



EMPLOYMENT TRIBUNALS

Claimants: 1. Mrs J Leonard
2. Mr D Leonard

Respondents: 1. Mr J Garfin, Ms J German, Mr K Ralph, Mr S Leonard, Mr A Francis, Mr D Finch and Mr C Shaw as the Management Committee of the Leigh Labour Club
2. Graham Anthony Andrews and Tracey Jane Andrews t/a "The Abbey"

Heard at: Manchester

On: 5 and 6 February 2019

Before: Employment Judge Franey
(sitting alone)

REPRESENTATION:

Mrs Leonard: Mr D Tolcher, Solicitor

Mr Leonard: In person

Respondents: **Mr J Garfin** – Mr S Redpath (Counsel)

Ms J German – In person

Mr S Leonard – In person

Mr Ralph, Mr Leonard, Mr Finch and Mr Shaw – neither present nor represented

Mr and Mrs Andrews - Mr J Doyle (Lay Representative)

JUDGMENT

1. The title of the second respondent in these proceedings is amended to Graham Anthony Andrews and Tracey Jane Andrews t/a The Abbey.

2. All complaints in relation to holiday pay and unlawful deduction from pay are dismissed upon withdrawal by the claimants.

3. The complaint of unfair dismissal against the members of the management committee (the first respondent) is dismissed on withdrawal by the claimants.

4. There was a transfer of an undertaking under regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 on 16 April 2018 between the management committee (the first respondent) and Mr and Mrs Andrews (the second respondent), meaning that the contracts of employment of the claimants were transferred to Mr and Mrs Andrews under regulation 4(1). As a consequence, all claims against the management committee are dismissed and those individuals are removed from the proceedings.

5. Both claimants succeed in their complaints of breach of contract in relation to notice pay against the second respondent. Mr and Mrs Andrews are ordered to pay the claimants the following sums as damages for breach of contract:

Mrs Leonard	£2,463.96
-------------	------------------

Mr Leonard	£3,000.24
------------	------------------

6. Both claimants succeed in their complaints seeking a statutory redundancy payment against the second respondent. Mr and Mrs Andrews are ordered to pay the claimants the following as redundancy payments:

Mrs Leonard	£6,308.10
-------------	------------------

Mr Leonard	£8,167.96
------------	------------------

7. The unfair dismissal complaints brought by both claimants against the second respondent are well-founded. The claimants were unfairly dismissed. However, the basic award is extinguished by the statutory redundancy payment, and no compensatory award is made.

8. The recoupment regulations do not apply to these awards.

REASONS

Introduction

1. After almost 100 years of operation, Leigh Labour Club closed in April 2018. The trustees sold the premises at 2 Abbey Street to Mr and Mrs Andrews. The claimants had been employed for many years at stewards at the club. It was clear that they would not be taken on when the premises reopened as a public house ("The Abbey"), and their employment came to an end.
2. By a series of claim forms lodged between 24 May and 5 July 2018 the claimants brought complaints of unfair dismissal, breach of contract in relation to notice pay, a failure to pay holiday pay and unlawful deductions from pay.
3. Response forms lodged by Mr and Mrs Andrews denied that they had ever employed the claimants. Their case was that the transaction was simply the purchase of the premises and its contents, and no other assets, goodwill or staff transferred. Any responsibility for payments lay with the management committee of the Club.
4. As far as the management committee was concerned, initially a response form was filed only by the secretary, Mr Garfin. His response form denied that any money was due to the claimants. The response left it to the Tribunal to decide whether there had been a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), but said that even if there had been an unfair dismissal of the claimants there should be a 100% reduction to compensation because a fair dismissal was inevitable.
5. As a case management hearing before Employment Judge Feeney on 25 September 2018 provision was made for the individual members of the management committee to be named as respondents, and subsequently response forms resisting the complaints were filed by Ms German and Mr S Leonard. No response forms were received from the other members of the management committee.
6. Employment Judge Feeney directed that the case be listed for a final hearing of two days. The first day was concerned with the question of whether there had been a relevant transfer under TUPE, which would determine the identity of the correct respondent. The second day would be concerned with the substantive complaints and, if appropriate, remedy.
7. Mrs Leonard was represented by her solicitor, Mr Tolcher. Mr Leonard was technically representing himself, but he endorsed the submissions made by Mr Tolcher on behalf of his wife. Similarly, Ms German and Mr S Leonard endorsed the submissions made by Mr Redpath on behalf of Mr Garfin. Mr and Mrs Andrews were represented by Mr Doyle.

8. At the start of the hearing Mr Tolcher withdrew the complaints of holiday pay and unlawful deductions from pay and they were dismissed on withdrawal. He also withdrew the unfair dismissal complaint against the management committee.
9. The remainder of these Reasons is in two parts.
10. Part one deals with the first day of the hearing and explains my decision that there was a TUPE transfer. That decision was given in brief oral terms at the end of the day, meaning that the management committee and Mr Redpath were not required to attend the following day.
11. Part two deals with the substantive complaints of unfair dismissal and notice pay brought by the claimants against Mr and Mrs Andrews.

PART 1: TUPE Transfer

Evidence

Documents

12. The parties had agreed a bundle of documents which ran to 223 pages. Any reference in these Reasons to a page number is a reference to the hearing bundle unless otherwise indicated. In addition there were some documents exhibited to Mr Garfin's witness statement which were numbered "R1, R2" etc.
13. At the outset of the hearing the first and second respondents both wanted to add some documents to that bundle. Arrangements were made for those documents to be copied and considered by Mr Tolcher. No-one had any objection to those documents being added and they were inserted into the bundle as pages 224-239.
14. During Mrs Leonard's evidence it became apparent that she had some documents which had not been provided to Mr Tolcher, and during the lunchtime adjournment these documents were obtained and copied. They consisted of P60s and copies of correspondence which already appeared in the bundle.

Witnesses

15. The claimants' oral evidence came from Mrs Leonard. Mr Leonard had prepared a brief statement simply confirming that he agreed with what his wife said, and confirming his dates of employment. It was agreed that there was no point calling him to give oral evidence as he endorsed the answers his wife gave under cross examination.
16. For the first respondent I heard from Mr Garfin, and for the second respondent I heard from Mr Andrews.

17. Each witness confirmed the truth of his or her written statement and then answered questions from the other parties and from the Tribunal.

Relevant Legal Principles

18. The claimants' case was that there had been a relevant transfer under regulation 3(1)(a) of TUPE. The relevant parts of regulation 3 are as follows:

- “(1) These regulations apply to –
 - (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; ...
- (2) 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.
- (6) A relevant transfer –
 - (a) ...
 - (b) may take place whether or not any property is transferred to the transferee by the transferor.”

19. Where there is a relevant transfer, the effect of regulation 4 is that the transfer does not terminate contracts of employment but instead they take effect after the transfer as if originally made between the transferee and the employee. Importantly, regulation 4(3) provides:

“Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1). ...”

20. These provisions seek to implement Council Directive 2001/23/EC, sometimes termed the “Acquired Rights Directive”. That Directive seeks to protect the position of employees in the event of a change of employer. The wording of regulation 3(2) is taken from Article 1(b) of the Directive.

21. The leading case on the definition of an economic entity, and on the question of whether it retains its identity after a transaction, remains the decision of the Employment Appeal Tribunal in **Cheesman & others v R Brewer Contracts Ltd [2001] IRLR 144**. After a review of the European case law and other authorities, the EAT set out in paragraph 10 the principles distilled from the earlier case law as to when there will be an economic entity.

22. In paragraph 11 it identified the principles which apply in deciding whether that economic entity has been transferred in a way which retains its identity. Those passages were as follows:

- “(i) As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed - Vidal paragraph 22 and the case there cited; Spijkers - v- Gebroeders Benedik Abattoir C.V. [1986] ECR 1119 ECJ; Schmidt -v- Spar-und Leihkasse [1994] IRLR 302 ECJ para 17; Sanchez Hidalgo paragraph 21; Allen paragraph 23.**
- (ii) In a labour intensive sector it is to be 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 predecessors to that task. That follows from the fact that in certain labour intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity - Sanchez Hidalgo paragraph 32.**
- (iii) In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation - Vidal paragraph 29; Sanchez Hidalgo paragraph 29; Allen paragraph 26. However, whilst no authority so holds, it may, presumably, not be an error of law to consider "the decisive criterion" in (i) above in isolation; that, surely, is an aspect of its being "decisive", although, as one sees from the "inter alia" in (i) above, "the decisive criterion" is not itself said to depend on a single factor.**
- (iv) Amongst the matters thus falling 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 - Sanchez Hidalgo paragraph 29; Allen paragraph 26.**
- (v) In determining whether or not there has been a transfer, account has to be taken, inter alia, 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 - Vidal paragraph 31; Sanchez Hidalgo paragraph 31; Allen paragraph 28.**
- (vi) Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets - Vidal paragraph 31; Sanchez Hidalgo paragraph 31; Allen paragraph 28.**
- (vii) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer - Allen paragraph 30.**
- (viii) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer - Vidal paragraph 35.**

- (ix) More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor - Sanchez Hidalgo paragraph 30.
- (x) The absence of any contractual link between 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 such direct contractual relationship Sanchez Hidalgo paragraphs 22 and 23.
- (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 - ECM page 1169 e-f.
- (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 of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub-contractor and the start by the successor - Allen paragraphs 32-33.”

23. It follows that the test is “multifactorial”: all relevant factors must be weighed in the balance and no one factor is likely to be determinative. Whether the parties to a transaction intended or believed that TUPE applied is only part of the picture, and the Tribunal is not bound by the labels which the parties attach to their transaction at the time. The fact that there is an interruption in the activity of the business does not prevent there being a transfer: it depends on the length of the interruption, the reasons for it and the nature of the business in question: **Landsorganisationen i Danmark v Ny Molle Kro [1989] ICR 330**.

Relevant Findings of Fact

24. This section of the Reasons set out the relevant facts as I found them to be based on the evidence before me. There are some factual matters addressed in the evidence which it was not necessary for me to record because they were not relevant.

The Club

25. Leigh Labour Club is an unincorporated association which acquired premises on Abbey Street in Leigh by a Deed of Conveyance dated 29 May 1919 (pages 201-208). Membership of the association was open to those paying a subscription, latterly £4 per year. Membership entitled the member to use the club’s licensed premises at Abbey Street. Facilities there included a bar, snooker and pool tables, gambling machines and an upstairs function room. The members elected a management committee from time to time. Mr Garfin was elected to the committee in 1977, and took over as secretary in July 2003. As secretary he oversaw the day-to-day running of the club. He kept the accounts, dealt with wages payments via the external payroll provider, and dealt with cash takings.

The Claimants

26. The club employed a handful of staff.

27. By a Service Agreement from July 1994 (pages 151-157) Mrs Leonard was appointed as Club Stewardess and was assisted by her husband. Their engagement had actually begun in August 1992. In 2015 Mr and Mrs Leonard purchased the house which backed onto the premises which had previously been club property.

28. The club also employed cleaners.

Non-Members

29. Importantly, for some years the club had been open to members of the public. There was no doorman checking membership when people came in. Non members could use not only the bar facilities but also the snooker and pool tables, or attend entertainment such as bingo. The only restriction on patrons who were not members of the club was that they could not represent the club on the darts, snooker or pool teams, and nor could they be elected to the management committee. In all other respects the club was just like any other licensed premises.

2017

30. By late 2017 it was clear that the club was not financially viable and it would have to close. At a special general meeting on 2 November 2017 (minutes page 121) the members voted to accept an offer made by Mr Andrews to purchase the club. Mr Andrews had in the past been a member of the club, although not for a couple of years. His offer was subject to valuation.

January - March 2018

31. Discussions continued into the New Year. Mr Andrews engaged a property lawyer to act for him in the transaction. On 19 February 2018 (page 217) Mr Andrews emailed his solicitor to confirm the state of discussions. His email said:

“I did promise to do my best to run/keep as a club/pub HOWEVER if necessary I would take measures to ensure I do not lose my house/home/property totally at my discretion. Once club is signed all previous writes [sic] to members/staff/committee and any other parties is [sic] null and void. Also redundancy’s [sic] need to be signed prior to completion to state I will pay in full settlement to Mr D Leonard £8850, Mrs J Leonard £8850, Tracey (cleaner) £300, Susan (cleaner) £900. ...”

32. Mr and Mrs Leonard were represented in these discussions by their trade union, the GMB. It was clear to them that their employment would cease once Mr Andrews took over. He intended to run the premises himself (trading jointly with his wife) and had no need of stewards.

33. Following a meeting on 5 March between Mr Bowe of the GMB, Mr and Mrs Leonard and Mr Andrews, Mr Bowe put his calculation of redundancy and notice payments forward to Mr Andrews in an email at page 232. Mr Andrews told his solicitor his thought the calculations were wrong but he did not dispute his liability to pay them. The transaction moved towards completion in mid April.

April 2018

34. On 6 April a notice was posted in the club (page 133) informing members that the club would close after the opening hours on Sunday 8 April 2018.

35. On the morning of Monday 9 April 2018 Mrs Leonard went into the club to supervise the cleaning as usual. The cleaners had already been told by Mr Garfin that they were no longer employed, and the same was conveyed to her.

36. This was subsequently confirmed in writing to Mr and Mrs Leonard by letters dated 9 April 2018, although those letters were actually sent out on 19 April 2018. The letters confirmed that their employment was being terminated with immediate effect because the buyer had refused to purchase the business and would only buy the premises. There was no sale of the business as a going concern. The letters said that each of the claimants would receive a statutory redundancy payment, payment in lieu of notice and payments in respect of accrued but untaken holidays. The letters acknowledged, however, that payment of these amounts would be subject to the club's ability to pay.

37. Mr Andrews' change of heart about the transaction was evident in emails exchanged between his solicitor and the club's solicitor on 10 and 11 April 2018 (pages 227-228). Having made further enquiries about the state of the club's debts he realised that he could not run it profitably and therefore he only wanted to buy the premises and the contents. That was a transaction with the trustees who held title to the property on behalf of the members of the club.

38. A general meeting of members was held on Thursday 12 April 2018. They voted unanimously to accept a revised sale price of £100,000 (page 199). There was also a minute of other resolutions that were passed. It appeared at pages 120 and 225 (although in the latter it was described as an extraordinary general meeting). The resolutions passed were as follows:

- “(1) Due to the financial position of the Club it cannot continue to operate and it be closed and the Club property be sold with vacant possession.**
- (2) Mr and Mrs Andrews' offer to purchase the Club property in the sum of £100,000 be accepted.**
- (3) All outstanding debts and liabilities of the Club shall so far as possible be discharged using the sale proceeds.**
- (4) The Trustees be instructed to enter into a contract for the sale of the property in the sum of £100,000 pursuant to clause 3 and 6 of the Declaration of Trust dated 29 May 1919 to be completed as soon as possible.**
- (5) Upon conclusion of the sale of the premises the Club be wound up and any surplus assets distributed according to the Declaration of Trust and the Club Rules.”**

Completion 16 April 2018

39. The club relinquished its alcohol licence on 12 April 2018. The transaction in relation to the sale of the premises was completed on 16 April 2018.

40. The contract of sale appeared at pages 158-179. It included in it a long list of fixtures and fittings that were also sold as part of that transaction (pages 171-175). They included the furniture and equipment in the office; furniture in the stockroom; shelving units, tables and ladders in the cleaning store; display cabinets and notice boards in the foyer; cabinets, desk and chairs in the office off the foyer; chairs, tables and a television in the lounge; two snooker tables and a dartboard together with chairs and tables in the games room; tills, cabinets and a glass washer from the downstairs bar; an icemaking machine and cellar cooling system from the cellar; substantial numbers of tables and chairs from the meeting room and concert room upstairs, together with an organ, speakers, stage lighting and controls, tills, cabinets and a glass washer from the concert room bar; and a fridge and other equipment from the kitchen.

41. The contract made it clear in clause 5.1 on page 161 that vacant possession of the property was to be given on completion. Mr and Mrs Andrews were buying only the property itself and the “chattels”.

42. The transaction was registered with the Land Registry the same day and title to the premises passed to Mr and Mrs Andrews (pages 180-185).

43. The completion statement provided to the club by its solicitors (page 187) showed that just under £69,000 was owed to Carlsberg to redeem a charge in respect of amounts due for the supply of drinks. Approximately £7,500 went on professional fees. The balance was just over £23,000. Mr Garfin used that to discharge a number of debts on the part of the club (pages R17-R19). There was no money left to pay the claimants the sums mentioned in their dismissal letters.

44. Mr Garfin left on the premises all the club’s accounts and papers. These were retained by Mr and Mrs Andrews but they had no use for them.

After Completion

45. Prior to the sale a booking had been made for an engagement party on 21 April 2018. Although the club closed for a period of about a week after 8 April, it was open again in time for the engagement party. It was rebranded as “The Abbey” and operated as a pub open to members of the public.

46. Mr Andrews found that the fixtures and fittings he had thought he had purchased were not all property of the club: some of them were leased items. That included the hand dryers in the toilets and the pool table. It also included some electrical units. He replaced the pool table after about six weeks. He had to arrange for new bar pumps to be fitted. The electrical voltage devices which helped reduce electricity bills were leased from a company called PEAC, and he carried on paying the lease payments for some time before purchasing the units himself. In the meantime correspondence would come in from creditors of the club seeking payment.

47. One of the bar staff employed at the club on a part-time basis before it closed was Jack Burdon. A letter signed by him appeared in the bundle at page 219. He worked behind the bar when the premises re-opened after the sale. He also acted as the licensee of the premises from 23 April to 3 May 2018 under the supervision of Carol Cornwall, the licensee of a nearby pub, and then acted as licensee in his own right once approved to supervise premises by Wigan Council. This was not a permanent arrangement, and the licence for The Abbey was taken on by someone else after a few weeks or months. Mr Burdon's letter said that he received no payment and was not an employee: the arrangement suited him because he received free food and drinks. He left to become an apprentice joiner in July 2018.

48. There were no significant changes to the interior of the premises after Mr Andrews purchased the property. That was in part due to the financial position. The premises had the same layout with the same facilities available as before the club closed.

49. The club had teams in local darts, snooker and pool leagues. One of those teams moved to a different pub when the club closed, but the other teams carried on using the premises as their base and kept the name "Leigh Labour Club" until the end of the season in May. Mr Andrews knew the team members from his own attendance at the club over many years and did not ask them to leave or change their name mid-season. The teams did change their name or leave for different premises later in 2018.

50. In December 2018 The Abbey honoured a booking made by a customer on 1 April 2018 even though Mr Andrews had no record of the money for that booking having been transferred over when he purchased the premises. Understandably he was keen to keep up the reputation of The Abbey in the local area.

Submissions

51. At the conclusion of the oral evidence each representative summarised the case to help me make my decision.

Claimants' Submission

52. Mr Tolcher had helpfully prepared a written submission on behalf of Mrs Leonard, and Mr Leonard confirmed that he agreed with it. The submission emphasised that the nature of the business was exactly the same after the transaction as before. There were the same facilities open to members of the public. The sports teams continued to operate under the name of the Labour Club. Bookings were honoured. The work which both claimants had done for the club was still required after the transfer even though Mr Andrews largely did it himself. It had been clear that prior to completion he had in mind being responsible for redundancy and notice payments. The fact the club had been closed for a short period before re-opening as The Abbey was not material in the light of European case law. I was invited to find that there had been a relevant transfer.

Management Committee's Submission

53. On behalf of the management committee Mr Redpath made an oral submission to the same effect. Ms German and Mr S Leonard confirmed that they endorsed his comments. He reminded me of the evidence about Mr Andrews' intention to be responsible for termination payments to the claimants, and suggested that the property transaction was only part of the picture. The key point was that after the transfer the business operated as licensed premises in virtually the same way as before. There was no real change. There had clearly been an economic entity which retained its identity after the transaction. The fact that leases in relation to equipment did not transfer was not significant when all the other factors were considered.

Mr and Mrs Andrews' Submission

54. On behalf of Mr and Mrs Andrews Mr Doyle submitted that the transaction was limited to a purchase of property and the contents and could not amount to a relevant transfer under TUPE. He reminded me that the club's licence had been cancelled on 12 April. There was no continuity because the premises were closed. The legal documentation was all consistent with it being a property transaction only, with Mr and Mrs Andrews taking vacant possession. The claimants had been dismissed by the club prior to completion and their employment had never transferred to Mr and Mrs Andrews. He reminded me that the management committee had approved the transaction on two occasions, so it could not be said that it was simply Mr and Mrs Andrews who were trying to present it as a property transaction only. The club had not been a going concern financially and could not have been purchased as one.

Discussion and Conclusions

55. There was no dispute that the club was an economic entity within the meaning of regulation 3(2). That entity consisted of licensed premises with a games room and a function room which was open to members of the public. The subscription income was very limited with subscriptions being at such a low rate, and the vast majority of its income came from bar sales, entertainment and events.

56. The real question in this case was whether that economic entity retained its identity after the transaction.

57. I reminded myself of the **Cheesman** guidelines and that no one factor is likely to be determinative in isolation. The fact that the premises were shut for a period of no more than 12 days (they were closed on 9 April but re-opened at the latest on 21 April) was not in itself a significant factor. It was a short period, and no greater than one might expect, for example, if such premises were to be refurbished.

58. Even so, there were some other factors which supported Mr Doyle's argument that this was not a transfer. The legal documentation was plainly a purchase only of the premises, fixtures and fittings. There was no payment for goodwill. The staff did not transfer. I accepted that Mr Burdon had worked in the business after the transaction but only on a voluntary basis and not as an employee.

59. I also declined to attach any weight to the statements made in February and early March by Mr Andrews about paying termination payments to the claimants. I accepted his explanation that at that stage all options were open and he was considering purchasing the club as a business. He decided against that later on when the true financial position became clear. By mid-April it was in his mind a transaction only in relation to the property.

60. I also recognised that the ownership of the club was structured very differently after the transaction. Previously it had been property held by the trustees on behalf of the management committee of a members' association. After it Mr and Mrs Andrews would own the property as joint traders in a business rebranded as "The Abbey". This added a little to the force of Mr Doyle's argument.

61. I also acknowledged that none of the staff employed by the club on 9 April were employed by Mr and Mrs Andrews when the premises re-opened later than month. However, that in itself does not prevent a transfer having occurred. In this case I concluded that the absence of any transfer of the employees was attributable to the impression of the club and Mr and Mrs Andrews that this was a property transaction only. It reflected the label which the parties to that transaction attached to it. It was a factor therefore of relatively little weight.

62. In contrast there were some factors which pointed strongly towards this having been a transfer. The most significant was that the economic entity after the transaction was almost identical to that which existed before. It remained licensed premises with a games room and a function room which was open to members of the public. The business re-opening on those premises was not a different kind of business.

63. It might have been different had the club only been open to members when it ceased to trade, but it had been open to the public for at least a decade. Mr Andrews candidly acknowledged in cross examination that to an individual patron little would appear to have changed after the transaction save for the name of the premises and the identity of the manager.

64. The fact that the fixtures and fittings needed to run it as licensed premises were also transferred supported the proposition that this was an economic entity retaining its identity.

65. The fact that the club had leased property which did not transfer, and Mr Andrews did not take over those leases, was not a significant matter. He was able to replace leased equipment which was needed to operate as licensed premises. He carried on using the voltage meters which had been leased by the club and eventually purchased them himself from PEAC.

66. It was also significant in my view that bookings made with the club were honoured by The Abbey. That was no doubt a sound business decision, but it showed that there was a degree of continuity there.

67. The fact that the sports teams were allowed to continue until the end of the season using the old name was not a significant factor.

68. Putting all these matters together I was satisfied that the economic entity of licensed premises with a games room and a function room which was open to members of the public retained its identity after this transaction even though the ownership structure had changed and it was rebranded as "The Abbey". The legal transaction concerning property and contents was only part of the overall picture. In my judgment this was a relevant transfer under regulation 3(1)(a) of TUPE.

69. It therefore followed that anything done by the management committee prior to that transfer was treated under regulation 4(2) as done by Mr and Mrs Andrews.

70. All claims against the management committee and the individuals named as part of the first respondent were therefore dismissed. Liability for any well-founded claims lay with Mr and Mrs Andrews.

PART 2: Individual Claims

71. On the morning of the second day of the hearing we engaged in a discussion with the help of Mr Tolcher and Mr Doyle about the claims which were being pursued.

72. Mr Tolcher had already withdrawn the unlawful deductions and holiday pay claims on behalf of both claimants. He had prepared a Schedule of Loss for each claimant setting out the amounts sought in respect of redundancy payment, unfair dismissal and notice pay. I explained the legal framework to Mr Doyle and Mr Andrews and we discussed matters in more detail. The result of that discussion was as follows.

Agreed Matters

73. Firstly, it was agreed that the claims in respect of notice pay must succeed because there was no suggestion that the claimants had been guilty of gross misconduct. They were each entitled to 12 weeks' notice of termination (the statutory minimum). Mr Doyle and Mr Andrews did not challenge the claimants' evidence that they had not found any other work within that 12 week period. Indeed, it was explained that Mrs Leonard had not been able to look for work because of caring responsibilities. Subject to the point about the rates of pay (see below) the awards of 12 weeks' net pay were agreed.

74. Secondly, it was agreed that the calculation of the redundancy payment should show that each claimant had worked for more than 20 years and that Mr and Mrs Leonard were aged 60 and 61 respectively at the date their employment ended. The application of the statutory formula led to a calculation of 29.5 weeks' pay for Mr

Leonard and 30 weeks' pay for Mrs Leonard. The only dispute was in relation to the rate of a week's pay.

75. Thirdly, the claimants did not challenge Mr Doyle's case that the reason for dismissal was an economic, technical or organisational reason entailing changes in the workforce of the transferor within regulation 7(2). This is because Mr Andrews did not need stewards for the club as he was going to undertake those roles himself. It was accepted by the claimants that this was a potentially fair reason for dismissal, being redundancy under regulation 7(3)(b)(i). The business needed fewer employees after the transfer than it did before.

76. Further, it was conceded by Mr Doyle on behalf of Mr and Mrs Andrews that this was an unfair dismissal because there had been no warnings or consultation of the claimants. Although they knew in broad terms that the club was going to be sold, there was an absence of the steps one would expect an employer acting reasonably to take if employees were going to be at risk of redundancy.

77. However, the claimants also accepted that even if the matter had been handled fairly they would have been dismissed at the same time. Accordingly neither of them sought any award for loss of earnings following dismissal, save for those encompassed by the notice pay claim.

78. Those sensible and appropriate concessions on all sides left me with two matters in dispute.

Loss of Statutory Rights

79. The first was the award for loss of statutory rights. The Schedules of Loss claimed £350 for each claimant. This is a sum to represent the fact that it will take an unfairly dismissed claimant two years in a new job to gain unfair dismissal and redundancy protection.

80. In the course of the discussion Mr Tolcher withdrew that claim for Mrs Leonard because she has been forced out of the labour market by personal circumstances. He suggested such an award would still be appropriate for Mr Leonard. Mr Doyle opposed this on the basis that Mr Leonard would have been dismissed at the same time in any event if treated fairly, and therefore has no loss attributable to any unfairness. I agreed with Mr Doyle and declined to make any award for loss of statutory rights to Mr Leonard.

Gross and Net pay

81. The final dispute was about the figures for gross and net pay, Mr Tolcher had prepared schedules showing the figures he had worked out based on payslips for the previous 12 weeks. Mr Doyle and Mr Andrews pointed out that these figures did not tally with the payroll information in the bundle. That payroll information was difficult to understand.

82. A difficulty arose because unfortunately Mr Tolcher had brought the wrong payslips to the hearing. He did not have the payslips for the three months immediately prior to termination.

83. After discussion it was agreed that he would provide copies of the relevant payslips to Mr Doyle by 15 February, and that if Mr Doyle considered that the figures on which the Schedules of Loss were based were inaccurate he could apply on behalf of Mr and Mrs Andrews for reconsideration of this Judgment. If on consideration of the payslips it is apparent that these figures are accurate Mr Doyle and Mr Andrews need take no further action.

Awards

84. Based on that discussion and my determination in relation to loss of statutory rights I made the following awards.

85. Each claimant was entitled to 12 weeks of net pay for a failure to give contractual notice of termination. For Mr Leonard this was $\text{£}250.02 \times 12 = \text{£}3,000.24$. For Mrs Leonard this was $\text{£}205.33 \times 12 = \text{£}2,463.96$.

86. I also awarded each claimant a redundancy payment. For Mr Leonard this was $29.5 \times \text{£}276.88$ making a total of $\text{£}8,167.96$. For Mrs Leonard this was $30 \times \text{£}210.27$ making a total of $\text{£}6,308.10$.

87. In relation to unfair dismissal, although both claimants were unfairly dismissed I made no award. The basic award was extinguished by the statutory redundancy payment in each case. Neither claimant sought any award for loss of earnings. Mrs Leonard withdrew her claim for a payment for loss of statutory rights, and for reasons set out above I declined to make any award in that respect to Mr Leonard. There was therefore no award for unfair dismissal to either claimant.

88. Because there is no award made for ongoing loss of earnings after dismissal the recoupment regulations (which relate to the recoupment of state benefits) do not apply.

Employment Judge Franey

21 February 2019

JUDGMENT AND REASONS SENT TO THE PARTIES ON
27 February 2019

FOR THE TRIBUNAL OFFICE

**Case Nos. 2411094/2018,
2411908/2018, 2411909/2018,
2413270/2018, 2413271/2018,
2413314/2018, 2413315/2018.**

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Case Nos. 2411094/2018,
2411908/2018, 2411909/2018,
2413270/2018, 2413271/2018,
2413314/2018, 2413315/2018.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2411094/2018, 2411908/2018, 2411909/2018,
2413270/2018, 2413271/2018, 2413314/2018,
2413315/2018**

Name of **Mrs J Leonard** v **Graham Anthony**
case(s): **Mr D Leonard** **Andrews and Tracey**
Jane Andrews t/a "The
Abbey"

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **27 February 2019**

"the calculation day" is: **28 February 2019**

"the stipulated rate of interest" is: **8%**

MRS L WHITE
For the Employment Tribunal Office