



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

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**Case No: 4100167/2020 (V)**

**Held on 14 August 2020**

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**Employment Judge J Hendry**

**Mr G Ewen**

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**Claimant  
In person**

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**Reids Deli Cafe Ltd**

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**Respondent  
Represented by:  
Mr A Ovenstone,  
Director**

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The judgment of the Tribunal is that:

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1. The respondent shall pay to the claimant a redundancy payment in the sum of Two Thousand Four Hundred and Fifty Five Pounds Sterling (£2455).
2. The Tribunal finds that the claimant is entitled to the sum of Four Hundred and Sixty Pounds (£460) as pay in lieu of notice.
- 35 3. The Tribunal finds that the claimant is also entitled to the following sums which shall be paid by the respondent company to the claimant:

- i) The sum of Seventy Pounds (£70) being an unlawful deduction made by the respondent from the claimant's wages.
- ii) The sum of Eighty One Pounds (£81) gross being underpayment of one day accrued holiday.

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## REASONS

1. The claimant in his ET1 sought a finding that he had been unfairly dismissed from his position as a Chef with the respondent company. He also sought notice pay, holiday pay and redundancy.
- 10 2. The respondent indicated in their ET3 that the company was no longer trading and was insolvent. Their position was that the claimant committed gross misconduct by contaminating stock in the premises prior to the transfer of the business to another party. This was denied by the claimant.
- 15 3. Following correspondence with the Employment Tribunal it was accepted that the correct respondent's name was Reids Deli Cafe Ltd and that the company had traded from the premises at 23/34 High Street, Perth PH1 5TQ.
- 20 4. Parties agreed that the hearing would take place by CVP. The hearing commenced on 14 August 2020. Mr Ewen gave evidence as did Mr Alan Alex Ovenstone the owner of the company.
- 25 5. There was little or no dispute about the facts of this case other than Mr Ovenstone had been told by the new owners of the business that the claimant had contaminated some of the dried stock left in the premises with salt and had boasted about this to one of their members of staff. Mr Ovenstone accepted that what he had heard was third hand and that he had not spoken to the member of staff that had alleged that the claimant had admitted to this behaviour. He admitted, frankly, that the value of the stock contaminated was probably overstated. In response the allegation was flatly denied by the claimant. There was insufficient evidence before  
30 me for me to find the allegation proven on the balance of probability. The deduction of £70 made for the stock requires to be upheld.

6. I found both witnesses credible and reliable in their testimony. I made the following findings in fact.

**Findings in fact**

7. The claimant is a Chef. He worked for Reids Deli Cafe Ltd in Perth from  
5 25 July 2014 until his dismissal on 11 November 2019. He was 40 years of age.
8. The cafe had been run in various guises by Mr Alan Ovenstone for many years. He had latterly found the lease financially burdensome and had been looking to sell the premises for some time. He came to an agreement with  
10 the owner of the next door business, a restaurant, to take over the running of the cafe on 12 November.
9. The claimant's hours varied week by week. He was paid £491 gross per week (£408 net) on average. His last three months' gross pay being £2512 for August, £1903 for September and £1488 for October. The claimant  
15 worked six days per week.
10. The new owner of the business was a Mr Vinod Mathew who traded through the company Dewberry Cafe Limited. He had agreed to take over the business and pay a sum for the stock. Mr Ovenstone understood that any staff Mr Mathew wanted to take on would be approached by him and that  
20 the others including the claimant would be made redundant.
11. On 7 November 2019, a couple of days before the transfer of the business, the claimant received a letter from Mr Ovenstone indicating that the business would change hands on 12 November. He wrote: *"I will no longer require your services. Thank you for all your hard work you put into Reids  
25 over the years and if you require a reference don't hesitate to contact me."*
12. On the 11 November the claimant who understood he was to be made redundant finished working around four in the afternoon and left the premises.
13. Following the transfer the claimant received a further letter on 15 November  
30 stating that the company was terminating the claimant's employment "from 11 November 2019 for gross misconduct". Mr Ovenstone later agreed with

the new owners that the value of the stock that had been damaged would be £70. He also deducted a sum for a kitchen knife that the claimant had taken. The claimant accepted the deduction in relation to the kitchen knife but not the deduction of £70 for stock.

- 5 14. Following the claimant's dismissal he was unemployed. He obtained employment on 18 November his is weekly wage was on average £395.

### Discussion and Decision

15. Employees are given protection in the event their employer's business is transferred by "The Transfer of Undertakings (Protection of Employment) Regulations 2006"
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Regulation 7 provides:

#### **"Dismissal of employee because of relevant transfer**

- 7.—(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—*
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- (a) the transfer itself; or*
- (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the*
- 20 *workforce."*

16. The claimant was dismissed the day before the transfer. It is apparent from the evidence that the new owners must have decided not to contact the claimant and offer him continued employment. The respondent had no Economic Technical or Organisation (ETO) requirement to change its workforce nor was that argued. The claimant should have transferred and then it would then have been up to the new owners to dismiss him if he was not needed using ETO justification. In these circumstances the dismissal is automatically unfair as it was because of the transfer. It was probably likely that the claimant would have been made redundant by the new owners who already had staff as they ran the next door restaurant and no doubt had their own Chef. Luckily the claimant obtained work at a slightly lower rate. Looking at the matter broadly his loss would only begin at the end of his
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notice period. Future loss is not easy to calculate and there is an element of speculation given the current Pandemic. The claimant is likely to have an ongoing loss and I will award him six months future loss of earnings bearing in mind that he has been on furlough during the pandemic and that would have occurred if he had remained with the respondent. The claimant is not entitled to a basic award as he will receive an award for his redundancy payment.

17. The claimant was entitled to a redundancy payment based on his service of five full years and his gross weekly wage (5 x £491) or £408 net.

18. The claimant was entitled to five weeks' notice amounting to £2040 (5 x £408). He obtained work on the 18 November and earned £2641.48 net until the end of December. However, that includes £269.53 as a tax rebate which requires to be deducted. This gives him an average net weekly wage of £395 (£1822.48 less tax rebate of £269.53 plus £819 earned in November) earned during this period. His loss is £52 (£13 x 4). The balance of his notice relates to a period of approximately a week. He will be awarded £460 (£52 plus £408). No award for future loss will be made.

19. Finally, it was agreed that he was entitled to one day's holiday pay (£491/6) amounting to £81 gross.

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

**James Hendry**  
**13 October 2020**  
**15 October 2020**