Case Number: 1400141/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mrs Cheryl Ford**

Respondents: **1 The Sandwich Box (Southampton) Ltd**
2 Mr and Mrs Saint t/a The Sandwich Box

Heard at: **Southampton** **On:** **22 January 2019**

Before: **Employment Judge Hargrove sitting alone**

Representation
Claimant: **In Person**
Respondents: **1 Mrs Clarke**
2 Mrs Saint

JUDGMENT

The Judgment of the Tribunal is as follows:

1. The claimant was automatically unfairly dismissed by the second respondent pursuant to Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

2. The claimant's complaint of a failure to consult contrary to Regulation 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is well founded and the respondents are jointly and severally ordered to pay compensation to the claimant.

3. The second respondent is ordered to pay to the claimant for unfair dismissal:

   (1) A basic award of £1,152.68.

   (2) A compensatory award of £4,672.32 to date (62 weeks x £75.36).

   (3) Future loss £904.32 (12 weeks x £75.36)

   (4) £350 for loss of statutory rights.

4. Pursuant toRegulation 15(9) the first and second respondents are jointly and severally ordered to pay compensation of £1,538.48 (4 weeks x £384.62).

REASONS

1. The claimant was employed as a manager by the first respondent of the Sandwich Box (referred to in this Judgment as SB), a kiosk selling snacks operated from the Avenue, Southampton.

2. Her employment with the respondent commenced on a date in October 2014. The directors of the first respondent are Mrs Fiona Wilson (FW) and Mrs Clarke. The claimant's contract was for 41 hours per week. The first respondent first put the kiosk on the market in January 2017 but the sale fell through.

3. In or about June 2017 the first respondent received a further offer for the purchase of the lease/business from the second respondent, Mr and Mrs Saint. The offer was accepted. On 14 August 2017 the claimant was notified by FW of the proposed sale to Mr and Mrs Saint which was then proposed to take place in mid September.

4. On or about the 30 September 2017 exchange of contracts took place between the first and second respondents and on 26 October 2017 completion took place.

5. The claimant was on holiday from 25 – 29 September and Mr Saint ran the shop during that period and was granted access to the keys to the property taking over some aspects of the management of the business on a trial basis. The claimant returned to work on 2 October 2017 but was off sick from 11 October 2017, initially with a stomach bug but then with stress/anxiety. She continued to be signed off sick until the 10 November 2017 when she resigned.

6. The claimant presented her claims to Employment Tribunal against the first and second respondent on 10 January 2018. The outstanding claims are of automatically unfair dismissal contrary to Regulation 7 of the 2006 Regulations; and of a failure to consult contrary to Regulation 13. The claimant has not further pursued in the Tribunal hearing her modest claims for unpaid wages and/or holiday pay.

7. The provisions relevant to the claims are in relation to the failure to consult and dismissal Regulation 4(1) of the 2006 Regulations. This materially provides that:

> "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 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".

8. Regulation 4 (2) provides:

> " ….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;
>
> (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 transfer".

9. Regulation 7 deals with dismissal of employees because of a relevant transfer. It provides materially as follows:

> "(1)Where either or before or after a relevant transfer any employee of the transferor or transferee is dismissed, that employee is to be treated 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 an economic, technical or organisational reason entailing changes in the workforce of either of the transferor or the transferee before or after a relevant transfer.
>
> (3) Where paragraph (2) applies:
>
> (a) paragraph (1) does not apply
>
> (b) Without prejudice to the application of Section 98(4) of the 1996 Act (test of fair dismissal):
>
> (i) The dismissal is regarded as having been for redundancy where Section 98(2)(c) of the Act applies.
>
> (ii) In any other case the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held".

10. These provisions are highly complex. They are complex even for qualified lawyers to fully understand and apply. I accept in this case that they were particularly difficult for the respondents, the first respondent being a small employer with very few employees and the second respondent being a new employer at the time that the events in question arose. However, in short, if a transferee sacks an employee who has transferred under Regulation 4 the dismissal will be automatically unfair if it relates to, and the principal reason for it, is the transfer itself. The same would apply if the transferor sacks the employee in contemplation of a transfer. It will apply unless, in very limited circumstances the transferee can show that the reason for the dismissal was an economic, technical or organisational reason which required a change in the workforce namely in the number of people employed in that workforce. That is an issue which potentially arises in this case.

11. There are also separate provisions in Regulations 11 – 16 implementing the obligations to provide information to and consult with employees affected by a transfer contained in the EC Acquired Rights Directive no 23 of 2001. The format starts with the obligation on the transferor, in this case the first respondent, to notify the transferee, in this case the second respondent, in writing of the employee liability information, including the identity and age of each employee and the particulars of employment required to be given to that employee under Section 1 of the Employment Rights Act including the details of the employment commencement date, the rate of pay and the frequency of pay. Regulation 13, the duty to inform and consult representatives, materially defines who are affected employees: That is anyone who may be affected by the transfer process either within the employment of the transferor, or where there is a transfer to, or merger with the transferee, any employee whose employment is likely to be put under threat or materially altered. Regulation 13(2) sets out when the consultation should take place and what information is to be provided to the affected employees. It provides:

> "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 to that fact
>
> (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."

There are simplified provisions dealing with micro businesses, which these two respondents are, for the purposes of Regulation 13A of the Regulations: Thes apply where the employer employs fewer than ten employees; and in those circumstances the information and consultation has to be directly with the employees, or in this case the employee, rather than the appropriate representatives.

12. Regulation 15 provides that where an employer has failed to comply with a requirement of Regulation 13 a complaint may be presented to an Employment Tribunal on that ground. That is the complaint which the claimant makes in this particular case. There are provisions for the Tribunal to make a declaration and an appropriate award of compensation which may be up to thirteen weeks pay, having taken into account the seriousness of the default

13. The section which deals with appropriate compensation is Regulation 16(3)

" appropriate compensation means such sum not exceeding thirteen weeks pay for the employee in question as the Tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty".

The compensation order may be made jointly and severally between the transferor and the transferee under Regulation 15(9).

14. In respect of the claim of unfair dismissal, the burden lies on the claimant to prove that she was dismissed. The claimant has to establish a breach of contract by her employer of such gravity as to justify her resigning without notice. That breach of contract may have occurred whilst the claimant is still employed by the transferor and may continue after that date. The Regulations provide that the second respondent, the transferee, is responsible for any repudiatory breach of contract by the transferor, the first respondent in this case, which occurs before the transfer. The breach relied upon in this case is a breach of the implied term of trust and confidence. There is an implied term in all contracts of employment that neither party will without reasonable and proper cause act in such a way as to be calculated or likely to destroy trust and confidence in the other. If the claimant satisfies this test she must also establish that she resigned in part at least because of the employer's breach or breaches and not for some wholly unconnected reason.

15. The issues which the Tribunal has identified briefly are as follows:

(1) Was there a transfer of an undertaking on or about the 26 October 2017? There is now no dispute about that although there is an argument that the transfer took place earlier.

(2) Did the claimant's employment contract transfer to the second respondent on 26 October 2017? Again, there is now no dispute about that.

(3) Was there a failure to inform and consult with the claimant contrary to Section 13 of the transfer Regulations. That is an issue which remains outstanding.

(4) Was the claimant constructively dismissed by the first and/or the second respondent. Did the claimant resign in response in part at least to that breach?

(5) Was any dismissal automatically unfair and Regulation 7(1) in that the sole or principal reason for the dismissal was the transfer itself or a reason connected with the transfer?

(6) Alternatively, was there an economic, technical organisational reason for this dismissal, to be established by the second respondent, entailing a change in the workforce as a result of which the dismissal was fair applying also the provisions in Section 98(4) of the Employment Rights Act?

(7) To what compensation is the claimant entitled for unfair dismissal and for any failure to inform or consult?

16. Findings of Fact and Conclusions

(1) The claimant worked on her own at the SB which is a kiosk only some 6ft by 8ft in the Avenue in Southampton. I accept that she had a degree of autonomy in the ordering of stock although FW and Mrs Clarke the directors of the first respondent nominated the suppliers. The claimant also had a set of keys and was responsible for opening and closing the kiosk at the end of the day. She also cashed up but would leave the takings to be collected by one of the directors later.

(2) In addition to SB the first respondent had another business, a café called Finikis. In January 2017 the first respondent put SB including the lease up for sale. There was a prospective buyer, a Mr Binney, who expressed a wish for the claimant to be kept on. However, Mr Binney dropped out of the sale and nothing further need be said about that matter.

(3) Amongst the options put forward was that SB should be run by Fiona Wilson (FW)in partnership with the claimant but the claimant declined. This is confirmed by FW's later email of 26 August 2017 at page 8a.

(4) In June 2017 Mr and Mrs Saint expressed an interest in the purchase. An offer was subsequently accepted sometime in June/July but the claimant was not notified of the situation by FW until 14 August 2017. I accept that FW was reluctant to notify the claimant earlier being concerned as to her reaction. That may have been because she was concerned about the upheaval it would cause her but I also find that FW was aware that Mr and Mrs Saint were intending to purchase SB in order for Mr Saint to work in it himself, which would put the claimant's future employment in jeopardy.

(5) A further meeting with the claimant took place on 21 August 2017. By that stage the claimant was informed there would not be a position for her. This was confirmed in writing to her on 26 August 2017. FW offered the claimant an alternative of continued employment at Finikis but on hours reduced from her contractual hours of 41 per week and at a lesser hourly rate of pay, albeit temporary. The claimant turned it down as she was entitled to do. In her letter of 26 August FW enquired whether the claimant was interested in a redundancy package. At that stage the information supplied to the claimant was that the sale of the business was likely to proceed in mid September 2017.

(6) The claimant wisely then sought legal advice from the CAB. On 30 August she texted FW notifying her that she refused the offer of alternative employment at Finikis and also notifying her of the application of TUPE (see page 11). I accept that FW had no prior knowledge of the possible application of TUPE and its implications.

(7) I accept that the relationship between the claimant and the first respondent became strained after that. Communication between them became less frequent, and clearly the claimant was concerned about her future employment at SB.

(8) On at least three occasions in early September the claimant enquired by text what was happening with the sale of the business (see communications on 9, 14 and 19 September). At about that time the claimant applied for a job as an administrative Assistant with No Limits, a charity assisting young people. She was shortlisted for interview and interviewed on or about 21 September. I accept that although her application was considered favourably she did not accept any offer of employment at that stage. She was, perfectly properly, awaiting the outcome of the expected further consultations concerning her future with SB and in particular about a possible redundancy package. I do not regard the Facebook messages uncovered by the first respondent as indicating anything improper on the claimant's part.

(9) Also on 19 September 2017, there was an unannounced visit to SB by Mr and Mrs Saint. It is agreed that the claimant enquired what future she had at SB. It appears that Mr and Mrs Saint had by this stage sought some advice about TUPE and had been advised not to discuss matters until the transfer was concluded. If that advice was given, it was poor advice.

(10) Also on 19 September 2017 the claimant's name was removed as administrator on the first respondent's Facebook page. It was on that day that the claimant emailed FW (see page 17) indicating prior to the meeting with the Saints on that day, that there as only two days until the change or expected change of employer and she had not yet met them and had little time to discuss and consult as to any change in her employment position.

(11) On 22 September 2017 the first respondent responded to earlier enquiries from the claimant indicating that the lease assignment and TUPE transfer of SB would occur on or around 13 October, identifying

the names of the transferees, who were to be given her employee liability information under Regulation 11; and stating that:

> "Under TUPE measures Mr and Mrs Saint have informed us, as we have you, that they will be operating SB as sole traders and may not have any requirement for an employee. They will consult with you after (Tribunal's underlining) the transfer".

(12) The claimant was away on holiday from 22 September 2017 until 2 October. Prior to that she handed over the keys and they were passed to Mr and Mrs Saint. In effect they were given control of the premises and also took over financial responsibility, in particular for the ordering of and payment for goods, I find, as licensees in advance of the due completion date for the lease transfer. That position continued after the claimant's return to work on 2 October. The claimant was also no longer responsible for cashing up at the end of the day.

(13) On 4 October FW, having discovered that the claimant had been in contact with No Limits, enquired of the claimant whether she was giving notice, or intending to give notice, to the Saints. The claimant's written response is at page 22 and is informative as to her state of mind, complaining of lack of consultation and uncertainty about her future employment with SB, and that she had been looking for other employment.

(14) The claimant continued to work at SB until the 11 October 2017 when, after Mr Saint has opened the shop on that day and delivered some produce, the claimant contacted FW and notified her that she was unwell with a stomach bug and was going home. The claimant remained on the sick thereafter and submitted sick notes. She visited her GP. As from 13 October, the sick notes diagnosed anxiety with depression. She was prescribed additional antidepressants. She had had this condition for some time. The last sicknote was due to expire on 22 November 2017, after the claimant subsequently resigned by letter of 10 November.

(15) On 12 October 2017 the day before the next expected date of completion the second respondent wrote to the first respondent at page 43 in purported compliance with Regulation 13(4) notifying the first respondent of the measures proposed for the claimant's employment. The letter was not copied to the claimant but FW on the next day (page 28) emailed the claimant indicting that completion would not be that day but not at that stage providing any other date confirming that the claimant's employment would transfer to the second respondent and notifying the claimant of their proposals as follows:

> "the business will be subject to organisational changes resulting from our involvement in the day-to-day operation of the business owner/operators and there will be no requirement for employees in the day-to-day operations of the business. Accordingly, the employee will be made redundant on an as yet undetermined date".

(16) Completion eventually took place on 26 October. At this stage the claimant was still on sick. Mrs Saint wrote to the claimant on 31 October indicating an intention to defer discussion concerning the claimant's employment until her return to work (see page 67). On 3 November (see page 68) the claimant's then solicitor wrote to the second respondent complaining at length about their conduct of the transfer process and in particular their conduct towards the claimant. There was a response from the second respondent's solicitors on 9 November (page 69). The claimant's resignation letter dated 10 November is at page 62a and sets out a catalogue of allegations which she claims caused her to resign, allegations which are said to constitute breaches of the implied term of trust and confidence. That concludes a chronology of the main events.

(17) The conclusions I reach are as follows:

(1) It is not now in dispute between the parties that there was a transfer of the business SB in which the claimant was the sole employee on 26 October 2017. I have already stated there are grounds for concluding that there was an earlier transfer on or shortly after the 2 October but it does not make any difference to the outcome of the case. I merely observe that the second respondent had de facto possession of the premises and control of the business and in particular of the employment of the claimant from that date.

(2) The affect of Regulation 4(1) and (2) is that the claimant's employment transferred to the second respondent with all of the liabilities thereunder under the contract of employment. The claimant was entitled to a contract for 41 hours per week at SB at a net rate of pay of £384.62, that is according to the statement of earnings at page 75 of the bundle.

(3) I deal next with the consultation issue the outcome of which is also relevant to outcome of the dismissal issue. As I have already stated the obligations on the transferor and transferee start at stage 1 in Regulation 11(1) with a requirement on the transferor to notify the transferee in writing the details of each employee, in this case the claimant only. Regulation 13(4) requires the transferee to provide to the transferor, details of the proposals the transferee has for the employment of the employee after the transfer if there are to be changes, or if there are to be no changes, ie if the employee's employment is to continue on the same terms, that fact. There is then an obligation on both to notify specific information to the appropriate representatives or in this case the claimant alone, this being a micro business, "long enough before the relevant transfer is to take place to enable consultation to take place." That information is to be supplied in writing. The consultation must be meaningful and the employer must consider any representations made by the employee and reply to those representations giving reasons for any rejection of them.

(18) Although I accept that the first respondent did make the second respondent aware of the existence of the claimant as an employee, it

does not appear that the first respondent formally and fully complied with Regulation 11 by giving all of the required information and in writing although there was partial compliance in document 24 on 6 October 2017. The second respondent's response in writing notifying a proposal to dismiss the claimant as redundant was not sent to the first respondent until October and not passed onto the claimant until 13 October 2017, the date when the transfer was then envisaged to take place.

(19) Although I accept that there was some discussion between the first respondent and the claimant about alternative employment at the first respondent's other business, the claimant was entitled to refuse, having a right to remain at her job at SB on her original terms and conditions. In these circumstances there were serious failures to comply with the regulatory requirements in Regulations 11 – 15 by both respondents. I accept that these are only small employers and in the case of the second respondent employers for the first time who had no prior knowledge of TUPE but TUPE information was provided by the claimant to the first respondent, or at least a warning about ,it at the end of August 2017 and both were subsequently represented by solicitors who appear to have given belated advice which resulted in a botched attempt at the first and second stages of the consultation requirements, which were far too late in the day, less than a week before completion was originally due to take place and three weeks before it did in fact take place. In addition, the second respondent did not come up with any other proposal other than redundancy at any stage before the completion of the transfer and did not participate in the consultation process at all.

(20) I will deal with the appropriate compensation for this default later and after I have dealt with the dismissal issues.

(21) Next, I consider whether the claimant has established that she was constructively dismissed. I do not accept a number of the contentions which she made in her resignation letter of 10 November. I do not accept that the removal of the keys from her to enable Mr Saint to enter the premises while she was on holiday and thereafter in order to prepare for the take over, was conduct without reasonable and proper cause. It was not a term of her contract of employment that she was entitled to the keys and was exclusively entitled to open and close the premises. I do not accept that it was an important part of her job to do so. Mr Saint was entitled as the prospective owner of the business, to decide who he would use as his supplier and to order goods himself. The claimant had only had limited rights to place orders with suppliers chosen by the first respondent. The claimant could not change that without consent. There was some change in the nature of the relationship between the claimant and the first respondent after the notification of the sale in August but I do not accept that the claimant was treated thereafter in such a way as to entitle her to resign or to contribute anything to her decision to resign.

(22) Where I find however, that there was clearly a breach of the implied term lies in the fact that the claimant's rights under TUPE, subject to the respondent showing an ETO reason for dismissal, to transfer on

her existing terms and conditions were put under threat from the outset or at least August 2017 when negotiations had been taking place since June 2017. It is clear from the claimant's communications with the first respondent that she was seeking clarity as to what was to happen to her repeatedly. She was under early threat of "redundancy" without any consultation taking place. I can see nothing wrong in these circumstances in her making approaches to other employers and attending an interview.

(23) The respondents have taken a view that the claimant was being deceptive in failing to disclose that fact and further claim that in some way she then went of sick in order to prevent any consultation taking place. I accept that it was the circumstances of her work with the first respondent which contributed to her sickness absences and the uncertainty entailed with her future employment. She was not unfit to work elsewhere, for example occasionally at Southampton football club.

(24) The consultation should have started much earlier than 11 October which was the official start but in any event, it is clear that the second respondent had no intention of complying with the claimant's rights under Regulation 4(2), the only alternatives to "redundancy" eventually to be proposed were that the claimant should work some extra hours over and above the normal hours of opening which were to be covered by Mr Saint.

(25) The reality of the matter is that the second respondent appears to have been under the impression at the time of the purchase that Mr Saint could take over her job and that she could be offered a lesser alternative job or, in the alternative, be paid a modest "redundancy" payment. In these circumstances while I have not accepted that all of the matters raised by the claimant in her resignation letter justified her in resigning and claiming constructive dismissal, the respondents' settled intention not to permit her to remain in her established job justified her in resigning when she did and she did resign principally for that reason. The second respondent's contention that she resigned only because she had another job to go to three days later does not reflect reality. The claimant acted reasonably and justifiably in seeking alternative employment when it became clear that her future employment with the respondents was under threat. This reason for dismissal was a reason related to the transfer or, to put it another way, the transfer was at least the principal reason for her dismissal.

(26) There remains however, the second respondent's argument that the principal reason was an economic, technical or organisational reason entailing changes in the workforce.

(27) In the TUPE context these expressions are to be construed narrowly, or almost any reason could be dressed up to justify a dismissal after a transfer, which would rob TUPE of the legitimate protection it is designed to give established employees of a business. What is obvious in the present case is that the claimant's role was NOT redundant in the sense that there was no reduction in the requirement of the business for someone to run the Sandwich Box. It was the claimant who was no longer required, not her job, because Mr Saint was going to take over her role. Her role remained. There was in those circumstances no redundancy and in any event the circumstances did not entail a change or reduction in the workforce.

17. Compensation.

The claimant is entitled to a basic and compensatory award for loss of earnings in respect of her dismissal. Having regard to the claimants age and length of service it is not in dispute that the claimant is entitled to a basic award amounting to £1152.68. Section 123 of the employment rights act provides that the compensatory award shall be "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that losses attributable to action taken by the employer". The claimant had employment to go to following her dismissal but at a continuing reduction in earnings of £75.36 per week. That has continued to the date of the hearing of the tribunal case. There are prospects but not immediate prospects for promotion. I am satisfied that the claimant has not failed to mitigate her loss brackets (the burden of showing which lies upon the second respondent). Accordingly the loss to date amounts to £4672.32 loss sustained by the claimant in consequence of the dismissal. There are prospects for promotion or at least higher pay within the near future. Accordingly, by 12 weeks from the date of the hearing, I conclude that the claimants loss will come to an end either because of higher pay or if not, that her continuing loss will not no longer flow from the dismissal. The continuing loss figure amounts to £904.32. To that must be added the sum of £350 for loss of statutory rights. The second respondent argued following this award that it would not be just to award such a high figure because, if the hearing had taken place when it was originally listed in April 2018 and when it had been adjourned postponed by the tribunal for want of judicial resource, the compensatory award would have been far lower. I am sympathetic to the argument, but I am obliged to consider the position at the date of that the hearing actually takes place, not some earlier date. It is entirely speculative how much would have been awarded for future loss of earnings if the hearing had taken place in April 2018. The tribunal is obliged to calculate the loss based upon the information current to the date when the hearing when the hearing actually takes place.
As to the award for failure to consult in advance of the transfer, the tribunal is making an award, not compensating the claimant but punishing the wrongdoer, the intention being to encourage employers to engage in meaningful consultation with a view to mitigating the effect of any transfer upon employees affected. I take into account that these are very small employers and that only one employee was in fact have affected. I also take take into account there was ignorance of the requirements of the regulations and the poor advice which they may have received at a late stage how to comply with them. I regard the blameworthiness and failures as being equivalent and accordingly find that the award should be of four weeks pay for which each respondent will be jointly and severally liable.

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Employment Judge Hargrove

Date: 5 February 2019.