THE EMPLOYMENT TRIBUNALS

Claimant	***Respondent***
Mr P Welsh	Wickham Developments Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 17th April 2018
EMPLOYMENT JUDGE GARNON (sitting alone)
Appearances
For Claimant: Mr A Crammond of Counsel
For Respondent: no attendance

JUDGMENT

The Judgment of the Tribunal is that the claims of unfair dismissal, breach of contract ,compensation for untaken annual leave and unlawful deduction from wages are well founded and on the reference as to entitlement to a redundancy payment, the claimant is so entitled . I award the following

1. Unfair Dismissal compensation to which the Recoupment Regulations do not apply of £ 1707.77

2. Damages for breach of contract net of tax and National Insurance (NI) of £ 1064.28

3. Compensation for untaken annual leave gross of tax and NI of £748.80

4. A Redundancy payment of £1944

5. I order the respondent to repay to the claimant the unlawful deduction from wages of £749 gross of tax and NI

REASONS

1 The Relevant Law and the Issues

1.1. The claims are unfair dismissal, breach of contract , compensation for untaken annual leave, a reference as to entitlement to a redundancy payment and unlawful deduction from wages . All but the last two depend on the start date on the claimant's period of continuous employment.

1.2. The respondent failed to attend today. It had filed a response to the claim on 21st October 2017 with a contact name of Paula Armstrong asserting the claimant's employment did not commence until 13th March 2017 and ended on 31st May 2017.The claimant says it started on 1st October 2013 and ended on 31st May 2017 though his last day of work was 24th May 2017. The respondent was incorporated on 23rd February 2001 . It entered administration on 27th November 2017 and the administrators have consented to these proceedings continuing. Rule 47 of the Employment Tribunal Rules of Procedure 2013 provides that if a party fails to attend or to be represented at the Hearing, the tribunal may dispose of the proceedings in the absence of that party having first made such enquiry as is practicable to determine the reason for non-attendance and considered such information as is available to it. The respondent 's absence was not unexpected and is due to it being in administration . I have considered everything they have written to the Tribunal.

1.3. Chapter 1 of Part XIV of the Employment Rights Act 1996 (the Act) includes:
Section 210
(1) References in any provision of this Act to a period of continuous employment are (unless provision is expressly made to the contrary) to a period computed in accordance with this Chapter.

(3) In computing an employee's period of continuous employment for the purposes of any provision of this Act, … where it is necessary to compute the length of an employee's period of employment it shall be computed in months and years of twelve months in accordance with section 211.

(5) A person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

Section 211
(1) An employee's period of continuous employment for the purposes of any provision of this Act—

(a) .. begins with the day on which the employee starts work, and

(b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.

Section 212

(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.

Section 218

(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.

(2) If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another—

(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and

(b) the transfer does not break the continuity of the period of employment.

(6) If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer—

(a) the employee's period of employment at that time counts as a period of employment with the second employer, and

(b) the change of employer does not break the continuity of the period of employment.

1.4 Section 231 of the Act says

For the purposes of this Act any two employers shall be treated as associated if—

(a) one is a company of which the other (directly or indirectly) has control, or

(b) both are companies of which a third person (directly or indirectly) has control;

and "associated employer" shall be construed accordingly.

1.5. If one employer ceases to carry on business but another takes it over, the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) may also apply . They, so far as relevant, say

3 (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.

4 (1) …. a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources ….. that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

1.6. Case law governs whether or not there is a transfer of an economic entity which retains its identity. The leading case in European Law is Spijkers –v- Gebroeders Benedik Abattoir and in the United Kingdom building on Spijkers is Cheeseman –v Brewer. One has to look at all the circumstances including the following criteria

(1) Whether the type of business remains the same
(2) Whether there is a significant transfer of tangible or intangible assets
(3) Whether the majority of staff are taken on
(4) Whether customers transfer
(5) Whether there is a similar activity before and after the transfer
(6) Whether any interruption of the activities is of short or planned duration.

1.7. A limited liability company is an association of one or more persons registered at Companies House. It is a legal **person** in its own right. The people who manage it are called Directors. The people who "own" it are called shareholders. Neither the Directors nor the shareholders are personally responsible for the debts of a

company. This fundamental principle established in a case called Salomon –v-Salomon Ltd is often called "the veil of incorporation" It also means a change of directors and/or shareholders does not constitute a change of employer.

1.8 . Secton 98 of the Act provides:
"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair it is for the employer to show –
(a) the reason (or if more than one the principal reason) for dismissal
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it is… that the employee is redundant."

1.9. Redundancy is defined in s 139 which says dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to, among other things, the fact the requirements of a business for employees to carry out work of a particular kind , generally or in a particular place , have ceased or diminished or are expected to cease or diminish permanently or temporarily and for whatever reason . The "for whatever reason" part comes from s 139(6) and means we must not call upon an employer to justify objectively its commercial decision to respond to its declining financial performance by reducing the number of employees. Safeway Stores –v-Burrell, affirmed by the House of Lords in Murray-v-Foyle Meats fully explains how, if there was (a) a dismissal and (b) a " redundancy situation" (shorthand for one of the sets of facts in s 139) the only remaining question is whether (b) was the principal reason for the happening of (a). Section 135 of the Act says an employer shall pay a redundancy payment to any employee of his if the employee is dismissed by reason of redundancy. The amount is 1.5 week's pay for every year of continuous employment during the whole of which the claimant was over the age of 41.

1.10. Section 98(4) of the Act says:

"Where an 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 on whether in all 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
(b) shall be determined in accordance with equity and the substantial merits of the case."

1.11. In Langston –v- Cranfield University the EAT said we must look at all ways in which a dismissal by reason of redundancy may be unfair . They are (a) inadequate warning (b) inadequate consultation (c) unfair selection and (d) insufficient effort to find alternatives. In Polkey -v-AE Dayton , Lord Bridge said an employer having prima facie grounds to dismiss for redundancy will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as "procedural," which are necessary to justify that course of action. In the case of

redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected, adopts a fair basis on which to select for redundancy arid takes such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps the one question the tribunal is not permitted to ask in applying the test of reasonableness is the hypothetical question whether it would have made any difference to the outcome But the likely effect of taking the appropriate procedural steps should be considered , at the stage of assessing compensation and if the tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment.

1.12. The common law provides a contract of employment may be brought to an end by reasonable notice. Unless the employee is guilty of gross misconduct, dismissal without such notice is termed ”wrongful”. Damages for wrongful dismissal are the pay, net of tax and NI, due to the employee during the notice period (see Addis v The Gramophone Company). The statutory minimum period of notice is set out in Section 86 of Act 1996 and in this case is 3 weeks . The right to damages is subject to the common law duty to mitigate loss and all sums earned during the notice periods must be credited to the respondent.

1.13. Moving to unlawful deduction from wages, the law is set out in Part 2 of Act. Section 13, as far as relevant , says:

(1) An employer shall not make a deduction from wages of a worker employed by him....

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.

Section 23 says

(1) A worker may present a complaint to an employment tribunal—

(a) that his employer has made a deduction from his wages in contravention of section 13

Section 24 says

(1) Where a tribunal finds a complaint under section 23 well-founded, it shall make a declaration to that effect and shall order the employer—

(a) in the case of a complaint under section 23(1)(a), to pay to the worker the amount of any deduction made in contravention of section 13,

1.14. The Working Time Regulations 1998 say in Regulation 14 that where a worker's employment is terminated during the course of his leave year, and on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired. his employer shall

make him a payment in lieu of leave in accordance with paragraph (3) which says. the payment shall be -

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula -

(A × B) - C

where -
A is the period of leave to which the worker is entitled under regulation 13(1);
B is the proportion of the worker's leave year which expired before the termination date, and
C is the period of leave taken by the worker between the start of the leave year and the termination date.
A "leave year may be specified in a "relevant agreement " .

1.15 The issues , put briefly, are:
(a) What was the start date of the claimant's continuous employment?
(b) Was dismissal by reason of redundancy? If so to what redundancy payment is the claimant entitled?
(c) Was dismissal fair applying the test in s98(4)?
(d) What , if any untaken entitlement to annual leave did he have ?
(e) Has the respondent made unlawful deductions from his wages?
(f) What , if any, payments is entitled to by reason of not having been given sufficient notice?

2 Findings of Fact and Conclusions

2.1. The claimant was born on 28th February 1964 and employed by Canterhall Builders Ltd (Canterhall) from 1st October 2013 . His job title was " groundworker". Canterhall was controlled by Mr John Armstrong. Although the claimant does not know for sure whether he was a statutory Director, a director defined in the Companies Act as a person in accordance with whose instructions a company is accustomed to act . Paula Armstrong is his wife.

2.2. Canterhall went into compulsory liquidation on 23rd May 2016, a winding up petition having been presented on 4th March 2016. The winding up concluded on 29th August 2017 and Canterhall was dissolved on 8th December 2017.

2.3. NB Building Contractors Ltd (NB) was incorporated on 25th January 2016 . Mr John Armstrong was in charge. The claimant was made aware of a change of employer from Canterhall to NB on 4th April 2016. NB entered creditors voluntary liquidation on 1st March 2017.

2.4. The respondent (Wickham) was incorporated on 23rd February 2001. In late 2016 or early 2017 the claimant became aware his employer changed from NB to Wickham . However he and other employees did the same jobs, from the same depot, using the same equipment (vehicles and tools), for the same customers (the claimant recalls a regular customer named Mr Dhillon) and under the management of the same people, Mr John Armstrong and a manager named Scott Proud, without any significant interruption of the work they were doing . The dates tie in with the

business being transferred to a new corporate owner just before the financial collapse, first of Canterhall and then of NB.

2.5. The manuscript response form contains " *As per company payroll start was as above (13 March 2017) . In 2013 there were no employees in this company and the company was run by another director, Mr Dent who is now deceased"* The fact Wickham was not managed or owned by the same people in 2013 is irrelevant, if ,in 2017, when the claimant entered its employment having until then worked for NB, the business remained the same, and I am satisfied it did .

2.6. Applying section sections 218 (6) and 231 the directors of Canterhall, NB and Wickham were on balance of probability the same so all were associated companies.

2.7. Applying section 218 (2) the trade or business, or undertaking was transferred from one company to another.

2.8. Applying TUPE the type of business remained the same , there was a significant transfer of tangible and intangible assets, the majority of staff were taken on, customers transferred , there was a similar activity before and after the transfer and any interruption of the activities was of short or planned duration.

2.9. Whichever test is applied, on a balance of probability, the claimant's continuous employment stared on 1st October 2013. The response form agrees his pay was £1872 gross £1537 net per month. This is £432 per week gross. Mr Crammond had checked the payslips and fairly pointed out the weekly net was £ 354.76.

2.10. The response form said the claimant was given notice verbally on 12th May to expire 31st May but his last day of work was "agreed " as 24th May. He says he was first told his employment was to end on 23rd May by a letter from Mr Armstrong the reason being the company " must make savings" which led to redundancy. I accept the claimant's version. He last worked on 24th May and was not paid for any part of his notice period. He started new employment on 26th June 2017 earning £33.25 net per week less

2.11 The response form accepts he is owed £749 in wages . This consists of an accumulation of underpayments over the last 6-8 weeks of his employment .

2.12. The leave year was specified in a relevant agreement as the calendar year. In 2017 up to termination the claimant had taken all three Bank Holiday days only. The daily rate of holiday pay is £86.40 x 3 = £259.20 . He had worked 5 of the twelve months of the year for which his holiday pay entitlement would have been £1008 . Subtracting the £259.20 leaves £748.80.

2.13. His redundancy payment is 4.5 weeks gross = £1944.

2.14. The pay due in his notice period , net of tax, would have been £ £ 1064.28.

2.15. Applying s 98(4) the dismissal was unfair. The reason was redundancy but there was no warning or consultation , no selection as between himself and another employee dismissed at that time on the one hand and, on the other hand,

two other groundworkers who remained. There was no effort to find alternatives such as re-deploying him to a labourer role. The claimant is convinced he and his colleague were chosen because they were on higher pay. The workers who were retained appear to have worked on until the company entered administration.

2.16. There are two elements to compensation: the basic award an arithmetic calculation set out in s 122 which is " cancelled out" by the redundancy payment , and the compensatory award explained in s 123 which as far as relevant says:
(1) *… the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

2.17. Paragraph 54 of the Judgment of the EAT in Software 2000 Limited v Andrews 2007 ICR 825, is an excellent summary of the law if updated to take into account legislative changes .It includes " *The evidence from the employer may be so unreliable that the exercise of seeking to reconstruct what might have been is too uncertain to make any prediction, though the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence*".I have no evidence upon which to decide the employment would not have continued to the date of administration had a fair procedure been followed . The breach of contract damages cover the claimant's loss up to 13 June. He then had two weeks of total loss at £354.76 (£ 709.52) and 21 weeks earning £33.25 per week less (£698.25). He claimed no benefits at any time. I also award £300 for loss of statutory rights . The total is £1707.77..

T M Garnon EMPLOYMENT JUDGE

SIGNED BY EMPLOYMENT JUDGE ON 17th APRIL 2018