# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K McQuade

**Respondents:** 1. Air Factory Leisure Limited
2. Asel Fashion Limited

**HELD AT:** Manchester **ON:** 6 September 2019

**BEFORE:** Employment Judge Holmes

**REPRESENTATION:**

**Claimant:** Mr B Henry, Counsel
**Respondents:** Not in attendance, responses struck out

# JUDGMENT

The judgment of the Tribunal is that:-

1. The claimant was unfairly dismissed, the principal reason for his dismissal was a relevant TUPE transfer , and was automatically unfair.

2. The claimant is entitled to compensation.

Basic Award

The claimant received a redundancy payment and has no entitlement to a Basic Award.

Compensatory Award

| | |
|---|---|
| Loss of earnings, 29 weeks @ £456.20 | £13,229.80 |
| Loss of statutory rights | £ 500.00 |
| TOTAL | **£13,729.80** |

The Recoupment Regulations do not apply.

3. This award is made against the first respondent only.

4. The first respondent failed to consult with the claimant in respect of the relevant TUPE transfer, contrary to Regulation 13 of the TUPE Regulations 2006, and the claimant is entitled to compensation in the sum of 13 weeks pay.

13 x £576.90 **£ 7,499.70**

5. The first and second respondents are jointly and severally liable to pay the claimant this sum.

# REASONS

1. The Tribunal today has been considering the claims by Mr McQuade arising out of the termination of his employment which was originally with the first respondent, Air Factory Leisure Limited , and which ended on 9 October 2018. He has presented claims for unfair dismissal , and for failure to consult in relation to a proposed TUPE transfer, claims which were originally brought against two respondents, his original employer and a further respondent, the alleged transferee, Asel Fashion Limited. Both of those respondents responded to the claims and denied the claims . In particular they denied there had been any relevant TUPE transfer. A Preliminary Hearing was held on 19 June 2019 which the claimant attended and was represented , but neither respondent did. In those circumstances the Tribunal then wrote to each respondent pointing out their failure to attend or indeed to pursue their responses , and warning them that they would be struck out if they did not respond. They did not respond , and consequently each respondent's response was struck out by judgment of the Tribunal sent to the parties on 2 August 2019. Neither respondent has attended or sent any representations into today's hearing , and consequently the Tribunal has proceeded to hear the claimant's evidence and submissions made on his behalf, by his Counsel Mr Henry, in support of the awards that he seeks.

2. In terms of his claims , the first is of unfair dismissal and that is brought in the species of both ordinary unfair dismissal , and also on the basis of automatically unfair dismissal on the grounds that the claimant's dismissal was by reason of a relevant TUPE transfer. There was an issue as to whether the claimant had requisite qualifying service for ordinary unfair dismissal, the respondents contending that he was just short of qualifying service , and that the claimant's evidence in fact is that his employment began before the respondents say , it did and he would in any event having started employment on 10 September 2016 , as I find he did, have had the necessary qualifying service in any event.

3. The circumstances giving rise to the termination of his employment are set out in his witness statement , and , in brief in either September or October 2018 there were discussions being held by his employer which made the claimant suspect that all was not well , and that the business may well be about to be sold .Although there were denials of that , in due course the claimant was made redundant having had a meeting , and subsequently a letter dated 9 October 2018 which is contained in the bundle. It turned out that the claimant's suspicions were right , in that around about that time, probably on 15 October 2018, and therefore conceded to be after his dismissal , the second respondent got involved in the business and indeed took over the business from that date.

4. The responses of the two respondents challenge whether there was a relevant TUPE transfer , but both in his witness statement and in the particulars of claim annexed to his claim form , the claimant sets out the circumstances in which he says that the second respondent became the transferee of the first respondent's business. It is apparent from the responses entered that the second respondent accepts that it acquired the lease previously held by the first respondent, but also and perhaps most significantly , it accepts that it acquired the stock from the first respondent very shortly thereafter. It is well established that a TUPE transfer can take place, as it were, in stages and need not be one single transaction giving rise to such a transfer , and the second respondent has never fully explained what exactly it was doing thereafter when it took over , firstly , the premises and secondly the stock in the premises that the first respondent had previously been trading from. Nothing is said by the second respondent , or indeed the first , about customers and the business as at such , and I am quite persuaded and satisfied by the claimant's evidence and the absence of any evidence from the respondents in support of their contention that there was no relevant TUPE transfer on the 15 October 2018 , but indeed there was. Consequently, having found that there was a relevant TUPE transfer in terms of the reason for the dismissal , the burden of establishing which is upon the first respondent who dismissed the claimant I am satisfied that no potentially fair reason has been established by the first respondent , and I accept the claimant's evidence , and all the other inferences to be drawn from the facts which were that the reason for his dismissal was indeed the impending TUPE transfer that then happened. That consequently means that this was an automatically unfair dismissal , and his claim for unfair dismissal succeeds on that basis.

5. It also follows that , whilst there was some consultation , but perhaps putting it no higher than that , in relation to redundancy there was no consultation earlier than then in relation to any proposed TUPE transfer , not least of all because the first respondent did not recognise there was going to be one. Consequently whatever talks were being held , the claimant was never given any relevant information that would amount to effective consultation in relation to a proposed TUPE transfer , and his claim in that regard succeeds as well.

6. He is therefore entitled to compensation . In relation to unfair dismissal , that would normally be in two parts, a basic award and then a compensatory award but the first respondent made a redundancy payment to him, albeit one couched originally in rather strange terms as being a without prejudice offer . Whether that was a without prejudice offer or not, it was never dealt with as any form of compromise by the claimant , and he was simply paid by the first respondent, thereby satisfying its potential liability for a redundancy payment , which, of course, extinguishes the entitlement to a basic award.

7. The claimant is however entitled to a compensatory award in respect of the losses that he has sustained by reason of the dismissal, and whilst a respondent can in these circumstances , and often will , argue that the employment would have terminated anyway so as to entitle the Tribunal to make a reduction under the ***Polkey*** principle, that has not happened, nor indeed can it happen given the absence of the respondents , and indeed, the fact that it is an automatically unfair dismissal. That does not, however, relieve the Tribunal of the obligation to assess the losses that properly flow from the dismissal , and the claimant's evidence very

candidly in his witness statement , and in Mr Henry's submissions on his behalf acknowledges that by 13 May 2019 the Trampoline business in which the claimant had been employed , and which the second respondent then had transferred to it in any event closed up. So whatever else would have happened , this employment would have ended at that date , and consequently the loss of earnings that the claimant seeks is limited very sensibly to that period. That is a total of some 31 weeks , but the claimant was paid , and he has shown evidence in his bank statements , as the letter dismissing him indicates that he would be , paid some two weeks' notice. Consequently, the claim is for 29 weeks loss of earnings, the Schedule of Loss sets out his gross and net pre-dismissal earnings, the net figure is £456.20 per week and consequently 29 weeks at that figure produces , as indeed Mr Henry submitted , a figure of £13,229.80.

8. In addition to that , the claimant seeks loss of statutory rights and although his employment would have ended in any event I nonetheless do think it appropriate to award him that figure of £500 claimed in the Schedule of Loss in respect of the loss of statutory rights he suffered during the intervening period , and I see no reason not to grant him that in addition. Consequently, those being the two heads of loss claimed in respect of the compensatory award , the total compensatory award will be £13,729.80. The claimant did not claim benefits. As is clear from his witness statement , he borrowed money and was otherwise assisted during this period and so the recoupment regulations do not apply to the loss of earnings award.

9. The other award sought is in relation to the failure to consult , and it is provided statutorily that the maximum award for such failure is 13 weeks. A week's pay is not capped for these purposes , and so the appropriate multiplier is £576.90. As is clear from the authorities , as cited by Mr Henry, and familiar to the Tribunal , the case law makes it clear that the starting point is 13 weeks , and it is up to a respondent to advance mitigation as to why the award should be reduced from that figure. The respondents of course have not in this case sought to do so , and so there is no basis upon which the Tribunal should reduce the award from 13 weeks, and accordingly it does award 13 weeks' pay in the total sum of £7,499.70. The award in respect of the unfair dismissal is sought , and indeed is made, made solely against the first respondent as the transferor , but in relation to the second respondent that is jointly and severally liable with the first respondent for the award for failure to consult in relation to a TUPE transfer. So those are the awards of the Tribunal.

Employment Judge Holmes
Dated : 9 September 2019
JUDGMENT AND REASONS SENT TO THE PARTIES ON

23 September 2019

FOR THE TRIBUNAL OFFICE



[JE]

# NOTICE

## THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2402161/2019**

Name of case: **Mr K McQuade** v **1. Air Factory Leisure Limited**
**2. Asel Fashion Limited**

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: **23 September 2019**

"the calculation day" is: **24 October 2019**

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

For the Employment Tribunal Office