



EMPLOYMENT TRIBUNALS

Claimant: Gemma Wheeler

Respondent: Steven Newman and Jake Newman, trading as MediClean Lincoln

Heard at: Lincoln **On:** 4 June 2018

Before: Employment Judge Evans (sitting alone)

Representation

Claimant: in person

Respondent: Mr Hawes

JUDGMENT

1. The Claimant was dismissed by the Respondent by reason of redundancy and the Respondent is ordered to pay the Claimant a statutory redundancy payment of £375.00.
2. The Claimant was dismissed by the Respondent in breach of contract because she was not given four weeks' notice of dismissal. The Respondent is ordered to pay the Claimant £375.00.
3. The Respondent failed to pay the Claimant an amount in respect of accrued but untaken leave as required by Regulation 14 of the Working Time Regulations 1998. The Respondent is ordered to pay the Claimant compensation of £11.25.

REASONS

Preamble & the Hearing

1. The Claimant began work for Minster Cleaning Services ("Minster") in April 2013. In January 2018 the contract of Minster in relation to which she was employed was taken over by the Respondent. Minster informed the Claimant that her employment had transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) ("TUPE") to the Respondent. The Respondent informed the Claimant that TUPE did not apply. The result of this was that the Claimant was left unemployed from 11 January 2018.
2. The Claimant presented a Claim Form to the Tribunal on 22 February 2018 claiming a statutory redundancy payment, notice pay and a payment in respect of accrued but untaken holiday pay. That claim came before me as a short-track claim on 4

June 2018.

3. The Claimant represented herself and gave oral evidence. The Respondent was represented by Mr Hawes. Mr Steven Newman, a partner in Mediclean, attended and gave oral evidence. Neither the Claimant nor Mr Newman provided a written witness statement. A detailed notice of the evidence they gave is contained in the record of proceedings on the Tribunal's file.
4. There were no Case Management Orders requiring the preparation of a bundle and the parties attended without one. They did, however, produce various documents which they said were relevant to the claim the Claimant had brought. They provided me with these and I arranged for a bundle to be prepared. This ran to 21 pages and a copy of it is held on the Tribunal's file. Page references are to the pages of this bundle unless otherwise stated.

Issues and discussion at the beginning of the Hearing

5. At the beginning of the Hearing I explained to the Claimant that disputes such as this were relatively common. I explained that if she had been represented she might well have decided to bring a claim against both Minster and the Respondent, rather than just against the Respondent. I explained that the reason for this was that if I concluded that her employment had not transferred under TUPE to the Respondent from Minster she would be left without a remedy as I would not be able to make any award against Minster, given that it was not a party to the proceedings. I said that in these circumstances she could, if she wished, apply to join Minster as a party. I explained that if I decided any such application in her favour it would then be necessary for me to adjourn the Hearing so that a copy of the Claim Form could be served on Minster and to permit it a period to prepare and file a Response.
6. The Claimant said that she did not wish to make any such application. After a period of unemployment she had found alternative work with Minster and did not wish to bring a claim against it. As such no application to join Minster as a respondent was made.
7. I noted that the Claim had been brought against "MediClean Lincoln". I queried whether MediClean Lincoln was a company. Mr Steven Newman explained through Mr Hawes that it was a partnership comprising himself and his son, Jake Newman. The parties agreed that the name of the Respondent should be amended so that it is as set out above.
8. The Claimant had completed 4 years' employment when her employment ended and she was working 12.5 hours a week at the then national minimum wage of £7.50 an hour. It was therefore agreed that she was earning £93.75 per week. It was therefore also agreed between the parties that if she had been entitled to a statutory redundancy payment the amount of that payment would have been £375. Equally, it was agreed that as at the date her employment ended her statutory notice period was 4 weeks and that consequently the value of her notice pay would have also been £375. Finally, it was agreed that the leave year of the Claimant for the purposes of the Working Time Regulations 1998 ("the WTR") was 1 January to 31 December. The Claimant based her claim for holiday pay on an annual entitlement of four weeks' paid leave. It was therefore agreed that under Regulation 14 of the WTR her entitlement was to $11/365 \times 20 = 0.60$ day's pay. That amount would be $2.5 \times £7.50 \times 0.6 = £11.25$.
9. The Respondent pragmatically accepted that, if the Claimant's employment had

transferred to it under TUPE, then it would be liable to pay these amounts in relation to redundancy pay, notice pay and holiday pay. As such it was agreed that the only issue for me to decide was whether the Claimant's employment had transferred to the Respondent under TUPE.

The Law

10. TUPE applies when there is a "relevant transfer". A "relevant transfer" is a transfer of an undertaking or a service provision change as set out in regulation 3 of TUPE.

11. The relevant sub-paragraph of regulation 3 in this case is sub-paragraph (1)(b)(ii) which provides:

(1) These Regulations apply to...

(b) a service provision change, that is a situation in which –

...

(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf

...

And in which the conditions set out in paragraph (3) are satisfied.

12. Sub-paragraph (2A) of regulation 3 provides:

(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

13. Sub-paragraph (3) of regulation 3 provides:

(3) The conditions referred to in paragraph (1)(b) are that –

(a) Immediately before the service provision change –

(i) There is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) The client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) The activities concerned do not consist wholly or mainly of the supply of goods for the client's use.

Findings of Fact

14. I am bound to be selective in my references to the evidence when setting out my findings of fact. However, I wish to emphasise that I considered all the evidence in the round when making these findings.

15. The contract held by Minster and subsequently by the Respondent in relation to which the Claimant was employed was for the cleaning of the premises of the Fountain Medical Centre in Newark ("the Medical Centre"). I accept the Claimant's unchallenged evidence that the Medical Centre has about 7 rooms occupied by doctors, 5 or 6 occupied by nurses, a reception and waiting area, secretarial rooms, kitchens and toilets. In short, it is a fairly large doctors' surgery.

16. When the contract was held by Minster, the Claimant and another employee attended the Medical Centre Monday to Friday each week for 2.5 hours each day to conduct the required clearing. The Respondent has since January 2018 carried out the cleaning work using one employee and one of its partners. They have both attended Monday to Friday for 2 hours each. As such the number of weekly hours dedicated to the cleaning of the Medical Centre has reduced from 25 to 20.
17. The manner in which the Respondent has cleaned the Medical Centre since January 2018 was set out in documents between pages 9 and 21 and in oral evidence given by Mr Newman. The manner in which Minster had cleaned the Medical Centre was detailed in oral evidence given by the Claimant. I make the following findings in relation to the similarities and differences between the activities carried out by on the one hand the Respondent, and on the other Minster, under their respective contracts with the Medical Centre.
- 17.1. The Respondent carried out a free initial deep clean of the Medical Centre's premises and will provide that annually on an ongoing basis. I find that when Minster held the contract they also carried out deep cleans, but not at specific intervals in time.
- 17.2. The two individuals who have carried out the cleaning on behalf of the Respondent since January this year carry out a number of daily closing tasks (page 13) and cleaning tasks for the kitchen/canteen area as set out at page 14, the toilet facilities as set out at page 15, the clinical rooms as set out at page 16 and 17, and general cleaning tasks as set out at page 18. Having heard evidence from the Claimant, I accept that she and the other employee who worked with her carried out the same tasks except that they did not clean either outside lights or the exterior of windows. The latter task was carried out by a specialist window cleaner employed by Minster. I find that as such the cleaning tasks carried out by the Claimant and the other employee of Minster prior to the Respondent taking over the contract with the Medical Centre were very similar indeed to the tasks carried out by an employee and partner of the Respondent after the Respondent had taken over.
- 17.3. The Respondent styles the two individuals who have since January this year carried out the cleaning as "hygienists" not "cleaners". Mr Newman suggested in his oral evidence that a hygienist was a "specialist in human health" who has completed a 2 month training course. However, when the matter was explored in more detail, his more detailed evidence was that a "hygienist" would have completed only a two full-time week course and thereafter would have received on the job training. The training did not lead to any qualification. A hygienist who was an employee was, at the date of the Hearing, paid £8, just 17p more than the National Living Wage paid to those aged 25 and over. I find that in fact a "hygienist" is fundamentally the same as a "cleaner". A hygienist is not a "specialist in human health". Rather he or she is a cleaner who has received some training. I therefore find that the cleaning skills possessed by the Claimant and by the individuals who carried out the cleaning of the Medical Centre on behalf of the Respondent were very similar.
- 17.4. The Respondent requires its employees to be "DBS checked". Minster had no such requirement. However I find that this distinction does not result in any difference in the activities carried out by on the one hand Minster and, on the other, the Respondent.

17.5. The Respondent puts in place a variety of documentation for clients. This includes “individual cleaning plans, daily checklists, audits, and practice handbooks, signed confidentiality agreements” (Respondent’s website, page 21). None of these documents were produced to the Tribunal other than the checklists between pages 13 and 18). I accept however that such documentation existed. Minster did not deploy a similar range of documentation, although I find in accordance with the Claimant’s evidence that Minster did provide a document explaining which cleaning products should be used in which areas of the Medical Practice.

17.6. The Respondent uses “wipe roll” instead of microfibre cloths when carrying out the cleaning of the Medical Practice. It also uses “black light technology for inspections” (Respondent’s website page 21). Black light technology will reveal urine and blood which are invisible to the naked eye. In addition, on occasion it uses “germicidal lamps” which, when left in a room, will as their name suggests kill germs. Minster did not use either of these technologies and did use microfibre cloths. Both Minster and the Respondent, I find, used a variety of cleaning products for different areas of the Medical Practice.

18. I accept the evidence of the Claimant that she has recently undergone a DBS check which did not produce any results which would have prevented the Respondent from employing her.

Submissions

19. Mr Hawes for the Respondent referred to the case of Johnson Controls Ltd v Campbell & others UKEAT/0041/12. He submitted that the cleaning of the Medical Practice as carried out by the Respondent was essentially a different activity to that carried out by Minster. The cleaning services provided by the Respondent were carried out by DBS vetted uniformed hygienists who deployed black light technology and germicidal lamps. This was a significantly more technically advanced service to that provided by Minster. The Respondent could not have employed the Claimant because she was not DBS vetted.

20. Overall, Mr Hawes’ submissions were to the effect that there had been no relevant transfer because the activities carried out by the Respondent were not fundamentally the same as the activities carried out by Minster. He referred in general terms to a press release which had appeared on the GOV.UK website on 31 January 2014 explaining the amendments to TUPE from that date including the inclusion of what was then the new regulation 3(2A) (which I have set out above).

21. The Claimant did not make any oral submissions but simply referred back to what she had said when giving evidence.

Conclusions

22. I conclude that the activities carried out by the Respondent for the Medical Centre were fundamentally the same as the activities carried out by Minster. I so conclude for the following reasons:

23. I conclude that:

23.1. Both Minster and the Respondent carried or carry out periodic deep cleans of the Medical Centre, albeit not necessarily at the same intervals;

23.2. The number of hours spent carrying out the activities is similar (20 hours a

week by the Respondent, 25 by Minster);

23.3. The basic daily tasks carried out by Minster and the Respondent as detailed in my findings in paragraph 17.2 above were fundamentally the same;

23.4. The skills possessed by the individuals who carried out the cleaning by Minster were fundamentally the same as those possessed by the Respondent, as detailed in my findings in paragraph 17.3 above.

24. In light of these conclusions I find that the activities carried out by the Respondent for the Medical Centre were fundamentally the same as the activities carried out by Minster for the Medical Centre. I recognise that there are differences, in particular:

24.1. in the equipment and techniques used (as set out in paragraph 17.6 above);
and

24.2. in the level of documentation provided (as set out in paragraph 17.5 above)

but I find that these differences do not mean that the activities carried out by the Respondent are not fundamentally the same as those carried out by Minster. Above all I find that they are fundamentally the same because they comprised with Minster and comprise now with the Respondent the day to day performance of a series of tasks as set out in paragraph 17.2 above. The activities remain fundamentally the same even though the Respondent documents them more extensively, provides a little training to those who carry them out, and applies some new technology around the edges to, perhaps, provide a better quality service.

25. I conclude that the Claimant was part of an organised grouping of employees situated in Great Britain which had as its principal purpose the carrying out of the activities analysed above and that since 11 January 2018 those same activities have been carried out by the Respondent. I therefore conclude that there was a relevant transfer for the purposes of Regulation 3 of TUPE and that as a result of it the contract of employment of the Claimant had effect after the transfer as if originally made between the Claimant and the Respondent. The fact that she had not had a DBS check carried out on her prior to the relevant transfer does not alter this conclusion. In fact there is every reason to suppose that the Respondent could have carried out a DBS check on her post-transfer, if that is a requirement of employment with it, given that the Claimant has since her dismissal undergone a DBS check.

26. In light of the concessions sensibly made by the Respondent at the beginning of the Hearing, it therefore follows that the Respondent dismissed the Claimant and failed to pay her a statutory redundancy payment, notice pay and compensation due under Regulation 14 of the WTR.

27. I therefore order the Respondent to pay the Claimant:

27.1. A statutory redundancy payment of £375;

27.2. Notice pay of £375;

27.3. Compensation due under Regulation 14 of the WTR of £11.25

Employment Judge Evans

Date: 13 June 2018

JUDGMENT SENT TO THE PARTIES ON

23 June 2018

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FOR THE TRIBUNAL OFFICE