



THE EMPLOYMENT TRIBUNALS

Claimant

Ms Claudia Muniz-Porley
Ms Linda Johnson

Respondents

The Leven, Hotel Restaurant & Spa Ltd (LHRS)
Mr Martin Robert Hindmarsh

JUDGMENT (Liability and Remedy)

Empolymnt Tribunals Rules of Procedure 2013 –Rule 21

1. The claims by each claimant of unfair dismissal are dismissed on withdrawal, as are all claims against Mr Martin Robert Hindmarsh personally.
2. Each claimant is entitled to a redundancy payment of £ **£ 2,943.00** payable by LHRS.
- 3 Their claims of breach of contract (notice pay) are well founded. I award damages to each claimant payable by LHRS of £ **1,962.00** gross of tax and National Insurance (NI).
4. The claims for compensation for untaken annual leave are well founded. I order the LHRS to pay £ **£610.00** to each claimant gross of tax and National Insurance (NI).

REASONS

1. Ms Muniz-Porley was employed from 18 January 2011 and Ms Johnson from 1 September 2010 at Chapters Hotel in Stokesley, North Yorkshire (the Hotel). They presented claims on 11 July and 19 August respectively against both respondents of unfair dismissal, breach of contract, holiday pay and for a redundancy payment. Lyndon-Dykes Ltd (L-D) is a hotel operator based in Chorley, Lancashire. From 9 January 2018 until 18 October 2019 it operated the Hotel. It ran into serious financial difficulty.
2. A Companies House search confirms on 14 October 2019, Mr Martin Robert Hindmarsh formed a new limited Company, LHRS, in which only 1 share with a nominal value of £1 was allotted and that was to himself. Its registered office is the same as the Hotel, 27 High Street, Stokesley, Middlesbrough, TS9 5AD. Mr Hindmarsh's correspondence address was 3 Kirkbride Way, Ingleby Barwick, Stockton-On-Tees, TS17 5NN. A limited liability company registered at Companies House is a legal **person** in its own right. The people who manage it, Directors, and those who "own" it, shareholders, are not personally responsible for its debts. Although it is possible, there is no evidence Mr Hindmarsh personally ever took over the Hotel.
3. On 18 October 2019 Hotel staff were told by Mr Andrew Lyndon-Dykes, director of L-D, the business was going to be run by Mr Hindmarsh. Mr McCartan, Area Manager of the transferor would be reporting to him. That day they were given new contracts of employment

to sign with the employer shown as LHRS and a commencement date for new employment of 18 October 2019. On the same day LHRS paid £20,000 for the fixtures and fittings at the Hotel. From that date staff were paid by LHRS and their payslips show it as their employer.

4. I have issued a judgment today in case number 2504330/19 brought by the man who had been manager of the Hotel since 2005, which sets out the full history. There was undoubtedly a relevant under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), which may have taken place by a series of transactions. He was unfairly dismissed because of the transfer or a reason connected with it.

5. Reg 4 of TUPE includes

*(1) ... 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), ...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.

6. Case law governs whether or not there is a transfer of an economic entity which retains its identity. The lead case in European Law is Spijkers-v-Gebroeders Benedik Abattoir and in the United Kingdom building on Spijkers is Cheeseman-v-Brewer. One has to look at whether (i) the type of business remains the same (ii) there is a significant transfer of tangible or intangible assets (iii) the majority of staff are taken on (iv) customers transfer (v) there is a similar activity before and after the transfer (vi) any interruption of the activities is of short or planned duration. A number of cases eg Landsorganisationen i Danmark-v-Ny Molle Kro and P.Bork International-v-Forenigen Af Arbejdsledere i Danmark held a short interruption of activities does not prevent there being a transfer. Forenigen Af Arbejdsledere i Danmark-v-Daddy's Dance Hall is a good example of a planned closure for refurbishment not preventing there being a series of transactions . Artificially engineered breaks in the activities are to be disregarded see Longden-v-Ferrari Limited. The Tribunal will disregard criterion (iii) if it concludes the failure to take on staff was designed to prevent TUPE from operating, ECM Vehicle Delivery Service Ltd-v-Cox . **Among the best examples of an economic entity which retains its identity are pubs and hotels which change hands .**

7. Mr Kristofer Walton became a director of LHRS on 20 December 2019 and resigned on 17 January 2020. Companies House shows Waltons Hospitality Ltd has a registered office Francis House, Humber Place, The Marina, Hull, HU1 1UD. It was incorporated on **17 February 2020**. Its directors were Catherine and Kristofer Walton. Although it is possible, there is no firm evidence, it ever took over the business of the Hotel. On 23 March 2020 staff were furloughed due to "lockdown" to combat the Covid 19 Pandemic .

8. On 1 June 2020 Ms Johnson received a message on the company Facebook group chat from a Mr O'Byrne which stated due the current situation and hospitality future being uncertain the business was closing and the final payment for all staff would be on 7 June

2020. The message finished “**Kris** will be making a statement about **his** company” Later that day Mr Walton sent a message “due to the ongoing pandemic and hospitality industry we have taken the difficult decision to **not go ahead with** the purchase of the Leven”. The message was signed off by Kris and Cat Walton.

9. On 9 June 2020 a message from a Mr O’Byrne asked members of staff to come to the Hotel at 10 am the next day to see him and Mr Nathan Longthorne who had worked for L-D. Ms Johnson could not attend because she was shielding, so sent a text to Mr O’Byrne saying so. Closure and dismissal were confirmed.

10. On 2 July 2020 a friend of Ms Johnson told her she had seen members of staff going into the Hotel. Ms Johnson looked on Facebook and saw the Hotel had been refurbished and was now open. Various members of the staff told her Mr Hindmarsh was running the Hotel. On 7 August 2020 Ms Johnson discovered the Hotel had reported she had received a wage of £850.00, which was going to affect her universal credit claim but she had not received any such wage. That day she sent a text to Mr Hindmarsh asking why she had been reported as having earnings from the Hotel. **He replied** he had not made any such report and would get his accountant to look into it. Nothing was resolved and Mr Hindmarsh blocked Ms Johnson from sending anymore texts. She is unsure who is running the Hotel.

11. LHRIS is shown as active but a proposal to have it struck off the Register of Companies was lodged on 28 August 2020 signed by Mr Hindmarsh. Strike off has been suspended on application from another claimant to enable these proceedings to complete . On 11 May 2020 MH Hospitality & Leisure Ltd was incorporated and Mr Hindmarsh is its sole director and holder of its one £1 share. It changed its registered office from 27 High Street Stokesley to 31 High Street Stokesley on 13 July 2020. The extent of concealment of the chain of transactions which followed what was undoubtedly a transfer in October 2019 was considerable. Although it is possible, there is no evidence of a later “relevant transfer” to MH Hospitality & Leisure Ltd of the business of the Hotel.

12. In September 2020 I decided to hold a telephone hearing with other claimants and respondents invited to see if together more light could be shed on the situation by considering what everyone had to say. Other claimants who participated on 25 September included the former Hotel Manager and a Mr David Fenwick acting in person. Ms Muniz-Porley and Ms Johnson were both represented by Mr McDermott, an experienced CAB Employment law advisor. Mr Fenwick had presented his claim on 7 April 2020 against L-D, Martin Hindmarsh and Kris Walton **personally** but not against LHRIS. Mr Hindmarsh presented no response but one was received from Walton’s Hospitality Ltd signed by Mr Walton. Mr Fenwick had only been employed since 1 March 2019 as a Business Consultant, so had no right to claim unfair dismissal or a redundancy payment. His account did not differ from the manager’s i.e. Mr Hindmarsh and Mr Walton took over the business to be known as The Leven Hotel. L-D transferred the Hotel under TUPE in October to LHRIS. I explained the options to those present and gave them time to decide how best to proceed. On behalf of these two claimants Mr McDermott emailed the claimants agreed to withdraw their claims for unfair dismissal if a Judge issued Rule 21 judgments on all their other claims for Redundancy Pay, Notice Pay and Holiday Pay. That is a wise practical decision

13. No response has ever been received from LHRIS. An Employment Judge is required by Rule 21 of the Employment Tribunals Rules of Procedure 2013 (the Rules)to decide on the

available material whether a determination can be made and, if so, obliged to issue a judgment which may determine liability and remedy. I have in the claim form and further information provided in response to questions from the Tribunal sufficient to enable me to find these two claims proved on balance of probability and determine sums to be awarded.

14. The law relating to redundancy payments is in Part XI of the Employment Rights Act 1996 (the Act). Both claimant were over the age of 41 throughout their period of continuous employment so are entitled to 1.5 weeks pay for each such year. Both had 9 complete years and a week's pay of £ 218 , $13.5 \times £218 = \mathbf{£ 2,943}$

15. The common law provides a contract of employment may be brought to an end by reasonable notice. Dismissal without such notice is termed "wrongful". The statutory minimum for both claimants in this case was one week for each year of continuous employment, Damages are the pay due during the notice period (Addis-v-The Gramophone Company). Each is entitled to $9 \times £218 = \mathbf{£1962}$

16. The Working Time Regulations 1998 (WTR) say in Regulation 14 where a worker's employment is terminated during a leave year, and on the date termination takes effect the proportion she has taken of the leave to which she is entitled in the leave year differs from the proportion of the leave year which has expired, her employer shall make a payment in lieu of untaken leave. Coincidentally each has the same untaken entitlement probably due to taking no annual leave on furlough. It is **£610.00**.

EMPLOYMENT JUDGE T M GARNON

JUDGMENT AUTHORISED BY THE EMPLOYMENT JUDGE ON 23 NOVEMBER 2020