



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

Mr James Coles

AND

Respondents

The Sunday Independent Limited (1)

Mr David Duncan Williams (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter

ON

19 March 2019

EMPLOYMENT JUDGE N J Roper

MEMBERS

Mr I Ley
Mr T Slater

Representation

For the Claimant: In Person
For the First Respondent: Mr D D Williams
For the Second Respondent: In Person

JUDGMENT

The Unanimous Judgment of the Tribunal is as follows:

1. The correct name of the First Respondent is the Sunday Independent Limited and the record is amended accordingly; and
2. The claimant was unfairly dismissed by the First Respondent by reason of a TUPE transfer; and
3. The claimant is entitled to a statutory redundancy payment; and
4. The First Respondent and the Second Respondent failed to consult on the prospective TUPE transfer; and
5. The claimant succeeds in his claims for breach of contract and unlawful deduction from wages as against the First Respondent; and
6. The appropriate remedy is dealt with in the attached Remedy Judgment.

REASONS

1. In this case the claimant Mr James Coles, who was dismissed by reason of redundancy, claims that he has been unfairly dismissed, and also brings claims for entitlement to a

- statutory redundancy payment; for breach of contract in respect of his notice period; for failure to inform and consult in connection with a prospective TUPE transfer; and for breach of contract and for unlawful deduction from wages in respect of unpaid pension payments.
2. This is the judgment for Mr James Coles as lead claimant in 26 combined claims against the same two respondents. The claimant and the 25 other claimants have also brought a claim for a protective award, which is dealt with in a separate judgment of today's date.
 3. The first respondent has recently changed its name from Vibe Marketing Group Limited to the Sunday Independent Limited, and the record is amended accordingly.
 4. This judgment should be read in conjunction with a judgment dated 18 September 2018 following a preliminary hearing which determined that there had been a TUPE transfer from the First Respondent to the Second Respondent and (with the exception of the pension - related claims) that liability for the various claims had passed to the Second Respondent. The detailed findings of fact in that judgment are repeated for the purposes of this judgment.
 5. We have heard from the claimant, and we have heard from Mr Anders Larsson, another of the claimants, on his behalf. We have heard from the Second Respondent Mr David Duncan Williams on his own behalf and on behalf of the First Respondent.
 6. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence and have observed their demeanour in the witness box. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
 7. The claimant commenced employment in November 2009. On 14 July 2017 the First Respondent purchased "Pulman's view" and the "View From" titles from Capital Media Newspapers Limited, which was then in administration. We refer to this newspaper and media business as the View From Business which operated out of Lyme Regis. The controlling interest in the First Respondent at that time was Mr Peter Masters. There were approximately 31 employees in the View From business which transferred under TUPE to the First Respondent at that time. This included this claimant Mr Coles and the other 25 claimants in these combined claims.
 8. On 4 January 2018 the First Respondent closed the Lyme Regis office. All of the employees were told to clear their desks and to leave the building, and the doors were locked. The First Respondent also purported to make all the staff redundant, and issued a letter under the name of View From Newspapers on 4 January 2018 which was headed "Closure of Business". This letter confirmed the closure of the View From Newspapers and the Lyme Regis office. It was a generic letter which was handed to all employees, and it confirmed the termination of each employee's employment by reason of redundancy on one month's notice. It also confirmed that as of the date of that letter the employees were on garden leave and were no longer required to attend work unless specifically requested to do so. It was a generic letter which did not confirm the correct amount notice for each employee, but did confirm that each employee would be given one month's paid notice.
 9. Four members of staff who are also claimants in this combined action were not present in the office on 4 January 2018 (these were Mr A Larsson 1400501/2018; Mr O Alner (1400483/2018); Mrs C Hodges (140 0495 2018) and Miss L Bright (1400485/2018). They only discovered the news of their redundancy through colleagues and social media, although it was clear from the comments and actions of the First Respondent that it was dismissing all of the employees. Mr Alner was at College but saw a copy of another employee's letter; Miss Bright was on maternity leave; Miss Hodges was not at work; and Mr Larsson was on holiday; but they all soon learned of their fate from their colleagues, and by way of a further letter dated 12 January 2018.
 10. Under this subsequent letter dated 12 January 2018 the First Respondent confirmed the redundancies and asked all of the employees to confirm their length of continuous service in order to assist in the calculation of the relevant redundancy payments.
 11. For the record we find that all employees at the View From business were given notice of the termination of their employment on or after 4 January 2018, with the effective date of termination on 5 January 2018.

12. A number of events and transactions then followed, all of which took place on 16 January 2018. In the first place the First Respondent changed its name to View From Newspapers Limited, and Mr Masters sold his entire shareholding in that company (the First Respondent) to the Second Respondent Mr Williams. The entire shareholding was in fact one ordinary share of £1.00. Mr Masters then resigned as a director, and the Second Respondent Mr Williams became the sole director of the First Respondent. The Second Respondent Mr Williams, who now owned and controlled the first respondent, transferred the Intellectual Property in the first respondent to his personal ownership. That is a significant element of the background as to why the Second Respondent was held to have been the transferee under a relevant TUPE transfer as explained in the judgment following the preliminary hearing dated 18 September 2018.
13. The various employees were expecting payments to be made to them on their next payday which was 19 January 2018. They did not receive any payments, and when challenged the Second Respondent confirmed that the First Respondent was unable to pay the various employees. The relevant employees, including all of the 26 claimants, have still not been paid. This includes the period of four days from 1 January to 4 January 2018 before notice was given which the claimant's worked but were not paid.
14. It subsequently became clear that the First Respondent (whilst under the control of Mr Masters) had failed to make appropriate pension payments for the six months from July to December 2017 inclusive in respect of six of the claimants. These six claimants are this claimant Mr Coles (1400481/2018); Miss A Budden (1400487/2018); Mr R Coombe (1400488/2018) Mrs C Denslow (1400491/2018); Mr A Larsson (1400501/2018); and Miss C Welch (1400507/2018). It was contractually agreed between the First Respondent and each of these claimants that the First Respondent would make pension payments amounting to 6% of gross annual salary, which was to consist of 3% of employer contributions, and matching 3% employee contributions. This claimant Mr Coles chose to increase his employee contributions to 7%. The First Respondent failed to pay the 3% employer contributions for the six-month period, and despite deducting 3% (or the case and Mr Coles 7%) for the employee contributions from their salaries for the same period, failed to pass on these sums deducted and/or to make any payment to the pension provider.
15. Having established the above facts, we now apply the law.
16. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").
17. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish"
18. We have considered section 98 (4) of the Act which provides "... the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on 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".
19. The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations") are also relevant.
20. Regulation 7(1) provides that: Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is – (a) the transfer itself; or (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce. The effect of Regulations 7(2) and (3) is that where there is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer, the automatically unfair

- dismissal provisions of regulation 7(1) do not apply, but rather the dismissal is treated as a redundancy dismissal which is potentially fair under section 98 of the 1996 Act.
21. Regulation 13 requires both the transferor and the transferee to consult with employees ahead of a relevant transfer. Regulation 13(2) sets out the information which must be the subject of that consultation. Regulation 16(3) allows appropriate compensation of up to 13 weeks' pay to be ordered following a failure to consult.
 22. The claimants' claims for breach of contract are permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claims were outstanding on the termination of employment.
 23. The claimants also claim in respect of deductions from wages which they allege were not authorised and were therefore unlawful deductions from their wages contrary to section 13 of the Employment Rights Act 1996.
 24. It is clear that Mr Coles and the other claimants were all dismissed by reason of redundancy. That was the reason given for the dismissals at the time, and the reason relied upon by the respondents for the claimants' dismissals. Accordingly, we make a declaration that Mr Coles is entitled to a statutory redundancy payment. Similarly, each of the other claimants will be entitled to a statutory redundancy payment provided that they have sufficient continuity of service of more than two years.
 25. We deal next with the unfair dismissal claims. The letters terminating employment by reason of redundancy were handed to all but four of the claimants. Although the letter was ambiguous as to the exact notice period for each person, it was made clear that the employees were being given notice of one month, even though it also referred vaguely and generically to some longer unspecified period (which would apply to those who had sufficient length of service such that the statutory minimum period would require more than one month's notice). The employees believed that they had been given one month's notice of the termination of their employment. Given the surrounding circumstances of the closure of the office and confirmation that they were to be dismissed, we find that the dismissals took effect on 4 February 2018. This includes the four employees who were not originally handed the letter, but who were made aware of the same information subsequently, whether from the First Respondent, or from their work colleagues.
 26. Although Mr Masters was not present to give evidence as to his exact intentions at the time he had control of the First Respondent, it is clear that all the employees were dismissed very shortly before a relevant TUPE transfer. It seems that Mr Masters was deliberately trying to slim down the business with regard to a prospective sale, and in order to entertain offers for that sale. There has been no suggestion from either respondent that the sole or principal reason for the dismissal was an economic technical or organisation reason entailing changes in the workforce. In any event an economic reason has to be a reason connected with the ongoing conduct the undertaking, and not a desire to make the undertaking more saleable or more attractive to a purchaser.
 27. For these reasons we unanimously conclude that the sole or principal reason for the claimant's dismissal was the relevant TUPE transfer. Accordingly, the dismissal of Mr Coles and the other combined 25 claimants were "automatically" unfair by reason of Regulation 7(1).
 28. In any event, even if there had not been a TUPE transfer, the claims would clearly be unfair under normal principles in accordance with section 98(4) of the Act. There was no warning to the various employees; there was no consultation; there was no selection process; no consideration of reasonable alternative employment; and no appeal process. For these reasons we would have held the claimant's dismissal to have been unfair, and also that of the other claimants, in any event.
 29. In addition, we find that there was a breach of Regulation 13 by both the First Respondent (the transferor) and the Second Respondent (the transferee) because there was no consultation by either respondent, let alone any consultation which included the required information in Regulation 13(2).
 30. To the extent that any claimant had five years' service or more, that claimant would have been entitled to five weeks' notice of termination of employment, up to a maximum of 12 weeks. Similarly, to the extent that the appropriate statutory minimum period of notice is

not given, any such claimant succeeds and the claim for breach of contract in respect of the balance of the notice period over the one-month notice which was given. In the case of this claimant Mr Coles, who commenced employment in November 2009, his contractual notice entitlement was eight weeks. He succeeds in his claim for breach of contract in respect of the balance of four weeks' notice.

31. Finally, we turn to the claims relating to the failure to pay the relevant pension payments. Mr Coles succeeds in his claim for breach of contract in respect of the First Respondent's failure to pay the 3% employer contributions as agreed for the six months from July to December 2017 inclusive.
32. In addition, during the same period, the First Respondent deducted 3% of the claimant's salary by way of employee contributions. These deductions were only authorised by the claimant by way of payments which were to be made to the relevant pension provider, and which were not made as required. They were therefore unauthorised deductions. The claimant also succeeds in his claim against the First Respondent for unlawful deduction from wages in this respect.
33. Finally, each of the claimants succeeds in his or her claim for unlawful deduction from wages in respect of the four days worked but unpaid between 1 and 4 January 2018.
34. The appropriate remedy for Mr Coles is dealt with in the attached Remedy Judgment.
35. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 7 to 14; a concise identification of the relevant law is at paragraphs 16 to 23; how that law has been applied to those findings in order to decide the issues is at paragraphs 24 to 33; and how the amount of the financial award has been calculated is dealt with in the attached Remedy Judgment.

Employment Judge N J Roper
Dated 20 March 2019

Judgment sent to Parties on

27 March 2019

For the Tribunal Office