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**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: S/4102409/2017**

**Held in Glasgow on 16 July 2018**

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**Employment Judge: Rory McPherson**

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**Mrs Tracey Lauder**

**Claimant  
In Person**

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**1. KMT Cleaning Services Limited**

**First Respondent  
Not Present and  
Not Represented**

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**2. KMT Prestige Limited**

**Second Respondent  
Not Present and  
Not Represented**

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**E.T. Z4 (WR)**

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

5 The judgment of the Employment Tribunal is that:

- (1) The employment of the claimant transferred from the first to the second respondent on 15 July 2017; and
- (2) In the event that the claimant was to succeed for claims for arrears of pay  
10 which arose prior to 14 July 2017 the second respondent would be liable.

### REASONS

#### Introduction

#### 15 Preliminary Procedure

1. This claim arises out of the cessation of the first respondent's business, which occurred in the circumstances set out below.
- 20 2. The claimant claims outstanding pay, notice pay and sick pay.
3. Following Case Management Preliminary Hearings on 8 March 2018 and 15 January 2018 it was decided the Tribunal should decide at this hearing whether the claimant's employment transferred from the first to the second  
25 respondent pursuant to Regulation 4(1)(a) of the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE 2006) and in the event that the claimant was to succeed for arrears of pay, notice pay and sick pay whether the first or second respondent would be liable.
- 30 4. The Tribunal heard evidence from the claimant. The claimant was not represented and no formal bundle of documents was provided however where documents were provided they are identified by their title and date. There was no appearance by either respondent.

**Findings in fact**

5. The Tribunal made the following findings in fact:
- 5 6. The claimant was employed by the first respondent from 18 January 2017 to 14 July 2017 as a domestic cleaner.
7. The first respondent has had its registered office at 18 Park Crescent, Eaglesham G76 0JD since they were incorporated on 10 February 2016 and  
10 operates from that address. It is a company which at all material times provided both domestic and small business cleaning services.
8. Since its incorporation the first respondent has had one director, Kierra Marie Wilson who was appointed on 11 October 2016 and who remains a director.  
15 There is no person beyond who is identified by Companies House with any significant control of the first respondent.
9. The first respondent's annual accounts for the period up to 28 February 2017 were due to be submitted to Companies House by 10 November 2017 but  
20 have not been. The last annual Confirmation Statement submitted to Companies House was dated 9 February 2017. A subsequent Confirmation Statement was due on 10 November 2018 but has not been submitted.
10. The Registrar of Companies has given notice of its intention to strike the first  
25 respondent off the Register of Companies and to dissolve the company.
11. The second respondent has had their registered office at 18 Park Crescent, Eaglesham G76 0JD since they were incorporated on 11 October 2016 and  
operates from that address. The second respondent provide both domestic  
30 and small business cleaning services.
12. Brian Wilson, who was Kierra Marie Wilson's husband, was appointed as a director of the second respondent on 11 October 2016 and remains a director of the second respondent.

13. Kierra Marie Wilson was also appointed as a director of the second respondent on 11 October 2016 and while she resigned as a director on 1 February 2017, she remains identified by Companies House as the sole person with significant control of the company with ownership of 75% or more of the shares. There is no other person identified with any significant control of the second respondent.
14. Following incorporation and up to 14 June 2017, all tradespeople employed by the first respondent were cleaners.
15. Since incorporation all the tradespeople employed by the second respondent are cleaners.
16. The claimant worked under the supervision of an employee of the first respondent known to her simply as Kirsty and who is Kierra Marie Wilson's sister in law.
17. When the claimant commenced employed with the first respondent she was provided with various pieces of cleaning equipment including a Kitten Stock Bag, a work brand T-shirt, a number of green, orange, blue and glass cloths together with a Henry vacuum cleaner and a work mobile phone. Other cleaners employed by the first respondent were provided with the same equipment by the first respondent and those cleaners who it transpired had been employed after by the claimant by the second respondent were also provided with similar equipment.
18. The claimant's contract of employment (the contract) provided at clause 19 "*Statutory Sick Pay. You will be entitled to Statutory Sick Pay for any period of absence due to sickness or injury subject to meeting the required qualifying conditions*".
19. Clause 20 the contract provided that the claimant was "*entitled to receive written notice of termination of employment*" of "*one week*" after "*one month but less than two years' service*". The contract of employment had no explicit

provision for deductions from wages on the non-return of any cleaning or other equipment provided by the first respondent upon termination of employment.

5 20. Kierra Marie Wilson would allocate the first respondent cleaning jobs amongst the cleaning workforce employed by the first respondent and would provide the specific cleaner with keys and or other access to the domestic or small commercial premises.

10 21. On or about Monday 22 May 2017 the claimant received by text message an instruction from the first respondent to attend with all her colleagues what was described as an emergency first respondent staff meeting on Wednesday 24 May 2017.

15 22. On Wednesday 24 May 2017 the claimant attended the emergency meeting. In addition to the claimant, 13 staff members attended the meeting including 2 who had been recruited more recently than the claimant and who it transpired were employed by the second respondent. Kierra Marie Wilson represented the first respondent at the meeting and advised that for financial reasons the first respondent would be ceasing to operate although no specific date for the cessation of the first respondent was indicated.

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23. At the emergency meeting Kierra Marie Wilson explained that there a tax related matter for the first respondent to deal with which meant that no specific date could be confirmed at this stage but that the emergency meeting had been called to notify the staff of the plan for the first respondent to cease to operate imminently.

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24. Kierra Marie Wilson indicated that those cleaning staff who were not at work, including through ill health, and unable to attend the meeting would be directly affected and it was likely that their employment would be terminated when the company ceased to operate.

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25. Kierra Marie Wilson however indicated that other cleaning staff and those in attendance at the emergency meeting would be engaged by the cleaning company the second respondent who operated from the same premises.
- 5 26. It was further indicated that while not all existing first respondent customers would transfer it was expected that those customers who were commercially viable would.
- 10 27. Prior to this date the claimant and the majority of her colleagues were unaware there were 2 companies operating from same address and providing similar cleaning services.
- 15 28. A note was created by Kierra Marie Wilson of the emergency meeting. However as not all employees were able to attend the note did not record the information provided by Kierra Marie Wilson regarding the cessation of the first respondent and the consequences for those who were unable to attend and simply recorded planned cleaning job allocations.
- 20 29. Subsequently Kierra Marie Wilson issued a letter to the first respondent's clients which stated "*We regret to inform you that I have no other option but to close down*" the first respondent "*Our last day of business will be on Friday 14<sup>th</sup> July 2017. After that date*" the first respondent "*will no longer be.... My husband's company*" the second respondent "*does have some limited availability for those of you who wishes to continue a weekly cleaning service. Please see the enclosed itemised price list for*" the second respondent "*If you have any queries or concerns please do not hesitate to contact me*".
- 25 30. On Thursday 15 June and Friday 16 June 2017, the claimant who provided transport to herself and her supervisor was unable to attend work as her car was not operable. The claimant did not however take annual leave on either of the dates as she arranged with her supervisor to work double shifts within the following work period bringing up her total number of hours to the normal allocated hours for the month: reference is made to payslip for the 4 week
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period ending 30 June 2017 which identifies no holidays were taken in this period.

5 31. On the afternoon of Thursday 29 June 2017, the claimant notified Kierra Marie Wilson that she unexpectedly required to collect her teenage son and was sourcing assistance for urgent alternate domestic accommodation for herself and her son and was unable to complete the final allocated cleaning job in consequence. Although the claimant provided information on the background, the claimant was concerned and distressed at Kierra Marie  
10 Wilson's response and in consequence the claimant required to attend her General Practitioner (GP) around 5.00pm for an unscheduled urgent appointment. The claimant's GP provided a Fit Note (described as a Sick Line) advising the claimant that she was not medically fit to attend work until after the week ending Friday 14 July 2017.

15 32. On the morning of Friday 30 June 2017, the claimant arranged for her supervisor Kirsty to pick up the sick line when collecting client keys from the claimant in order that the sick line was provided to Kierra Marie Wilson.

20 33. The claimant was thereafter off work on the advice of her GP.

34. On Wednesday 4 July 2017 Kierra Marie Wilson telephoned the claimant on her mobile telephone requesting clarification of the whereabouts of a set of customer keys. The claimant explained that the customer keys were with  
25 Kirsty.

35. In response Kierra Marie Wilson advised that "*she was about to add to*" the claimant's existing "*problems*", which the claimant took to refer to the claimant's difficulties with domestic accommodation which Kierra Marie  
30 Wilson was aware of. Kierra Marie Wilson continued that the claimant was being dismissed with immediate effect and that the claimant should arrange for the return of the provided cleaning materials to the first respondent the following Monday 10 July 2017. The claimant was distressed and upset during this telephone conversation.

36. Kierra Marie Wilson thereafter wrote a letter dated 4 July 2017 addressed to the claimant's then former address with the phrase "(Last address known)" under the claimant's former address. The letter stated "*I am writing to confirm that your employment with*" the first respondent "*is terminated with immediate effect on 4 July 2017. For gross misconduct with client keys. You are entitled to one weeks' notice but, as explained to you, you are not required to work this and will be paid in lieu. Please return your full cleaning kit and all*" the first respondent's "*property on Monday 10<sup>th</sup> of July at 10 to the company address. If you could also supply your new address so I can forward on your P45 and final payslip. For the avoidance of doubt, the effective date of termination of your employment is 4<sup>th</sup> July 2017.*"
37. Kirsty thereafter provided an e-mail to Kierra Marie Wilson confirming that she had mislaid the customer key and confirming the claimant's explanation stating "*I opened the door in gillies and left the key on the sideboard, then leave I didn't have the key, we were talking to the woman and I don't remember locking the room so if anything, I think we've left it there and been distracted by talking to the woman*".
38. The claimant did not receive the letter of 4 July 2017 as it was issued to her former address.
39. On Monday 10 July 2017, as instructed by Kierra Marie Wilson in the telephone call of 4 July, the claimant arranged for the delivery to the first respondent of the cleaning materials retained at that time together with the mobile phone and Henry vacuum cleaner.
40. Kierra Marie Wilson wrote on behalf of the first respondent on 10 July 2017 acknowledging return of the property once again to the claimant's former address, again with the phrase "*(last address known)*" under the address, stating that a number of items were omitted including 4 blue cloths, 3 orange cloths and 9 green cloths which she valued at £0.50 each and also indicated



that a phone charger and vacuum attachment was omitted both of which she valued at £7.99.

41. The claimant did not receive the letter of 10 July 2017 as it was issued to her former address.

42. The first respondent issued its last 4 weekly payslip dated 28 July 2017 recording pay at £8.00 per hour for 25 Hours with no payment for the period of sick pay. The payslip also recorded a deduction of “£23.88” for missing stock. The payslip recorded a payment of £240.00 for outstanding holiday pay. The payslip did not mention entitlement to sick pay. The claimant did not carry out work for the first or second respondent beyond 28 July 2017.

### Submissions

43. The claimant who was unrepresented made an informal submission to the effect that she understood that the first respondent had no assets and were likely to be struck off by Companies House but that had she not been dismissed she would have returned to work in the same manner as previously but for the second respondent and that she believed she would have transferred under the relevant regulations but that in any event the liability of outstanding pay and holiday should have transferred to the second respondent.

### TUPE

#### Relevant Law

44. Although the Acquired Rights Directive 2011/23/EC is to a considerable extent enacted in the TUPE 2006 both are set out for ease of reference.

The preamble to the Directive at para 3 provides that:-

*(3) It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.*

45. Regulation 3 of TUPE 2006 provides:

3. *A relevant transfer*

(1) *These Regulations apply to-*

5 (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”*

10 46. Regulation 3(2) provides that: *In this Regulation “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary”.*

47. *Regulation 3(6) provides that*

15 (6) *A relevant transfer-*

*(a) may be affected by a series of two or more transactions; and*

*(b) may take place whether or not any property is transferred to the transferee by the transferor.”*

20 48. Although I was not referred to any authority by the claimant who as noted was unrepresented I am aware that the EAT in Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 reviewed recent key ECJ decisions and distilled from these a number of factors for determining whether there was an undertaking and, if so, whether it had transferred.

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49. The EAT in Cheesman at para 10 indicated that the approach to whether there is an undertaking set out 5 factors (i) to (v) which in order to avoid repetition I do not set out here but set out below.

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50. A further 12 factors were highlighted by the EAT in Cheesman at para 11 as to whether there has been a transfer (i) to (xii) and again in order to avoid repetition I have set these out below.

51. This approach was approved by the Court of Appeal in McCarrick v Hunter [2012] EWCA Civ 1399, [2013] ICR 235 (Elias LJ).

52. In terms of regulation 4 of TUPE 2006 the subsequent employer (the transferee) inherits all the accrued rights and liabilities connected with the contract of employment of the transferred employee. Thus, where there are arrears of wages (although not statutory sick pay which is addressed below) at the time of the transfer liability for those arrears of wages transfers to the new employer.

53. On the date of transfer in Celtec Ltd v Astley [2005] ICR 1409, ECJ, the European Court of Justice held that the date of transfer was the date on which responsibility as an employer for carrying on the business unit in question moves from the transferor to the transferee.

### Notice of Termination

#### Relevant law

54. The Employment Rights Act 1996 (ERA 1996) s 86(1) sets out rights of employer and employee to a minimum period of notice.

(1) *The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—*

(a) *is not less than one week's notice if his period of continuous employment is less than two years,*

...

(3) *Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.*

.....

*(6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.*

5 55. So far as the date of termination of employment is concerned the Supreme  
Court in Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood  
[2018] UKSC 22 confirms that “*Receipt in some form or other was always*  
*required, and arguably by a person authorised to receive it*”. When written  
10 notice is given to end a contract of employment, there is an implied term that  
the notice period does not start to run until the employee has a reasonable  
opportunity to read the notice.

### **Sick pay**

#### **Relevant law**

15 56. Her Majesty’s Revenue and Customs (Statutory Sick Pay and Statutory  
Maternity Pay (Decisions) Regulations 1999 provides that where employee  
wishes to challenge an employer’s decision on payment of statutory sick pay  
she may ask for a determination on the issue by Her Majesty’s Revenue and  
Customs. However, this Tribunal does not have jurisdiction to determine  
20 whether an employee is entitled to statutory sick pay (SSP). Sarti  
(Sauchiehall St) Ltd v Polito [2008] ICR 12790 confirms this Tribunal would  
have jurisdiction to determine a claim of unlawful deduction if the employer  
admits entitlement but withheld payment of SSP.

#### **25 Discussion and Decision**

57. The aim of Council Directive 77/187 is to ensure the effective protection of  
employees’ rights in the event of a transfer.

58. Taking the relevant factors set out in Cheesman above on whether there is  
30 an undertaking in sequence:

59. *"(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 ...*

5 60. There was an organised grouping of persons facilitating the exercise of an economic activity which pursued a specific objective being the delivery of cleaning work.

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

15 62. In 2017 and up to 14 June 2017, the first respondent, was structured as a cleaning business and which, owing in part to the proximity of the second respondent, did not have significant assets beyond the cleaning materials and Henry vacuum cleaner and mobile phone allocated to each of the employed cleaners. The EAT in Cheesman set out above that *"where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction ...*  
20 *cannot logically depend on the transfer of such assets"*. It is not considered in all the circumstances that any absence of transfer of assets is a significant factor in the assessment of whether there was an undertaking.

25 63. *(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;*

64. As a cleaning business, the first respondent's assets were reduced to their most basic and the activities were essentially based on manpower.

30 65. *(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;*

66. The claimant was part of an organised grouping of wage earners who were specifically and permanently assigned to a common task of cleaning.
67. (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.'*
68. In the present case there was more than a simple activity. There was a consistent method of organisation. The cleaners staff were provided with similar material including a work brand T-shirt, a Henry vacuum cleaner and a work mobile phone. The work force was organised by a single person, Kierra Marie Wilson, who operated consistently across the cleaning workforce in relation to matters including allocation of cleaning jobs and provision of keys and or other access to the domestic or small commercial premises.
69. Again, taking the relevant factors set out by the EAT in Cheesman on the question of whether there was a transfer:
70. (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; ...*
71. The operation of the provision of cleaners continued beyond 14 June 2017 and the majority of the first respondent's employees transferred to the second respondent.
72. The cessation of the first respondent's business did not impact on delivery of cleaning services for those customers who were regarded as commercially viable.
73. (ii) *in a labour-intensive sector, it is recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer*

*does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task;*

5 74. The majority of the first respondent's employed cleaners became employed cleaners of the second respondent.

75. *(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;*<sup>7</sup>

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76. None of the factors have been considered in isolation.

15 77. *(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;*

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78. As the EAT in Cheesman set out the absence of transfer of such assets is not a significant factor. The majority of the employees were taken over by the second respondent. There was an inherent degree of similarity as

25 between the first respondent and the second respondent in both activities as provision of cleaning works before and after the transfer and the identity of the directors and those with significant financial control.

79. *(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;*

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80. The type of business was the provision of cleaning work, the essential service was that of the delivery of cleaning services to customers. Criteria which have particular importance include the emergency meeting on 24 May 2017 called by the first respondent at which employees of both the first and second respondent attended and at which it was indicated that certain customers were not considered to be economically viable but that those which were would transfer and at which it was indicated that employees of the first respondent who were able to attend would transfer. This is consistent with the communication issued by Kierra Marie Wilson on behalf of the first respondent to its customers which invited, in effect some, though not all customers to transfer to the second respondent following on from the cessation of the first respondent. Further important criteria which have particular importance include the include delivery of cleaning work using similar equipment and the direction of the workforce of from a single address by Kierra Maria Wilson, confirmed by the attendance of the employees of the second respondent at the emergency meeting of 24 May 2017. Additional important criteria include the role of Kierra Marie Wilson who was a director of the first respondent who, although had resigned as a director of the second respondent on 1 February 2017, remained the sole individual with significant financial control of the second respondent.

81. *(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;*

82. There was no suggestion that the first respondent required material assets beyond the cleaning material provided to the cleaning staff to function.

83. *(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; ...*

84. As above there is no indication that the first respondent required any material assets beyond the cleaning material provided to cleaning staff to function.



85. *(viii) where maintenance work is carried out by a cleaning firm and the next by the owners of the premises concerned that mere fact does not justify the conclusion that there has been a transfer;*

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86. In all the facts of this case this factor does not apply.

87. *(ix) more broadly, the mere fact that the service provided by the old and new undertaking provided contracted out services or the old and new contract holder are similar does not justify the conclusion that there has been a transfer;*

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88. While similarities existed between the cleaning activities of the first respondent and the activities of the second respondent, including the identity of one director and those with significant financial control these similarities are not conclusive.

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89. *(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;*

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90. There was a direct relationship between the first respondent and the second respondent, Brian Wilson and Kierra Marie Wilson had both been directors of the second respondent. Although Kierra Marie Wilson, who remains a director of the first claimant, resigned as a director of the second respondent she remains the sole individual with significant control of the second respondent.

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91. *(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.*

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92. The majority of the first respondent's employees became employees of the second respondent.

93. *(xii) the fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers...but there is no particular importance to be attached to the gap between the end of the work by one subcontractor and the start by the successor.*

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94. The cleaning work delivered by the active employees who took up employment with the second respondent was performed continuously with no interruption.

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95. While the first respondent wrote on 4 July 2017 purporting to provide written notice to end the contract of employment, the notice period did not start to run until the claimant had a reasonable opportunity to read the notice. As the notice was addressed to an address at which the claimant was known by the first respondent not to reside the claimant did not have any reasonable opportunity to read the notice. The first respondent was aware that the written notice was issued to the claimant's former address. The notice period did not start run.

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96. In all the circumstances it is just and equitable that absent the effectiveness of the purported notice the claimant's employment did not however continue beyond the date of the final provided pay slip being 28 July 2017.

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97. In the absence of an admission by the first respondent of the claimant's entitlement to statutory sick pay this Tribunal does not have jurisdiction to determine that issue.

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## Conclusion

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98. In relation to the claimant's employment, having regard to the factors set out above and in all the circumstances there was a TUPE transfer from the first respondent to the second respondent with effect from 15 July 2017.

99. Further and again in all the circumstances the liability for outstanding contractual pay which remained outstanding during the claimant's period of employment with the first respondent transferred to the second respondent with effect from 14 July 2017.

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15 Employment Judge: R McPherson  
Date of Judgment: 27 July 2018  
Entered in register: 03 August 2018  
and copied to parties

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