EMPLOYMENT TRIBUNALS

Claimant: Mrs C J Pau

Respondent: Mr G D Brannan & Mrs M Brannan (A Partnership) t/a Harbour

HELD AT: Liverpool **ON:** 12 May 2017

BEFORE: Employment Judge Barker

REPRESENTATION:

Claimant: Mr Pau, Claimant's husband
Respondent: Mr Hendley, Consultant

JUDGMENT

The decision of the Tribunal is as follows:

1. The respondent received the claimant as an employee as a result of a relevant transfer under Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The claimant's employment was therefore transferred with continuity of service and with her previous terms and conditions of employment from the transferor to the respondent under Regulation 4 of those Regulations;

2. The claimant's terms of employment were found by the Tribunal to be a minimum of 10 hours per week;

3. The respondent failed to provide the claimant with regular work after the transfer and failed to pay her regular wages. The claimant resigned in response to these breaches and was unfairly dismissed by means of a constructive dismissal by the respondent contrary to section 98 of the Employment Rights Act 1996; and

4. The respondent is to pay to the claimant the sum of £3895.60 in compensation, which is comprised of the following:

   a. Unpaid wages of £1,199.60 for the period from 11 June 2016 to 7 October 2016, minus payment for two hours' worked on 14 July 2016;
   b. A basic award for unfair dismissal of £864;

c. A compensatory award for unfair dismissal of £792 for the period from the effective date of termination for 11 weeks;
d. A sum in recognition of loss of statutory rights of £450; and
e. Employment Tribunal fees of £590.

REASONS

Issues for the Tribunal to decide

1. The issues for the Tribunal to decide were set out in a preliminary hearing before Employment Judge Shotter on 10 March 2017. At that hearing, as well as there being a case management discussion, there was a judgment in which the second respondent, who had been was the alleged transferor partnership which traded as "The Pantry," was dismissed from the proceedings and ordered to pay a sum in compensation relating to their period of employment of the claimant. It was clear from that discussion before Employment Judge Shotter that the claimant asserted that she had been transferred subject to the TUPE Regulations 2006 to the respondent in these proceedings, that being the partnership which trades as "Harbour".

2. The claimant has also consistently asserted that she has been unfairly dismissed. The claimant accepts that there has been no actual dismissal but she assumed her employment was at an end after several months without any regular work from the respondent or any regular pay. The claimant therefore claims constructive dismissal.

3. The respondent's case is that there was no TUPE transfer of the claimant's employment and that in any event the claimant was employed under the terms of a zero hours contract. There was therefore no breach of her terms and conditions because she had no entitlement to be provided with any work, and that she resigned when work was not given to her.

4. It came to my notice during the Hearing that in the Tribunal bundle there was the cover page and the interpretations page of a document which was listed in the bundle index as "Copy of Agreement for Sale of the Pantry". It ought to have been evident to the respondent and the respondent's representative that this was a material document in these proceedings. It was apparent that this was a document that could have confirmed or refuted whether the sale was one covered by the TUPE Regulations, and therefore it ought to have been disclosed in accordance with the ongoing duty of disclosure in these proceedings.

5. I am gravely concerned as to why the respondent's duty of disclosure has not been complied with. That duty is to disclose all documents which are relevant to the issues to be determined in these proceedings, whether the document is favourable to the respondent's case or not. An identical duty is also on the claimant.

6. The proceedings were adjourned to allow the respondent to contact the solicitors who had drafted that agreement, who are not part of these proceedings, to supply a copy of that agreement.

7. The agreement was then faxed to the Tribunal so that the entire document was disclosed to both parties. Clause 11.3 of the document states

> *"The parties hereby declare that it is their intention that the contracts of employment of the employees shall be transferred to the purchaser pursuant to the 2006 Regulations on the completion date".*

8. The employees are listed in a schedule to that agreement and they include the claimant. The "completion date" was 6 May 2016, the date of the transfer. The "purchaser" is the respondent in these proceedings. Therefore it was evident from that document, which the respondent accepts was a genuine document, that the TUPE Regulations 2006 apply to Mrs Pau's contract of employment and that from 6th May she became an employee of the respondent on the basis of her previous terms and conditions and with continuity of service.

Findings of Fact

9. It is the claimant's evidence to the Tribunal that she began working for the transferor, the Pantry, as a kitchen assistant on 25 September 2008. The respondent's evidence was that the claimant had always been employed on a zero hours contract. There was no documentary evidence before me of the terms of the claimant's contract of employment from 2008 although it was agreed by the parties that the claimant had a contract with the Pantry and had given a copy of that to the respondent at the time of, or shortly after, the transfer. Mrs Pau had not, so far as she could recall, kept a copy for herself. I note again that I am extremely concerned that although this was at some point in the respondent's possession it has not been disclosed to the Tribunal. It is a material document that would have assisted the Tribunal in establishing the terms of the claimant's employment.

10. The respondent's evidence before the Tribunal was Mr Brannan's recollection that he had been told by the Pantry that the claimant was employed on a zero hours contract. There was also a letter from Mrs Moxon of the Pantry to the Tribunal in connection with these proceedings that stated, "*Caroline remained on a zero hours contract while in employment with us*".

11. The claimant's evidence was that her hours were as set out in the "Afternoon Duties" list, which was in the bundle of Tribunal documents. The Afternoon Duties list clearly lists the claimant's daily duties and schedules them to take place from 2.30pm to 4.30pm daily. The claimant's evidence was that this fitted in with her other regular part-time job, which she did every lunchtime at a local school. She also disclosed in evidence a series of tax documents that suggested that she was paid a regular and recurrent wage for the period of her employment with the Pantry prior to the transfer on 6th May.

12. The claimant also told me in evidence that she had what she called "*contracted hours*," but she could not remember where she had heard that phrase or where she had read it. However, the document at page 38 in the bundle headed "Afternoon Duties" makes clear that there is a regular schedule of jobs for the claimant to do that fit in between 2.30pm and 4.30pm.

13. I note that Mr Brannan himself initially accepted these regular hours and paid Mrs Pau from 6 May 2016 to 10 June 2016 a regular wage of 10 hours' pay per

week. His reason for not continuing to pay her beyond 10 June was that he could not afford to pay her after that point. I note that his reason was not that there was no work and no obligation to provide work, which would confirm that Mr Brannan believed Mrs Pau to be employed under a zero hours contract.

14. Also before me in evidence supporting Mrs Pau's assertions that she had a regular commitment of 10 hours per week was document 45B from Mrs Moxon. It is headed "Caroline Pau" and it states as follows: "No contract. Works 10 hours per week £7.20 per hour".

15. It is clear from the evidence in the bundle that the intention of Mrs Moxon and Mrs Pau was that Mrs Pau worked regular fixed hours, that she was paid for her regular fixed hours, and that the behaviour of the parties in the performance of the contract was such that she had a regular contractual commitment of a minimum of 10 hours a week at £7.20 an hour from her employer.

16. Mrs Pau's assertion was the contractual hours were 11 hours per week. I find no evidence of 11 hours per week as being the regular contractual commitment. I understand that she may have frequently been paid 11 hours per week on the basis of overtime, and Mrs Pau herself said it was because she often did not finish until 5.00pm. While that may have been a regular payment of overtime it is clear from the contemporaneous documents before me, and from Mr Brannan's behaviour after the transfer, that the contractual minimum was 10 hours per week at £7.20 per hour.

17. The respondent ceased to pay Mrs Pau's wages on 10 June 2016, but in fact she had been given no work from the time of the transfer in early May because of the refurbishment of the premises.

18. The claimant was told by the respondent to wait until the kitchen had been refurbished so that she could resume her kitchen assistant duties. In fact the kitchen did not open until November 2016 but in the interim the respondent opened the front of the premises as a bar and coffee shop for drinks, coffee and cake, in approximately early August 2016. They advertised in June 2016 for bar staff and kitchen staff and for somebody to supply them with homemade cakes. The respondent's evidence was that this was for staff to start at a later date to work with Mrs Pau when the bar and kitchen area were ready.

19. The claimant told the Tribunal that she is a baker and that she has qualifications including NVQs and City & Guilds and that she could have been employed to bake the cakes for the coffee shop. Mr Brannan's evidence was that he did not realise this. The claimant admitted that she did not pursue the matter with the respondent. Her evidence was that she did not ask why she had not been taken on in the interim in any other capacity, she simply waited for the kitchen to open.

20. Mrs Pau's evidence was that she visited the respondent's premises on approximately five occasions prior to the end of July when the bar opened to enquire as to progress with the kitchen, but that she eventually stopped because she felt like she was badgering Mr Brannan. Her evidence, which I accept, was that she decided at the end of August that she had waited long enough with no clear outcome as to what was happening with her employment, and at the start of September she approached ACAS via pre-claim conciliation which eventually resulted in a claim being submitted to the Tribunal at the beginning of November 2016.

21. The claimant's last work for the respondent was two hours' cleaning work on 14 July 2016. The claimant says she was not paid for this. The respondent says she was paid. On the balance of probabilities I find that the respondent did pay Mrs Pau for that work. I find that had she not been paid she would have pursued the matter with Mr Brannan and there would have been evidence that as part of her visit to the café on subsequent occasions she would have asked for payment, and there was no evidence that she did so.

22. However, in terms of her regular work of 10 hours a week, there was a failure to supply work to her and a failure to pay her wages. This is a fundamental breach of contract by the respondent. That breach was eventually accepted by the claimant. The question arises as to when that fundamental breach of contract was accepted by her and whether she could be said to have affirmed the breach in the meantime. In her evidence she says that the "final straw" came she was told by the ACAS conciliator that the respondent believed her to have been employed on a zero hours contract such that Mr Brannan was not prepared to honour her 10/11 hours' work per week. She submits that at this point, she realised that her position with the respondent was untenable. Her evidence was that this information was given to her by ACAS on 7 October 2016. I accept Mrs Pau's evidence in that regard. It was at that point that she received a clear and unambiguous answer from the respondent as to what was happening with her contract of employment. Prior to that point, she had not been able to obtain any clear information as to when she could return to work.

The Law

23. In an action for unfair dismissal, the burden of proof is on the claimant to demonstrate that she has been dismissed. The burden of proof is then on the respondent to demonstrate that, if there has been a dismissal, that there was a potentially fair reason for that dismissal as per s98 Employment Rights Act 1996. It is then for the Tribunal to determine if the respondent's actions in dismissing the claimant for that reason fall within the range of reasonable responses an employer could take in those circumstances.

24. In determining the terms and conditions of an employee whose employer has changed as a result of a relevant transfer as described at regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006, regulation 4(1) states that such an employee's contract shall not be terminated but instead "*shall have effect after the transfer as if originally made between the person so employed and the transferee*".

25. A failure on the part of an employer to pay an employee her regular wage is a fundamental breach of the contract of employment.

26. It is not ordinarily possible for an employer to unilaterally change the terms and conditions under which an employee works in respect of their pay and fixed hours of work unless the employee consents to those changes. Regulation 4 of the TUPE Regulations 2006 further limits the circumstances in which contracts can be varied following a TUPE transfer.

27. In demonstrating that there has been a constructive dismissal, an employee must show that there has been a fundamental breach of contract and that they have accepted that breach. In ***Geys v Societe Generale, London Branch*** **2013 ICR 117**

SC, a fundamental breach of contract by an employer is only effective to terminate the contract when it is accepted by the employee.

28. An employee can exercise her right to accept a breach of contract by her employer at any time while it is continuing. Even if the claimant does not accept the first breach, it is open to her to accept further breaches by the respondent at a later date.

Application of the law to the facts found

29. The claimant's case before the Tribunal was that she was employed to work for 11 hours per week and be paid £7.20 per hour for the work done by her, and that in failing to honour these terms of her contract, the respondent committed a fundamental breach of her contract that permitted her to resign. The respondent's case is that the claimant's contract of employment contained no obligation to provide work and that therefore, when no work was forthcoming, there was no breach of contract by them and instead, the termination of the claimant's employment was as a result of a resignation by her.

30. I find that the claimant was employed under a set of terms and conditions that provided for regular work. I find on the balance of probabilities that the weekly minimum to which the claimant was entitled was 10 hours per week at £7.20 per hour, meaning that her basic contractual pay was £72.00 per week. Although I accept the claimant's evidence that she regularly worked and was paid for 11 hours per week by the transferor, the extra hour was, I find, overtime and not part of her contractual minimum hours. 10 hours per week was the weekly amount initially honoured by the respondent after the transfer, irrespective of the availability of work at their café.

31. The respondent failed to provide the claimant with regular work and failed to pay her after 10 June 2016, save for payment for two hours' cleaning work done in mid-July. The claimant chose initially to wait for the respondent's kitchen renovations to be completed, hoping to regain her weekly salary. However, in a conversation with the ACAS conciliator on 7 October, she learned that the respondent would in any event refuse to honour her 10 hours per week even after the kitchen renovations were completed. At this point, the claimant chose to accept the respondent's repudiatory breach of contract.

32. I find that it cannot be said that the claimant has affirmed the contract by waiting from 11 June until early October before treating herself as dismissed. Her understanding was that once the kitchen was renovated, she would be able to return to her previous role. It is clear that there was an ongoing breach of contract by the respondent's ongoing failure to pay her or provide her with work. The claimant chose finally to accept those breaches when it was made clear to her on 7 October via ACAS that the terms of her contract as to regular hours would not be honoured.

33. The claimant has therefore demonstrated on the balance of probabilities that she has been dismissed. What was the reason for the claimant's dismissal? In an unfair dismissal complaint, an employer must demonstrate that they had a potentially fair reason for dismissal, and here none has been advanced by the respondent.

34. I considered firstly whether, because this is a TUPE transfer, the dismissal was automatically unfair because the reason or the principal reason was the transfer itself. Under regulation 7(1) of the TUPE Regulations 2006 I do not find that the reason or the principal reason for the dismissal was the transfer itself. The respondent initially honoured the commitment that he had to the claimant to pay her wages after the transfer, and I accept that he intended to keep her on in the kitchen after the transfer but that the kitchen took longer than expected, and that the financial consequences of that had not been planned for by him, and that this was the reason for non-payment of the claimant. The reason was therefore an economic one and not the transfer itself.

35. I then briefly considered whether it was an economic reason that falls within regulation 7(2) of TUPE, "an economic, technical or organisational reason entailing changes in the workforce", although this argument was not advanced by the respondent. I do not find that it was. It might have been an economic reason, but it did not entail any changes in the workforce, which is clear from the fact that Mr and Mrs Brannan recruited extra staff. There was no need to reduce the number of staff they had; they still needed people to work for them, they simply failed to supply the claimant with any work.

36. I find that the respondent did not consider itself obliged to provide Mrs Pau with work. They did not consider, and they certainly did not offer, any alternative jobs to Mrs Pau, and a range of jobs were suggested, cleaning or cake making being amongst them, prior to the kitchen being opened. There was, of course, the opportunity for her to serve coffee as a waitress or to serve behind the bar but they did not offer those to her either. They did not discuss any temporary changes to terms and conditions or a temporary lay-off. They did not discuss redundancy either, in fact Mrs Pau was left in the dark. Therefore there was not an economic, technical or organisational reason entailing changes in the workplace and there also was no potentially fair reason advanced as per section 98(4).

37. Mr Hendley raised the issue on behalf of the respondent that Mrs Pau should have raised some manner of grievance and she did not. I find that there was not a formal grievance raised, but there was much informal contact between Mrs Pau and the respondent. Plenty of questions were asked by her and no clear answers were given, and in fact it was quite reasonable of her to conclude, as she did after several months without any real work and without any proper pay and with no prospect of regular work or pay, that her position was untenable.

38. No procedure was followed by the respondent in relation to the claimant's employment. There was no attempt to discuss alternatives with her or any temporary measures that could be put in place, and therefore they did not follow any procedure as is required by section 98(4) of the Employment Rights Act 1996.

39. In conclusion, the respondent has not shown that they had a potentially fair reason to dismiss Mrs Pau, nor that any kind of procedure was followed. Mrs Pau was unfairly dismissed.

Remedy

40. Having heard further evidence from both parties and having considered the claimant's Schedule of Loss and the respondent's Counter Schedule of Loss, I make the following award to the claimant.

41. The dismissal date having been fixed at 7 October 2016, the claimant claims unpaid wages from 11 June 2016 to the dismissal date. I had already found that the claimant had been paid for two hours' work done on 14 July 2016 and therefore the sum of £14.40 must be deducted from the overall amount claimed. The unpaid wages from 11 June 2016 to 7 October 2016 minus two hours on 14 July 2016 is £1,199.60 assuming a weekly contract of 10 hours a week and a contractual hourly rate of £7.20 an hour.

42. The claimant claims a basic award from the date of commencement of employment on 25 September 2008 to the effective date of termination on 7 October 2016, being eight years' service at an age factor of 1½ as the claimant's age at the effective date of termination was 57, and a weekly wage of £72 gives £864 for the basic award.

43. The claimant claims ongoing losses from the date of dismissal for a period of loss of 44 weeks. Evidence was taken from Mrs Pau under oath as to her efforts to secure alternative work. She has so far been unsuccessful. Mr Hendley for the respondent contested that Mrs Pau had not achieved her duty to mitigate her losses adequately.

44. Mr Hendley adduced evidence that Mrs Pau has applied for approximately 12 jobs since her dismissal, in fact she began to apply for alternative work before her dismissal. The first job was applied for in July 2016. However she asserts that she would need until May 2017 to find a job. She wishes us to take into account the fact that she needs her job to be compatible with her other job in a school which hours are Monday to Friday 11.00am to 1.30pm, although she tells me that she is considering evening and weekend work. The claimant has been looking across a wide area, being Southport, Formby and Ainsdale, and is looking for part-time kitchen assistant or cook jobs.

45. I find on the basis of the skills that she has, on the basis of the areas that she has been searching in, on the basis that she is available evenings and weekends and only restricted to a period across lunchtime, that Mrs Pau ought to have found a job already. She has, I find, behaved unreasonably in applying for so few jobs since leaving the respondent's employment.

46. Even prior to her effective date of termination, as is evident from the fact that she was applying for jobs speculatively on July and August, she knew or was beginning to suspect at least that her employment was not secure at Harbour. Given the large number of cafes, shops, department stores and care homes in Formby, Ainsdale and Southport, and her availability and willingness to work evenings or weekends, it was reasonable to expect Mrs Pau to have found a job by Christmas 2016. I have taken into account that she is fully available during the school holidays, however she did not secure any temporary work during these periods. Therefore the losses are to stop 11 weeks from the date of dismissal, to 23 December 2016, a period of 11 weeks. At a weekly wage of £72, Mrs Pau's compensatory award is £792 for loss of earnings.

47. I also award the Employment Tribunal fees paid by Mrs Pau to be paid by the respondent, which is £160 issue fee after the remission and £430 hearing fee after the remission, making a total of £590. Loss of statutory rights of £450 is also awarded. Those amounts added together make a total compensation payable by the respondent within 14 days of today's date of £3,895.60.

48. I was asked by Mr Pau to reimburse his costs and expenses in bringing these proceedings, such as travel costs, a subsistence allowance, document preparation, and so on. They are not recoverable in Tribunal proceedings in the ordinary course of events. Occasionally expenses are awarded in connection with having, for example, to relocate as a consequence of dismissal, moving house and so on; that obviously has not occurred here. I made it clear to the parties that I considered and declined to make a costs award against the respondent on the basis of issues to do with disclosure earlier in the proceedings.

49. It was put to me by Mr Hendley that the Tribunal ought to take matters of contributory fault into account in considering whether Mrs Pau had contributed to her dismissal. I find that there are two separate issues. The first is whether there is any contributory fault. The second issue is where there has been a failure to comply either on the part of the respondent or the claimant with the ACAS Code of Practice. Taking the second issue first, it was open to me to make a reduction of up to 25% in the claimant's award for failure to comply with the requirement in the ACAS Code of Practice to consider writing a letter of grievance. Equally, however, there were obligations on the respondent to engage with the ACAS Code of Practice in relation to the claimant's employment, which they have not done. There have been failures on both sides in relation to the ACAS Code, therefore I have declined to exercise my discretion in that regard and the award remains unchanged.

50. In terms of contributory fault by the claimant prior to her dismissal, I do not find there was any. There was no hint of misconduct; no hint of a failure to attend, for example training events and so on even though they were not actually applicable to her.

51. The award of £3,895.60 stands unamended.

52. At the conclusion of the Tribunal judgment and reasons being delivered to the parties, the respondent requested that written reasons be provided.

Employment Judge Barker

Date 23 May 2017

JUDGMENT AND REASONS
SENT TO THE PARTIES ON

7 June 2017

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): 2406094/2016

Name case(s):	of Mrs CJ Pau	v	Mr GD Brannon & Mrs M Brannan (A Partnership) T/A The Harbour & Others

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 7 June 2017

"the calculation day" is: **8 June 2017**

"the stipulated rate of interest" is: 8%

MISS K MCDONAGH
For the Employment Tribunal Office