



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms T Jack

**Respondents:** (R1) Pirtek (Nottingham) Limited  
(R2) Kenbro Limited  
(R3) Simon Cracknell

**Heard at:** Nottingham      **On:** Wednesday 12 December 2018

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

## Representatives

**Claimant:** Mr Greaves of Counsel  
**Respondent (R3):** Mr D Penman of Counsel

# JUDGMENT

The Employment Judge gave judgment as follows: -

1. There was a transfer of undertakings in accordance with Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 whereby the Claimant's employment was transferred to the second Respondent.
2. The transfer took place on 1 February 2018.

# REASONS

## Background and Issues

1. The Claimant presented her claim to the Tribunal on 27 April 2018. It is agreed that she was employed as an Accounts Manager and commenced employment with the first Respondent on 1 September 1992. She was dismissed on 2 March 2018.
2. She says that her employment was transferred to the second Respondent on 1 February 2018. The third Respondent is a Director of the second Respondent and the Claimant claims that she was sexually harassed by him and then dismissed.

Her claims are: -

- Automatic unfair dismissal contrary to Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE Regulations”)
- Unfair dismissal contrary to Section 94 Employment Rights Act 1996 (“ERA”)
- Harassment contrary to Section 26 of the Equality Act 2010 (“EQA”)
- Victimisation contrary to Section 27 EQA
- Wrongful dismissal
- Statutory redundancy pay
- Failure to provide written reasons for her dismissal contrary to Section 92 ERA
- Unlawful deduction of wages contrary to Section 13 ERA
- Holiday pay

3. The case is listed for a final hearing on 1, 2 and 3 July 2019.

4. At a case management Preliminary Hearing conducted by me on the telephone on 31 July 2018 I ordered that a Preliminary Hearing should take place to determine: -

4.1 Was the Claimant employed by Pirtek (Nottingham) Limited or Pirtek UK Limited?

4.2 Was there a Transfer of Undertakings, ie a relevant transfer in accordance with Regulation 3 of the TUPE Regulations whereby her employment was transferred to the second Respondent.

5. Since that case management Preliminary Hearing the Claimant has withdrawn her claims against Pirtek UK Limited who were the second Respondents. It was agreed at the commencement of this hearing that the matters I should determine today were: -

5.1 Was there a relevant transfer in accordance with Regulation 3 of the TUPE Regulations whereby the Claimant’s employment was transferred to the second Respondent? After the evidence was heard the second Respondent conceded that a relevant transfer had taken place.

5.2 When did the transfer take place?

## **Evidence**

6. I heard evidence today from: -

- The Claimant
- Phillip Brown, owner and Director of Kenbro Limited

7. There was an agreed bundle of documents and where I refer to page numbers it is from that bundle. Where there was a conflict in the evidence I preferred the evidence of the Claimant. Her evidence was credible and consistent and there was little of her evidence that was successfully challenged by the Respondents. Mr Brown’s evidence and position was that no transfer had taken place.

That the first Respondent's business had ceased on 2 March 2018 and that following the liquidation they simply bought the assets and licences for the business of the first Respondent. His contention was that they did not purchase the business as a going concern and did not accept that TUPE applied to the same. It was only after hearing all the evidence that he could accept through his Counsel that a transfer had taken place. His evidence was not credible or consistent.

### **The Facts**

8. The respondent having now conceded that a relevant transfer had taken place the relevant facts so far as when the transfer took place are as follows.

9. Pirtek Nottingham Limited is a franchise of Pirtek UK Limited. They provide hydraulic products. The Pirtek brand had started in Australia before setting up in the UK and when it arrived in the UK it opened franchises nationwide. The Nottingham branch opened in 1991 and the Claimant commenced her employment with Pirtek Nottingham Limited on 1 September 1992. She was employed as Office Manager working 37.5 hours per week. Her contract of employment is at pages 49-63. The owners of Pirtek Nottingham Ltd were Steve Maguire and Andy Godward.

10. Messrs Maguire and Godward also owned Mansfield Hydraulics Ltd which acquired a similar Pirtek UK franchise for the Mansfield area. Phillip Brown is the owner and Director of a company Pirtek Limited that has a franchise for Pirtek UK in Sheffield. Stephen Cracknell owns and runs a franchise for Pirtek UK in Lincoln.

11. Although the Mansfield business was run as a separate entity Ms Jack also was responsible for the Mansfield office. She engaged Tricia Nadin as Accounts/Office Administration clerk on 16 hours per week to assist her.

12. Kenbro Limited was formed in 2008 but remained dormant. It had been set up by Phillip Brown and Simon Cracknell was appointed as a Director on 24 October 2017.

13. During the latter stages of 2017 Phillip Brown and Simon Cracknell commenced discussions with the Directors of Pirtek UK about acquiring the business of Pirtek Nottingham Limited. They held a meeting with Stephen Martin of Pirtek UK Limited on 7 September 2017 (page 65). Mr Martin also had meetings with Steve Maguire a Director of the first Respondent about the transfer. This is evidenced in an email dated 25 September 2017 at page 66 of the bundle.

14. It was agreed that Kenbro Limited would be used as a vehicle to obtain a franchise from Pirtek UK Limited for Nottingham and Mansfield which had previously been owned by Pirtek Nottingham Limited who were having financial difficulties. Heads of agreement were drawn up and signed on 19 January 2018 (pages 71-74). It was agreed that the fixed assets and stock held by Pirtek Nottingham Limited and Mansfield Hydraulics Limited and Mr Maguire would be sold to Mr Brown and Mr Cracknell and Kenbro Limited. The buyers would pay £130,000 to Pirtek UK Limited for the stock and assets and the sale would be completed by no later than 5 February 2018.

15. On 30 January 2018 Mr Maguire had a meeting with the Claimant. He told the Claimant that Kenbro Limited had entered into an agreement which would mean that all trade assets and employees of Pirtek Nottingham Limited would transfer to Kenbro Limited as at 1 February 2018. He said that the Mansfield office was to close. It would not affect her role. He acknowledged that the TUPE Regulations applied to the transfer and told her that they proposed reducing her working hours from 40 to 30 hours per week.

16. This was confirmed in a letter dated 31 January 2018 (pages 75-6) which was handed to the Claimant on 31 January 2018 by Simon Cracknel. Mr Cracknell discussed with the Claimant the fact that Kenbro Limited were taking over the Nottingham franchise with effect from 1 February 2018. He told her that her employment would transfer from 1 February 2018.

17. He then went on to say that he had made a big mistake in closing the Mansfield office. He regretted dismissing Ms Nadine. He said that if it was up to him she would not be there as she was too expensive. As from 1 February 2018 Ms Jack had no reason to doubt that her employment had been transferred. She was not told anything to the contrary.

18. On 1 February 2018 Ms Jack received a call from Laura Wilson who was Administrative Manager for Pirtek UK Limited. She instructed her to finish the month end accounts for Pirtek Nottingham Limited and asked her how long she thought that this would take as she wanted to instruct the IT department to install the new SAGE programme for Kenbro Limited. She informed Ms Wilson that it would take her about a week. Ms Jack was instructed that she should take other instructions from Mr Cracknell who was described as her new employer. As at 12 February 2018 the new programme had been installed and was running and ready to use.

19. Mr Cracknell instructed Ms Jack to contact E. ON the gas/electric supplier, the water supplier and the landlord regarding the tenancy and have all these transferred to Kenbro Limited. Ms Jack was given details of the bank account for Kenbro and told that £5,000 had been deposited into that account. The gas and electricity accounts were successfully transferred over to Kenbro Limited.

20. Ms Jack was receiving invoices from Pirtek UK in the name of Kenbro Limited.

21. Mr Godward a former Director of Pirtek Nottingham Limited was working in the depot and told the Claimant that he was now working for Kenbro Limited as Centre Manager. He served a customer and took a card payment via the streamline. Ms Jack informed him and Mr Cracknell that the streamline terminal was still the merchant number connected to the Pirtek Nottingham Limited bank account. Mr Cracknell instructed Ms Jack to transfer the money from the Pirtek Nottingham Limited bank account to either his Pirtek Lincoln account or the Kenbro account. Whilst Ms Jack cannot recall exactly which bank account it was paid into it was done and it was arranged that any further streamline payments would be put through the Pirtek Lincoln streamline terminal.

22. Mr Cracknell instructed Cheryl Cunningham who was the Accounts Manager at Pirtek Lincoln to set up a new streamline terminal for Kenbro Limited at the Nottingham branch. Until this was done Mrs Cunningham e-mailed a daily spreadsheet of the monies owed to Kenbro Limited bank through the Pirtek Lincoln streamline terminal for sales done at Nottingham.

23. Ms Jack asked Mr Cracknell for a paying in book for Kenbro Limited so she could bank cash sales. She was eventually given this around the middle of February 2018. No cash sales were banked though as they were left in a cash tin in her office. Mr Cracknell bought some cleaning products giving Ms Jack a cash receipt and told her she could reimburse him at the end of the month. He had also deposited a £20 float in change from his own money to use for small sundry purchases and he also put a £50 float of his own money in the cash till in Ms Jack's office.

24. During this period Sandra Brown who was Accounts Manager for Pirtek Sheffield telephoned Ms Jack to ask for details of Pirtek Nottingham's fleet insurance company. All vehicles at Nottingham were to be insured under Kenbro Limited.

25. The MSST engineers were issued with fuel cards by Mr Cracknell in the name of Kenbro Limited. This came across the Claimant's desk.

26. The Claimant says that during this period she had some issues with Mr Cracknell and his behaviour towards her. She told Steve Maguire and her union official about this and Andy Godward at Nottingham who was still working at the depot told the Claimant on 7 February that they were worried that these issues could affect the transfer.

27. This is confirmed in an e-mail sent by Mr Brown to Mr Martin on 14 February 2018 (pages 80-1). It can be seen in the second paragraph of that e-mail that the second Respondents were worried about the allegations made by Ms Jack. They were also aware about the liability for employees under the TUPE Regulations. They wanted to change their approach and the e-mail goes on to say:

"We propose that we revert back to the original plan which was to place Pirtek Nottingham into administration, Pirtek UK negotiate with the administrator for the purchase of the assets of Pirtek Nottingham and Mansfield out of the £130,000 payment plan as previously agreed.

We will reemploy the MSST's and possible Richie Brown (5 staff), this will make everyone in the company redundant with a government pay out or an in-administration pay out payment.

I am sorry that we have been backed into this situation, but it now seems the only safe way moving forward without any liability, Trudy Jack situation will be with Pirtek Nottingham as we have not taken over the business and effectively employed the staff yet. We are in a caretaking situation until the sale agreement has been signed. I will need to explain this to the staff at Nottingham."

28. On 15 February 2018 Phil Brown and Sandra Brown (Accounts Manager, Pirtek Sheffield) visited the Nottingham branch. They read out the contents of the letter at page 83. It purported to say that the transfer had not taken place. It said they were "still in the throes of negotiation". After he had finished reading out the letter Mr Brown immediately left the room saying he didn't want to stay and that Mrs S Brown would deal with everything else. He did not give Ms Jack a chance to comment to him personally at all. In his evidence to me Mr Brown contradicted the above saying that they had withdrawn from the deal on 6

February 2018 as evidenced by a letter of that date sent to Messrs Maguire and Godward. The letter is contradicted by the email of 14 February 2018 referred to above.

29. The Claimant was very upset by what had happened and it was agreed with her union representative Mr McGlinchy and Mrs Brown that until things were clear and that she felt safe she should be suspended on full pay until further notice. At this stage Ms Jack's concern was that Mr Cracknell was at Nottingham almost all the time and the only support she received was from Andy Godward and Steve Maguire.

30. After the meeting Phil Brown and Sandra Brown returned to Pirtek Nottingham and removed the £50 till float and left an invoice on Ms Jack's desk for fuel that the MSST's had purchased with the Kenbro fuel cards between 1 February 2018 and 14 February 2018.

31. On 19 February 2018 Ms Jack made a statement to the Police reporting the allegations of sexual assault against Mr Cracknell.

32. On 23 February 2018 Ms Jack received an e-mail from Steve Mcguire asking her to return to work as the sale of Pirtek Nottingham to Kenbro had fallen through and her employment would not now transfer under the TUPE regulations.

33. On 27 February 2018 Ms Jack returned to her duties at the office. She was told again that the sale to Kenbro had fallen through.

34. On 2 March 2018 the Claimant met with Steve Maguire who informed her that Pirtek Nottingham was going into voluntary liquidation and that her employment was terminated with immediate effect. She was handed a letter (page 83). Mr Maguire said that Mr Brown would be calling all employees over the weekend to offer them a new position with Kenbro imminently. He said that Kenbro Limited would be opening the doors on 5 March 2018 for business as usual.

35. On 5 March 2018 Kenbro opened for business trading as Pirtek Nottingham. All 4 MSST's and the Centre Manager were reemployed with effect from that date. They were doing the same jobs working in the same region for the same customer base as they were when the business was run by Pirtek Nottingham. Mr Brown in his statement says that the business of the first Respondent ceased on 2 March. That all the employees including the Claimant were redundant.

36. Although Pirtek Nottingham Ltd ceased to trade as at 2 March 2018 the business continued and the company commenced winding up in Creditors Voluntary Liquidation on 18 April 2018.

## **The Law**

37. Mr Penman has conceded that there was a Transfer of Undertakings ie a relevant transfer in accordance with Regulation 3 of the TUPE Regulations whereby the Claimant's employment was transferred to Kenbro Limited the third Respondent.

38. The only matter that I must determine is now when that transfer took place.

39. Mr Penman's contentions to me are as follows: -

39.1 The contents of the letter of 31 January 2018 are wrong. Even though the letter is sent by Simon Cracknell and Phil Brown the Directors of Kenbro Limited, Mr Penman contends that there was no transfer of the business on 1 February 2018. He says it is clear from the other correspondence in the bundle.

39.2 That Steve Maguire and Andy Godward retained control of the first Respondent's business and the Claimant's employment could not have been transferred without their consent.

39.3 If the Claimant had been employed by the third Respondent since 1 February 2018 why would Steve Maguire and Andy Godward dismiss her on 2 March 2018.

39.4 The Claimant has admitted that she was paid for February 2018 by the first Respondent and not by the second Respondent.

39.5 He points to the events between 23 February 2018 and 2 March 2018 saying this amounted to an admission that she continued to take instructions from Steve Maguire.

39.6 He contends that things that were provided by Pirtek Nottingham by Pirtek Sheffield such as fuel cards were provided to support the business that was in financial distress with the aim of taking over as a going concern and that Pirtek Nottingham continued to trade until 2 March 2018.

### **My Conclusions**

40. I am satisfied that by 31 January 2018 it had been agreed that Kenbro Limited was to acquire the assets, interests and rights of Pirtek Nottingham Limited. The letter of 31 January 2018 confirmed that and that all employees were transferred under the TUPE Regulations as at 1 February 2018. I am satisfied: -

- From 1 February 2018 Mr Cracknell and Mr Brown the Directors of Kenbro Limited moved in and ran the business
- Phones and fuel cards were issued to the MSST's in the name of Kenbro Ltd
- They installed a new SAGE accounting programme
- They contacted gas and electricity suppliers, water suppliers and the landlord
- They received invoices from Pirtek Nottingham in the name of Kenbro
- They issued paying in books in the name of Kenbro

41. They had taken over the business as at 1 February 2018. Messrs Maguire and Godward did not continue to run the business. I am satisfied that although the letter of dismissal dated 2 March 2018 (page 87) came from Pirtek (Nottingham) Ltd that company had ceased trading on 1 February 2018 and that is when Ms Jack's employment transferred. As per the e-mail of 14 February 2018 from Phillip Brown they became concerned about the claims made by Ms Jack and wanted to avoid them.

42. They were aware of the potential liabilities they could face as the employer of Ms Jack and did not want to employ her but wanted to employ all the other employees.

43. They then went through a sham process which involved them pretending that they had not taken over the business on 1 February 2018 and decided with Mr Maguire and Mr Godward's agreement to place Pirtek Nottingham Ltd into liquidation when they had already taken over the business.

44. They did not complete all the paperwork necessary to try to avoid these potential liabilities but they had not withdrawn from the agreement at all. They continued to run the business because the business had transferred to them on 1 February 2018.

45. For these reasons I am satisfied, not only that there was a relevant transfer in accordance with Regulation 3 of the TUPE Regulations but that the transfer took place on 1 February 2018.

**Further Case Management**

46. After the hearing I listed the matter for a telephone case management Preliminary Hearing that would take place on 11 January 2019 at 9:30 am with a time estimate of 30 minutes. Unfortunately, because of delays in issuing this judgment and reasons I have had to postpone that hearing. A further telephone case management Preliminary Hearing will now be convened as soon as possible to make further case management orders and to consider whether the case is suitable for Judicial Mediation.

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Employment Judge Hutchinson

Date 18 January 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE