EMPLOYMENT TRIBUNALS

Claimant: **Mr P Graham**

Respondent: **Calder Wood Joinery Ltd**

Heard at: **Leeds** **On: 13 June 2018**

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

Representation
Claimant: In person
Respondent: Mr D Roberts, Director

JUDGMENT having been sent to the parties on 25 June 2018 and written reasons having been requested by the Respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The issues

1. The Claimant complains of unfair dismissal. The Claimant says that he has continuity of employment from 2 October 2016, whereas the Respondent submits that the Tribunal has no jurisdiction to hear his claim as there was no continuity prior to the Claimant being employed from only 9 January 2017 when the Respondent commenced trading. Whether the Claimant had continuity of service prior to that date will depend on whether there was a relevant transfer pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE'). The Respondent contends that the Claimant was dismissed for a reason relating to capability, whereas the Claimant says that he was told he was being made redundant. The Claimant also contends (as an unauthorised deduction from wages) that his rate of pay had been agreed at £10 per hour, yet on a continuing basis he had only been paid at the rate of £9.21.

The evidence

2. The Tribunal had before it a bundle of documents numbering some 172 pages and a brief supplemental bundle. Prior to commencing the live hearing, it took some time to read into the witness statements exchanged between the parties and relevant documents.

3. The Tribunal heard firstly from Mr Dafyd Roberts, the Respondent's Managing Director, and a machinist, Rodney Makin. The Claimant then gave evidence on his own behalf.

4. Having considered all of the relevant evidence, the Tribunal found the facts as follows.

The facts

5. The Claimant's employment commenced on 2 October 2006 as an apprentice joiner with Todmorden Door and Window Centre. He was thereafter offered a permanent position as a qualified joiner and continued in that role through a number of different incarnations and trading names until he was employed by RJM Ltd ('RJM'), the sole shareholder and director of which was Mr David Roberts. Mr David Roberts was joined in the business by his son Mr Dafyd Roberts. For most of the time and certainly latterly the Claimant worked as the sole joiner within the business.

6. RJM manufactured wooden doors windows and staircases, mainly bespoke products but sometimes made from standardised templates which the business' machines were set up to utilise.

7. The Claimant had been provided with a contract of employment which included a disciplinary procedure which provided for various levels of warning to be given prior to a dismissal for, for instance, sub-standard performance. The procedure provided for a right of appeal.

8. Towards the end of 2016 Mr Dafyd Roberts created a company, the Respondent, anticipating that RJM was in financial trouble and could possibly close. He considered then procuring the machinery and premises to operate as a manufacturing joinery business. He foresaw the possibility of buying the machinery from RJM.

9. By December 2016 the Respondent was in talks with RJM regarding the sale of machinery and was also interested in occupying the mill premises from which the RJM business traded and which were owned personally by Mr David Roberts. An agreement was indeed reached for the sale of

machinery, the transfer of what was admittedly a minimal level of remaining stock/materials and for the Respondent to lease the premises from Mr David Roberts.

10. Mr Dafydd Roberts spoke to the Claimant about his intentions in November/December 2016. The Tribunal accepts that the Claimant was never more formally advised by RJM of its intentions, but he left work on 19 December 2016 on the understanding between himself and Mr Dafydd Roberts that he would attend work on 9 January 2017, after the Christmas break, working for a business known as Calder Wood Joinery. No P45 was issued by RJM and no new contract of employment by the Respondent. The Claimant was paid for the period up to 9 January by RJM.

11. After the Christmas break, the Respondent's business commenced trading with no visible difference to how RJM had operated it business. The Claimant and Mr Dafydd Roberts continued to work in the business. Mr David Roberts also continued to attend and provide services on a regular basis. Mr Makin had commenced an unpaid trial period of work for RJM during December 2016 during which his performance was judged to be satisfactory and he commenced as a paid employee of the Respondent from 9 January 2017.

12. The Respondent carried on a very similar joinery business to that previously carried on by RJM manufacturing wooden doors, windows and staircases. The concentration of work remained on bespoke products often as part of a larger job which involved other joinery businesses. Mr Dafyd Roberts hoped to diversify into the production of more standard products and to receive commissions to carry out entire joinery projects. As at 9 January there was only a small amount of work to be carried out which did, on the balance of probabilities, involve the completion of some RJM work albeit not a huge quantity. RJM did not have any contracts in place with customers on a continuing basis but simply relied on customers returning to it on a job by job basis. Those customers would tend to use a range of joinery businesses to satisfy their needs in the local area. Some of RJM's customers did commence using the Respondent including Sean Sunderland and Nathan Chapman. Prior to the Respondent starting up in business it had already spoken to another customer of RJM, Mr Derek D'Ath, who was concerned about how he would source his joinery needs and there were talks to see if he would give work to the Respondent which did indeed subsequently transpire.

13. The Claimant received a number of disciplinary warnings relating to timekeeping in 2011, 2013 and a final warning dated 19 August 2016. This warning referred to the Claimant's pay having increased but there having been no improvement in the Claimant's timekeeping. It was commented that RJM was unable to sustain "*the lack of production*".

14. Following the Respondent commencing trading, team meetings were held every two months attended by Mr Dafydd Roberts, Mr Makin and the Claimant. Whilst some of the minutes may have been mis-dated, the dates referring to at times non-working days, the Tribunal is satisfied that the meetings did take place and that Mr Roberts took notes of the meetings which were subsequently typed up. All of the meetings in fact illustrate the precarious nature of the business in its current state and Mr Roberts' desire to become associated with high quality products and a reliable service with responsibility and accountability taken from top to bottom within the business. Reference was made to improving productivity and quality checks as well as new product development. Notes of the meeting on 6 March 2017 referred to some limited success with customers who were struggling to find manufacturers since the demise of RJM but that the work from those customers was very bespoke. Finances were said still to be tight. There was a discussion regarding a lack of efficiency in carrying out standard work. The meeting on 8 May 2017 included a reference to *"silly errors/quality issues"* arising frequently which was impacting on customer feedback. A note of 8 July 2017 recorded the need to reduce the backlog of work and again silly errors with customers being unhappy. Notes of the team meeting on 11 September referred to products falling below their high standards which needed to be addressed immediately. It was said that the customer base was still expanding, yet the Respondent's capacity to produce items seem to be decreasing. Mr Roberts had recruited Daniel Roberts into the business to develop business but also to assist with joinery work. Nevertheless, by 11 September lack of productivity was still noted. The Claimant was consistently identified as the relevant person responsible with regard to production and quality.

15. The Claimant was invited to a disciplinary meeting by letter dated 17 October which the Claimant maintains he received only late in the day on 19 October. The meeting was to and indeed did take place on 20 October chaired by Mr Roberts. The Claimant was given the right to be accompanied and chose Mr Makin to accompany him. The meeting involved a discussion of the Claimant's performance including a review of weekly diary sheets and job summary sheets. These were discussed with the Claimant at the meeting and previous conversations were highlighted where productivity had been raised. It was said that performance had been persistently below expectation and was linked with lax timekeeping on the Claimant's part and a lack of regard towards the workplace, professional responsibility and fellow work colleagues. The Claimant was informed that he was being given a first and final warning regarding his poor performance and that there would be a further meeting on 17 November to review performance and to ascertain whether any improvements had been demonstrated. The Claimant was advised that the performance issues were jeopardising the Respondent's business and the issue must be concluded at the next scheduled meeting on 17 November.

16. That meeting took place as expected by the Claimant. It took place towards the end of the working day on 17 November. Mr Makin was busy at the time trying to complete a job. The Tribunal accepted Mr Makin's evidence that he asked the Claimant if he still wanted to attend the meeting and that the Claimant said that that was not necessary.

17. Prior to the meeting, Mr Roberts had reviewed the Claimant's performance in terms of productivity and product quality and thought in fact that the Claimant's performance had deteriorated and that the lack of timely and quality product manufactured was indeed jeopardising the viability of the Respondent's business. Mr Roberts had been through the diary sheets and noted what he viewed as unprofessional comments about failings in the manufacturing process.

18. Mr Roberts explained to the Claimant that the business was in jeopardy and its closure was a possibility. He did not however on balance refer to the business closing and certainly not to the Claimant's employment terminating by reason of redundancy. The business in fact was and did continue. The real issue for Mr Roberts was the Claimant's performance and there is no reason why redundancy would be referred to by him in the context of this potentially creating a further financial liability for the business. The Claimant may have understood that his employment was not unrelated to the precarious future of the business but that was not the reason stated to him for the termination of his employment.

19. The Claimant was told that his employment was being terminated due to the need for a high level of production performance where the Claimant had not shown that he could make sufficient progress to improve his performance. The Claimant's employment was terminated with immediate effect with one week's notice paid in lieu together with an additional ex gratia sum. Mr Roberts had not intended necessarily to terminate the Claimant's employment on 17 November, but having commenced a discussion regarding performance issues felt that the Claimant's attitude indicated an unlikelihood of any future improvement in circumstances where urgent improvement was required.

20. Mr Roberts had considered the ACAS Code of Practice on Disciplinary Procedures and printed out a copy of it. He did not, however, on balance notify the Claimant of any right of appeal. The Claimant is clear that no right was communicated to him verbally and Mr Roberts' recollection was unclear in circumstances where the Claimant's evidence is preferred. Further, the letter of 17 November sent to the Claimant confirming the decision to terminate his employment gives no right of appeal.

21. The Claimant's rate of pay had been increased by RJM to the rate of £10 per hour. Mr Dafyd Roberts wrote a reference to the Claimant stating that to be his rate of pay dated 25 November 2016 albeit he told the Tribunal

that he simply included information provided by the Claimant. The Claimant never received any wage slips whilst with RJM and could not say that in the period to January 2017 his payments had not reflected that enhanced hourly rate. However, whilst employed by the Respondent the Claimant was paid, it is agreed, at the rate of £9.25 per hour. The Claimant did not realise that such rate was being applied as he received payment on a four weekly basis without reference to any hourly rate contained on any payslips provided to him. When a dispute arose as to pay and on a change of accountant the Respondent has produced revised monthly payslips showing the pay received and statutory deductions together with the hours worked and the rate of £9.25 applied.

Applicable law

22. Regulation 3(1) of TUPE states:

"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;"

23. Regulation 3(2) provides:

"(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."

24. Regulation 3(6) provides:

"(6) A relevant transfer –

may be effected by a series of two or more transactions; and

may take place whether or not any property is transferred to the transferee by the transferor."

25. Regulation 4 of TUPE provides for the automatic transfer of contracts of employment of those persons employed by the transferor and assigned to the undertaking. Regulation 4(3) states as follows:

"(3) 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), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions."

26. The decision of the European Court of Justice in the case of **Spijkers v Gebroeders Benedik Abattoir CV [1986] 2 CMLR 296** addressed the decisive criterion for establishing the existence of a transfer as being whether the entity in question retains its identity. The court was of the view that it was necessary to consider whether having regard to all the facts characterising the transaction the business was disposed of as a going concern. The court said that this would be apparent from the fact that the operation is actually being continued or has been taken over by the new employer with the same economic or similar activities. It is clear from that authority that it is necessary to take into account all the factual circumstances including the type of business or undertaking; the transfer or otherwise of tangible assets such as buildings and stock; the value of intangible assets at the date of transfer; whether the majority of staff are taken over by the new employer; the transfer or otherwise of customers; the degree of similarity of activities before and after the transfer; and the duration of any interruption in these activities. However, the ECJ considered that no single factor is decisive and that not all the criteria need to be satisfied in order for the Acquired Rights Directive from which TUPE derived and therefore Regulation 3(1)(a) of TUPE to apply.

27. Helpful guidance was given of how a Tribunal might determine whether or not there has been a transfer in the case of **Cheesman v R Brewer Contracts Ltd [2001] IRLR 144**. There it was stated that the following principles apply:

"(i) 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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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.

(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 subcontractor and the start by the successor."

28. In a claim of unfair dismissal it is for the employer to show the reason for dismissal and that it was a potentially fair reason. One such potentially fair reason for dismissal is a reason related to capability under Section 98(2)(a) of the Employment Rights Act 1996 ("ERA"). This is the reason relied upon by the Respondent.

29. If the Respondent shows a potentially fair reason for dismissal, the Tribunal shall determine whether dismissal was fair or unfair in accordance with Section 98(4) of the ERA, which provides:-

" [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case".

30. Classically in cases where performance is in issue, a Tribunal will determine whether the employer genuinely believed in the employee's lack of capability and whether it had taken steps to effect an improvement in performance, warning the employee of the consequences of him not being able to attain the standards required.

31. The Tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. The Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in these circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached.

32. A dismissal, however, may be unfair if there has been a breach of procedure which the Tribunal considers as sufficient to render the decision to dismiss unreasonable. The Tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

33. If there is such a defect sufficient to render dismissal unfair, the Tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to want degree of likelihood the employee would still have been dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory (but not basic) award. The principle established in the case of Polkey applies widely and indeed beyond purely procedural defects.

34. Having applied the above principles to the facts as found, the Tribunal reaches the conclusions set out below.

Conclusions

35. When the Claimant commenced his employment with the Respondent on 9 January 2017 he did so pursuant to a relevant transfer under TUPE. There was a transfer of an economic entity comprising the business of RJM which retained its identity in the hands of the Respondent. There was a transfer of the machinery used in the RJM business, the premises from which it operated and the small amount of remaining stock. The Respondent carried out from 9 January an identical business to that carried out by RJM albeit there were plans to diversify and produce an increased number of standard products rather than bespoke joinery. It was arranged that RJM's employees would continue to work within the business and indeed the business of the Respondent continued with an identical staffing complement to that within RJM. Whilst there was no formal transfer of customer contracts, RJM did not have any contracts. The Respondent did however work for some of the same customers as RJM and again, in one case, by a pre-arrangement reached with the customer whilst still being serviced by RJM. Whilst the business ceased to operate for a brief period, this was in fact the ordinary Christmas shutdown throughout which indeed the Claimant continued to be paid by RJM. Whether or not there is a relevant transfer is not a matter of choice between the parties but depends upon the facts when applied to the applicable legal test. Applying such test, there was a relevant transfer in this case as at 9 January 2017 pursuant to which the Claimant's contract of employment transferred automatically to the Respondent with no break in continuity.

36. One consequence of this is that the Claimant has the right to bring a claim of unfair dismissal. Turning to the claim of unfair dismissal, the Tribunal is satisfied that the Claimant was dismissed for a reason relating to his capability. There was no other reason for the termination of his employment. The Respondent has produced ample evidence regarding its genuine performance concerns and the Tribunal rejects the suggestion that the Claimant's employment was terminated by reason of redundancy or for any other reason.

37. The Tribunal considers that the Respondent had reasonable grounds for concluding that the Claimant's performance was below the required standard. Again, the management meeting notes reflect very real issues and difficulties regarding productivity and product quality for which the Claimant was primarily responsible. There is evidence that the Claimant, certainly in terms of timekeeping, had shown a lack of the desired level of attitude and application within what was a precarious small business where urgent steps needed to be taken if it was to continue to be viable.

38. The Respondent addressed these concerns with the Claimant less formally through the management meetings but quite clearly and directly ensuring that he was clear as to what was expected of him and the responsibility attached to him in terms of productivity and product quality. The Claimant was given a warning regarding his performance where he was clear that, without an improvement, his employment might be terminated. Whilst this was a first and final warning it had again been preceded by significant discussion at team meetings and it was not unreasonable for the Respondent, given the precarious state of the business, to advance to this stage as at 20 October 2017.

39. The Claimant was given a reasonable opportunity to then show an improvement in circumstances where he was an experienced joiner and was aware of what was expected of him. There is no evidence that the Claimant put forward any particular proposals of his own regarding how an improvement might be effected or any assistance which could be provided to him. The Respondent had been seeking to recruit an additional joiner but had not had an appropriate response to advertisements it had placed.

40. The Claimant was dismissed only after a prearranged final disciplinary meeting where again he knew the issues under discussion and where his perceived performance failings were discussed with him.

41. The dismissal of the Claimant as at 17 November (assuming a fair process) fell within a band of reasonable responses open to a reasonable employer in the Respondent's circumstances. Again, productivity issues were paramount for the Respondent, the production issues jeopardised the continuance of the business and there was no indication that the Claimant would be able to turn performance issues around.

42. The Respondent sought to adopt a fair procedure in terminating the Claimant's employment aware of the ACAS Code. The Claimant was issued with an appropriate warning as already described and such warning and indeed his dismissal took place after a properly convened formal hearing where the Claimant was given the right to be accompanied.

43. The Claimant was not however given any right of appeal. Whilst the Respondent is a small business and would have struggled to identify an individual and certainly a senior manager or officer within the business to hear an appeal, the requirement to give a right of appeal is still a fundamental part of any fair process and small employers are not excused from this requirement within the ACAS Code or otherwise. Indeed, the ACAS Code provides for employees to have the ability to appeal dismissal decisions. This might even have been a further review by Mr Dafyd Roberts. In addition, the Respondent had inherited the Claimant's contract of employment which set out a disciplinary procedure which included a right of appeal. No right was given and the Respondent has not put forward any explanation for why it could not have been. The Tribunal's conclusion is that Mr Roberts did not in fact turn his mind to the issue.

44. The termination of employment can be unfair if a reasonable procedure has not been followed and, in the circumstances, the Tribunal must conclude that the Claimant was treated unreasonably by reason of this breach of procedure such as to render his dismissal unfair.

45. The Claimant's claim of unfair dismissal succeeds.

46. The Tribunal must still however consider whether the Claimant might and with what degree of certainty have been fairly dismissed had a fair procedure been followed. In the circumstances and having heard nothing additional from the Claimant in terms of any representations he might have made at an appeal stage, the Tribunal must conclude that the Claimant would have been fairly dismissed in any event with a 100% degree of certainty. The effect of this is that whilst the Claimant is entitled to a basic award there is no entitlement to any additional compensation for unfair dismissal.

47. The Tribunal turns to the Claimant's complaint in respect of unpaid wages. The effect again of the Transfer Regulations is that the Claimant's contract with RJM transferred to the Respondent such that the Claimant was entitled to be paid at the rate of £10 per hour. This rate is corroborated by the earlier warning referring to an increase and the letter of reference given to the Claimant. The Claimant's contract was not subsequently varied by agreement, nor can the Claimant be said to have impliedly accepted a change in the rate of pay when he was unaware of any change in rate applied to him. It is noted that this is even more so the case given that the Respondent's standard weekly hours of work were slightly less than those which had operated within RJM. The Claimant was therefore due a further amount in respect of the shortfall in his wages in the period from 9 January 2017 to 17 November 2017.

48. The Tribunal has calculated from the wage records that the Claimant worked 1313 hours in April 2017 up to the ending of his employment. His

hours for February and March 2017 for which the Tribunal has no records have been assessed as an average of hours worked of 164 per month and it is likely that the Claimants hours for January (from 9 January) would have been 120 hours. That gives a total of 1761 hours paid at a shortfall of 75p per hour, thus giving a total deduction from wages of £1320.75.

49. The Claimant's basic award is calculated applying a multiplier of 8 to the Claimant's gross weeks pay figure of £380. The Claimant had 11 years of continuous service and was aged 27 years as at the termination of his employment. His entitlement is to the sum of £3,040.

Employment Judge Maidment

3 August 2018