Case No:3333022/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr Slawomir Martyka

-v-

Respondent: Arriva London North Ltd

Heard at: Watford **On: 30 April 2019.**

Before: Employment Judge Tuck

Appearances:

For the Claimant: In person
For the Respondent: Mr Noblet

JUDGMENT

The Claimant's claims fail and are dismissed.

Reasons

1. Following a period of early conciliation between 8 and 27 June 2018, the Claimant presented an ET1 on 17 September 2018 setting out claims of unfair dismissal, failure to consult under the TUPE regulations, for a redundancy payment and a claim for his notice pay. By an ET3 of 30 October 2018 those claims were denied.

2. I heard evidence from the Claimant, and from Mr Sands, a Regional Human Resources Business Partner, for the Respondent. I was presented by the Respondent with a bundle containing 69 pages, all of which I read.

Facts.

3. The Claimant was employed by the Respondent as a PCV Driver working from the Watford Depot from 22 June 2006 until 9 June 2018. From around 2011 he drove on the 268 bus route. In 2016 there had been a TUPE transfer from Arriva the Shires to Arriva London North, but this involved only a change of name of the employer and involved no alteration to the work location or any terms and conditions of employment.

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4. All bus drivers based in Watford were part of a bargaining unit for which TGWU and later Unite the Union was recognised. The claimant was at some point a union member, but was not a member by late 2017 or at all in 2018.

5. A number of bus routes run by the Respondent, including that on which the Claimant was assigned, number 268, were operated under a contract with Transport for London (TfL). Periodically tendering exercises to run the bus routes were run by TfL; Mr Sands told me that when a contract ends, TfL expect drivers to stay on the route to which they are generally assigned, and to TUPE across with that route. It was however permissible for a transferor to allow an employee to move to a different route or location within its organisation at the date of transfer if that was what the parties wished.

6. By letter dated 17 July 2017 Alex Jones, Operation Director of the Respondent wrote to the recognised union official informing them that they had "taken the difficult decision to cease operations at Watford over the next 12 months". The letter recorded that a number of bus routes, including the 268 which had a contract end date in June 2018 was under consideration to be moved to operate from Palmers Green as it was closer to the area the route run and was considered to provide the Respondent with a better chance of retaining the operating contract with TfL. The letter went on to state "if we do move this work we would pay London pay rates plus a £1k retention bonus to be paid assuming each driver stays 6 months from the transfer date". A series of consultation meetings about the closure of the Watford site were held on 2 August 2017, 11 September 2017, 22 November 2017 and 9 March 2018.

7. In 2017 the Respondent bid to retain the 268 (and other) bus routes but was unsuccessful. It had been told informally of this by 22 November 2017, and during the consultation meeting between the Respondent and the Union it was recorded that drivers from the 268 (and other) routes would be offered a retention bonus of £3500 to be paid on the contract end date of 8 June 2018.

8. Mr Sands told me that on 15 December 2017 TFL gave formal notice that the 268 (and other routes) would transfer to Metroline from 9 June 2018. By letter dated 19 December 2017 the Respondent wrote to the Union confirming the agreement reached that there would be:

    a. £3500 retention bonus [for those drivers who remained in post until the transfer date]
    b. £1000 bonus for drivers who transferred to another London Garage (to be paid on transfer without a 6 month waiting period), and that drivers would be required to sign Arriva London Terms and Conditions ;
    c. Staff wishing to transfer to Luton or Hemel Hempstead may do so and both garages are offering an incentive to switch across.

    Mr Sands told me, and the claimant agreed, that drivers transferring to Palmers Green – which is a London Garage (and therefore within TfL) would, in addition to the £1000 bonus, also receive a £81 per week disturbance allowance for 12 months and that the London Terms and Conditions were more favourable than those he was employed on. Mr Sands further stated that the Luton / Hemel Hempsted transfer bonus was £2500, in addition to which the Respondent would pay £1000, but that the local terms and conditions there were not as beneficial as those the claimant had been on. The claimant said that he had not been aware of the £2500 payable by those local garages but did know the terms would be less favourable.

9. A further consultation meeting took place with the union on 9 March 2018 during which the Respondent stated that it did not envisage any driver redundancies would be made. The 268 route was recorded as having been won by Metroline who would operate it out of their

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Cricklewood Garage; a TUPE meeting was organized for 9 April 2018, and I have seen the minutes of that meeting. The situation was described as a "compulsory TUPE situation".

10. Mr Sands said that it was the responsibility of the union representatives to disseminate the information from the consultation meetings to the drivers. The claimant said that he heard some information from other drivers, but was not sure of what he was told when.

11. On 25 April 2018 the Respondent wrote to the Claimant informing him of his compulsory TUPE transfer under the 2006 Regulations. He was told that he had the right to object to the transfer but that if he decided not to transfer he would be deemed to have resigned. Options to move to another London Arriva Garage or to Arriva Midlands or Southern Counties were outlined. The letter stated "because your terms and conditions of employment are determined by a collective agreement between Arriva London North Ltd and Unite the Union that agreement is also transferred to Metroline on 9th June 2018". Whilst terms and conditions (save for pension) would remain the same, the location would move to the Cricklewood bus garage. The £3500 loyalty bonus was detailed, as was the £1000 bonus in the event of a move to another Arriva London Garage.

12. A one to one meeting was scheduled to take place with the Claimant on 10 May 2018, but I accept the Claimant's evidence that he was not told of it. A meeting did take place on 15 May 2018. The claimant said that this took around 10 minutes and was not "proper, personal or helpful. I was not objecting to the transfer but relocating my place of employment to Cricklewood in London would adversely affect my life and finance". He added that whilst he would retain his oyster card if he moved to Cricklewood, he would lose his local Arriva bus pass. Conversely, if he moved to Luton or Hemel Hampstead he would lose his oyster card. The short note of the meeting of 15 May records that Palmers Green was "not an option" for the Claimant as it was "40 miles from home", and nor was Cricklewood for the same reason. As to Luton he said he had "never done locals and rate is different" – ie it was a different bus route, and on lower rates of pay and without the benefit of an oyster card. It is recorded that the claimant "would like answers to the question the union has raised". By letter dated 25 May 2018 Mr Sands provided answers to those questions, confirming that there would not be any redundancy, and "as previously advised… if you decide not to transfer (or take up one of the alternatives on offer) you will have been deemed to have resigned."

13. The claimant attended work for the Respondent from Watford for the last time on 8 June 2018. He received the £3500 bonus. He did not report to work with Metroline from Cricklewood, and in fact found alternative employment close to his home address.

14. In cross examination the claimant accepted that he was not dismissed (by Arriva or at all) before 9 June 2018, and that he did not resign on or before 9 June 2018. The claimant did not resign to anybody; he said quite frankly, that he was told that if he wasn't "going with TUPE, he would be treated as having resigned" as there was no alternative job for him at the Watford garage.

15. The claimant received his P45 from the Respondent dated 12 June 2018.

Law

16. The following provisions from the Transfer of Undertakings (Protection of Employment) Regulations 2006 are relevant to the claims presented by the Claimant:
    a. Regulation 3(1)(b) (ii) which provides that there is a service provision change where:

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" 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; or"

b. Regulation 4(9) provides:

"… 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."

c. Regulation 13 deals with the duty to inform and consult representatives where there is a relevant transfer:

13 Duty to inform and consult representatives

(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 the 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 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.

[(2A) Where information is to be supplied under paragraph (2) by an employer—

(*a*) this must include suitable information relating to the use of agency workers (if any) by that employer; and

(*b*) 'suitable information relating to the use of agency workers' means—

(i) the number of agency workers working temporarily for and under the supervision and direction of the employer;

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(ii) the parts of the employer's undertaking in which those agency workers are working; and

(iii) the type of work those agency workers are carrying out.]

(3) For the purposes of this regulation the appropriate representatives of any affected employees are—

(*a*) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(*b*) in any other case, whichever of the following employee representatives the employer chooses—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;

(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(*d*).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(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.

(10) Where-

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(*a*) the employer has invited any of the affected employee to elect employee representatives; and

(*b*) the invitation was issued long enough before the time when the employer is required to give information under paragraph (2) to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this regulation in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).

(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the relevant transfer is taken by the employer or a person controlling the employer.

d. A complaint of failure to inform or consult is provided for in regulation 15.

17. Part X of the Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed.
    a. Section 95 provides

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(*a*) the contract under which he is employed is terminated by the employer (whether with or without notice),

(*b*) [he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(*c*) 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.

18. Part XI ERA 1996 provides for the right to redundancy payments if an employee is dismissed by an employer by reason of redundancy.
    a. Section 136 ERA provides:

(1) Subject to the provisions of this section and sections 137 and 138, for the purposes of this Part an employee is dismissed by his employer if (and only if)—

(*a*) the contract under which he is employed by the employer is terminated by the employer (whether with or without notice),

(*b*) [he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

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(*c*) 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.

Conclusions.

19. There is no dispute that the Claimant was assigned to the 268 bus route which was operated for TfL by the Respondent until 8 June 2018, and from 9 June 2018 by Metroline. Nor is there any dispute that this amounted to a Service Provision Change within regulation 3 of TUPE.

20. I am satisfied that the Respondent complied with its obligations to inform and consult with the union which was recognised by it, and that it also held one to one consultation meetings. Whilst the Claimant felt these lacked detail and were formulaic, they did cover the changes anticipated and what alternatives were open to the claimant.

21. The claimant has stated expressly in his statement that he did not object to the transfer. He may well have feared that to do so might have jeopardised his £3500 loyalty bonus, but whatever the reason was, he at no point communicated any objection. He was clearly dissatisfied about the prospect of a move to a much more distant work location at Cricklewood, and nor did he feel able to contemplate moves instead to Palmers Green, Luton or Hemel Hempstead.

22. The claimant frankly stated that he did not resign and was not dismissed on or before 9 June 2018 and that he knew his employment on that date transferred to Metroline. In these circumstances I cannot find that there was any dismissal, either for the purposes of a claim of unfair dismissal nor for the claim of a redundancy payment.

23. Finally, as the Respondent did not terminate the Claimant's contract of employment, it owed no obligation to him to give notice. I therefore do not find any breach of contract.

Employment Judge Tuck.

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Date: 30/4/19

JUDGMENT SENT TO THE PARTIES ON

……16.05.19……
AND ENTERED IN THE REGISTER

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FOR THE TRIBUNAL OFFICE

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