Case No: 2500220/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr N M Gobie

Respondent: Ms Zhi Fang Xu t/a Chow Kee Chinese Takeaway

Heard at: Middlesbrough **on: 7 & 8 August 2018**

Before: Employment Judge A.M.S. Green
Mrs P Wright
Mr M Brain

Representation
Claimant: In person
Respondent: In person

JUDGMENT

The unanimous decision of the Tribunal is that the claimant's contract of employment being tainted by illegality, his claims of

(1) automatic unfair dismissal pursuant to Transfer of Undertakings (Protection of Employment) Regulations 2006, regulation 7(1);
(2) unfair dismissal pursuant to sections 94/98 of the Employment Rights Act 1996;
(3) failure to provide a statement of particulars of employment under section 1 of Employment Rights Act 1996 and section 38 of Employment Act 2002;
(4) failure to pay outstanding holiday pay pursuant to regulation 13 of the Working Time Regulations;
(5) breach of contract for non-payment of notice and holiday pay;

are dismissed.

The claimant's claim for failure to inform and consult under Transfer of Undertakings (Protection of Employment) Regulations 2006, regulation 13 is dismissed.

REASONS

1. By a claim form presented on 10 February 2018, following a period of early conciliation from 29 January to 29 January 2018, the claimant brought

complaints of:

a. automatic unfair dismissal pursuant to Transfer of Undertakings (Protection of Employment) Regulations 2006, regulation 7(1) ("TUPE");

b. unfair dismissal pursuant to section 94/98 of the Employment Rights Act 1996;

c. failure to provide a statement of particulars of employment under section 1 of Employment Rights Act 1996 and section 38 of Employment Act 2002;

d. failure to pay outstanding holiday pay pursuant to regulation 13 of the Working Time Regulations;

e. breach of contract for non-payment of notice and holiday pay; and

f. failure to inform and consult under TUPE, regulation 13

2. The claimant worked as a delivery driver for the respondent. His claims arose from his employment at the respondent's fast food takeaway where he stated on his claim form that he had worked from 28 May 2008 until 2 January 2017. He claimed that he had originally been employed by Mr Chow until he sold the business to the respondent. He claimed that his employment was automatically transferred to the respondent under Transfer of Undertakings (Protection of Employment) Regulations 2006 with effect from 31 October 2017 although his first day working for the respondent was 3 November 2017. He was dismissed without notice on 2 January 2018. He claimed that his last day at work was 31 December 2017.

3. During the hearing the respondent raised a claim of illegality on the part of the claimant regarding his request to change his working hours. She alleged that he asked her to give the impression that his hours had been reduced from 24 to 12 per week so that he could maximize his entitlement of Universal Credit. Under this arrangement he would continue to work 24 hours per week. His payslip would state he worked 12 hours per week. However, he would be paid for the "excess" 12 hours without this being recorded in the respondent's books. Furthermore, the respondent would not account to HMRC for the "excess" 12 hours that the claimant worked. Having heard from the respondent on this, we gave the claimant the opportunity to answer the respondent's allegation of illegality before reaching our decision.

4. The respondent, the claimant and Gary Cooper adopted their witness statements and gave evidence at the hearing. The respondent gave her evidence through an interpreter; the language was Mandarin. The parties made closing submissions.

5. The claimant must establish his claims on a balance of probabilities. The respondent must prove her claim of illegality on a balance of probabilities. She must establish that she and the claimant had either made a contract with the object of defrauding the Department of Work and Pensions and/or HMRC or that they performed it in a manner that led to a fraud on themIn

reaching our decision we have considered the oral and documentary evidence and our records of proceedings.

6. In summary, we noted the following evidence:

    a. The respondent believed that she had agreed with Mr Chow that none of the employees would transfer when she took over the business. He would dismiss all the employees for redundancy. The claimant would then start his employment with the respondent afresh. In fact, she admitted that she would never have purchased the business if any of the employees had automatically transferred to her under TUPE.

    b. She said that the claimant worked as a delivery driver with Mr Cooper. Mr Cooper worked on Monday and Wednesdays. The claimant worked Thursday-Sunday inclusive. This arrangement never changed. This was disputed by the claimant (see below).

    c. The respondent expected the claimant to come to work on 1 January 2018. Instead, he was working as a steward at Hartlepool United Football Club. Although she knew about this arrangement she understood that the claimant had agreed to come to work on 1 January 2018. He did not come to work, and she spoke to the claimant on the telephone late in the afternoon of 1 January 2018 and he indicated that he was not coming to work because he did not normally work on a Monday. We noted that he said in his witness statement that he told her during that conversation that his usual hours of work were Thursday-Sunday inclusive.

    d. The respondent dismissed the claimant with immediate effect and relied upon conduct as the reason for dismissal. She had lost trust in him and believed that he and/or Mr Cooper had lied to her about who was supposed to be working and when.

    e. During his evidence, the claimant stated that he was originally contracted to work 24 hours per week. However, this arrangement changed with effect from 8 December 2017. He was clear that it was the respondent who instigated this. She had told him that she needed to reduce his hours to 12 hours per week. This meant that he would only work on Thursday and Friday evenings. When we asked him who worked Saturday and Sundays he was unable to answer that question.

    f. In her evidence, the respondent gave a completely different account. She said that the claimant had asked her to reduce his hours because he would be able to receive the maximum benefit under Universal Credit. In reality, his hours did not change; she agreed to pay him for 12 hours work with effect from 8 December 2017 and he would receive a payslip reflecting this and he was paid cash in hand. However, he would continue to work a further 12 hours, ostensibly as a self-employed person, according to the same shift pattern and would be paid cash in hand for that work as well. The only difference

was that she did not put this through the books of the business. She did not declare the income. He continued to work 24 hours per week, Thursday to Sunday inclusive.

g. In response to this, the claimant said that it was true that in the first week of December 2017 he worked from Thursday to Saturday inclusive. This arrangement changed. He denied that he instigated the change as suggested by the respondent.

h. Regarding his claim that he had not been informed or consulted relating to the transfer of the business, we noted that there was no dispute that there had been a relevant transfer under TUPE when the respondent took over the business on 31 October 2017. Indeed, the respondent told us that she had been advised by a Chinese lawyer on the sale and purchase agreement which contained specific provisions regarding TUPE. In his evidence, the claimant stated that Mr Chow told him on 31 October 2017 that he was selling the business to the respondent. He said that the effect of the sale was that all the employees would be made redundant except for the claimant, whose employment would transfer to the respondent. The only change would be his start and finish times. He would continue to work 24 hours per week, Thursday to Sunday. There was no evidence that Mr Chow or the respondent discussed this proposed change with a view to seeking the claimant's agreement either before or after the transfer of the business. We also understood from the respondent's evidence that the business employed less than 10 employees at all material times.

7. In considering the law, we are reminded that if a contract is tainted with illegality, in one form or another, it may not be possible to enforce some or all the rights which would otherwise be available. There are three situations where illegality may arise:

   a. The employment was directly prohibited by legislation.

   b. If the purpose of object of the contract involves criminality or immorality it will be unenforceable as being contrary to public policy. Such contracts may not be enforceable if the activities do not form a term of the contract.

   c. There is Illegality in performance. This arises where the contract is legal on the face of it but in some way, the performance is illegal. Most commonly, in an employment situation, this may involve some kind of tax fraud.

8. Two conditions must be satisfied when considering if a party will be prevented from enforcing a contract which is performed illegally:

   a. The party must, in some way know of the illegality; and

   b. Must also participate in the illegality.

9. We are reminded that in **Hall v Woolston Hall Leisure Ltd 2001 ICR 99** Gibson LJ said at paragraph 38:

In cases where the contract of employment is neither entered into for an illegal purpose nor prohibited by statute, the illegal performance of the contract will not render the contract unenforceable unless in addition to knowledge of the facts which make the performance illegal the employee actively participates in the illegal performance. It is a question of fact in each case whether there has been a sufficient degree of participation by the employee.

10. In **Newland v Simons & Willer (Hairdressers) Ltd [1981 IRLR 359** the employee had claimed unfair dismissal in circumstances where the Tribunal had held that the employee knew or ought to have known that her employer had failed to pay tax and National Insurance contributions in respect of her wages. The EAT held that where both the employer and the employee knowingly commit illegality by way of a fraud on the Revenue in the payment and receipt of employee's remuneration under a contract of employment, the contract was turned into one prohibited by statute or common law and the employee was precluded from enforcing any employment rights which she might otherwise have against the employer. The essential question was whether the employee had knowingly been a party to a deception on the Revenue.

11. We believe that there was illegality by performance in this case. Although the contract of employment between the claimant and the respondent was legal on the face of it, the illegality arose because both parties participated in an arrangement to defraud the Department of Work and Pensions in respect of the claimant's entitlement to Universal Credit. We have reached this conclusion for the following reasons:

    a. In her evidence the respondent admitted that the claimant proposed the change in hours and payment specifically because of his benefits claim. She always paid the claimant in cash for 24 hours but gave the false impression that he was being paid for 12 hours. The claimant instigated this arrangement and she agreed to participate in it. She admitted that the remaining 12 hours per week were not accounted for in her books and we can reasonably conclude that HMRC were not notified of payments made to the claimant for those 12 hours. In her evidence the respondent was clear that the claimant's actual working hours did not change. He continued to work 24 hours per week.

    b. The claimant was questioned about what the respondent had said, and he admitted that it was true that in the first week of December 2017 he had worked 24 as per week from Thursday to Sunday inclusive. He said that his hours were reduced so that he only worked on Friday and Saturday. He did not know who took over the delivery driving on Saturdays and Sundays. Furthermore, we noted that paragraph 8 of the claimant's witness statement contradicts his oral evidence because he states that when the respondent called him on 1 January 2018 to ask why he had not come to work he said, "I explained that I only work Thursday, Friday, Saturday, Sunday". We believe that this contradiction fundamentally undermines the claimant's credibility and we prefer the respondent's evidence concerning the arrangements that were put into place with effect from

8 December 2017 concerning his working hours, his remuneration and what was recorded in the respondent's books. We believe that the claimant continued to work for 24 hours per week and not 12 hours per week as he claimed. We believe that the purpose of this arrangement was to understate the level of the claimant's earnings for the purposes of maximizing his claim for Universal Credit and the respondent knowingly participated in this arrangement. We also believe that the respondent knowingly understated the claimant's earnings by not putting the excess 12 hours that he worked, ostensibly as a self-employed person, through the books. The effect of this would be to understate any PAYE and National Insurance payable to HMRC.

c. We have considered whether any part of the claimant's contract is severable from the illegal portion and, thus, enforceable. The guiding principle here is public policy: a tribunal will only sever the illegality from the contract where public policy allows it to do so. We have regarded the employment contract as one whole contract and we believe that the illegality infected the entire arrangement between the claimant and the respondent. We believe that public policy has meant that we should take a stern approach to severance in tax evasion and benefits fraud cases.

12. Because the claimant's contract of employment was tainted by this illegality, his claims arising from his contract of employment (which includes his automatic and ordinary unfair dismissal, notice pay, holiday pay and failure to provide written particulars of employment are unenforceable and are, therefore, dismissed.

13. Turning to the claimant's claim for failure to inform and consult under TUPE, regulation 13 we regard that this as a free-standing statutory right which is not contractual in nature and not tainted by the illegality we have identified above. We are reminded that the duty to inform (and consult) is as follows:

    a. The fact that the transfer is to take place, the date or the proposed date of the transfer;

    b. The legal, economic and social implications of the transfer for any affected employees;

    c. The measures which he envisages he will, in connection with the transfer take in relation to any affected employees, or, if he envisages that no measures will be so taken, that fact; and

    d. If the employer in question is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4, or if he envisages that no measures will be taken that fact.

14. The duty to inform (and consult) is owed to appropriate representatives. However, where the employer is a micro business (i.e. one with less than 10 employees) the duty is directly owed to affected employees. This is the case with the claimant as he worked for a micro business. There is no time

limit within which the information must be provided. However, it must be provided in good time.

15. Having considered the evidence, we are satisfied that the claimant was informed of the fact of the transfer and when it was taking place. We are also satisfied that he was informed of the legal, economic and social implications of the transfer. He was the only employee transferring and he would do so on his existing terms and conditions. He was told that there would be measures on transferring – his start and finish times would be changing. Because measures were envisaged, the duty to consult was triggered under regulation 13(6). The law suggests that the respondent was not required to consult with the claimant prior to the transfer. This was incumbent on Mr Chow, the transferor employer. He failed to discharge his duty. We also do not believe that the respondent was required to consult with the claimant on the proposed measures after the transfer. In this regard we are guided by the decision in **UCATT v Amicus and others UKEATS/0007/08 and 0014/08**. Declining to refer the matter to the ECJ, the EAT held that the 2001 Acquired Rights Directive clearly intends transfer-related consultation obligations to cease on the date of the transfer. Further, it was clear that TUPE reflects this intention.

16. If Mr Chow had been a party to these proceedings, the Tribunal could have found him liable for his failure to inform and consult and order him to pay compensation. However, he is not a party and we can make no such declaration or make such an award. The claim against the respondent is dismissed.

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Employment Judge Green

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Date 16 August 2018