EMPLOYMENT TRIBUNALS

BETWEEN

Claimants:	Respondent
Mr J Lewis, Mr A Walker, Mr K Swan and Mr W Plant	**Castle Ceramics Ltd**

v

Heard at: **Birmingham** **On: 12th September 2017**

Before: **Employment Judge Dawson** (sitting alone)

Appearances:
For the claimant: **Mr P Roberts (solicitor)**
For the respondent: **Mr C Bourne (counsel)**

REASONS

1. In this case the claimant, Mr Lewis, Mr Swan, Mr Walker and Mr Plant bring claims of unfair dismissal, redundancy, non payment of wages, non payment of notice pay and for an award for failure to inform and consult under the Transfer of Undertakings *(*Protection of Employment*)* Regulations 2016. A claim for holiday pay was withdrawn at the start of the proceedings. The claimants have been represented by Mr Roberts and called Mr Lewis to give evidence on their behalf. The respondent has been represented by Mr Bourne and called Mr McGillivray to given evidence on its behalf.

2. The issues in the case were agreed at the outset of the hearing between the parties as follows:

3. In respect of the claim for unfair dismissal, the first issue was whether there was a dismissal or a resignation by the claimants. If there was a dismissal, then the respondent advances, as a reason for dismissal, misconduct on the part of the claimants in so far as they refused to attend work and carry out their duties. If there was not a dismissal but, instead, a resignation by the claimants, they seek to rely on regulation 4(9) of the Transfer of Undertakings *(*Protection of Employment*)* Regulations 2006, hereafter referred to as TUPE, which provides that where a relevant transfer involved or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is transferred, such an employee may treat the contract of employment as having been terminated and the employee should be treated for any purposes as having been dismissed by the employer.

4. It was agreed between the parties that, as part of my deliberations I may need to have regard to regulations 7(2) and 7(3A) of TUPE in respect of the question whether, if there was a dismissal, it was for an economic, technical or organisational reason entailing changes in the workforce.

5. In the event that I find that there was a dismissal which was unfair, the respondent seeks to rely upon "Polkey"- that is to say that a fair procedure would or may have resulted in a dismissal of these employees in any event - and in particular it refers to the redundancy situation which it says existed and asserts that the claimants would have been made redundant in any event. The respondent also seeks to rely upon the contributory fault of the claimants in not attending for work and/or not transferring to Bolton in circumstances I will set out below.

6. In respect of the claim for failure to inform and consult under TUPE, it was agreed that there was no information or consultation prior to the transfer in question. The question therefore, according to the respondent, is whether a duty to consult arose, whether the transferee or transferor knew or ought to have known that a transfer was about to take place so that the duty to inform and consult was engaged in the first place and, if the duty to inform and consult did arise, whether there were special circumstances under regulations 13(9) and 15(2) TUPE**.**

7. It is not in dispute that if there was a failure to inform or consult by the transferor, the transferee is jointly and severally liable for any award. It was agreed that in that respect precise quantification of remedy would be dealt with separately to the liability hearing.

8. In respect of the claim for non-payment of wages between 9th October and 8th November, the respondent did not take issue with the fact that wages were not paid between those dates but asserted that this was a straightforward case of "no work, no pay". The claimants resisted that argument, partly, on the ground that in the respondent insisting that they should work from Bolton, it was in breach of the contract of employment and the respondent should not be able to benefit from its own wrongdoing.

9. In respect of the claim for redundancy pay, to the extent that it exists as a stand-alone claim, the questions are well known and require the application of tests set down in section 139 of the Employment Rights Act 1996.

10. In relation to the claim for notice pay the question is, if there was a dismissal, whether the claimants were given notice and if they were not whether that was because they, themselves, were in repudiatory breach of contract.

Conduct of the Hearing

11. It is necessary to say a word about the conduct of the hearing.

12. At the outset an application to amend the ET3 was made by Mr Bourne. That was not challenged by Mr Roberts and in those circumstances I granted permission to amend.

13. As I have indicated, Mr Roberts withdrew the claim for holiday pay.

14. Part-way through the closing submissions of Mr Roberts, it became clear that there had been a misunderstanding earlier in the hearing which led to the recall of Mr McGillivray in circumstances I shall now explain. When the issues were being discussed, I asked the parties whether the administration was a "pre-pack". Both Mr

Roberts and Mr Bourne stated that it was and matters moved on. Mr Roberts had proceeded on the basis that the definition of a "pre-pack" was to the effect that the sale of the assets of the transferor had been negotiated and agreed prior to the administration taking place, and the sale of the assets took effect upon the administration. In those circumstances he did not put to Mr McGillivray that there had been an agreement for a sale of the assets to the respondent prior to the administration. Mr Bourne, during Mr Robert's closing submissions objected to the failure by Mr Roberts to put that case to Mr McGillivray in cross examination. Mr Bourne submitted that he had not been intending to make such a concession when he stated that the administration had been a "pre-pack". I took the view that Mr Roberts' understanding was a reasonable one but to avoid any potential injustice to either of the parties, with the consent of both Mr Roberts and Mr Bourne, I dealt with the matter by permitting the recall of Mr Mc Gillivray for that point to be put to him.

15. Following that recall, and after he had left the witness table, Mr McGillivray then brought to Mr Bourne's attention that he had a document which turned out to be an email of 26th September from the administrator to him, which referred to the sale of the assets. Mr Bourne sought to adduce that evidence, Mr Roberts unsurprisingly resisted. Whilst the disclosure was very late - and in circumstances where I suspect disclosure has not been carried out as fully as it might have been by the respondent- I considered that the overriding objective required me to allow the document into evidence and that document was admitted, together with an attached letter dated 26th September 2016, and I have considered it in reaching my conclusions.

Findings of Fact

16. I turn then to the findings of fact I have made in this case.

17. All of the claimants were employees of Castle Ceramics Dental Laboratory until 30th September 2016. For the sake of convenience I will refer to that company as the 'old company'.

18. I have been provided with a document headed 'Statement of Main Terms of Employment' which describes itself as relating to Hayley Walker but I understand, from the way that it was put before me, that it relates to all of the claimants and shows that the wage to which they were entitled was an annual wage payable monthly by credit transfer.

19. I have also been referred to a document headed 'Joining our Organisation' which appears to be part of a staff handbook and contains a mobility clause which all parties accepted was the clause which governed these claimants' employment. That states "*Although you are usually employed at one particular site, it is a condition of your employment that you are prepared, whenever applicable, to transfer to any of our client's sites. This mobility is essential to the smooth running of our business.*"

20. All of the claimants were based at the old companies' premises in Tamworth, which were leased by the old company and the lease was guaranteed by one of its directors and shareholders Mr Caddick.

21. On 30th September 2016 the old company went into administration. On the same day its assets were sold to Castle Ceramics Ltd, the respondent to these proceedings which I will refer to as the new company.

22. The new company had been incorporated on 21st September 2016. It had been incorporated, according to Mr McGillivray, because he had been involved in

discussions with Mr Caddick, on behalf of the old company in the past with a view to purchasing the old company. He and the old company had entered into a Non-Disclosure Agreements and he said in his evidence "*Any company we enter into an NDA with, we know they are there for the picking*". When pressed as to why the new company had been incorporated in September 2016- as opposed to at any other point- he said "*Because we knew it [by which he meant the old company] was in trouble*".

23. On Monday 3rd October 2016, the claimants were invited to a meeting. The meeting took place in the morning and the claimants were told that the old company had gone into administration, that the assets had been sold to the new company and their employment had transferred to the new company under TUPE.

24. The claimants were told that TUPE applied to the sale so that there was a transfer of their contracts of employment. They were also told that the production side of the business was no longer operating in Tamworth and instead production would be carried out at Bolton.

25. The respondent told the claimants that it would provide a car for people to travel in from Tamworth to Bolton and, having regard to the substantial amount of travelling time involved, the claimants would be entitled to work a shorter day in the factory so that the travel time was part of their working day and, therefore, they would not be away from home for longer than they would have been if they had been working in Tamworth.

26. The respondent, by Mr McGillivray, states that the claimant were also told that the new company would pay their rail fare to travel from Tamworth to Bolton if they wanted to. He says they were also told that the move would be temporary because the new company was hoping to take over businesses in either Oldbury, Birmingham or Nottingham. The claimant denies that they were told those things and I have to decide which version of events I prefer. Mr McGillivray said, I think for the first time in his evidence, that there were notes of the meetings when the claimants were told of these matters but they had not been disclosed "because nobody had asked for them".

27. In deciding whose version of events I prefer, I take account of the fact that over time people's recollections of events change. In the absence of any contemporaneous notes from the meetings I have done my best to form a judgment based on the contemporaneous documents that I do have. I, therefore, have regard to the letter dated 5th October 2016 at page 237 of the bundle which states "*As discussed, we will provide you with suitable transport to allow you to travel to Bolton, to our laboratory and amend your working time to take into account your travelling time. We are a forward thinking and growing businesses and there could be many opportunities for everyone*". I also have regard to the letter of 6th October 2016 at page 238 which states that in both the initial group meeting and the one to one meetings, details of how the claimant's employment under TUPE would continue were given and states "*Swift would supply cars for travel, Swift would pay all expenses of travel including fuel. Employees' working hours would remain the same including travelling time. Employees' production would be reduced to time on site after travel time (approximately 1 hour and 30 minutes) each way*". Neither of those letters makes reference to the provision of rail fare nor to the fact that it was anticipated that the transfer of base to Bolton would be temporary and, on the balance of probabilities, I prefer the claimant' version of events.

28. In terms of the amount of travel time, although the letter I have just quoted referred to travel time being approximately one hour and thirty minutes, Mr McGillivray's

statement has, as exhibit RM1, a schedule of travel time in respect of each claimant. It shows that the travel time by road from Tamworth to Bolton is between one hour forty minutes and two hours ten minutes. Most of that time would be on the motorways and, therefore, it is clear that if the claimant were to travel to Bolton they would spend over 3 hours each day sitting in a car.

29. An issue also arose during the evidence as to the reason why the new company did not continue to trade at Tamworth. Mr Roberts' line of questioning advanced the case that the new company never intended to manufacture from Tamworth. In evidence Mr McGillivray said that he had contacted the landlord on Monday 3rd October with a view to continuing to trade from the premises but the landlord was not interested in having a new company as a tenant, he was only interested in proceeding under the personal guarantee. Slightly later in his evidence Mr McGillivray said that "on the Monday" the landlord had said he wanted "us out", that he wanted the dilapidations paid, that he wanted the gas bottles removed and that there was a new tenant lined up. That version of events is not the same as the version of events in Mr McGillivray's statement. In particular I am concerned by paragraphs 9 and 11 of the statement. Paragraph 9 states "*Over the weekend we had to move assets off-site as the landlord was going to change the locks*". Paragraph 11 states "I *confirm that we had cleared the site over the weekend because the landlord would be taking the premises back because there was unpaid rent and because [old company] had become insolvent*".

30. In fact I have not found it necessary to resolve the question of whether the respondent intended to carry out trading from Tamworth but the change of account is relevant as to credibility for reasons to which I will return in a moment.

31. On 10th October 2016 the claimant sent a letter to Mr McGillivray which appears at page 24 of the bundle, stating that they were not willing to work in Bolton, they considered themselves redundant and stating "*We are NOT resigning and it is up to yourselves to make us redundant"*. The claimant did not then attend work until 8th November 2016 and, on that date, they were sent P45s in relation to their employment. In respect of that, Mr McGillivray stated at paragraph 35 of his statement "*On the basis that they did not attend work it was considered that they had resigned. They were notified because if they did not attend they would be considered and treated as resigned*".

32. It will be noted, in respect of the above findings, that there are no findings in relation to what had happened from the employer's point of view in the run up to administration. In that respect, there is a surprising lack of evidence before me. The response is largely silent on the point and Mr McGillivray's statement only deals with the matters very briefly in paragraphs 4 to 6. In particular, at paragraph 5, Mr McGillivray states "*two years before the purchase Mark and I were in discussion with Castle about purchase of the shares, however it did not proceed then due to there being a hostile situation…around 18 months later Geoff contacted me to see if we were still interested…from that point onwards, we kept in discussions until the point when Geoff confirmed that the business was in a state of insolvency.*"

33. Until the document which was disclosed during closing submissions, no disclosure at all had been given in relation to those matters.

34. In circumstances where Mr McGillivray's statement was limited, Mr Bourne sought to adduce additional evidence by way of examination in chief, which I permitted. In evidence in chief Mr McGillivray said that he had spoken to Mr Caddick about two years before the events in question and thereafter Mr Caddick had phoned him up about two months before the transfer. However after 7 or 10 days Mr McGillivray

decided that there was too much debt in the company and decided to proceed no further. Matters then changed when, on the Sunday before 30th September, Mr Caddick had driven up to see him and told him that the business was going into administration. There was no date for the administration at that point but Mr McGillivray had a discussion with the administrator on the following Monday (26th September 2016).

35. In cross examination it was put to Mr McGillivray that he had not submitted any documents to that effect, to which his response was that no one had requested any. In fact, that response was inaccurate in so far as an order for disclosure had been made in this case on the 5th June 2017.

36. Not only am I concerned by that lack of disclosure in this case, I am also concerned that the version of events given in chief by Mr McGillivray contradicted his statement at paragraph 5. From paragraph 5, the chronology, can only be read so that Mr Caddick had contacted Mr McGillivray about 6 months prior to the transfer, whereas in chief he told me it was around 2 months prior to the transfer. More significantly, at paragraph 5 he states clearly that from that point onwards there were discussions until the point when "Geoff" confirmed that the business was in a state of insolvency. That is different to the version of events given in-chief, that there was a break in negotiations after 7 to 10 days and then matters only picked up on the Saturday and Sunday before 30th September.

37. Given the inconsistencies, I am not able to accept Mr McGillivray's account as to what happened in the run up to the old company going into administration. It is clear, however, that there were some discussions between him and the administrator as well as him and a director of the old company.

The Law

38. The relevant legal provisions in this case are sections 95 and 98 of the Employment Rights Act 1996, regulations 4 and 7 of TUPE, and regulations 13(9) and 15(2) of TUPE. In addition, Mr Bourne helpfully drew to my attention the case of *Unison v Somerset County Council and others [2010] IRLR 207*, *Hamish Armour v Association of Scientific Technical and Managerial Staff* [1979] IRLR 24, *The Bakers Union v Clarks of Hove Ltd* [1978] IRLR 366 and *The Union of Construction Allied Trades and Technicians v H Rooke and Son* [1978] IRLR 204. I was not taken to any authorities in respect of the claim for wages.

Conclusions

39. I then turn to my conclusions.

40. In respect of unfair dismissal, the first question is whether the claimants resigned or were dismissed. The respondent's assertion of resignation is based upon an implicit resignation from conduct arising from the fact that the claimants were told that if they did not attend work it would be considered that they had resigned, they did not return to work and, therefore, it was considered that they had resigned. The difficulty with that analysis is that the claimant had expressly stated on 10th October 2016 "*we are NOT resigning and it is up to you to make us redundant*". In those circumstances I do not consider there was a resignation, indeed it is clear that there was not a resignation. The claimants remained employees who were refusing to work apart from at Tamworth. The claimants did not turn up for work at Tamworth, but given that they had been told that there was no work for them to do there I do not consider it necessary for them to turn up every morning only to turn round and return home

again. The respondent knew that the claimants were willing to work at Tamworth but not in Bolton. In the circumstances there was not a resignation, I find that there was a dismissal when the P45s were sent.

41. If, however, I had been inclined to take a different view as to whether there had been a dismissal, I would have found that this was a case were regulation 4(9) of TUPE applied and that, in requiring the claimants to work from Bolton, there was a substantial change in working conditions to the claimants' material detriment. Notwithstanding that the respondent had attempted to shorten the working day to accommodate the travel time, it is clearly reasonable for an employee to take the view that it is to their detriment to have to travel for an hour and a half, at least, each way to work every day. Many people would not relish such a journey on the motorways. The shortening of the working day could not, on a day by day, basis anticipate whether there would be traffic jams on the way home of an evening and in those circumstances I would find that even if there had been a resignation regulation 4(9) applied so that the claimant should be treated as having been dismissed.

42. Returning to my primary finding, that there was a dismissal when the P45s were sent, the next question is what the reason for the dismissal was. I am not satisfied that the reason for dismissal was misconduct. That is not what Mr McGillivray says in his witness statement. He says that the reason for the dismissal, in paragraph 35, was that he considered the claimants had resigned. The reason for the dismissal is the facts which were operating on the mind of the dismissing officer and, in this case, that was a belief in resignation. In those circumstances I am unable to conclude that the reason for the dismissal was a potentially fair one and I conclude that the dismissal was unfair. In any event no procedure had taken place which would also render the dismissal unfair.

43. I do, however, conclude that had Mr McGillivray applied his mind to matters in such a way, he would have been entitled to take the view that the move to Bolton was an economic, technical or organisational reason entailing changes to the workforce and, therefore, the dismissal could have been regarded as having been for redundancy. That is relevant because, having found that the dismissals were unfair, I then have to consider whether any reduction should be made to the compensatory award on the basis of the principles in *Polkey*. The question for me is not what a reasonable employer would have done, but what were the chances of this employer dismissing these claimants, if this employer had followed a fair process.

44. I have no doubt at all that had this employer followed a fair process on the 8th November 2016, when the P45s were sent, it would have dismissed for redundancy, albeit that it would have done so on notice.

45. In those circumstances, the compensatory award will be reduced on the basis that I am certain that these employees would have been dismissed for redundancy.

46. I do not find that there is any contributory fault on behalf of the claimants- I do not consider that they did anything wrong. Insofar as there was a mobility clause in their contracts, it only required them to work on client's sites. Mr McGillivray accepted in evidence that the site in Bolton was a supplier's site rather than a client's site. Nor, in my view, can it be said that they contributed to their dismissal by not attending for work. Not only was that not the reason for their dismissal, but they had been told there was no work for them to do.

47. I turn then to the question of failure to inform and consult under TUPE.

48. Under regulation 13, the duty on the employer is "*(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult…the employer shall inform…"*

49. It is clear that did not happen in this case. There was no informing or consultation at all.

50. In my judgment, under regulation 13 the duty to inform and consult arises whenever there is a transfer, however there is a defence of special circumstances if it can be shown that it was not reasonably practicable for an employer to inform and consult. Under regulation 15(2) it is for the employer to show that there were special circumstances which rendered it not reasonably practicable to do so and to show that it took all steps as were reasonably practicable. Because I am not willing to accept Mr McGillivray's evidence on this point for reasons that I have already given, the employer has not satisfied me either that it was unaware that a transfer was likely to take place, or that there were other special circumstances which rendered it not reasonably practicable to perform the duty or that all steps were taken as were reasonably practicable. I do not know when it was anticipated that the company would go into administration. I do not know when negotiations started taking place between the old company and the new company. It is apparent that on Mr McGillivray's own evidence he spoke to the administrator on 26th September 2016 and I see no reason why the process of informing staff about a likely take over could not have started then, at the latest. In those circumstances, the claim under TUPE succeeds.

51. I turn then to the claim in respect of wages. As I have indicated I was not taken to any authority in this respect, the parties simply made reasonably brief submissions that either it was a case of "no work no pay" (on the case of the respondent) or (on the case of the claimant)s that the respondent should not be able to benefit from the its own breach in forcing the claimant to relocate.

52. In those circumstances I have directed myself to Harvey on Industrial Relations Division B1 which says this: "*It is too simplistic to say that no work always means no pay. As Lord Bridge recognised so long as the employee offers his services and is ready and willing to work, then he is generally entitled to payment of remuneration under the contract unless there is a specific term whether express or implied that provides otherwise. This principle applies even if no work is actually performed*". Harvey goes on to state "*It should be noted that the principle enunciated in Beveridge is not of universal application there are clearly cases where the obligation to pay does not arise until work has actually been performed. Whether this is the case will be a question of construction of the individual contract so, for example where the contract is called piece work it can be seen that absent any contractual term to the contrary depends upon actual performance. The same reasoning may well apply to so-called zero hours contracts*"

53. Applying those principles to this case, given that the claimants' salary was calculated on an annual basis but paid monthly, it could not be said that this was piece work, nor could it be said that this is a zero hours contract. There is nothing express or implicit in the contract to the effect that if an employee does not work they will not be paid and in those circumstances I do not think this is a case of "no work no pay". These claimants were always ready, willing and able to work but were not given work. In those circumstances I consider they are entitled to their wages.

54. That leaves the question of notice pay. The claimants were not in repudiatory breach of contract for the reasons which I have given. They were ready, willing and able to

work; there was no basis for moving them to Bolton on a permanent basis - or indeed on a temporary basis in my view. In those circumstances they have done nothing that would warrant the respondent dismissing them summarily and they should have been dismissed on notice.

55. Based on the above findings the parties have agreed the quantum of the claims and I enter judgment accordingly.

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Employment Judge Dawson

Dated: 28 November 2017

Judgment sent to Parties on

Dated: 28 November 2017
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