



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G S Kasbia

**Respondents:** 1. Helen's Cuisines Ltd (In Administration)  
2. PASSBY Ltd  
3. Framemill Ltd

**Heard at:** Nottingham

**On:** Wednesday 27 September 2017

**Before:** Employment Judge P Britton (sitting alone)

## Representation

**Claimant:** Ms L Badham of Counsel  
**Interpreter:** Ms S Bhalla  
**Respondents:** No appearance

## JUDGMENT

- 1) The claim against the third Respondent is dismissed upon withdrawal.
2. The claim of failure to consult by the first Respondent (the transferor) pursuant to regulation 13 of the TUPE Regulations 2006 ("the Regs") succeeds. Pursuant to regulation 15(9) the second Respondent (the transferor) is jointly and severally liable. Pursuant to 16(3) the first and the second Respondents, or one of them, shall pay to the Claimant a protective award of 13 weeks pay namely **£4368.00**.
- 3) The claim for automatic unfair dismissal pursuant to regulation 7 of the Regs succeeds against the second Respondent it having accepted that there was a TUPE from the first Respondent. Additionally, the claim of unfair dismissal pursuant to s98 (4) of the Employment Rights Act 1996 ("the ERA") also succeeds against the second Respondent. It will pay the Claimant compensation for the unfair dismissal as follows:
  - i) basic award £3528.
  - ii) compensatory award of £2806.44.
  - iii) this makes a total award payable by the second Respondent to the Claim under this head of claim of **£6334.44**.
- 4) The claim of breach of contract (failure to pay correct statutory notice entitlement) succeeds against the second Respondent. The second Respondent will pay him by way of damages the balance outstanding of **£1024.14**.

## REASONS

1. First, as to the non appearance of the Respondents: The first Respondent's administrators made it clear long ago that they consent to the proceedings but will not be participating.

2. Respondents 2 and 3 filed responses to the Claim penned by Robert Rhodes a director of both. All communications from the Tribunal were to the address he gave. Furthermore earlier in the proceedings he requested and received the Claimant's schedule of loss. The Claimant's solicitors emailed to Mr Rhodes at the e-mail address he was using for this litigation the directions it had proposed and the Tribunal had then granted. They were also sent by the Tribunal. Ms Badham, has told me that despite her instructing solicitors' best efforts the first and second Respondents have not cooperated with those directions at all. Finally I have been provided with no explanation for their non attendance. Accordingly I have proceeded in their absence.

3. Before me I have a bundle of documents prepared by the Claimant's solicitors. Furthermore I have the Claimant's witness statement. I have also received additional clarification from his wife. I am grateful for the interpreter's assistance.

### Findings of fact

#### Consultation and the TUPE

4. The Claimant was in continuous employment at the Red Hot World Buffet and Bar ("Red Hot") in the centre of Nottingham starting at latest by 1 November 2008<sup>1</sup> and latterly as the van driver. By the time of material events the employer had for some years<sup>2</sup> been Helen's Cuisines Ltd. The restaurant was part of a chain and thus the Claimant was engaged with deliveries and such like between some of the outlets including Nottingham.

5. In April 2016 he had time off for pre-planned surgery on his left knee. He returned to work on 26 April 2016. On 7 May when he went into work he was informed by one of the new owners that his services were no longer required. He spoke to colleagues and understood that there was a letter in circulation. On 12<sup>th</sup> May he obtained from the premises a letter addressed to him dated 27 April (Bp59). Albeit addressed to his home address it had not been sent to him and this was the first time he had seen it. This was penned by, I detect, Helen's Cuisines Ltd. It informed him that with effect from 25 April 2016 Red Hot at Nottingham had been transferred to Framehill Ltd and which was now his employer. But then he received a letter headed PASSBY t/a World Cuisines Buffet, address as per where he had worked, informing that in the context of consultation "regarding proposed compulsory redundancies" his "preference for voluntary redundancy" had been accepted. The letter (Bp60), signed by Robert Rhodes and his co director Mr Nasim Kayani, then inter alia set out his statutory entitlements as to which given his length of service and pay slips the calculations are wrong and understate what he was due.

6. Stopping there, I am satisfied on the Claimant's evidence that there was no consultation process and that he never put himself forward for voluntary redundancy. And save for this letter at Bp60 and the same assertion in the ET3

<sup>1</sup> See inter alia P60 at Bp (bundle page) 70.

<sup>2</sup> I detect at least one TUPE in the preceding years plus a slight change in the name of the restaurant.

for Rs 2 and 3, I have no documentation or statements from them to show there was consultation etc in what was a relatively large scale exercise in that the transferee had employed 25-30 staff at Red Hot in Nottingham pre the TUPE, whereas post TUPE PASSBY Ltd has only retained 6-7. The Claimant tells me there was no consultation.

7. I say PASSBY Ltd because it is clear from the documentation post TUPE that I do have and married to the ET3s, that Framehill limited doesn't employ anyone and is "a leaseholding company". And of course PASSBY Ltd accepts there was a TUPE and that it was the new employer. Therefore with the leave of Ms Badham I dismiss it from the proceedings

8. Before I go forward, it is of course now obvious that there was a wholesale failure to consult the Claimant or any other employees by either the transferor or the transferee pursuant to regulation 13 onwards of the Regs. As to compensation, pursuant to reg 16(3) the starting point<sup>3</sup> is that a maximum award of 13 weeks pay should be made unless the Respondents can satisfy the tribunal that it is not just and equitable so to do in the circumstances. There has been no such explanation provided by either Respondent despite that the second Respondent will be jointly and severally liable for the failures of the transferee first Respondent.

9. Thus I make the maximum award as per the schedule of loss. The Claimant's gross weekly wage was £336. Thus the award is 13 x £336= **£4368**.

### **The fairness of the dismissal**

10. Also this dismissal coming as it does after the TUPE and prima facie because of it, was automatically unfair pursuant to reg 7(1) of the Regs. As it would be for the first Respondent to show that it was for a economic technical or organisation reason (TEO) pursuant to reg 7 (2) but it has failed to do so, thus the claim succeeds.

11. Additionally/ alternatively I find there was a failure to warn; consult; and including undertake a selection process<sup>4</sup>. It thus follows that this was an unfair dismissal pursuant to s98 (4) of the ERA.

12. But the Claimant is claiming for 52 week loss of earnings. I queried why he could not get another job given he is clearly resourceful with wide experience in the restaurant business and he has of course been a van driver. Such jobs in my experience are not difficult to come by in Nottingham. The reason became clear the surgery on his leg was not successful. It is yet to be successfully corrected. Thus his left leg would severely restrict his ability to drive other than short distances and of course perform such as the duties of a waiter. Second because PASSBY Ltd only bought the Nottingham outlet it had no need for a van driver and it has not employed one since the departure of the Claimant. It follows that applying Polkey,<sup>5</sup> I conclude that if the procedure had been handled properly and/ or if he had been kept on as say a waiter but then soon thereafter encountered the difficulties with the knee, that either way this employment would not have lasted later than 2 months after the EDT which I conclude was the 7<sup>th</sup> May 2016 when he was told he was no longer needed. Thus I am going to cut off his losses for earnings at 7 July 2016. His net wage was £289. Thus £289 x 8 =

<sup>3</sup> Susie Radin Ltd v GMB and ors 2004 ICR 893 CA.

<sup>4</sup> See for example Williams and others v Compare Maxam Ltd (1982) IRLR 83 EAT.

<sup>5</sup> Polkey v A E Dayton Services Ltd (1987) IRLR 503 HL and also see Software 2000 Ltd v Andrews (2007) IRLR 568 EA.

£2312.

13. As per the schedule of loss the basic award is gross weekly wage £336; aged 54 at EDT with 7 years continuous service: thus  $£336 \times 1.5 \times 7 = £3528.14$ .

14. As to the compensatory element first I carry forward the £2312. Then I award loss of statutory rights at £479 being the prevailing figure in this region at the time. Compensation for loss of pension at  $£1.93 \text{ p/w} \times 8 \text{ weeks} = £15.44$ . Thus the total compensatory element of the award is £2806.44.

15. Thus total award for the unfair dismissal:  $£3528.14 + £2806.44 = \mathbf{£6334.44}$ .

**Notice pay**

16. The Claimant was entitled to 7 weeks notice pay. Thus  $£289 \times 7 = £2023$ . There was a muddled issue before me which has resolved itself. Shortly after the first Respondent via Robert Rhodes had erroneously stated that the Claimant had accepted voluntary redundancy, he was sent by Mr Rhodes (Bp61) six post dated cheques total value £1730.77. These, on the advice of his solicitor, the Claimant returned as to which see the covering letter dated 22 June 2016 (Bp 64) which is self explanatory.

17. Subsequently Mr Rhodes sent him another six post dated cheques total value £998.86. This time he was advised to cash them in part payment of his notice entitlement. Thus it follows that the sum outstanding for notice pay is  $£2023 - £998.86 = \mathbf{£1024.14}$ .

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Employment Judge P Britton

Date: 27 September 2017  
JUDGMENT SENT TO THE PARTIES ON

28 September 2017  
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FOR THE TRIBUNAL OFFICE

Note