



Case Numbers: 3332461/2018

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

1 Mr J Hunt

2 Mr D Hurst

and

Respondents

1 Greencity Solutions
Ltd

2 Chess ICT Limited

Held by CVP on 2 August 2021

Representation

Claimants:

1 In Person, with Mr
S Ryan, McKenzie
Friend

2 Mr K Zaman,
Counsel

Respondents:

1 Did not appear and
not represented

2 Miss Platt, Counsel

Employment Judge Kurrein

Statement on behalf of the Senior President of Tribunals

This has been a remote hearing that has not objected to by the parties. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 369 pages, the contents of which I have recorded.

REASONS FOR THE JUDGMENT

given orally on 2 August 2021 provided
at the request of the Second Respondent.

Claims and Issues

- 1 On 30 August 2018 the First Claimant presented a claim against the First Respondent claiming unfair dismissal and other sums. On 4 September 2018 the Second Claimant, the First Claimant's half-brother, presented a similar claim.
- 2 the First Respondent presented a response in which it denied those claims, but it has taken little part in the proceedings since.

- 3 On 27 February 2019 the Claimant sought to join a Second Respondent named Chess Limited and that application was granted by EJ Postle on 2 August 2019.
- 4 The Second Respondent presented a full response. taking out of time points, amongst others, on 2 September 2019.
- 5 At a case management hearing before EJ Ord on 8 November 2019 he gave directions for the further conduct of the claim and defined the issues for this hearing as follows:-

The issues for the tribunal to determine are as follows:

- (i) Are any of the claimants' complaints out of time?
- (ii) Was there a transfer within the meaning of the Transfer or Undertakings (Protection of Employment) Regulations 2006 [TUPE] from the first respondent to the second respondent?
- (iii) Did either respondent act in a way calculated or likely to destroy the mutual duty of trust and confidence without just cause by:
 - a. Allegedly deducting wages from the claimants; and/or
 - b. Failing or delaying to provide the claimants' grievance outcome.
- (iv) If so, did the claimants resign as a result?
- (v) If so, did the claimants resign in a timely fashion?
- (vi) If so, was the claimants' dismissal fair (the respondent does not offer a fair reason for dismissal)?
- (vii) Are the claimants entitled to notice pay in the event that they were dismissed?
- (viii) If there was a transfer within the meaning of the regulations:
 - a. Were the claimants assigned to a relevant grouping at the time of the transfer?
 - b. Was there a failure by the transferee to consult the employees?
 - c. If so, were the claimants affected employees?
 - d. Was the employment of either claimant terminated by way of the conduct of either respondent in order to Facilitate a transfer undertakings of in the sale of the business?
- (ix) Were the claimants' terms and conditions changed in respect of:
 - a. Working hours.
 - b. Entitlement to sick pay.
 - c. Entitlement to compassionate/personal time off with pay.
- (x) If so, were those changes lawful?
- (xi) If not, what if any loss has either claimant suffered?
- (xii) Has either claimant suffered unlawful deduction from wages in relation to:
 - a. A failure to pay company sick pay.
 - b. The failure to pay compassionate/personal time off pay.
 - c. Deductions for alleged damage to a company vehicle.
- (xiii) In the event of any complaints succeeding, what is the appropriate remedy to which either claimant is entitled?

The Evidence

- 6 I have heard the evidence of each of the Claimants on their own behalf, the evidence of Mr. Ryan, an official of the Employees General Union on their behalf, and taken account of a statement from Mr Downey, one of the First Respondents former customers, on their behalf. I have heard the evidence of Mr Btsh, a Director of the Second Respondent, whose name was later changed to that above, effectively by consent. I have considered a bundle of documents prepared for this hearing and heard the parties submissions I make the following findings of fact.

Finding of Fact

- 7 The Second Claimant was born on 9 May 1969 and his half-brother was born on the 30th September 1977.
- 8 The First Claimant started a business Total Computing Support Limited ("Total") in about 2002 and owned and controlled it. On 1 August 2015 the Second Claimant started working with his half-brother. He is a software specialist.
- 9 At about this time Mr Baldacci, who will feature later, sold a database of customers for his then business to the Second Respondent, dealing with Mr Btsh. I find as a fact that they had no significant contact after that date, and only then in relation to the customers in that database.
- 10 On 6 September 2016 the First Respondent, acting by Mr Baldacci, the Director, agreed to acquire the business of Total. On 1 November 2016 there was a transfer of the assets and staff of Total to the First Respondent.
- 11 As a matter of law the employment contracts of the Claimants automatically transferred or identical terms to the First Respondent.
- 12 That does not appear to have been satisfactory to either the Claimants or the First Respondent. On the same date of the transfer the Claimants each entered into detailed comprehensive employment contracts whereby they were given notice periods of 12 months, in my view quite sufficient consideration for that contract to be binding and to replace any former contract that might have existed. They were paid respectively £50,000 and £55,000 per annum and in those circumstances had removed any risk to themselves and obtained 'guaranteed' incomes for a minimum period.
- 13 The terms of those contracts required them to work at the First Respondent's premises in Peterborough and to work 40 hours per week. They were not entitled to anything other than statutory sick pay, and were required to make requests for holiday.
- 14 There has been a suggestion that there may have been a brief further TUPE transfer, to a company or business referred to as BHHS, in about July 2017 which was later reversed
- 15 One of the Claimants' claims is in respect of that transfer: they complain there was no consultation when it was made or reversed. I deal with that later.
- 16 On 9 August 2017 Mr Baldacci sent an email to a number of staff, asking them to please comply with the requirement that they work normal hours in the office.

- On the 23rd of February 2018 a further email was sent identifying tasks that were relevant to various employees. Both Claimants received those emails.
- 17 In March 2018 the First Claimant made a formal complaint to Mr Baldacci, and the finance director Mr Cheesewright, that an unauthorised deduction had been made from his pay, for four days pay, in the sum of £769.24. No action seems to have been taken since that date in respect of that sum until these proceedings were issued on 13th of April 2018.
- 18 The Claimants allege that in mid-April they had a meeting with Mr Baldacci in which he made it plain that he did not want them to continue in the service of the First Respondent. I accept that evidence. As Mr. Ryan has acknowledged, it is not unusual, when one company takes over another, for the former directors not to be required for the future business of the acquiring company.
- 19 On the 14 May 2018 Mr Baldacci sent an email to the senior management team, including the Claimants, emphasising the requirement that they should work the hours that they were contracted to.
- 20 On the 21 May 2018 the Respondent informed the Second Claimant that he was being put at risk of redundancy. The Second Claimant has suggested in the course of his evidence, primarily in response to cross examination, that this was an entirely false situation. I do not accept that evidence. He was a specialist in D3 software, which was used by the First Respondent's then largest client, Maplin plc, which was then in serious financial difficulty and had ceased using the First Respondent's services.
- 21 In those circumstances, the Second Claimant being a software developer and a specialist in D3, I thought it entirely reasonable for the First Respondent to take the view that they were in a position where they would no longer need his services. The fact that that was only a brief meeting followed by one further meeting in May is not at all unusual in a small business.
- 22 On 5 June 2018 the First Claimant again complained about an unlawful deduction, but does not seem to have taken it any further. It appears to have been in respect of sickness absence.
- 23 The First Respondent engaged an offshoot of Peninsula called Face2Face HR to deal with the second consultation meeting. They compiled a detailed report on the position and found that it was fair and reasonable.
- 24 On 6 June 2018 Mr Baldacci sent an email to the senior management team about home working only being permissible to a limited extent, and only then working minimum hours at home.
- 25 It was about this time that both Claimants were signed off sick. They have confirmed that at this time they were suffering from stress and anxiety.
- 26 On the 12 June 2018 the Second Claimant wrote to Mr Cheesewright to complain about the redundancy situation, and on the 15 June the First Claimant sent an email concerning his and the Second Claimant's positions.
- 27 On 26 June 2018 both Claimants raised grievances about the manner in which they had been treated. Those grievances were acknowledged by the First

- Respondent on 29 June, and on 2 July 2018 both Claimants were invited to attend a grievance meeting on the following day.
- 28 The First Respondent had engaged the assistance of Face2Face HR for that meeting but, as I understand it, neither Claimant attended the grievance meeting. Mr. Ryan, however, did attend that meeting and made the best points he could on behalf of both the Claimants.
- 29 Before the First Respondent had an opportunity to publish its report into those grievances both Claimants resigned forthwith by an email attached letter on 13 July 2018. That was their effective date of termination.
- 30 The Claimants had already started early conciliation on the 13 July 2018 and it ended on the 30 July.
- 31 The grievance outcome report was completed on the same date and sent to the Claimants on the 31st July 2018. On the same day the First Respondent wrote to the Claimants to accept their resignation.
- 32 There was some correspondence following that about the return of company property and sums owed which does not concern me today.
- 33 On 18 August both Claimants also wrote to Mr Cheeswright concerning what they considered to be their dismissal.
- 34 The claims were then presented and responded to and on the 4th October 2018 the First Respondent put in an Amended Response. That was its last involvement in this case.
- 35 On 24 or 25 September 2018 Mr Btsh, acting for the Second Respondent, met Mr Baldacci. acting on behalf of the First Respondent. with a view to the sale and purchase of the First Respondent's business.
- 36 I accepted Mr Btsh's evidence that the approach from Mr Baldacci earlier in September came out of the blue, he not having had contact with Mr Baldacci for several years. I accepted his evidence that this was not unusual: he had sold, but mostly purchased, many, many businesses and customer databases from many, many people over the years. Mr Baldacci was far from being one of his main business contacts.
- 37 Approximately one month later there was an exchange of emails marked 'subject to contract' for the acquisition by the Second Respondent of the First Respondent's business. A meeting for that purpose took place on 13 November 2018 and it completed on 14 December 2018. All the First Respondent's then staff transferred to the Second Respondent under TUPE.

Further Findings and Conclusions

2017 TUPE transfer

- 38 I deal first with the claim regarding the alleged TUPE transfer of 2017 to and from the HSSH entity.
- 39 That claim is very out of time. The Claimants did not start early conciliation until the 13th of July 2018. Even if the transfers took place (as indicated) in about July 2017 the claim is nine months out of time.

- 40 The Claimants have given no evidence to explain why they have delayed in presenting that claim, nor have they given any reason as to why it was not reasonably practicable for them for them to have presented it in time.
- 41 In those circumstances the tribunal has no jurisdiction to hear that claim and it must be dismissed.

Unauthorised Deductions – Sick/Compassionate Pay

- 42 The next claim is the alleged unauthorised deduction from wages made by the First Claimant 1st Claimant in the sum of £769.24 deducted in March 2018.
- 43 I find as a fact that this deduction was not unauthorised. The contract of employment made no provision for contractual sick pay, and this and other alleged deductions appear to relate to such absences.
- 44 That was a single deduction and any claim for it should have been started by commencing early conciliation no later than three months after the date that that deduction was made.
- 45 Early conciliation was not started until 13 July 2018 and that means that that claim is also out of time.
- 46 Similarly the Claimants have given no explanation for the delay in starting that claim or as to why it was not reasonably practicable for them to have presented their claim in the relevant time.
- 47 The Tribunal has no jurisdiction to hear this claim.

2018 TUPE transfer

- 48 There was undoubtedly a TUPE transfer from the First to the Second Respondent on 14 December 2018.

Constructive Dismissal

- 49 I am quite unable to find that either Respondent acted without reasonable cause in the manner in which the Claimants were treated.
- 50 The issues raised by them by grievances on 26 June 2018 arose from the failure to understand the fundamental change in their status following the TUPE transfer of 1 November 2016. They were no longer Statutory or other Directors, in name or otherwise. They had no interest by way of shareholding. They were simply employees who had agreed significant variations to their former relationship with the Transferor, for their benefit and for good consideration. The Claimants could no longer act as they pleased.
- 51 The First Respondent's conduct, which only became the Second Respondent's conduct if the Claimants transferred to the Second Respondent, was entirely in line with its contractual rights. I find as a fact that the First Respondent acted with reasonable and proper cause in requiring the Claimants to work their contractual hours and not work at home save exceptionally. The Claimants had no right to contractual sick pay.
- 52 There was no unreasonable delay in dealing with the Claimants' grievances. The hearing took place a little over 2 weeks after the grievances were raised

and the detailed report, by a specialist external provider, was provided 4 weeks later.

- 53 In the above circumstances there has been no breach of the implied term relating to trust and confidence, no dismissal and no entitlement to notice pay.

Did the Claimants Transfer?

- 54 There was no evidence on which I could find that the First Respondent had, in some way, tricked the Claimants into resigning so that they would not be employed 'immediately before the transfer' so as to avoid the application of TUPE to their contracts of employment.

Final Conclusions

- 55 None of the Claimant's claims are well founded. They must be dismissed.

Employment Judge Kurrein

Dated: 15 August 2021

Sent to the parties and
entered in the Register on:
26 August 2021

S. Bhudia

For the Tribunal

Public access to employment tribunal decisions Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the Claimant(s) and Respondent(s) in a case.