EMPLOYMENT TRIBUNALS (SCOTLAND)

Case no 4100969/2020 (V)

Held by means of the Cloud Video Platform on 12, 13 and 14 July 2021

Employment Judge W A Meiklejohn
Tribunal Member Ms J Anderson
Tribunal Member Ms M McAllister

Miss L Milroy	**Claimant** **Represented by:** **Ms S Mechan – Solicitor**
Cowden Holdings Ltd	**First Respondent** **Represented by:** **Mr P Mataros – Consultant**
Damall Limited	**Second Respondent** **No Appearance and No Representation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Employment Tribunal is as follows –

(a) The complaint brought under Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") succeeds; the claimant was unfairly dismissed by the first respondent.

(b) The first respondent is ordered to pay to the claimant a monetary award of **SIX THOUSAND EIGHT HUNDRED AND THIRTY SEVEN POUNDS AND FIFTY PENCE (£6837.50);** the prescribed element is **SIX THOUSAND FIVE HUNDRED POUNDS (£6500.00)** and relates to the

period from 18 November 2019 to 13 May 2021; the monetary award exceeds the prescribed element by **THREE HUNDRED AND THIRTY SEVEN POUNDS AND FIFTY PENCE (£337.50).**

(c) The complaint of failure to consult in terms of Regulation 15 of TUPE was brought out of time and is dismissed.

(d) The complaint brought under section 18 of the Equality Act 2010 ("EqA") does not succeed and is dismissed.

(e) The first respondent is ordered to pay to the claimant the sum of **FIVE HUNDRED POUNDS (£500.00)** in terms of section 38 of the Employment Act 2002.

REASONS

1. This case came before us for a final hearing, conducted by means of the Cloud Video Platform ("CVP"), to deal with both liability and remedy. Ms Mechan represented the claimant and Mr Mataros represented the first respondent.

2. The second respondent had not entered appearance and was not represented. We ascertained in advance of the hearing that the second respondent had been dissolved on 22 September 2020, having been struck off the Register of Companies on 13 September 2020.

Nature of claims

3. There was a discussion at the start of the hearing to establish the precise nature of the complaints brought by the claimant in this case. We say "*in this case"* because, as described below, there is another claim brought by the claimant relating to her employment at the Crown Bar, Paisley.

4. After discussion, and a short adjournment to allow Mr Mataros to take instructions, it was agreed that the complaints with which we had to deal were –

(a) a complaint of automatically unfair dismissal in terms of Regulation 7 of TUPE;

(b) a complaint of failure to consult under Regulation 15 of TUPE; and

(c) a complaint of pregnancy and maternity discrimination under section 18(4) EqA.

Procedural history

5. The claimant presented an ET1 claim form (2-16) bringing a claim against (i) the second respondent and (ii) Mr R Best on 2 September 2019. Her complaints were brought under sections 18 and 27 EqA. This was answered and resisted by both respondents in terms of their ET3 response form (17-28). This is case number 4110541/2019 (the "first claim").

6. The claimant presented her ET1 claim form (29-43) in the present case on 17 February 2020. This was resisted by the first respondent in terms of their ET3 response form (44-54). No response was entered by the second respondent.

7. A Preliminary Hearing to deal with case management in both the first claim and the present one took place on 6 August 2020 (before Employment Judge Kemp). The principal outcomes were that –

(a) the first claim was sisted pending a Preliminary Hearing in this case;

(b) there was to be a Preliminary Hearing in this case to address (i) whether or not there had been a relevant transfer from the second respondent to the first respondent (ie from Damall Ltd to Cowden Holdings Ltd) and (ii) when was the effective date of termination of the claimant's employment; and

(c) after a Judgment was issued following that Preliminary Hearing, the sist in the first claim would be recalled and a further Preliminary Hearing would be convened to address case management of both claims, which might include whether they should be combined.

8. In advance of the Preliminary Hearing referred to at (b) in the preceding paragraph, the first respondent conceded that there had been a relevant transfer (from Damall Ltd to Cowden Holdings Ltd) under Regulation 3(1)(a) of TUPE. The outcome of that Preliminary Hearing which took place on 16 November 2020 (before EJ Wiseman) was a decision that the effective date of termination of the claimant's employment was 18 November 2019.

9. A further Preliminary Hearing to deal with case management in both the first claim and the present one took place on 12 April 2021 (before EJ Gall). The outcomes were (i) refusal of an application by the claimant to have the two claims combined and (ii) orders for separate CVP hearings in the first claim and the present one.

10. Against that background, the present case was listed for a final hearing before us. We understood that a final hearing had already taken place in the first claim but that matters were not concluded and no Judgment had yet been issued.

Scope of hearing

11. We were concerned that there might be some overlap between the issues before us and the issues before the Tribunal dealing with the final hearing in the first claim. However, after discussion, it was agreed that (i) the first claim was focussed on events in the period up to 10 October 2019 (when the TUPE transfer of the business of the Crown Bar occurred) and (ii) the present case was focussed on events in the period between 10 October 2019 and 18 November 2019.

12. There was also discussion as to whether EJ Wiseman had decided that the claimant had been dismissed by the first respondent on 18 November 2019. This arose from the terms of paragraph 48 of EJ Wiseman's Judgment which was in these terms –

> "*I, in conclusion, decided the claimant's employment transferred from Damall Ltd to Cowden Holdings Ltd on the 10 October 2019. The claimant was subsequently dismissed on the 18 November 2019 when*

she understood she was no longer required to work. The effective date of termination of employment was the 18 November 2019."

13. We noted that at paragraph 5 of her Judgment, EJ Wiseman stated that "*The issue for determination at this Preliminary Hearing was, therefore, the effective date of termination of employment."* The claimant's position before EJ Wiseman was that her employment ended on 18 November 2019. The first respondent's position was that it had ended on 10 October 2019.

14. In the "*Discussion and Decision"* section of her Judgment, EJ Wiseman addressed the issue of whether the claimant's employment had terminated on 10 October 2019 or 18 November 2019 and, having done so, she stated at paragraph 45 of her Judgment "*I concluded from those facts that the claimant's employment ended on the 18 November 2019."* Nowhere in her Judgment before that paragraph did EJ Wiseman express a view on the manner in which the claimant's employment had ended, ie was it a dismissal or a resignation or something else? It seemed to us that this was entirely appropriate as the issue before EJ Wiseman was not the manner of termination but the effective date of termination.

15. We decided that EJ Wiseman's reference to the claimant being "*subsequently dismissed"* was obiter dictum. Although EJ Wiseman heard evidence from the claimant and Mr Cowden about what happened on 18 November 2019, that was in the context of a dispute as to when the employment had ended, not how it had ended. It was not necessary, for the determination of when the effective date of termination had been, to decide the manner of termination. We therefore proceeded on the basis that the question of whether or not the claimant had been dismissed on 18 November 2019 was one for us to decide.

Evidence

16. For the first respondent we heard evidence from (i) Mr A Cowden, Director, (ii) Mr C Bruce, Director of Rosemount Inns Ltd, owners of the Crown Bar

("Rosemount") and (iii) Ms B Rodgers, a member of bar staff employed by the first respondent. For the claimant we heard evidence from (i) the claimant herself and (ii) Ms D Kennedy, a former member of bar staff at the Crown Bar.

17. We had a bundle of documents extending to 146 pages to which we refer above and below by page number. In the course of the hearing we were also referred to the bundle of documents at the Preliminary Hearing on 16 November 2020 and we refer to this by page number prefaced by "PH".

Findings in fact

18. The Crown Bar belongs to Rosemount. The premises have been let to a number of tenants over the years. They are currently let to the first respondent, Cowden Holdings Ltd. Before that they were let to the second respondent, Damall Ltd. According to Companies House records, Mr Cowden is the sole director of Cowden Holdings and Mr Best was the sole director of Damall Ltd. Prior to Damall Ltd being the tenant, the premises were let to West Street Pubs Ltd from around the end of October 2016. Companies House records Mr Best as the sole director of West Street Pubs Ltd, and that this company was (a) incorporated on 15 September 2016 and (b) dissolved on 14 August 2018.

19. The claimant worked at the Crown Bar on and off, on a casual basis, from 2006. When West Street Pubs Ltd took over as tenant of the premises in 2016, the claimant's employment transferred under TUPE from the previous tenant, Mr A Arbison. Because of that the claimant had some awareness of TUPE. The claimant's employment became regular rather than casual on 1 July 2016. She worked 16 hours per week with her shifts alternating between Wednesday/Thursday/Friday and Wednesday/Saturday/Sunday. No written statement of terms and conditions of employment was provided to the claimant.

Claimant's maternity leave

20. The claimant commenced a period of maternity leave on 15 February 2019. This ended on 15 November 2019. She agreed with Mr Best that she would

return to work in the week commencing 18 November 2019. Issues relating to the claimant's maternity leave were the subject of the first claim.

21. These issues appear to have caused a deterioration in the relationship between the claimant and Mr Best. This was reflected in a message which Mr Best sent to the claimant on or around 5 July 2019 which included –

> "*Also Do Not enter the Crown Bar Paisley for any reason. If you do so without my authority I will take matters further."*

22. Mr Best also sent a text message to his other bar staff – Ms Kennedy and Ms C Davidson – informing them that the claimant was not to enter the premises.

First respondent becomes tenant

23. Mr Cowden knew of the Crown Bar. He had played dominoes there, we understood as a member of a visiting team. He saw an advertisement indicating that the tenancy of the Crown Bar was available. He visited the premises and spoke to Mr Best.

24. Mr Cowden then attended three meetings with Mr Best and Mr Bruce. In the course of these meetings, Mr Cowden asked Mr Best for financial information about the business. This was not forthcoming. Mr Cowden also asked Mr Best about the employees at the Crown Bar. On each occasion when asked about the staff, Mr Best told Mr Cowden that there would be no staff transferring.

25. According to Mr Cowden, Mr Best told him that (a) there were three employees, one of whom was on maternity leave and (b) he (Mr Best) was making these employees redundant. Mr Bruce confirmed that Mr Best had said in his presence (at the meetings with Mr Cowden) that no staff would transfer. That was consistent with what Mr Bruce had said in a statement he provided for the Preliminary Hearing on 16 November 2019 (PH76-77) – "*I have no doubt that Robin Best told us that there would be no staff transferring over when the change in tenant came into effect."*

26. Mr Cowden was familiar with TUPE because he had previously operated a public house business and, upon his ceasing to do so, his staff had transferred to his successor. He evidently accepted Mr Best's word that no staff would transfer. No employee liability information was provided under Regulation 11 of TUPE.

27. Mr Bruce was also familiar with TUPE. His evidence was that, if employees had been transferring, he would have obtained a list and explained to Mr Cowden as incoming tenant what he needed to do to deal with the transferring employees. The lease which Mr Bruce presented to Mr Cowden on 4 October 2019 (104-121) contained a clause dealing with employees (clause 7 at pages 118-119). It seemed to us that the main purpose of this was to ensure that Rosemount were indemnified against liability to their tenant's employees. Mr Cowden accepted that he had not read the lease before signing it.

28. The first respondent became the tenant of the Crown Bar in succession to the second respondent on 10 October 2019.

Events on and after 10 October 2019

29. On 10 October 2019 the claimant received an email from Mr Best (134). There was no message but her P45 was attached. This caused the claimant concern as she was unclear as to whether she was being dismissed. Her evidence was "*I panicked in case Mr Best meant he would sack me or possibly call the police."*

30. The claimant forwarded Mr Best's email to Mrs Mechan who contacted Mr S Connolly, the solicitor acting for Damall Ltd and Mr Best. Mr Connolly emailed Ms Mechan on 11 October 2019 (135) including the following paragraph –

> "*Your client was not dismissed yesterday. Damall Limited has lost the contract to manage/operate the Crown Bar and a new operator has taken control of the premises as at today's date. The bar will continue to trade as such. As per its legal obligations, the letter sent to your client yesterday confirmed this information and advised that the change of*

contractor amounts to a relevant transfer under TUPE. Your client's employment was not terminated by Damall Limited. I am unaware as to any decision the new contractor may have taken in respect of your client's employment, but if it has dismissed your client then any claim needs to be addressed by that new contractor. Damall Limited will have no liability in that regard."

31. The "*letter sent to your client"* was a reference to a letter dated 9 October 2019 (100-101) purporting to have been sent by the second respondent to the claimant. The claimant denied that she had received such a letter, and we accepted her evidence on this. She saw the letter for the first time when she reviewed the bundle for the hearing on 16 November 2020 (PH64-65). She expressed her surprise in a text message to Ms Mechan on 12 November 2020 (142) in which she said that she had never seen the letter before.

32. When Ms Mechan forwarded Mr Connolly's email, the claimant was reassured. She believed that she had been transferred under TUPE and that her job was safe. She asked Ms Mechan to get details of her new employer and learned it was Mr Cowden.

33. The claimant's evidence about this letter was supported by the evidence of Ms Kennedy. She was asked about a statement in an email from Mr Connolly to Ms Mechan dated 18 December 2020 (140), referring to the letter allegedly sent to the claimant on 9 October 2019, that *"similar letters were sent to the two other employees".* Her response was "*I never got any information that Mr Best was not keeping us on".* We understood that to mean that she had not received a "*similar letter".*

34. Ms Kennedy observed that the Crown Bar was closed on 10 and 11 October 2019. When the bar was open on 12 October 2019 she went in, accompanied by a friend, and spoke to Mr Cowden. According to Ms Kennedy, she asked about her shifts. Mr Cowden told her that he was not keeping the staff on. He said he was having a *"complete wipe out".* When Ms Kennedy referred to TUPE, Mr Cowden said that he had looked into it and *"it's a load of nonsense".*

35. According to Mr Cowden, when Ms Kennedy came into the bar she asked for advice about Mr Best. Mr Cowden told her that he *"had no ties with her as Mr Best had made her redundant".* Mr Cowden said that Ms Kennedy *"accepted that at the time".* He understood that Ms Kennedy was going to pursue a claim against Mr Best. He said that she did not mention her shifts. He said that Ms Kennedy introduced the person accompanying her as her daughter.

36. These versions of the same conversation were difficult to reconcile. It seemed to us that, on the balance of probabilities, (a) Ms Kennedy had asked about her employment at the bar, (b) she was told by Mr Cowden that he had not taken over any of Mr Best's staff and (c) that had led to a discussion about her pursuing a claim against Mr Best.

37. Between 10 October and 18 November 2019 the claimant did not attempt to make contact with Mr Cowden to discuss her return from maternity leave. Her evidence was that she felt it was for Mr Cowden to contact her. She was enjoying the last few weeks of her maternity leave.

18 November 2019 – claimant's version

38. We had conflicting evidence from the claimant and Mr Cowden about what happened on 18 November 2019. The claimant said that she drove to the Crown Bar, arriving around 11.20/11.30am. She was alone. Her intention was to find out what shifts she was on. She was dressed for work in case she was expected to work that day. She arranged that her parents would look after her baby and deal with collection of her other children from school/nursery if required.

39. As the claimant entered the bar she passed Ms Rodgers who was smoking at the door. There was only one customer in the bar. Ms Rodgers followed her in. The claimant realised Ms Rodgers was bar staff and introduced herself. She asked if Mr Cowden was in and Ms Rodgers said no. She said that she had been off on maternity leave and was due to start back at work. She asked Ms Rodgers to give Mr Cowden a call, which Ms Rodgers proceeded to do,

using her mobile phone and moving to the lounge where she was out of earshot to the claimant.

40. When Ms Rodgers returned she told the claimant that Mr Cowden had said that he was too busy to speak to her and that he did not understand why she (the claimant) needed to speak to him in the first place as she was never employed by him. The claimant told us that Ms Rodgers did not mention her going back to the bar to speak to Mr Cowden. If Ms Rodgers had said that, she would have done so even if it was at 10.00pm. She told us "*I needed that job".* The claimant understood from this conversation that she had been dismissed.

41. The claimant had exchanged text messages with Ms Mechan about her return to work (PH74-75). These messages indicated that it had been discussed that the claimant should present herself for work, and report back to Ms Mechan. Accordingly, the claimant sent a text message to Ms Mechan dated 18 November 2019 and timed at 12.36pm (PH75). The message was as follows –

> "*….went in to pub he wasn't in girl phoned him he said he's to busy to speak to me so said it was to get confirmation about work and he wasn't coming back in he's to busy so been sent away…."*

42. Responding to the first respondent's version of events, the claimant said that between 3.00 and 3.30pm she was collecting her older children from school and nursery. She denied that she had been told to come back around 6.00pm.

18 November 2019 – first respondent's version

43. Ms Rodgers said that between 3.00 and 3.30pm she was behind the bar when two ladies walked in. She offered to help them and one said that she was *"looking for Alan".* She identified this as the claimant. She said that Mr Cowden was not working. The claimant said that her maternity leave was finished and she was in to see when she was to start back. Ms Rodgers

offered to phone Mr Cowden. She asked the claimant her name and the claimant replied "*Leanne".*

44. Ms Rodgers then called Mr Cowden from the lounge. She did that because there were other people in the bar. It was not "overly busy" but the television or jukebox were usually on. According to Ms Rodgers, she told Mr Cowden that there was a girl called Leanne in to speak to him. She said her maternity leave is finished and when is she to start back. Mr Cowden replied "*Who?"* Ms Rodgers told him it was Leanne. Mr Cowden replied "I don't have a Leanne". He said that Mr Best had paid all the staff off. Ms Rodgers asked Mr Cowden if he was starting at 6.00pm and should she tell the claimant to come back. Mr Cowden told her to do that. According to Ms Rodger, Mr Cowden said "Tell her to come in just before 6.00 to give me a chance to speak to her".

45. Ms Rodger then returned to the claimant and told her that Mr Cowden was working on the taxis. If the claimant came in at 5.45pm that would give Mr Cowden a chance to speak to her before he started his shift. The claimant said "Fine" and she and the other lady left.

46. Ms Rodgers' evidence was contradictory as to whether she discussed the matter with Mr Cowden when he came in that evening. She said she "never really discussed it" with him. She then said Mr Cowden asked her what happened and she told him. She said she could not recall if she referred to the claimant by name. She then said that she did refer to the claimant as "Leanne*"* when she spoke to Mr Cowden – "I definitely mentioned her name".

47. Mr Cowden said that around 3.00pm on 18 November 2019, he had just picked up some children from school in his taxi. He received a phone call from his bar. He was told that a young lady had come in saying that she was there to start her shift. He was not given a name. He told Ms Rodgers to tell the person to come back at 6.00pm. He never heard from her.

48. Mr Cowden said that he assumed the person who came to the bar was "the girl who had been on maternity leave". He said that he knew it was not Ms

Davidson, because he knew her. Ms Kennedy had already been in so he "assumed it was the third person".

Our view of this

49. We had to deal with two significant conflicts in this body of evidence. The first related to the time of day at which these events occurred. Mr Cowden and Ms Rodgers agreed that it had been around 3.00 in the afternoon and linked this to Mr Cowden school pick up in his taxi. The claimant was adamant that it was around 11.20/11.30 and asserted that this was confirmed by the time of her text message to Mrs Mechan.

50. We decided that we preferred the evidence of the claimant on this point. We did so principally on the basis of the text message timed at 12.36pm. The claimant could not have reported to Ms Mechan about what happened on 18 November 2019 until after the event. It seemed to us more plausible that if the claimant believed she might be required to work a shift on 18 November 2019, as evidenced by her dressing for work, she would visit the bar earlier in the day rather than later.

51. There was some inconsistency between the versions of events given by Mr Cowden and Ms Rodgers. They disagreed as to whether Ms Rodgers had mentioned the claimant's name. Ms Rodgers' evidence as to whether she had discussed the matter with Mr Cowden was contradictory. The claimant's evidence about attending the bar alone and there being only one customer present was more credible that Ms Rodgers' account, particularly as Ms Rodgers was unable to describe the person she said had accompanied the claimant.

52. The other conflict related to what the claimant was told, which caused her to believe she had been dismissed. We noted that EJ Wiseman had heard evidence about the events of 18 November 2019 at the preliminary hearing on 16 November 2019, in the context of determining the effective date of termination. Her Judgment included the following paragraphs –

"*18. The claimant presented for work on the 18 November 2019. She did not recognise the person behind the bar, but asked them to contact Mr Cowden. The person (Ms Rogers) did this and reported to the claimant that Mr Cowden was too busy to speak to her and that he had not ever employed her. The claimant left and understood she did not have a job."*

"23. There was one dispute between the evidence of the claimant and Mr Cowden and that related to whether Mr Cowden told the claimant (via the person who had phoned on the 18 November 2019) that she was to return at 6pm when he could speak with her. I accepted Mr Cowden's evidence that this is what he told the person on the phone. I also accepted that message did not get to the claimant."

53. We came to a similar conclusion. We preferred the claimant's version of what Ms Rodgers told her after she (Ms Rodgers) had spoken to Mr Cowden. While Ms Rodgers said that Mr Cowden told her "*I don't have a Leanne"*, it was credible that this had been relayed to the claimant as "*she was never employed by him".* The claimant used the expression "*been sent away"* in her message to Ms Mechan which was in our view consistent with her understanding that she no longer had a job at the Crown Bar.

Personal licence

54. We heard evidence about whether the claimant held a personal licence under the Licensing (Scotland) Act 2005. The claimant's position was that she did. It was kept behind the bar. The police had visited the premises and inspected the personal licences of the staff (including the claimant), and had been satisfied. So far as the claimant was aware, her personal licence had not been revoked.

55. Mr Cowden's evidence was that he understood the claimant's personal licence had been revoked after she was convicted of an offence. He was aware that it was possible to check with the Council as to who holds a

personal licence but his information did not come from the Council and he had not checked with the Council.

56. Mr Cowden said that all of his current staff held personal licences. We had no reason to doubt that was true but it was apparent that at least some of those staff, including Ms Rodgers, did not hold a personal licence when first employed by the first respondent but acquired this by going through the necessary training.

First respondent's position if staff had transferred

57. Mr Cowden said that when he took over the Crown Bar he wanted *"a fresh start with new staff".* He said that if the claimant had returned to the bar on 18 November 2019, he would have told her that she did not have a job – *"I would not have employed her".* In answer to a question from me as to what he would have done if the second respondent's staff had transferred to the first respondent under TUPE, Mr Cowden said –

> "*I would have told them there wasn't a job for them. I'd have dismissed them."*

Mitigation

58. After she understood that she had been dismissed, the claimant handed out her CV to local businesses. This eventually resulted in her securing employment as a hairdresser as from 13 May 2021. Her pay in that job is greater than she received from the second respondent.

59. The claimant did some six hours cleaning work but the lady for whom she did this suffered a stroke and she did not like to pursue payment. She worked one day for a family friend who was opening a showroom where she was to be the receptionist, earning £50.00. She set up a home salon for hairdressing but was unable to pursue this because of Government restrictions introduced in response to the Covid-19 pandemic. She earned £30.00 from that. During periods of lockdown the claimant had her two school age children with her for

home schooling. She was contacted by NHS Scotland Test and Protect on 11 December 2020 (146) and advised to self-isolate until 23 December 2020.

Effect of pandemic

60. Mr Cowden said that the Covid-19 pandemic had a significant impact on the first respondent's business. They had been unable to trade during periods of lockdown. Their staff had been furloughed and had received only the 80% of pay which was reimbursed under the Coronavirus Job Retention Scheme ("CJRS").

Comments on evidence

61. It is not the function of the Tribunal to record every piece of evidence presented to it and we have not attempted to do so. We have focussed on those parts of the evidence which had the closest bearing on the issues we had to decide. On that basis, we did not consider it necessary to deal with matters such as who was running the bingo at the Crown Bar since the first respondent took over or the leaving party organised by Mr Best on 9 October 2019.

62. The claimant was a credible witness and gave her evidence in a straightforward manner. She came across as having a clearer recollection of events than Mr Cowden and Ms Rodgers.

63. In the case of Mr Cowden and Ms Rodgers, we felt that the passage of some eighteen months since October/November 2019 had affected their ability to recall what happened at the relevant time for the purposes of this case. While the inconsistencies in their evidence indicated there had been no collusion between them, we found their evidence less reliable than that of the claimant.

Submissions for the respondent

64. Mr Mataros for the first respondent submitted that there was contributory fault on the part of the claimant. The transferee had been identified and yet there was no attempt by the claimant to make contact. The claimant had legal advice. A letter could have been sent stating the claimant's intended date of

return to work and asking about her shifts. This might have avoided the difficulties that ensued. Mr Mataros suggested that a reduction of 50% was appropriate.

65. Mr Mataros submitted that the evidence did not disclose words of dismissal being used. His position was that there had been neither a dismissal nor a resignation (unless the claimant's failure to return to the bar on 18 November 2019 was construed as a resignation). Mr Mataros argued that the claimant had made a *"token presentation at work"* to breathe life into a new claim. If the claimant believed she had been dismissed she could have requested written reasons for that dismissal. She did not do so.

66. Referring to ***Abernethy v Mott, Hay and Anderson 1974 ICR 323***, Mr Mataros argued that the reason for dismissal *"must be the principal reason which operated on the employers' mind".* There had to be more than just a connection between the TUPE transfer and the dismissal. Based on what he was told by Mr Best, Mr Cowden believed that the first respondent had no employees at the point when the business transferred. When he spoke with Ms Rodgers on 18 November 2019 Mr Cowden was simply expressing a view on someone he did not believe he employed.

67. Mr Mataros submitted that the grievance part of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "Code") applied. The claimant should have submitted a grievance. She had legal advice. A reduction of 20/25% in any compensation we were minded to award would be appropriate.

68. Turning to the failure to consult claim, Mr Mataros argued that this was time-barred. As we were with him on this, for the reasons set out below, we need say nothing further here.

69. Referring to the conflict as to what happened on 18 November 2019, Mr Mataros invited us to prefer the evidence of Mr Cowden and Ms Rodgers. There was no reason for Ms Rodgers to be untruthful. It seemed strange that the claimant should come into the bar on a Monday morning (according to her

evidence) dressed for work when she previously did not work until a Wednesday. Mr Mataros also invited us to prefer the evidence of Mr Cowden and Ms Rodgers as to the time of the claimant's visit.

70. Mr Mataros developed a ***Polkey*** argument. He submitted that the claimant could have been fairly dismissed for an economic or organisational reason. The economic reason was that the second respondent's staff had been responsible for the financial state of the business. The organisational reason was the need to hold a personal licence. Mr Mataros argued that this could have led to a *"some other substantial reason"* dismissal (although I suggested to him that, in the case of the need to hold a personal licence, it might be a section 98(2)(d) reason – that the employee could not continue to work in the position he/she held without contravention of a duty or restriction imposed by or under an enactment).

71. Mr Mataros submitted that there had been no unfavourable treatment under section 18(4) EqA. The statutory test was that the treatment had to be because of the maternity leave. Mr Best had told Mr Cowden that no employees were transferring. Since Mr Cowden believed that, his treatment of the claimant (including her dismissal, if there had been a dismissal) could not be because of her maternity leave.

Submissions for the claimant

72. Ms Mechan provided a written submission. This is available within the case file and so we do not rehearse its terms here. Instead we focus on Ms Mechan's oral submissions.

73. Ms Mechan submitted that the claimant did not require to make a request for a written statement of reasons for dismissal because section 92(4)(b) ERA applied. We pause to observe that we considered this submission to be misconceived. Section 92(4)(b) only applies where maternity leave ends by reason of the dismissal. In this case the claimant's maternity leave ended on 15 November 2019 and the alleged dismissal took place on 18 November 2019.

74. Ms Mechan argued that the respondent had failed to provide fair notice in relation to the personal licence issue. If fair notice had been given the claimant would have been in a position to bring evidence that her personal licence had not been revoked. In any event, Mr Best knew about her conviction and there had been police visits to the bar, during which personal licences had been checked against the relevant database, without difficulty. There was also a failure to provide best evidence. Mr Cowden could have obtained confirmation of the position from Renfrewshire Council but had not done so.

75. Ms Mechan argued that it was not credible that Mr Cowden believed that Mr Best was going to make the second respondent's staff redundant. Why would the transferor of a business which was struggling financially elect to accept liability for redundancy payments when the transferee would have been (as stated at the hearing before EJ Wiseman) "*happy"* to take over the staff?

76. Answering Mr Mataros' ***Polkey*** argument that there would have been an economic or organisation reason, Ms Mechan noted that the first respondent had not provided details of any "*measures"* it envisaged taking (a reference to Regulation 13(4) of TUPE).

77. Ms Mechan referred to the conflict in the evidence as to the events of 18 November 2019. While Mr Cowden relied on his school taxi run to confirm the alleged time of the call with Ms Rodgers, equally the claimant could rely on the fact that she has school age children and required to collect them from school/nursery (and so could not have been in the bar at 3.00/3.30 in the afternoon). If Ms Rodgers used her mobile phone to call Mr Cowden, a call record from her service provider could have been produced to verify the time of the call, but was not.

78. Ms Mechan criticised Mr Mataros' argument that if the claimant had made the effort to go into the Crown Bar between 10 October 2019 and 18 November 2019 *"we would not be here today".* She argued that the same could be said if the first respondent had kept the claimant's job open for her. Mr Cowden

had turned Ms Kennedy away at a time when he needed to recruit staff. If he needed staff, why did he not contact the claimant?

79. Referring to the impact of lockdown, Ms Mechan (sensibly in our view) said that the claimant did not expect to be compensated for more than furlough pay during periods of lockdown. She had taken reasonable steps to secure employment and had attempted to establish her own hairdressing business only to frustrated by lockdown restrictions.

Applicable law

80. Regulation 7 of TUPE provides, so far as relevant, as follows –

> "*(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.*
>
> *(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.*
>
> *(3) Where paragraph (2) applies –*
>
> *(a) paragraph (1) does not apply…."*

81. Regulation 13 of TUPE provides, so far as relevant, as follows –

> *"(1) In this regulation and regulations 13A, 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee….who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.*

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of –

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact….

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d)….

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2)….”

82. Regulation 15 of TUPE provides, so far as relevant, as follows –

“*(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal –*

….(d) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a

particular duty or as to what steps he took towards performing it, it shall be for him to show –

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances….

(12) An employment tribunal shall not consider a complaint under paragraph (1)….unless it is presented to the tribunal before the end of the period of three months beginning with –

(a) in respect of a complaint under paragraph (1), the date on which the relevant transfer is completed….

or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months…."

83. Section 18(4) EqA provides as follows –

"A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave."

84. Section 38 of the Employment Act 2002 provides, so far as relevant, as follows –

"(3) If in the case of proceedings to which this section applies –

(a) the employment tribunal makes an award to a worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996….

the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections ….(3) –

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks' pay.

(5) The duty under subsection….(3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable…."

85. Section 122(2) ERA provides as follows –

"Where the tribunal considers that any conduct of the complainant before the dismissal….was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

86. Section 123 ERA provides, so far as relevant, as follows –

"(1) Subject to the provisions of this section and sections 124…., 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 in so far as that loss is attributable to action taken by the employer….

(6) Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of 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."

87. Section 124 EqA provides, so far as relevant, as follows –

"(1) The amount of –

….(b) a compensatory award to a person calculated in accordance with section 123,

shall not exceed the amount specified in subsection (1ZA).

(1ZA) The amount specified in this subsection is the lower of –

(a) £88,519, and

(b) 52 multiplied by a week's pay of the person concerned…."

Discussion

88. We identified the issues we required to address as follows –

(i) Did the claimant's employment end by reason of dismissal or resignation?

(ii) If the claimant was dismissed, what was the reason for that dismissal?

(iii) Having regard to that reason, was the dismissal fair or automatically unfair?

(iv) If it was unfair, did the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) (the "Code") apply and, if so, with what consequences?

(v) Was there a failure to consult under TUPE?

(vi) Was the claim for a failure to consult time-barred?

(vii) If so, should time be extended?

(viii) Was there contributory conduct on the part of the claimant?

(ix) If so, should any award be adjusted to reflect that?

(x) Did the claimant suffer unfavourable treatment under section 18(4) EqA?

(xi) If so, what compensation should be awarded?

(xii) Should any award be reduced with reference to ***Polkey v A E Dayton Services Ltd [1987] UKHL 8*** *("**Polkey**")?*

Did the claimant's employment end by reason of dismissal or resignation?

89. As recorded above and for the reasons stated (see paragraph 50), we preferred the evidence of the claimant as to the events of 18 November 2019. We were satisfied that Mr Cowden said that he had never employed the claimant and that this had been communicated to the claimant by Ms Rodgers. We found that the claimant was entitled to interpret this as indicating that she no longer had a job at the Crown Bar. Accordingly we found that the claimant was dismissed by the first respondent on 18 November 2019.

90. We had some concern that this was in the nature of a *"set up"* in the sense that the claimant had arranged with Ms Mechan that she (the claimant) would go to the bar and then report back. However, our task was to decide what happened and apply the law to the facts as we found them to be. That Mr Cowden might have walked into a trap on 18 November 2019 did not alter our view of the evidence about the events of that day.

If the claimant was dismissed, what was the reason for that dismissal?

91. When the first respondent took over the Crown Bar, Mr Cowden believed that no staff were transferring from the second respondent. That was what Mr Best told him in the presence of Mr Bruce. In our view, having been told that no staff were transferring, Mr Cowden took the position that he would not have accepted any of the second respondent's employees into the first respondent's employment (see paragraph 56 above).

92. We considered whether it could be said that the reason for the claimant's dismissal on 18 November 2019 was a reason connected with the transfer of the business of the Crown Bar, rather than the transfer itself. We decided that this would be an artificial distinction to draw. But for the transfer (i) the claimant would not have presented herself at the bar on 18 November 2019 seeking to speak to Mr Cowden and (ii) Mr Cowden would not stated that he had never employed her. The first respondent could only escape the

consequence that the claimant's dismissal was unfair in terms of Regulation 7(1) of TUPE if we found that Regulation 7(2) of TUPE was engaged, in other words that there had been an economic, technical or organisational ("ETO") reason entailing changes in the workforce.

93. Mr Mataros sought to persuade us that there had been (a) an economic reason in that the second respondent's staff had been responsible for the state of the business and (b) an organisational reason in that the first respondent required its staff to hold a personal licence. We were not with him on either point. We simply had no evidence to indicate whether the second respondent's staff had played any part in Mr Best's decision that the second respondent should give up its lease of the premises. We did have evidence that some of the staff taken on by the first respondent, including Ms Rodgers, did not hold a personal licence when their employment commenced. We found no economic or organisational reason entailing changes in the workforce.

94. Accordingly, we found that the TUPE transfer of the business of the Crown Bar from the second respondent to the first respondent on 10 October 2019 was the sole reason for the claimant's dismissal on 18 November 2019.

Having regard to that reason, was the dismissal fair or automatically unfair?

95. The effect of Regulation 7(1) of TUPE is clear. Where the transfer was the sole reason for the dismissal, that dismissal is unfair. This is commonly referred to as an automatically unfair dismissal, and that is what happened here.

If it was unfair, did the Code apply and, if so, with what consequences?

96. Paragraph 1 of the Code provides as follows –

"*This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.*

- *Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted.*

- *Grievances are concerns, problems or complaints that employees raise with their employers.*

The Code does not apply to redundancy dismissals or the non-renewal of fixed term contracts on their expiry."

97. We did not believe that the Code was engaged in respect of the claimant's dismissal. It was not a dismissal by reason of misconduct or poor performance, but by reason of a TUPE transfer. We considered whether the claimant could be said to have acted unreasonably by not raising a grievance with the first respondent after her dismissal. We found that she had not acted unreasonably. She did not know the first respondent or Mr Cowden. In the particular circumstances of this case, it would not have been reasonable to expect her to raise a grievance about her dismissal.

Was there a failure to consult under TUPE?

98. We found that the second respondent had been under a duty to comply with Regulation 13 of TUPE. The second respondent should have invited its employees to appoint a representative (or representatives) under Regulations 13(3) and 14(1) of TUPE. If the second respondent's employees failed to elect a representative, the second respondent should have given to each of its employees the information set out in Regulation 13(2) of TUPE. The second respondent failed to comply with these duties.

99. In so finding, we regarded the letter dated 9 October 2019 (100-101) purportedly sent by Mr Best on behalf of the second respondent to the claimant as a sham. We were satisfied that the claimant was not sent such a

letter. We believed that Ms Kennedy's evidence that she also had not received such a letter was confirmatory of that.

100. It followed that there had been a failure to inform or consult, giving rise to a complaint under Regulation 15(1) of TUPE.

Was the claim for a failure to consult time-barred?

101. In terms of Regulation 15(12)(a) of TUPE, time starts to run from the date on which the relevant transfer was completed. In this case that was 10 October 2019. The claimant had already been through ACAS Early Conciliation with the second respondent in advance of the first claim (being issued with certificate number R566595/19/32). The time limit for presenting a compliant under Regulation 15 against the first respondent was 9 January 2020. This was subject to an extension of the time limit to facilitate early conciliation under Regulation 16A of TUPE. The claimant notified ACAS in respect of the first respondent on 23 January 2020 and the Early Conciliation certificate (1) was issued on the same date.

102. Accordingly, when the claimant presented her complaint of failure to consult on 17 February 2020, it was out of time. We therefore had to consider whether it had been reasonably practicable for the claimant to present her complaint before the end of the period of three months beginning on 10 October 2019.

103. The claimant's position in evidence was that she left the matter to her solicitor. Ms Mechan knew that a new operator had taken over the Crown Bar in circumstances said to be a relevant transfer under TUPE from Mr Connolly's email of 11 October 2019 (135). We understood from her submissions that Mrs Mechan was aware that the new operator of the business was Mr Cowden but it took some time to ascertain that it was the first respondent which was the transferee under TUPE.

104. We found that difficult to understand because a Companies House search on www.gov.uk discloses only one company with "Cowden" in its name with a registered office in Paisley. In those circumstances we decided that it had been reasonably practicable for the claimant to present her complaint under

Regulation 15 of TUPE within the relevant period of three months from 10 October 2019. We therefore decided that this complaint was time-barred.

If so, should time be extended?

105. Consideration of a further period within which it was reasonable for the complaint under Regulation 15 of TUPE to be presented would only arise if we found it had not been reasonably practicable for that complaint to have been presented before the end of the relevant period of three months. As we found that it had been reasonably practicable to do so, this did not arise.

Was there contributory conduct on the part of the claimant?

106. Our view of this was that the only conduct of the claimant which could be said to have contributed to her dismissal was her failure to contact Mr Cowden between 11 October 2019 (when her solicitor became aware that a new operator had taken over the Crown Bar) and 18 November 2019. Her evidence was that it was for Mr Cowden to contact her and that she was enjoying the last few weeks of her maternity leave (see paragraph 37 above).

107. We noted that EJ Wiseman had dealt with this point at paragraph 47 of her Judgment (82) in these terms –

> "*I did consider the claimant had to bear some responsibility for what occurred on the 18 November 2019 and I say that because she failed to make any contact with Mr Cowden prior to returning to work. The claimant knew, from the email dated 11 October from Mr Best's legal representative, that he did not know what arrangements, if any, had been made by the transferee. I considered that in the circumstances, and given that the claimant did not know which days/shifts she may have been required to work, she ought to have made contact with Mr Cowden prior to the 18 November 2019 to clarify the position."*

108. We found no reason to disagree with EJ Wiseman. The claimant could have made contact with Mr Cowden by visiting the Crown Bar prior to 18 November

2019. There was no evidence before us of anything which actually prevented the claimant from doing so.

If so, should any award be adjusted to reflect that?

109. We considered that the claimant's failure to contact Mr Cowden (a) made it just and equitable to reduce the basic award in terms of section 122(2) ERA and (b) contributed to her dismissal making it appropriate to reduce the amount of the compensatory award in terms of section 123(6) ERA. We did not agree with Mr Mataros that a reduction of 50% would be appropriate.

110. We found it difficult to speculate on what the effect of the claimant making contact with Mr Cowden prior to 18 November 2019 might have been. On the one hand, it would have alerted the first respondent to the fact that the claimant considered herself entitled to return to work. On the other hand, Mr Cowden's evidence was that if the claimant had returned to the bar on 18 November 2019 he would not have employed her. If the claimant had made contact with Mr Cowden prior to 18 November 2019 and had been told that he would not employ her, that might have triggered some dialogue about the consequences of TUPE (notwithstanding what Mr Cowden said to Ms Kennedy) particularly if the claimant's solicitor had become involved.

111. Looking at matters in the round, we decided that a small reduction in both the basic award and the compensatory award was appropriate. We determined that the reduction should be 10%. That reflected the modest likelihood that contact by the claimant in advance of her return date might have led to a different outcome.

Did the claimant suffer unfavourable treatment under section 18(4) EqA?

112. We considered that the right to return to work was an element of the right to ordinary or additional maternity leave. The reason why the claimant visited the Crown Bar on 18 November 2019 was to exercise her right to return to work. In terms of section 18(4) EqA, what we had to look at was (a) the

treatment the claimant received and (b) whether this was because she had exercised her right to maternity leave.

113. We were satisfied that the claimant suffered unfavourable treatment when she was not permitted to return to work on 18 November 2019. We were not satisfied that she suffered that treatment because she had exercised her right to maternity leave. We found that she suffered that treatment because the first respondent was unwilling to accept as employees any of the second respondent's former staff. Ms Kennedy had been treated in the same way when she spoke with Mr Cowden on 12 October 2019.

114. We understood that the claimant was also asserting that the first respondent's failure to contact her between 10 October 2019 and 18 November 2019 was unfavourable treatment. We did not agree. Mr Cowden had been told by Mr Best that no staff would transfer. There may well be circumstances where failure to make contact with an employee on maternity leave will amount to unfavourable treatment, for example if there is a change to the place of employment or hours of work. However, there were no such circumstances in the present case.

If so, what compensation should be awarded?

115. As we found that the unfavourable treatment suffered by the claimant was not because of her exercise of maternity leave, this question became academic.

Should any award be reduced with reference to Polkey?

116. We deal with this below when considering remedy.

Disposal and remedy

117. Having decided that the claimant was unfairly dismissed under Regulation 7 of TUPE, we considered what compensation should be awarded. The claimant had three years' continuous employment as at 18 November 2019. Her gross (and net) weekly pay was £125.00. She was 35 years of age at the date of dismissal and so the appropriate multiplier was 1. Her basic award was therefore £125.00 x 3 (years' service) x 1 which totals £375.00. Applying

a reduction of 10% in terms of section 122(2) ERA produces an amount of £337.50.

118. We then considered the compensatory award under section 123 ERA. We agreed with the calculation in the claimant's schedule of loss (98-99) that the period between her date of dismissal (18 November 2019) and the date of commencement of her new employment (13 May 2021) was 77.4 weeks. We also agreed that this represented, before mitigation and other relevant adjustments, loss of net earnings of £9675.00.

119. We accepted the claimant's evidence that she had earned a total of £80.00 between 18 November 2019 and 13 May 2021. We considered that there should be an adjustment for the period between 13 and 23 December 2020 when the claimant was advised to self-isolate. This period included 4 days when the claimant would otherwise have been working (assuming her shift pattern had remained unchanged) and would have earned £166.67.

120. We noted that the first respondent's business had closed during periods of lockdown and that staff had been furloughed, receiving 80% of normal pay. We considered that, if the claimant had remained in the first respondent's employment, she would have been treated in the same way. Based on publicly available information we assessed that of the 77.4 weeks referred to above, 47 were in periods of lockdown. During those weeks the claimant would, if still employed by the first respondent, have received only 80% of her normal pay. That represents an adjustment of £1175.00.

121. The claimant suffered a loss of her statutory employment protection rights. We felt that the figure of £500.00 in her schedule of loss was overstated. We believed a figure of £300.00 was more appropriate. That means a running total of £9675.00 plus £300.00 less (a) £80.00, (b) £166.67 and (c) £1175.00 which equals £8553.33. From this we deduct 10% in terms of section 123(6) ERA which produces an amount of £7698.00.

122. We considered whether any part of the compensation due to the claimant should be reduced with reference to ***Polkey***. We decided that no such

reduction should be made. Mr Mataros argued that any compensation should be limited to reflect that the claimant would have been dismissed anyway shortly after 18 November 2019 (as indicated by Mr Cowden – see paragraph 56 above). However, for the reasons set out in paragraph 93 above, (a) we believed any such dismissal would still be because of the TUPE transfer of the claimant's employment to the first respondent, (b) we did not consider that the respondent would be able to show an ETO reason for any such dismissal and (c) accordingly any such dismissal would be automatically unfair. In contrast, a ***Polkey*** reduction in compensation is made to reflect the likelihood of a fair dismissal.

123. The amount of the claimant's loss of earnings calculated in terms of paragraph 104 above brings section 124(1ZA)(b) ERA into play. As £7698.00 is more than 52 times a week's pay for the claimant, her compensatory award requires to be capped at an amount which equals 52 times her weekly pay of £125.00. This results in a compensatory award of £6500.00. The total of the basic award and the compensatory award is therefore £6837.50.

124. The claimant had not been provided with a statement of initial employment particulars in terms of section 1(1) ERA. This meant that, as an award was being made to the claimant, section 38 of the Employment Act 2002 applied. We were required to make an award of either the lower amount of two weeks' pay or the higher amount of four weeks' pay. As we had no evidence of any attempt by the first respondent (nor for that matter any of the claimant's previous employers at the Crown Bar) to comply with the duty to provide the claimant with a statement of terms and conditions of employment we decided to award the higher amount of four weeks' pay. This amounted to £500.00. We found no exceptional circumstances which made such an award unjust or inequitable.

125. The claimant had received benefit while unemployed. The attention of parties is drawn to the attached schedule in terms of the Employment Protection (Recoupment of Benefit) Regulations 1996.

Employment Judge: Sandy Meiklejohn
Date of Judgment: 23 July 2021
Entered in register: 04 August 2021
and copied to parties