EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Foxwell**

Respondents: **(1) Dial a Carer Group Limited**
(in Creditors Voluntary Liquidation)

(2) 3HA Limited

Heard at: **East London Hearing Centre (in person)**

On: **10 June 2021 (with the parties); 11 June 2021 (in chambers)**

Before: **Employment Judge Gardiner**
Members: **Mrs S Jeary**
Ms K Labinjo

Representation
Claimant: Mr J Hitchens, counsel
Respondents: (2) Dr V Onipede, counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **The Claimant's employment transferred from the First Respondent to the Second Respondent by reason of Regulation 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.**

2. **By consent, the Claimant is entitled to receive the sum of £1000 from the Second Respondent for failing to inform and consult in relation to the proposed transfer under Regulation 13 Transfer of Undertakings (Protection of Employment) Regulations 2006.**

3. **By consent, the Claimant is entitled to the sum of £750 from the Second Respondent for failing to provide the Claimant with a statement of the changes to her particulars of employment, under Section 4 Employment Rights Act 1996.**

4. **The Claimant's claim for arrears of pay is not well founded and is accordingly dismissed.**

5. **The Tribunal does not have the jurisdiction under Section 11 Employment Rights Act 1996 to determine whether the Second Respondent is in breach of the Claimant's employment contract by failing to pay her for her accrued but untaken holiday pay.**

6. **The complaint that the First Respondent failed to inform and consult in relation to the proposed transfer under Regulation 13 Transfer of Undertakings (Protection of Employment) Regulations 2006 is dismissed upon withdrawal.**

7. **The remainder of the complaints brought against the First Respondent are not well founded and are dismissed.**

REASONS

1. The Claimant is currently employed by the Second Respondent, 3HA Limited as a Support Worker. In this claim, she alleges she became a 3HA employee as a result of a TUPE transfer of her employment from Dial a Carer Group Limited ("DAC") on 22 January 2020. DAC were named as the First Respondent when the ET1 was presented on 14 May 2020. By that date, DAC were in creditors voluntary liquidation. Despite the proceedings being correctly served on DAC, that legal entity has not presented a Response and has taken no part in these proceedings. 3HA were named as the Second Respondent and has defended the claim, and appeared by counsel at the Final Hearing.

2. The Final Hearing took place over two days on 10 and 11 June 2021. It was an in-person hearing taking place at the East London Hearing Centre. One of the Tribunal Panel members, Ms K Labinjo, participated remotely. The remainder of the Panel were in person. The Claimant was represented by Mr Hitchens of counsel. 3HA were represented by Dr Onipede of counsel. The Claimant gave oral evidence and was cross examined. The Respondent's Managing Director, Mr Tayo Agoro, also gave evidence and was questioned in cross examination. Reference was made to documents in an agreed bundle which extended to 164 pages. Further pages were added at the start of the Final Hearing.

3. Up until the first day of the Final Hearing, 3HA were disputing that there had been a relevant transfer. As a result, it was disputing that the Claimant was entitled to the same terms and conditions as she enjoyed in her contract with DAC. Following an initial discussion between the Tribunal and the parties' representatives at the outset, Dr Onipede, counsel for 3HA, accepted there was a service provision change within the wording of TUPE Regulations 2006. As the Claimant was assigned to the legal entity which transferred to 3HA, her terms and conditions remained the same as those in her employment with DAC. As a result, it has not been necessary for the Employment Tribunal to determine that issue.

4. During the course of the Final Hearing, the parties' legal representatives were able to agree two of the Claimant's claims. It was agreed that the Claimant should receive the sum of £1000 for failure to inform and consult in relation to the transfer, under Regulation 15 of the TUPE Regulations 2006. Because this complaint was effectively withdrawn in the light of the parties' agreement, in circumstances where the Tribunal was not asked to make any findings on it at the conclusion of the case, there is no joint and several liability with the First Respondent. It would clearly not be appropriate for the Tribunal to make a determination as to the First Respondent's liability without full argument from at least the Claimant; and would not be appropriate to impose on the First Respondent a sum by remedy which had not been the subject of judicial determination. The effect of the agreement that there was a transfer of an undertaking is that the Claimant's employment did not end but transferred to the Second Respondent. As a result, the remainder of the Claimant's claims against the First Respondent are not well founded and are dismissed.

5. The parties also agreed that the Claimant should receive the sum of £750 from 3HA pursuant to Section 38 Employment Act 2002 for 3HA's failure to provide the Claimant with a full and complete statement of employment particulars in accordance with Sections 1 and 4 of the Employment Rights Act 1996.

6. The remaining issues to be determined were as follows:

    a. Whether the Claimant was entitled to receive any sum by way of arrears of pay, and if so, in what amount? ("the arrears of pay issue")

    b. Whether the Tribunal should make a declaration as to the amount of holiday pay that the Claimant had accrued by the end of the 2019/2020 holiday year under Section 11 Employment Rights Act 1996, and if so, whether a sum equivalent to this amount was paid in the July 2020 payslip? ("the holiday declaration issue").

The Arrears of Pay issue

7. The parties agree that the effect of the Claimant retaining her previous terms and conditions is that she was guaranteed a minimum of 30 hours pay each week from when she started working for 3HA, rather than being on a zero hours contract.

8. If the Claimant was offered less than 30 hours work in any particular week, then she would be entitled to recover as an underpayment the difference between the pay she received for the fewer hours worked and the higher total pay that should have been paid if the Claimant had been working 30 hours. The claim is in relation to the period between 23 January 2020 and 14 May 2020 when these proceedings were issued.

9. The Claimant set out her claim in the Schedule of Loss which itemised 18 different underpayments, totalling £940.43. The Claimant's evidential difficulty was that the basis on which each of these sums were calculated was not clear from the

Schedule of Loss. Neither the Claimant nor her counsel were able to explain how these figures had been derived. Had this been the only evidence on the issue of arrears of pay, then the Claimant would have been in considerable difficulty in proving her claim.

10. However, the bundle included a spreadsheet which covered the relevant period to which the claim related. This had been supplied by 3HA. Clearer colour copies were provided at the outset of the Tribunal hearing. It appeared to show that the Claimant had been underpaid for 91 ¾ hours in the weeks where her hours were less than 30 hours per week. Therefore, the Claimant's claim effectively amended to be advanced on a different basis to that set out in the Schedule of Loss. This was that the Claimant was entitled to be paid for those 91 ¾ hours at her new higher rate of pay, £9.20 per hour. This gives a total of £844.10.

11. To this revised claim, 3HA makes two points in response. Firstly, it argues that the Claimant is limited to the rate of pay she was entitled to under her DAC contract, because she is seeking to rely on those terms and conditions. As a result, the rate of pay should be calculated based on £9 per hour, not £9.20. Secondly, it argues that the Claimant did in fact work more than 30 hours in each of the weeks in question. 3HA argues that the hours on which the Claimant now computes her claim, suggesting a shortfall of 91 ¾ hours were contact hours. In addition, 3HA argues, the Claimant was also paid an hourly rate of £9 per hour for time taken travelling between clients. When this time is added to the contact time, the Claimant's total hours exceeded 30 hours in each week.

12. In relation to the hourly rate issue, we find that the appropriate hourly rate to which the Claimant was entitled under her terms and conditions is and was the rate of £9.20 per hour for hours that were regarded as contact hours. The pay rise to £9.20 per hour for each of the contact hours was an increase given to all members of staff, not just those who had transferred from DAC. It was given at a point in time when the Second Respondent did not consider that former DAC employees were transferring under TUPE. The purpose of the increase was to ensure that the pay rates given were competitive, as Mr Agora himself stated at paragraph 16 of his witness statement. He said he did so confident that no other care provider would be paying this hourly rate to their staff, and implied he did so to stop his carers from going to work with other companies. It was therefore not a variation made where the sole or the principal reason for the variation was the transfer. The variation was therefore effective and not void under Regulation 4(4) of TUPE 2006. However, the hours regarded as travelling time continued to be payable at £9 per hour.

13. In relation to the hours per week issue, we start by analysing the term of the contract that the Claimant had with DAC. This is found at page 40 of the Final Hearing bundle. Under the heading "Job Title and Hours of Work", this described the Job Title as Support Worker and the required hours as 30 hours per week. The contract went on to state that, from time to time, there would be a requirement to work in excess of 48 hours in any one week, but that the Claimant was entitled to opt not to work more than 48 hours in any one week. This was clearly a reference

to the maximum working week under the Working Time Directive. Under the heading "Wages and Travelling" the contract stated that "DAC Essex pays 20p per mile, however mileage cannot be made between home and the first visit and the final visit to home. Our rostering system also calculates your mileage". The contract made no distinction between contact hours and travelling hours. Under the contract with DAC, the wage rate was expressed to be £9 per hour for all hours worked. There is a further heading "Remuneration and Overtime" but the wording that follows does not specify a different rate for hours worked in addition to the required hours. In summary, the Claimant is guaranteed a minimum of 30 hours a week (however spent), and all hours worked are to be paid at £9 per hour.

14. The Claimant attaches significance to the payslips, and particularly the payslip at page 127, as showing that there was an entitlement to 30 contact hours and to travelling time in addition to these contact hours. We have analysed the payslips from December 2018 onwards during her employment at DAC. These payslips do not support the Claimant's argument that by the time of the transfer, the Claimant had a contractual entitlement to 30 contact hours together with whatever time was spent in travelling between clients. This is because none of the payslips up until the end of June 2019 have a specific item for travelling time. All time is treated in the same way. Travel pay is only itemised as a separate item from 1 July 2019 onwards. Even here, the payslip does not clearly evidence there was necessarily an entitlement to 30 hours of contact time in addition to whatever time was spent travelling. Whilst the payslip on page 127 indicates that there was 117.5 hours for "regular pay" and a further 11.74 hours of "holiday pay", as well 7.6 hours of travelling time (dividing the sum stated by £9 per hour), the fact that these hours were worked and paid does not evidence any variation to the terms of the employment contract. Earlier payslips indicate that in some weeks the Claimant did work more than 30 hours for that week (or 120 hours over 4 weeks). In fact, the payslip at page 128 is consistent with the minimum hours remaining at 30 hours as a combination of contact and travelling time, given that the regular pay together with travel pay equates to just under 120 hours in the four-week period. The only conclusion that the Tribunal can draw from the payslips is that, for whatever reason, DAC chose to categorise that proportion of the total working hours spent travelling as travel pay, rather than regular pay. It does not provide any evidence that there was an agreement to vary the October 2018 written contract in the way that the Claimant contends.

15. As a result, the contractual term that transferred to 3HA with the Claimant was that the Claimant would be paid for a minimum of 30 hours per week at £9 per hour, regardless of whether the time was spent with clients or travelling between clients. The hourly rate for contact hours was then increased to £9.20 per hour. The Tribunal must now decide whether what was in fact paid equates to what ought to have been paid.

16. 3HA's spreadsheet differentiates between contact hours and travelling hours. The relevant period applicable to the authorised deduction of wages claim is the period from the transfer to the 31 May 2019. This is because payment was made two

weeks in arrears. Therefore, the parties agree that the period to 31 May 2019 covers work performed up until 14 May 2019, which was when these proceedings were issued. Over that period, the spreadsheet shows that the Claimant worked 91.75 fewer hours of contact time than she should have worked if the contractual term was that she was entitled to 30 hours of contact time. At a rate of £9.20 per hour this equates to a potential deduction from her contractual pay of £844.10.

17. However, this is not the end of the analysis. The Tribunal needs to total the number of hours worked which is characterised as "travel pay", to see whether the travel pay given in relation to these hours makes up the shortfall so as to ensure that the Claimant received at least 30 hours pay each week at £9.20 per hour. The spreadsheet shows that the total of travelling time paid over this period was £982.45. This was paid at £9 per hour, and therefore reflects just over 109 hours of travelling time. As a result, over the period from the date of the transfer to the date on which the proceedings were issued, we disagree with the Claimant. Rather than the Claimant being offered 91.75 fewer hours than she was contractually entitled, the Claimant was offered 17.25 hours (being 109 – 91.75) more than the minimum to which she was contractually entitled. Her claim for arrears of pay therefore fails.

The holiday entitlement issue

18. The Claimant accepts that the employment tribunal does not normally have jurisdiction to determine the extent to which there is accrued but untaken holiday entitlement, except where employment has ended. That is not the Claimant's position, given that her employment continues. The Claimant argues that in these particular circumstances, there is jurisdiction to determine this entitlement under Section 11 of the Employment Rights Act 1996. This is because the effect of the TUPE transfer is to require that the Claimant receives notification of the changes to the relevant employment particulars under Section 4 Employment Rights Act 1996.

19. The Tribunal has the jurisdiction by reason of Section 11 of the Employment Rights Act 1996 to determine what ought to have been provided in a statement of employment particulars in relation to holiday entitlement. This is to determine any terms and conditions relating to the entitlement to holidays, including public holidays and holiday pay (the particulars being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated). It does not give the Tribunal jurisdiction to determine whether there has been a breach of that contractual term in the present case.

20. There was a statement of the contractual position so far as holiday entitlement and pay is concerned, in the DAC employment contract. This was worded as follows:

> "The holiday year runs from 1 April to 31 March
>
> Your annual holiday entitlement in any holiday year is 20 days, with 8 Bank holidays.

> All holiday entitlement must be taken in the awarding year otherwise they will be forwarded. No holidays shall be taken during the months of December and January, unless expressly authorised by your Area Manager. All holidays must be taken at times agreed with management. The Employee must give at least one month's notice to their line manager and complete a Holiday Request Form. No more than two weeks may be taken at any one time without the permission of the management. Such permission shall not normally be given other than in special circumstances."

21. A fuller wording of the Claimant's holiday entitlement was included in the 3HA contract with which the Claimant was issued following the transfer. To the extent that the provisions in the 3HA contract were any less favourable than those in the DAC contract, then the DAC contractual term must apply. The parties agree that as at the date of the transfer, the Claimant had eight days' holiday left in the holiday year that ended at the end of March 2020. This accrued holiday would have transferred with the transfer of her employment to 3HA. Ordinarily, any accrued holiday would not have been able to be carried over to the 2020/2021 holiday year.

22. The Claimant says she was told she could not take her 8 days accrued holiday in the period up until the end of March 2020. This was apparently because 3HA did not accept, at the time, that there was a TUPE transfer. The Respondent says that this accrued holiday was subsequently paid in July 2020, although that is disputed by the Claimant. Section 11 Employment Rights Act 1996 does not give the Tribunal jurisdiction to make any determination as to whether there has been a breach of her entitlement to holiday in the way that 3HA chose to apply the Claimant's holiday entitlement in the period following the transfer.

23. Whilst the Respondent contends that it has paid the Claimant for her accrued holiday entitlement during the 2019/20 holiday year in a payslip on 10 July 2020, this is disputed by the Claimant. This is not a dispute that the Tribunal has jurisdiction to determine. Accordingly, we express no view on whether the payment on 10 July 2020 discharged any accrued but untaken entitlement to holiday pay for the 2019/20 holiday year.

Employment Judge Gardiner
Date: 14 June 2021