



EMPLOYMENT TRIBUNALS

Claimants: Mr D Gage
Mrs R Gage

Respondent 1: Silversmiths Restaurant Limited
Respondent 2: Gallagher's of Yorkshire Limited

HELD AT: Sheffield **ON:** 12 September 2019

BEFORE: Employment Judge Little

REPRESENTATION:

Claimants: In person

Respondent 1: No attendance or appearance (no response presented)

Respondent 2: No attendance or appearance

JUDGMENT

My Judgment is that:-

1. There was a relevant transfer pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 of the business of Silversmiths Restaurant from the first respondent to the second respondent on or about 3 September 2018.
2. Both claimants were assigned to the business which so transferred.
3. Accordingly and pursuant to Regulation 4 of the 2006 Regulations the second respondent is liable to make the payments set out below to the claimants forthwith.
4. In respect of Mr D Gage the sum of £900.83 in respect of accrued but untaken holiday at the effective date of termination and the further sum of £1365.10 in

respect of unauthorised deduction from wages (including non-payment of bonus) – accordingly the total amount of £2,265.93.

5. In respect of Mrs R Gage I find that she was dismissed by the second respondent on 18 October 2018 and because that was dismissal without notice or payment in lieu the dismissal was wrongful. Mrs Gage is entitled to the sum of £2,000 in lieu of notice; Mrs Gage is also entitled to the sum of £1,866.99 in respect of accrued but untaken holiday. Accordingly she is entitled to a total award in respect of these complaints in the amount of £3,866.99.
6. The complaint by Mrs Gage that her dismissal was unfavourable treatment because she was exercising her right to additional maternity leave will be determined at a subsequent hearing which has been listed for 19 November 2019 with a time allocation of one day.

REASONS

1. The primary issue before me today was whether there had been a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 as between the first and second respondents.
2. The first respondent has not participated in these proceedings at all and it is understood that it has ceased trading although the Companies House register shows that it is active, albeit with an active proposal to strike off.
3. The second respondent did present a response to the second claim brought by each claimant. The second respondent was represented by solicitors at the last hearing when various case management orders were made. However on 11 April 2019 the Tribunal were informed that those solicitors (Woskow Brown Solicitors) were no longer instructed by the second respondent.
4. The second respondent is currently shown in the Companies House register to be active. It has not complied with the majority of the case management orders which were made at the preliminary hearing for case management on 21 February 2019. The only compliance was the provision on 12 April 2019 of a document described as 'Statement'. This is a one page document which I have assumed is the second respondent purporting to comply with one of the Orders made on the last occasion, which was for it to give full particulars of it's case that there was no relevant transfer to it from the first respondent.
5. In that document it is suggested that employees of the first respondent, including at least Mrs Gage, continued to work for the first respondent but at a different location, Eyam. In unchallenged evidence from the claimants before me today this is denied. At the material time Mrs Gage was on maternity leave and had had keeping in touch visits to the restaurant in Sheffield which traded as Silversmiths. Mr Gage has told me that he worked at the Sheffield restaurant both during the time it was operated by the first respondent and subsequently whilst it was being operated by the second respondent.
6. The second respondent's 'statement' refers to a "licence to trade", between unspecified parties, but I assume possibly made between the first and second respondents. No copy of this document has been provided or disclosed. The

statement denies that any employees of the first respondent were “adopted or transferred”. References are made to forfeiture of an old lease and the granting of a new lease to the second respondent on 10 October 2018. The second respondent also says that there was no sale agreement or consideration passing between the first respondent and itself. It is suggested that in November 2018 new contracts of employment were issued to “a number of employees” – presumably this means employees of the first respondent.

7. The claimants have explained to me that the Sheffield restaurant, at the time when it was undisputedly being operated by the first respondent, closed for approximately two weeks from about 19 August 2018. However the restaurant re-opened on 3 September 2018 and at that stage it was being operated by the second respondent. The claimants say, and I accept, that on the re-opening it was essentially ‘business as normal’. The majority of the staff working there in early September were those who had worked there prior to the August closure. The same business was being operated “fine dining”, from the same premises and the clientele were very often the same. Bookings which had been made pre-closure were honoured once the restaurant re-opened in September.
8. Whilst the respondent’s failure to meet its obligations of disclosure leaves matters uncertain, even if there was no formal or other sale arrangements as between the first and second respondents and even if no money was exchanged that does not mean that there was not a relevant transfer. Mrs Gage has shown me a tweet from Mr John Gallagher a director of the second respondent dated 6 October 2018 which begins “*I am proud to announce that we are now the official owners of Silversmiths Sheffield*”. The inclusion of the word “official” is significant in my judgment. Whilst formalities in terms of the lease may not have been resolved until October 2018, I conclude that de facto the business of the Silversmiths restaurant Sheffield had been operated by the second respondent since 3 September 2018 or thereabouts. Accordingly the position is not, as the second respondent has attempted to portray it, one where there was a significant gap or closure of the restaurant as between its operation by the first and then the second respondents.
9. Mrs Gage has also shown me a press release which she was asked to prepare towards the end of August 2018 in respect of the new ownership, albeit at that stage the identity of the new owner was not known to her.
10. Mr Gage was an employee who continued to work at the restaurant once it re-opened in September 2018.
11. Mr Gage resigned from his employment on 29 November 2018 and makes no claim in respect of the ending of his employment in the sense that he does not complain that it was wrongful or otherwise unlawful. He does claim in respect of unpaid wages including tips or bonus and this information is documented in the bundle which the claimants have prepared. He also seeks holiday pay. These figures, or at least an earlier calculation of the holiday pay and wages, had been sent to the respondent as a letter before action.
12. Mrs Gage’s witness statement explained how she endeavoured to make contact with the new owners on 12 October 2018. She wished to have a meeting to make arrangements for her intended return to work when her maternity leave ended in January 2019. After some delay the claimant received a telephone call from Mr John Gallagher on 18 October 2018. During that conversation Mr Gallagher sought information as to what the claimant’s role was but then informed the

claimant that one of the other directors in the business had a marketing company and Mrs Gage took that as an indication that her services as the events and marketing manager were no longer required. In the event she now understands that the person who was providing maternity cover during the claimants' absence continues to be employed in the role which the claimant previously undertook. When the claimant wrote her letter before action to Mr Gallagher on 20 November 2018 she referred to the telephone conversation on 18 October and wrote "*as you are making a business decision to make the position I held redundant and use an external marketing company, I am due payment in lieu of notice*".

13. In the second respondent's grounds of resistance they deny that they ever employed Mrs Gage and suggest that they had no knowledge of her until the telephone call of 18 October 2018. That lack of knowledge is not borne out by the WhatsApp exchanges the claimant has shown me from 15 October 2018 where Mr Gallagher's response to the claimant's request for a meeting is not met by anything which suggests he had never heard of her. In fact he indicates that he will telephone her back "to discuss everything now that we have completed the purchase". Other than the denial of employment, the grounds of resistance do not deal with the claimant's contention that she was dismissed in the circumstances set out above. On the balance of probabilities I therefore conclude that there was a dismissal. That dismissal was in breach of contract (wrongful) because no notice was given or payment of lieu made. I am not making any determination of the reason for the claimant's dismissal because that is not a matter for me today and there will need to be a further hearing to determine whether, as the claimant alleges, her dismissal was unlawful discrimination because she was exercising maternity leave.

Employment Judge Little
Date 23rd September 2019