Case No: 2601316/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr R Garden**

Respondent: **(R1) Trans-European Trailer Services Limited (In Liquidation)**
(R2) Global Logistics Freight Solutions Limited

Heard at: **Nottingham** **On:** **Monday 14 May 2018**

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

Representation

Claimant:	**Mr Britton, Solicitor**
First Respondent:	**Did not attend and was not represented (correspondence received from its IP)**
Second Respondent	**Did not attend and was not represented**

JUDGMENT having been sent to the parties on 2 June 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Background

1.1. This claim arises from the Claimant's dismissal effective on 22 July 2017. The circumstances of that dismissal may have engaged further consideration as to whether there was a TUPE transfer between the first and second Respondent but it is now accepted that there is insufficient evidence to take that claim further and that issue has fallen away. I am told settlement has been reached with the second respondent through ACAS and, if it has not already happened automatically, I therefore dismiss the claim against it. The issues proceed against the first Respondent only.

1.2. The Claimant brings a claim for unfair dismissal or, in the alternative, a redundancy payment.

1.3. The first Respondent is in liquidation and if it hasn't been ordered already, its name will be amended to add "(in liquidation)". It is not a compulsory liquidation

by court order. The first respondent's participation has been limited. The insolvency practitioners, Kingsbridge, have been appointed to act in the process of winding up the company and have communicated with the Tribunal that they will not be in a position to have a company representative at this hearing and whilst the company disputes the claims there will be no further participation. There has been some limited disclosure in the form of a partial contract of employment and it seems that there may be some underlying genuine reason for the absence of further disclosure due to the circumstances in which the premises that the first respondent previously leased were vacated. That being said, I do have documentation before me so far as it was the Claimant's possession.

2. Evidence

2.1. I have a witness statement from the Claimant which he has adopted on oath before me today.

2.2. I have a small bundle running to about 155 pages, setting out the relevant documentation.

2.3. For the reasons referred to above, I have had no evidence from the first Respondent, although I do take into account what it has pleaded so far as understanding the background to the case and understanding how it might have advanced things in evidence. In particular I note where there is no dispute. In its ET3 there is no dispute that it employed the Claimant and that it did so until July 2017. It asserted that the claimant wasn't ever an employee of the second Respondent. It accepted that a Mr Legg acquired the first Respondent by share transfer and that there was some engagement with the Claimant and a colleague of his about changes to their terms and conditions. It accepts the Claimant was dismissed with effect from 22 July and it suggests it needed to maintain financial viability and reduce costs. I will keep that case in mind although, as I have said no, evidence is before me to support that contention and be tested.

2.4. Mr Britton produced a written submission and schedule of loss on which he based his oral closing submissions.

3. Issues

3.1. The issues are:-

a. The fact of dismissal being accepted, whether or not the first Respondent has established the reason for dismissal and that, as a matter of law, that reason was a potentially fair reason for dismissal.
b. If so, whether it was reasonable in the all the circumstances for it to rely on that as a sufficient reason to dismiss the claimant.

4. FACTS

4.1. I make the following findings of fact on the balance of probabilities.

4.2. The claimant started his period of continuous employment in 2004. He became a director in April 2005. That directorship ended in 2012 when the first respondent was sold to form part of the Morehouse & Mohan Limited group but retaining its own separate identify as a discrete legal entity. Thereafter, the claimant continued as an employee only with the title of Operations Director and

General Manager. That phase of employment was initially on a 5 year fixed term to 1 March 2017 after which it became an open contract subject to 3 months notice of termination. His salary was £55k per annum plus a profit related bonus at 1% of gross annual profits; a 5% employer's pension contribution and a fully expensed company car.

4.3. On 20 September 2016, Morehouse and Mohan Limited went into liquidation. The first respondent continued to trade.

4.4. Another company called Global Logistics Freight Solutions Limited "GLFS" was interested in purchasing the first respondent. GLFS was owned by a Simon Legg. He purchased the first respondent from the Administrators and would became its sole director.

4.5. Prior to the purchase, on 4 April 2017, the claimant was told by Mr Legg that when the deal goes through his current employment would be terminated on notice and he would be offered a new contract on reduced terms.

4.6. On 25 April 2017, the claimant received an undated letter giving 3 months' notice of termination. The stated reason was the need to bring the claimant onto GFLS employment contracts as part of the migration of working practices to GFLS working practices. I see no basis on which the later events that unfold, which I deal with below, in particular the claimant's own stance on the proposed changes to terms and conditions, could therefore have logically had any bearing on this earlier harmonisation decision.

4.7. The claimant, and his only other colleague, Mr Danson, then suffered a period of delay and uncertainty for a couple of months during which their employment position was up in the air.

4.8. On 6 June 2017, the claimant received an envelope containing an unsigned employment contract. It presented a substantial reduction in terms. His salary was reduced by £25k. His pension contribution reduced from 5 to 1%, there was no bonus and no company car. It appeared to show a loss of continuous service and placed him in an uncertain job role.

4.9. Through June, various meetings and discussions took place about the reduction in pay. Mr Legg maintained his position. The claimant maintained what he needed for salary and benefits. The various meetings were inconclusive. No figures or documents were provided to the claimant to justify the financial situation and the need to make changes. There was a proposal by Mr Legg to employ a business development manager within the first respondent business. I accept Mr Garden's evidence that this post was created and advertised. I find the claimant did not believe at that time he was facing imminent dismissal.

4.10. On 27 June 2017, the claimant and Mr Legg held a further meeting, following a similar meeting with his colleague, Mr Danson. At that meeting the claimant was informed his employment was to be terminated and that Mr Danson was being retained. He was informed there would be no further negotiation and his employment would end on 22 July 2017.

4.11. On 10 July, the claimant appealed against the decision to dismiss him. The appeal was heard on 28 July by Mr Veness, a subordinate of Mr Legg. The outcome was that the appeal was dismissed. The outcome letter contained a

number of matters the claimant took issues with. I do not accept the accuracy of its content beyond the fact of it dismissing the claimant's appeal. I note, however, that it is critical of the claimant's stance in the discussions, which could relate to his conduct, it suggests financial pressures on the business, which could be a basis for seeking contractual changes, but it also suggests redundancy as Mr Veness asserts that the claimant "had lost his right to a redundancy payment due to refusing to accept suitable alternative employment". That alternative employment was the job he was already doing on much reduced terms.

4.12. In January 2018, the first respondent ceased trading. On 23 March 2018, the first respondent was made subject to a resolution of members' to voluntarily wind it up. Kingsbridge were appointed as insolvency practitioners. It follows that I have to find, whatever else happened, any continuing employment with the first respondent would have ended at the latest by this date.

4.13. Since his dismissal, the claimant has made significant efforts to find new employment. I accept his career has been in the freight forwarding business since 1985 and that is the industry he knows, and is known in. I accept it was not reasonable to begin a search for work in a totally new sector until he could be said to have exhausted all reasonable attempts in his chosen sector.

4.14. The claimant is an employable individual in this sector. He has been able to engage in productive discussions with 4 different companies within the industry and in each case has come close to securing new employment. All have been put off employing him at the time due to the fact his last contract contained a restrictive covenant. It was not unreasonable in the circumstances, for the claimant to proceed on the basis that that remained a valid clause and to be honest with prospective new employers about its existence.

4.15. The fact the first respondent ceased trading in January 2018 may have had the practical, if not legal, effect of releasing him from the threat of covenants being enforced against him or new employers. The claimant obtained new employment with Scotia logistics UK Ltd since 22 January 2018. It was reasonable to accept that role. He initially earned £35,000 per annum with an expectation that it would increase to £45,000 after successfully completing his initial probationary period.

5. Discussion and conclusions

Liability

5.1. It is not disputed that the claimant was dismissed by the first respondent.

5.2. The first question then is for the first respondent to establish the reason for dismissal. There are various reference points in the background to this case which give hints of various possibilities as to the reason for dismissal. There may have been reorganisation or restructuring, that may have been driven by genuine business needs and financial necessity or it might have been a matter of choice on the part of the new owner. In that regard, there is reference at the outset merely to "harmonising" contracts with GLFS contracts. There may or may not have been a genuine need for costs saving and there may or may not have been a genuine redundancy although the need for employees to perform work of a particular kind appears not to have diminished. It is possible, therefore that somewhere within this background there may be a set of facts that were, in fact, relied on by the

respondent and which might engage either "redundancy" or "SOSR" as potentially fair reasons. But there is no clear line which points to one over the other.

5.3. Informal though the tribunal is, relatively, this remains an adversarial process and the respondent carries both an evidential and, crucially, a legal burden. It is not for me to guess from amongst the background what the reason for dismissal might have been, particularly as there is as much to suggest that these changes were simply a desire to harmonise terms or a dissatisfaction with the claimant's stance in the discussions. That legal burden is clear in s.98(1) of the Employment Rights Act 1996. The respondent has simply not discharged it.

5.4. The respondent having failed to prove a potentially fair reason, the claim of unfair dismissal succeeds without the need to go further. The claimant is entitled to judgment.

Remedy

5.5. The claimant seeks financial compensation.

5.6. I accept as facts the following matters relevant to remedy.

a. His continuous service was 13 complete years between 1 April 2004 and 22 July 2017.
b. He was aged 54 at the date of dismissal, having been born on 6 August 1962.
c. His gross weekly basic pay was £1057.69 and £599.09 net. The larger than expected difference is explained by the fact he had agreed a tac efficient salary sacrifice whereby he reduced his gross salary by £10,345 and instead benefitted by a further employer's contribution to his pension of the same amount per annum.
d. The total pension benefit was made up of the 5% employer's contribution, the salary sacrifice mentioned above and a further small pension as a result of auto enrolling the claimant into a "the peoples pension scheme" of £64.62 per month. I accept that the total pension benefit was £1,274.87 per month (or £294.20 per week)
e. I accept that the value of the loss of use of the company car is £125 per week, based on the HMRC company car and car fuel benefit calculator which shows £1882 for the 15 weeks in 2017/2018 tax year.
f. He received a payment from the first respondent in August 2017. This appears to have been paid as a result of him challenging the amounts stated on the P45 and the exact nature of this payment is unclear. However, in any event, the claimant gives credit for it in his claim for lost earnings. His loss of wages effectively starts from 28 August.
g. He did not claim job seekers allowance.
h. He obtained new employment from 22 January 2018 earning £513.46 net per week.

5.7. The claimant is entitled to a basic award. This is 1.5 weeks' pay for each of the 13 years of his continuous employment subject to the relevant cap of £489 per week. That results in a figure of £9,535.50.

5.8. As to the compensatory award, the losses flow from 22 July 2017. (albeit the wages loss starts from 28 August). The claimant acknowledges the obvious issue in the chronology of events after his dismissal which is that the company

ceased trading and passed a resolution to liquidate on 23 March 2018. As I have already found, his losses must stop at that date. I am therefore concerned with past loss only. The total period is 34 weeks. I have found his attempts to mitigate reasonable, albeit the burden of proving otherwise would falls to the absent respondent. I accept his losses in full up to 22 January 2018 when he commenced his new employment. Thereafter, credit has to be given in the sum of £513.46. He is therefore entitled to 21 weeks at a loss of £599.09, and 8 weeks at £86.63 making £12,580.89 and 685.04 respectively. The total loss of earnings is therefore £13,265.93. This accounts for the salary sacrifice which is recovered as part of the pension loss.

5.9. The claimant's pension loss is for the full period of 34 weeks at £294.20 resulting in a figure of £10,002.80.

5.10. The claimant's financial loss in respect of his company car is 34 weeks at £125 per week resulting in a figure of £4,250.

5.11. I also award a notional sum of £500 to reflect the fact that the claimant has lost his statutory rights.

5.12. The total compensatory award is therefore £28,018.73 which, when added to the basic award produces a grand total of £37,554.73.

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Employment Judge R Clark

Date 26 July 2018

REASONS SENT TO THE PARTIES ON

30 July 2018

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FOR THE TRIBUNAL OFFICE