EMPLOYMENT TRIBUNALS

Claimant: Mrs Charlotte Holdway

Respondent: Little Explorers Hythe Limited

Heard at: London South (Ashford) **On: 4 & 5 January 2018**

Before: Employment Judge John Crosfill
Mrs S Dengate
Mr N Phillips

Representation

Claimant: In person

Respondent: Mr P Holt, a lay representative.

JUDGMENT having been signed on 18 January 2018 and sent to the parties; 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. Mrs Holdway ('the Claimant') had been employed at a nursery which was established by Stephen Firth as sole trader but latterly, and prior to the events giving rise to the present dispute, incorporated and operated by Happy Dayzzz Nursery Limited. Little Explorers Hythe Limited ('the Respondent') now operates a nursery from the same premises. The Claimant initially brought her claims against Happy Dayzzz Nursery Limited and Little Explorers Hythe Limited. In the course of these proceedings, Happy Dayzzz Nursery Ltd had been struck from the register of companies, has been dissolved and ceased to exist. Mr Stephen Firth had been joined as a party after the proceedings started apparently upon the basis that it was unclear whether he continued to personally employ the Claimant. The Claimant withdrew her claim against him. That decision had been criticised by the Respondent but was entirely a matter for the Claimant. In any event, on the evidence before us, there was no claim that could properly have been advanced against Stephen Firth.

2. In her ET1, the Claimant has made a number of claims, principally claiming that she was automatically unfairly dismissed on the occasion of a transfer of

undertakings from Happy Days Nursery Ltd to Little Explorers Hythe Ltd. She brings a number of ancillary claims including claims for wages, holiday pay and a failure to consult in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 (hereafter 'TUPE 2006' or 'the regulations').

3. Neither party was professionally represented. The Respondent had better understood the directions and orders that had been made and had prepared a trial bundle. The Claimant had not properly understood what had been expected and had a small bundle of documents. In the main we worked from the Respondent's bundle.

4. At the outset of the hearing we identified that the key issue that we needed to determine was whether there had been a transfer of the undertaking in which the Claimant was employed to the Respondent. If there was, then we needed to ask whether the transfer was the reason for the Claimant's dismissal. It became apparent in the course of the hearing that Mr Holt had erroneously thought that, if the Respondent had been misled by Stephen Firth as to the terms and conditions that the employees enjoyed, that might have a bearing on the issues. We pointed out that that had very little, if anything, to do with what we had to decide.

5. Having read the witness statements and the documents referred to we heard evidence from the Claimant. The Respondent's principle witnesses were; the two Directors Nichola Pochin and Georgina Culshaw. Mr Holt (Nicola Pochin's father). We also heard from Mr Hodgman who was the landlord of the nursery premises. The Respondent has served a signed statement from Sara Troke who had been employed by Mr Firth and then after he ceased to run the business by the Respondent. She did not attend but in the main her evidence was uncontroversial and we gave it some weight. At the conclusion of the evidence the parties made brief submissions on the facts and Mr Holt addressed on his understanding of the law having correctly identified the relevant ACAS guide. We will not set out those submissions here but had regard for them when reaching our decision.

<u>Our general findings of fact</u>

6. In this section we set out our general findings of fact. Below this we have addressed specific questions raised in these proceedings and where appropriate made further findings necessary to answer those questions.

7. The Claimant started work for (Happy Days Nursery) on 10th November 2008. The nursery operated from a premises in Hythe. The premises had been acquired on a lease by Mr Stephen Firth who had expended some money and effort converting the premises for use as a preschool nursery. He had acquired a lease from his landlord, Mr Hodgman, who gave evidence in these proceedings. The nursery was run in a fairly collaborative way: many members of the same families appear to have worked in the nursery, all working fairly closely together. We have seen various Ofsted reports and it appears that the nursery was run in a fairly conventional manner but perhaps not to the highest administrative standards. There has been no criticism made by any party as to the standard of care given to children.

8. In the latter part of 2015, Mr Firth had incorporated Happy Dayzzz Nursery Ltd and had registered that business with Ofsted as running the nursery somewhat

later but had not at the time informed any of the employees that there had been a change of identity of their employer. We are satisfied that that corporate body operated the business and from that point was the employer of the Claimant and other staff. If we are wrong about that we have found below that in April 2016 each staff member signed a contract naming that corporate body as their employer.

9. During 2015, Mr Stephen Firth was becoming dissatisfied with running the nursery. It appears that his enthusiasm for doing so had been lagging for some time. At that stage, his initial thoughts were to convert the running of the nursery to a cooperative. In the end, that came to nothing. At some point the Claimant and her husband considered taking over the management of the nursery but they decided that the financial commitment was beyond their means.

10. With no takeover or buyer on the horizon Stephen Firth took the decision that he would exercise his right under a break clause found in his lease with Mr Hodgman. Despite this formally terminating the lease the nursery remained open and continued to occupy the premises, paying rent on a monthly basis. Stephen Firth then sought to sell the business and he had a number of interested parties.

11. At about the same time, the fact that the lease had been determined and the premise may become available came to the attention of Nichola Pochin and Georgina Culshaw who were interested in commencing a nursery business and were looking for premises. Initially they were looking for empty premises. By late 2015, they had made inquiries both of Stephen Firth and Mr Hodgman in relation to taking over the premises and acquiring the lease. It is fair to say the negotiations were somewhat stop/start because initially Mr Firth indicated he had other purchasers but, when that potential transaction fell through, negotiations recommenced.

12. Nichola Pochin and Georgina Culshaw were both formerly schoolteachers, both with experience of nursery education. They had sought advice from a number of sources. They had asked for assistance from an individual offering human resources advice but also were guided to a great extent by Mr Holt. Initially the negotiations took a fairly conventional form in that Nichola Pochin and Georgina Culshaw made an offer to purchase the business as a going concern.

13. During April 2016, offers were made for the purchase of the business initially of £20,000 then ultimately increased to £25,000, an offer that was accepted by Mr Firth. That caused both parties to instruct solicitors. The solicitors drew up a contract for the sale of the business.

14. In accordance with ordinary practice, in precontractual inquires, Nichola Pochin and Georgina Culshaw sought information in respect both of the assets of the business and of the identity of the employees, and the terms and conditions upon which they were engaged. It seems that that inquiry prompted Stephen Firth to approach all of the employees and asked them to sign new contracts of employment which named Happy Days Nursery Limited as the employer. In respect of all employees, when the contract was initially drafted, they were expressed as having zero hours contracts. That is they were not guaranteed any work.

15. When the Claimant was presented with her contract, she noted that her hours were expressed as zero hours and objected and said that she had always been offered a minimum of 16 hours per week. In fact, she worked nearer 30 hours or 40 hours on average, albeit there were times of year in school holidays where she tended to work less. When she was presented with her contract of employment, it was amended by Stephen Firth without any protest. Copies of the contracts of employment were then submitted to the solicitors acting for Nichola Pochin and Georgina Culshaw. This caused some alarm because it was immediately noted that the contracts had been signed only recently and inquiries were made as to why that was the case. Furthermore, it had come to the attention of Nichola Pochin and Georgina Culshaw that the employees had been asked to sign those contracts in circumstances where they had little opportunity to consider the contents. Indeed, that some employees had considered that they had some fixed working hours not reflected by the zero hours contracts.

16. By this time, Nichola Pochin and Georgina Culshaw, with the assistance and collaboration of the Claimant, had organised two meetings with the employees. Nichola Pochin and Georgina Culshaw and the Claimant were proceeding on the assumption that TUPE 2006 would apply to the transaction. A further cause for alarm for Nichola Pochin and Georgina Culshaw in respect of the information provided by Stephan Firth was the fact that, when the assets of the business were listed, Mr Firth had included a number of items that might ordinarily be regarded as the landlord's fixtures and fittings. They were advised by their solicitors that the difficulties that arose in respect to the contracts of employment and indeed, the approach taken to the landlord's fixtures and fittings rendered the whole situation "a mess".

17. With the assistance of Mr Holt, Nichola Pochin and Georgina Culshaw entered direct negotiations with the landlord, Mr Hodgman. Even under the previous agreement it had been envisaged that Nichola Pochin and Georgina Culshaw or their company would take a lease directly from Mr Hodgman. It appears to have occurred to Mr Holt that it was open to Nichola Pochin and Georgina Culshaw to cease to deal with Stephen Firth as he had surrendered his lease and was vulnerable to eviction. After a meeting between Mr Holt and Mr Hodgman the two attended Mr Hodgman's solicitors and Mr Hodgman was informed that he was able to serve a notice to quit on Happy Dayzz Nursery Ltd or on Mr Firth and bring the lease to an immediate end. A notice to quit was served on 10th or 11th August 2016. Nichola Pochin and Georgina Culshaw wrote to Stephen Firth on 10th August 2016 and they informed him that they were no longer prepared to proceed with the proposed sale.

18. Upon receipt of the landlord's notice to quit on 11 August 2016, Mr Firth informed the employees by e-mail that the nursery would close at the end of the following week that is 19th August 2016 and that they would all be redundant. He informed them that there was insufficient money in the company to pay their wages and, if they wished to work, they would not be able to be paid. In fact, to their credit, the majority of the employees took their responsibilities to the parents and children so seriously that they maintained the nursery as a going concern until 19 August 2016 in the knowledge that they may not be paid.

19. In the course of the week ending on 19th August 2016, there was a meeting between Mrs Holdway and Nichola Pochin and Georgina Culshaw at which Mrs

Holdway wished to discuss what had gone wrong with the transaction and why it was that they were not proceeding with the original transaction as envisaged. We return to the contents of that meeting below.

20. The nursery closed as usual at about 5 o'clock on that day and, as the last of the children were leaving, Mr Hodgman received the keys for the building from Mr Firth and permitted Nichola Pochin and Georgina Culshaw to commence their occupation. They started immediate renovation works possibly even as early as that evening.

Was there a transfer of an undertaking?

21. The first issue that we were required to resolve was whether or not the transaction whereby the Little Explorers Hide Ltd commenced trading from the same premises as Happy Dayzzz Nursery Ltd amounts to a transfer of undertakings for the purpose of the TUPE 2006. The material part of the definition of what amounts to a transfer of undertakings is found in regulation 3(1)(a) which says:

> *'3.—(1) These Regulations apply to—*
>
> *(a) a transfer of an undertaking, business or part of an undertaking or 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'*

22. Where there is a relevant transfer, then the effect of that on any employee of the transferor is set out in regulation 4. The material parts of that regulation are as follows:

> *4.—(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as 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), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a 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) any act or omission before the transfer 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),*

including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(4) Subject to regulation 9, in respect of a contract of employment that is, or will be, transferred by paragraph (1), any purported variation of the contract shall be void if the sole or principal reason for the variation is—

(a)the transfer itself; or

(b)a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(5) Paragraph (4) shall not prevent the employer and his employee, whose contract of employment is, or will be, transferred by paragraph (1), from agreeing a variation of that contract if the sole or principal reason for the variation is—

(a)a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce; or

(b)a reason unconnected with the transfer.

(6) Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

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

23. Regulation 7 deals with the consequences of a dismissal effected either by the transferor or the transferee where the reason or principle reason for the dismissal was the transfer. The material parts of regulation 7 read:

> *7.—(1) Where either before or after a relevant transfer, any 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 a reason connected with the transfer that is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.*
>
> *(3) Where paragraph (2) applies—*
>
> > *(a) paragraph (1) shall not apply;*
> >
> > *(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.*
>
> *(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.*
>
> *(5) …*
>
> *(6) …*

24. Guidance as to the proper structured approach to deciding whether or not there has been a transfer of any undertaking was given in ***Whitewater Leisure Management Ltd v Barnes and ors*** **2000 ICR 1049, EAT**, where it was said: 'it will normally be best and clearest for an employment tribunal to deal first with the question of whether there was a relevant and sufficiently identifiable economic entity, and then proceed, whatever be the answer to that question, to ask and answer whether there was… a relevant transfer of any such entity'.

25. Guidance on what may or may not amount to an 'economic entity' has been given in a series of cases. The effect of those cases was summarised in ***Cheesman and ors v R Brewer Contracts Ltd*** **2001 IRLR 144, EAT**, where at paragraph 10 Mr Justice Lindsey said:

> *'We shall attempt, although it is not always a clear distinction, to divide considerations between those going to whether there is an undertaking and those, if there is an undertaking, going to whether it has been transferred. The paragraph numbers we give are references to the numbering in the IRLR reports of the ECJ's judgments. Thus:*
>
> *(i) As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling*

(or facilitating) the exercise of an economic activity which pursues a specific objective - Sanchez Hidalgo paragraph 25; Allen paragraph 24 and Vidal para 6 (which, confusingly, places the reference to "an economic activity" a little differently). It has been held that the reference to "one specific works contract" is to be restricted to a contract for building works - see Argyll Training infra EAT at paras 14-19.

(ii) In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible - Vidal paragraph 27; Sanchez Hidalgo paragraph 26.

(iii) In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower - Sanchez Hidalgo paragraph 26.

(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 - Vidal paragraph 27; Sanchez Hidalgo paragraph 26.

(v) An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it - Vidal paragraph 30; Sanchez Hidalgo paragraph 30; Allen paragraph 27.'

26. Where there was before the putative transfer a '*stable economic entity'* the question of whether that transferred does not depend upon whether there has been any direct contract or transaction between the transferor and transferee. In ***Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S*** **1988 IRLR 315, ECJ** the surrender of a lease of a night club and subsequent granting of a new lease by the landlord was held by the ECJ to be capable of amounting to a transfer. The fact that the assets of a business were not owned by the transferor or transferee is immaterial what is important is their use within the undertaking.

27. The issue of whether there has been a transfer of an economic entity requires a multifactorial approach. In ***Spijkers v Gebroeders Benedik Abattoir CV and anor 1986 2 CMLR 296*****, ECJ** the ECJ stated:

27.1. 'The decisive criterion for establishing the existence of a transfer within the meaning of the Directive is whether the entity in question retains its identity.'; and

27.2. 'it is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of as a going concern'; and

27.3. [This] 'will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer with the same economic or similar activity'; and

27.4. 'it is necessary to take account of all the factual circumstances of the transaction in question'

28. The ECJ In ***Spijkers*** thought that the material circumstances would include:

    28.1. the type of business or undertaking

    28.2. the transfer or otherwise of tangible assets such as buildings and stocks

    28.3. the value of intangible assets at the date of transfer

    28.4. whether the majority of the staff are taken over by the new employer

    28.5. the transfer or otherwise of customers

    28.6. the degree of similarity of activities before and after the transfer, and

    28.7. the duration of any interruption in these activities.

29. The business operated by Happy Dayzzz Nursery Limited was a typical preschool nursery which took in children under the age of five. Within the nursery the children divided into groups including babies, toddlers and preschool children. A particular feature of the business, as is typically the case, was the fact that parents of the children were partially subsidised by public funds which were paid by way of payments from Kent County Council. Like all nursery businesses the nursery was highly regulated by OFSTED. OFSTED have strict requirements for example as to the ratio of staff to children and the maximum capacity of a given nursery. The geographic position of the nursery essentially gave rise to a catchment area in that its position needed to be convenient for parents. It therefore benefited both from being close to a residential area and various workplaces.

30. The nursery was staffed in the usual way with formal lines of reporting through the Claimant to Mr Firth. All of the staff were dedicated to providing nursery provision to children. The staff were recruited for that purpose and for no other.

31. The assets used by the business, although not necessarily owned by it, included its premises. The evidence that we heard showed that the premises were a former industrial unit which had been adapted and equipped by Mr Firth for the particular use as a nursery. That included a number of special adaptions. There was a fitted kitchen necessary to prepare meals and drinks for the children, there were toilets which have been adapted for children's use and there were a number of special fixtures such as coat racks and the like. There had been some minor works to the exterior garden. Putting it broadly this was a building which had been modified for the particular use as a nursery.

32. In addition to the fixtures that we have identified there were some other assets which were used in the course of the business. We note that from the list of assets disclosed by Mr Firth in the pre-contract negotiations there were a number of items of equipment which could not be regarded as fixtures. It is unlikely that many of these items had any significant value. There had been some equipment supplied pursuant to an arrangement with Kent County Council. This equipment was provided in 2014 and we would imagine its use in a nursery meant it was subject to a fair amount of wear and tear. We note some £3000 worth of equipment of items such as musical instruments, nursery books and the like had been provided for the use of the nursery.

33. We considered what if any intangible assets the existing business had. Firstly, and echoing our finding above, one of the benefits that a nursery might have is operating in a particular 'catchment' area. In the present case the nursery was positioned in a convenient location. In particular, it was equipped with a car park which made decanting and collecting children convenient. Mr Holt told us that one of the advantages of it was that it was located beside a car wash and therefore was in a prominent position.

34. Plainly, any nursery will have some existing relationships with parents. There will be a progression through the cohort and one would expect that at least something in the order 20% of the children to move onto school every year but, nevertheless, there would be some existing relationships with parents. When the negotiations with Mr Firth looked like they would bear fruit a request was made to place a banner outside the existing premises notifying them that the nursery was to reopen under new management. The parents were invited to contact Little Explorers Hide Ltd with a view to achieving some continuity. We consider that the pre-existing relationships between parents and their carers was an intangible asset of the existing business.

35. We have no hesitation in concluding that the nursery business that operated prior to 19 August 2016 amounted to a readily identifiable stable economic entity. That leads to the question of whether or not that economic entity changed hands. In answering that question we have considered it useful to go through the factors identified in ***Spijkers*** but have had regard to all of the evidence that we heard.

36. On 19 August 2016 a decision was taken to pay Mr Firth £1,200 for the things that he was leaving behind in the nursery premises. This included all of the equipment with the exception of the computer used in the business and the business records.

37. We have concluded that with the exception of the computer and business records the Respondent, directly and indirectly took over all of the tangible assets that had been used in the existing business with the exception of a computer and business records. The Respondent says, and we accept that it is probably correct, that in respect of the equipment it obtained much of it had been well used and was ultimately thrown away or replaced. However, the significant asset essential to the running of the nursery was the building itself adapted as it had been for use as a nursery.

38. The Respondent also acquired the benefit of the geographical trading position of the nursery. This was, in our view, a significant intangible asset.

39. The next matter for which we must have regard is the question of whether or not the staff of Happy Days Nursery Ltd ultimately came to work for Little Explorers Ltd. We were provided with a list and, prior to 19 August 2016 we find that there were at least 10 staff members. After that date we were told and accept that at least five members of staff were taken on. Whilst they were not immediately, they were all taken on within a month or so of the Respondent taking over.

40. We are entitled to and do have regard for the question of why more staff were not taken on. In respect of the Claimant, the reason that she was not taken on is that the Respondent had taken the stance, albeit on advice, that there was

no transfer of undertakings and therefore it was not automatic or guaranteed that any staff member would be taken on. The Respondents took the view that if they were employing people that they needed to satisfy proper employment checks and proper recruitment processes.

41. In the Claimant's case, when she met with Nichola Pochin and Georgina Culshaw in the week ending 19 August 2016, she was told that she was welcome to apply for a job. The Claimant declined to do so because she considered that she should not have to apply for a new job and that if she did so she would lose her continuity of employment. She thought, rightly or wrongly, that the Respondent would be able to use her relationships with employees and parents to secure a smooth transition of the business but then dismiss her when she had done so with no recognition of her continuity of employment. She would have willingly worked for the Respondent had her rights under TUPE 2006 been recognised.

42. We find that the reason that the staff were not automatically engaged, as had been anticipated, was that the Respondent had been advised and subsequently asserted that the regulations did not apply.

43. Mr Holt made submissions that it was not possible as a matter of law for the Respondent simply to engage the existing staff without complying with the fair recruitment processes expected by OFSTEAD and carrying out the proper checks necessary for those who will be working with children. We do not accept that submission. What it overlooks is the effect of regulation 4(2)(b) of the regulations which provides that anything done by the Transferor is deemed to have been done by the Transferee. As such any pre-employment checks and recruitment processes done by Mr Firth would have been deemed to have been done by the Respondent. We would accept that it would have been prudent to check whether all staff had a DBS check and any that did not might have been suspended or fairly dismissed but these requirements do not operate to oust the effect of TUPE 2006.

44. The next factor identified in ***Spijkers*** is the customers and whether they transferred. We were told by the Respondent and accept that when the nursery opened, it did retain 16 of the children that had previously attended when the nursery was run by Happy Dayzzz Ltd. There would of course have been some loss of children at that time of year anyway because some of the children who had been in Happy Dayzzz Ltd would have gone on to school so at least a significant proportion of the children who might have been expected to do so stayed on. That is unsurprising given that Mr Firth had permitted the Respondent to display a banner indicating that a new nursery was opening on the same site. Furthermore, in advance and in anticipation that they would do so, an email had been prepared and sent inviting parents to indicate whether they had any interest in sending their children to the 'new' nursery. Certainly it had been anticipated that the existing customer base might provide business.

45. The next matter that we must have regard to is the degree of similarity between the old business and the new business. Mr Holt suggested that the new business is much better managed and there has been some expenditure to improve the premises (some and some £7000 spent on improvements and it seems to us that that is likely that that did not include some free labour provided by friends and family). Mr Holt referred to matters such as an improvement to the uniforms, policies and the like. That said it seems to us however that

essentially the core of the business remained exactly the same. The system of regulation by OFSTEAD and the practice of receiving subsidies from Kent County Council continued. What the business was doing before was providing local nursery provision for children and that is exactly what it did afterwards. The fact that it does so by different methods or did so better does not in our view mean that there is not a similarity between the business.

46. We must have regard to is whether there was an interruption of services between the closure of the existing business and the opening of the new business. The authorities tell us that a mere temporary cessation to the business would not necessarily mean that there was not a transfer of undertakings. What is important is to look at the intention and what was going on. In the present case, the business was closed only briefly in order that the premises could be refurbished but with every intention, and every need, to ensure that the business opened for business at the start of a new term on 1st September. That was always the plan and that is exactly what happened.

47. Taking these matters in the round we asked ourselves whether the 'economic entity' that had existed prior to the 19 August 2016 had retained its identity in the hands of the Respondent. We note that prior to 10 August 2016 all parties had assumed that the regulations would apply. The only significant variation in the transaction was that the contract for sale was never executed and that Mr Firth received considerably reduced consideration after he was served with a notice to quit. Despite that the nursery premises, its equipment and a proportion of its staff and customers changed hands. We have no hesitation in concluding that the Respondent took over an established nursery business and that the business retained its essential and core identity. We therefore conclude that on 19 August 2016 there was a transfer of undertakings for the purposes of Regulation 3(1)(a) of TUPE 2006.

'Immediately before'

48. The next question to be addressed is whether or not the Claimant was employed immediately before the transfer. To be able to answer that question we have to be able to identify when the transfer took place. ***Celtec Ltd v Astley and others*** **2005 ICR 1409** is authority for the proposition that a transfer takes place is when the putative transferee takes effective control of the undertaking. The events of 19 August 2016 were that the nursery was essentially open as normal until 5 o'clock in the afternoon when the last of the children were leaving and shortly after that the Claimant herself went home. At exactly that time the Respondent through Mr Holt was in place ready to receive the keys. The keys were duly handed over and the Respondent assumed control of the premises and the business.

49. It was argued by Mr Holt that at the announcement by Mr Firth that the business could not afford to pay its staff from 12 August 2016 and the fact that the staff worked on during the week ending 19 August 2016 meant that the dismissals took place on 12 August 2016 and that that meant that the Claimant was not employed immediately before the transfer. In ***Societe Generale, London Branch v Geys*** **[2012] UKSC 63** the Supreme Court held that, at common law, the fact that one party was in serious breach of contract would not terminate the contract unless that breach was accepted by the other party. It was not suggested that any actual words of summary dismissal were used on 12 August 2016 in the E-mail from Mr Firth. On the contrary his e-mail makes it clear that

the nursery would close on 19 August 2016. There was a statement that wages would not be available. That might have been a breach of contract or an anticipatory breach but that would not without more amount to a dismissal. We would and do accept that the effect of what was said was to give notice of a dismissal that would take effect on 19 August 1996.

50. If we are wrong about that and the Claimant was dismissed either on 12 August 2016 or before the very moment that the Respondent assumed control of the business we have gone on to consider the reason for the dismissal. We have concluded that the only reason Mr Firth had for closing the business was the fact that he had been given a notice to quit. Mr. Hodgeman, who was a candid witness gave evidence to us that his principle interest was maintaining the existence of a tenant. He had been approached by the Respondent and in particular on its behalf by Mr Holt and reached a firm agreement, albeit non-legally binding, that he would have a new tenant. It was that, and only that, we find that spurred him to issue the notice to quit. Had it not been for the prospect of the Respondent stepping in as a tenant he would not have done so. The notice to quit was the means of facilitating the transfer of the business. This was known to Mr Firth. We find that that means the reason for the dismissal was the transfer itself.

51. The consequence of this finding is that, whether or not the Claimant was dismissed prior to the transfer, the reason for it was a reason falling within regulation 7(1) with the effect that by reason of regulation 4(3) of TUPE 2006 the Claimant is deemed to have been employed immediately before the transfer.

Did the Claimant object for the purposes of the regulations?

52. The issue of objection was not raised by the Respondent but it seemed to us on the facts presented it was one which arose in the evidence and which on any proper application of the regulations we were obliged to deal with. As set out above regulation 4(1) TUPE 2006 will not apply where an employee objects to the transfer. What is meant by an objection is a manifestation by words or deeds of a refusal to consent to a transfer see ***Hay v George Hanson (Building Contractors) Ltd*** **1996 IRLR 427**.

53. In this case, the position that was taken by the Respondent by the time of 12 August 2016, was that the transaction that they were entering into was not one which was caught by the transfer of undertakings regulations. At the meeting between the Claimant and Nichola Pochin and Georgina Culshaw her principle concern was to find out what had gone wrong and why the original transaction which would have preserved the employment of all the employees had been abandoned. She did say in the course of the meeting that she did not believe that the Respondents would wish to employ her because she was having an operation and went on to air a suspicion that if she was employed that she would soon find herself without employment once a smooth handover had taken place.

54. In our view the conversation has to be seen in the following context. Firstly, on the evidence that we have heard, given that the Respondent believed that the regulations did not apply, they were not meeting with the Claimant to assure her that her employment would be continuous. In fact, they believed that they could not offer her employment unless a DBS check and recruitment processes

had been followed. They had made it plain both in an email to all employees including the Claimant and indeed in the meeting that an application for any work would be necessary and they also made it clear that they had no immediate need for a deputy manager. From that it follows, as the Claimant suspected, that they did not consider that any continuity of employment would be respected.

55. We do not consider that a refusal to apply for a job in these circumstances can be properly be construed as equating to refusing to transfer or objecting to a transfer. Had the Respondent accepted that the regulations applied the Claimant's concerns would have evaporated. She did not so much object to the transfer as object to the fact that the Respondent was declining to acknowledge her right to do so. Our conclusion in this regard is consistent with the approach of the EAT in ***Euro-Die (UK) Ltd v Skidmore and another*** **EAT 1158/98**.

56. Having considered the matter of our own volition we have concluded that there was no objection by the Claimant to the transfer.

The Claims

Unfair dismissal

57. The Claimant has claimed unfair dismissal. She must show that she was dismissed. Whilst above we have rejected the suggestion that Mr Firth summarily dismissed the workforce on 12 August 2016 we have found that his expressed intention to close the nursery on 19 August 2016 must and did take effect as a dismissal. If we are wrong about that then the fact that the Respondent did not accept that the Claimant was still employed and did not offer her work or wages (other than on condition of an application) would amount to an actual dismissal or conduct that would entitle the Claimant to treat herself as dismissed for the purposes of Section 95(1)(c) of the Employment Rights Act 1996.

58. The Claimant says that the reason or principle reason for her dismissal was the transfer. If she can show that, then the dismissal will be automatically unfair unless the Respondent can show that the reason was '*an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer'* ('and ETO reason') in which case the tribunal must go on to ask whether or not the dismissal was fair or unfair applying the test set out in Section 98(4) of the Employment Rights Act.

59. We have concluded above that the if the Claimant was dismissed prior to the transfer then the reason for the dismissal was the transfer itself. We reach the same conclusion in respect of our primary finding that the dismissal took effect on or after 5pm on 19 August 2016. The reason for the dismissal is that the Respondent had asked the landlord to curtail the lease in order that a new lease could be granted to it. That was the reason that Happy Dayzzz Nursery Limited closed down. The business undertaking it had operated was to be undertaken by the Respondent in its place. We conclude that the reason for the dismissal was the transfer.

60. The Respondent advanced no positive case that the reason for the dismissal was 'an economic, technical or organisational reason entailing changes in the workforce'. To 'entail changes in the workforce it is necessary to show a need for fewer employees or a need for a different type of employee. Such an argument would sit uneasily alongside the Respondent's case that it could and would have employed any staff member who applied for work. We are not satisfied that the Respondent has shown an ETO reason and conclude that the dismissal was automatically unfair.

61. If we are wrong about the ETO issue, then we are satisfied that applying the test set out in S98(4) of the Employment Rights Act 1996 the dismissal was unfair. The Claimant has sufficient continuity of service to present a claim of 'ordinary' unfair dismissal. The reason given by Mr Firth for the dismissal in his e-mail to all of the employees was 'redundancy'. As the Respondent had wrongly assumed that TUPE did not apply and was insisting upon applications from the former employees neither Mr Firth nor the Respondent followed any process or procedure designed to permit the employees to demonstrate which if any jobs could be saved. On ordinary principles the dismissals were substantively and procedurally unfair.

Wrongful dismissal

62. The Claimant had been continuously employed from 10 November 2008. She therefore had 7 years of continuous service. Her statement of terms and conditions was silent as to the notice period. We find that a reasonable period of notice would not exceed the statutory minimum set out in Section 86 of the Employment Rights Act 1996 that is 7 weeks.

63. The Claimant was, on our findings most favourable to the Respondent given only one week's notice of her dismissal although she was not paid for that week. She was therefore dismissed in breach of contract and her complaint of wrongful dismissal must succeed.

Failure to make payment of holiday pay

64. The Claimant had contended that there had been a failure to make payment for annual leave accrued but untaken at the time of the dismissal. The Claimant was unable to say what holidays she had taken and what she said she was due. We explained to the Claimant that, even though it seemed likely that some balancing of holiday entitlement was likely, we were unable to make any assumptions and could deal only with evidence. The Claimant accepted that position and frankly accepted that she was unable to evidence her claims. On that basis we dismiss the claims brought under Regulation 30 of the Working Time Regulations 1998.

TUPE – failing to consult in accordance with the regulations.

65. The legal requirement to consult with employees in respect of a transfer of any undertaking is set out in regulation 13 of TUPE 2006. The key provisions for the present purposes are:

> *13 Duty to inform and consult representatives*
>
> *(1) In this regulation and regulations [13A,] 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees*

of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

[(2A) ……

(3) For the purposes of this regulation the appropriate representatives of any affected employees are—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(b) in any other case, whichever of the following employee representatives the employer chooses—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;

(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall—

(a) consider any representations made by the appropriate representatives; and

(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

(10) Where—

(a) the employer has invited any of the affected employee to elect employee representatives; and

(b) the invitation was issued long enough before the time when the employer is required to give information under paragraph (2) to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this regulation in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).

(12) ….

66. Neither party focussed a great deal upon this complaint. Nevertheless, we were able to make the findings set out above some of which were relevant to this complaint.

67. It is clear that Mr Frith was either unaware of any responsibility to consult with his employees or that he did not think that the time had come to do so. There was no recognised trade union nor any other persons who had the authority to receive information for the purposes of the regulations. Accordingly, there was an obligation imposed by reason of Regulation 13(3)(b)(ii) to elect representatives in accordance with the requirements of regulation 14. There was no attempt to comply with that requirement.

68. To their credit Nichola Pochin and Georgina Culshaw did meet with the employees at the early stages when it was anticipated that the Respondent would reach an agreement with Happy Dayzzz Nursery Limited and Mr Firth. During those meetings they took steps to reassure the employees of their future employment and explained their plans for the nursery. The agreed bundle included copies of meeting notes with the claimant and others and a pro-forma prepared for that purpose. To some lesser extent that was continued when Nichola Pochin and Georgina Culshaw wrote to the Claimant and other employees by e-mail dated 15 August 2016 suggesting that they would need staff in the future. A further e-mail to that effect was sent to the Claimant on 16 August 2016 although that e-mail suggested that there would be a pre-condition of imposing fresh DBS checks.

69. We invited the Respondent to say whether the 'micro-business' exception would apply in the present case. If it did then no election of employee representatives was required and individual consultation would have been sufficient. It was accepted in the hearing by the Respondent that Happy Dayzzz Nursery Limited had 10 employees. In any event there was no evidence that there had been any attempt by Mr Firth or any other person to comply with the modified duty to comply with the obligations imposed by Regulation 13 at least in respect of the position after the notice to quit was served and the negotiations for sale discontinued. There was no information provided by Mr Firth to the employees about the transfer because he did not believe that there was to be a transfer. Accordingly, whether or not the micro-business exception applied there was a failure to consult with the employees individually.

70. We have therefore concluded that there has been no formal compliance with the requirement to consult imposed by regulation 13. Regulation 4(1) provides that any obligation owed by Happy Dayzz Limited transferred to the Respondent. We are of the view that that would include any claim that there had been a failure to consult. In any event regulation 15(9) provides that any liability for any failure to consult is 'joint and several'. It is not in our view necessary for the Transferor to remain a party to the proceedings. Or, as the case is here even continue to exist. The fact that Happy Dayzzz Nursery Limited has been dissolved makes no difference to that conclusion.

71. We therefore conclude that the Claimant's claim under regulations 13 and 15 is well founded and that the Respondent is liable to compensate her in respect of the same.

Remedy Issues

72. We announced our decision on remedy separately to our decision on liability. We do not understand that there has been any challenge to our decision on remedy nor any request for full written reasons in respect of the same. Nevertheless, we briefly set out our reasons below.

73. In respect of the claim of unfair dismissal the Claimant was entitled to a full basic award. We saw no basis upon which it might be just and equitable to reduce this. The Claimant had 7 full years of continuous service at an age where the statutory multiplier is 1. Her average gross wage was £241.20. Per week. Accordingly, she is entitled to a basic award of £1,688.40.

74. The Claimant had agreed that whilst she regularly worked for up to 38 hours a week the terms of her agreement with Mr Firth and the terms that passed to Happy Dayzzz Nursery Limited guaranteed her only 16 hours per week. We had found that in the first uncertain months of trading, had her employment actually transferred to the Respondent they would have taken advantage of the contractual right to offer the minimum number of hours of work. We find that the Claimant would have been offered no more than 16 hours per week at a rate of £7.20 per hour.

75. Thankfully the Claimant found alternative employment on 17 October 2016 and was at that stage able to completely extinguish any further loss. In the intervening period she briefly did a cleaning job and earned £26 pounds. There was also a 2-week period when she had surgery. She accepted that she suffered no losses during that period as she believed that she received non recoupable benefits equivalent to statutory sick pay.

76. The Tribunal considered that it should award the sum of £300 to reflect the loss of statutory rights suffered by the Claimant.

77. Our calculations as to the amount of the compensatory award are set out in the schedule to the Judgment.

78. The period for which we awarded loss in the unfair dismissal claim overlapped with that for the wrongful dismissal claim. We therefore made no separate award in respect of that claim.

79. Turning to the quantum of any award for the failure to consult contrary to regulation 13 and 15 of the regulations. We reminded ourselves that such an award is intended to be punitive and that the starting point should be the maximum of 13 weeks' pay. No special circumstances had been shown to exist. The burden for that would have fallen on the Happy Dayzzz Nursery Limited or the Respondent. The reason why there had been no consultation appeared to be that the otherwise orderly negotiations had been truncated when the Respondent negotiated directly with the landlord and a notice to quit was served, Even then there was sufficient time to consult but a view was wrongly taken that the regulations would not apply.

80. We do find that there are mitigating circumstances. The microbusiness exception did not apply but 'only just'. Even if it had there was no full compliance with the amended requirements. The Respondent was a small business and it appeared had tried to take advice. It was given the wholly erroneous advice that TUPE would not apply where the business was acquired via the landlord. In addition, the directors did make efforts in advance of pulling out of negotiations to inform and consult the employees directly. They then explained their understanding of what had happened and encouraged the employees to apply for work. At all times the new owners acted honestly and in a considerate manner towards the affected employees.

81. This is most certainly not the worst case of a failure to consult and we have applied a substantial discount to the 13 weeks' pay which is the starting point. We consider that 1 figure of £1000 being about 4 weeks' pay is the appropriate sum in all of the circumstances.

82. We had ordered the Respondent to pay those sums in our judgment.

83. The tribunal apologises for the delay in sending out these reasons. For a period, the file was not available. It is understood that this was because the administration was dealing with a complaint. This caused the request for written reasons to be overlooked and the matter was only drawn to the attention of the employment judge when prompted by ACAS. Thereafter the delay was caused by pressure of work. It is hoped that this has not caused too much inconvenience to the parties.

Employment Judge John Crosfill

Date 17 September 2018