THE EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Brydon (1)**
Mrs B Brydon (2)

Respondents: **Ms Samantha Hill (1) & Mr Christian Norwood (2)**
T/A Fattsams Butchers

Heard at: **Teesside Justice Hearing Centre** **On:** **3 & 4 July 2019**

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

Representation:

Claimants: **Mr R Owen, Citizens Advice Adviser**
Respondents: **Mr M Rowlinson, Solicitor**

JUDGMENT

The judgment of the Tribunal is as follows continuity:

1. The claimants were dismissed by the respondents by reason of redundancy and, therefore, in accordance with section 135 of the Employment Rights Act 1996 each of them is entitled to be paid a redundancy payment.

2. The respondents are ordered to pay to the claimants respectively the following amounts as agreed by the parties to compensate them, in accordance with section 163(5) of the Employment Rights Act 1996, for the financial loss sustained by them which is attributable to the non-payment of the redundancy payments: Mrs J Brydon £3,793.63; Mrs B Brydon, £3,836.70.

3. At the time of their respective dismissals the claimants had each been continuously employed by the respondents and their predecessor for in excess of twelve years and, therefore, in accordance with section 86 of the Employment Rights Act 1996 each of them was entitled to twelve weeks' statutory minimum notice; and each of them received only six days' notice.

4. The respondents are ordered to pay to the claimants respectively the following amounts as agreed by the parties to compensate them for their not having received the full amount of statutory minimum notice to which they were respectively entitled: Mrs J Brydon, £1,497.48; Mrs B Brydon, £1,761.75.

REASONS

Representation and evidence

1. The claimants were represented by Mr R Owen, Citizens Advice Adviser, who called each of the claimants to give evidence. The respondents were represented by Mr R Rowlinson, Solicitor, who called each of the respondents to give evidence.

2. I also had before me an agreed bundle of documents comprising 171 pages.

3. In these reasons, for convenience and clarity, I shall refer to the claimants together as "the claimants" but to the claimants separately by the nomenclature used during the course of the Tribunal hearing of, respectively, "Jillian" and "Beverley"; I shall similarly refer to the respondents together as "the respondents" and to them separately (again adopting the nomenclature used by the parties) of "Sam" and "Chris".

The complaints

4. Each of the claimants had presented two complaints to the Tribunal in more or less identical terms as follows:

    4.1 In accordance with section 135(1) of the Employment Rights Act 1996 ("the 1996 Act") each of them was entitled to seek a redundancy payment from the respondents as they had each been dismissed by the respondents by reason of redundancy.

    4.2 Given their lengths of continuous employment with the respondents and their predecessor, Mr S D Gibbon (trading as PT Gibbon), which in each case was in excess of twelve years, each of them was entitled to receive, pursuant to section 86 of the 1996 Act, not less than twelve weeks' notice of the termination of their respective employments but each had received only one day short of one week's notice.

The issues

5. The essential issues are as follows:

Redundancy payments

    5.1 Were the claimants employees of the respondents or workers as those terms are defined in section 230(3) of the 1996 Act?

5.2 If so, were the claimants dismissed by the respondents in the circumstances set out in section 136 of the 1996 Act?

5.3 If so, were they dismissed by reason of redundancy in the circumstances set out in section 139 of the 1996 Act?

5.4 If so, had the claimants been continuously employed for a period of not less than two years ending with the "relevant date" (which in this case means the date on which their respective notices of termination expired) as is required by section 155 of the 1996 Act?

5.5 If so, in accordance with section 135 of the 1996 Act, are the respondents required to pay each of the claimants (or either of them) a redundancy payment and if so of what amount(s)?

Entitlement to notice or pay in lieu

5.6 Were either of the claimants entitled to receive notice of the termination of their respective employments; including whether at the time of their dismissals by the respondents the claimants' were employees of the respondents as defined in section 230(3) of the 1996 Act?

5.7 If so, to what period of notice were they each entitled and what period of notice did they receive?

6. Although the above represent the principal issues in respect of the actual claims they conceal issues that are in some ways more complex as follows:

6.1 Was there a transfer of an undertaking (for the purposes of regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")) between Mr Gibbon and the respondents?

6.2 If so, what was the date of that transfer?

6.3 Were the claimants employees of Mr Gibbon, as defined in regulation 2(1) of TUPE, immediately before the transfer?

6.4 Did the claimants' employment transfer to the respondents pursuant to regulation 4 of TUPE?

6.5 If so, did each of the claimants' period of continuous employment at the time of their dismissals by the respondents include the periods when they were employed by Mr Gibbon?

Findings of fact

7 Having taken into consideration all the relevant evidence before me (documentary and oral), the submissions made on behalf of the parties at the hearing and the relevant statutory and case law, some of which was referred to by the representatives (notwithstanding the fact that, in the pursuit of some conciseness, every aspect might not be specifically mentioned below), I record the following

facts either as agreed between the parties or found by me on the balance of probabilities.

7.1 The claimants are sisters-in-law. They were employed as shop assistants at a butcher's shop at 82 Westbury Street, Thornaby. Jillian's employment began at the beginning of June 1996 and Beverley's employment began on 9 September 2000.

7.2 Their employer at that time was Mr Stewart Gibbon. He operated the butcher's shop along with his partner, Dorothy Dryden, under the trading name PT Gibbons.

[*Note: Insufficient evidence has been presented to me in this case to enable me to say with any certainty what was the business relationship between Mr Gibbon and Ms Dryden. The representatives informed me that they understood that business was not operated by a company but there might have been a partnership. The status of that previous business is not particularly significant to my judgement in these cases, however, and for simplicity, I shall refer throughout these Reasons to the claimant's previous employer being "Mr Gibbon" although, if necessary, that should be construed as being a reference to either a corporate identity or, more likely, a partnership between him and Ms Dryden*.]

7.3 Although a butcher's shop, the main focus of the business at that time was on the sale of sandwiches, pies etc and although what might be clumsily described as "raw meat" was sold, there was less emphasis on that aspect. The shop also sold cold drinks.

7.4 Mr Gibbon ceased operating his business on Saturday 4 November 2017. In the few years before that he had been unwell and did not come into the shop very often, which was then run mainly by Ms Dryden.

7.5 Two to three months before 4 November 2017 Ms Dryden told the claimants that someone was coming to look at the shop and then, later, that she was retiring and the respondents would be taking over. She told the claimants that they would be getting kept on and the business would be exactly the same. At this time, Chris had known Mr Gibbon for about ten years and considered him to be a friend.

7.6 On 23 October 2017 the respondents entered into a lease of the shop premises from Mr Gibbon and Ms Dryden in the nature of a periodic tenancy of (108). The term of the lease was that it commenced on 6 November 2017 and continued on a twelve-month basis until terminated on not less than two months' notice to end on or after 5 November 2018.

7.7 The lease agreement had been downloaded from the internet by Sam and the respondents had then put it together themselves. They did not seek any further advice in relation to either the lease or its implications.

7.8 Mr Gibbon also prepared an inventory of the equipment he intended to leave in the shop. That included equipment typically found in such a shop including a butcher's block, cold display unit, cabinets, freezer (which actually contained some meat that the respondent's paid for), till etc.

7.9 Mr Gibbon told the respondents that he would be terminating the employment of his employees at the shop, including the claimants and two others, would issue them with HMRC forms P45 and would attend to payments of redundancy payments. He did none of that, however, and the only payment that the claimants received from him related to their last week of employment with him, ie. week ending 4 November 2017.

7.10 The respondents then took over the operation of the business. It did not open for business on Sundays and when it opened on the next normal business day following Mr Gibbon's closure of it on Saturday 4 November (ie. on the morning of Monday 6 November 2017) it was, as Chris accepted in evidence, "essentially the same business". Nothing had changed as between 4 November and 6 November 2017, all four of Mr Gibbon's employees continued to work at the shop, albeit in the employment of the respondents, and on the same hours even if they were told (as the respondents said in evidence) that their hours could go up or down in the future. The work of the claimants for the business and the activities of the business were identical.

7.11 Some two weeks after 6 November the claimants received HMRC forms P45 (104 and 105). Their evidence was that they received them from Sam but hers was that although she received the P45s from Mrs Dryden she did not give them or copies of them to the claimants. I am not satisfied that anything turns upon how the claimants came into possession of the P45 forms. Each form shows a leaving date of 4 November 2017 in respect of the claimants.

7.12 After the respondents took over the business they introduced some changes such as the installation of new lighting, signage, pictures and posters; changed menus and pricelists; and acquired new equipment being a machine enabling the sale of hot drinks and soups and a new 'vacpac' machine. Additionally, over time, there was a shift in focus of the business to sales of meat, which compared with the previous emphasis being on sandwiches, pies etc. They also undertook some limited outside catering with the provision of sandwiches at breakfast and pies and peas for lunch to a local transport contractor for two weeks in either May or June 2018 in respect of a drivers' training course.

7.13 Some time in January or February 2018 the respondents obtained from an HR consultant a document headed "Zero Hours Contract" (113 and 117), which they completed with the names of the two claimants and gave to them within an envelope. They asked them to take them home and consider them. Sam said words to the effect, "That's your contract", but did not discuss the terms of the contract document with them. Beverley's evidence was that she did not consider that the contract accurately reflected

their situation and it did not fit because she was working Monday to Thursday every week from the start of her employment until it ended. At that time, however, she had just been kept on by the respondents and was pleased to have been kept on so did not want to 'rock the boat' by saying anything about it. Jillian's evidence similarly was that although she received this Zero Hours Contract document she thought it was wrong as they had never been told that they were casual workers and never been told that they would work on a zero hours' basis. She had not raised these points with the respondents, however, as she was happy to have a job.

7.14 The Zero Hours Contract documents are neither signed on behalf of the respondents nor by the claimants. Sam's evidence was that signatures are not required as a matter of law. That is correct but the presence of a signature is clearly indicative of a contract or other document having been agreed by the parties to it. Instead, I accept the claimants' evidence that they did not agree the new terms and conditions contained in those contract documents but, equally, did not expressly object to them. I also accept their evidence that the proposals to terminate their existing terms and conditions of employment and move them onto the new terms and conditions contained in the Zero Hours Contract documents were never discussed with them prior to or after those documents were issued to them. Even the respondents did not suggest that there had been such a discussion. At its highest, their evidence was that the claimants were both told at or around the point of their taking the lease of the premises from Mr Gibbon that their hours could go up or down.

7.15 In mid-April 2018 the respondents, recognising that their business was not doing as well as they had hoped, requested Jillian to reduce her hours from 20 hours per week to 17 hours per week, which she agreed. Also with her agreement her pay was adjusted accordingly.

7.16 The Zero Hours Contract documents contain a number of provisions commonly found in such documents including as follows:

7.16.1 The contract governed the engagement of the individual "from time to time by **Fattsams Butchers** as a casual worker".

7.16.2 "This is not an employment contract and does not confer any employment rights on you."

7.16.3 "It does not create any obligation on the Company to provide work."

7.16.4 "The Company makes no promise or guarantee of a minimum level of work to you."

7.16.5 "You will work on a flexible "as required" basis".

7.16.6 "It is the intention of both you and the Company that there be no mutuality of obligation between the parties at any time when you are not performing an assignment."

7.16.7 "It is entirely at the Company's discretion whether to offer you work and it is under no obligation to provide work to you at any time."

7.16.8 "Each offer of work by the Company which you accept shall be treated as an entirely separate and severable engagement (an assignment)."

7.16.9 "If the Company wants to offer you any work it will contact you by telephone and/or text/verbally."

7.16.10 "You are under no obligation to accept any work offered by the Company."

7.17 The contract document also contains common provisions relating to work, place of work, hours of work, pay, holidays, sickness etc. On a minor a point of detail, it refers, wrongly, to the respondents as a "Company".

7.18 The parties were agreed, however, that notwithstanding the respondents having given these contract documents to the claimants, their work for the respondents did not follow the arrangements envisaged in the contract documents including as follows:

7.18.1 They were not offered work on an "as required basis".

7.18.2 They were not offered work as separate assignments.

7.18.3 They were never contacted by the respondents by telephone and/or text or verbally to tell them when they would be required to work.

7.18.4 They never exercised their apparent right not to accept any work offered by the respondents.

7.19 To the contrary, the claimants' employment continued with the respondents, as it had been with Mr Gibbon, on the same days each week and on the same hours each week except to the extent that, as mentioned above, Jillian agreed to a reduction of her hours in mid-April 2018 from 20 to 70 per week.

7.20 Those working days of the two claimants were, in the case of Jillian, Wednesday to Saturday inclusive and, in the case of Beverley, Monday to Thursday inclusive every week. The respondents disputed this, Chris suggesting that Beverley worked from Monday to Friday and Jillian from Tuesday to Saturday but his evidence and the basis for it lacked clarity and substance (when compared with the evidence of the claimants) and although Sam also insisted that they had each worked five days a week she was unable to answer my question as to how many hours each day they had worked. Instead, she answered candidly, "To be honest I don't know", adding that although they had each worked (at least initially) twenty hours a

week she did not know on what day and did not know what hours. In these circumstances, I accept the claimants' evidence in these respects.

7.21 The employments of the claimants continued until, faced with a failing business, the respondents made the decision that the butcher's shop would close on Saturday 14 July 2018. They issued letters to the claimants dated 9 July 2018 to that effect and giving "one week's notice" (157 and 158) but Jillian was told that her last day of work would be Saturday 14 July 2018 whereas Beverley was told that her last day of work would be Thursday 12 July 2018. Those letters were given, respectively, to Beverley on 9 July and to Jillian on 11 July 2018. Although purporting to give one week's notice, the effect of those letters (coupled with the closure of the business on 14 July 2018 and the working days of the claimants being as above) was that they actually each received one day less than a week's notice of the termination of their respective employments.

Submissions

8 The parties' representatives made submissions that I have taken into account. It is not necessary for me to set them out fully as they will be apparent from my decisions below but I record the principal submissions made as follows:

9 The respondents' representative made submissions by reference to a detailed skeleton argument, which I took into account together with the case law cited therein. His submissions included as follows:

9.1 The claimants are not entitled to a statutory redundancy payment as they did not have qualifying service with the respondents in accordance with section 155 of the 1996 Act. Their employment with PT Gibbon terminated prior to their engagement by the respondents and there was no TUPE transfer; further or in the alternative the claimants were never employed by the respondents but were engaged on zero hours' contracts.

9.2 The claimants were given one week's notice of termination of their engagements which accorded with their contracts that specified that their engagement was terminable on one week's notice.

9.3 The respondents only entered into a commercial lease of the premises from Mr Gibbon on the understanding that the claimants' employment had been terminated by him. The lease contains reference to equipment and not staff. There had been no agreement that the staff would form part of the respondents' business and no obligation on them to provide them with work.

9.4 Mr Gibbon had given the respondents P45s stating that the claimants' employment ended on 4 November 2019 and told them that the P45s had been issued to the claimants. The respondents therefore understood that the claimants' employment had terminated. Their dismissal by PT Gibbon was implied by conduct: Kelly v Riveroak Associates UKEAT/0290/05. Their dismissals were effectively communicated to them: Sandle v Adecco UK Limited [2016] IRLR941.

9.5 Alternatively, the claimants were dismissed by implied conduct as dismissal was effectively communicated through their discussions with Mr Gibbon, Ms Dryden and the respondents. They ought to have been aware that their employment was ending and that their engagement by the respondents would be/was under different contractual arrangements. Their employment ended when the commercial lease for the premises began and the respondents opened for business after that termination. The claimants' P60s distinguish their pay from the respondents and their previous employments, which they had not challenged.

9.6 The claimants were engaged by the respondents on zero hours' contracts to provide casual work and such work does not count as employment or as qualifying service for statutory redundancy purposes.

9.7 If the claimants were employed by the respondents they had insufficient qualifying service to be entitled to a statutory redundancy payment.

9.8 There was no relevant transfer for the purposes of TUPE. The claimants' employment had already terminated when the commercial lease began and there was no transfer of an economic entity which retained its identity. Although the respondents operated a similar type of business there were significant differences. Neither Mr Gibbon nor the respondents complied with the TUPE obligations as they considered the regulations did not apply.

9.9 The claimants worked their notice period of one week and are not owed any notice pay, which was in accordance with the zero hour contracts.

9.10 The commercial lease was only for a twelve-month term to enable the respondents to see if they could make their business work. They would not have entered into the commercial lease if they had understood that this would mean inheriting liability for the PT Gibbon's staff.

10 The claimant's representative made submissions including as follows:

10.1 There was a transfer. There was an economic entity on Saturday 4 November 2017 and that same economic entity existed on Monday 6 November 2017 when the respondents opened up the shop, which transferred.

10.2 There was no dismissal by Mr Gibbon; no correspondence or paperwork regarding dismissal or redundancy. The only payment they received was their last week's wage. Contrary to being told that they would be dismissed they were told that they would be continuing in employment that would not change, and that was the case.

10.3 Although there had been some informal discussions between the claimants and the respondents those had been in general terms to the effect that their hours could not be guaranteed. There had been no discussion regarding a zero hours' contract and no mention of casual work. The reality was that at

no time had they ever worked on a zero hours' basis or as casual workers. Their hours remained the same throughout apart from Jillian's reduction to 17 hours, which she was happy to agree.

10.4 Both had attended for work during the first week of the respondents operating the business as they had done in previous weeks. They continued to work their previous pattern as they had for Mr Gibbon.

10.5 There had been some changes in the business, which would be expected, such as the change of name or efforts to enhance the business, but that happened after the transfer; the outside catering being some seven months later. The main business of the butcher's shop had remained the same, however. Although the percentage of sales of meat and sandwiches may have changed and the sale of hot drinks introduced, they were not of substance. They were minor changes and the economic entity remained the same.

10.6 As to the contract document, apart from being told there would be a contract it was not produced to the claimants until two to three months after the transfer. That was the first reference to a zero hour hours' contract or casual work. In any event the new contracts did not change things. They continued to work as they had done previously.

10.7 They did not see the P45 forms until they were given them by the respondents. They did not receive them from Mr Gibbon direct. Depending on the circumstances, the a form P45 does not necessarily conclude that there has been a dismissal but only indicates that Mr Gibbon ceased to be their employer. There was no other evidence that there was a dismissal. There was none.

10.8 The respondents and Mr Gibbon had a clear intention. They would take over the existing business, stock, staff and the same customer base and they would operate on the same basis. That was the intention and that was what happened. There was clearly a transfer and continuity of employment between the claimants and the respondents was maintained to give full redundancy and notice entitlement.

10.9 The respondents talk about the lease document but there is no evidence of an agreement between them and Mr Gibbon.

Application of the facts and the law to determine the issues

11 The above are the salient facts and submissions relevant to and upon which I based my Judgment having considered those facts and submissions in the light of the relevant law and the case precedents in this area of law.

12 As indicated above the claims in this case relate to, first, entitlement to a redundancy payment and, secondly, the balance of twelve weeks' notice of termination of the claimants' respective contracts of employment. The issues in respect of these claims are set out in paragraph 5 above.

13 Other questions that have a fundamental bearing upon each of those claims are set out in paragraph 6 above. In essence, those questions can be summarised as being, first, was there a transfer of an undertaking from Mr Gibbon to the respondents and, secondly, were the claimants employees of Mr Gibbon at the time of what is sometimes termed 'the putative transfer' and of the respondents at the time of their dismissals. I shall address first the question of whether there was a transfer of an undertaking.

A transfer of an undertaking

14 Such a transfer is governed by regulation 3 of TUPE, which, so far as is relevant to these cases, provides as follows:

> "(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."

15 These provisions give rise to four essential sub-questions which (at risk of over simplification but in interests of brevity at this stage) are as follows:

15.1 was there a transfer of an undertaking;

15.2 was there an economic entity that transferred;

15.3 did the economic entity retain its identity;

15.4 was that entity situated immediately before the transfer in the UK?

I shall address each of these four elements in turn.

Was there a transfer of an undertaking?

16 It is well established by European case law in particular (see for example the decision of the ECJ in Landsorganisationen i Danmark v Ny Molle Kro [1989] ICR 330) that the Acquired Rights Directive and, therefore, TUPE, can apply to the granting of a lease of property where a business is intrinsically linked to such property and where, as a result of the transaction, the business changes hands and continues to be run as essentially the same business. Similarly, in Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S [1988] IRLR 315, the ECJ stated that the Directive applies, "as soon as there is a change …. of the natural or legal person responsible for operating the undertaking who, consequently, enters into obligations as an employer towards the employees working in the undertaking, and it is of no importance to know whether the ownership of the undertaking has been transferred".

17 Applying these case precedents, I am satisfied as to this first element that there was, between Mr Gibbon and the respondents, a grant of a lease of the premises from which the butchers shop was operated (82 Westbury Street, Thornaby) and that the business of that shop was intrinsically linked to the property with the consequence that the business changed hands between him and the respondents and continued to be run (I repeat, as Chris said in evidence) as "essentially the same business".

Was an economic entity transferred?

18 In relation to this second element I am guided by relevant caselaw including the decision of the ECJ in Spijkers v Gebroeders Benedik Abattoir CV 1986 2 CMLR 296 and the guidelines given by the EAT in Cheeseman v R Brewer Contracts Ltd [2001] IRLR 144. In particular, I find on the basis of the evidence before me that the following principles in that latter decision are satisfied in this case:

18.1 Prior to the putative transfer there was in the hands of Mr Gibbon and his partner a stable economic entity, which was an organised grouping of persons and of assets enabling the exercise of an economic activity that pursued the specific objective of the butcher's shop business.

18.2 That entity was sufficiently structured and autonomous and although it is not necessary for such an undertaking to have significant tangible or intangible assets, I am satisfied that this undertaking did have relatively significant tangible assets (being the shop premises and equipment within it as described above) and intangible assets in the shape of the goodwill arising from its customer base.

18.3 The identity of that entity is apparent from factors such as its workforce of four employees including the two claimants, its management style, the way in which its work was organised, its operating methods and the operational resources available to it.

19 In short, for the purposes of regulation 3(2) of TUPE I am satisfied that there was in this case an "economic entity" being "an organised grouping of resources which has the objective of pursuing an economic activity".

Did the economic entity retain its identity?

20 In relation to this third element I apply the multi-factorial approach derived from Spijkers including, importantly, focusing on the identity of the entity transferred and whether the business of PT Gibbon "was disposed of as a going concern". Once more, I apply principles drawn from the decision of the EAT in Cheeseman. Thus, on the evidence before me in this case, I am satisfied as to the following of those principles:

20.1 The entity in question retained its identity as indicated, amongst other things, by the fact that its operation was actually continued without a break apart from its normal closure on its non-trading day of a Sunday.

20.2 Apart from that closure on Sunday, 5 November 2017 the work of the butcher's shop business was performed continuously with no interruption or change in its manner or performance.

20.3 As mentioned above, the tangible assets of the entity were transferred as is borne out by the inventory prepared by Mr Gibbon, it had valuable intangible assets at the time of transfer in the form of its customer base and all of its employees are were taken over by the respondents on the same hours and working the same days even if they were told that those hours could go up or down in the future. All the parties were agreed that comparing Saturday, 4 November, with Monday, 6 November 2017, nothing changed. Thus, at the moment of the putative transfer the activities carried on before and after were identical and I am satisfied that even after the changes introduced by the respondents over the weeks and months thereafter, there was a close similarity between those activities. In that regard, I am satisfied that those changes were in the nature of the business evolving and developing under its new owners and did not constitute a change in the essential identity of the entity being transferred: see Porter v Queen's Medical Centre (Nottingham University Hospital) [1993] IRLR 486. Importantly, I repeat that those changes occurred some time after the transfer. At the time of the transfer there were no such changes and the business and its activities were identical.

21 Thus, as to this third element I am satisfied on the evidence before me that the economic entity of Mr Gibbon retained its identity following the putative transfer to the respondents.

Was the entity situated immediately before the transfer in the UK?

22 Finally, and for completeness (as for obvious reasons this aspect was not in dispute) the business was clearly "situated immediately before the transfer in the United Kingdom".

23 In summary and conclusion of this aspect of whether there was a transfer of an undertaking in this case, I am satisfied in the circumstances and on the basis of the evidence and my findings as described above that there was such a transfer.

Employees

24 I move on to address what I have identified above as the second question having a fundamental bearing upon each of those claims: namely whether the claimants were employees of, first, Mr Gibbon at the time of the transfer and, secondly, of the respondents at the time of their dismissals.

25 Regulation 2(1) of TUPE defines "employee" as meaning "any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract for services and references to a person's employer shall be construed accordingly"; and "contract of employment" as meaning "any agreement between an employee and his employer determining the terms and conditions of his employment.

26 There is no dispute between the parties that the claimants' engagements with Mr Gibbon and his partner constituted employment. The respondents have not sought to suggest otherwise. The claimants were part of the workforce of PT Gibbon and they were employed under contracts of employment notwithstanding that they did not have any written document setting out the terms and conditions of those contracts. That is not uncommon, especially among relatively small businesses.

27 The more important question, however, is whether the claimants were employed by Mr Gibbon and assigned to the transferred undertaking at the time of the transfer, which took place on 6 November 2018 that being the commencement of the term under the Commercial Lease Agreement (108).

28 In this respect I accept the evidence of the claimants, which was not seriously challenged by the respondents, that at that date Mr Gibbon had not terminated their respective employments. Thus, they were employed "immediately before the transfer". It may well be (as was the respondent's evidence) that Mr Gibbon told the respondents that he would terminate the claimants' employment, sort out their redundancies and issue them with P45s before the transfer but, on the evidence before me, I am not satisfied, on balance of probabilities, that he did. In this respect, I found Chris' evidence telling, "We took him at his word – unfortunately". As I said when announcing this judgement orally, the respondents have my sympathy in this regard but it is trite to make the point (as I did then) that I have to make my judgement applying the law not influenced by personal feelings.

29 I address one point of detail in this connection at this stage. The respondent's representative sought to rely upon the fact that Mr Gibbon had produced HMRC forms P45 in respect of each of the claimants showing leaving dates of 4 November 2017 (102 and 107). There is no dispute that those forms were prepared and were given to the claimants. A form P45 is a document that is relevant for purposes of income tax, however, and is not, in itself, necessarily evidence that a dismissal has been or is thereby being executed, although it may be confirmatory of such a dismissal. In this case, however, no evidence has been provided to me of Mr Gibbon having actually dismissed either of the claimants. More particularly as to the form P45s, I accept their evidence that they were not given those forms before the transfer date of 6 November 2017 and, in fact, did not receive them until a short while afterwards. In this regard, therefore, (and having considered the precedents upon which the respondent's representative relied) I do not accept his submission that the claimants were told by Mr Gibbon that they had been dismissed or that such dismissals could be implied by conduct in the form of him issuing the claimants with their P45s; neither do I accept his submission that such dismissals were effectively communicated to the claimants for the purposes of section 95(1)(a) of the 1996 Act.

30 In conclusion on this aspect, I mention only briefly as it is not a point of particular relevance in these cases that even if the claimants had been dismissed before the transfer (repeating that I am not satisfied that they were) regulation 4(3) of TUPE clarifies that a reference to a person employed immediately before the transfer can include someone "who would have been so employed if he had not been dismissed". An effect of this provision is that it can be the case that a dismissal

that takes effect before the transfer where the sole or principal reason for it is the transfer (as I am satisfied would be the situation in these cases) would be automatically unfair under regulation 7(1) of TUPE, which could give rise to the dismissed employee therefore being deemed to have been employed "immediately before the transfer" so that liability for the dismissals would consequently be passed on to the transferee.

31 To summarise thus far, addressing what I have referred to above as the two questions that have a fundamental bearing upon each of the two claims brought by the claimants, I am satisfied on the basis of the evidence presented to me as follows:

31.1 For the reasons set out fully above, there was a transfer of an undertaking from Mr Gibbon to the respondents.

31.2 One of the effects of that transfer was that, under regulation 4(1) of TUPE, the contracts of employment of the claimants (being persons "employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer) had "effect after the transfer as if originally made between" them and the transferee (ie. the respondents) and there was thus transferred to the respondents, under regulation 4(2) all "rights, powers, duties and liabilities under or in connection with" those contracts.

32 An important aspect of the above findings is that the length of continuous service that the claimants had established with Mr Gibbon was maintained and transferred to the respondents: that in accordance with either that regulation 4(2) of TUPE as one of the "liabilities" under the contracts or section 281(2) of the 1996 Act that provides that if a business or undertaking 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."

33 The transfer of the claimants' contracts of employment at the time of transfer on 6 November 2017 is not an end to the matter, however, as the second aspect of the question of whether the claimants were employees remains. That is to say whether those contracts of employment then continued in force governing the relationship between the claimants and the respondents until they were given notice by the respondents on 9 July 2018 (157 and 158) or whether, at some time between the transfer and the giving of that notice, those contracts were either lawfully varied or were terminated by the respondent with the claimants then being re-engaged on the basis of different contracts.

34 There is no dispute between the parties that new contractual documents were given to the claimants in January or February 2018. On the evidence available to me, however, as found above, I am not satisfied that the terms of those contracts

were discussed with them or, importantly, that they expressly agreed them. Further, although I accept that there were discussions between the parties, no sufficient evidence has been presented to me to the effect that during the course of any such discussions there was mention of the claimants moving to zero hours' contracts or what that would mean. As mentioned above, taken at its highest, the respondents' evidence was that they told the claimants that their hours could go up or down but that is not the same as working on a zero hours' basis.

35 I repeat that I am not satisfied that the claimants expressly agreed to the terms of the Zero Hours Contract documents that were presented to them. That said, I do accept that it is possible that if an employee continues to work for an employer under new terms and conditions without protest he or she may be deemed to have accepted those new terms and conditions by implication. Certainly, in this case the claimants continued to work for the respondents after being issued with the new contract documents and did not object. That is not the issue, however: the issue is whether they actually worked under the new terms and conditions. On the basis of the respondents' evidence alone, I have no hesitation in finding that they did not. As set out in my findings above, they were not assigned to work from time to time on an "as required" basis, they were not contacted "by telephone and/or text/verbally" to be told when the respondents wanted to offer them any work and they never exercised the supposed right not to accept work that was offered.

36 A telling consideration in this regard is that when, in mid-April 2018, the respondents recognised that their business was not doing as well as they had hoped they requested Jillian to reduce her hours from 20 to 17 each week, which she agreed. That discussion and that agreement between the parties would not have been necessary if they were genuinely working on the basis of a zero hours' contract. Instead, the respondents would simply have offered Jillian (or, indeed, Beverley) assignments of such number and of such length as they considered were affordable.

37 A further point in this connection is that the evidence of all the parties was that the claimants were given notice of termination. That would be a further indication of employment status, such notice not being required in relation to a genuine zero hours' contract in respect of which the 'employer' simply need not offer further work assignments to the individual. The respondent's representative submitted that what he referred to as this notice of termination of their engagements accorded with their contracts that specified that their engagement was terminable on one week's notice but I cannot identify any such provision in the contract documents; except in relation to the individual declining assignments on two consecutive occasions or having committed a serious breach of the contract or an act of gross misconduct none of which circumstances apply in these cases.

38 In this respect, I accept that one matter emerged in the evidence that might point away from employee status when, in answer to a question I asked when seeking clarification, Jillian confirmed that she considered that there would be flexibility as between her and Beverley to swap shifts if either of them had need to do so. Considering that evidence in the round in the context of all the other evidence before me, however, I am not satisfied that swapping shifts between established employees who are sisters-in-law amounts to a right of substitution that could

indicate a lack of a mutuality of obligation between the respective claimants and the respondents such that they were not employees of the respondents.

39 Thus, although I accept that the Zero Hours Contract documents that were issued to the claimants were probably the basis for engagement that the respondents would like to have achieved, I am not satisfied that those contracts were agreed, expressly or impliedly. Further, in the absence of either, first, an agreed variation of the contracts of employment that transferred from Mr Gibbon to the respondents on 6 November 2017 or, secondly, a termination of those contracts and a re-engagement of the claimants on the basis of the Zero Hours Contract documents, I am satisfied that those contracts of employment that transferred continued in place until they were terminated by the respondents.

40 In short, I am satisfied that the claimants became employees of the respondents at the point of the transfer of the butcher's business to them on 6 November 2017 and remained their employees until they were given notice on 9 July 2018. Thus, they were dismissed by the respondents as they have claimed.

41 In conclusion, for the reasons set out above, addressing the issues in these cases as also set out above, I am satisfied as follows:

41.1 The claimants were employees of the respondents as that word is defined in section 230(3) of the 1996 Act.

41.2 They were dismissed by the respondents in the circumstances set out in section 136 of the 1996 Act in that they were given letters of termination dated 9 July 2018 (157 and 158).

41.3 They were dismissed by reason of redundancy in the circumstances set out in section 139(1)(a)(i) of the 1996 Act in that the reason given in those letters was a downturn in business and the closure of the shop on Saturday, 14 July 2018; that amounting to the employer having ceased or intended to cease, "to carry on the business for the purposes of which the employee was employed" (indeed, at the private preliminary hearing in respect of these claims that was held on 15 January 2019 it is recorded, albeit with reference to the alternative statutory provision contained in section 139(1)(b)(i) of the 1996 Act, the respondent's representative "conceded that when the business closed, the requirements for employees to carry out work of the kind performed by each claimant ceased").

41.4 Given the length of continuous employment that the claimants had each established with Mr Gibbon and continued with the respondents, they had each been continuously employed for a period of not less than two years ending with the "relevant date" (which in this case means the date on which their respective notices of termination expired) as is required by section 155 of the 1996 Act.

41.5 As such, in accordance with section 135 of the 1996 Act, the respondents were required to pay each of the claimants a redundancy payment.

41.6 The parties were agreed that in the above circumstances the amounts due to the respective claimants to compensate them, in accordance with section 163(5) of the 1996 Act, for the financial loss sustained by them which is attributable to the non-payment of the redundancy payments are, Mrs J Brydon £3,793.63 and Mrs B Brydon, £3,836.70, and the respondents are ordered to pay those amounts to those respective claimants.

41.7 As employees, the claimants were each entitled to receive at least the minimum notice of the termination of their respective employments as set out in section 86(1) of the 1996 Act.

41.8 Once more given the length of continuous of employment that the claimants had each established with Mr Gibbon and continued with the respondents, they were each entitled to "not less than 12 weeks' notice" but each only received six days' notice and they are therefore entitled to be compensated by reference to the period of 11 weeks' and one day's notice not given.

41.9 The parties were agreed that were in the above circumstances the appropriate sums due to the claimants to compensate them for not having received the full amount of statutory minimum notice to which they were both entitled are, Mrs J Brydon, £1,497.48 and Mrs B Brydon, £1,761.75, and the respondents are ordered to pay those amounts to those respective claimants.

EMPLOYMENT JUDGE MORRIS

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 11 July 2019

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2503252/2018 & 2503253/2018**

Name of case(s):	**Mrs J Brydon & Mrs B Brydon**	v	**Samantha Hill and Christian Norwood (T/A Fattsams Butchers)**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: **25 July 2019**

"the calculation day" is: **26 July 2019**

"the stipulated rate of interest" is: **8%**

MISS K FEATHERSTONE
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.