considered that the claimant was appointed as Imam and that his role was not one of employee, as he was to act as a spiritual guide to the community and that he respected the claimant and looked to him for guidance. He could not therefore control what he did. However, he did expect him to lead prayers 5 times per day, to teach children's classes and marriage classes and to host events for the various religious holidays throughout the year. Mr Syedain explained that whilst he recognised that the appointment may amount to employment under UK law, he did not regard it as such under Sharia law.
44. I must consider whether there is a religious belief held by the Trustees that there is no enforceable contractual relationship. In order to decide this, I view the evidence as set out before me. This includes the facts that the claimant's tax and national insurance was paid by the first respondent as though he were an employee; there was an intention to TUPE transfer the claimant to the businessman, had the sale completed; a disciplinary process was followed, that the claimant was said to have been dismissed; that the reason given was some other substantial reason; and that pay in lieu of notice was paid. All of these points are in contrast to Mr Syedain's evidence that the claimant could not have been an employee due to his important religious position as an Imam and leader of the community.
45. Mr Syedain's evidence was not consistently reliable. In oral evidence he said that he did not discuss with the second respondent what would happen to the claimant's employment. However, the report written in October 2019 says that there is a buyer for the property and they do not wish the claimant to continue to be employed. Whilst Mr Syedain remained respectful of the claimant and his position, it is clear from the actions which he and the other Trustees took, that they considered that they controlled the claimant's work and that they had the right to remove him if he did not do as they required. Mr Syedain recognised that in UK law, there was a relationship of employer and employee.
46. The evidence of the claimant not telling the first respondent when he took holiday and arranging his own cover if he was sick, is not sufficient to indicate that the claimant was not an employee. Nor was there sufficient evidence to suggest that the spiritual purpose of the role of Imam was inconsistent with an employment relationship. The claimant was therefore an employee of the first respondent between 1985 and 15 February 2020.
47. The first respondent acknowledged that they failed to provide the claimant with written terms and conditions and therefore an award of 4 weeks pay is awarded for this breach of s. ERA 1996. An award of £600 is allowed.

TUPE

48. I must therefore go on to consider the various claims brought by the claimant; dismissal related to TUPE, holiday pay, notice pay, redundancy pay and failure to provide written terms and conditions. The last of these claims is conceded by the first respondent on the basis of my finding of an employment contract.

49. The claimant was dismissed on 15 February 2020 with pay in lieu of notice. His dismissal therefore took effect immediately.
50. The second respondent asserts that they purchased the property on 4 March 2020 and therefore the dismissal was not after the transfer. However, the evidence of the second respondent's timetable, shows that they regarded themselves as having had conduct of the mosque since the end of 2019. I have seen no evidence to suggest that there was any legal ownership of the property or the running of the mosque prior to 4 March 2020. The claimant continued to lead services up to the point of his dismissal on 15 February 2020.
51. In order for a transfer to occur under there must be a 'transfer of an economic entity which retains its identity' TUPE reg 3(1)(a). In this case the economic entity was the function of the mosque as a place of worship and community (and not merely the property). I do not accept that the second respondent were running the economic entity of the mosque prior to 4 March 2020; this is the date of transfer.
52. I must therefore consider whether the claimant was 'assigned to the organised grouping of resources or employees' TUPE reg 4 (1) immediately prior to the transfer. He was an employee who clearly had a central and critical role within the mosque. It is clear that he was therefore part of the resources and employees of the mosque prior to his dismissal. The claimant had been dismissed 18 days prior to the transfer, under the strict interpretation of this phrase, he was not therefore employed immediately before the transfer. The question that I must consider is whether his dismissal a relatively short time before transfer, was connected to the transfer.
53. To fully consider this point, reg 7(1) indicates that I must consider whether the 'sole or principal reason for the dismissal is the transfer'; the first respondent has put forward an alternative reason for dismissal, described as 'some other substantial reason', but in essence due to a breakdown in the relationship between the parties. The evidence indicates that this was at least a partial reason for the claimant's dismissal, as there had been a long negotiation which had not culminated in any agreement. The relationship between the claimant and Mr Syedain had become strained as a result of the claimant's behaviour in relation to the previous offer of purchase of the mosque. The further point to be considered is whether the transfer was the principal reason for his dismissal.
54. The evidence indicates that on 2 October 2019 in the investigation report, there was no direct or independent evidence of the claimant failing to carry out his work. No evidence from members of the community was considered. The only evidence was the allegation of the trustees. The report also indicated that there was a new prospective purchaser and that they did not want to employ the claimant as Imam. It was therefore a matter which was known to the trustees when they took the decision to instigate a disciplinary procedure and dismiss. The trustees were also aware that there had not been agreement previously about the claimant moving out of the premises.
55. The evidence of Mr Syedain indicated that the trustees wanted to sell the mosque and that they were aware that the claimant had caused difficulty in

the previous sale negotiations. The relationship between the claimant and Mr Syedain had soured as a result of the dispute over his work, but no action had been taken between January 2019 when the previous sale fell through and September 2019 when the new purchaser (second respondent) took interest.

56. I therefore conclude that the prompt to take disciplinary action and dismiss the claimant, arose from the prospect of selling the mosque to the second respondent, who had made it clear that they did not wish to employ the claimant, or have him in residence. The procedure of disciplinary and dismissal was therefore put in place to effect dismissal prior to the transfer.
57. The prospective transfer of the claimant under TUPE was therefore the principal reason that the first respondent dismissed the claimant and not the 'some other substantial reason' asserted by the first respondent. This is contrary to regulation 7(1) TUPE Regulations 2006 and is an unfair dismissal.

Notice Pay

58. In relation to notice pay. The evidence indicated that the claimant was paid until April 2020, a period of 10 weeks of pay beyond his termination date of 15 February 2020. He was entitled to statutory notice pay of 12x 1.5 weeks x £150. As he was paid for 10 weeks, the first respondent must pay the remaining 8 weeks x £150, a total of £1,200.

Holiday Pay

59. In relation to holiday pay. The claimant had a statutory entitlement to take holidays and to be paid during that time. There is no evidence of the claimant taking holidays, or indeed being prevented from taking them. The evidence showed that there was no record of the claimant taking agreed holiday. The claimant had taken some time off, as he had completed studies whilst an employee, including tutorials with his tutor. There was no evidence of whether this was considered holiday, or studies undertaken outside working hours.
60. The agreed evidence was that the claimant was paid the same amount every week. There was therefore no evidence of loss by the claimant in relation to holiday pay. The loss to the claimant was from a health and safety perspective. King v Sash Window Workshop Ltd [2018] IRLR 142 indicated that where the employer has refused to allow holiday, or to pay for it, compensation may cover the whole period back to 1996 when the EU Directive on holiday pay was introduced.
61. The claimant is not entitled to be paid for the statutory holidays each year, but is entitled to 4 weeks pay for 1996 to 2019 and a further 3 days for 2020. A total of £600 x 23 = £13,800, plus a further £64.28. A total holiday pay of £12,864.28.

Compensation for unfair dismissal

62. The liability for unfair dismissal sits with the second respondent due to Regulation 4(2)(b) which sets out that any act or omission before the transfer is completed in respect of a person assigned to the organised grouping, shall be deemed to have been an act in relation to the transferee.

63. The claimant's weekly wage was £150 per week (according to his P60). The appropriate basic award is therefore $20 \times 1.5 \times £150 = £4,500$.
64. The claimant's annual wage was £7,800. From the end of his notice period in May 2020 to the Tribunal hearing on 20 September 2021, is more than 12 months. The claimant is therefore awarded the maximum of 12 months compensatory loss.
65. An award of £300 for loss of statutory rights is also appropriate.
66. Whilst the claimant's schedule of loss includes claims for failure to pay the national minimum wage and loss of accommodation, there was no evidence led on either of these claims. No evidence was provided on the number of hours per week the claimant worked. Furthermore, no evidence on the value of any monthly rent equivalent was led by either party. On that basis, no award is made under either of these heads of claim.

Employment Judge Cowen

29/11/2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

3/12/2021

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FOR EMPLOYMENT TRIBUNALS