



EMPLOYMENT TRIBUNALS

Claimants: Mr Simon Hole (C1)
Mr Craig Curtis (C2)

Respondent: Quantum Limited (Company number 08993593)
Formerly called Kingswood Furniture Design Limited

Heard at: Southampton On 11 January 2019

Before: Employment Judge Wright

Representation:
Claimants: Mr C Curtis
Respondent: Mr A Karia of Counsel

JUDGMENT

The Judgment of the Tribunal is that the Claimants' employment transferred from GSRC Ltd to the Respondent. The claims for notice pay and redundancy pay therefore succeed. C2's claim for holiday pay fails as it was presented out of time and it is not reasonably practicable to extend that time limit.

REASONS

1. C1 presented a claim form on 31/7/2018 and C2 on 1/8/2018 making a claim for redundancy pay, notice pay; and in respect of C2 holiday pay.
2. The main issue to be determined, was whether or not there had been a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) in or about June 2016.
3. The Tribunal heard evidence from both claimants and from Mr G Sawyer (former Director of GSRC Limited). For the respondent it heard from Mr Andrew Read who is the respondent's finance manager. It did not hear from Mr Martin Shaw, MD of the respondent.
4. The Tribunal had before it an agreed bundle of documents.
5. All of the evidence which was presented has been considered. Not

necessarily every issue between the parties requires a determination and accordingly, only those relevant to the issues have been recorded in this judgment.

6. Both claimants were employed by GSRC Limited ('GSRC'); C1 from 12/10/2015 and C2 from 1/3/2014. This was Mr Sawyer's company. Mr Sawyer had an accident in June 2015 and as a result of the GSRC began to suffer from financial difficulties. GSRC was compulsorily dissolved by Companies House on 17/10/2017.
7. GSRC carried out tasks for Mr Shaw personally and for his limited companies (Mr Read describes them as three hotels and golf courses in the south of England).
8. Due to the amount of work which was being carried out and the financial difficulties, Mr Sawyer had talks with Mr Shaw about him becoming an investor in GSRC, by means of buying some shares. Nothing however came of those discussions.
9. Mr Shaw had however purchased a CNC machine (expensive specialist equipment) in about March 2016 and this machine was stored at GSRC's premises and used by GSRC's employees. The Tribunal was told the machine was used for Mr Shaw's work and other work carried out by GSRC.
10. In June 2016 the situation for GSRC was dire. On 9/6/2016 GSRC was prevented from entering its premises at Bordon by the landlord. The lease was in Mr Sawyer's name, not in GSRC's name. Mr Sawyer had several meetings with Mr Shaw. Mr Shaw told Mr Sawyer to have GSRC's staff report to one of his hotels and they carried out work there. Ultimately, Mr Shaw paid off the rent arrears and as a result the landlord agreed to the removal of the machines and equipment from the Bordon site on 27/6/2016.
11. Mr Read said that Mr Shaw then offered the claimants (and Mr Sawyer) 'new' employment with Kingswood Furniture Design Limited.
12. It is the claimants' case that their employment transferred to the respondent under TUPE at some point in June 2016.
13. The respondent says there is no TUPE transfer for the following reasons:
14. The respondent issued a written statement of terms of employment to both claimants on 25/8/2016 and both of their start dates are given as 27/6/2016. This date accords with the date the landlord allowed GSRC to access the Bordon premises. Furthermore, the contract states 'no previous employment counts as part of your period of employment'.
15. C2 says he queried this and raised the possibility of a TUPE transfer at the time the claimants started to work for the respondent and when the contracts were issued. C2 said he had been to an Employment Tribunal approximately 10-years ago, where there was a claim under TUPE and therefore he had some knowledge in this area. C2 says he was told TUPE

did not apply and in effect told to 'shut up'. C2 says he had a mortgage to pay and a family to support, so he left the matter.

16. The respondent also relies upon the fact that C1's job title change (according to the contract) from 'machinist' to 'machinist/CNC operator'.
17. Both claimants' salaries were increased. C1's by £2,120 and C2's by £3,000. It is not clear when the salary rise came into effect.
18. Both claimants were paid by GSRC in May 2016. Both were paid at the same rate of pay by the respondent in June 2016. They were paid by the respondent for the whole of June. This was despite the contention that the claimants' start date with the respondent was 27/6/2016. Mr Read's explanation for this was that it was simply goodwill on Mr Shaw's part.
19. There were other changes according to the written contract the respondent produced, for example a change in the holiday year and the amount of holiday (the statutory minimum) and to rest breaks.
20. C2 said in evidence that nothing in reality changed, despite the content of the contract.
21. GSRC had a company van, which C2 used. The evidence was that he continued to use the van from June 2016 onwards.
22. Mr Sawyer says he was offered employment by the respondent and he used a Mercedes company car. He says he told his services were no longer required on 8/8/2016 and his employment terminated on 18/8/2016. The respondent then vacated the Bordon premises as agreement could not be reached by Mr Shaw and Mr Sawyer in respect of the lease of those premises. The machinery (including the CNC machine) were moved from the Bordon premises to one of Mr Shaw's hotels and then later to Liphook.
23. C2 was on annual leave during this time, however the respondent took issue with both claimants' stating that 'it took a month to get the business up and running properly again'. The respondent states that this indicates there was no TUPE transfer and that it was a fresh start in August 2016.
24. In respect of C2's annual leave in August 2016, the respondent made deductions from his wages of £269.23 in September 2016 and £134.61 in October 2016. The respondent says C2's holiday pay claim is not sufficiently particularised. This is despite C2 writing to the respondent on 9/5/2018 (attaching the relevant payslips) and asking to be reimbursed for £403.84. Apart from stating in the ET3 that the holiday pay claim could not be understood, the respondent has not taken any further steps in respect of this part of C2's claim.
25. The claimants then continued to work for the respondent until they were made redundant on 6/4/2018.
26. As the respondent does not accept there was a transfer under TUPE, it did

not pay redundancy pay to the claimants and it based their notice period on the purported start date of 27/6/2016.

27. In closing submissions, Mr Karia relied upon his note. The respondent's case was premised upon the argument that there was no TUPE transfer. The nature of the claimants' employment significantly differed and notably there was an increase in salary.
28. It was submitted that as C2 had experience of TUPE previously, that there would have been some written evidence, had he raised the TUPE point, as he said he had.
29. It was suggested that the nature of the respondent company gave no illustration of a transfer of an undertaking and there were significant differences between the two contracts such that they did not transfer.
30. Mr Karia said the claimants' evidence was relevant and in particular there was the reference to getting the business 'up and running'. There was a clear break and if there was a need to get the business 'up and running' there was nothing to transfer; it was a new era in the summer of 2016.
31. Mr Sawyer had said Mr Shaw was not 'prepared to take GSRC on'. If Mr Shaw was not prepared to take GSRC 'on' how can there have been a TUPE transfer?
32. Any interest expressed by Mr Shaw in GSRC had been expressed over a year earlier and what happened was a gesture of good will by Mr Shaw on the basis of the relationship with Mr Sawyer over two years.
33. The businesses were very different. GSRC was a furniture maker and the respondent was a property developer.
34. It was clear the lease of the premises in Bordon was not transferred as Mr Sawyer would not agree to it.
35. Any interest Mr Shaw may have had, was his interest in the CNC machine, which he owned. The fact Mr Shaw owned the CNC machine may have been the reason why he took an interest in GSRC in June 2016.
36. Mr Karia suggested the best approach was that GSRC shut down at the beginning of June 2016 and Mr Shaw took no interest in GSRC - a furniture business, beyond showing goodwill to its employees.
37. On the time limit, Mr Karia submitted the effective date of termination was 6/4/2018. For C1 the period of Acas early conciliation took place between 27/7/2018 to 19/7/2018, which he said was 23 days. For C2 it was between 1/7/2018 and 19/7/2018, which was 19 days. C1's ET1 was presented on 31/7/2018 and C2's on 1/8/2018. He said that was over three months, even allowing for Acas early conciliation.
38. Mr Karia submitted the claim for notice pay falls under The Industrial

Tribunals Extension of Jurisdiction (England and Wales) Order 1994 ('Order') and Mr Karia made two points. Firstly, that it was reasonably practicable for the claimants to meet the time limit. Secondly, the claimants' position that the time limit should be extended was premised upon the Employment Rights Act 1996. Mr Karia says the equivalent position under the Order does not provide for a one month extension.

39. In respect of C2's claim for holiday pay, the deductions were made in September and October 2016, more than three months prior to the claim being presented. It was therefore the simple case that the claim had not been presented within the specified time limit. The other point to make was that there was no evidence any deduction was unlawful. If there was no TUPE transfer, there was no entitlement to take 13-days holiday in August 2016, when employment had just started on 27/6/2016. If that were the case and C2 did take annual leave, there was no entitlement for him to be paid in respect of that annual leave.
40. For the claimants, Mr Curtis submitted that Mr Shaw in his position as managing director has told him how much work he put through the respondent from his hotels. It was therefore submitted that despite the explanation being 'goodwill'; Mr Shaw had a massive interest in the claimants and the furniture making business.

Findings

41. In applying the judgment of Cheesman v R Brewer Contracts Ltd [2001] IRLR 144. The Tribunal has to consider 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 facilitation) the exercise of an economic activity which pursues a specific objective.
42. There is no need to have significant assets and an organised grouping of wage-earners who are specifically and permanently assigned to a common task, may in the absence of other factors, amount to an economic entity.
43. 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 the work is organised.
44. Although GSRC was struggling financially, the evidence heard points to a finding that it was a stable economic entity and the respondent makes no challenge in respect of this.
45. The next consideration is whether or not there was a transfer? According to Cheesman, the decisive criterion is whether the entity in question retained its identity. The judgment refers to, in a labour-intensive sector, the new employer taking over not only the activities, but also the major part of in terms of their numbers and skills, the employees assigned by the predecessor to that task.

46. No single factor should be considered in isolation. Other considerations are whether or not tangible assets are transferred, the value of the intangible assets, whether or not customers are transferred and the degree of similarity between the activities carried on before and after the transfer. In a case where assets do not pass, that does not preclude a transfer. Equally, the fact the service is similar between the old and new undertaking does not justify the conclusion there has been a transfer. The absence of any contractual link between the transferor and transferee may be evidence there has been no relevant transfer. There is no particular importance attached to the gap between the end of the work by one entity and the start by its successor.
47. The claimants continued to perform tasks related to their skills for the respondent. They continued to use the CNC machine. C2 continued to drive the same van. Both claimants were paid in full for the month of June 2016 by the respondent and subsequently given a pay rise (increasing salary does not prevent the finding there was a transfer). The location may have changed, that however does not prevent a finding there has been a transfer.
48. At Companies House GSRC's nature of business is described as 'manufacture of other furniture'. The nature of the respondent's business is also 'manufacture of other furniture'. The respondent's previous name was 'Kingswood Furniture Design Limited'. Names and descriptions alone are not enough to evidence a transfer, however, they undermine the argument advanced that the respondent was nothing to do with furniture design and was a property development company.
49. For those reasons, the Tribunal finds that the entity did retain its identity as the service provided by GSRC continued to be provided by the respondent once GSRC was locked out of its premises and certainly they were provided once the assets were transferred to the respondent on 27/6/2016 and the finding is that there was a transfer for the purposes of Regulation 3(1) of TUPE. Assets, staff, contracts all moved from GSRC to the respondent.
50. For those reasons, the finding is that there was a transfer of an economic entity which retained its identity and C1 and C2 transferred to the respondent on 9/6/2016. The sums due to the claimants were agreed at the hearing, pending the claim succeeding. The respondent is therefore ordered to pay to C1 redundancy pay of £1,016 gross and notice pay of £519 less deductions (one week's notice a week's notice having already been received). To C2 redundancy pay of £2,032 gross and notice pay (three weeks) of £2,596 less deductions. If the notice payments are paid gross to the claimants, they need to account to HMRC.
51. Despite Mr Karia's submissions, the Tribunal is satisfied the claims were brought within time in accordance with s.207B (3) ERA and Article 8B(3) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

52. In respect of the holiday pay claim for C2; it is advanced as an unlawful deduction from wages claim. Under s.23(4) of the ERA it should have been brought within three months of the deduction and if that was not reasonably practicable, be brought within such further period of time as the Tribunal considers reasonable. The deductions were made in September and October 2016 and the claim was presented on 1/8/2018. It could be argued that the deduction was not unlawful at the time it was made as on the respondent's case, the claimant had not accrued the holiday which he took. Even if that were correct (if there had be no TUPE) transfer, then the deductions could conceivably have become unlawful at the end of the holiday year when the claimant had worked for the entire year and had retrospectively accrued the holiday. Even so, the claim is still presented out of time; and by quite some time.
53. It is well known that time limits in the ET are short. There are a number of reasons for that, including that personnel move on, memories fade and originally, ETs were envisaged as being a speedy jurisdiction, unhampered by the stricter procedural Rules of the civil courts. There should be a finality to litigation; i.e. a claim should be brought promptly and in accordance with the relevant time limits.
54. Was the holiday pay claim presented within such further period as was considered reasonable? Unfortunately not. The Tribunal does not believe that C2 waited until 1/8/2018 to present his holiday pay claim, more that it was a case he was focussed on his claims for redundancy pay and notice pay. It is noted that he raised the issue of holiday pay with the respondent on 9/5/2018. He could have (it being accepted he is unrepresented) presented a holiday pay claim, then presented the redundancy and notice pay claim and applied for them to be consolidated. If discretion were exercised for C2 and the holiday pay claim was now allowed to proceed and absent a strong argument for the exercise of discretion, it would mean that the time limit was bypassed. That is not a good reason to exercise discretion in C2's favour and although his claim is found to be meritorious, it is not able to proceed and it is dismissed.

Employment Judge Wright

Date: 5 February 2019
