



THE EMPLOYMENT TRIBUNALS

Claimant: Mr J Firth

First Respondent: Winns Coaches Limited

Second Respondent: Winns Brothers Partnership

Heard at: Newcastle upon Tyne Hearing Centre (by CVP)

On: Monday 24th May 2021

Before: Employment Judge Martin

Members:

Representation:

Claimant: Mr P Hargreaves (Solicitor)

First Respondent: Mr G Winn (Director)

Second Respondent: Ms H Winn

This case was heard by way of Cloud Video Platform (CVP). The parties agreed to the hearing being conducted by way of CVP, due to the ongoing Coronavirus Pandemic.

RESERVED JUDGMENT

1. The claimant's complaint on failure to inform and consult under the Transfer of Undertakings Regulations 2006 (TUPE) is not well founded and is hereby dismissed.
2. The claimant's complaint of unlawful deduction from wages is well-founded. The second respondent is ordered to pay to the claimant the net sum of £3,135.55.
3. The claimant's complaint of breach of Working Time Regulations 1998 (holiday pay) is also well-founded. The second respondent is ordered to pay the claimant the net sum of £954.80.
4. The claimant's complaint of unfair dismissal is well-founded. The second respondent is ordered to pay the claimant the sum of £4,287.50.

5. The claimant's complaint of breach of contract (notice pay) is well-founded. The second respondent is ordered to pay the claimant the sum of £2,170.00.
6. The second respondent is also ordered to pay the claimant compensation for failure to provide particulars of employment in the sum of £1076.92 being 538.46 x 2 weeks.

Introduction

1. The claimant gave evidence on his own behalf. Mr Gary Winn gave evidence on behalf of the first respondent. Ms Helen Winn gave evidence on behalf of the second respondent. A written witness statement was submitted on behalf of Mr John Winn, but he did not give evidence at the hearing. The tribunal was provided with an agreed bundle of documents marked Appendix 1.

The law

2. The tribunal considered the following law.
3. Regulation 3 (1) of the Transfer of Undertaking Regulations (TUPE) 2006. A relevant transfer is "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".
4. Regulation 13 (2) of TUPE provides for the transferor to provide information about the transfer to employee representatives or, if there is no employee representatives, then to the employees. It also provides that the transferee must give information to the transferor to enable the transferor to provide any such information in particular in relation to any measures envisaged.
5. Regulation 15 (1) states that, where an employer has failed to comply with a requirement to inform and consult, a complaint may be brought to an employment tribunal by any of the employees who are affected employees.
6. Regulation 15 also provides that a transferor may seek to show that it was not reasonably practicable for him to perform the duty and may submit that the transferee failed to give him the requisite information.
7. Where the tribunal finds that a complaint is well-founded, it shall make a declaration to that effect and order compensation be paid to the employees affected.
8. Regulation 39 provides that the transferee shall be jointly and severally liable with the transferor in respect of any compensation payable.
9. Section 95 (1) (c) Employment Rights Act 1996. "An employee is dismissed by his employer if the employee terminates 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".

10. Section 123 (1) ERA 1996. The amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.
11. Section 123 (4) “ In ascertaining the loss the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales”.
12. Section 123 (6) – “Where the tribunal finds that the dismissal was to any extent caused or contributed to any action by the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding”.
13. Article 3 of the Extension of Jurisdiction Order 1994 “Proceedings may be brought before an employment tribunal in respect of a claim of an employee for the recovery of damages or any other sum if the claim arises or is outstanding on the termination of the employee’s employment”.
14. Section 13 (3) ERA 1996. “Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this part as the deduction made by the employer from the worker’s wages on that occasion.”
15. Regulation 13 and 14 of the Working Time Regulations. Regulation 13 states that a worker is entitled to four weeks annual leave. Section 13A increased that figure to a maximum of twenty-eight days (including 8 public holidays).
16. Regulation 14 of the Working Time Regulations 1998 provides that “where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave”.
17. Section 11 of the Employment Rights Act 1996 provides that, where an employer does not provide a worker with a statement as required by Section 1 or 4 of the Employment Rights Act 1996 (being a statement of either initial employment particulars or a statement of changes to employment particulars) the employee may bring a claim to the employment tribunal.
18. Section 38 (3) of Employment Act 2002 provides that where proceedings are brought and the employment tribunal makes an award to a worker in respect of any of the claims set at Schedule 5, which include unfair dismissal and unlawful deduction from wages and there has been a failure by the employer to provide a statement of particulars of employment under Section 1 or Section 4 of the Employment Rights Act 1996, the employment tribunal must increase the award by a minimum amount and may, if it considers it just and equitable, increase the award by the higher amount instead. The minimum amount is two weeks’ pay and the higher amount is four weeks’ pay.

19. The case of Western Excavating (ECC) Limited v Sharpe 1978 IRLR 27 where the Court of Appeal held that an employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the route of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice but the conduct in either case must be sufficiently serious to entitle him to leave at once.

The issues

20. The issues in this case were largely set out in the order made on 18th June 2020 and are as follows:
21. The first question that the tribunal had to ask was who was the claimant's employer. Was it the first or second respondent?
22. In that regard was there a relevant transfer under the Transfer of Undertakings Regulations and if so, did the claimant's employment transfer under those regulations from the second respondent to the first respondent? If so, did the respondent fail to comply with the duty to inform and consult the claimant and is the second respondent liable for any failure to inform and consult.
23. Alternatively, did the claimant leave the employment of the second respondent and take up employment with the first respondent and if so when?
24. If there was no transfer and the claimant's employment did not transfer did he remain in the employment of the second respondent up the date of resignation? Had there been any change in the partners of the second respondent at any point prior to the claimant's resignation.
25. In relation to the complaint of unfair dismissal was there a fundamental breach on the part of the respondent that entitled the claimant to resign? Was that a breach of an implied term in the contract of employment? The claimant relied on the fact that he was not paid his wages.
26. Did the claimant resign in response to that breach of contract?
27. Did he affirm the contract in the meantime?
28. If the claimant was constructively dismissed was the dismissal unfair within the meaning of Section 98 (4) of the Employment Rights Act 1996?
29. In relation to any remedy the tribunal had to consider what loss had been sustained by the claimant; what was the period of any loss; whether he acted reasonably in mitigating his loss; whether he contributed in any way to his dismissal and whether he would have been fairly dismissed in any event and if so, at what stage and for what reason?

30. In relation to the complaint of arrears of pay, the tribunal had to consider what, if any deductions were made from the claimant's salary and whether there was a failure to pay his pension contributions. If any deductions were made when were they made and what sums were deducted? In that regard the first respondent does admit that some wages are due and owing to the claimant.
31. In relation to the complaint of holiday pay the tribunal had to consider what was the holiday year; what if any holidays were due and owing to the claimant on termination and what if any holiday is due and owing to the claimant and in what amount? In that regard the tribunal noted that the first respondent did acknowledge that some holidays were outstanding and due to the claimant on termination.
32. The tribunal also had to consider whether if there was a TUPE transfer what if any compensation was due and owing to the claimant for any failure to inform and consult him in relation to any such transfer.
33. Finally the tribunal had to consider whether the claimant was provided with a statement of terms of employment and, if not, whether he should be entitled to any compensation in respect thereof.

Findings of fact

34. The second respondent is a partnership of Mr John Winn and his children Miss Helen Winn and Mr Gary Winn. They ran a fleet of coaches and undertook various contracts for local authorities for school runs and other activities for schools. They also ran tours for various companies in the UK and Europe and undertook some private hire.
35. Mr John Winn wanted to retire. Miss Winn did not want to continue working in the business. The second respondent partnership therefore looked to transfer the business to Mr Gary Winn on his own account. He was to set up as a limited company. The partnership accountants, Armstrong Watson, were instructed to effect the transfer.
36. The first respondent is a limited company set up by Mr G Winn in 2018.
37. It is common ground that the partners did agree to transfer the business. It appears that it is now common ground between both the first and second respondents that the transfer of the business did not actually take place.
38. The position of the respondents throughout these proceedings is confusing and is not, it must be said, assisted by their accountants who suggested in a letter in June 2020 that the business had transferred back in 2018 (page 107) of the bundle, at the same time they indicates that there was an intention to transfer in July 2019, yet in February 2018 the same accountants Armstrong Watson indicate that transfer had not in fact completed (page 75 of the bundle).
39. Mr Gary Winn and his father and sister have fallen out and there is an ongoing partnership dispute.

40. It appears that the partnership is still in existence, but based on the evidence of both of the respondents has not been trading since October 2019, following the fallout within the partnership.
41. The claimant was employed by the second respondent as a coach driver in March 2014.
42. The claimant worked on tours for the respondent and undertook some local authority work for schools. He enjoyed the tour work.
43. In April 2019 the first respondent indicated to employees that there would be changes in the partnership and changes to the payroll. They said that all employees would be employed by the first respondent and payments would be moved from weekly to monthly payments (page 76 of the bundle). Mr Gary Winn said that those matters was discussed with all employees. The claimant said that there was no discussion about the transfer, but that he was informed about the changes to pay. He agreed with the first respondent that he would be paid bi-monthly, so that part of his salary was paid mid-month and the balance was paid at the end of the month. The first respondent agreed that they did agree to the claimant's proposal regarding the payment of his salary bi-monthly.
44. It appears the transfer did not occur at that time nor indeed subsequently even by the date of these proceedings, nevertheless it seems that sometime in July 2019 the first respondent took over the payroll for the second respondent and started paying the claimant's wages as is noted at page 80 of the bundle. That document is the claimant's payslip for 31st July which shows the first respondent as the claimant's employer as noted on the payslip. The claimant did not indicate in his evidence that he agreed at any stage to join the first respondent company.
45. In August 2019 the claimant was only paid £700.00 of his salary. He was not paid the rest of his August salary.
46. In early September 2019, the claimant realised that deductions had been made from his pension. Earlier in the year, he had deductions made from his salary for pension contributions which it seems had not been paid into his pension fund. This is noted at page 83 of the bundle. The first respondent admitted that the pension contributions had been deducted but had not paid into the pension fund.
47. At around the same time in early September 2019, the first respondent had been texting employees to inform them of problems with their pay. The first respondent had told employees that it was having problems with its bank account. It informed employees that they would be paid late in August and that the problems had persisted into September. It texted employees on a regular basis up to 12th September 2019, as is noted at page 84 to 91 of the bundle. The first respondent continued to indicate that it was having problems with its bank account which it was trying to sort out.

48. On 12th September 2019 the first respondent texted the claimant to say that the outstanding wages would be paid into his bank account by at the latest Monday 16th September 2019 (page 92).
49. In or around the same time in early September 2019, the claimant's coach, which he drove for tours, was repossessed. He took a photograph and sent it a former colleague. It appears that the ex-colleague then posted it on social media and the first respondent received death threats.
50. The first respondent contacted the claimant by text on a number of occasions in the early part of September asking him about him about the photographs and informing him of the threats which had been made. Those texts to the claimant are attached to Mr Gary Winn's witness statement.
51. In evidence to the Tribunal, Mr G Winn said that he wanted to discuss the matter with the claimant, but admitted in evidence that he would not have dismissed the claimant for that matter.
52. It appears that the claimant had sometime previously loaned money to first/second respondent's business to assist the purchase of a vehicle. The loan was somewhere in the region of £15,000. By the time the claimant left the respondents he had not been repaid most of that money, except for a few thousand pounds so he was owed substantial monies by them. The claimant owed the respondent(s) some fuel costs, so in respect of his September payslip he wrote a note on the pay packet stating that he was deducting that £500.00 from the outstanding debt owed to him. The outstanding loan is not the subject matter of these proceedings.
53. On 16th September 2019, the claimant did not receive his outstanding wages. He has still not been paid those wages up to the date of this hearing.
54. The claimant was due to be paid the first part of his September wages in or about 14th of 15th September, but that was not paid to him either.
55. On 25th September 2019, the claimant resigned from his employment with immediate effect. He wrote to the respondent to tender his resignation. That letter is at page 95 of the bundle. In that letter he states that he is resigning because he has not been paid his August salary or the first payment for his September salary. He refers to the assurances that these would be paid, but that they have not been paid. He also refers to deductions from his pension scheme. He indicates he has lost trust and confidence in his employer. He questions as who is his employer; making reference to his last pay slip.
56. The claimant was issued with a P45 which stated that his employer was the first respondent.
57. In evidence before this tribunal, the first respondent said that the second respondent stopped trading in about October 2019, which was confirmed in evidence by the second respondent.

58. In evidence before the Tribunal, Mr G Winn said that the first respondent took over part of the business of the second respondent, namely the trade with regard to a company called Ledger Travel. That part of the business employed four drivers to work solely on that contract; all of who were assigned to that contract and none of whom were local. These employees were drivers who had always worked on that contract. It appears that the claimant, whose vehicle was repossessed, was offered the opportunity to work on that contract, but he thought the hours were too long. He, unlike those employees, did not regularly undertake that contract. He undertook other tours and local authority work.
59. Both respondents agree that the second respondent has no employees now and is not undertaking any business, albeit it is not clear whether any of the employees were dismissed by reason of redundancy. They all appear to have left the second respondent. At least one of the other employees has also brought a claim in the employment tribunal against the respondents.
60. The first respondent indicated that all the employees have now been paid their outstanding wages.
61. The first respondent maintains that the claimant's employment remains with the second respondent, who are not trading due to the partnership dispute.
62. Mr G Winn said that none of the other contracts transferred to the first respondent, who could not get access to the premises. He said that many of the vehicles were not operating because they were not insured; although he said he arranged to insure some of the vehicles to continue the Ledger Travel work. Mr G Winn said that the local authority contracts still remain with the second respondent.
63. During the course of these proceedings, both respondents appear to now acknowledge that, although there was an intention to transfer the partnership business to the first respondent, it is still in existence, albeit it is not trading and that all three of them remain partners in that business. Most importantly, both respondents now appear to accept that no transfer in fact took place.
64. Since his employment terminated, the claimant has set up in self-employment. He was contacted to do the tour for which his vehicle was originally repossessed. He said that that tour company arranged to purchase another coach and engaged him to do that tour.
65. The claimant has since become self-employed, but has been affected by the pandemic. He said that, if he had been employed he might have got about 80% of his furlough however because he had only just set up in self – employment, he did not get any furlough or equivalent payment.
66. Both respondents said that neither company has had any business at all during the pandemic. Both were affected by the pandemic.
67. Between October 2019 and June 2020 the claimant earned £4,500.

68. From July 2020 to date, the claimant has earned approximately £14,000. He has no on-going loss. He said the losses he experienced in terms of his wages was largely because of the pandemic otherwise he said he would have been earning the same or a similar amount from the date of termination, but because he was self-employed and had just set up, he was unable to claim furlough or any benefits.
69. The claimant's gross monthly income was £2333.00. His monthly net income was £1,881.00. His gross weekly take home pay was £538.46 and his net weekly take home pay was £434.00.
70. His daily income was £107.69 gross and £86.80 net. He was aged over 41 at the date of his termination.
71. The claimant said that the holiday year for the respondents ran from January to December. The first respondent and second respondent said that the holiday was the financial year from March to April. The Tribunal accept the respondent's evidence on this, as no documents have been produced, but it seems clear that they would probably both be more familiar with holidays years as they both ran the business.
73. The claimant said that he took three days holiday, which was accepted by both respondents. He suggested that employees were allowed to carry holiday over from one year to the next, but both respondents said that employees were not allowed to carry holiday over from one year to the next. The Tribunal again prefers the respondents' evidence on this point as they are likely to be more familiar with this from running the business. The claimant says that he is due 11 days accrued holiday for that year.
74. The claimant said that he was not given any written particulars of terms of employment. No contract of employment or statement of terms of employment has been produced before this tribunal. The first respondent said that the claimant was provided with an employment contract and referred to a file on the claimant in the office which he had not been able to access. Miss Helen Winn however said that she was not aware that employees had been given contracts. Neither party was able to produce a contract.

Submissions

75. The claimant's representative said that it appears there has been no transfer but the situation was confusing. He submitted that this was a classic case where the claimant had resigned because of a breach of contract. He said payment of wages was a fundamental part of the contract. Alternatively, he submitted that the claimant was entitled to a redundancy payment. He further submitted that the claimant was due unpaid wages, holiday pay and notice pay. He submitted that the claimant was not given a statement of terms of employment was also entitled to compensation in that regard.
76. The first respondent submitted that as there was transfer, the liability rested with the second respondent. He acknowledged that the claimant was due some

outstanding wages and holiday pay. He said that the second respondent had not been trading since October 2019.

77. The second respondent belatedly appears to acknowledge that there was no transfer. They confirmed the second respondent had not been trading since October 2019.

Conclusions

78. This Tribunal finds that there was no transfer of the business of the second respondent to the first respondent. The only transfer which appears to have occurred was a transfer of part of the business relating to Ledger travel. There was no suggestion the claimant was assigned to that part of the business.
79. Accordingly, the claimant's employment did not transfer to the second respondent, despite some documentary evidence to the contrary. Therefore there was no failure to inform and consult on any transfer.
80. The position regarding the transfer is both complex and confusing, but on balance this Tribunal finds that the claimant is still employed by the second respondent.
81. This Tribunal notes that the claimant was not paid his wages for part of August or September 2021. The payment of wages is the most basic provision under any contract of employment. In basic terms, an employee provides his/her services for payment. Accordingly, the payment of wages is a fundamental term of the contract of employment. The first respondent accepts that they failed to pay some of the claimant's wages for August and September 2019. The claimant had been informed his outstanding wages would be paid by 16 September 2019 at the latest. His wages were not paid on that date. He then heard nothing further from the respondent about the payment of his outstanding wages. Accordingly, he felt he had no option other than to resign because he was not being paid. His letter of resignation makes it clear that he was resigning because he was not being paid his wages. The Tribunal accepts that was the reason for the claimant's decision to resign. The Claimant did not delay before resigning from his employment. He resigned within a few days after the first respondent had promised he would be paid his outstanding wages. He did not do anything in the meantime to affirm the contract of employment.
82. Accordingly, this Tribunal find that the claimant was entitled to resign from his employment due to a fundamental breach of contract on the part of the respondent(s). Accordingly, the claimant was constructively unfairly dismissed.
83. The claimant resigned without notice and was not paid his notice. Accordingly, his complaint of breach of contract (notice pay) is well founded. He is accordingly awarded 5 weeks' notice at a weekly net rate of £434, which the second respondent is ordered to pay amounting to the sum of £2170.00
84. The Tribunal accepts that the second respondent stopped trading from October 2019. Bearing in mind, the issues with paying his wages and pension contributions as well as the repossession of his vehicle, it was very clear that the

ordering the second respondent to pay to the claimant 2 weeks' compensation in the sum of £1076.92 for that failure.

EMPLOYMENT JUDGE MARTIN

JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON
16 June 2021

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