EMPLOYMENT TRIBUNALS

Claimant **Respondent**
Ms D. Salakana

v (1) Glamrockz Ltd
(2) Tots to Teens Shoe Lounge Ltd

Heard at: Watford **On**: 27 July 2017, 22 November 2018, 9 and 10 July 2018.

Before: Employment Judge Heal

Appearances
For the Claimant: in person (27 July 2017 and 9 and 10 July 2018)
Mr. Nkafu, counsel (22 November 2017)

For the Respondent: Mr. P. Maratos, consultant (27 July 2017)
Not present or represented (22 November 2017)
Mr. R. Chaudhry, solicitor (9 and 10 July 2018).

RESERVED JUDGMENT

1. The claim for unfair dismissal is well founded.
2. The complaints of unauthorised deductions from wages are well founded.
3. The complaints of unpaid bonus and overtime are dismissed.
4. There was a transfer of an undertaking between the first and second respondents.
5. The second respondent is liable to pay to the claimant the following sums:

Unfair dismissal:
Basic award: **£1980**
Compensatory award:
£400+
£4495.43 net.

£4,895.43

Unauthorised deductions from wages:

Unpaid wages: **£365.46** net
Unpaid holiday pay: **£403.20** net

Unpaid sick pay: **£176.90** net

Failure to provide a written statement of employment particulars: **£1320.**

The total sum due and owing by the respondent is **£9140.00**.

6. The tribunal has no record of whether recoupment applies. As a matter or urgency and in any event within 7 days of the sending of this judgment the claimant shall notify the tribunal and respondent in writing whether she has received any benefits and if so which, between 12 October 2016 and 10 July 2018.

7. On the assumption that the recoupment regulations do apply:

The monetary award is £9140.
The amount of the prescribed element is £4495.43
The prescribed element is attributable to 12 October 2016 to 10 July 2018.
The monetary award exceeds the prescribed element by £4644.57.

REASONS

1. By a claim form presented on 13 December 2016 the claimant made complaints of personal injury, constructive unfair dismissal and unauthorised deductions from wages against the first respondent.

2. At a preliminary hearing held on 6 April 2017, Employment Judge Smail told the parties that the tribunal had no jurisdiction to consider a claim of personal injury so that there would be no further reference to it in these proceedings. Otherwise, he identified the issues as follows:

'*Unauthorised deduction from wages*

The claimant alleges she is owed wages and sick pay

Constructive unfair dismissal

the claimant alleges she resigned when the respondent's director, Mr Wirk informed her that her basis of pay would change from £7.20 after tax per hour to £7.20 per hour before tax, with the claimant being responsible for her own tax.

The respondent denies owing the claimant any money and also denies proposing to change the basis of pay as alleged by the claimant. There was no proposal to reduce her wages at all, submits Mr Wirk.'

3. The first respondent produced a 34-page bundle for the hearing on 27 July 2017. This was not agreed. At the beginning of that hearing, the claimant said that there were a number of documents which she wished to have disclosed by the first respondent. These were:

3.1 a red diary in which staff noted down their hours and payment her P60
3.2 personal files containing all her appraisals for the period of employment
3.3 copies of the claimant's payslips for the last 3 years
3.4 a printout of all the payments made to the claimant in the last 3 years
3.5 a copy of the notice of meeting with the claimant on 29 August 2016
3.6 the claimant's contract of employment

4. After discussion, and consideration, the following was the situation with the above documents:

5. The first respondent said that the red diary was no longer in its possession. The respondent said that it did not file or keep it: it was just a work diary. I cannot order disclosure of a document which no longer exists.

6. The appraisals: the first respondent confirmed that it made no criticism of the claimant's performance. I did not order disclosure of the appraisals therefore because they were not relevant to the issues before me.

7. A P60 for the year to 5 April 2016 was provided to the tribunal by the first respondent's accountants by email on 27 July 2017 at 11:17. The covering email said that the claimant would not have received a P60 from the first respondent for the year 16/17 as a P45 had already been produced.

8. The respondents said that it had given the claimant all the relevant payslips. The accountant's email of 27 July 2017 said that the claimant worked no hours in October 2016 and therefore no payslip was produced.

9. The respondent said that it had produced a contract of employment at the beginning of the relationship but could no longer find it. (The claimant said that she did not receive a contract of employment)

10. A record of the payments actually made to the claimant by the respondent was in the bundle. This covered the period 1 January 2016 to 30 September 2016. The respondent confirmed that no payments were made to the claimant in October 2016.

11. Meanwhile, the claimant produced a sheet of her own calculations of the sums owing to her and her hours of work in the relevant weeks. The respondent had not previously seen this.

12. It appears that the claimant had further documents which had not been disclosed and so I gave the parties time, first, for the respondent to set in train the production of documents not already in the tribunal; and second so that the claimant could sort out her own documents and give them to the tribunal clerk for photocopying.

13. As a result of this exercise there emerged from the claimant some further copies of her wage slips with annotations, some diary sheets and calculations. (The respondent produced the email noted above dealing with the P60 and P45).

14. It transpired that the claimant had not yet disclosed some relevant original text messages although she had them on her mobile telephone. We resolved this problem by the claimant voluntarily passing her telephone to Mr Maratos for the respondent who confirmed the text of the message already typed up and in the bundle although he added a few peripheral details from the original text. He also took instructions from Mrs Wirk who was sitting in the tribunal, about the content of the original text. Apart from the small peripheral additions Mr Maratos ultimately confirmed that the text message quoted on the second page of the claimant's witness statement was indeed sent by Mrs Wirk to the claimant.

15. All of the above took until 12.50 to achieve. The tribunal therefore broke for lunch early and we reconvened at 1.50. For that reason, it was only possible to hear evidence from the claimant, which continued until 4:30 pm. It was therefore necessary to postpone part heard until 12 September 2017.

Situation at the end of the first hearing (money claims).

16. In evidence at that first hearing, the claimant set out a precise calculation of the sums which she said that the first respondent had failed to pay her as wages in September 2016. Mr and Mrs Wirk were present at that hearing. In cross-examination the claimant was not challenged about the hours she said that she had worked or about her calculations. At that stage her claim for unauthorised deductions from wages stood at £365.46.

17. The claimant also claimed that she was not paid sick pay for 13 days when she was off sick. The respondent said that this was included in a sum of £1818 paid to her but had not in cross-examination or otherwise been able to show how her sick pay was included in this sum. The claimant's wage slip for August 2016 showed that the claimant was due the sum of £123.83 as sick pay. The claimant's schedule of loss claimed a different sum (£178) which the claimant said that her barrister gave her after using a government ready reckoner. She did not understand how the figure provided by her barrister was calculated.

18. The claimant told me orally that she also claimed for a bonus and for overtime. On questioning however, it appeared that these were not claims as such. She was troubled that a bonus and overtime were entered on her wage slips incorrectly.

19. The claimant said that the holiday year was January to December. She had 7 days left owing to her which the red diary would have shown. She says that when she had her meeting with Mr Wirk in August, she showed him the slip of paper on which she had written down holidays and he agreed that there were 7 days owing to her.

Further events

20. The hearing on 12 September 2017 was postponed by the tribunal because too many cases had been listed. A new hearing date was set for 22 November 2017.

21. On 3 October 2017 the first respondent was dissolved.

22. By letter dated 1 November 2017, Mr Maratos of Peninsula, acting for the first respondent, asked the tribunal to confirm whether the hearing on 22 November 2017 had been vacated given that the first respondent had been dissolved.

23. I ordered that the hearing would take place as listed.

24. The first respondent did not appear and was not represented at that hearing. The claimant appeared represented by Mr Nkufu of counsel. Upon application by Mr Nkufu, I gave the claimant permission to amend her claim to add Tots to Teens Shoe Lounge Ltd as a second respondent and also to add a claim for 7 days holiday and outstanding bonuses. I ordered the claimant to supply particulars of her claim for an unpaid bonus within 14 days.

25. I postponed that hearing to allow for service of proceedings on the second respondent.

26. The second respondent presented a response on 9 February 2018. The second respondent denied any TUPE transfer.

Hearing on 9 and 10 July 2018

27. At the hearing on 9 and 10 July 2018 both respondents were represented by Mr Chaudhry of Peninsula.

28. The difficulties with disclosure of documents continued.

29. A new bundle was produced by the respondents running now to 108 pages. New documents were produced at the outset of the hearing, copies made for the parties by the tribunal and added to the bundle. These documents were a summary of the respondent's bank statement payments to the claimant, an invoice for changes made to the second respondent's concession at Pearson's department store, and Mr Wirk's bank statement, all submitted by the respondent. Allowing for time for the parties to read the new documents, this took until 11.27 am.

30. I identified the new issues arising out of TUPE as follows. Mr Chaudhry agreed that these were the new issues.

30.1 Was there a transfer of an undertaking from the first respondent to the second respondent? Mr Chaudhry's defence for the second respondent was that there had been no transfer.

30.2 If so, was the transfer the reason, or principal reason for any dismissal?

30.3 Would the claimant therefore have been so employed immediately before the transfer if she had not been dismissed?

Facts.

31. I have made the following findings of fact on the balance of probability. Many matters have been absolutely disputed between the parties. Where there is a dispute of fact, I have to read and listen to the evidence placed before me by the parties and, on that evidence, decide what is more likely to have happened than not.

Credibility

32. Where there are disputes of fact I prefer the evidence of the claimant and her witnesses to that of the respondents' witnesses. I have found much of what Mr Wirk has said implausible; he has produced no documentary evidence at all of commercial agreements with department stores when I would expect there to be email trails and written terms and conditions. His evidence has been evasive and changeable.

33. For example, I pressed Mr Wirk to tell me to whom he had sold the shelves from the first respondent's retail concession at Pearson's department store. He said he had sold them to family but claimed that he could not recall who: he said it might have been one of his sisters or cousins. It was unusually difficult to get him to commit to any detail. When I told him that there was a risk I might disbelieve an evasive witness however, he immediately became very precise and recalled an exact name. I formed the impression that Mr Wirk was not being open with me about the transfer issue.

34. I noted too that the first respondent's case changed: it differed from Mr Wirk to Mrs Wirk and developed from hearing to hearing. Disclosure from the first respondent was incomplete (e.g. pages relating to the month of July payments from the first respondent were missing). There was some inconsistency between Mr and Mrs Wirk's insistence that they saw the claimant as one of the family, always putting her needs first, and the letter dated 27 February 2011 which provided that the claimant was to take sick absence as holiday and when she had no holiday left would not get paid for sickness. It is surprising too that the 'red diary' in which the claimant's hours of work, holidays and time off were recorded has not been kept by the respondent, even though they knew from August 2016 at least that she strongly disputed the payments due to her.

35. By contrast, although the claimant was sometimes overcome by emotion, I found the claimant careful and consistent. I formed the impression that she was passionate about her claim because she had a strong conviction that she had been underpaid and wronged. I was impressed by Mrs Somi, the claimant's aunt, who gave her evidence with clarity and certainty.

The chronology

36. The first respondent Glamrockz Limited, is (or was) a limited company engaged in retail sale of footwear in specialised stores. Its managing director was Mr Bhupinder (Bob) Wirk and its Sales Director was Mrs Ravinder (Cindy) Wirk.

37. Mrs and Mrs Wirk have a daughter, Miss Nikita Wirk, who in the summer of 2016 was sitting her A levels.

38. The second respondent, Tots to Teens Shoe Lounge Limited, was incorporated on 26 September 2014. Companies House describes the nature of its business as 'retail sale of footwear in specialised stores'. The second respondent's directors in September 2014 were Mr Bhupinder and Mrs Ravinder Wirk.

39. The second respondent, Tots to Teens Shoe Lounge Limited, opened a concession in Elys department store in Wimbledon. This opened under the name 'Tots to Teens Shoe Lounge' on 25 November 2016.

40. Elys is owned by Morley Stores Limited which also owns Pearsons department store in Enfield.

41. The claimant was employed from 1 January 2010 by the first respondent, Glamrockz Limited, as a sales assistant at its shop in Church Street in Enfield called Studio 52. At first, Studio 52 was the first respondent's only outlet.

42. In 2013 the claimant became the shop manager and her pay was increased to £56 a day at £7.20 an hour after tax. I accept the claimant's evidence that she was paid £7.20 ***net*** of tax and national insurance: the agreement, evidenced by the conduct of the parties, was that the respondent would deal with and pay her tax and national insurance on top of that.

43. I find that the claimant was not given a written statement of terms and conditions. Mr Wirk does not habitually produce written records or comply with all of the expectations of the law (the letter of 27 February 2011 is an example). I consider it more likely than not that the first respondent did not give the claimant any written contract or statement of terms and conditions.

44. Mr Wirk does have an accountant who has produced some wage slips. The claimant says that the wage slips are wrong. They show the £7.20 per hour as being paid gross. Without the red diary there is no objective contemporaneous record of the claimant's hours from the respondent's point of view. Mr Wirk accepts that the accountant has worked on the basis of figures he has provided. I have attempted to find ways to verify the wage slips and calculate the amounts owing using the documents showing sums actually paid out by the first respondent but, frustratingly, those records are incomplete. The figures recorded as paid out to HMRC do not tally with the sums said to be due in tax and NI. (The figures paid to HMRC are always for exactly £100 a month which Mr Wirk says were all he could afford.) There is no indication to what those payments of £100 relate. £100 is not the figure I would expect to be paid for the claimant's tax and NI.

45. The P60 for the tax year ending 5 April 2016 tends to support the claimant's account. This gives a figure of £16,242.64 gross, with tax of £1126.60 and NI of £981.60. If the sums deducted for tax and NI are taken off the gross figure, the result is £14,134.44 net. Putting on one side for the moment the probable variations in the hours worked each week, £7.20 per hour for a 40 hour week yields an annual

salary of £14,976. So, the P60 tends very broadly towards support for the claimant's case that the £7.20 was paid net.

46. I find that payment of the claimant's wages was erratic from 2015. The first respondent says that this was because the claimant was constantly requesting advances. The claimant says this is incorrect: the respondent regularly paid late. The documents, given their deficiencies, do not allow me to work out which is correct from reliable primary evidence. I prefer the claimant's evidence for all the reasons set out above and also because the text messages show her complaining about the difficulties she had in being paid. Mr Wirk spoke of borrowing money from his sister to pay the claimant an advance on her wages; I doubt that he would go to the trouble of borrowing money from his sister to pay an *advance* to the claimant. It is more likely that he would do this to pay an existing debt once the claimant was (as she says) threatening to take him to court. Indeed, at the hearing in July 2017 Mr Maratos put to the claimant that in August the claimant was saying only that £302 was owing. Mr Maratos continued: '*He went to get that from his sister and all was clear*?' If the £302 had been an advance, all would not have been 'clear'.

47. During 2015 the first respondent, Glamrockz Limited, opened a new 'shop' in addition to Studio 52. This was a concession within Pearson's department store in Enfield called 'Tots to Teens'. According to Mr Wirk, the first respondent occupied a space in the department store. He said that there was never any written agreement between the first respondent and Pearsons: no correspondence was exchanged about any agreement and no documents show the agreement reached. Nor, he says, at the end of the relationship, were there any emails, written documents or letters. There was no written notice of termination: all, says Mr Wirk, was done orally.

48. Mr Wirk said that the tills were provided by Pearsons. The takings from the Tots to Teens concession went into Pearsons' system. The first respondent was not given its money until the month end. The first respondent paid no rent, instead it had permission to occupy a space in the store where it would benefit from the footfall of customers. It was allowed to erect a sign saying, 'Tots to Teens'. In return, Pearsons received 25% of the sales of Tots to Teens and paid to the first respondent 75% of the takings. The first respondent 'invoiced' Pearsons for that 75% and Pearsons also charged a 'merchant fee' of 1.5%.

49. The first respondent supplied the stock, the shelves, displays and sales assistants' stools.

50. Mr and Mrs Wirk resigned as directors of the second respondent, Tots to Teens Shoe Lounge Limited on 12 July 2016 and Miss Wirk was appointed a director on the same date.

51. Mr Wirk closed down the shop Studio 52 on 31 July 2016. Once Studio 52 closed, from 1 August 2016 the claimant worked exclusively for the first respondent in the Tots to Teens concession at Pearsons.

52. On 19 August 2016 the claimant was off work sick until 5 September 2016. She was not paid sick pay. The wage slips show a payment of sick pay but I prefer

the claimant's evidence on this which is consistent with the letter of 27 February 2011. She claims £178, set out in her schedule of loss and calculated by her counsel. The respondent says that her calculation of sick pay is wrong because she has not allowed for three waiting days.

53. On 24 August 2016, the claimant sent a message to 'Shop News' (a chat group for those working for the first respondent) saying,

'*Cindy pls tell Bob! To pay me my wages I think it my right for him to pay me*
Cause I work for it, and tomorrow I'm going to c him in Pearson I think we need to discuss about my first contract with glamrocks LTD,
Before I continue with a new company under Nikita.
I think he need to surtout [sort out] first,
Cause now the company is finish, as we all know we the company died all the staff the have to get there right,
Every day when is the time for my payment I have to fight for it to get paid, pls let him know!...'

54. On 27 August 2016 there was a lengthy conversation between the claimant and Mr Wirk about money she said he owed her. Mrs Somi, the claimant's aunt was present. Mr Wirk denied the money was owing. Mr Wirk insisted at the hearing in July 2018 that he finally agreed to pay the money only as an advance, but he did not agree at the time that the £302 in question was a debt actually owing to the claimant. This was not put to the claimant by Mr Maratos at the hearing in 2017 although Mr Wirk tells me that he was present at that hearing. I find that he did owe the claimant £302 and Mr Wirk paid it because the claimant could show that it was due and was threatening to take him to court if he did not pay.

55. During that 6 hour meeting about the £302 Mr Wirk said to the claimant that his business was not doing very well. He suggested to the claimant that she would have to pay her own taxes out of her £7.20 per hour if she was to continue working for him.

56. This is confirmed by Mrs Somi and corroborated by Mrs Wirk's text message on or before 4 September 2016 to the claimant, saying,

'*Also you know it's harder now as we only have the two concessions and being under Tot's to Teens as bob discussed in your meeting retail is very difficult. We are happy for you to come back on Monday but your wages Bob will not be able to pay taxes, you will have to pay it yourself. Also depending on how busy it is you might do less days but that Bob will speak with you. …if you are happy I look forward to seeing you Monday*.'

57. Mr Wirk said that Mrs Wirk had no authority to send this text. Mrs Wirk said that the text was sent in these terms because the claimant had requested for the first time that the respondent pay her taxes on top of her £7.20, so Mrs Wirk's text was simply confirming that the pre-existing arrangement was to continue. I consider that the wording of the 4 September text is more consistent with the claimant's account than with Mrs Wirk's. The context is that Mrs Wirk was saying that retail was difficult and the respondent was looking to save money on wages.

It seems likely to me that this employer would indeed ask its employee to take, in effect, a reduction in wages. I find that Mrs Wirk sent the text using this wording because the claimant is correct: she had previously been paid £7.20 per hour net and now Mr Wirk intended her to pay her £7.20 per hour gross, thereby reducing her pay.

58. The claimant worked through September 2016. She worked for 5 days on 5 to 9 September with no lunch break. She worked 47 hours in that week and should have been paid £338.40 net. In that week, Mr Wirk paid her £250 into her bank account.

59. In the second week of September the claimant worked 52 hours with no lunch break, so that she was owed £374.40 net. She was paid £124.40.

60. In the third week of September the claimant worked 47 hours with no lunch break. She was owed £338.40 and was paid £250.

61. In the fourth week of September the claimant worked 37 hours with no lunch break. She should have been paid £266.40 and was paid £202.14.

62. On those figures, she is owed £365.46. (£1317.60 earned less £952.14 paid).

63. The claimant was suffering from stress and was becoming unwell as a result of the strain of dealing with Mr Wirk. On 30 September she realised that she had not been fully paid by the first respondent. She went to see him on the Saturday and asked him why he had not paid her. He said that he had paid her.

64. That for the claimant was the final straw. She went to see the manager of another store who said that she was willing to give the claimant a job. The new employer told the claimant that once she had 'finished' with Mr Wirk, she should come back and a place would be open for her. The claimant accepted that job offer because she could not go back to work for Mr Wirk.

65. After that the claimant wrote a letter of resignation to Mr Wirk on 12 October 2016.

67. At the time her contract terminated the claimant still had 7 days' holiday entitlement unused in that holiday year. (She had asked Mr Wirk if she could use those days as sick leave but he had refused, he told her she could not use it because it was not the end of the year and told her that she should never ask for sick pay.) Mr Maratos accepted that the claimant was entitled to 7 days' holiday pay.

68. I note that the 4 September text says, '***we*** *only have the two concessions'*. [Emphasis added.] That must mean the two Pearson's and the Elys' concessions, which Mrs Wirk plainly regarded as being under the same umbrella. There is no evidence of any other concessions. I note that Miss Wirk says that the Wimbledon concession opened on 25 November 2016, but the limited company was in existence since 12 July 2016. The 4 September text is at odds with the impression

that the respondents' witnesses have tried to convey: that the two concessions were always entirely separate businesses and viewed as such, and the similarity of name a co-incidence.

69. I find that, despite the respondent's evidence, the two concessions were viewed by the family behind the two limited companies as in practice a shared family operation, albeit Miss Wirk was entering the business and was expected to manage the new company. Although the respondents' witnesses deny it, it is plain that there was some expectation at the end of August that the claimant would move to Miss Wirk's business, that is to the second respondent. Since it is unlikely that the claimant would travel to Wimbledon, on balance I conclude that she was expecting to be employed by Miss Wirk at Pearson's and that in August 2016 there was a plan for Miss Wirk ultimately to run both concessions as Tots to Teens Shoe Lounge Ltd and for Glamrockz Ltd to close.

70. The evidence also shows that the first respondent was failing. Mr Wirk was behind in paying wages and in payments to HMRC (it is not clear for what these payments were being made). The bank statements are consistently 'in the red'.

71. At the July 2017 hearing, before she knew that the first respondent was to be dissolved, the claimant gave evidence that when Mr Wirk opened the Tots to Teens concession at Pearsons he was trying to close down Glamrockz. She said that he was not paying her on time in order to get her to leave and get another job. He told her on 3 October 2016 that he did not pay her money on purpose to get her to leave because he wanted to close down Glamrockz. I accept this evidence.

72. I conclude that the respondents' original plan changed and they decided for some reason that they did not want to continue to employ the claimant in Miss Wirk's new business. They wished her to leave and Mr Wirk treated her accordingly. In the circumstances I find that he did this in the full knowledge that Glamrockz was going to close and that the second respondent would take over the concession at Pearsons.

73. Meanwhile, on 25 November 2016, Tots to Teens Shoe Lounge Limited opened as a similar concession at Elys department store in Wimbledon. Both Elys and Pearsons are owned by Morley Stores Limited. The Wimbledon concession operated on exactly the same commercial basis as that with Pearsons.

74. Again, I have been shown no documents at all evidencing the formation of the commercial agreement between Elys and the second respondent: no pre-contract emails or correspondence and no written agreement. I doubt that a department store would set up such a commercial arrangement entirely orally. I note that there is in the respondent's bundle a Morleys Stores staff discount application form which sets out the terms of a staff discount card agreement with exactitude. On the balance of probability, it seems unlikely that a company that would produce such a document for staff discounts would enter commercial agreements setting up concessions without similar written exactitude.

75. Invoices in the respondents' bundle show the first respondent Glamrockz Ltd continuing to order shoes from suppliers through November and to mid

December 2016. There is also an invoice from Start-Rite to the first respondent dated 30 December 2016.

76. From mid December 2016 there are a series of credit notes from suppliers to the first respondent. Three of those credit notes evidence the re-sale (or at least re-invoicing) of shoes to the second respondent. Mr Wirk denied handing any stock at all over to his daughter.

77. I find that there is evidence that he did pass on stock to his daughter: that is, that the first respondent did pass on stock to the second respondent.

78. Mr Wirk told me that the first respondent's concession (Glamrockz Limited, trading as 'Tots to Teens') at Pearsons closed on 31 December 2016. The second respondent's (Tots to Teens Shoe Lounge Limited's) concession opened on 1 January 2017. He told me that none of the stock or shelves was passed on to the second respondent. All the first respondent's property was, he claimed, removed from the space in Pearson's on 31 December and Miss Wirk put in entirely new shelves and stock on 1 January. Mr Wirk's evidence about the buyer of the shelves was so evasive and changeable that I do not accept it. I consider it unlikely on balance that the first respondent would remove all the shelves and the second respondent would then replace them entirely. I consider it more likely than not, on the evidence I have heard, that at least some of the shelves, signs and stock were transferred over to the second respondent.

79. Mr Wirk also told me that a customer going into that space in Pearsons in mid-December 2016 and then again in mid-January 2017 would see '*not very much difference*'. There was a sign saying 'Tots to Teens' in both cases. The staff were wearing the same black clothing. Both concessions were selling shoes for children and teenagers. The claimant said that nothing changed between the two: there were the same shelves and the same products.

80. Wage slips show that both Mr and Mrs Wirk became employees of the second respondent.

81. Going back to the claimant: after her resignation, the claimant started new employment in the first week of December 2016. The first full week of December 2016 began on Monday 5 December. She was too ill to start work earlier. In her new employment she was paid £7.50 per hour gross for 4 hours per day, 5 days per week. That is 20 hours per week: £150 gross per week.

82. The claimant left that job after '5 or 6 months' on 2 June 2017. She got another job which pays more than she was earning with the respondent. I find that the claimant worked in the first job from 5 December 2016 to 2 June 2017. That is 180 days.

83. So, the claimant earned £150 gross per week for 180 days, on a daily rate of £21.37. (150 x 52 / 365) that is, £3856.57 gross. (On such a low figure I take £150 also as the claimant's net pay). She must give credit for that sum. Thereafter she suffered no loss.

Statement of the law

84. Regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 states,

'*These regulations apply to –*

A transfer of an undertaking, business or part of an undertaking of business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity.'

85. Regulation 4 provides:

'(1) *Except where objection is made under paragraph (7), a relevant transfer shall not operate to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*

(2) Without prejudice to paragraph (1)…on the completion of the relevant transfer–

(a) All the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
(b) And act or omission before the contract is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) *Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1)…*'

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of any right of an employee arising apart from these Regulations to terminate his employment without notice in acceptance of a repudiatory breach of contract by his employer.

86. Regulations 7 provides:

'(1) *Where, either before or after a relevant transfer, an employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.*

(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor and transferee before or after a relevant transfer.

(3) where paragraph (2) applies-

(a) paragraph (1) does not apply;
(b) without prejudice to the application of section 98 (4) of 1996 Act (test of unfair dismissal), for the purposes of sections 98 (1) and 135 of that Act (reason the dismissal) -

(i) the dismissal is regarded as having been for redundancy with section 98 (2) (c) of that Act applies; or
(ii) in any other case, the dismissal is regarded as having been for a substantial reason of the kind such as to justify the dismissal of an employee holding position which that employee held.'

87. Where there is a relevant transfer, those who transfer will be persons employed by the transferor and assigned to the organised grouping of resources or employees (and who are so employed immediately before the transfer, or would have been were it not for the fact that they had been dismissed for a reason described in regulation 7(1))

88. In *Cheesman v R Brewer Contracts Ltd* [20089.1] IRLR 144 the EAT identified a number of factors for determining (in relation to the 1981 Regulations) whether there was an undertaking and, if so, whether it had transferred. The EAT held:

"(i) As to whether there is an undertaking … an organised grouping of persons and assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective …

(ii) … such an undertaking … must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible;

(iii) in certain sectors, such as cleaning and surveillance, the assets are often reduced to their most basic and the activities are essentially based on manpower;

(iv) an organised grouping of wage-earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity;

(v) an activity of itself is not an entity; the identity of an entity emerges from other factors, such as its workforce, management style, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it."

89. As to the question of whether there had been a transfer, the following factors were identified for consideration by the EAT in *Cheesman*:

"(i) … the decisive criteria for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated … by the fact that its operation is actually continued or resumed; …

(iii) in considering whether the conditions for … a transfer are met, it is necessary to consider all the factors characterising the transaction in question, but each as a single factor and none is to be considered in isolation;

(iv) amongst the matters … for consideration, are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended;

(v) account has to be taken … of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on;

(vi) where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction … cannot logically depend on the transfer of such assets;

(vii) even where the assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer; …

(x) the absence of any contractual link between the transferor and transferee may be evidence that there has been no relevant transfer, but it is certainly not conclusive as there is no need for any direct contractual relationship;

(xi) when no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer."

90. I take *Cheesman* as the starting point when considering whether there has been a transfer under regulation 3(1)(*a*).

91 Regulation 7(1) provides that any dismissal will be automatically unfair if the *sole or principal* reason for the dismissal is the transfer.

92. In *Marshall v Game Retail Ltd UKEAT/0276/13 (13 February 2015, unreported)*, the EAT set out the burden of proof where it is alleged that the dismissal is by reason of the transfer. Once the claimant has produced some evidence in support of her case, the burden lies on the respondent to establish that the reason for dismissal was not the (TUPE-related) automatically unfair reason.

93. The EAT held that the principle in *Kuzel v Roche Products Ltd [2008] IRLR 230* should apply. *Kuzel* was a case where the claimant claimed automatically unfair dismissal for making protected disclosures, but the case was equally applicable to an assertion of automatically unfair dismissal in the context of a TUPE transfer. The EAT ruled that it was not correct to place the burden of proof wholly on the claimant. Once the claimant had produced some evidence in support of her case, the burden lay on the respondent to establish that the reason for the dismissal was not the automatically unfair reason.

Constructive dismissal

94. So far as is relevant section 95 of the 1996 Act provides:

> ***95 Circumstances in which an employee is dismissed***
>
> *(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—*
>
> *(a) …*
>
> *(b) …*
>
> *(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.*

95. To succeed in establishing a claim under section 95(1)(c) the claimant must show that the employer is guilty of a fundamental or repudiatory breach of the contract of employment. Behaviour that is merely unreasonable is not enough. The test is not one of whether the employer was acting outside the range of reasonable responses but the question is whether, considered objectively, there was a breach of a fundamental term of the employment by the employer.

96. Although unreasonableness on the part of the employer is not enough an employee may rely upon the "implied term of trust and confidence". Properly stated the term implied is "*the employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."*

97. The duty not to undermine trust and confidence is capable of applying to a series of acts which individually might not themselves be breaches of contract. Another possible breach is at play in this case. A contract of employment is at its simplest an agreement to exchange work for pay. That the amount to be paid is agreed between the parties is fundamental to the contract. Neither party may unilaterally vary that agreement. An employer who attempts or purports to do so is in fundamental breach. Similarly, a failure to pay wages when they fall due will be a fundamental breach.

98. The particular incident which causes the employee to leave may in itself be insufficient to justify his taking that action, but when viewed against a background of such incidents it may be considered sufficient by the courts to warrant their treating the resignation as a constructive dismissal. It may be the 'last straw' which causes the employee to terminate a deteriorating relationship. The question is, does the cumulative series of acts, taken together, amount to a breach of the implied term?

99. The employee must leave in response to the breach of contract, which may mean the tribunal deciding whether it was *an* effective (but not necessarily the sole or *the* effective) cause of the resignation. Accordingly, if an employee leaves both in order to commence new employment and in response to a repudiatory breach,

the existence of the concurrent reasons will not prevent a constructive dismissal arising. What is necessary is that the employee resigned in response, *at least in part*, to the fundamental breach by the employer. Elias P (as he then was) in Abbey Cars (West Horndon) Ltd v Ford EAT 0472/07 commented that 'the crucial question is whether the repudiatory breach played a part in the dismissal', going on to observe that even if the employee leaves for 'a whole host of reasons', he or she can claim that he or she has been constructively dismissed if the repudiatory breach is one of the factors relied upon.

100. There is *no* legal requirement that the departing employee must tell the employer of the reason for leaving however.

101. A repudiatory breach is not capable of being remedied so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal, regardless of his reason or motive for so doing. All the defaulting party can do is to invite affirmation by making amends.

102. The fact that a dismissal is constructive (within sub-section (2)(*c*)) does not of itself mean that it will be held to have been unfair (though in practice that will often be the case); I must still go on to consider fairness in the normal way.

Analysis

Was the claimant dismissed?

103. I take first the issue of whether the claimant has been constructively dismissed. This arises no matter who is the correct respondent.

104. I have found as a fact that the claimant resigned in response to the first respondent's communication to her that it proposed to change the basis on which she was paid. She had previously been paid £7.20 per hour net and respondent told her that would change to £7.20 per hour gross. Effectively, this was a unilateral variation of her contract so as to reduce the pay per hour. This was the breach which mainly motivated her to leave, albeit the final straw that actually prompted the resignation was the realisation that she had not been fully paid in September 2016.

105. I consider that this amounted to a fundamental breach of contract both of the term that the respondent would pay to the claimant the agreed wages when due and also the breach of the implied term of trust and confidence. There was no reasonable and proper cause for the failure to pay.

106. I have found as a fact that the claimant resigned in response to that breach. That she had other employment to go to does not mean that she did not resign in response to the respondent's breach of contract. On the facts of this case, the *effective* cause of her resignation was the change in her pay per hour followed by the failure to pay properly in September. The claimant did not affirm the contract after the respondent's breach but resigned promptly in response to it.

107. Therefore, I find that the claimant was constructively dismissed. Whether that dismissal was fair or unfair has to be determined in the light of the reason for that dismissal.

108. At this stage therefore, I turn to the question of whether there has been a transfer of an undertaking because it will be relevant to decide whether or not the sole or principal reason for the dismissal was that transfer.

Was there a relevant transfer?

109. I consider that there was a transfer of an undertaking from the first respondent to the second respondent on 31 December 2016.

110. In reaching that conclusion, I take into account that at the time of the transfer, the first respondent's sole business undertaking was the concession in Pearson's department store specialising in children's and teenagers' footwear. After the transfer, the second respondent also ran a retail concession in Pearson's department store in exactly the same space, specialising in children's and teenagers' footwear. The distinctive words, 'Tots to Teens' were common to the name of both. A customer visiting each concession before and after the transfer would notice very little difference between the two. The entity in question did retain its identity; its operation continued. There was no break in continuity from one day and one company owner, to the next.

111. Insofar as customers transferred, each concession was marketing itself to the same footfall of customers visiting Pearson's department store.

112. The first and the second respondent had an identical contract on the same terms and conditions with Pearson's department store.

113. Although there was no formal uniform, both before and after the transfer the staff dressed alike, in black.

114. Mr and Mrs Wirk had been directors of the first respondent and became employees of the second respondent. The evidence shows that the respondents in fact regarded the concessions at Elys and Pearsons as one family operation. The Pearsons' concession remained in that family both before and after the transfer, albeit with some legal changes in who occupied which role.

115. It has been very difficult indeed to discover the extent to which tangible assets transferred, however there has been some objective evidence that stock did transfer. I find myself unable to rely upon the respondents' evidence that the shelving and other tangible assets did not transfer. The claimant told me that the stock and shelving remained the same and that is consistent with Mr Wirk telling me that a customer would notice little difference. On balance I have considered it more likely than not that some stock and other tangible assets did transfer.

116. Taking all the factors available to me into account, using the multi factorial, Cheesman approach, I find that there was a transfer of an undertaking.

Would the claimant have been employed immediately before the transfer if not dismissed?

117. Had the claimant not been dismissed because of the transfer, she would have been employed in the first respondent immediately before the transfer. She was a capable employee who had committed no misconduct. She had no independent plans to leave. She would have continued in employment if not driven to leave. Therefore, the first respondent's liabilities in connection with her contract of employment transfer to the second respondent. The second respondent therefore is liable for the claimant's unfair dismissal and for her other money claims in these proceedings given my further findings below.

Was the transfer the reason or principal reason for the dismissal?

117. I have noted the time delay between the claimant's dismissal on 12 October 2016 and the date of transfer on 31 December 2016.

118. The claimant had been assigned to the Pearsons concession: Studio 52 had closed and she worked exclusively in the Pearsons' Tots to Teens concession at the time of her dismissal. That was an organised grouping of resources.

119. The claimant has more than two years' service. She has produced some evidence that the sole or principal reason for her dismissal was the transfer. I have accepted her evidence that Mr Wirk told her on 3 October 2016 that he did not pay her money on purpose to get her to leave because he wanted to close down Glamrockz Ltd. It is plain from the message dated 24 August that the staff, indeed, 'everybody', knew that the first respondent had no future. The claimant at that point expected to start a new contract with Miss Wirk. It seems that plan changed, and Mr Wirk instead decided that the claimant should be driven to leave. That is all '*some evidence*' that Mr Wirk had in mind the closure of the first respondent as a business, the transfer of that business to his daughter's company and that the claimant had no part in the future arrangement. The respondent has denied dismissing the claimant and indeed has denied the fundamental breach. It has not proved any alternative reason for the dismissal.

120. Therefore, the transfer was the sole or principal reason for the dismissal. The respondent has not advanced a case that it was for an organisational, technical or organisational reason. Indeed, I have no evidence of the respondents' detailed thinking behind the desire not to employ the claimant any more.

121. In summary, the claimant was assigned to the Tots to Teens concession which transferred to the second respondent. She was dismissed and the principal reason for that dismissal was the transfer. Had she not been dismissed for that reason, she would have been employed by the first respondent immediately before the transfer. Therefore, her dismissal is automatically unfair, and the second respondent is liable for it.

Other claims.

122. I have accepted the claimant's evidence and calculations about the sums due to her from the respondent in the month of September. Therefore, the respondent owes the claimant the sum of **£365.46** unpaid wages. The sums paid were not advances but were payments in respect of the work in each relevant week.

123. The respondent also owes the claimant 7 days unpaid holiday pay. She claims £288 as her net weekly pay (which equates to: £7.20 x 5 days per week x 8 hours). On this basis, her daily rate was £57.60. Therefore 7 days holiday pay is **£403.20 net**, which is what I award.

124. The respondent owes the claimant sick pay in the sum of **£176.90** (unauthorised deductions from wages). The claimant did not know how her barrister had calculated her sick pay claim at £178. Mr Wirk asserted that the claimant had failed to allow for three waiting days in her calculation.

125. Statutory sick pay is not payable for the first three qualifying days in a period of incapacity for work. A qualifying day is a day when the claimant normally worked. So, Friday 19 August is a qualifying day, as are 22 and 23 August. Those are the waiting days.

126. Lacking reliable information to calculate the claimant's average weekly earnings, I take £288 net as her average. The records and evidence are too chaotic for it to be a proportionate exercise to calculate the average weekly earnings more precisely.

127. The waiting days were 19, 22 and 23 August 2016. There remain 3 working days in that week: 24 to 26 August. At a daily rate of £57.60 x 3, the sum normally due exceeds the then weekly maximum of £88.45. The following week was a full week, in which the sum due exceeds the weekly maximum of £88.45. (It appears that the claimant's adviser has correctly allowed for the waiting days but has applied the maximum relevant to 2017/18, not 2016/17.)

128. The claimant would not have worked on Sunday 4 September. She was back at work on 5 September.

129. Therefore, I calculate the sick pay due as 2 x £88.45 = **£176.90**.

130. The claimant made a bonus claim only because a sum showed for bonus on her wage slip. There was no agreement to pay a bonus: Mr Wirk sometimes paid £10 at the end of a day. I make no award under this head. I find that there was no entitlement to bonus.

131. There was no agreement for a higher rate of pay if the claimant worked more than her expected hours. Insofar as overtime appeared on wage slips, this was at the same hourly rate as standard pay. There is no actual claim for overtime: it simply puzzled the claimant that overtime appeared on her wage slips.

132. The claimant is entitled to a basic award:

6 full years x 1 (not 1.5: date of birth 9.4.75) x one week's pay.

133. I have not been given a figure for gross pay, but I do not adopt the claimant's counsel's assumption that she should therefore receive the statutory weekly maximum of £479.

134. Doing the best I can, and assuming a standard tax code, I make my calculations of the basis of £330 per week gross.

6 x 330 = **£1980.**

Compensatory award

135. Loss of statutory rights: **£400**

Loss of earnings

12 October 2016 to 1 May 2017.

29 weeks at £288 per week net = £8352
Less sums earned: £3856.57.

Total: **£4495.43** net

17. I have found that the claimant was not provided with a written statement of employment particulars. I have considered whether to award 2 or 4 weeks' pay under this head. I consider it just and equitable in all the circumstances to award 4 weeks' pay. The first respondent has taken no care to comply with this duty to its employee at all, although professional accountancy services at least have been available. At the time of dismissal, the maximum sum for one week's pay was £479 which exceeded the claimant's pay. I award the sum of £330 gross per week x 4 = **£1,320**.

_____
Employment Judge Heal

Date: ……..

Sent to the parties on: .....

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For the Tribunal Office