



EMPLOYMENT TRIBUNALS

Claimant: Mr S Bright

Respondent: Extreme Mist Vapes Ltd

Heard: in Nottingham

On: 18 June 2021

Before: Employment Judge Ayre (sitting alone)

Appearances

For the claimant: in person

For the respondent: Mr K Bromhead, accountant

JUDGMENT

1. The claim for notice pay is dismissed upon withdrawal.
2. The claim for an additional statutory redundancy payment succeeds. The respondent is ordered to pay the sum of £837.12 to the claimant.

REASONS

The Proceedings

1. By claim form presented on 8 October 2020 following a period of early conciliation which started and finished on 8 October 2020, the claimant brought claims for a redundancy payment and notice pay.
2. The respondent defends the claim and argues that the claimant has received all of the payments to which he is entitled.
3. There was a preliminary hearing before Employment Judge Adkinson on 21 January 2021 during which the issues in the claim were identified and case management orders made to prepare the case for hearing today.
4. During the preliminary hearing on 21 January 2021 the claimant indicated that his claim was one for notice pay. At the outset of today's hearing however he explained that he did not wish to pursue a claim for notice pay as he considers

he had 'plenty of notice', but did wish to pursue a claim for an additional statutory redundancy payment.

5. Mr Bromhead did not object to the claim proceeding today as a claim for a redundancy payment. I was happy to allow the claim to proceed as one for a redundancy payment as such a claim was pleaded in the Claim Form, and the claimant told me at the start of the hearing that he did not fully understand the difference between notice and redundancy pay. Once I had explained the difference to him he said that he only wished to pursue a claim for a redundancy payment. The notice pay claim is therefore dismissed upon withdrawal.
6. I heard evidence today from the claimant and, on behalf of the respondent, from Mr Keith Bromhead. I found both witnesses to be truthful and credible. I was also presented with a witness statement for Mr Andrew Senior but have placed no reliance upon that statement in reaching my decision as Mr Senior was not here to give his evidence or be cross examined.
7. There was not agreed bundle of documents, but both parties had sent in a small number of documents in advance, which I have taken into account in reaching my decision.

The issues

8. The issues that fell to be determined at the hearing were:-
 - a. When was Social Smoke Limited dissolved?
 - b. When did the claimant cease to be an employee of Social Smoke Limited?
 - c. When did he start his employment with the respondent?
 - d. Did his employment transfer directly from Social Smoke Ltd to the respondent within the meaning of Regulation 3(1) (a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE")?
 - e. If not directly, did it transfer to Mr Senior in the interim period under the same regulation?
 - f. If so, does the claimant have continuity of employment from 8 August 2013? If not, from when?
 - g. If so, has he been paid all the notice pay to which he is entitled?

Findings of fact

9. I make the following findings of fact based on the evidence before me today. There was very little, if any, dispute over the key facts in this case, many of which were agreed.

10. The claimant began working for Social Smoke Ltd on 8 August 2013. Social Smoke Ltd was a business that ran a shop selling e-cigarettes and e-liquids. The claimant was an employee of Social Smoke Ltd but was not provided with a written contract of employment either by Social Smoke Ltd or by the respondent.
11. The claimant worked continuously in the shop from 8 August 2013 until he was dismissed by reason of redundancy on 31 October 2020, with the exception of periods of holiday (for which he was paid) and a period of furlough from 31 March 2020 to 31 October 2020.
12. The claimant consistently worked 16-17 hours a week, every week. He was employed as a shop assistant selling e-cigarettes and e-liquids in a shop which, throughout the period of his employment, was based in the High Street in Ridley.
13. At some point in either 2016 or 2017 the location of the shop changed from one end of the High Street to another, but the activities and branding of the shop remained the same.
14. In 2017 Social Smoke Limited was threatened with litigation by a company based in the US that also traded under the name Social Smoke. To avoid the risk of litigation Social Smoke Limited stopped trading on 1 August 2017, and was subsequently struck off the register of companies in January 2018.
15. On 1 August 2017 Mr Senior took on responsibility for running the shop and for paying the claimant and the two other employees working in the shop, until a new company, the respondent, could be incorporated.
16. On 21 August 2017 the respondent was incorporated, and that company subsequently became the claimant's employer.
17. During the summer of 2017, whilst the changes were taking place, the shop continued to trade as normal six days a week. The claimant continued to work as normal without any break in service. The shop and all of its products were rebranded with the respondent's name, and references to 'Social Smoke' were removed. There was no change in the activities that had previously been carried out by Social Smoke Limited, nor any cessation of those activities.
18. The respondent did subsequently start selling and repairing mobile telephones, but this was not until sometime later, in mid-2018.
19. On 25 September 2017 the respondent placed a post on social media which included the following:-

*"We've changed our name and our logo to bring us up to date and trendy...

Everything else remains the same..."*
20. The claimant remained employed continuously from 8 August 2013 until 31 October 2020 when he was dismissed by reason of redundancy. The respondent paid the claimant notice pay, holiday pay and a statutory

redundancy payment of £627.84. This payment was calculated on the basis of the claimant having three complete years' service with the respondent, namely from 21 August 2017 to 31 October 2020.

21. The claimant was aged 52 at the date his employment terminated. His gross weekly pay was £139.52. His statutory redundancy payment based upon 7 years' continuous employment going back to 8 August 2013 is £1,464.96.

The Law

22. Regulation 3 (1)(a) of TUPE states that TUPE applies to “a transfer of an 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”.
23. Where TUPE applies, “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...but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee...” (Regulation 4(1) of TUPE); and “all of the transferor’s rights, powers, duties and liabilities under of in connection with any such contract shall be transferred by virtue of this regulation to the transferee..” (Regulation 4(2) (a) of TUPE).
24. Section 218(2) of the Employment Rights Act 1996 (“ERA”) provides that:-
- “If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another –
- (a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and
- (b) the transfer does not break the continuity of employment.”
25. The method of calculating a statutory redundancy payment is set out in section 162 of the ERA and involves:-
- “(a) determining the period, ending with the relevant date, during which the employee has been continuously employed,
- (b) reckoning backwards from the end of that period the number of years of employment falling within that period, and
- (c) allowing the appropriate amount for each of those years of employment.”

Conclusions

- 26.** The claimant's employment with Social Smoke Ltd began on 8th August 2013, and he was employed continuously from that date through to 31st October 2020 when his employment terminated by reason of redundancy. There were no gaps in his employment and he continued working 16-17 hours a week throughout the changes in 2017 and beyond, except when he was on holiday or on furlough.
- 27.** There was, in my view, a transfer of an undertaking falling within Regulation 3(1)(a) of TUPE on 1st August 2020 when the business of the shop in which the claimant worked and which, at the time, sold e-cigarettes and e-liquids, transferred from Social Smoke Limited (the transferor) to Mr Andrew Senior (the transferee). The evidence before me was that Mr Senior took on responsibility for running the business when Social Smoke Limited stopped trading on 1st August, and he paid all of the employees then working in the business, including the claimant, until the respondent was incorporated.
- 28.** There was then, I find, a second transfer within Regulation 3(1)(a) on 21 August 2020 when the shop business transferred from Mr Senior to the respondent.
- 29.** The claimant's employment therefore transferred from Social Smoke Limited to Mr Senior pursuant to TUPE and then, a few weeks later, his employment transferred from Mr Senior to the respondent, also pursuant to TUPE.
- 30.** As a result of section 218(2) of the ERA, his continuity of employment was preserved by the two transfers.
- 31.** It was not disputed that his employment terminated on 31 October 2020, or that the reason for the termination of his employment was redundancy.
- 32.** He is therefore entitled, under section 162 of the ERA, to a statutory redundancy payment calculated on the basis of continuous employment from 8 August 2013 to 31 October 2020, a total of seven complete years.
- 33.** The claimant received a redundancy payment based on three years' service only, of £627.84. His statutory redundancy entitlement for seven years' service is £1,464.96. He is therefore entitled to an additional statutory redundancy payment of £837.12 and the respondent is ordered to pay this sum to the claimant.
- 34.** In summary, the answers to the issues are as follows:-

a. When was Social Smoke Limited dissolved?

It was struck off the register of companies in January 2018 but ceased trading on 1 August 2017.

b. When did the claimant cease to be an employee of Social Smoke Limited?

On 1 August 2017.

- c.** When did he start his employment with the respondent?

On 21 August 2017.

- d.** Did his employment transfer directly from Social Smoke Ltd to the respondent within the meaning of Regulation 3(1)(a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“**TUPE**”)?

No.

- e.** If not directly, did it transfer to Mr Senior in the interim period under the same regulation?

Yes. The claimant’s employment transferred to Mr Senior on 1 August 2017 and from Mr Senior to the respondent on 21 August 2017.

- f.** If so, does the claimant have continuity of employment from 8 August 2013? If not, from when?

Yes, the claimant has continuity of employment from 8 August 2013 to 31 October 2020.

- g.** If so, has he been paid all the notice pay to which he is entitled?

It was not necessary to determine this issue as the claim for notice pay was dismissed upon withdrawal.

Employment Judge Ayre

20 June 2021

Sent to the parties on:

24 June 2021

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For the Tribunal:

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