



# THE EMPLOYMENT TRIBUNAL

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**Claimant: Ms J Moon & Others**

**Respondent: KKDC England Ltd (1)  
Secretary of State for Business, Energy & Industrial  
Strategy (2)**

## **REASONS**

(Requested by the Claimants)

1. These are the reasons for the Tribunal's Judgment, sent to the parties on 14 December 2018, rejecting the unlawful deductions and breach of contract claims but upholding the redundancy claims as against the first Respondent (R1) in respect of 3 of the claimant.
2. The claims were for a statutory redundancy payment, notice pay, arrears of pay, holiday pay and other payments. Liability is denied by both Respondents, each contending that the other is potentially liable by virtue of TUPE. There is also an issue as to whether the claims (except the redundancy payment claims) were presented in time.
3. I heard evidence from all 4 Claimants and from Thomas Hall, on behalf of the R1. There was no evidence on the part of second Respondent (R2) who relied on submissions. There were separate bundles on behalf of the Respondents and some additional documents from the Claimants.

### **The Issues**

4. The issues in the case were as follows:
  - a. Were wrongful dismissal claims and unlawful deduction of wages claims presented in time and if not;
  - b. Was it reasonably practicable for them to have been presented in time
  - c. Was there a relevant TUPE transfer of the Claimants to R1.
  - d. Were the Claimants entitled to a statutory redundancy payment

### **Findings of Fact**

5. At the time of dismissal, the claimants were all employed by KKDC Limited, owned by a Thomas Fairhall. On 11 July 2017, KKDC Limited became insolvent within the meaning of section 183(3) Employment Rights Act 1996 and as a result, is not a party to these proceedings. R2 is being sued in its place in respect of certain heads of claim.

6. KKDC Limited was set up to supply products produced by KKDC Pty Limited (KKDC Australia), part of the KKDC Group of Companies. KKDC is a group of companies whose business is the manufacture and sale of lighting and ancillary products.
7. On 28 October 2016, KKDC Limited entered into a distribution agreement with KKDC Australia under which it was given exclusive rights to market, distribute and sell the products of KKDC Australia within the UK, UAE, Middle East and Spain. At the same time, KKDC Limited was granted a licence to use KKDC Global trademarks. The agreement was for a 4-year term.
8. On 12 April 2017, due to dissatisfaction with the sales performance of KKDC Limited and issues with Mr Fairhall's behaviour, KKDC Australia terminated the distribution agreement with immediate effect. The effect of this was that KKDC Limited's licence to use KKDC 's intellectual property also ceased.
9. On 15 May 2017, Mr Fairhall met with the Claimants and informed them of the termination of the agreement with KKDC Global and that as a result, the company could no longer trade. He subsequently, wrote to each of them giving one month's notice of termination by reason of redundancy. The termination dates in respect of Ms Moon (C1), Ms Kendall (C2) and Mrs Das (C3) was 15.6.17 and in respect of Ms Kim (C4) was 25 June 2017.
10. KKDC England Limited (R1) was incorporated on 11 May 2017. Thomas Hall, who gave evidence for R1, told the tribunal that R1 took over the role of distributing lighting to the territories previously covered by KKDC Ltd, as well as other territories [ N2]
11. It is the Claimants' case, agreed also by R2, that they should have transferred to R1 under TUPE.

Were any of the claims out of time?

12. It is common ground that the redundancy payment claim were presented within the 6 month time limit under the Employment Rights Act 1996 (ERA). The time point only relates to the remaining claims.
13. Section 23(2) ERA provides that a tribunal will not consider a complaint about unlawful deduction of wages unless it is presented before the end of the period of 3 months beginning with the date of payment of wages from which the deduction was made, or if not reasonably practicable, within such further period as the tribunal considers reasonable.
14. As there were no actual payments made in this case, time starts to run from the normal pay date, which I was told was the 25<sup>th</sup> of each month. The normal pay date for our purposes would have been 25 June 2017 and time would have run from this date in respect of the unlawful deductions claims (i.e. arrears of pay, holiday pay).
15. In relation to notice pay, which is a claim in contract, there is an equivalent provision at Article 7 of the Extension of Jurisdiction Order 1994. In that case, the 3-month time limit runs from the effective date of termination. In the case of C1, C2 and C3, that was the 15 June 2017 and in respect of the C4; 25 June 2017.

16. On that basis, the latest date for presenting the pay arrears and holiday pay claims was 24 September 2017 in respect of all of the Claimants. The latest date for presenting the wrongful dismissal claim (i.e. notice pay) was 14 September 2017 in respect of C1, C2 and C3 and 24 September 2017 in respect of C4. All of the claims were lodged on 13 October 2017 and so on the face of it are out of time. I have therefore considered whether it was reasonably practicable for the claims to have been presented in time.
17. The evidence of the Claimants was that a single claim was lodged on behalf of all by C1. When Mr Fairhall failed to pay what was due to them, they initially lodged a tribunal claim against KKDC Limited on 29 June 2017. However, due to the liquidation of KKDC Limited shortly afterwards, that claim could not proceed. What that does illustrate is that the Claimants were aware at a very early stage of their potential claim and their right to pursue it through the tribunal.
18. The Claimants then pursued a claim for their redundancy payments and pay arrears through the Insolvency Service. It is clear from the Claimants' joint document sent to the Insolvency Service on or around June 2017 that they were aware of the existence of R1 through 3 of their former colleagues who had been taken on by the KKDC Group. The Claimants told me that their former colleagues had informed them that R1 had been set up to take over the work done by KKDC Ltd. It is also clear from the same document that there was a potential TUPE issue. The Claimants therefore had sufficient knowledge of R1's potential liability to have lodged a claim against R1 at any point from June 2017 onwards.
19. On 30 August 2017, the Insolvency Service informed the claimants that their claim had been rejected on the basis that their employment had transferred to R1 who were now liable to make the payments due. The letter went on to say that if the Claimants were dissatisfied with the decision, they could complain about it to an Employment Tribunal but had to do so within 3 months of the letter. The Claimants say that they took this to be the date from which the 3 months ran for a tribunal claim against R1 as well. However, I am satisfied that the letter is unambiguous in its term and that the reference clearly relates to the Insolvency Services' decision only. In any case, C1 told the tribunal that she had carried out research prior to lodging the original claim in June and was aware of the requirement that the 3 months ran from the EDT (at least in respect of the notice pay claim) If the Claimants were confused about the apparent inconsistency in the information provided by two separate government services (i.e. The Insolvency Service and the Employment Tribunal Service), they could have queried it or indeed taken some independent legal advice. They did not do so.
20. Having asked the Insolvency Service to reconsider its decision and being notified on 4 September 2017 that it would not do so, it should have been apparent to the Claimants at that point, if it was not already, that R1 was another potential avenue of claim. If they had lodged a claim then, they would have still been in time. As we know, the claim was not lodged until 13 October.
21. No adequate explanation has been given for the delay. Although C4 told the tribunal that she had been in hospital with her baby, she had been discharged before 4 September even though her baby was still in hospital. In any event,

C4, C2 and C3 had authorised C1 to act on behalf of the group and they confirmed to the tribunal that everything she did was on behalf of them all. Therefore they are all bound by any acts or omissions done by C1 on their behalf, including late presentation of the claim.

22. Taking all of this into account, I find that it was reasonably practicable to lodge the claims in time and there is therefore no reason to extend time. It follows that the tribunal does not have jurisdiction to hear the claims for arrears of pay, holiday pay, notice pay and – what are described in the claim form as “other claims” and they are accordingly struck out as against R1.

Was there a TUPE transfer to R1

23. Regulation 3 of the TUPE Regulations 2006 (TUPE) provides that there is a transfer under the regulations where an undertaking, business or part of an undertaking or business...transfers to another where there is an economic entity that retains its identity, or where there is a service provision change. For these purposes “economic entity” means “an organised grouping of resources which has the objective of pursuing an economic activity” whether central or ancillary.
24. By virtue of Regulation 4, employees who are (a) employed by the transferor; and (b) assigned to the organised grouping of resources or employees that is the subject of the relevant transfer, go across to the transferee on their existing contractual terms and with uninterrupted continuity of service. The transferee will also inherit other liabilities and obligations connected with the employment of those individuals that transfer. For these purposes, relevant employees of the transferor include those employed immediately before the transfer or who would have been so employed had they not been dismissed in circumstances where the sole or principal reason for the dismissal is the transfer.
25. I am satisfied that the undertaking of KKDC Limited was an economic entity. It is clear that its whole business was to distribute and sell KKDC lighting products. It did nothing else.
26. In considering whether it retained its identity in the hands of R1, I have considered the guidelines in the case of Cheesman and others v R Brewer Contracts Limited [2001] IRLR 144 which both Respondents made submissions on. The factor that I have deemed relevant are set out below:
- a. It was R1’s evidence that it took over the activities previously carried out by KKDC Limited. However, it was submitted on its behalf that there was no TUPE transfer because the activities were discontinued on termination of the distribution agreement and did not re-start until just over a month afterwards. In my view a discontinuance of a month is insufficient to negate the existence of a transfer. It is clear from case law, both at local and European level, that an interruption of the activities does not in itself preclude the existence of a transfer. What is relevant is the reason for the interruption. It is clear from the evidence in this case that the interruption was only ever intended to be temporary and that the clear plan was to resume the activities once R1 was set up, which is what happened. I therefore find that the 1-month cessation in activities is immaterial.

- b. I have considered the degree of similarity between the activities before and afterwards. Again, I rely on the evidence of Mr Hall, who, when asked how R1 did the work differently said that the day to day activities probably didn't change that much. Whilst he also said that the work done by R1 covered a much larger territory, that of itself does not mean that the way that the work was done was materially different.
  - c. There was a significant transfer of assets in the form of the rights associated with the use of the intellectual property of the Global company, in relation to the territories previously covered by KKDC Limited.
27. Taking the above matters in the round, I am satisfied that the undertaking did retain its identity in the hands of R1. Further, I am satisfied that the Claimants were part of an organized grouping of resources that were assigned to the entity transferred and that they were dismissed by reason of the transfer.
28. R1 submitted that the dismissal of the Claimants was not connected to the transfer because it had an ETO reason for the dismissals, namely, that KKDC Ltd was going out of business. However, it is clear from Hynd v Armstrong and others [2007] IRLR 338 that an ETO reason must relate to the future conduct of the transferee's business and must entail changes in its own workforce. The closure of KKDC Ltd cannot therefore be relied upon by R1 as an ETO reason.
29. Taking all of these matters into account, I find that there was a relevant TUPE transfer from KKDC Limited to R1.
30. It follows that by virtue of Regulation 4, R1 inherited the liabilities and obligations of KKDC Ltd, vis-à-vis the Claimants. In those circumstances, there is no liability on the R2 and the claims against R2 are accordingly dismissed.
31. R1 is therefore liable to pay the redundancy payments to C1, C2 and C4. C3 is not entitled to a redundancy payment as she did not have sufficient continuity of service.

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Employment Judge Balogun  
Date: 9 January 2019