

Case No: 1811232/2018
1811242/2018 & 1811575/2018
1811396/2018
1800280/2019
1811232/2018



EMPLOYMENT TRIBUNALS

Claimants

1. Mrs T White
2. Miss J Weaver
3. Mr D Wilkinson
4. Miss J Holmes

v

Respondents

1. The Animal Ark Pet Store Ltd (in creditors' voluntary liquidation)
2. The Secretary of State for Business Energy and Industrial Strategy
3. Paw Prints Pet Supplies Ltd

Heard at: Sheffield

On: 16 April 2019

Before: Employment Judge Brain

Representation:

- | | |
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| 1 st Claimant: | Mr I Clay, Solicitor |
| 2 nd Claimant: | In person |
| 3 rd Claimant: | In Person |
| 4 th Claimant | In person |
| 1 st Respondent: | No attendance or representation – appearance not entered |
| 2 nd Respondent: | Mr J Hunter, Lay representative |
| 3 rd Respondent: | Mr I Clay, Solicitor |

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

REASONS

1. These reasons are supplied at the request of the solicitor acting for the first claimant and third respondent.
2. This preliminary hearing was listed in order to decide whether there was a transfer of the undertaking being carried out by the first respondent to the third respondent.
3. Mr Clay acted upon behalf of the first claimant and third respondent. The other three claimants were unrepresented. There was no attendance or representation by or on behalf of the first respondent. Mr Hunter appeared on behalf of the Secretary of State for Business, Energy and Industrial Strategy.
4. The claimants worked for the first respondent which operated from premises at 86 High Street, Maltby, Rotherham as a pet store and purveyor of sundry other items as set out in paragraph 19 below.
5. The first respondent went into liquidation. A liquidator was appointed on 30 August 2018. The liquidator was appointed following a creditors' meeting. Thus, the first respondent is in creditors' voluntary liquidation.
6. The claimants presented claims against the first respondent and the second respondent for redundancy pay, unpaid holiday pay, unpaid wages and unpaid notice.
7. The case benefited from a case management preliminary hearing which came before Employment Judge Little on 16 January 2019. He observed that the second respondent had declined to satisfy the claims being made against the first respondent. (The claimants had made claims for a redundancy payment and other monies owed to them by the first respondent as against the second respondent pursuant to Chapter VI of Part XI of the Employment Rights Act 1996 and Part XII of the 1996 Act). The second respondent's declinature of the claim was upon the basis that the second respondent believe there to have been a transfer of the undertaking from the first respondent to the third respondent and that liability for the payments had transferred to the third respondent.
8. The Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') contain provisions that apply in circumstances where an undertaking has transferred from one entity to another.
9. In short, in circumstances where there has been a transfer of an undertaking for the purposes of TUPE then, amongst other things, (by virtue of Regulation 4 of TUPE) upon completion of the transfer all of the transferor's rights, powers, duties and liabilities under or in connection with a contract of employment shall be transferred to the transferee. The protection afforded to those employed at the time of the transfer extends

to those employed immediately before the transfer or those who would have been employed had they not been dismissed because of a relevant transfer. The second respondent's case therefore was that the obligation to make the payments claimed by the claimants and referred at paragraph 7 above was one that fell upon the third respondent because there was a transfer of the undertaking.

10. The transfer of the rights and obligations from the first and third respondent will not occur unless there has been a relevant transfer under Regulation 3 of TUPE.
11. Under Regulation 3(1)(a) there is a "*relevant transfer*" of an undertaking or part of an undertaking only where "*there is the transfer of an economic entity which retains its identity.*" An "*economic entity*" is defined in Regulation 3(2) as "*an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary*".
12. In order to determine whether there is an economic entity in existence the following key principles need to be considered:
 - There needs to be a stable economic entity, which is an organised grouping of persons and assets enabling (or facilitating) the exercise of an economic activity that pursues a specific objective.
 - The undertaking must be sufficiently structured and autonomous but will not necessarily have significant tangible or intangible assets.
 - An activity is not of itself an entity. The identity of an entity emerges from other factors such as its workforce, management staff, the way in which the work is organised, its operating methods and where appropriate the operational resources available to it.
13. The Tribunal must also consider whether the economic entity retains its identity following a transfer. In order to decide whether such retention of identity has occurred the following circumstances need to be taken into account:
 - 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 the 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.
 - The duration of any interruption in these activities.
 - Whether there had been a change of location for the carrying out of the activities: A change of location will not mean that the identity

has not been retained. A similarity of location may be indicative of a transfer.

14. These are factors in the overall assessment and cannot be considered in isolation. No single factor is decisive and not all the criteria need to be satisfied in order for Regulation 3(1)(a) of TUPE to apply.
15. The decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity by the fact that the operation is actually continued or resumed. The absence of any contractual link between transferor or transferee may be evidence that there has been no relevant transfer but is certainly not conclusive as there is no need for any such direct contractual relationship. A transfer may be effected by a series of transactions.
16. TUPE applies automatically if there is a relevant whether or not the parties want it to.
17. The degree of similarity of activities before and after the transfer is a relevant factor. An illustration of this may be found in the case of **Mathieson and Another v United New Shops Ltd** EAT 554/94. There, a hospital shop operating from a portacabin was re-developed, and the hospital invited people to tender to run the new shop. The old shop sold newspapers, magazines, confectionary and flowers. The new one sold the same goods, with the exception of flowers, as well as other items such as clothes, electrical equipment, cards and toys; opened for longer hours; and was run on a commercial basis. The Employment Appeal Tribunal held that an Employment Tribunal was correct to determine that there had not been a relevant transfer as the differences in stock, hours and commercial attitude meant that the new shop was a different business. On the other hand, minor changes in the way in which activities are carried out might not change the essential identity of the entity being transferred.
18. The first respondent's business was run from the premises at 86 High Street, Maltby. The premises were leased to the first respondent by its director Abby Reece. The pet store and operation was run over two floors of the premises.
19. The first respondent sold an array of items from the premises. These were:
 - Exotic pets including reptiles and fish.
 - Aquatics equipment.
 - DIY equipment.
 - Pet supplies.
 - Gardening supplies.
 - Pet food.
 - Dog collars.

- Birds.
 - Hamsters, guinea pigs and rabbits.
20. The first respondent employed all of the claimants until 21 August 2018. It operated by utilizing a range of fixtures and fittings some of which are listed in the bundle at page 153 (which is an inventory of the shelving and stock). The shop served drop in/walk in customers.
21. The following are features of the business run by the third respondent:
- It is run from part of the premises at 86 High Street formerly occupied by the first respondent.
 - The third respondent leases the premises from Abby Reece.
 - The fourth claimant Miss Holmes is an employee of the third respondent. It seems that another employee hitherto employed by the first respondent has been engaged by the third respondent. The second and third claimants have not been retained by the third respondent.
 - Some of the shelving and equipment hitherto used by the first respondent is being utilized by the third respondent. In particular, the third respondent is using the shelving and two display cases.
 - The third respondent is servicing drop in/walk in customers.
 - The third respondent opened on 22 August 2018, the day after the closure of the business being run by the first respondent. In evidence given under cross-examination Mrs White fairly accepted there to have been a seamless transition of the business.
22. The third respondent sells an array of items as follows:
- Hamsters and guinea pigs.
 - Birds.
 - Pet food.
 - Pet accessories.
23. The third respondent does not sell garden items, reptiles and fish or rabbits.
24. There was no contract between the first and third respondent. A transfer can be affected by a series of transactions. Here, it appears that Abby Reece accepted a surrender of the lease between her and the first respondent and then in turn granted a lease from her to the third respondent.
25. In my judgment, there is such a similarity between the activities carried out by the first and third respondent as to constitute a transfer for the purposes of TUPE. The identity of the undertaking is the same before and after 21 August 2018. That is to say, both the first and third respondent are running

a pet store. The activities are very similar. I accept that there are differences in what is being sold but the core activity is the sale of pets, pet accessories and pet food. Further, there was no interruption in activities. A customer visiting the premises on 21 August and then repeating his or her visit the next day will still have found a pet store (operating albeit with a new sign signifying a change of ownership). Further, the second visit would reveal the premises operating from only part of the store hitherto occupied by the first respondent. Nonetheless, some of the same shelving and display units were being utilized by the second respondent.

26. The third respondent was therefore operating from the same premises, in the same location, serving the same customers, trading in similar goods and livestock, having retained part of the workforce with no business interruption between the closure of the first respondent's undertaking and the opening of the second respondents. A purposive approach is to be given to TUPE which is there to protect employees. That purpose would be defeated if minor differences in activity could defeat the employment protections conferred by TUPE. Standing back, in my judgment anyone calling in for dog food, for example, on 21 and 22 August 2018 would consider there to have been a seamless transfer to a new undertaking. I hold that TUPE applies and there was a transfer of the undertaking from the first to the third respondent.
27. A further issue in this case is the application of Regulation 8(7) of TUPE. This provision operates to disapply Regulation 4 (summarised at paragraph 9 above) and Regulation 7 (which provides for protection against dismissal because of a transfer) where the transferor is subject to bankruptcy or analogous insolvency proceedings instituted with a view to liquidating the transferor's assets under the supervision of an insolvency practitioner. In such cases, employees will not be accorded the normal protections in respect of the automatic transfer of their employment and attendant rights, duties, power and liabilities on a relevant transfer, nor the protections against detrimental variation of contracts or unfair dismissal by reason of the transfer.
28. The third respondent was incorporated on 30 July 2018. The first respondent went into creditors voluntary liquidation on 30 August 2018. I find that the relevant transfer occurred on or around 21 August 2018. Merely having an insolvency practitioner to advise does not constitute an appointment of an insolvency practitioner such as to bring Regulation 8(7) into operation. It follows therefore that Regulation 8(7) is not engaged. The claimants may claim the protection of TUPE having been dismissed immediately before the transfer. This is the effect of Regulation 4 of TUPE.

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In those circumstances, liability for the employee obligations and to make payments to the claimants for the monies owed passes to the third respondent.

Employment Judge **Brain**

Date 4 July 2019