



EMPLOYMENT TRIBUNALS (SCOTLAND)

5

Case No. 4100034/2020

Final Hearing held at Aberdeen on 19 March 2020

10

Employment Judge A Kemp

Mrs S Murison

15

**Claimant
Represented by
Mr P Murison,
Son**

**Mr G Crombie and Ms Y Smith,
partners of the firm trading as
Wishing Well**

20

**Respondents
Represented by
Ms Y Smith,
Partner**

25

JUDGMENT

30

1. The claimant had continuous service with the respondent from 31 January 2003 following a relevant transfer to the respondent on or around 31 March 2018.

35

2. The claimant was dismissed for redundancy by the respondent on 24 October 2019 having given oral notice of the same on 21 October 2019.

3. **The claimant is entitled to a statutory redundancy payment in the sum of FOUR THOUSAND FOUR HUNDRED AND FORTY POUNDS (£4,440) payable by the respondent.**
- 5 4. **The claimant was entitled to 12 weeks' notice of termination, received one week's notice, and is entitled to 11 weeks' pay in lieu of notice in the sum of ONE THOUSAND NINE HUNDRED AND EIGHTY POUNDS (£1,980) payable by the respondent.**
- 10 5. **The claimant had holidays outstanding at the date of termination amounting to six days, and she is entitled to the sum of ONE THOUSAND AND EIGHTY POUNDS (£1,080) as accrued annual leave under the Working Time Regulations 1998 payable by the respondent.**

15

REASONS

Introduction

20

1. The claimant pursues claims for a statutory redundancy payment, notice pay and holiday pay. The respondent denies all the claims.
2. At the commencement of the hearing agreement was reached on a number of matters, some of which arose from the terms of the Claim Form and Response Form:
- 25
- (i) The claimant's employment terminated on 24 October 2019, after verbal notice of a dismissal for redundancy was given to her on
- 30 21 October 2019.
- (ii) The claimant's gross pay with the respondent was £185 per week, and her net pay was £180 per week.

(iii) The holiday year operated by the respondent was from 1 April to 31 March the following year. In the period from 1 April 2019 the claimant had taken two weeks' holidays.

(iv) The respondent is a partnership between Mr Graham Crombie and Ms Yvonne Smith, and traded as the Wishing Well.

3. There had been an issue as to potential criminal proceedings, but the clerk to the Tribunal checked with the office of the Procurator Fiscal and was told that no such proceedings were ongoing.

4. Ms Smith was asked whether the respondent sought to pursue a counterclaim, and she confirmed that it did not.

Issues

5. The parties agreed with the proposed list of issues set out by the Judge as follows:

(i) When did the claimant's continuous employment start?

(ii) Had there been a relevant transfer of the claimant's employment under the Transfers of Undertaking (Protection of Employment) Regulations 2006 to the respondent?

(iii) What if any entitlement does the claimant have to

(a) A statutory redundancy payment

(b) Notice or pay in lieu of notice

(c) Holiday pay?

Evidence

6. Neither party had produced any document, but during the course of evidence the claimant referred to a text message sent to her by Ms Smith on 21 October 2019, and that she had passed to the Tribunal a print out of the messages.

They were then copied, and after an opportunity for Ms Smith to read them was given, evidence about that continued.

5 7. The claimant gave oral evidence herself. Ms Smith gave oral evidence for the respondent.

8. The central issue was whether the claimant's employment had transferred under the 2006 Regulations, which are commonly referred to as "TUPE".

10 **Facts**

9. I found the following facts to have been established:

10. The claimant is Mrs Sandra Murison. Her date of birth is 29 September 1959.

15

11. The respondent is a firm trading as the Wishing Well. Its partners are Mr Graham Crombie and Ms Yvonne Smith.

12. The respondent operates a shop, comprising a newsagent and general grocery store, at School Road, Aberdeen.

20

13. The claimant started working at the shop on 31 January 2003. She worked five days per week, a total of 20 hours per week. Her employer at that time was Mr Thomas Hunter.

25

14. On or around 31 March 2018 Mr Hunter sold the shop to the respondent. Shortly before he did so the claimant asked Mr Hunter about redundancy. He told her that she was not entitled to it as there were new owners taking over, or words to that effect.

30

15. There had been about four employees employed by Mr Hunter at the shop along with the claimant. All employees were retained working in the shop,

including the claimant, after the sale. They all continued to work the same hours as they had for Mr Hunter.

- 5 16. Ms Smith spoke to the claimant at or about the time of the sale of the shop to the respondent, and told her something to the effect that her continuity of service would be maintained. The claimant asked for a pay increase, and an increase from about £8.50 per hour to £9 per hour was agreed between them.
- 10 17. There was no cessation of the trade conducted from the shop at the time of the sale. The respondent continued to use the same premises, and entered into new lease arrangements with the landlord. The same stock was used by the respondent as Mr Hunter had used. The suppliers to the shop remained as they had been with Mr Hunter. The customers of the shop remained as they had been with Mr Hunter. The same trading name of The Wishing Well
15 was retained by the respondent. The name of Ms Smith was given on a sign to denote that she was the new licence holder for the sale of alcohol.
- 20 18. Shortly after the time of the sale of the shop the claimant received from Mr Hunter a P45.
19. Mr Hunter gave all the staff, at around the time of the sale, a gift in cash with a thank you card.
- 25 20. In week commencing 14 October 2019 the claimant was on holiday. She had taken a week of holiday in the earlier part of the year, after 1 April 2019.
- 30 21. The claimant returned from holiday on 21 October 2019. Ms Smith contacted her to inform her that she was dismissed for redundancy. On the same day Ms Smith sent a message to the claimant to indicate that the respondent “owe you redundancy”.
22. Ms Smith shortly afterwards took accountancy and legal advice and was told that there was no requirement to do so.

23. The claimant worked in the shop on 22 – 24 October 2019, and was paid for the period up to 25 October 2019. The date on which her employment with the respondent terminated was 24 October 2019.

5

24. The claimant's gross wage with the respondent was £185 per week, and her net pay was £180 per week.

Claimant's submission

10

25. Mr Murison argued that there had been a transfer under the TUPE Regulations, and that Ms Smith had confirmed the entitlement to redundancy in her text message on 21 October 2019.

Respondent's submission

15

26. Ms Smith accepted that she had sent the text referred to but at that point had been reading material online, and afterwards she took advice including legal advice and that was that no sum was due. There was no contract between Mr Hunter and the respondent. She did not think that the respondent was liable for the 15 and a half years' service with Mr Hunter when the claimant had worked for the respondent only for 18 months. If the respondent had known about the argument made by the claimant she would not have been taken on. Mrs Smith was invited to comment on the argument made as to the TUPE Regulations, but declined to do so.

20

25

Law

27. The entitlement to a redundancy payment is found in section 135 of the Employment Rights Act 1996 ("the Act").

30

28. The amount of the statutory redundancy payment is set out in section 162 as follows:

“162 Amount of a redundancy payment

(1) The amount of a redundancy payment shall be calculated by—

- (a) determining the period, ending with the relevant date, during which the employee has been continuously employed,
- (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
- (c) allowing the appropriate amount for each of those years of employment.

(2) In subsection (1)(c) “the appropriate amount” means—

- (a) one and a half weeks' pay for a year of employment in which the employee was not below the age of forty-one,
- (b) one week's pay for a year of employment (not within paragraph (a)) in which he was not below the age of twenty-two, and
- (c) half a week's pay for each year of employment not within paragraph (a) or (b).”

29. Continuous employment is provided for in Part XIV of the Employment Rights Act 1996. Section 218 of the Act includes the following provision:

“218 Change of employer

(1) Subject to the provisions of this section, this Chapter relates only to employment by the one employer.

(2) If a trade or business, or an undertaking (whether or not established by or under an Act), 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.”

30. The Transfer of Undertakings (Protection of Employment) Regulations 2006 were introduced to give effect to the Acquired Rights Directive of the

European Union 2001/23/EC. It requires to be construed in accordance with the purpose of that Directive.

31. Regulation 3 makes provision as to the definition of a relevant transfer, as follows:

“3 A relevant transfer

(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.....”

32. Regulation 4 provides as follows:

“4 Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

- (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
- (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person

assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.....”

5 33. A summary of the law in relation to when there is a transfer of undertaking under Regulation 3(1)(a) of the Regulations is in ***Cheesman and Ors v Brewer Contracts Ltd [2001] IRLR 144***. The first step is to identify the economic entity, and the second to establish whether that transferred. In ***D36 Ltd v Castro UKEAT/0853/03*** the EAT held that the employment tribunal had
10 been correct to conclude that where an employee had transferred under TUPE, continuity of employment was preserved by the operation of what is now Regulation 4(1).

15 34. Section 86 of the Employment Rights Act 1996 provides for a minimum period of notice, dependent on the length of continuous service. If that is under two years, the period is one week. If it is over 12 years it is 12 weeks.

20 35. The Working Time Regulations 1996 implement the Working Time Directive 2003/88/EC. Regulations 13 and 13A provide for a minimum entitlement to annual leave amounting to 5.6 weeks, which for someone working five days per week is the maximum of 28 days per annum. Regulation 14 has provision for a pro-rata entitlement for a worker whose contract is terminated.

25 Discussion

36. The central question in the case was whether or not there had been a relevant transfer when the respondent bought the shop from Mr Hunter in 2018. That will determine if there is continuous service for 16 years as claimed by the claimant, or less than two as claimed by the respondent. In turn that will
30 dictate whether the entitlement to notice is 12 weeks or one.

37. There was little if any dispute on the material facts. There was a dispute as to whether the claimant had been offered and declined a contract, which was

not put to her in cross examination but spoken to by Mrs Smith. There was some dispute as to whether Mr Hunter had said something to the effect that redundancy was not payable if there was a transfer. These issues are not relevant to the determination, but generally I preferred the evidence of the claimant, who gave evidence in a straightforward way. She had also referred to a text message sent by the Ms Smith. She said that Ms Smith had said to her at the time of transfer that there would be continuity of service and there was neither cross examination on that point, nor contrary evidence given.

5
10 38. The economic entity that existed prior to the potential transfer on the sale by Mr Hunter was the operation by Mr Hunter and his employees of the shop called the Wishing Well. I consider that it is clear that it retained its identity after the sale. The same staff were employed, at the same premises, with the same trading name, using the same stock, supplied by the same suppliers,
15 and to the same customers. There was no cessation of the operation of the shop. That was a relevant transfer under Regulation 3(1)(a) of the Regulations, having regard to the terms of that Regulation and the guidance in ***Cheeseman***.

20 39. The effect of that was to transfer all rights and liabilities from Mr Hunter to the respondent, and that included the date on which the claimant's continuous employment started. The effect of a transfer in law is that there is no cessation of employment, but new employment with the new operators of the shop, called in law the transferee. The transferee is deemed in law to have been
25 the employer of the claimant throughout. It is sometimes called a statutory novation of contract. It operates as a matter of law and it is not relevant that there was no written contract between Mr Hunter and the respondent, nor that the claimant was offered a written contract later, nor that there was an agreement to increase her hourly rate.

30

Remedy

40. In turn that means that the claimant has 16 years' service, and is entitled to a statutory redundancy payment. That is calculated on the basis of one and a half weeks' pay for all of the employment as it was all over the age of 41. The gross pay of £185 is utilised for this purpose, and the sum due is £4,440.

41. The entitlement to notice is accordingly to 12 weeks, but the evidence was that the claimant was paid for the first week, such that 11 weeks' pay remains due. That is calculated on the net pay, and is £1,980.

42. Applying the terms of Regulation 14 of the Working Time Regulations 1998 the accrued leave due at termination was a total of 16 days. 10 days had been taken leaving six due, and payable at £180 per week, a total of £1,080.

Penalty

43. Employment Tribunals have a discretionary power in certain circumstances to order employers who lose a claim to pay a financial penalty to the Secretary of State, under the Employment Tribunals Act 1996 section 12A, which was inserted by section 16 of the Enterprise and Regulatory Reform Act 2013. It has subsequently been amended.

44. The provision states as follows:

“12A Financial penalties

(1) Where an employment tribunal determining a claim involving an employer and a worker—

- (a) concludes that the employer has breached any of the worker's rights to which the claim relates, and
- (b) is of the opinion that the breach has one or more aggravating features,

the tribunal may order the employer to pay a penalty to the Secretary of State (whether or not it also makes a financial award against the employer on the claim).

(2) The tribunal shall have regard to an employer's ability to pay

5 (a) in deciding whether to order the employer to pay a penalty under this section;

(b) (subject to subsections (3) to (7)) in deciding the amount of a penalty.

(3) The amount of a penalty under this section shall be—

10 (a) at least £100;

(b) no more than £20,000.

This subsection does not apply where subsection (5) or (7) applies.

(4) Subsection (5) applies where an employment tribunal—

15 (a) makes a financial award against an employer on a claim, and

(b) also orders the employer to pay a penalty under this section in respect of the claim.

(5) In such a case, the amount of the penalty under this section shall be 50% of the amount of the award, except that—

20 (a) if the amount of the financial award is less than £200, the amount of the penalty shall be £100;

(b) if the amount of the financial award is more than £40,000, the amount of the penalty shall be £20,000.

(6) Subsection (7) applies, instead of subsection (5), where an employment tribunal—

25 (a) considers together two or more claims involving different workers but the same employer, and

(b) orders the employer to pay a penalty under this section in respect of any of those claims.

(7) In such a case—

30 (a) the amount of the penalties in total shall be at least £100;

(b) the amount of a penalty in respect of a particular claim shall be—
(i) no more than £20,000, and

- (ii) where the tribunal makes a financial award against the employer on the claim, no more than 50% of the amount of the award.”

5 45. This power was granted to tribunals, according to the Explanatory Notes to the 2013 Act by which that amendment was introduced:

10 “to encourage employers to take appropriate steps to ensure that they meet their obligations in respect of their employees, and to reduce deliberate and repeated breaches of employment law”.

15 46. I considered whether or not to engage this provision, as there was a clear transfer, there had been discussion about that at the time, and what appeared to be a clear acknowledgement of liability by text. I concluded however that whilst there was in law no proper argument put forward by the respondent, in that the argument was essentially that TUPE was wrong to provide as it does, in light of the fact that it was a small business and apparently in financial difficulties, and I was told that it had been sold, that it was not appropriate to impose that penalty.

20

25 47. It is however necessary to state that the respondent has not fulfilled its employment law responsibilities to the claimant. It did not appear to understand to any extent what they were. The suggestion that had the respondent known of TUPE it would not have taken the claimant on ignores entirely the effect of TUPE itself. Such an act would very likely indeed have been a breach of the Regulations, and led to a claim of unfair dismissal which was very likely indeed to have succeeded and led to an award at a higher level than that made by me in the Judgment. Paradoxically that may be of some small comfort to the respondent. Having agreed to purchase the shop,
30 the terms of the Regulations were engaged and employees such as the claimant were protected by its terms, which is the purpose of the Directive itself.

Conclusion

48. There had been a relevant transfer of the claimant's employment to the respondent, and the claimant is entitled to a statutory redundancy payment, a payment in lieu of notice and accrued holiday pay in the sums set out above.

5

10

15

20

25

Employment Judge:
Date of Judgment:
Date sent to parties:

Alexander Kemp
20 March 2020
23 March 2020