



EMPLOYMENT TRIBUNALS

Claimant: Miss V Clark

Respondent: Kim Middleton

HELD AT: Leeds

ON: Tuesday 18th and
Wednesday 19 August
2020

BEFORE: Employment Judge Wade
Miss Y Fisher
Mr M Elwen

REPRESENTATION:

Claimant: Mr N Sharples, solicitor, GMB

Respondent: Mrs A Gray, solicitor, acting pro bono.

JUDGMENT

The claimant's claim for a 13 week protective award is dismissed.

REASONS

Introduction

1. This claim was one of two claims presented to the Tribunal (Miss Clark and another employee) concerning their employment at Black Dog Hydrotherapy Ltd ("Black Dog") following a transfer of that business from Mrs Middleton in September last year. Both claims against Black Dog were settled and dismissed following withdrawal; in the claimant's case, this was recorded in a Judgment sent to the parties on 17 August 2020. Mrs Middleton's operation of the business had been as a hobby or interest, albeit generating employment for a number of staff.
2. In grounds of claim running to 25 paragraphs against Black Dog, including constructive unfair dismissal, the complaint made this sole complaint against Mrs Middleton at paragraph 26: "The Claimant brings a protective claim against the 1st Respondent for 13 weeks' gross pay in respect of her failure to comply with her obligations to inform and consult under Regulation 13 TUPE".

3. For reasons which will become apparent it is convenient to record the relevant parts of the enforcement paragraph for breaches of Regulation 13 (as modified by Regulation 13A for micro businesses, which was accepted to apply in this case):

Failure to inform or consult

15.—(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—

(a) in the case ...;

(b) in the case ...;

(c) in the case ...and

(d) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

...

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

.....

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

(10)

4. In her response Mrs Middleton said this at paragraph 19: “R1 denies that she failed to comply with her duties to inform and consult pursuant to TUPE. In the alternative. R1 avers that in the event of any failure by R1 (which for the avoidance of doubt is denied), any failure was as a result of R2’s failure to properly notify R1 about any measures envisaged and that [f]iability for any protective award made, if at all, should therefore fall to R2.” She had therefore given the requisite notice pursuant to paragraph 15 (5) and Black Dog was, in any event, a party.
5. At the outset of these proceedings then, there was a conflict between Mrs Middleton and Black Dog. The joined claims were subject to a case management hearing on 14 April 2020 where both claimants were represented by solicitors, Mrs Middleton represented herself and Black Dog was separately represented by counsel. The relevant issues were identified as follows:
6. Did R1 notify C1:
 - 6.1. The fact that a transfer was to take place, the date or proposed date of the transfer and the reasons for it?
 - 6.2. The legal economic and social implication of the transfer for any affected employee, if any?
 - 6.3. The measures which R1 envisaged she would take in connection with the transfer, or if no measures, were to be taken of that fact?
 - 6.4. What measures R1 envisaged R2 would take in relation to any affected employees who would become employees of R2 after the transfer, and if no measures were envisaged of that fact?
 - 6.5. Was there a requirement for the above information to be supplied in writing to C1 and C2?
 - 6.6. Was it supplied in writing?
 - 6.7. Did R2 envisage taking any measures?
 - 6.8. Did R2 notify R1 that it envisaged taking such measures?
 - 6.9. Was information supplied long enough before the relevant transfer and, if appropriate, was consultation undertaken long enough before the relevant transfer?
 - 6.10. If R1 did breach its duty under Regulation 13 to what extent, if at all, should there be joint and several liability with R2.
7. During this hearing, the Tribunal heard from Mrs Slade-Andrews (the sole director and owner of Black Dog) as a witness for Mrs Middleton. Mr Sharples pointed out the potential conflict between Mrs Middleton and Mrs Slade-Andrews (in the context that both their statements had been drafted by Mrs Gray): if the Tribunal did not accept Mrs Slade-Andrews’ evidence to the effect that (1) she had informed the claimant of the transfer and the social, economic and legal implications on behalf of Mrs Middleton, and (2) there were no measures envisaged by Black Dog, then Black Dog could be jointly and severally liable for any award arising.
8. The difficulty with that submission was that there was no protective award complaint under paragraphs (1) and (7) of Regulation 15 against Black Dog directly: the claimant had chosen to pursue Mrs Middleton only pursuant to paragraph 9, if Mrs Middleton’s defences did not succeed, or paragraph 8(b) by an award against Black Dog directly, if they did. The Tribunal identified to Mr Sharples

that Black Dog had been released from the proceedings because claims against the company had been dismissed. The company was not represented in this hearing.

9. As to the potential conflict, there is no property in a witness and if Mrs Slade-Andrews, in circumstances of her company previously being professionally represented but released through settlement, chose to appear as a witness for Mrs Middleton, that was a matter for her. The Tribunal was satisfied that a fair hearing could take place and there was no application to adjourn or amend the claim from the claimant.

Evidence

10. The Tribunal had a short, helpful bundle of relevant documents. Notably absent in a TUPE case was a sale and purchase agreement. We were told, there was none, and the arrangements for the transfer were reflective of its small size and origins as a hobby. The Tribunal heard from the claimant and from Mrs Middleton and Mrs Slade-Andrews. Notably absent was Mr Andrews, with whom we were told, Mrs Middleton had discussed the transfer arrangements – Mrs Slade-Andrews is dyslexic and any emails or longer communications were drafted by her husband who has commercial experience, the Tribunal was told.

Findings of fact

11. The claimant was employed by the respondent from 2015, having done work experience for the very small dog hydrotherapy business, “Black Dog Hydrotherapy”, operated by the respondent as a sole trader.
12. The claimant was provided with written terms of conditions, including an update to those in 2017. She was paid a salary based on minimum wage hours (25 a week) and she also participated in a “nest” pension scheme. She had five weeks’ holiday a year, in addition to bank holidays. Her contract provided for two weeks’ paid leave in the event of sickness absence.
13. The respondent (that is Mrs Middleton at the time) employed only five people by 2019 and this was a micro business within Regulation 13A. The claimant was latterly in an administrative role, having started work or volunteering, as a poolside assistant. Concurrently the claimant also had NHS employment and ran her own gumshield business. She is well informed and commercial in her approach.
14. The respondent had operated for very little profit, around £14,000 over six or seven years, taking no salary for herself but employing others on salaries. She had reinvested that profit to provide an underwater treadmill for the dogs’ treatment, but come the spring of 2019 she told Mrs Slade-Andrews and others that she would wish to retire from the September of 2019. By April of 2019 there was a very firm expectation that Mrs Slade-Andrews, a hydro therapist known to Mrs Middleton for some years, and her husband, would be taking over the undertaking.
15. Through 2019 the Andrews’ were gathering information and making plans for changes that might take place if they did take over, including cutting the hours of one member of staff, and changing contracts of employment, and those plans were afoot from April of 2019. The transfer was not certain, however - in early August Mrs Slade-Andrews told the claimant that she was unsure whether she was taking over.
16. By later in August things had become clearer and Mrs Middleton sat down with three of the employees (aside from the claimant) with Mrs Slade-Andrews present

and told them of the retirement and that Mrs Slade Andrews was taking over on 30 September. They were the words she used, and that nothing would change. Mrs Slade-Andrews said that some things would have to change because there would be one less therapist (Mrs Middleton) and there was a potential impact from that on income and administrative support. The three staff were also told that P45s would be issued and their pensions would move to be provided by Mrs Slade-Andrews. Mrs Slade-Andrews did not tell Mrs Middleton or those three staff of any changes to their terms, or proposals for that, at that stage.

17. Mrs Middleton had refreshed her knowledge of the Transfer of Undertakings Regulations before that meeting. She is a certified and previously chartered accountant and she had been involved in a TUPE transfer when her husband went through a similar succession issue in 2001 or thereabouts.
18. Mrs Middleton did not use the word TUPE when she was discussing matters with those members of staff, but the principle enshrined in the regulations was that their employment would transfer to Mrs Slade-Andrews and without change (apart from pensions) and that was discussed alongside the necessary change in the pension provision.
19. The claimant was then fully aware of the retirement date from discussions amongst all the staff, but particularly after 12 September, from exchanges between her and Mrs Slade-Andrews, with whom she had a close friendship and working relationship.
20. The claimant and Mrs Slade-Andrews discussed all manner of consequences and matters involved in Mrs Middleton's retirement. The claimant had suggested that Mrs Slade-Andrews might want to set up a limited company if she was going to take over. That was also something Mr Andrews had also encouraged. The claimant and Mrs Slade-Andrews also discussed a potential name change for the business because of the name, "Black Dog" and its potential association with depression, from which the claimant suffered.
21. It was also an option for Mrs Slade-Andrews to allocate a share/include the claimant as a co-owner or in the business, or indeed to change its name, had she chosen to do so, but she chose not to do either of those things.
22. The claimant knew and could access all manner of commercial information about the undertaking by virtue of her administration role. She could, for instance, access the number of "swims" carried out by dogs in the pool, per month, and hence the revenue, and Mrs Slade-Andrews relied on her to gather that information and pass it on as appropriate.
23. There was no sale and purchase agreement in writing between transferor and transferee. No cash changed hands upon transfer between Mrs Middleton and Mrs Slade-Andrews or Black Dog. There was simply an inventory of the assets being transferred such as the treadmill, and the sundries, and a note of the number of paid for sessions for which Mrs Slade-Andrews would be liable to deliver to clients after the date of the transfer.
24. To some extent it is properly described as a gentleman's/gentlewoman's agreement made and finalised in the first and last weeks of September 2019 - Mrs Middleton was on holiday for the two middle weeks. Mrs Slade-Anderson did not incorporate the company with the name Black Dog Hydrotherapy Limited until 19 September 2019.

25. Mrs Middleton further agreed, as part of their arrangement, to pay the rent for the premises until December 2019 and to provide cover for any hydrotherapy sessions where members of staff were ill or on holiday.
26. During August and September the day to day management was transferring to Mrs Slade Andrews. In the final week of September there was an international cycling event in Harrogate and the premises were closed.
27. The Tribunal considers that the agreement was reached in principle earlier on in 2019, but in detail very late in the day, not least because of the late coming into being of the transferor. The precise calculation of the number of sessions owed to clients was not done until the week of the cycle event later in September, when the premises were also refurbished by Mrs Slade-Andrews.
28. There was no communication of the final and necessary details of the transfer in writing to staff, but the claimant organised Mrs Middleton's retirement party with clients, and she was involved in communicating the change in the ownership and was involved in work to refurbish the premises in the last week of September. It was clear that she knew the date of the transfer from verbal communications from Mrs Slade-Andrews and others.
29. The transfer took effect at midnight on 30 September. It was not until 21 October, when seemingly out of the blue staff were sent letters and new contracts of employment from Mrs Slade-Andrews, that Black Dog (the limited company) was the new employer.
30. Those contracts were drafted by Mr Andrews and sought to remove the two weeks' full pay in the event of sickness absence, removed paid breaks and varied provisions relating to hours. They were the substantive changes for the claimant. For one member of staff there also a reduction in her contracted hours. There were other cosmetic changes.
31. The accompanying letter from Mrs Slade- Andrews said this: "as you know Black Dog Hydrotherapy has been taken over and formed into a limited company. There have already been a number of changes and there are lots more to come in the next few weeks and months". She went on "Black Dog Hydrotherapy now needs to start creating profits commensurate with the renewal of our main assets ie the pool and treadmill and ensure that we can invest in both further equipment and our people. For the most part that can be achieved by small changes ... some of these will be achieved through changes to contracts of employment and others through improving processes, chasing out waste and reducing costs that do not harm our reputation".
32. Mrs Slade-Andrews had proposed as early as April 2019 cutting one member of staff's hours to 30 from 20. The contract that she sent out to that member of staff cut her hours from 30 to 25. Reducing hours was clearly envisaged by Mrs Slade-Andrews before the transfer date.
33. We further find that the other material contract changes or measures, which directly affected the claimant, were also being envisaged by Mrs Slade-Andrews, or more accurately, Black Dog, before the transfer date.
34. The Tribunal has not commented on the reliability or otherwise of the witness evidence that we have heard generally, but we consider that Mrs Slade-Andrews' evidence to the effect that contract changes were not envisaged before the transfer is unreliable. There is a wealth of evidence in the text exchanges between the claimant and Mrs Slade-Andrews and others, of, frankly, duplicity and we consider

that on the balance of probabilities and taking into account the changes to the particular member of staff's contract, that all the changes were envisaged before the transfer date. The rationale was clear in the October letter: this undertaking was no longer to be operated as a hobby, but for profit because Mrs Slade-Andrews (and perhaps also Mr Andrews) had to earn a living from it.

35. Ultimately then, and perhaps unsurprisingly given the chain of events above, relationships broke down, and the claimant resigned.
36. The claimant's claims in connection with that resignation alleging constructive dismissal and so on against Black Dog have been withdrawn and dismissed. The claimant's witness statement for this hearing addresses only the complaint against Mrs Middleton.

The law

37. The relevant provisions are Regulation 13 of the Transfer of Undertaking (Protection of Employment) Regulations 2006; and Regulation 15, which appears above.
38. As to Regulation 15, the Tribunal initially agreed with Mr Sharples that a complaint could not be brought directly against Black Dog Hydrotherapy Limited as "the Employer", pursuant to Regulation 15(1). However, in our deliberations it is clear from Regulation 15(7) that a protective award complaint can be brought against a transferee.
39. A further issue which we have addressed as a matter of law in our deliberations is issue 6.5 above: was there an obligation for Regulation 13 information to be provided in writing.
40. We have had submitted to us two cases of the Employment Tribunal, which do not bind us. They are GMB v Easteigh Borough Council and anor unreported ET Case No.3102915/08, in which the Tribunal found that information provided verbally in a meeting satisfies the current regulations; and the claimant referred us to Nalgo v British Waterways Board 1988WL1697095, chaired by Mr Robson, and given on 12 December 1988, suggesting the opposite when construing the 1981 Regulations.
41. We have applied the usual rules of construction - the ordinary Dictionary meaning of the words that are to be found in Regulation 13(2): "...the employer shall inform those representatives of - the fact the transfer to take place...". We take into account the provisions of Regulation 13 (5):..."the information... shall be given to each of them by being delivered to them **or** sent by post".
42. We have concluded, like the Tribunal in the GMB v Eastleigh that had Parliament wished, as it did in TULR(C)A Section 188 (4) provisions, to specify that the information has to be given in writing, it would have said so.
43. The Tribunal has concluded that there is no such requirement in TUPE Regulation 13. The obligation is to deliver information by whatever means is appropriate, which will very often be in writing but not always.
44. We have also been referred to the new Regulation 13A, which enables the employer employing fewer than 10 employees to provide information and consult with each employee directly as if they were representatives.

Conclusions

45. Answering the issues we have to decide, our conclusion is that while Mrs Middleton did not herself inform the claimant of the fact of the transfer, the date and the reasons for it, the date and reasons were provided by Mrs Slade-Andrews. These matters were also well known to her. Mrs Middleton had taken a deliberate decision to inform the other staff members, but left communications with the claimant to Mrs Slade-Andrews, not least perhaps because Mrs Slade-Andrews would need to tell the claimant that she was not to be a co-owner.
46. We have also concluded that the fact of a transfer to Black Dog Hydrotherapy Limited could not have been, and was not communicated with any degree of certainty by Mrs Middleton to employees: that was not recorded in her note of their meeting, but instead a transfer to Mrs Slade-Andrews. Understandably that was so, because the company was not in existence in the August meeting and was incorporated at the eleventh hour. There may have been an expectation from the claimant that the transfer would be to a limited company, but it was not confirmed to her by Mrs Middleton before the transfer, nor by Mrs Slade-Andrews in the week before the transfer – we accepted the claimant’s evidence about that, because it struck us as likely in the circumstances, and spontaneously given in cross examination.
47. To Mrs Middleton’s knowledge, there were no measures proposed to the running of the business, nor any social or economic implications. The fact of the transfer to a limited company is, in our judgment, a legal implication which should have been communicated – employees are entitled to know if Mrs Slade-Andrews, unlike Mrs Middleton, is to be protected by limited liability. For these reasons we find that Mrs Middleton has failed as employer to comply with a duty pursuant to the Regulations and the complaint to that extent is well founded.
48. As to Mrs Middleton’s Regulation 13 2(d) obligation to inform long enough before the transfer to consult, where measures are envisaged, we refer to our findings about the communications that were going on between Mrs Slade-Anderson and the claimant about the potential changes (concerning others) directly. We have found that Mrs Slade-Anderson and her husband envisaged further changes or measures but had not communicated any of them to Mrs Middleton. It was also the case that Mrs Slade-Anderson and the claimant believed Mrs Middleton would resist such changes in respect of one member of staff. It was not therefore reasonably practicable or doable for Mrs Middleton to have known about the envisaged changes, when they were being kept from her. Her defence in that respect succeeds.
49. We are therefore left with one very technical breach of the Regulations on the part of Mrs Middleton in a micro business from which she drew very little or no financial reward. We have directed ourselves in accordance with Suzie Radin Ltd and the provisions in Regulation 15 (8) and 16 (3): “Where a Tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and **may** – (a) order the transferor subject, to paragraph 9, to pay compensation to that description of employees...”.
50. In deciding to award compensation the punitive principle applies: we start at 13 weeks for the gravest of breaches, and then take into account mitigating circumstances and the nature of the breach and discount appropriately.
51. We consider that the circumstances of this case are exceptional, including duplicity towards Mrs Middleton by Mrs Slade-Anderson, the nature of the undertaking, the

very late incorporation of a limited company as transferee, and the consequent very limited nature of the breach by her - not informing the claimant directly or through Mrs Slade-Anderson that the identity of the transferee was a limited company with the name Black Dog Hydrotherapy Limited, That was doable in the period between 19 September and 30 September, but was not done albeit Mrs Middleton was away on the date of incorporation. We also take into account that in that period the claimant will have in all likelihood come to know of that fact through her work in any event. We also take into account that the failure was remedied by 21 October by the provision in writing of confirmation of the new employer's name.

52. For these reasons we exercise our discretion to award no compensation be payable by Mrs Middleton.
53. It will also be apparent from our findings that had a Regulation 13 complaint been presented directly against Black Dog Hydrotherapy Limited, or had the complaints in the claim form not been withdrawn and dismissed against Black Dog Hydrotherapy Limited, we might have been in very different territory. Black Dog, through Mr and Mrs Slade-Andrews, envisaged measures and did not inform the claimant or other employees long enough before the transfer for consultation with a view to reaching agreement to take place. That arguably resulted in the departure of two staff. That is not a minor breach.
54. If we are wrong (as we may be) that the dismissal judgment against Black Dog prevents us awarding compensation under Regulation 15(8)(b), in these exceptional circumstances we do not exercise our discretion to do so: it seems to us to be outwith the interests of justice for compensation to be awarded against a party who has been released from the proceedings and been unrepresented (which arose through the claimant's withdrawal against that party and/or failure to bring a Regulation 13 complaint directly against that party) to face a penal remedy of this kind.

JM Wade

Employment Judge Wade

Date 10 September 2020

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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ⁱ A well known book about depression and local social media group