EMPLOYMENT TRIBUNALS

Claimants: **Miss S Kennedy**
Mrs D Hales
Mrs W Adamson
Mrs S Garner

Respondent 1: **Mr J Pushpanayagam**
Respondent 2: **Mrs J Wisker**

HELD AT: **Hull** **ON:** **15 and 16 October 2020**

BEFORE: **Employment Judge T R Smith**

Members: **Mr J Shah**

Mrs N Arshad-Mather

REPRESENTATION:

Claimants: **In person**
Respondents: **In person**

JUDGMENT

1. **Transfer of Undertakings (Protection of Employment) Regulations ("the Regulations") 2006.**

   There was a transfer within the meaning of the Regulations between the Second and First Respondent on or about 03 January 2019.

2. **A Failure to inform or consult under the Regulations.**

   The Tribunal declares that there was a failure to inform or consult all of the Claimants

   2.1. The First Claimant is awarded 13 weeks' pay namely £3986.71
   2.2. The Second Claimant is awarded 13 weeks' pay namely £2213.93
   2.3. The Third Claimant is awarded 13 weeks' pay namely £1246.92

2.4. The Fourth Claimant is awarded 13 weeks' pay namely £1246.92
2.5. Neither the Second nor the First Respondent have established there were special circumstances which rendered it not reasonably practicable to perform the duty imposed under Regulation 13.
2.6. The liability for the payments to the Claimants is joint and several between the Second and the First Respondent.

3. **Breach of contract/notice pay.**

3.1. The complaint of the Third Claimant is not well founded and is dismissed.
3.2. The complaint of the Fourth Claimant is partly well founded and she is awarded damages for breach of contract amounting to £33.27. The said sum is payable by the First Respondent.

4. **Constructive unfair dismissal.**

4.1. The First Claimant was constructively unfairly dismissed and she is awarded compensation of £ 1220.01. The said sum is payable by the First Respondent.
4.2. The Second Claimant was constructively unfairly dismissed and she is awarded compensation of £1216.50. The said sum is payable by the First Respondent.

The recoupment regulations do not apply.

5. **Unlawful deduction from wages**

The complaints of the First, Second, Third and Fourth Claimants of unfair deduction from wages is well-founded and the Tribunal declares so accordingly.

5.1. The First Claimant is awarded the sum of £202.27
5.2. The Second Claimant is awarded the sum of £170.30
5.3. The Third Claimant is awarded the sum of £ 162.47
5.4. The Fourth Claimant is awarded the sum of £ 62.64

The First Respondent is solely responsible for the payment of the unlawful deduction from wages

6. **Failure to provide written particulars of employment.**

The complaints of the First, Second, Third and Fourth Claimant are well-founded and the Tribunal makes an award of two weeks' pay per Claimant as follows.

6.1. First Claimant £306.67 x 2 weeks = £613.35
6.2. Second Claimant £170.30 x 2weeks = £340.60
6.3. Third Claimant £95.91 x 2weeks = £191.83
6.4. Fourth Claimant £95.91 x 2weeks =£191.83

Liability rests with the Second Respondent but pursuant to Regulation 4 of the TUPE regulations it passes solely to the First Respondent.

WRITTEN REASONS

(provided pursuant to regulation 62 (3) of the Employment Tribunal's (Constitution and Rules of Procedure) Regulations 2013.)

1. The Evidence

1.1. The Tribunal had before it a bundle consisting of 132 pages. A reference to a number in this judgement is a reference to a document in the bundle.

1.2. It also had statements from the First, Second, Third, and Fourth Claimant and the Second Respondent.

1.3. The First Respondent relied upon his response as his statement.

1.4. The First, Third and Fourth Claimants, together with the First and Second Respondents gave oral evidence. There was no oral evidence from the Second Claimant who did not attend.

1.5. The Second Claimant had notified the Tribunal the day before that, sadly, her mother had died. Following enquiries made by the Tribunal all parties wished to proceed. The Second Claimant was advised that if she was not present to give evidence it would carry less weight.

1.6. As it transpired there was very little, if any, evidential dispute between the parties.

2. The Issues

The issues in this case were set out in a case management order of Employment Judge Shulman dated 20 August 2019.

2.1. In essence they were as follows: -

- Were the First and Second Claimants constructively unfairly dismissed by the Second Respondent (This is a clear error and should read First Respondent)
- Did any of the Claimants have a complaint for breach of contract (non-payment of notice money)
- Was there a transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) between the Second and First Respondent.
- If so, was there a failure to inform and consult the Claimants in accordance with Regulation 13 of TUPE
- If so, did the special circumstances defence in Regulation 13 of TUPE apply
- If the Second Respondent was liable under Regulation 13 did that liability transfer to the First Respondent?

3. Findings of fact.

3.1. Background

3.1.1. The Second Respondent purchased Chantlerlands Avenue post office ("the business") in Hull in approximately August 2005.

3.1.2. The business comprised of a post office franchise together with the sale of sweets, stationary and general goods.

3.1.3. The Second Respondent was a sole trader and ran the business with the support of the Claimants.

3.1.4. In June 2017 the Second Respondent obtained full-time employment at Siemens. She ceased to have day-to-day involvement in the business. The Claimants then ran the business, with the First Claimant as the manager on behalf of the Second Respondent. The First Claimant received a higher rate of pay than the other Claimants to reflect her role as manager.

3.1.5. Immediately prior to the alleged transfer of the business the Claimants were the only employees in the business.

3.1.6. No contracts of employment were issued to the Claimants and nor were they given any written particulars as to their terms of employment by either the Second or First Respondent.

3.2. The Sale of the Business.

3.2.1. The Second Respondent had been anxious to sell the business for some time

3.2.2. The Second Respondent became aware from about 20 March 2018 that the First Respondent was interested in purchasing the business (43).

3.2.3. On 17 October 2018 the Second Respondent instructed Kaiser solicitors ("Kaiser"). They specifically noted in their retainer letter (48 to 51) that the Second Respondent wished to sell the business and that *"there are four employees to be transferred with the business".*

3.2.4. During discussions between Kaiser and the First Respondent's solicitors' enquiries were made as regards staffing of the business. The Second Respondent supplied details of each Claimants position, start date, hourly rate of pay and hours of work.

3.2.5. The Tribunal concluded that the First Respondent was aware when he was subsequently to take over the business that there were existing employees in the business.

3.2.6. A deed of assignment and grant of lease were drawn up (58 to 95). The deed of assignment contained a noncompetition clause binding the Second Respondent. It also referred to a purchase price of £30,000 covering the price for the fixtures and fittings and goodwill and stated that the Second Respondent transferred to the First Respondent *"the goodwill of the business for the purposes of carrying on the business and to represent as the purchasers* (sic) *may think expedient the business as being a continuation of the business carried on by the vendor".*

3.2.7. As part of the purchase process the First Respondent spoke directly to the Second Respondent and it was agreed as to which stock he wished to purchase and the residue was left to the Second Respondent to dispose of. The fixtures and fittings transferred from the Second to the First Respondent.

3.2.8. The First Respondent obtained the business as a going concern together with a transfer of the goodwill and the grant of a lease from the Second Respondent to the First Respondent of the premises. Both the Second and First Respondent worked together to ensure the transfer of the Post Office franchise to the First Respondent.

3.2.9. The business was sold on 03 January 2019, being the day, the Post Office completed their audit of the accounts of the Second Respondent as the outgoing franchisee, and the handover to the First Respondent. Although the documentation referred to the transfer being on 10 January 2019 (61) the Tribunal was satisfied that the transfer took place on the earlier date and both parties accepted there was some delay in signing documents, which explain the apparent discrepancy.

3.2.10. The Tribunal concluded that the business was sold as a going concern.

3.2.11. It is right to mention that unfortunately, either late on Sunday 06 or in the early hours of Monday, 07 January 2019 there was an explosion at the premises caused by an attempt to steal the ATM machine.

3.2.12. The business was unable to operate, serving the public, between Monday, 07 January 2019 until Friday, 11 January 2019 inclusive.

3.3. **Information and consultation**

3.3.1. The Second Respondent informed the Claimants orally that the business was to be sold on or about 02 January 2019 (the Third Claimant on the morning of 03 January 2019), with completion planned for the following day.

3.3.2. The Second Respondent accepted that, other than supplying information that she thought the post office was about to be sold, she did not give any other information in respect of the sale of the business to the Claimants. In particular the Tribunal found that the Second Respondent did not give the Claimants the information required under Regulation 13 of TUPE. There was nothing in writing.

3.3.3. The Second Respondent accepted that she knew, pre-transfer that under the law the Claimants would transfer to the First Respondent although she did not know of any detailed procedures.

3.3.4. The Second Respondent had not been informed by the First Respondent of any measures he intended to take in respect of the Claimants, and in particular to dismiss employees or to change their terms and conditions. The Tribunal determined that it was always the First Respondent's intention that he would be working in the business and would need less staff. He did not discuss with the Second Respondent the fact that he would need to reduce the number of staffing hours.

3.3.5. Prior to the sale of the business the Second Respondent had suffered ill health and was on sick leave from October 2018 although returned to Siemens, part-time in December of the same year.

3.3.6. The Second Respondent frankly accepted that she should have discussed matters with the Claimants prior to 02 January 2019 and certainly would have done so if she believed the First Respondent was to make any changes to the running of the business. The Tribunal noted that the Second Respondent said to our own solicitors and she was looking for a change of post office ownership on 03 January 2019 in an email dated 02 December 2018 (54). She therefore believed at least a month before the sale of the business when she considered it most likely to take place.

3.3.7. The First Respondent knew well before he took over the business there were four existing staff, their hours of work, start dates and rates of pay. This is illustrated by the fact that the First Respondent decided to sack the Third and Fourth Claimants because he knew they did not have two-year service and therefore he could not liable for an unfair dismissal claim.

4. **Specific findings in respect of each Claimant.**

4.1. **Miss Kennedy**

4.1.1. Miss Kennedy, the First Claimant was the manager of the business and was paid £8.70 ph.

4.1.2. She worked Mondays, Wednesdays, Thursdays and Fridays from 8.45am until 5.30pm each day, with a 30-minute lunch break. She also worked alternative Saturdays from 8.45am to 1pm.

4.1.3. For the week commencing 07 January, the week the business was damaged, she worked on the Monday from 8.45am until 4 pm.

4.1.4. She was asked by the First Respondent to work her day off, Tuesday, 08 January and she worked two hours.

4.1.5. On Wednesday, 09 January she worked from 8.45am until 12 noon

4.1.6. On Thursday, 10 January she worked 8.45am until 1 pm

4.1.7. She did not go into work on Friday 11 January as she was told not to do so by the First Respondent

4.1.8. She did not go into work on Saturday 12 January, although it was one of her working days, as she not been told whether the business was now open to the public.

4.1.9. Miss Kennedy was paid for the hours she worked for the week commencing 07 January.

4.1.10. The Tribunal found the First Claimant was ready willing and able to work her full contractual hours that week.

4.1.11. Her unlawful deduction from wages claim was for the difference between her contractual hours and the hours she worked, which she put £287.10.

4.1.12. On or about Wednesday 16 January the First Respondent told the First Claimant that she was now only required to work all day Monday, Wednesday morning, and all-day Friday effective immediately. This was a considerable reduction on the First Claimant's contractual hours and thus a reduction in her remuneration.

4.1.13. The Tribunal found the First Respondent had no contractual right to vary the Claimants hours without her consent. At no time did she signify consent and indeed the First Respondent accepted the First Claimant did not accept the variation.

4.1.14. The First Claimant had been contacted in the week commencing 07 January by a person who knew the business was temporarily closed and offered other work, which she did not accept.

4.1.15. The First Claimant worked on Thursday 17th and Friday 18th and it was on this latter day that she handed in her notice with immediate effect (96). The reason for resignation given in the letter was the reduction in hours.

4.1.16. She started alternative employment on Saturday, 19 January 2019.

4.1.17. The First Claimant's new employment was more remunerative than that which she enjoyed whilst working in the business. She therefore suffered no financial loss in her new employment.

4.1.18. The Tribunal concluded that whilst the First Claimant was perhaps somewhat disappointed that the business has been sold, she had no firm plans to leave prior to her resignation, evidenced by the fact that when she was first approached with offers of work, in the week commencing 07 January she did not pursue that opportunity. The Tribunal considered the First Claimant's evidence to be credible, namely that she would give the First Respondent a chance and see how things went and if it did not go well would then consider her options. The Tribunal was satisfied that it was the unilateral imposition of a reduction in hours that was the principal reason why the First Claimant resigned.

4.2. **Mrs Hales**

4.2.1. The Tribunal noted that Mrs Hales did not give evidence. In her statement she said her normal working hours were every Tuesday from 12:15 pm to 5:30 pm, Wednesday 9 am to 5:30 pm and Friday from 9 am to 5:30 pm. There were unpaid breaks. The First Respondent was not able to agree or disagree with this evidence. The Tribunal regarded the fairest way to proceed was to take the lower figure for hours worked supplied by the Second Respondent to the First Respondent solicitors namely 21.75 hours per week.

4.2.2. The Second Claimant was paid £7.83 per hour.

4.2.3. It follows therefore that the Second Claimants gross was approximately £170.30pw or £737.97 per calendar month.

4.2.4. Because of the attempted robbery the Second Claimant did not work the week commencing 07 January 2019. The Tribunal found that she was ready, willing and able to work that week. She did not work because she had been told by the First Claimant, effectively her line manager, that there was nothing that could be done. She

had not been formally introduced to the First Respondent as her employer

4.2.5. On or about Tuesday 15 January 2019 Ms Hales was told by the First Respondent that her hours were to be reduced from two and a half days per week and every other Saturday to 2 half days and every Saturday.

4.2.6. The Tribunal found the First Respondent had no contractual right to vary the Second Claimants hours without her consent. At no time did she signify consent and indeed the First Respondent accepted the Second Claimant did not accept the variation. The Second Claimant resigned forthwith that day having made enquiries and obtained the offer of employment at the Beestonville post office working two full days a week plus holiday cover to commence on 23 January 2019.

4.2.7. The Tribunal was satisfied that the reason Mrs Hales resigned was because she had been told her hours were to be reduced forthwith. She only sought alternative employment to ensure she would meet her daily living expenses.

4.3. **Mrs Adamson and Mrs Garner**

4.3.1. Both the Third and Fourth Claimant were paid £7.83 per hour.

4.3.2. The Third Claimant worked from 8:45 am to 5:30 pm on a Monday, from 8:45 am to 5:30 pm on Tuesday and from 8:45 am to 1 pm on a Thursday. There was a 30-minute rest break.

4.3.3. The Fourth Claimant worked by Tuesday from 8.45 am to 12.15 p.m., on Thursday from 1 pm until 5:30 pm and a Saturday from 8.45 am 1 pm.

4.3.4. Both the Third and Fourth Claimants were ready willing and able to work their shifts for the week commencing 07 January 2019. They did not attend work because they had been told by the First Claimant not do so because of the explosion at the premises caused during the robbery. Neither the Third nor the Fourth Claimant had been formally introduced to the First Respondent. They have been used to taking instructions from the manager of the business, the First Claimant and it was for that reason that they spoke to her about whether they needed to attend work.

4.3.5. The Fourth Claimant worked Saturday, 12 January 2019 as she was requested to do so.

4.3.6. On Monday, 14 January 2019 the First Respondent spoke to the Third and Fourth Claimants and told them that they were dismissed

and their last shifts would be on that Thursday. The reason he gave was that he would now be working in the business.

4.3.7. Both the Third and Fourth Claimant had more than one and less than two years' service.

4.3.8. The Third Claimant worked all her contractual hours the week commencing 14 January 2019 and was paid for them.

4.3.9. The Fourth Claimant's contractual hours that week did not finish until the Saturday. The Fourth Claimant was paid up to the Thursday but not paid for her Saturday shift. She was ready willing and able to work that shift

5. Discussion and conclusion

5.1. Was there a TUPE transfer

5.1.1. Whether there has been a transfer to which the TUPE regulations applied requires an analysis of Regulation 3 (1) which provides; -

"a transfer of undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity"

5.1.2. In deciding whether there has been a transfer of an undertaking the critical question is whether the undertaking retains its identity and is carried on by the transferee. In answering that question the case law suggest the following factors are likely to be relevant, namely the type of undertaking or business concerned, whether tangible assets such as buildings and movable property are transferred, the value of intangible assets at the time of the transfer, whether the majority of employees are taken over by the new employer, whether customers are transferred, the degree of similarity between the activities: before and after the alleged transfer and if any of the activities are suspended. The Tribunal therefore has to apply a multifactorial approach.

5.1.3. Here the business pre-transfer was essentially the same post transfer.

5.1.4. The physical premises were transferred from the Second to the First Respondent.

5.1.5. The First Respondent selected which stock he wanted to retain and the Second Respondent sold the rest.

5.1.6. There was a transfer of the post office franchise from the Second to the First Respondent.

5.1.7. The goodwill of the business transferred, coupled with a noncompetition clause to protect the First Respondent.

5.1.8. All the employees transferred.

5.1.9. The Tribunal has not overlooked the fact that within days of transfer the business had to close for just under a week due to the robbery. This was a very short temporary cessation of business and, in any event, it was post transfer. In the Tribunal's judgement the economic entity remained stable.

5.1.10. Pulling all these matters together Tribunal has concluded that there was a transfer within the meaning of the TUPE Regulations.

5.2. **Was their failure to inform and consult under TUPE?**

5.2.1. Under Regulation 13 the employer of the employees affected by the transfer must inform appropriate representatives of any of the affected employees, long enough before the transfer to enable consultations to take place between the employer and those representatives that firstly a transfer is to take place, when it is to take place, the reasons for it, the legal economic and social implications of the transfer for any affected employees, the measures which that party envisages taking in relation to those employees (and if no measures are envisaged that fact) and if the employer is the transferor the measures which the transferee envisages that he will take in relation to those employees who are automatically assigned to him on the transfer (and where no measures are envisaged that fact.

5.2.2. Given there were less than 10 employees Regulation 13A operates and there was no need to elect appropriate representatives. The information and/or consultation could have been with each individual employee.

5.2.3. The Tribunal found that the Second Respondent was aware, at the latest from 22 October 2018 that the business was to be sold (52) and that the First Respondent was the purchaser. Approximately one month before the transfer both parties had a provisional date for the sale. The Regulations require a transferor to inform and consult long enough before the transfer. Whilst "long enough" is not defined it must be to give the employees sufficient time to consider the proposals and to respond.

5.2.4. Other than telling the Claimants the day before the sale that the business was to be sold the Second Respondent took no steps to comply with her obligations under Regulation 13. The notification was not even in writing.

5.2.5. The First Respondent failed to comply with his obligations under Regulation 13 as he did not inform the Second Respondent of his plans to dismiss two employees and to reduce the hours of two others.

5.2.6. The Tribunal had no hesitation in concluding there had been a breach of the duties by both the Second and First Respondent under Regulation 13.

5.2.7. The Tribunal then turned to the special circumstance defence, reminding itself it was for the Respondents to establish the same. Regulation 15 provides that an employer may only escape liability if the employer can show that there were *"special circumstances which rendered it not reasonably practicable for him to perform the duty and that he took all such steps towards its performance as were reasonably practicable in those circumstances"*

5.2.8. Whilst the Second Claimant made reference to ill-health, she was able to return to work in December 2018 and had been liaising with her legal advisers prior to that date. The case law makes it clear that special circumstances is a very limited defence and the high threshold required is not surmounted by the Second Respondent.

5.2.9. The First Respondent did not put forward any cogent explanation at all.

5.2.10. To the extent that both Respondents relied upon ignorance that is not a defence in law, particularly when they both had skilled advisers to assist them in the transfer of the business. Whether the Respondents have any remedy against those advisers is not a matter that this Tribunal although the Tribunal has noted the wording of the retainer between the Second Respondent and Kaiser

5.2.11. Bearing in mind that the special circumstances defence requires something that must be exceptional or out of the ordinary the Tribunal was not satisfied that either of the Respondents had established the same.

5.2.12. The Tribunal has little hesitation in making a declaration that there has been a failure to inform and consult in respectable four Claimants.

5.2.13. It now turns to the appropriate remedy. The maximum award is 13 weeks' pay. There is no upper limit on a week's pay.

5.2.14. A week's pay is based on gross pay and a day is equated to one seventh of a week's pay. The Tribunal is required to focus upon the

seriousness of the Respondent's default, and the Tribunal should start with the maximum period and reduce it only if there are mitigating circumstances to justify a reduction**, Sweetin -v- Coral Racing 2006 IRLR 252.** The award is designed to be punitive. It does not matter that no employee has suffered any loss.

5.2.15. The proper approach is the Tribunal starts at 13 weeks and then discount from that figure, if appropriate. The Tribunal were not satisfied having regard to the penal nature of the legislation that any discount was appropriate given the extent of the failure.

5.2.16. The Second Respondent could have informed the Claimants at least one month before the transfer took place. As it was, they were informed the day before, one only on the day of transfer. Whilst the Tribunal accepted that the date for the sale of the business may have changed there would be nothing to stop the Second Respondent still informing and consulting but changing the date as matters developed. If the sale did not proceed, she could have withdrawn the written notice to the Claimants.

5.2.17. The First Respondent also substantially failed to comply with the Regulations in failing to inform the Second Claimant of his intentions as regards the staff.

5.2.18. In the circumstances the Tribunal has awarded each Claimant 13 weeks gross pay. There was insufficient evidence before the Tribunal to reduce the point from which it has to start.

5.2.19. The issue for the Tribunal was who should be liable. Under the majority of the TUPE Regulations, on a transfer, all liabilities transfer from the transferor to the transferee.

5.2.20. However, this does not apply in respect of Regulation 15.

5.2.21. The Second Respondent may also be fixed with liability if notice is given under Regulation 15 (5). No such notice was before the Tribunal.

5.2.22. The Tribunal does have the power to fix both the Second and First Respondent with joint and several liability and the Tribunal resolved this was such a case where that power ought to be exercised having regard to the level of culpability. That means both the Second and First Respondent are both collectively and individually liable.

5.2.23. The Tribunal is not empowered to apportion the liability between the Second and First Respondent see **Todd -v- Strain 2011 IRLR 11**. That must be done by agreement or by the ordinary courts.

5.2.24. The awards are as follows, factoring in alternative Saturday working where appropriate.

First Claimant 13 weeks = £3967.20

Second Claimant 13 weeks = £2213.93

Third Claimant 13 weeks = £1246.92

Fourth Claimant 13 weeks = £1246.92

5.3. **Was there a breach of the contracts of the Claimants?**

5.3.1. None of the Claimants had written particulars of employment as required by sections 1 and 2 of the Employment Rights Act 1996 ("ERA 96").

5.3.2. Under section 86 ERA 96 every employee is entitled to a minimum of one weeks' notice for each complete year of service subject to a maximum of 12 weeks.

5.3.3. The Tribunal concluded that the statutory minimum was appropriate in this case having regard to the nature of the duties undertaken by the Third and Fourth Claimant.

5.3.4. The Third Claimant was informed on 14 January 2019 that she was to be *"let go"* and was to finish her shifts that week. She worked the rest of the week and was paid for her work.

5.3.5. In the circumstances the Tribunal is satisfied the Third Claimant was given contractual notice. She was told, in terms she understands, that her employment was ended and when it would end. She worked her notice and was paid for her notice. It follows therefore she has no claim for wrongful dismissal/breach of contract.

5.3.6. The position in respect of the Fourth Claimant is similar in that she was entitled under section 86 ERA 96 to one weeks' notice. She again was told by the First Respondent on 14 January 2019 that she was *"let go"* and was to finish on Thursday. That however was not her full contractual notice. Her working week included Saturday. Whilst she was paid for her work up to and including the Thursday, she was ready willing and able to work her complete shift which ended on a Saturday but was dismissed before that date.

5.3.7. In the circumstances she has a claim for breach of contract for her Saturday hours and the Tribunal awards her £33.27 as damages for breach of contract.

5.3.8. The First and Second Claimants cannot have a claim of breach of contract given the fact that they resigned forthwith in circumstances

in which they contended they were constructively unfairly dismissed.

5.4. **Constructive unfair dismissal.**

5.4.1. Only the First and Second Claimant pursued such a claim.

Section 95 (1) of the ERA1996 defines dismissal as follows: –

"(1) for the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) …

(c) the employee terminated the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

For an employee to succeed in a claim of constructive dismissal the employee must satisfy the following four conditions on the balance of probabilities.

- One, there must be a breach of contract by the employer. This may be either an actual or anticipatory breach.
- Two, that breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justifies the employee leaving.
- Three, the employee must leave in response to the breach, that is, it must have played a part in the employee's decision, and not some other unconnected reason.
- Four, the employee must not delay too long in terminating the contract in response to the employer's breach, otherwise the employee may be deemed as waived the breach and agreed to vary the contract.

5.4.2. The First Claimant was told on Wednesday, 16 January 2019 that her hours were being reduced. The reduction in hours would in turn impact upon her income.

5.4.3. Similarly, the Second Claimant was told the previous day, on Tuesday, 15 January 2019 that hours were reduced from 2 ½ days per week and every other Saturday to just two half days and every Saturday.

5.4.4. The Tribunal concluded that these were fundamental changes made by the First Respondent to both the First and Second Claimants contracts of employment.

5.4.5. There was no contractual right for First Respondent to make those changes. Neither the First nor Second Claimant agreed to the changes.

5.4.6. The Tribunal was satisfied that both the First and Second Claimants principally resigned because of those fundamental breaches. Whilst they both obtained employment almost immediately thereafter, the trigger for securing alternative work was the reduction in hours.

5.4.7. It is not suggested either First or Second Claimant delayed too long

5.4.8. Both the First and Second Claimant have established their respective dismissals.

5.4.9. The First Respondent was not legally represented and the Tribunal concluded that the reason or principal reason in the First Respondent's mind for the dismissal of the First and Second Claimants was a cessation or diminution in work. He intended to do the vast majority of the work within the business.

5.4.10. Whilst the dismissal was connected with the transfer it was technically an economic technical or organisational changes entailing changes in the workforce.

5.4.11. However, the procedure was wholly unfair. There was no warning. There was no consultation. There was no appeal.

5.4.12. The First Claimant's compensation is limited to a basic award (as no redundancy payment was tendered) together with loss of statutory rights as she obtained alternative employment on a higher level of remuneration immediately thereafter.

5.4.13. The First Claimant started work with the Second Respondent on 20 July 2015. Given the First Claimant's age the appropriate multiplier in terms of a basic award is one for each complete year of service.

5.4.14. The Tribunal therefore awarded the First Claimant a basic award of £920.01 (3 x £306.67) together with loss of statutory rights in the sum of £300. In calculating a week's pay the Tribunal has worked on the average over the reference period (£306.67) given some weeks the First Claimant work Saturdays and other weeks she did not.

5.4.15. The recoupment provisions do not apply.

5.4.16. The total award for the First Claimant is therefore £902.01 plus £300 equals £1220.01

5.4.17. The position as regards the Second Claimant is that she is entitled to a basic award as no redundancy payment was tendered.

5.4.18. The Second Claimant was not present and the Tribunal did not have her date of birth although noted she started employment on 05 May 2016.

5.4.19. The Tribunal have worked on a multiplier of one

5.4.20. The Second Claimants basic award would amount to £ 340.60 (2×£170.30).

5.4.21. The Second Claimant would also be entitled to an award of loss of statutory rights which the Tribunal put at £300.

5.4.22. She started alternative employment on 23 January 2019.

5.4.23. The Tribunal did not hear oral evidence from Second Claimant as to any future loss and therefore had to base its findings on the wage slips in the bundle. There was no schedule of loss before the Tribunal.

5.4.24. It was not clear in respect of the payslips on page 116 who the Second Claimant was working for.

5.4.25. Clearly the Second Claimants employer changed in May 2019 as is evident from the more detailed payslips (117 to 118)

5.4.26. Doing the best, it could and having reminded itself it was for the Second Claimant to prove her loss the Tribunal found there was no loss during the remainder of the month of January 2019.

5.4.27. In February March and April, she earned in total £1638 (13 weeks). Had she remained in employment with the First Respondent she would have earned 13 weeks x £170.30 = £2213.90. The difference is therefore £ 575.90.

5.4.28. The Tribunal determined that three months loss from the date of dismissal was reasonable applying section 123 of the ERA 96

5.4.29. The Second Claimant is therefore entitled to £340.60 + £300 = £640.60 + £575.90 = £ 1216.50

5.5. **Unlawful deduction from wages.**

5.5.1. The Second Third and Fourth Claimant based their claim on the fact they were not paid for their shifts the week commencing 06 January 2019.

5.5.2. The Tribunal found that each of the Claimants were ready willing and able to work. They did not go into work because they were told not to do so by the First Claimant who was their Manager.

5.5.3. In the circumstances the Tribunal was satisfied that their complaints of unlawful deduction from wages, that is a non-payment, were well-founded.

5.5.4. Whilst this may seem hard on the First Respondent, he could have insured against business interruption.

5.5.5. The sum for the Second Claimant was 21.75 hours x £7. 83 = £170.30

5.5.6. The sum for the Third Claimant was 20.75 hours x £7.83 = £ 162.47

5.5.7. The sum of the Fourth Claimant was not for the full week as she did work on the Saturday and it was not suggested to the Tribunal she was not paid for that work.

5.5.8. The Fourth Claimant was therefore entitled to 8 hours x £7.83 = £ 62.64

5.5.9. The position of the First Claimant is somewhat different because she worked part of the week commencing 07 January 2019 and was paid for the hours she worked. She claimed in evidence that she was entitled to payment for 33 hours. The Tribunal is not stating that it does not accept the First Claimant's evidence but she did not show any calculation as to how that was arrived at this figure and on the evidence before it the Tribunal considered that it could only make an award between the difference of the hours that she actually worked on the week commencing 07January 2019 and her contractual hours for that week.

5.5.10. The contractual hours for that week, given she was due to work on a Saturday amounted to 37.5. The Tribunal does not take into account the two hours the First Claimant worked on the Tuesday as they were not her contractual hours. The Tribunal has also assumed, given the length of the work on the Monday that there will be a 30-minute meal break. From the evidence before it, it appears the First Claimant would appear to have been paid for 14.25 hours. The difference is therefore 23.25 and the Tribunal makes an award in that sum namely 23.25 x £8.70 = £202.27

5.6. **The lack of written particulars of employment**

5.6.1. Under section 38 of the Employment Act 2002 the Tribunal must make an award of between 2 to 4 weeks' pay if it finds for an employee in respect of a jurisdiction listed in schedule five. Schedule five includes unauthorised deductions from pay

5.6.2. Although there was no express application before the Tribunal for such an award, evidence was discussed as regards the lack of written particulars.

5.6.3. The Tribunal has concluded that an appropriate award would be two weeks' pay per Claimant

5.6.4. Where a Claimant worked some Saturdays, this has been averaged in to the calculation.

First Claimant £306.67 x 2= £613.35

Second Claimant £170.30 x 2= £340.60

Third Claimant £95.91 x 2= £191.83

Fourth Claimant £95.91 x2 =£191.83

5.6.5. No exceptional circumstances existed that would not make it just and equitable to make an award. The Tribunal have pitched the award at the lowest level bearing in mind these are small employers.

5.6.6. Liability rests with the Second Respondent but due to the operation of Regulation 4 of the TUPE Regulations liability passes to the First Respondent. Again, this may seem unfair but no doubt the First Respondent's solicitors will have included an indemnity clause in the business documentation so he can recover from the Second Respondent. If he cannot that is a matter that he must take up with his solicitors.

Employment Judge T R Smith

Dated: 7th April 2021