Case Number: 3303529/2020

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Drake	**v**	Churchil Contract Services Limited

Heard at: Watford (by hybrid hearing)
On: 27, 28 June 2022

Before: Employment Judge Cowen

Appearances
For the Claimant: Ms Drake (in person)
For the Respondent: Mr Kerr (consultant)

JUDGMENT

1 The claimant's claim for unfair dismissal is dismissed.

WRITTEN REASONS

BACKGROUND

1. This is a claim for unfair dismissal brought by the claimant against her employer who gave her notice to terminate her contract and re-employed her on different terms and conditions immediately. The claim was issued on 27 March 2020 after an Early Conciliation certificate was issued on 27 March 2020. The claimant had been given notice on 11 November 2019 that her employment would terminate on 3 February 2020.

Preliminary Point

2. The claim was brought within the 3 month time limit for unfair dismissal claims and therefore the Tribunal has jurisdiction to hear the claim.

Preparation

3. I was provided with a joint bundle of documents and witness statements on behalf of two former members of staff for the respondent who dealt with the termination and appeal. The claimant did not provide a formal witness statement but I accepted her Schedule of Loss and an email to the Tribunal dated 27 September 2021 as her evidence in chief. The Respondent was content that they had had notice of these documents and did not place them at any disadvantage by taking these to be the claimant's statement.

4. The case was listed to be heard by CVP. Unfortunately, it was not possible for the Claimant to join CVP from home. She indicated this in emails to the Tribunal on Friday last week and over the weekend. On receiving no response, she sensibly came to the Tribunal today, in order to present for her case. Thankfully, the Tribunal staff were able to find her a room and joined the CVP so that she could participate. The Tribunal staff were also able to provide the Claimant with copies of the bundle and witness statements as these had been provided electronically to her in advance of the hearing. Therefore, with a little delay, we were able to start the hearing.

5. I heard evidence from Mrs McDonald, the respondent's dismissing officer. I read a statement from Ms Fletcher the appeal officer, who did not attend to give evidence. I also heard evidence from the Claimant and Mr Edwards, her supervisor at work.

The Issues

6. These were identified by EJ Maxwell in an earlier PH and confirmed with the parties at the start of the hearing:-

   Unfair Dismissal

   1. The parties agree the claimant was dismissed.
   2. What was the reason or principal reason for dismissal? The respondent says the reason was:
      2.1 a substantial reason capable of justifying dismissal, namely the need to vary the Claimant's terms;
      2.2 alternatively, redundancy.

   3 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

   Redundancy

   4 If dismissed for redundancy, whether the Claimant is entitled to a redundancy payment.

The Law

7. Where an employee has been TUPE transferred to a new employer, their terms and conditions are maintained, as they were with the transferor. Contractual changes can occur if both parties agree to them. Where the employee refuses to agree to a contractual change, the transferor can make the change they require by terminating the existing contract, by giving contractual notice and combining this with an offer of re-engagement on the revised terms and conditions to come into effect on the day after the old contract expires. In these circumstances, there will be no breach of contract as proper notice has been given.

8. The fact that an employee is entitled to decline to accept the changes involved in a

reorganisation does not mean that his or her dismissal for refusing to accept them will be unfair; see Bowater Containers Ltd v McCormack 1980 IRLR 50, EAT

9. Where there is a sound business reason for doing so, an employer can fairly dismiss an employee for refusing to accept detrimental changes to his or her terms and conditions. 'Some Other Substantial Reason' ('SOSR') can be established if the employer has a sound business reason for imposing changes in fundamental breach of the contract.

10. The Respondent would need to show that there are 'clear advantages' in introducing a change in working pattern or terms and conditions, in order to justify an SOSR dismissal. This is not a particularly difficult burden, as the test is one 'which management thinks, on reasonable grounds, is sound'; see Scott and Co v Richardson EAT 0074/04.

11. The issue of redundancy only arises where the criteria of s. 139 Employment Rights Act 1996 are satisfied. That is whether the reason for dismissal is because;
    i. The employer has ceased to carry on the business for the purpose the employee was employed,
    ii. The employer has ceased to carry on the business in the place where the employee was employed, or
    iii. The requirements of the business for employees to carry out work of a particular kind or
    iv. The requirement of the business for employees to carry out work of a particular kind in a particular place, have ceased or diminished.

    If these criteria are not met, then there is no redundancy situation and therefore the C cannot be entitled to a redundancy payment.

The Facts

12. The Claimant was employed as a cleaner by the transferor ISS, when she was transferred under TUPE to R on 1 November 2018. She continued to work 6.5 hours per day (32.5 hours per week).

13. Around March 2019, the Claimant's manager, Zara Boeva, commenced a consultation procedure with the Claimant and others in relation to changing her terms and conditions. The Claimant was told that the client wanted to reduce the number of hours of cleaning per week. She was not told that this would include taking on more cleaners. The Claimant immediately said that she did not want to change her terms and conditions and did not want to work elsewhere, to make up the lost hours.

14. A further meeting took place on 2 April 2019 at which the Claimant was asked if she had any suggestions how to work around this problem. She offered no solution. At a third meeting on 17 April 2019, the Claimant's only proposal was to reduce hours, but increase the rate of pay, so that she did not lose out financially. This matter was not followed up and the Claimant continued to work 6.5 hours per day, including a 30 min break. She remained unsure what was going to happen and was not told that this process had been abandoned.

15. In August 2019, Tracey McDonald who had become the Claimant's account manager at the site recommenced the consultation process, which had previously been

abandoned. At a meeting on 19 August 2019, she offered the Claimant a position for 6 hours per day, working 10am to 4pm. The Claimant rejected that offer as she wanted to continue to work early in the morning, as she had another job in the afternoon.

16. On 29 August 2019, the Claimant was invited to attend a consultation meeting on 10 September. Prior to that meeting, the Claimant questioned (in an email of 5 September 2019) whether a proper procedure was being followed. The letter she had been sent did follow the ACAS guidelines, by offering her the consultation, the right to be accompanied and asked for her comments at the meeting. At the meeting on 10 September, the Claimant was told of reduction in hours to 4 per day, but an increase in the number in the team. She was told this was a new consultation process, separate from the previous process by Zara. The Claimant made it clear that she could not afford to reduce her hours, as this would lead to a financial loss.

17. The Respondent wrote to the Claimant again on 11 September asking her to a further consultation meeting on 18 September. Again, she was offered her right to bring a representative with her and was told the meeting was to discuss reducing her contractual hours. She was also told in this letter that the Respondent may decide to terminate her contract and offer re-engagement. The Claimant wrote a letter outlining her concerns about the process.

18. She attended the meeting on 18 September, at which the proposal remained to reduce her hours to 4 per day. The Claimant acknowledged that she had been sent a list of alternative vacancies, but there was nothing on it that she wished to apply for, as the other jobs did not pay as well. She was also offered the alternative of a split in her working hours of 6-10am and then 10.30am to 12.30pm. This would mean that she would be paid for 6 hours per day. The Claimant agreed to think about this offer, but asked if the break could be paid, otherwise It would mean that there was a 30 min unpaid break between the two shifts. The Claimant also mentioned that if she was offered redundancy, she would take it. The Claimant indicated that she felt this process had been going on too long, as she did not make the distinction that the Respondent did, between the process with Zara and this process.

19. On 27 September the Respondent sent the Claimant another letter inviting her to a final consultation meeting on 2 October. The Claimant once again responded to set out her views that the process was long and inappropriate. She also stated that her terms and conditions remained those set out by Ocean, who were her original employer. The Claimant also requested the HR policy for consultation which had not been given to her by the Respondent. This led to a delay in the final meeting, whilst the Respondent responded.

20. On 11 October, the Respondent confirmed that they do not have a specific policy for such consultation and were following the ACAS guidelines. They outlined the offer, (a reduction of 30 mins in pay) and made it clear that this was not a redundancy situation, as there was no significant reduction or ceasing of the requirement for work. The Claimant was invited to the final consultation on 6 November.

21. The Claimant continued to correspond with the Respondent right up to the final meeting, outlining her objections to the proposal, not least of which was the £100 per month reduction in salary. Just prior to the meeting on 5 October, the Claimant

included in her email a proposal that she reduce her hours by 30 mins per day. This was in accordance with the Respondent's proposal. There was an agreement to vary the Claimant's contract to 6 hours per day. The structure of it, was a matter of organisation.

22. At the meeting on 6 November 2019 the proposal made by the Respondent was that she work 6 hours, from 6am to 10am and then 10.30am to 12 noon. This is 5.5 hours of work and 0.5 hours of break. A total of 6 paid hours. The Claimant refused to change her hours at all, which was in contrast to her email the previous day. The Claimant was told that she would be dismissed and re-engaged on this contract. She was told that the Respondent did not intend to make redundancies, as the requirement for work had not reduced significantly. In response to the proposal, the Claimant asked for voluntary redundancy.

23. On 11 November the outcome letter stated that the new hours would be 6am to 10am and then 10.30am to 12.30pm. This meant that the offer no longer included a paid 30 minute break. The offer had changed from that contained in the meeting. However, as the Claimant had rejected the offer in the meeting, the Respondent informed her that she was given 12 weeks notice and that her employment would end on 2 February 2020 and she would be re-engaged on 3 February 2020 in the new role.

24. The Claimant appealed against this decision, setting out her reasons in writing. She was asked to attend an appeal meeting with Elaine Fletcher on 10 January and did so. The notes of the meeting and outcome letter indicate that there was discussion of the points the Claimant raised and that Ms Fletcher considered them all. Ms Fletcher rejected the Claimant's appeal in a letter dated 29 January 2020. The outcome was therefore fixed that the Claimant would be dismissed and re-engaged for 6 hours per day.

25. Following this outcome, the Claimant spoke with Tracey McDonald, Account Manager, about where she should work. Ms McDonald allowed the Claimant to choose between splitting her time between the main building and Parkfield, or solely in the main building. The Claimant agreed to trial working solely in the main building, for the first month of the new contract.

26. Towards the end of the month, the Claimant asserted the trial was of the hours, not the location. This was not in line with the contract. The Claimant has continued to work and be paid for 6 hours per day since 3 February 2020.

DECISION

Process

27. The Claimant did have protection of the terms of her contract under TUPE when she was transferred in November 2018 to the Respondent. In early 2019 the Respondent started consultation, but this was abandoned. The process was re-started in August 2019. The ACAS guidelines indicate that the employer should outline the proposed changes, who might be affected, why the changes are needed, the timeframe and alternative options. The guidelines also say sufficient time must be given for consideration of the proposed changes and that employees should be given the opportunity to comment.

28. The letters sent to the Claimant on 29 August 2019, 11 September 2019, 27 September 2019 and 24 October 2019 all set out the relevant information, giving the Claimant the opportunity to consider and respond in person (or writing). All of the letters set out the Claimant's right to be accompanied.
Once the consultation had completed, the Claimant was given the right to appeal the decision and a further meeting was held. I therefore consider that in accordance with the ACAS guidelines and with the principles of natural justice, the Respondent has followed an appropriate process from August 2019 onwards. The fact that there was a previous process which faltered and stopped does not make the subsequent process unfair. Everything the Respondent did from August onwards was correct in terms of procedure.

Redundancy

29. The need for the cleaning work to be done had not ceased or diminished. Nor had the requirement for the work to be done at this location. The Respondent was not proposing less work, or even fewer workers to do the work. Given that these are the requirements for a redundancy situation, I am satisfied that there was no redundancy situation. The Claimant's request for voluntary redundancy is irrelevant if no need to reduce the number of workers has arisen. An employee cannot force an employer to make them redundant. Therefore, there was no redundancy situation and no redundancy pay is therefore due to the Claimant.

Change of terms required/Sound business reason

30. In order to decide whether the dismissal was fair, I must consider whether there was a sound business reason for the change in terms. The Respondent must prove that there are 'clear advantages' to the changes proposed. In this case the Respondent says that the changes resulted from a demand by the client to reduce the total hours of work within the contract. This has also been said in correspondence to be the requirement of the client for cleaners to work only 4 hours per day. I have seen no evidence of the request from the client, as this was not contained in the bundle and the Respondent's witness did not refer to it in detail.

31. However, on a balance of probabilities I accept that the Respondent was asked by the client to reduce the overall hours provided. To go through the whole process of re-negotiating a large number of contracts would seem churlish, if there were not a business need to do so. I therefore accept that the Respondent had such a sound business reason. The reason for dismissal therefore was SOSR.

Whether R acted reasonably in treating the SOSR as sufficient reason to dismiss

32. I find that the Respondent attempted to negotiate and consult with the Claimant, who understandably did not want to reduce her hours and therefore her pay. I accept the Claimant's evidence that she was the breadwinner at the time and therefore even a small reduction was significant to her. I also accept the Claimant's evidence that she had another job in the afternoon and therefore could not alter her working hours in the way that was initially proposed.

33. The evidence of Mrs McDonald, that she was trying to find a way to allow the

Claimant to continue to work as much as possible, whilst conforming to the requirements of the client, is reliable. The Claimant was the only cleaner who worked more than 4 hours each day and therefore she was theonly one who needed to have the amendment. The Respondent tried to consult with the Claimant and find a way to compromise between the requirements of the business and the Claimant's resistance to reducing her hours.

34. An acceptable solution was found in the Claimant's email of 5 November, that she would work 6 hours per day. At the meeting on 6 November this was broken down as 5.5 hours work and 0.5 hours break – the Claimant finishing work at 12 noon each day. Unfortunately, when the Claimant reached the meeting on 6 November she changed her mind and did not enter into this agreement. That could have been an amicable resolution to the issue.

35. From this point onward, both parties became more entrenched. The Respondent withdrawing (either on purpose or due to some error) the offer to include the 30 min break in her pay. This led to the Claimant being even more reluctant to agree.

36. Having tried, and almost succeeded in gaining an agreement with the Claimant and having a requirement of the client to reduce the number of hours, I am of the view that it was reasonable for the Respondent to treat the SOSR as a reason for dismissal. I therefore find that the Claimant's dismissal was fair and dismiss her claim.

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Employment Judge Cowen

Date: 22 October 2022

JUDGMENT SENT TO THE PARTIES ON

24 October 2022

FOR THE TRIBUNAL OFFICE