



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111860/2019 (V)

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Held by Cloud Video Platform (CVP) on 23 November 2020

Employment Judge I McFatridge

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Ms Marion Sergeant

**Claimant
Represented by:
Ms Burton and
Ms Pozzo -
Strathclyde Law Clinic**

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Madisons (Central) Limited

**First Respondent
Represented by:
Ms Wall -
Solicitor**

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The Greenhouse Community CIC

**Second Respondent
Not present and
Not represented**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the claimant's employment with the first respondent transferred to the second respondent in terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006 on or about 3 June 2019.

REASONS

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1. The claimant submitted a claim to the Tribunal in which she claimed that she had been unfairly dismissed by the second respondent following a transfer of the undertaking for which she had worked from the first respondent to the second respondent. She claimed that the second respondent had failed to provide written reasons for dismissal. She claimed that there was a failure to inform and consult under the Transfer of Undertakings (Protection of Employment) Regulations 2006. She also claimed that she had suffered an unlawful deduction of wages. She claimed that she had suffered a breach of the Working Time Regulations

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and that her dismissal was wrongful as well as unfair. The first respondent submitted a response in which they denied the claims. It was their position that the claimant's employment had transferred to the second respondent. They denied that there was a failure to inform and consult under the
5 Transfer of Undertakings (Protection of Employment) Regulations 2006 at least so far as the obligation of the first respondent was concerned.

2. The second respondent did not submit a response within the statutory period. Subsequent to this a company called Greenhouse Services Limited submitted a response. Their point of contact was given as Steven
10 Jacobs who was also the contact for the second respondent. In their ET3 they noted that they were now running the business. It was their position that the claimant's employment had not transferred to them because she had left her employment with the first respondent before the transfer.

3. It is not clear from the information before me precisely what steps were
15 taken by the Employment Tribunal on receiving the ET3 from Greenhouse Services Limited. The agenda for the first preliminary hearing which was lodged by the claimant draws the Tribunal's attention to the matter and indicates that arrangements had been made for the ET1 claim form to be re-served on Greenhouse Services Limited however it is noted that this is
20 a matter which would require to be discussed at the preliminary hearing. In any event, there was no appearance either by the second respondent The Greenhouse Community CIC or by Greenhouse Services Limited at the preliminary hearing and no orders have been made by the Tribunal substituting Greenhouse Services Limited as a respondent in the case. A
25 further preliminary hearing took place and following this it was ordered that an open preliminary hearing take place to establish whether or not there had been a transfer of undertaking from the first respondent to the second respondent. That hearing took place by CVP on 23 November 2020. There was no appearance at the hearing either by the second respondent
30 or by Greenhouse Services Limited. They had failed to respond to any correspondence from the Tribunal and as a result could not be given log-in information for the hearing. At the hearing Mr Winter a former Director of and owner of the first respondent gave evidence. The claimant also gave evidence on her own behalf. A joint bundle of documents was lodged
35 which included the missives of sale dated 7 June 2019 by which the first

respondent and Mr Winter transferred the business and the lease of the premises from which the business was carried out to the second respondent. On the basis of the evidence and the productions I found the following essential facts relative to the matter to be decided at the preliminary hearing to be proved or agreed.

Findings in fact

4. Alexander Winter is the sole Director of the first respondent which is a limited company known as Madisons (Central) Limited. Madisons was a newsagent and takeaway food outlet based at 80 George Street, Glasgow G1 1RF. The company employed eight members of staff who undertook duties in the kitchen and front of house operations. The claimant was employed by Madisons (Central) Limited as a kitchen and front of house operator. The claimant worked directly with Mr Winter on a daily basis. The claimant had worked for the previous proprietors of the business and her most recent period of employment with the first respondent commenced in late 2009. The first respondent took over the claimant's employment following their incorporation on 14 April 2014. Fresh contracts were given to all staff including the claimant at that stage.
5. Mr Winter leased premises at 80 George Street, Glasgow from which the business was carried out. The lease was still in Mr Winter's own name since he had not changed this following the incorporation of the business in 2014.
6. Food preparation and sales were delivered by a group of eight staff employed on a shift system from Monday to Friday. All staff were employed by the first respondent including the claimant.
7. The claimant was paid by the first respondent. Payroll was done by an outside firm of accountants. In 2016 Mr Winter decided to sell the business and marketed it but had little interest at that time. In about February 2019 he was approached by a Mr Jacobs and entered discussions about the sale of the business. After lengthy negotiations the sale of the business was agreed. Mr Winter had understood that Mr Jacobs would be purchasing the business through a limited company namely Greenhouse Services Limited however in the event the missives

of sale and purchase were with The Greenhouse Community CIC which is another company that Mr Jacobs is involved with.

8. The missives of sale and purchase for the business comprise an offer dated 7 June 2019 from Messrs McVey and Murrricane on behalf of The Greenhouse Community CIC addressed to DHW Legal, 2a Catherine Street, Kirkintilloch and a letter of acceptance signed by DHW Solicitors addressed to Messrs McVey and Murrricane also dated 7 June 2019. Both of these documents were lodged (pages 105-120). In addition to this Mr Winter signed an assignation of the lease in favour of The Greenhouse Community CIC. An extract of this assignation was lodged (pages 123-124). The assignation was registered in Books of Council in session on 7 August 2019.
9. The offer letter is referred to for its terms however within the offer it is clear that the second respondent agreed to purchase an assignation of the lease of the subjects together with the whole business carried out by the first respondent as a going concern. Their purchase included all intellectual property rights together with the contents and stock used in the business. Clause 13 makes it clear that they were purchasing the business as a going concern. In clause 14 various warranties were given by the seller in relation to employees. The inescapable inference from these warranties was that it was the intention of the parties that the employment of these employees would transfer to the second respondent. The seller was also required to enter a restrictive covenant preventing them from carrying on or being engaged or interested in any business similar to or in competition with the business previously carried out by Madisons for a period of three years.
10. All eight of the individuals who were employed by the first respondent immediately prior to the sale transferred to the employment of the second respondent. The sandwich bar and takeaway food shop which was operated by the first respondent continued. It closed on the Friday and re-opened on the next business day with no changes.
11. The claimant was due to go on holiday from 3 June onwards. On 3 June she met both with Mr Winter and with Mr Jacobs of the second respondent. Mr Jacobs confirmed to her that her employment would continue on the

same terms and conditions as before. He confirmed to her that there would be absolutely no change. The claimant did in fact work at the business following her return from holiday

Matters arising from the evidence

5 12. I had no hesitation in accepting that both witnesses were giving honest
evidence and truthfully setting out their understanding of events. I should
say that there were some initial difficulties in conducting the hearing over
the CVP platform. Mr Winter and the first respondent's representative had
difficulties dialling in and although they were visible on video at the start
10 of the hearing they only could participate on audio for much of the hearing.
The claimant had some difficulty identifying some of the documentary
productions which had been forwarded to her. One of the difficulties was
that she had already been sent a bundle of productions which comprised
many documents which were not required at this particular point. The
15 issue of preparing bundles for online hearings is one which is new to the
Tribunal and to practitioners. Hopefully for any future hearings the parties
will have learnt from their experience this time to ensure that there is one
bundle suitably bookmarked so that witnesses know exactly which bundle
is the correct one and are able to locate any document within it. With
20 regard to the evidence the only discrepancy was that Mr Winter had
understood that Mr Jacobs was to be purchasing the property in the name
of Greenhouse Services Limited. It is clear that the missives were
concluded in the name of The Greenhouse Community CIC. It is clear
that the agreement was to transfer the business to them and that the lease
25 was assigned to them and not Greenhouse Services Limited. I decided
that on the basis of the totality of the evidence it was clear that the transfer
was to The Greenhouse Community CIC and not Greenhouse Services
Limited.

Discussion and decision

30 13. I had the benefit of a full and comprehensive legal submission from the
claimant's representatives. This sets out the case law in considerable
detail and relates this to the evidence in the present case. The first
respondent's representative also made a legal submission which

essentially agreed with that of the claimant's representatives and was more than sufficient in all the circumstances.

14. The sole issue which I required to determine was whether or not there had been a transfer of undertaking from the first respondent to the second respondent. The parties correctly referred me to the case law and in particular the case of **Cheeseman** and the various factors which are relevant to the matter.
15. In this case I had no hesitation in finding that all or virtually all of the **Cheeseman** factors indicated that there had been a transfer. It was absolutely clear to me that the business to which the claimant had worked was an economic entity, that it had been transferred and had retained its identity following the transfer. The undertaking was sufficiently structured and autonomous. It had stocks and equipment and the entity had the right to use the subjects which were leased by Mr Winter and did in fact use these subjects. There is no doubt that it was transferred. The missives make this clear. There was also no doubt that it retained its identity following the transfer. The claimant gave evidence that it carried on much as before. No doubt there will have been some changes as one would expect when a new owner takes over a business however there was nothing before me to suggest that there was any substantial change.
16. I indicated to the parties at the end of the hearing that I had no hesitation in finding that there had been a transfer of undertaking in this case and that the claimant's employment had transferred. At that point I held a short preliminary hearing for case management purposes and a note regarding this is also produced.

Employment Judge: Ian McFatrige
Date of Judgment: 26 November 2020
Entered in register: 09 December 2020
and copied to parties