EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondents**
Mr C Wilfert		(1) Everycs Limited (in administration) (2) Makersite GmBH

Heard at: London Central Employment Tribunal

On: 2 November 2020

Before: Employment Judge Adkin
Ms Z Darmas
Mr D Carter

Representations

For the Claimant: Ms L Robinson, Counsel
For the First Respondent: Did not attend, not represented
For the Second Respondent: Mr T Cordrey, Counsel

REMEDY JUDGMENT

(1) The First and Second Respondents are ordered to pay **5 weeks'** gross pay for failure to inform and consult under TUPE 2006 (Transfer of Undertakings (Protection of Employment) Regulations 2006) amounting to **£16,776.90**. Each Respondent is jointly and severally liable for this award.

(2) The First Respondent is ordered to pay the following amounts:

a. For the unlawful deduction from wages in relation to the Claimant's salary in the period 1 – 28 August 2018 the sum of **£8,419.64**.

b. For the failure to provide a statement of particulars of employment pursuant to section 1 of the Employment Rights Act 1996 the sum of **£7,384.62**.

REASONS

Procedural matters

1. A judgment and written reasons were sent to the parties on 7 October 2020, following a hearing 9 – 16 September 2020.

2. This remedy hearing was a "hybrid" in the sense that the Tribunal panel was physically in the Tribunal building, whereas counsel and solicitor for each party and the Claimant and witness for the Second Respondent Mr Neil D'Souza attended the hearing remotely using video (CVP) technology.

3. We heard oral evidence from Mr D'Souza and received a witness statement from him dealing with matters relevant to remedy.

Findings of fact

4. It has not been necessary to make any further findings of fact beyond those made in the written reasons for our judgment on liability.

LAW

5. We received written submissions from both counsel, for which we are grateful. These were supplemented with clear and focused oral submissions from both counsel.

Failure to inform and consult (TUPE)

6. Regulation 16 of TUPE 2006 provides:

> 16 Failure to inform or consult: supplemental
>
> […] (3) 'Appropriate compensation' in regulation 15 means such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

7. The Employment Appeal Tribunal in *Sweetin v Coral Racing* [2006] IRLR 252 adopted the Court of Appeal's guidance in the leading case of *Susie Radin Ltd v GMB* [2004] IRLR 400 in the context of analogous provisions under TULRCA 1992, to apply to TUPE Reg 15-16. Peter Gibson LJ in *Susie Radin* (at [45]) gave the following guidance:

> 'I suggest that employment tribunals, in deciding in the exercise of their discretion whether to make a protective award and for what period, should have the following matters in mind. (1) The

> purpose of the award is to provide a sanction for breach by the employer of the obligations in s 188: it is not to compensate the employees for loss which they have suffered in consequence of the breach. (2) The employment tribunal have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's default. (3) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult. (4) The deliberateness of the failure may be relevant, as may the availability to the employer of legal advice about his obligations under s 188. (5) How the employment tribunal assess the length of the protected period is a matter for the employment tribunal, but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there are mitigating circumstances justifying a reduction to an extent which the employment tribunal consider appropriate.'

8. Given that the protective award is penal it is not a defence that consultation would be futile, i.e. that would have made no difference.

9. In *Keeping Kids Company (in compulsory liquidation) v (1) Smith (2) SoS for Business, Energy and Industrial Strategy* [2018] IRLR 484 the Respondent did not make out the 'special circumstances' defence. The Tribunal awarded the maximum 90 days award arising from failing to consult in a redundancy situation. In *Keeping Kids* the obligation to consult arose on 12 June. On 30 July a police investigation came to light which led to a substantial government grant being terminated, and subsequently for KKC to be made subject to an order for compulsory winding up. The EAT held that the Tribunal was wrong not to take account of these subsequent events mitigating circumstances as part of its assessment of the appropriate award. The events of 30 July in HHJ Eady's view might have prevented further consultation taking place.

10. Applying *Keeping Kids* to the present case, we do not understand that the Tribunal is required to estimate the period of consultation that would have occurred. The award is penal rather than compensatory (*Susie Radin*). Nevertheless, we consider that *Keeping Kids* is authority for the proposition that events subsequent to the duty to inform and consult arising may be mitigating circumstances justifying a reduction in the award. In that case it was relevant (i) that no further consultation was likely to be possible after 30 July and (ii) that the respondent charity KKC came to an end as a working entity.

CONCLUSIONS

Complete failure to inform and consult

11. In this case there was a complete failure to provide the required information and to consult. We find that the failure to consult is deliberate (see paragraph 114 of our findings on liability). This position is further strengthened by our impression from Mr D'Sousa's evidence to us today. He was candid that, due

to the background, he was not inclined to speak to the Claimant about any of the matters relating to the pending transfer.

12. Given this complete failure, we find that the starting point for assessment of the award is the maximum of 13 weeks.

13. We do not find, as suggested by the Second Respondent, that it would be appropriate to make no award at all. There was a complete failure to comply with regulation. There should be an award.

14. There is a broad discretion to make an award which is "just and equitable". Our focus is on the Respondents' default, rather than focusing on a "very high degree of blameworthiness" on the part of the Claimant as suggested in the Second Respondent's submissions. We do not consider that the appropriate approach is to carry out a comparison of relative blameworthiness. That exercise has been carried out for different reasons elsewhere.

Mitigating circumstances

15. Are there circumstances which mitigate against an award at the maximum level?

16. The First Respondent was faced with a situation where the relationship with the Claimant had completely broken down. Additionally it was aware of circumstances which amounted to gross misconduct on the part of the Claimant. There was evidence that Claimant was guilty of making payments to himself without authorisation and had deliberately concealed evidence that would be relevant to the investigation of this.

17. The First Respondent had decided to dismiss the Claimant, and had decided to do this before the transfer took effect. In short therefore it was their intention that he would never become an employee of NewCo (i.e. the Second Respondent). In this context consulting regarding "measures" within the meanings of regulations 13(2)(c) and 13(2)(d) would not be merely futile but meaningless.

18. The period in which informing and consulting could have taken place was extremely brief. It is submitted by the Second Respondent that at most there was a window of 12 days from Begbies Traynor the insolvency practitioner becoming involved on 16 August to the Claimant's dismissal on 28 August. During the period 16-19 August 2018 the First Respondent was still taking advice from insolvency practitioners. It seems from the available documents that the administration/pre-pack plan had crystalised on 19 August, which was a Sunday. In practical terms Monday 20 August 2018 was the first 'working' day on which informing and consulting could have begun.

19. On Tuesday 28 August 2018 the Claimant was summarily dismissed for gross misconduct. We have found that the transfer was not the sole or principal reason for the dismissal and it follows that under regulation 4(3) there was no transfer of rights and liabilities when the transfer took place on 4 September

2018. From 28 August onward therefore there was no longer any ongoing duty to inform or consult.

Respondent's other arguments on "inform & consult"

20. In respect of the argument that the First Respondent was simply following legal advice, we have struggled with this argument for the reason identified in submissions by Ms Robinson. While it seems in general terms that the First Respondent may have received advice to the effect that the Claimant was not expected to transfer by operation of TUPE, and may have understood this, simplistically, to mean that TUPE did not apply, we have not seen evidence that demonstrates that a solicitor specialising in employment law advised in terms that there was no obligation to inform or consult the Claimant about the pending transfer while the Claimant remained an employee. Privilege in respect of advice given to the First Respondent has not been waived.

21. Further, even had this precise advice been given, we do not consider it would be appropriate to allow this to absolve the Respondents in some way. We consider that for policy reasons there would be a real risk in employers being able to mitigate away their liability to under TUPE regulations by being in receipt of such advice.

22. Regarding other mitigation arguments, we did not find that there had been consultation in respect of other employees, as was submitted on behalf of the Second Respondent.

Claimant's arguments on "inform & consult"

23. We accept Ms Robinson's arguments that there was deliberate delay in informing the Claimant and other employees of the transfer.

24. With regard to the arguments set out at paragraphs 11, 12, 14, 15, 16, 18, 21 of Ms Robinson's skeleton argument, we acknowledge these. We do not consider that this Tribunal hearing is the appropriate forum to adjudicate on the conduct of the parties in their capacities as shareholders. We have been focused on the Respondents' failures in respect of their duty to inform and consult the Claimant as an employee regarding an upcoming transfer.

Conclusion on quantum of award

25. Focussing on the Respondents' default, we have set out the mitigating reasons why the First Respondent did not inform nor enter into consultation regarding the transfer with the Claimant.

26. There was only an eight day period in which the Claimant should have been consulted. Thereafter he was dismissed and would not transfer. Following *Keeping Kids* we consider that this this was a relevant mitigating circumstance.

27. We remind ourselves that the scheme of this compensation is penal rather than compensatory. We not attempting to identify financial loss or an actual period of consultation. In view of the significant and material mitigating

matters we have identified, we conclude on a 'just and equitable' basis that there should be a significant reduction from the starting position of 13 weeks' pay.

28. In our judgment the appropriate award is **5 weeks' pay**.

Unlawful deduction from wages

29. The sum ordered against the First Respondent is not disputed, given that the First Respondents' administrators have not participated in this litigation.

Failure to provide a statement of particulars of employment

30. The Tribunal has exercised its discretion to award two weeks' pay. The calculation of the figure was put forward by Ms Robinson. Given the circumstances, set out in our earlier decision in which the Claimant himself decided not to enter into an employment contract and had control over this process, we consider the appropriate award is the lowest end of the scale.

Employment Judge - Adkin

Date: 05/11/2020

WRITTEN REASONS SENT TO THE PARTIES ON

05/11/2020

FOR THE TRIBUNAL OFFICE

Notes

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant (s) and respondent(s) in a case.