EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
MS C ROMAIN-GARY (C1)	AND	THE PLOUGH INN (R1)
MS A COOPER (C2)		MS MARGARET CASEY (R2)
		MR JOHN MURPHY (R3)
		MR ANDREW MILLS (R4)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 13TH / 14TH JANUARY 2020

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

APPEARANCES:-

FOR THE CLAIMANTS:- **IN PERSON**

FOR THE RESPONDENT:- **MR R CASEY (R2)**
MS L TAYLOR (COUNSEL) (R3/4)

JUDGMENT

The Judgment of the Tribunal is that:-

i) The claimants' claims against the Plough Inn (R1) are dismissed;

ii) The claimants' claims against Ms Margaret Casey (R2) are dismissed.

iii) The claimants' claims against Mr Murphy (R3) of unfair dismissal, unpaid wages unpaid holiday pay, unpaid notice pay are well founded and are upheld

iv) The claimants' claims of unpaid redundancy pay against Mr Murphy (R3) are dismissed.

v) The claimants' claims against Mr Mills (R4) are dismissed.

vi) The case will be listed for a TPH to give directions in respect of remedy

Reasons

1. By this claim the claimants bring claims of unfair dismissal, unpaid wages, unpaid holiday pay, notice pay, and redundancy pay. The primary dispute between the parties is whether there was or was not a TUPE transfer from the second to either or both of the third or fourth respondent in the circumstances set out below.

2. There were initially two further respondents EI Group PLC and Mr Matthew Venables but the claims against them were dismissed on withdrawal. Mr Venables has attended to give evidence for the third and fourth respondents, who were added as respondents by order of EJ Livesey on 11th September 2019.

Facts

3. There is very little dispute of fact between the parties. The Plough Inn Portishead is owned by EI Group, which has a very substantial portfolio of some 4,000 pubs. On 9th February 2017 it entered into a tenancy at will (TAW) with Ms Casey (R2). That tenancy broadly gave her responsibility for running the pub business and specifically provides that she is the employer of any staff engaged. Both the claimants were employed prior to her taking on the tenancy and remained employees. It is not in dispute that until 24th July 2018 she was their employer.

4. EI Group has a number of separate internal divisions, one of which is Beacon, of which Mr Venables is a Regional Manager. These divisions have no separate legal status, but operate via different business models and sites can be transferred between divisions to the one with the most suitable business model. In 2018 it was decided that the site would be shut to carry out property works and that when it reopened it would be with a new tenancy at will and would fall within the remit of the Beacon division. Ms Casey applied to run the pub but was unsuccessful. Mr Mills and Murphy who jointly ran a number of other pubs owned by EI/ Beacon also applied and were successful. At that point it was anticipated that on the expiry of Mrs Casey's TAW that the pub would close for refurbishment for a period of some two to three weeks. When that was completed a new TAW would be entered into between EI/Beacon and Messrs Mills and Murphy who would at that point take on responsibility for the pub. There is no dispute that EI took the view, and advised all the other relevant parties that this would constitute a TUPE transfer, and that all the parties were happy to accept this. On 24th July 2018 Ms Casey's TAW came to an end and she relinquished any responsibility for the business.

5. Had events proceeded as planned, the evidence before me is that although agreement in principle had been reached between EI/Beacon and Messrs Murphy and Mills that they would take on the lease and the running of The Plough Inn, that

there was no legal obligation on either party to do so. EI/Beacon would carry out the refurbishment of the pub and when completed the tenancy would be likely to be offered to Messrs Mills and Murphy. There was however no obligation on EI/Beacon to do so nor any obligation on Messrs Murphy and Mills to accept. As set out above if it was offered and accepted all parties agreed that it would constitute a TUPE transfer.

6. During the course of the hearing an issue has arisen as to differences between Ms Casey's original TAW and that subsequently entered into firstly by Mr Murphy on 12th October 2018 (and subsequently by Murphy and Mr Mills on 13th December 2018). As set out above the various divisions of EI operate different business models with different terms. The TAW of Ms Casey was agreed on "Core" terms. Those terms give the tenant much greater freedom in particular in the selection of product supplied and the price applied, than the "Beacon" contract. Mr Murphy's evidence, which is not disputed, is that the Beacon terms are much more restrictive than the "Core" terms, "fully tied" as Mr Murphy put it. There is no choice in the product supplied nor in pricing. The tills are controlled and monitored by EI/Beacon and it is not possible to increase or decrease the prices or to offer discounts, or two for one offers, or anything similar. Any such discounts or promotions are controlled and applied by Beacon. Mr Murphy and Mr Mills are entitled to fifty percent of the profit but have to bear all of the costs, with Beacon essentially retaining total control of the products and prices. There is a "Craft Union" business model which is different again, but which is not relevant for these purposes.

7. The evidence of Mr Venables, Mr Murphy and Mr Mills is that shortly before the 24th July 2018 the situation changed. A survey discovered substantial asbestos at the property which meant that there would not simply be a short two to three weeks standard refurbishment but a much longer programme of works. Mr Venables evidence is that that altered the situation fundamentally within EI/Beacon as it meant that if The Plough Inn became Beacon's responsibility it would take on an open ended commitment to the full cost of the refurbishment out of its own budget. At that stage the full extent of the remedial works was not known, and it was not predictable for how long the pub would be shut. Mr Murphy's evidence is that a day or two before the 24th July 2018 he was contacted by Mr Venables who told him of the asbestos problem and that EI/Beacon could not move forward with the proposed TAW at that stage. Put simply as he understood it as at 22nd/23rd July 2018 the deal was off, or at least on hold for an indeterminate period of time. The second respondent has expressed some scepticism as to whether there was an asbestos problem and if so how extensive it was, but there is no evidence specifically to contradict Mr Venables, and as there is no apparent benefit to EI/Beacon having the pub closed for a longer period than necessary I can see no reason why he should invent or embellish his evidence, which I accept.

8. However, the same information was not conveyed to the claimants or Ms Casey. Her evidence, again which I accept, is that she had been explicitly told that there was to be a TUPE transfer which would mean the staff transferred. Although she had lost the tenancy there was no further action she needed to take. Mr Venables never informed her that this had changed. There was a handover meeting on the 24th July

itself with a Mr Keith Gordon of EI/Beacon and no mention was made of any change in circumstances, and on that same day Mr Venables gave her the email address of Messrs Murphy and Mills so that she could send the employee information. Thus, as at the point at which she relinquished the tenancy Ms Casey did not know or believe, and had no reason to know or believe, that a TUPE transfer to Messrs Murphy and Mills was not going to take place.

9. In the course of the hearing itself the third and fourth respondents have disclosed an email from Mr Gordon dated 10th August 2018 in which he says " *Be aware that I did call the publican on Monday this week to advise her that it is our understanding that any redundancy payments will be her responsibility and that if she believed this to be incorrect then she should take legal advice*". Mr Gordon has not been called and Ms Casey has not had the opportunity to the challenge this. She accepts that there was a telephone call but not that Mr Gordon ever mentioned responsibility for redundancy. He did mention that she should take legal advice. If Mr Gordon did not mention redundancy it begs the question of what Ms Casey should take legal advice about. However irrespective of what was or was not said in this phone call on 4th September 2018 Mr Venables emailed Ms Casey, and separately both of the claimants, to express the view that ".. *the fact that the premises are now likely to be shut for so long means that TUPE will no longer apply*". As a consequence, all three took advice from the CAB and ACAS and on 8th October 2018 issued these proceedings.

10. The evidence of Mr Venables and Mr Murphy is that there was no further contact between them about the Plough Inn until early October 2018. In the early part of October 2018 the refurbishment was complete and a TAW was offered to Mr Murphy. He accepted and took a TAW individually on 12th October 2018. None of the staff transferred to the newly re-opened premises. Mr Mills evidence is that he was ill and was not involved at this stage but in December 2018 a further agreement was entered into with both himself and Mr Murphy.

11. In summary the Plough Inn was shut from 24th July 2018 until 12th October 2018 at which point Mr Murphy in initially took on the tenancy. It re-opened and has been run as a pub from that point onwards.

Conclusions

First Respondent

12. As is set out in the various case management orders “The Plough Inn” is simply the name of a building which has no independent legal personality. On any analysis it could not be liable for any of the claims which are dismissed

TUPE

13. In determining the TUPE issues I bear in mind that neither the claimants nor Ms Casey were legally represented and they did not attempt, nor could they be reasonably be expected, to make submissions as to the arcane mysteries of the TUPE Regulations. Whilst I have therefore specifically addressed the submissions of Ms Taylor on behalf of the third and fourth respondents, I have sought to consider any points which might have been made on behalf of the other parties had they been represented.

14. The overarching question is whether there was a transfer of an undertaking within regulation 3(1)(a) TUPE Regs 2006. The third and fourth respondent submit firstly that this is not a service provision change within the meaning of reg 3(1)(b) and it appears to me that that must be correct. If there was a transfer it must fall within reg 3(1)(a).

15. The first question is therefore whether there was a transfer of a business entity which retained its identity. In broad terms the economic entity prior to transfer was the operation of The Plough Inn as a public house offering food and drink to members of the public. In determining whether it retained its identity I have to apply the well-known Spijkers tests as analysed in *Cheeseman and others v R Brewer Contracts Ltd 2001 IRLR 144*. Those include (insofar as they are relevant for this case) :-

> • *the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, among other things, by the fact that its operation is actually continued or resumed;*
>
> • *in considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question, but each is a single factor and none is to be considered in isolation;*
>
> • *among the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they were suspended;*
>
> • *in determining whether or not there has been a transfer, account has to be taken, among other things, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on;*

the absence of any contractual link between transferor and 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;

• when no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.

16. In her original submissions (para 27) Ms Taylor accepted on behalf of the third and fourth respondents that there had, applying those tests, been a business entity which retained its identity post transfer, and her submissions focussed on the questions of the date of transfer and whether the claimants were employed immediately before the transfer. However, in the light of Mr Murphy's evidence as to the differences in the contractual relationship she no longer makes that concession. In essence she submits that the different contractual obligations and the extent to which the tenant has a significant degree of freedom to run the business, and to select and price products in particular, are a part of the business entity as they at least in part define the business being conducted. Whilst on one level it is possible to say that there was a pub business before and a broadly identical pub business afterwards operating from the same premises, the economic entity has not retained its identity as the business model adopted by the new tenants is wholly different to the previous model. They were not truly in business on their own account with broad discretion as to how the pub should be run and the business operated, but were in reality self-employed managers who had no say in any of the fundamental questions as to the running of the business. There is no evidence that this is a device to avoid TUPE, indeed as is set out above all parties assumed that TUPE would apply even on the basis of the different business model had events proceeded as planned. However just as the parties cannot agree that TUPE does not apply, they cannot agree that it does if in reality the facts do not allow the conclusion that there was a TUPE transfer.

17. In essence she submits that whilst the respondents are providing an essentially identical service to the public from the same premises, the business that they are running is different from that being run by Ms Casey.

18. The next factor she relies on is the period of suspension of the activities and the reason for that suspension. As is set out above it is not in dispute that it was originally intended that there would be a two to tree week break for refurbishment. However, the discovery of asbestos changed everything. It changed EI's internal arrangements which put at risk it becoming a Beacon property, which in turn would have affected the terms upon which it was subsequently let. All negotiations with Messrs Murphy and Mills ceased and the agreed transaction fell away. In early October the proposition was resurrected and an agreement reached with Mr Murphy alone.

19. I have been referred to a number of authorities in relation to the suspension of activities. They are all highly fact sensitive, and the temporary cessation of work does not in and of itself preclude the existence of a transfer (See *Wood v Caledon Social Club and others 2010 EAT*; *Alno v Turner and others 2016 EAT* in which the relevant

extract from Bork in the ECJ is set out at para 22; *Housing Maintenance Solutions Ltd v McAteer and others 2014 EAT* although that is primarily concerned with the date and not the fact of the transfer). In Bork the temporary cessation was very short, and over the Christmas break (see the summary in Alno para 23); in Wood there was a short suspension of a few weeks during which a licence was sought which would allow the undertaking to be continued exactly as before. By contrast in Alno itself the cessation had lasted some eighteen months and the business had not resumed at the time of ET hearing, whereas in in the Housing Maintenance case it was only for a few weeks. Moreover, in both the latter cases it was held that the tribunal had fallen into error in elevating the intentions of the parties prior to the period of suspension as being the decisive or determinative factor.

20. Ms Taylor submits that in this case the cessation of business was of a different character to that in Wood or Housing Maintenance in particular and was more comparable to that in Alno. Because of the discovery of asbestos the original plans were put on hold whilst the nature and length of the remedial works was established. At that stage it was not known whether this would be a month, or a year or how that would affect any future tenancy or contractual arrangements. The fact that the suspension of activities lasted for just under three months was wholly fortuitous. In essence she submits that as at the date of the discovery of the asbestos a wholly new factual situation arose with at that stage the prospect of the closure of the pub for an indeterminate period.

21. To deal briefly with the other factors. In relation to the fact that none of the staff were taken on that does not in my judgment assist in the resolution of this issue. They were not taken on precisely because Mr Murphy did not believe that TUPE applied, even though he would have done so had the TAW been entered into at some point in August. There was no separate independent or unconnected reason which has any bearing on the issue of whether there has been a transfer.

22. In terms of the tangible and intangible assets Mr Murphy took over the lease of the pub itself which had at that point been fully refurbished. In terms of customers there is no evidence at all before me as to the extent to which the customer base returned after the three month break or had taken their custom elsewhere.

23. Ms Taylor submits that when all of those factors are put together that whilst none is necessarily individually decisive, that the overall picture is that after a three month cessation of business necessitated by the discovery of asbestos, that the pub re-opened under a new tenant who operated the business under a significantly different business model from that which previously obtained, without any of the existing staff, and that looked at in the round it follows that in this case I should conclude that that business entity did not retain its identity and that there is accordingly no transfer.

24. The contrary argument is that in all its essentials the business remains identical. The premises were used to run the business of a public house before the transfer and the same premises were used to run the business of a public house after the transfer. Thus, applying the “decisive criterion” set out above after the suspension of activities the same business resumed operating from the same premises. Whilst the terms on

which Ms Casey and then Messrs Murphy and Mills took on the tenancy may have been different and involved different contractual arrangements that does not alter the essential nature of the economic entity which resumed.

25. In my judgement it is clear that there was a business entity which retained its identity for the reasons set out in the paragraph above and that there was therefore a transfer within the meaning of reg 3(1)(a).

Date of Transfer/ Claimants Employment Status Immediately Before Transfer

26. In any event, and whatever the answer to the question of whether or not the business entity retained its identity, the third and fourth respondents submit that the date of the transfer must have been 12th October 2018. If this is correct, they submit that the claimants were not employed immediately prior to the transfer as required by the regulations.

27. The tribunal is required to identify a specific date of transfer (See: Celtec v Astley). However, the fact that a party has been engaged in discussions which might in other circumstances have led to a TUPE transfer does not mean that a TUPE transfer occurred on any particular date. As it was put in the Housing Maintenance case *".. the judge erred in law in treating the alleged date of acceptance by (the transferee) of responsibility for the claimants as* determinative of the date of transfer of the undertaking ….*That assumption of responsibility occurs on the date of the transfer of the undertaking not vice versa. The belief of the parties or their actions of entering or not entering into contracts of employment do not dictate the date of transfer of an undertaking*." Ms Taylor submits on this basis that the 12th October 2018 must be the date of transfer as Mr Murphy had no legal involvement in the business until that date. Prior to 24th July there had been a legally non-binding expression of interest. In my judgement this must be correct and if there was a transfer it follows that it cannot have happened earlier than 12th October 2018.

28. That leads on to the second question of whether the claimants were employed immediately prior to the transfer, which itself devolves into two parts. The first is purely factual; the second relates to the application of regulation 4(3).

29. As is set out above perhaps by the 10th August 2018, and certainly by 4th September 2018 EI were of the view that here had been, and would be, no TUPE transfer and that Ms Casey should have dismissed the claimants on 24th July 2018. However, the claimants and Ms Casey all agree that she did not do so then, or indeed at any stage after the 4th September 2018. Clearly as EI/Beacon were not and never had been their employer EI cannot have dismissed them whatever view it took of their correct employment status. One possibility is therefore that they continued to be employed by Ms Casey until the transfer on 12th October 2018, and were therefore employed by her immediately prior to the transfer.

30. Before dealing with regulation 4(3) (and although it is somewhat academic given my conclusions as to the application of regulation 4(3) but needs to be addressed in case

I am incorrect in those conclusions) it follows that I have to deal with the question of the claimants employment status as a matter of fact. Whilst the claimants and Ms Casey agree that she never expressly dismissed them, they equally all understood that there would be a transfer of the undertaking to Messrs Murphy and Mills and that she would cease to be their employer at that point. What no one appears to have considered, or at least about which there is no evidence at all before me, is whether they would remain employees of Ms Casey for the anticipated two to three week shutdown at which point their employment would transfer, or that their employment would transfer immediately. If it is correct, as I have held above that the date of the transfer was 12th October 2018, and in the absence of any agreement by Messrs Murphy and Mills to accept responsibility for the employees prior to the transfer it appears to me that the only conclusion is that in the absence of any express dismissal they remained the employees of Ms Casey until 12th October 2018. That is the date upon which the event occurred, albeit unknown to them at that point, that had been agreed in advance as the point at which she would cease to employ them.

31. However, if that analysis is correct, given that Ms Casey had relinquished the tenancy and no longer ran the pub that it raises the question of whether immediately prior to 12th October 2018 the claimants were "*assigned to the organised grouping of resources or employees that is subject to the relevant transfer*.." (Reg 4(1) and 4(3)). Thus, Ms Taylor submits that even if there was in principle a transfer (ie a business entity which retained its identity), and even if the claimants remained in Ms Casey's employment until the 12th October 2018, that they cannot have been assigned to any organised grouping of employees immediately prior to the transfer as none existed at that point. It appears to me that this must be correct, and they could not gain the benefit of reg4(1) simply by that route.

32. That brings into play the rest of regulation 4(3) which provides that the reference to a person "..so employed immediately before the transfer.." includes "..where the transfer is effected by a series of two or more transactions .. a person so employed and assigned or who would have been employed and assigned immediately before any of those transactions." If therefore there is a transfer effected by a series of transactions if the employees were employed in the transferred undertaking at the beginning of the process (ie immediately before the first transaction) they will be afforded the benefit of regulation 4(1) protection. As is set out above in my judgement there was a relevant transfer. Whilst the date of transfer was the 12th October 2018 that transfer was effected by a series of transactions the first of which was the relinquishing or forfeiture of the tenancy by Ms Casey on 24th July 2018. It is not, and has never been anyone's case that the claimants were not still employed immediately prior to, and indeed at that point. It appears to me to follow that they do get the benefit of Regulation 4 (1) protection and that the transfer did not operate so as to terminate their contracts of employment.

33. That in turn raises the question of their current status. If they were not and have not ever been dismissed by Ms Casey, are they and they have they been since 12th October 2018 employed by the third and fourth respondent albeit unknown to them and without the requirement to carry out any work. Alternatively, is the failure of the third and fourth respondents to engage them on 12th October 2018 in effect a

dismissal. Since the third and fourth respondents defend these proceedings explicitly on the basis that the claimants did not and have never become their employees in my judgement if they were transferred by operation of the TUPE regulations they were in effect dismissed on 12th October 2018.

Identity of the Transferee

34. That in turn raises the question of the identity of the transferee. As is set out above Mr Murphy personally and not Mr Murphy and Mr Mills entered into a TAW on 12th October 2018. It follows in my judgement that the transferee must be Mr Murphy.

Reason for dismissal – Reg 7

35. The third and fourth respondents submit that even if (as I have held above) that the effect of the TUPE Regulations was to transfer the claimants' employment and that they have been dismissed, that the dismissal was not unfair within the meaning of reg 7 as the "sole or principal reason for the dismissal" was not the transfer. In support of this she relies on Kavanagh and others v Crystal Palace FC Ltd. She submits that as in this case the claimants had brought proceedings including claims for unfair dismissal on 8th October 2018 prior to the transfer, that the reason for the dismissals cannot have been the transfer. The claimants' answer to that is that the claim was not only brought against Ms Casey but also The Plough Inn on the advice of the CAB/ACAS. Whilst they were legally incorrect in naming the Plough in itself as it has no legal personality, in effect they were attempting to bring a claim against those running the business of the Plough Inn for the time being. Once they understood that the mechanism they had used for doing this was legally incorrect they applied to, and were permitted to join the third and fourth respondents.

36. In my judgement the transfer must have inevitably been the sole or principal reason for dismissal. But for it they would have remained in employment, and would have done so in any event had the original agreement been put into effect. The only reason for dismissal was that the business had transferred in circumstances in which Mr Murphy did not believe or understand the TUPE Regulations to apply.

Summary

37. It follows that in my judgement there was:-

i) A relevant transfer within the meaning of Reg 3(1)(a) TUPE Regs 2006 from the second respondent to the third respondent;

ii) That transfer occurred on 12th October 2018; and

iii) Was effected by a series of transactions within the meaning of reg 4(3); and

iv) The claimants were employed immediately before the first transaction; and

v) Were assigned to the organised grouping of workers of the Plough Inn at that point; and

vi) That in consequence their employment did transfer to the third respondent; and

vii) The failure to engage them amounts to dismissal; and

viii) The sole or principal reason for their dismissals was the transfer.

38. It follows that the claimants claims for unfair dismissal and all other claims except redundancy pay against the third respondent succeed. The redundancy pay claim is bound to be dismissed as on the basis of my findings the claimants were not dismissed by reason of redundancy.

39. The case will be listed for a Telephone Preliminary Hearing to give directions as to remedy.

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Employment Judge Cadney

Dated:……27 January 2020……..

EMPLOYMENT TRIBUNALS

Claimant: **Mrs C Romain-Gary (C1)**
Ms A Cooper (C2)

Respondent: **Th Plough Inn (R1)**
Ms Margaret Casey (R2)
Mr John Murphy (R3)
Mr John Mills (R4)

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the Judgment and Reasons sent to the parties on 31st January 2020 is corrected to identify the parties as is set out above:-

Mr John Murphy (R3); and

Mr John Mills (R4).

Employment Judge Cadney

Date: 4th February 2020

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.