



EMPLOYMENT TRIBUNALS

Claimant: Miss P P Ponzi

Respondents: 1 Lewis & Graves Partnership Ltd
2 Pendergate Ltd t/a Kindred
3 St Mary's & St John's CE School

Heard at: London Central

On: 21 October 2022

Before: Employment Judge H Grewal

Representation

Claimant: Ms J Muhima-Mundele, Lay representative (sister)

First Respondent: Ms E Evans-Jarvis, Solicitor

Second Respondent: Mr R Scuplak, Consultant

Third Respondent: Mr J Braier, Counsel

JUDGMENT

1 The complaint of unfair dismissal is dismissed.

2 The Tribunal does not have jurisdiction to consider the complaints of race discrimination.

3 The Tribunal does not have jurisdiction to consider the Claimant's complaint of failure to consult under Regulation 13(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

4 The Second and Third Respondents are to be removed as respondents from the claim as there are no live claims against them.

5 The claims for notice and redundancy pay are dismissed.

6 The Tribunal will list a hearing to determine the Claimant's complaints of unauthorised deductions from wages against the First Respondent.

REASONS

1 In a claim form presented on 15 March 2022 the Claimant complained on unfair dismissal, race discrimination, breach of the Transfer of Undertakings (Protection of Employment) Regulations 2006, unauthorised deductions from wages, failure to pay notice and redundancy pay. The dates when Early Conciliation ("EC") commenced and concluded in respect of each of the Respondents was as follows:

First Respondent – 18 November 2021 and 29 December 2021;

Second Respondent – 22 November 2021 and 3 January 2022

Third Respondent – 2 December 2021 and 12 January 2022.

2 This preliminary hearing was listed for the following purposes:

(a) To identify the claims made in the claim form, against whom they were made and the issues to be determined;

(b) To consider any application made to amend the claim;

(c) To consider whether it was appropriate to consider time limits prior to the final hearing and, if so, whether the claims were made in time and, if not, whether time should be extended;

(d) To consider any applications to strike out or the removal of any of the Respondents;

(e) List the case and make case management orders.

3 On 12 May 2022 the Claimant sent to the Tribunal a document comprising eight typed pages in which she set out the claims that she was making. Some of it was a repetition of what was in her particulars of claim, some of it provided further particulars and some of it was new additional material. At the preliminary hearing on 9 June 2022 EJ Green directed that if the Claimant wished to add new matters to her claim, she needed to apply to amend her claim and should do so by 21 July 2022. The Claimant has not made any such application amend. I, therefore, proceeded on the basis of the particulars of claim and any further details about those particulars in the email of 12 May 2021. I ignored new matters raised in the 12 May document.

Undisputed Facts

4 The Third Respondent (R3) is a voluntary aided school and was located at three different sites – Neale House, Bennett House and Stamford Raffles, Downage.

5 The Second Respondent ("R2"), who was formerly called Ridge Crescent Cleaning Services Ltd, had a contract with R3 for the provision of cleaning services on its sites at Bennett House and Stamford Raffles.

6 The Claimant, who is of African origin, was employed by R2 on two separate contracts as a supervisor. One contract was to work 12 hours a week 39 weeks a year on the Bennett House site and the other was to work 12.5 hours a week 39 weeks a year on the Stamford Raffles site. In both cases the employment

commenced on 31 July 2017. The rates of pay for the two sites were respectively £9.43 per hour and £10.48 per hour.

7 In 2019, about a year before the cleaning contract was due to expire. R3 expanded to include sixth form and opened an additional block on the Stamford Raffles site to accommodate the sixth form students. R3 had an additional requirement for cleaning services. It decided to employ someone on a fixed term contract for one year to provide cleaning services for the sixth form building. The Claimant was appointed to that role on September 2019 for a fixed term until 31 August 2020. She was employed to work 15 hours a week 40 weeks a year. She was paid £6,980.21 per annum for that role. On 31 August 2020 it was extended for one year to 31 August 2021. R2's contract was also extended to 31 August 2021.

8 In April/May 2021 R3 began a tender process for the provision of cleaning services from September 2021. In June 2021 the Claimant awarded a contract to the First Respondent ("R1") to provide cleaning services to the whole school. The agreement was to commence on 1 August 2021.

9 R1 and R2 agreed that there was TUPE transfer of the employees working on the cleaning contract for R2 to R1 on 1 August 2021. The Claimant has been absent sick since 17 September 2021 and has sent some unfit to work medical certificates to R1.

10 On 21 July 2021 R3 wrote to the Claimant that her employment with them would terminate on 31 August 2021 as that would fall under the new contract for the cleaning of the whole school. R3 said that she would be entitled to redundancy payment if she did not secure another post within local government before 12 September 2021. On 9 September 2021 R3 wrote to the Claimant that the earlier letter that it had sent to her was incorrect. It should have said that her employment with the school had transferred under TUPE to R1. She was not entitled to a redundancy payment.

11 The Claimant had a separate contract with R3, which is not a cleaning contract. That contract continues and is not part of this claim.

Unfair Dismissal

12 I asked the Claimant to clarify whether she had been dismissed and, if so, by whom and when, or she had resigned and , if so, when. The Claimant responded that she had been dismissed by R3 in its letter of 21 July 2021. As far as the other cleaning contracts were concerned, she said that she had never resigned or been dismissed by anyone.

13 In those circumstances, the only complaint of unfair dismissal that the Claimant had was against R3 for its dismissal of her which took effect on 31 August 2021. The Claimant did not have the requisite two years' continuous service with R3 to being a complaint of unfair dismissal against it. She has no complaint of unfair dismissal against R1 or R2 because she is not claiming that she has been either actually or constructively dismissed by either of them. It follows from that the Tribunal does not have jurisdiction to consider her complaint of unfair dismissal and the claim must be dismissed.

Race Discrimination

14 I asked the Claimant to clarify which of the matters set out in her particulars of claim were alleged to be acts of race discrimination. The Claimant said that she was complaining of race discrimination in respect of what happened on 19 July 2021 (paragraph 3), 20 July 2021 (paragraphs 4-7) and 16 August 2021 (paragraphs 14-17). The complaints are that:

(a) On 19 July 2021 when she arrived at work at the school her line manager at R2 (Helder Moreira) introduced her to three individuals (two men and one woman). One of the men, who said he was from R1, (identified at the hearing as Karolis Stepanavicius) told her that her hours had changed and she would no longer be working on two sites any more. He added that if she was not happy she could follow her manager from R2. She turned to her line manager for his reaction and he laughed and did not say anything. Although the line manager is referred to as “she” I was told that it was in fact Mr Moreira;

(b) On 20 July 2021 the same man from R1 approached the Claimant at work and gave her an unsigned letter from Ms Parker (General Manager of R1). He told her “read it” and said “Everything you need to know is in the letter, and all depends on your decision, leave or stay.”

(c) On 16 August 2021 the same man from R1 attended the school with two other women. He called the Claimant and five cleaners into the school hall. He gave them all cleaners’ uniforms and gave the supervisor’s woman to one of the white women with him. The Claimant questioned this and he told her in front of everyone, “You are no longer a supervisor just a cleaner effective from today and your hours of work have changed.” The Claimant asked him if there was someone to whom she could speak. He replied, “Don’t you know how to write?”.

The Claimant describes herself as being of African origin. I understood her complaints to be of direct race discrimination/harassment related to race.

15 There are no complaints of race discrimination against R3. The only complaint of race discrimination against R2 is the reaction of the Claimant’s line manager on 19 July 2021.

16 I heard submissions from the parties on the following two issues:

(a) Whether any liability of R2 for any acts of race discrimination by its employees had transferred to R1 on 1 August 2021; and

(b) Whether the complaints of race discrimination had been presented outside the primary time limits and, if not, whether it would be just and equitable to consider them.

Transfer of Liability

17 Regulation 4 (2) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE Regulations 2006”) provides,

“Without prejudice to subsection (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer –

(a) All the transferor’s rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor 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.”

18 In **DJM International Ltd v Nicholas [1996] IRLR 76** the EAT held that the ET had not erred in concluding that liability for an alleged act of sex discrimination by the transferor prior to the transfer had transferred to the transferee. That case was decided under the previous version of the current regulation 4(2) – regulation 5(2) of the 1981 TUPE Regulations. The wording was slightly different but the meaning was the same. Mummery LJ said,

“That paragraph [regulation 5(b)] applies not only to things done before the transfer ‘in respect of that contract’; it also applies to anything done before the transfer in respect of ‘a person employed in that undertaking’ [assigned to that organised grouping of resources or employees]. Anything done in respect of such a person is deemed to have been done by the transferee. The crucial question is not, therefore, whether what was done was done in respect of a particular contract, but whether it was in respect of a particular person employed in that undertaking.”

19 In **Clarke v Mediquard Services Ltd [2000] NI 73** the Northern Ireland Court of Appeal held that on transfer liability of the transferor for acts of sex discrimination by the transferor transferred to the transferee, and the transferor could no longer be liable for those acts. It rejected the argument that the transferor could still be liable under the Equality Act 2010 as agent of the transferee or as having aided and abetted the transferee.

20 It is clear from the decided cases that R2’s liability for any act of race discrimination on 19 July 2021 transferred to R1 when the TUPE transfer took place on 1 August 2021, and R2 is no longer liable for it. Therefore, the Claimant cannot pursue any claims of race discrimination against R2. She can only pursue them against R1.

Time limits – jurisdiction

21 I accepted the Claimant’s evidence that she first sent her claim from to London Central Employment Tribunal on 28 January 2022 by First Class Special Delivery. She did not receive any acknowledgement. On 1 2March 2022 she sent it again by First Class Special Delivery to the Employment Tribunal Central Office in Leicester. It was received there on 15 March 2022 and she was sent an acknowledgement on the same day. The Claimant’s evidence was that that was done by her sister, who is a solicitor (who specialises in immigration law) and was helping her at the time.

22 Rule 8(1) of the Employment Tribunals Rules of Procedure 2013 provides,

“A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.”

A Presidential Practice Direction made on 2 March 2020 under Regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides at paragraph 5,

“A completed (prescribed) claim form may be presented to an Employment Tribunal in England & Wales:

(1) Online by using the online form submission service provided by Her Majesty’s Courts & tribunals Service, accessible at employmenttribunalsservice.gov.uk;

*(2) By post to **Employment Tribunal Central Office (England & Wales), PO Box 10218, Leicester, LE1 8EG,***

(3) By hand to an Employment Tribunal Office listed in the schedule to this Practice Direction.”

The Government website also states that a claim can be made online or by sending it by post to the Central Office in Leicester.

23 It follows from that that this claim was presented in accordance with the Tribunals Rules of Procedure on 15 March 2022.

24 Section 123(1) of the Equality Act 2010 provides,

“Subject to section 140B, proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.”

Section 140B applies where a time limit is set by section 123(1)(a). It defines Day A as the day on which a claimant commences Early Conciliation (“EC”) and Day B as the day on the EC certificate is granted. It provides,

“(3) In working out when the time limit set by section 123(1)(a) ... expires the period beginning with day after Day A and ending with Day B is not to be counted.

(4) If the time limit set by section 123(1)(a) ... would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.”

25 The only act of race discrimination alleged against R2 is said to have occurred on 19 July 2021. The time limit under section 123(1)(a) for that act would have expired on 18 October 2021. That is about five weeks before Early Conciliation started, i.e. Day A. Hence section 140B(4) does not apply. Where EC commences after the primary three month time limit has expired, section 140B(3) provides no assistance to the claimant. The delay in presenting the claim is not due to the Early Conciliation process. In the present case, the period beginning with the day after Day A and ending with Day B comprised 42 days. That would have extended the primary time

limit to 29 November 2021. The claim was presented on 15 March 2022, 3.5 months after the time limit expired.

26 The last act of race discrimination alleged against R1 is said to have occurred on 16 August 2021. The primary time limit for that would have expired on 15 November 2021. Early Conciliation with R1 was commenced on 18 November 2021. Section 140B(4) does not apply. Section 140B(3) provides no assistance when EC starts after the primary time limit has expired. The period beginning with the day after Day A and ending with Day B comprised 40 days. That would have extended the primary time limit to 26 December 2019. The claim was presented 2.5 months after the time limit expired.

27 I considered whether it would be just and equitable to consider those complaints. The Claimant has been certified as unfit to work since 17 September 2021. A letter from her doctor dated 1 September 2022 said that the Claimant had seen the doctor regularly since September 2021. She had been suffering from work-related stress and had been experiencing headaches, dizziness, chest pain and difficulty sleeping at night. She had subsequently been diagnosed as having high blood pressure and was on medication for that. She was also awaiting surgery for large fibroids in her womb. She also said that because of her health and the pandemic it had been practically impossible for her to seek legal advice and representation. I do not accept that the Claimant's medical condition, as set out in her doctor's letter, would have made it practically impossible for her to seek advice between mid-July 2021 and the end of the year. Furthermore, by July 2021 most of the lockdown restrictions had been lifted and it would have been possible to seek legal advice. The Claimant's sister is a solicitor, albeit not an employment law practitioner, and has been helping the Claimant, at the least since she started Early Conciliation in November 2021. The Claimant referred to seeking legal advice in a letter dated 21 August 2021 to R3 and said in a letter dated 20 September 2021 that R3 would be hearing from her solicitors in due course. It is clear from the Government website how a claim should be presented. There was no good reason why the Claimant's sister should have sent it by post to London Central Employment Tribunal. Even if the Claimant had validly presented the claim on that date, it would still have been out of time. There was then a further delay of another six weeks. The Claimant considered that she had been subjected to race discrimination in July and August 2021. She was aware of the need to take legal advice but took no steps to do so. She was not prevented from doing so because of the pandemic. Her sister is a solicitor and was helping her. In all the circumstances of this case, I did not consider that it would be just and equitable to consider the complaints that had been presented months after the time limits expired.

Failure to consult

28 Regulation 13 of the Transfer of Undertakings (Protection of Employees) Regulations 2013 ("TUPE Regulations 2006") provides,

"(1) In this regulation and regulations 13A, 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it, and references to the employer shall be construed accordingly.

(2) Long before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of –

(a) the fact that the transfer is to take place, the date of the proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer of any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be taken, that fact, and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if envisages that no measures will be taken, that fact.

...

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeing their agreement to the intended measures.”

29 Where an employer has failed to comply with regulation 13 or 14 (relating to the election of employee representatives) a complaint may be presented to an employment tribunal either by an affected employee or the elected representatives or trade union, depending on the nature of the claim – regulation 15(1). Regulation 15 also provides,

“(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may –

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of employees as may be specified in the award, or

(b) ...

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).”

...

(12) An employment tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with –

(a) in respect of paragraph (1), the date on which the relevant transfer is completed, or

...

or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.”

Regulation 16A contains similar provisions to section 140B of the Equality Act 2010 for the extension of time to ensure that Early Conciliation does not reduce the time limits for bringing complaints.

30 R2 and R3 argued that the Claimant had not made a complaint of failure to consult against either of them in her claim form.

31 The Claimant's Particulars of Complaint refer to her contract with R2 and the transfer of that to R1. There is no reference in those Particulars to the separate cleaning contract she had with R3 and the transfer of that contract. At the start she sets out the claims she is making, one of which is "*Breach of the TUPE Transfer Undertakings (Protection of Employment) Regulations 2006.*" In the body of the Particulars the Claimant referred to meeting employees of R1 for the first time on 19 July 2021 and an employee of R1 giving her an undated letter on 20 July 2021 which was signed by Tracey Parker, General Manager of R1. At paragraph 11 she said that she had never "*received any letters or being consulted about the transfer prior*" to the letter she was given on 20 July 2021. At the end of the Particulars she said that she believed that R1's actions constituted a breach of the TUPE Transfer Undertakings (protection of Employment) Regulations 2006.

32 I accepted that the Claimant had not complained of failure to consult against R3 because she had not referred at all to her cleaning contact with R3 in her particulars of complaint. She has clearly complained about the lack of any consultation prior to the letter of 20 July 2021 in respect of the transfer of her contact from R2 to R1. The duty to consult her lies with her employer and she can only bring a complaint of failure to consult under regulation 13 against her employer. I find, therefore, that in her particulars of claim the Claimant complained of failure to consult about the transfer, and that that must be a complaint against R2.

33 I then considered whether that complaint had been presented in time and the Tribunal had jurisdiction to consider it. The transfer took place on 1 August 2021. The letter that was given to the Claimant on 20 July 2021 stated that R3 had been awarded the cleaning contact at the school, the Transfer of Undertakings (Protection of Employment) Regulations 2006 applied and that her employment would transfer to R1 on 1 August 2021.

34 The primary time limit for bringing a complaint of failure to consult against R1 expired on 31 October 2021. Early Conciliation commenced on 22 November 2021 and concluded on 3 January 2022. Any extension of time by Early Conciliation would have meant that the claim had to be presented by 12 December 2021. The claim was not presented in time. I considered whether it had not been reasonably practicable for the Claimant to have presented the complaint before the time limit expired and thereafter before 15 March 2022.

35 The only reasons given by the Claimant were the difficulty of seeking legal advice during the pandemic and her health. I have already decided that neither of them prevented the Claimant seeking legal advice. The Claimant had recognised that she needed to seek legal advice. Her sister, who is a solicitor, was assisting her. I fully accept that the Claimant and her sister were probably not aware of the her employer's obligations under the TUPE Regulations, but the Claimant could have sought legal advice on it and her sister could have done some initial research on it. I

am not satisfied that it was not reasonable practicable for the Claimant to have presented this complaint before 12 December 2019.

Unauthorised deductions from wages

36 The Claimant confirmed that her complaints about her pay related to a failure to pay her for the period 1 August to 16 September 2021 and any sick pay after that. It was clear that any complaints in respect of that could only be brought against R1. R3 paid the Claimant until the end of August 2019. After that she ceased to be an employee of R3, either because her contract of employment with R3 terminated or because it transferred to R1. Her employment with R2 transferred on 1 August 2021 to R1.

37 R1 accepts that it should have paid the Claimant sick pay since her sickness absence started, but there are disputes about what it should have paid her and whether it ought to have paid her for August and the first half of September 2021. R1 does not accept that the Claimant's employment with R3 transferred to it. That will have to be determined by the Tribunal because it might impact on what R1 is contractually obliged to pay the Claimant. It is also not clear whether R2 paid the Claimant only for the weeks she worked. That would impact on whether R1 had to pay the Claimant anything for August and the first half of September. R1 also argued that it had not been able to pay the Claimant because she had not provided them with her bank details. I indicated to the parties that that was something which could be resolved easily if the Claimant provided them with her bank details. I will list the case for a hearing (2 days) to determine the pay claims. That will involve determining whether there was a TUPE transfer from R2 to R1.

Redundancy and Notice Pay

38 The Claimant had also claimed redundancy and notice pay. She cannot bring any such complaint against R1 or R2 because she has not been dismissed by either of them. Even if she was dismissed, by R3 she cannot pursue a claim for redundancy pay against R3 as she did not have the requisite two years' continuous service with R3. R3 have her notice of the termination of her contract.

No complaints against R2 and R3

39 As there are no live complaints against R2 and R3 they will be removed as respondents from this case.

R1's application to extend time for making a complaint under regulation 12 of the TUPE Regulations 2006

40 Regulation 11 of the TUPE Regulations 2006 provides that the transferor should provide to the transferee certain information about the employees ("employee liability information") about the employees who are going to transfer to the transferee. Regulation 12 provides that on or after the transfer the transferee may present a complaint to the employment tribunal that the transferor has failed to comply with regulation 11. Regulation 12(2) provides that an employment tribunal shall not consider such a complaint unless it is presented before the end of the period of three months beginning with the date of the relevant transfer or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not

reasonably practicable for the complaint to be presented before the end of that period of three months.

41 R1 wanted me to extend time to enable it to make an application under regulation 12. I decided that I could not do that. The proper course is for R1 to present a complaint to the Tribunal and for the Tribunal to decide whether it can consider such a complaint when it has been presented over a year after the relevant transfer.

Employment Judge Grewal

Date: 02/11/2022

JUDGMENT & REASONS SENT TO THE PARTIES ON
02/11/2022

FOR THE TRIBUNAL OFFICE