



EMPLOYMENT TRIBUNALS

Claimant: Mrs C Scott
First Respondent: Marlow Chiropractic Ltd
Second Respondent: JONROG Ltd
Heard at: Watford Employment Tribunal (by CVP)
On: 8,9 and 10 July 2024
Before: Employment Judge L Cowen

REPRESENTATION:

Claimant: In person
First Respondent: In person
Second Respondent: Ms S Phumaphi (counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim for constructive unfair dismissal against the First and Second Respondent is ill-founded and is dismissed.
2. The Claimant's complaint of a failure to inform or consult contrary to Regulation 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is well-founded and the Respondents are jointly and severally ordered to pay compensation to the Claimant.
3. Pursuant to Regulation 15 (9) of the of the Transfer of Undertakings (Protection of Employment) Regulations 2006, the First and Second Respondents are jointly and severally ordered to pay compensation of £5,088 (8 weeks x £636.00).

The Tribunal declares that:

4. The Claimant transferred from the First Respondent the Second Respondent on 1 February 2022.
5. There was a failure by the First Respondent to inform or consult the Claimant, contrary to Regulations 13 and 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

REASONS

Introduction

1. The Claimant's claim was heard on 7,8,9 and 10 of July 2024.
2. The Claimant was employed by the First Respondent, a company providing chiropractic and healthcare services, as a Practice Manager from 6 October 2010.
3. On 1 February 2022 the First Respondent sold the intellectual data and goodwill which formed the business of Marlow Chiropractic to the Second Respondent, and there was the transfer of a service to the Second Respondent. On 1 February 2022 the Claimant commenced work with the Second Respondent, who were trading as "Marlow Beauty".
4. The Claimant claims that her duties were changed from her previous employment, and that there were issues with the equipment she was provided with to undertake her work. The Claimant left her employment on 11 March 2022.
5. The Claimant claims that she was constructively dismissed, and that her dismissal was unfair. Following amendment of the List of Issues to be determined by the Tribunal during the Final Hearing, she also claims for breach of Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the TUPE Regulations") in relation to the alleged failure to consult her in relation to her transfer as part of the sale of the First Respondent's business.
6. The Respondents deny that the Claimant was constructively dismissed and deny the claim for breach of Regulation 13 of the TUPE Regulations.
7. There is no dispute that the Claimant's claim was brought in time. Early conciliation started on 21 March 2022 and ended on 1 May 2022. The claim form was presented on 15 May 2022.
8. The Claimant gave sworn evidence. Mr G Brooks (Director of Marlow Chiropractic Ltd) gave evidence on behalf of the First Respondent. Mr R Partridge

(Director of Jonrog Ltd) and Miss B Grimshaw (Operations Manager for Back2 normal and Marlow Beauty) gave evidence on behalf of the Second Respondent.

9. I have also had regard to documents contained in an agreed bundle as well as appendices submitted by the Claimant, and an agreed chronology.

Preliminary matters

10. I clarified the scope of the Claimant's claim at the start of the hearing on 7 July 2024. The parties were in agreement that the List of Issues set out in the Case Management Order of Employment Judge Callan dated 20 November 2023 set out the issues that the Tribunal had to determine.

11. In the course of hearing evidence, I determined that it was necessary to clarify whether the Claimant's claim included a claim under Regulation 13 of the TUPE Regulations.

12. The list of issues already referred to an alleged failure to consult in relation to the claim for constructive unfair dismissal. I proposed amendment to the List of Issues to include a claim under Regulation 13 of the TUPE Regulations and also to amend the List of Issues to make reference to Regulation 4 (9) of the TUPE Regulations.

13. The First Respondent objected to a claim under Regulation 13 being included in the List of Issues. The Claimant and the Second Respondent did not object. Applying Rule 29 of the Employment Tribunals Rules of Procedure 2013, I considered whether adding a claim under Regulation 13 would amount to an amendment of the claim. I determined that it would not as the claim form raised the issue of a failure to consult and TUPE obligations.

14. I determined that the requirements of Rule 2 of the Employment Tribunals Rules of Procedure 2013, namely, dealing with cases fairly and justly, necessitated amendment of the List of Issues to include this claim. I considered that the parties had given evidence on this issue, which was already in the List of Issues as the question of any failure to consult was included as conduct potentially giving rise to the breach of contract in the unfair dismissal claim. I therefore determined that it was appropriate to amend the List of Issues to include a claim under Regulation 13.

15. The parties confirmed that having made this amendment to the List of Issues, they agreed that I could continue to hear the claim as a Judge Sitting Alone.

Issues for the Tribunal to decide

16. It is accepted that the claim is brought in time. It is accepted that the Claimant was an employee of the First Respondent and that she had the qualifying length of service. It is accepted that she resigned on 11 March 2022. It was accepted that a

TUPE transfer took place on 1 February 2022. The following issues were identified for the Tribunal to determine in relation to liability:

1. *Unfair dismissal*

1.1. Was the Claimant dismissed?

1.1.1. Did the respondent/s do the following things:

- 1.1.1.1. fail to consult the Claimant in respect of the transfer?
- 1.1.1.2. unilaterally change the Claimant's duties from those of Practice Manager to those of a Receptionist?
- 1.1.1.3. unilaterally change the Claimant's terms and conditions, including pay dates, days and hours worked?
- 1.1.1.4. did Mr. Partridge of R2 state that if she did not agree to the said changes, she would have to leave her employment?
- 1.1.1.5. fail to provide a suitable desk and/or chair which allegedly adversely affected the Claimant's health?
- 1.1.1.6. did Mr. Partridge tell the Claimant that he would not address the health and safety/welfare concerns raised by her until he was satisfied she would remain employed in the business?

1.1.2 Did those matters breach the implied term of trust and confidence? The Tribunal will need to decide:

1.1.2.1 whether the respondent/s behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the respondent/s; and

1.1.2.2 whether it had reasonable and proper cause for doing so.

1.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the Claimant was entitled to treat the contract as being at an end.

1.1.4 Did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

1.1.5 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

- 1.2 If the Claimant was dismissed (either constructively, or through operation of Regulation 4 (9) of the TUPE Regulations 2006), what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract? Was there an economic, technical or organisational reason for the alleged treatment?
- 1.3 Was it a potentially fair reason?
- 1.4 Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the Claimant?
- 1.5 The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

2 Failure to inform/consult (TUPE 2006, Regs 13, 13A and 15)

- 2.1 Is the Claimant an "affected employee" within the terms of Regulation 13 (1) of the TUPE Regulations 2006;
- 2.2 Did the respondent/s fail to inform the Claimant of the matters set out in Regulation 13 (2) of the TUPE Regulations 2006;
- 2.3 Did the respondent/s fail to consult the Claimant in accordance with Regulation 13 (6) and 13 (7) of the TUPE Regulations 2006.
- 2.4 Does any employers' defence apply (in accordance with regulation 13 (9)) of the TUPE Regulations 2006.

The Findings of Fact Relevant to the Issues

17. I have made the following findings of fact based on the balance of probability from the evidence I have read, seen, and heard. I do not make findings in relation to all matters in dispute but only on matters that I consider relevant to deciding on the issues currently before the Tribunal.

The Claimant's employment prior to the business transfer

18. Mrs Scott joined the First Respondent as a part-time receptionist on 6 October 2010. Marlow Chiropractic Ltd was owned by Dr Brooks, and he was the sole chiropractor practising at the business premises. The practice only offered chiropractic services.

19. Mrs Scott was promoted to the full-time role of Practice Manager in July 2014. I accept the account of her employment that Mrs Scott gave in her claim form and

during her oral evidence. Her duties involved meeting and greeting clients, booking appointments, taking payments and registering clients, as well as payroll, accounting and stocktaking responsibilities, as well as dealing with medical insurance claims.

20. The Tribunal was provided with a copy of a contract that was signed and dated by Dr Brooks and Mrs Scott on 18 January 2021. The contract set out the terms of her employment as Practice Manager. It stated that her normal days of work would be Monday-Friday, and her hours of work were 8am-6pm on Tuesdays and Thursdays, and 8am-7pm on all other working days. Her hourly rate of remuneration is set out as £12.00 per hour, and she was to be paid on the 24th of each month. The contract states that she was entitled to 28 days holiday per year.

The transfer of business

21. The First Respondent sold the intellectual data and goodwill which formed the business of the First Respondent to the Second Respondent on 1 February 2022. The Claimant's employment transferred to the Second Respondent through operation of Regulation 4 (1) the TUPE Regulations 2006.

22. Regulation 4 (1) provides that "*except where objection is made under paragraph (7), 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*".

23. It was not submitted that there was any objection to the transfer, or that the Claimant's employment did not transfer to the Second Respondent.

The First Respondent's consultation with the Claimant prior to the business transfer

24. The Claimant accepts that in November 2021, Dr Brooks advised the Claimant that he was selling his business to the Second Respondent, and that he suggested she may be made redundant. This is consistent with a text message the Claimant sent to her family on 24 November 2021 informing them that she expected to be made redundant soon and asking them to look out for other opportunities.

25. I found the Claimant to be a credible witness, and the documentary evidence considered demonstrates that redundancy was envisaged as a potential consequence of Dr Brooks selling his business to the Second Respondent.

26. On 19 January 2022, Miss Grimshaw provided the Claimant with a contract for employment with the Second Respondent. This contract was for the position of receptionist. Her working hours were to be 9am-7pm on Wednesdays and Thursdays, 9am-5pm on Fridays and 10am-4pm on Saturdays. Her hourly rate was to be £13.50. I accept that this was a draft contract, as indicated by "?" on the

contract. Another contract dated January 2022 was included in the Claimant's appendices documents. This contract had 5 working days, including Saturdays.

27. The Claimant sought to clarify her employment status in an email she sent to Miss Grimshaw on 21 January 2022. It is clear from this email that the Claimant was unsure as to her employment status and what employment rights she would retain should she work for the Second Respondent.

28. The Claimant also emailed Dr Brooks on 21 January 2022. It is clear from this letter that the Claimant felt confused and hurt by the lack of information with which she had been provided. She was also unsure of what employment rights she would retain following any transfer of her employment. Dr Brooks responded by inviting her to meet him after work to answer some of his questions.

29. This meeting took place on 24 January 2022. In her written and her oral evidence, the Claimant stated that she met Dr Brooks, and he gave her an £800 pension contribution, told her she would be transferred under TUPE and expressed some lack of understanding of TUPE. Dr Brooks recalls that at this meeting he told her she would be transferred through TUPE and that she had been made a very good offer by the Second Respondent. There is no written record of this meeting. However, I accept that the Claimant was left with significant uncertainty after this discussion as being told she was to be transferred would not answer the questions she had.

30. There then followed further discussions in January 2022. When asked about these discussions, Dr Brooks stated that the Claimant was "told about TUPE" on three separate occasions. The Claimant responded that "mentioning the word TUPE is not a consultation". It appears nothing was written down for the Claimant setting out how her employment would be affected. I accept that there was no clear discussion with the Claimant regarding what any TUPE transfer would mean for her.

31. The Claimant did have discussions with the Second Respondent about her ongoing employment during this time. She met with Miss Grimshaw during December 2021, and emails demonstrate that Mr Partridge was in email correspondence with the Claimant on 4 January 2022, inviting her to come into the Second Respondent's clinic in Marlow to discuss a contract.

32. It is clear that the mechanism through which the Claimant would transfer to the Second Respondent were somewhat uncertain at this time. For example, Mr Partridge's email of 4 January 2022 states that things "*seem to be moving forward*" and refers to agreeing a contract "*if all things continue to progress*".

33. Messages between Mr Partridge and Miss Grimshaw on 21 January 2022 indicate that at that stage, they did not know whether Dr Brooks would be making the Claimant redundant or not. I find that all parties did not know, at this stage, what the basis for the Claimant's ongoing employment would be.

34. On 25 January 2022, Dr Brooks emailed the Claimant to explain that contracts with the Second Respondent were ongoing, and that the contract contained a clause about her future under TUPE “as we discussed”. In this email, he stated that “I have valued your position at the clinic and have made it clear to Jonrog Limited that you are very good at your job and deal the majority of the admin and paperwork side of the business which is why they are keen to have you onboard”. I accept that Dr Brooks was trying to provide information and reassurance to the Claimant through this correspondence.

35. On 1 February 2022, the Claimant was advised that Dr Brooks and Mr Partridge had signed their contract and she was to go into the Second Respondent’s premises (“Marlow Beauty”) to familiarise herself with her new workplace.

The Claimant’s employment following the business transfer

36. On 1 February 2022, the Claimant attended Marlow Beauty . She was invited to set up an account with “Marlow Beauty” and she described being required to work alongside a cupboard, with no desk, and an unsuitable chair.

37. I accept that the Claimant’s immediate impression was that the premises were a beauty salon, rather than a chiropractic clinic. In her questions to Miss Grimshaw she asked whether the premises were aesthetically a beauty salon with a chiropractice room. I accept that the Claimant formed the view that she was to work as a receptionist in a beauty salon, which she felt was a very different role to her work with the First Respondent.

38. I have also had regard to the evidence of Miss Grimshaw and Mr Partridge, and I accept that whilst the premises had features of a beauty salon, it did provide chiropractic services, for example, Dr Brooks was working there for a period following sale of the business, and there were other chiropractors operating rooms there.

39. I also accept the evidence of Miss Grimshaw that although the Second Respondent uses the term receptionist, the duties are mainly equivalent to the Practice Manager role in which the Claimant was working when employed by the First Respondent. Miss Grimshaw explained that the receptionist role involved meeting and greeting patients, checking forms, checking insurance, administering appointments, bookings and patient accounts, stocktaking and ordering, and social media development. Miss Grimshaw explained that other than payroll responsibilities, the roles were identical.

40. There was a change in working hours; Miss Grimshaw described the post as a four-day post with Saturdays as required. I accept the evidence of Miss Grimshaw that this was discussed with the Claimant. The Claimant’s claim form states that she carried out 55 hours a week when working for the First Respondent. Dr Brooks referred in his evidence to her working 50 hours. The contact I refer to above from

2021 suggests fewer hours, but does state that work in excess of contract hours might be required. I do accept that the post with the second Respondent would entail fewer hours. This was accepted by Mr Partridge and Miss Grimshaw.

41. I also accept the evidence of Mr Partridge and Miss Grimshaw that the Claimant's pay was increased to £13.50 p/h to ensure that her pay remained the same. The parties' disputed whether this pay increase would offset the lost income due to the reduction of hours. Although the parties presented slightly different figures regarding the hours worked by the Claimant, I accept the evidence of the Second Respondent that the intention was for the Claimant to be paid the same amount whilst working for them as she was when working for the First Respondent, and there may have been further adjustment of hours or hourly rate to ensure this.

42. There was also some loss of the ability to work from home, but the Claimant had not indicated that this would be an issue. I accept the evidence of Miss Grimshaw and Mr Partridge that there was ongoing consideration of the Claimant's role and that there would be some flexibility to ensure they retained her.

43. On or around 6 February 2022 Mr Partridge was on holiday. He remained in contact with Miss Grimshaw during this time. In their messages Miss Grimshaw refers to the Claimant settling in well at Marlow Beauty, though she remained angry at Dr Brooks for how he had treated her.

44. The Claimant contacted Dr Brooks and Mr Partridge on 22 February to make them formally aware of matters which she said remained unsolved. These matters related to the transfer of her role of Practice Manager, the lack of consultation regarding her transfer of employment and the change in her terms and conditions of her work.

45. The Claimant then met with Mr Partridge on 23 February 2022 to discuss her concerns. There is no agreed written record of this meeting. I have had regard to the notes that both parties made following the meeting. The Claimant described Mr Partridge as telling her that he was unsure of what she wanted to achieve and that they would have to find a way to make things work or not.

46. Mr Partridge disputed this account of their meeting. He said that when he returned from holiday he realised that things were not going well. He said that he, as the business owner, was doing all he could do to assuage the situation that he felt his business had been put into at the last minute. He described the Claimant as being very angry about the way she had been treated by the First Respondent. In the absence of an agreed written record of this meeting, I do not reach any conclusion regarding the precise detail of what was said. I do accept that Mr Partridge was keen to keep the Claimant as an employee.

47. The Claimant was paid by the Second Respondent on 28th February 2022. The Claimant's previous pay date was 24th of every month. When employed by the

Second Respondent, she was paid on 28th of the month. Miss Grimshaw accepted that this was an oversight and would have been changed had the Claimant's employment continued.

The provision of equipment for the Claimant

48. I have viewed photographs of the Claimant's work set up at Marlow Beauty. The Claimant was provided with an office chair. She had a working surface at which she could work, but it does also appear to be a storage area. There was no space for the Claimant to stretch her legs.

49. From 8 February 2022 the Claimant experienced what she described as "*worsening back pain and neck pain*". She attributed this to her workstation. Miss Grimshaw was aware that the Claimant was not sleeping well, and that she had previously had back issues. One of the chiropractors at Marlow Beauty started to treat the Claimant. Miss Grimshaw explained that the Claimant did mention that she was not comfortable on her chair and they had a conversation about changing it.

50. The details of this conversation are disputed. Miss Grimshaw recalled that she said that nothing could be bought until it was discussed with Mr Partridge, and Miss Grimshaw said that she wanted to get the whole area redecorated and they would look at changing the Claimant's chair. She remembered looking into potential options in the second week of the Claimant's work.

51. The Claimant does not recollect looking at potential options. The Claimant states that Miss Grimshaw told her that no new chair would be bought until the area was redecorated. I find that there is some difference in the parties' accounts of this conversation, but they seem in some agreement that a new workstation was discussed, and Miss Grimshaw was receptive to this, if not able to immediately act to provide one.

52. The Claimant also alleges that Mr Partridge told her during their meeting on 23 February 2022 that he would not buy any new workstation equipment until he knew she was staying at the business. There is no agreed written record of that meeting. Mr Partridge stated that he recollected discussing the workstation in this meeting, and that he thought options were being discussed with Miss Grimshaw, and that he did not say that he would not arrange a new workstation until she was signed up properly. In his oral evidence, he stated that "*our whole mantra with her was that we wanted a happy member of staff. That could only reflect positively upon our business*". In the absence of an agreed written record of that meeting, I do not conclude that Mr Partridge said that no chair would be purchased until the Claimant signed on with the business.

53. At the meeting of 23 February 2022, the Claimant was asked to meet with Mr Partridge again on Saturday 26 February to discuss things further.

The circumstances of the Claimant's resignation

54. On 25 February 2022, the Claimant notified Miss Grimshaw that she would not be coming into work due to, amongst other things, neck pain and headaches. Her GP issued her with a sick note for two weeks, diagnosing work related stress and anxiety.

55. On 11 March 2022, the Claimant resigned from her employment. In her evidence to the Tribunal, when asked what prompted her to resign, the Claimant was asked whether the thing that finally prompted her to resign was Mr Partridge saying that she would not get a new chair until she confirmed her working arrangements, and she said "*it was the fact that I could not get the workstation sorted. On top of everything else, yes that was*".

56. The Claimant was not issued with a written statement of her employment particulars by the Second Respondent.

The law

Unfair dismissal

57. Section 95(1)(c) of the **Employment Rights Act 1996** provides that an employee is dismissed if: - "*the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*"

58. An employee is "entitled" so to terminate the contract only if the employer has committed a fundamental breach of contract, i.e. a breach of such gravity as to discharge the employee from the obligation to continue to perform the contract. The conduct of the employer must be more than just unreasonable or unfair to constitute a fundamental breach.

59. The Claimant relies upon i) breach of the implied of trust and confidence and ii) Regulation 4 (9) of the TUPE Regulations.

60. The implied term of trust and confidence was defined by the House of Lords in the case of **Malik and Mahmud v BCCI [1997] ICR 606** as being an obligation that an employer shall not "*Without reasonable and proper cause, conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".

61. If there was a fundamental breach, the next question is whether the Claimant resigned, at least in part, in response to the breach, and not for some other unconnected reason, and did the Claimant resign before affirming the contract. If so, there will be a dismissal. If there is a dismissal it is for the respondent to show the reason for dismissal.

62. **Regulation 4 (9)** of the TUPE Regulations states that:

“...where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer”.

Failure to consult and/or inform

63. Regulation 13 (2) and (6)-(9) of the TUPE Regulations (which I consider to be the parts of Regulation 13 most relevant to this case) state that:

“(2) Long enough 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 or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for 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 so 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 he envisages that no measures will be so 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 seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall—

(a) consider any representations made by the appropriate representatives; and

(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

64. I have also had regard to Regulation 13A of the TUPE Regulations, regarding when the duty to consult can be complied with through consultation with affected employees. In my assessment, as there were fewer than 10 transferring employees at the time of transfer, the respondents could comply with the duty under regulation 13 by consulting with the affected employee, namely, the Claimant.

65. Regulation 15 of the TUPE Regulations, which I do not reproduce here, sets out relevant provisions regarding the bringing of claims and potential remedies for an alleged breach of Regulation 13.

66. I have also had regard to section 38 of the Employment Act 2002 in relation to the alleged failure to provide a written statement of employment particulars. Section 38 (1) states that the section applies to proceedings before an employment Tribunal relating to a claim under any of the jurisdictions listed in Schedule 5 of the Employment Act 2002.

The parties' submissions

67. I heard closing oral argument by each party. I had also received a written skeleton argument on behalf of the Second Respondent. The submissions made by all parties are not repeated here but have been considered and taken into account in reaching this decision.

The Tribunal's conclusions

Unfair Dismissal

The implied term of trust and confidence

Did the conduct alleged by the Claimant to have occurred happen?

The alleged failure to consult the Claimant in respect of the transfer

68. In relation to the failure to consult the Claimant in respect of the transfer, I have concluded that the First Respondent failed to consult the Claimant in respect of the transfer. I do not consider this to be the result of any ill will on the part of the First Respondent.

69. The evidence of all parties shows that there was consideration given to the Claimant being made redundant. There was a lack of certainty regarding how the Claimant was to be treated until a very late stage, and the Claimant was not consulted about her transfer, rather, it seems she was told it was going to happen and encouraged to trust that all would be well.

70. In relation to the Second Respondent, I have concluded that they made sincere efforts to address the Claimant's situation, and that they were in some doubt prior to the transfer regarding what was going to happen to the Claimant. I accept that the Second Respondent sincerely wanted to retain the Claimant's services, both for sound business reasons relating to their own business success, and also out of consideration for the Claimant's circumstances. I have therefore concluded that, to the extent that they were able, the Second Respondent did seek to consult the Claimant about her ongoing employment.

The alleged unilateral change of the Claimant's duties from those of Practice Manager to those of a Receptionist

71. I do not conclude that there was a substantive change of the Claimant's duties. I acknowledge the job title was different, but accept that the roles were substantially the same, I consider that both roles involved very similar duties, and the one difference, namely payroll responsibilities, was not such as to entail a significant change.

72. I do however conclude that the background to the transfer left the Claimant feeling uncertain and lacking any confidence that her situation had been properly considered and planned for.

The alleged unilateral change of the Claimant's terms and conditions, including pay dates, days and hours worked

73. There was some change to the Claimant's terms and conditions, including days and hours worked. However, I conclude that her rate of pay would have remained the same, due to her hourly rate being increased.

74. The Claimant was paid on 28th February rather than the 24th of the month as she expected from her previous employment, however, I accept the evidence of the Second Respondent that the payment date would have been changed to the date the Claimant was expecting.

75. I also accept the evidence of the Second Respondent that there was discussion of working days and hours with the Claimant as they were seeking to accommodate the Claimant within their business.

Did Mr. Partridge state that if the Claimant did not agree to the said changes, she would have to leave her employment?

76. There is no agreed written record of the meeting where this comment was allegedly made.

77. Both parties have different recollections of the conversation where this alleged comment was made. I also accept the evidence of Mr Partridge, which appears consistent with the tone of text messages he sent at the relevant time, that he wanted to retain the Claimant as an employee.

78. I therefore do not conclude that Mr Partridge said that if the Claimant did not agree to the changes she would have no choice but to leave her employment.

The alleged failure to provide a suitable desk and/or chair which allegedly adversely affected the Claimant's health

79. I accept the Claimant's evidence that she found her workstation at Marlow Beauty very uncomfortable, and that she began to experience significant pain and discomfort shortly after commencing work there.

80. However, in the absence of medical evidence, I do not conclude that the equipment provided was unsuitable and that it adversely affected the Claimant's health. In reaching this conclusion, I have had regard to the Claimant self-reported pre-existing back pain, as well as the significant stress she was experiencing at the time of the transfer of employment and commencing work with the Second Respondent.

Did Mr. Partridge tell the Claimant that he would not address the health and safety/welfare concerns raised by her until he was satisfied she would remain employed in the business?

81. There is no written record of the meeting where this comment was allegedly made. I accept the evidence of the Second Respondent's witnesses that they were sincerely seeking to accommodate the Claimant within their business. I therefore do not find that the Claimant was told her concerns would not be addressed until they knew she would remain.

82. For the reasons set out above, I concluded that part of the conduct alleged by the Claimant did happen, namely, that the First Respondent failed to consult her regarding the transfer of her employment.

83. I have gone on to consider whether the conduct that I have found did happen amounted to a breach of the implied term of trust and confidence. I have considered whether failing to consult the Claimant in the way the First Respondent did is conduct calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee (per **Malik** above]. I have concluded that Dr Brooks did not intend to destroy or damage the relationship of trust and confidence and his conduct was therefore not calculated to have this effect.

84. I have considered whether it was likely to have this effect. I have considered the way Dr Brooks sought to inform the Claimant of the steps that were being taken in relation to his business and her employment. I accept that Dr Brooks did try to keep the Claimant informed, but I conclude that he failed to provide her with sufficient detail of the proposed transfer arrangements to assuage her legitimate concerns about her future.

85. However, this is not a case involving deliberate concealment of the fact of or likelihood of transfer, and I accept that Dr Brooks did seek to respond to the Claimant's concerns, and provide reassurance to her at the time that her employment would continue with the Second Respondent, and that she would be protected through TUPE.

86. I have therefore considered that the conduct of the First Respondent does not amount to sufficiently damaging conduct to amount to a breach of the implied term of trust and confidence.

87. As I have reached this conclusion, I have not gone on to ask whether the First Respondent's conduct in failing to consult the Claimant was the reason for her resignation. However, had I been required to consider this issue, I would have considered that the reason for the Claimant's resignation was her dissatisfaction with her working conditions at Marlow Beauty.

88. I accept that the lack of certainty regarding her job transfer was part of the background of her decision, but I have had regard to the fact that the Claimant commenced work with the Second Respondent, and worked there for some time before she resigned, and I have had regard to her evidence regarding her back and neck pain at the time, and her upset at not being provided with an appropriate workstation, and I consider these experiences to be the reason for her resignation, rather than the conduct of the First Respondent in failing to consult her about the proposed transfer.

Regulation 4 (9) of the TUPE Regulations

89. I have reached the conclusion that there was not a material difference in the terms and conditions of the Claimant's employment with the Second Respondent. I have concluded that despite the differences in job title, the roles were substantially the same. I have considered that although there was some change in working hours, this did not affect the Claimant's overall pay.

90. I do not consider that the changed location of work amounted to a substantial change in working conditions to the material detriment of the Claimant; I accept the evidence of the Second Respondent that the Claimant was initially content to work at Marlow Beauty on the days envisaged. For these reasons, I do not conclude that there was a substantial change in working conditions to the material detriment.

91. I have therefore concluded that the Claimant was not unfairly dismissed.

The duty to inform/consult

Regulation 13 of the TUPE Regulations

92. For the reasons set out above, I do conclude that the First Respondent failed to inform and consult the Claimant in the way required by Regulation 13 (2) and (6) and 13A of the TUPE Regulations.

93. The Claimant was not provided with detailed information regarding her transfer to the second employment, and was only told at a very late stage that the transfer would definitely be happening. She was unclear about what employment rights she would retain upon transfer.

94. I accept that Dr Brooks did not intend to cause the Claimant distress, and I acknowledge that he did seek to provide reassurance that her employment would continue, and facilitated contact with the Second Respondent, however, I consider that there was insufficient information provided to the Claimant to satisfy the requirements of Regulation 13 (2) and (6).

95. In relation to the Second Respondent, I accept that they only appreciated at a very late stage that the Claimant would be transferring to their employment. I conclude that when they realised this would be happening, they took steps to consult with the Claimant regarding her employment with them.

96. I therefore do not conclude that there was any failure to inform or consult by the Second Respondent, or alternatively, I conclude that if there was a failure to consult, the Second Respondent took all reasonably practicable steps to fulfil the duty under Regulation 13.

97. I therefore conclude that the claim under Regulations 13 and 15 of the TUPE Regulations 2006 succeeds against the First Respondent.

98. Applying Regulation 15 (9) the First and Second Respondent are jointly and severally liable with in respect of compensation payable in relation to this claim. I have had regard to Regulation 16 (3) of the TUPE Regulations in considering the amount of compensation payable.

99. Given my conclusion above that this was not an attempt to conceal the fact of transfer, and that Dr Brooks did make some effort to keep the Claimant informed, I have determined that a just and equitable award is nine week's pay. I have determined a week's pay (gross) to be £636.00, per the Claimant's Schedule of Loss.

100. I have not made any award in relation to the Second Respondent's failure to provide a written statement of particulars the TUPE Regulations are not listed in Schedule 5 of the Employment Act 2002.

Employment Judge L Cowen

Date: 9 October 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

10 October 2024

FOR THE TRIBUNAL OFFICE

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