



EMPLOYMENT TRIBUNALS

Claimant: Ms J Coles

Respondents: (1) Mr Paramjeet Thind
(2) Mr Paolo Sousa Fernandes t/a Britain's

HEARD AT: Watford Tribunal Centre (via CVP) **ON:** 21 July 2021

BEFORE: Employment Judge Douse (Sitting alone)

Representation:

For Claimant: In person

For Respondents: (1) No attendance and was not represented; (2) No attendance and was not represented

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was CVP. A face-to-face hearing was not held because it was not practicable and no-one requested the same or it was not practicable and all issues could be determined in a remote hearing.

JUDGMENT

1. All claims against the first respondent fail and are dismissed.
2. The claims for unfair dismissal, damages for failure to give notice, sick pay, and unpaid holiday pay against the second respondent succeed.

3. The claims for unpaid wages and a redundancy payment against the second respondent fail and are dismissed.
4. Remedy is to be determined at a hearing on 13 October 2021 at 2pm.

REASONS

Claims and issues

1. The Claimant brought claims for:
 - 1.1. Unfair dismissal;
 - 1.2 Redundancy payment;
 - 1.3 Notice pay;
 - 1.4 Sick pay;
 - 1.5 Unpaid wages; and
 - 1.6 Unpaid holiday pay
2. The issues to be determined were identified by EJ Palmer at a preliminary hearing on 24 February 2020. These were:
 - 2.1 Who was C employed by between 2 February 2015 and 28 February 2019? Was it Mr P Thind or was it The Boundary Plaice (dissolved)?
 - 2.2 Was there a transfer of an undertaking under the TUPE Regulations and was the Claimant thereby transferred to the transferee (Britain's/ Britain's Best/ Brittain's Best/ Paolo/ Mario) at a point of transfer on 28 February 2019?
 - 2.3 If there was no transfer, was C dismissed by her employer the Boundary Plaice Limited or Mr Thind on 28 February 2019?

2.4 If there was a transfer was C then dismissed by the transferee at about, or shortly after, 28 February 2019?

2.5 Who should be responsible for liability in respect of any claims C has which may be successful, including her claims for unfair dismissal, a redundancy payment, damages for failure to give notice, sick pay, unpaid wages, and unpaid holiday pay?

Procedure, documents, and evidence heard

3. Although neither Respondent attended, the first respondent - Mr Thind - had previously submitted an ET3 in response to the Claimant's ET1. This provided some useful information.
4. The Claimant had not provided a written witness statement, so was asked to verify the contents of her ET1 and gave sworn oral evidence in response to my questions.
5. The Claimant had not provided any of the documentation she intended to rely on in advance of the hearing as she had expected a face-to-face hearing, only became aware of that the hearing would be via CVP the day before, and by her own admission is not good with technology (she appeared via her smartphone).
6. I adjourned the hearing for a short time to allow the Claimant to try to provide the documentation by email to the Tribunal, even if this was only possible by taking photographs with her smartphone. After multiple failed attempts, and a much longer than anticipated adjournment, I decided to proceed as far as possible without copies of the documents.

Findings of fact

7. The Claimant worked at Boundary Plaice fish and chip shop as a manager and fryer, from 2 February 2015. The first respondent was the owner and sole director Boundary Plaice Ltd, who employed the claimant – the claimant confirmed that Boundary Plaice was recorded as the employer on her pay slips.
8. The claimant worked 25 hours per week, and received £250 gross pay each week (£231 net).

9. The claimant was off sick from work from 21 January 2019 with a swelling of the temporal artery. She provided the first respondent with sicknotes regularly – every 2 or 3 weeks – and received Statutory Sick Pay (“SSP”). The last payment was made on 2 March 2019.
10. Shortly before 28 February 2019, the first respondent informed the claimant that he was selling the business, and that her employment would transfer to the new owners. He assured her that her wages and holiday would stay the same, and advised that the new owners would be responsible for her SSP from 1 March 2019. At that time, the first respondent didn’t give the claimant any information about who her new employers would be.
11. In his response to the claims, the first respondent – in his ET3 - submits that:
 - “4. On 28th February 2019, the business of the Boundary Plaice was sold to The Brittain’s of 147 Harrowden Road Bedford
 5. The sale included physical assets, goodwill and the transfer of staff to the new owner
 6. Mr Thind retained personal ownership of the building and agreed a lease with the owners of The Brittain’s for the premises”
12. Shortly after 28 February 2019, the claimant went into the chip shop to introduce herself to the new owners, and to provide sicknotes. She was told to speak to Paolo, who she now knows is Mr Fernandes - the second respondent - but his brother, Mario, took the lead. The claimant says they didn’t seem very interested, but accepted the sicknotes she provided.
13. The claimant didn’t receive any SSP from the second respondent - she raised it with them after about 4 weeks, and was told that they had rent to pay so weren’t going to pay her SSP. Despite this, the claimant continued to provide sicknotes to the second respondent.
14. The claimant tried to contact the first respondent during this time, but he didn’t want to talk and said it wasn’t any of his concern.
15. The last sicknote the claimant provided to the second respondent covered the period 9 May 2019 to 8 June 2019, after which she advised that she was able to return to work. At this point, the second respondent informed her that there wasn’t a job for her. The claimant asked why they had continued to accept her sicknotes – they had no explanation, but stated that the first respondent should have made a redundancy payment to the claimant.

16. The claimant sought help from HMRC in relation to her situation. On 6 June 2019, HMRC sent her a letter which said (as no copy was available to the Tribunal, then claimant read out the contents of the letter):

“You asked us about SSP as you’ve been sick since 15/01/19.

I understand you had received SSP from Boundary Plaice up to 01/03/19 when your employment with them ended.

I can confirm HMRC has received electronic information from Boundary Plaice which advises your employment with them ended on 01/03/19 and you were last paid SSP on 02/03/19.

You have told me your previous employer Boundary Plaice said you had been transferred to Britain’s Best at 147 Harrowden Road Bedford MK42 0RU under TUPE. You have told us you have not received any SSP from Britain’s Best, and RTI confirms no payments were made to you after 02/03/19

We took this case on to investigate entitlement to SSP and sent you and your employer forms for completion. You returned your form to us, however we did not receive a reply from Boundary Plaice or Britain’s Best. As there is insufficient evidence to suggest transfer of undertakings took place we have closed your case and suggest you contact ACAS to see if TUPE does apply.

At this time it means you are not entitled to SSP after 02/03/19 and should try to make a claim to benefits as you were/are still sick.

We hope any claim could be backdated as it appears you may have been misled.

This letter can be used as a replacement for the SSP1 form and can be used to help with any claim for benefits you may make.”

17. When the claimant made a claim for benefits, she was initially told by the Department for Work and Pensions (“DWP”) that she had made insufficient National Insurance (“NI”) contributions. She provided documents, including P60s issued to her at the end of each financial year, to prove that the first respondent had deducted NI from her wages.
18. The claimant was eventually paid Employment and Support Allowance (“ESA”) - a benefit for people who have limited capability for work – this was backdated to 12 March 2019 and paid up until 8 June 2019. ESA stopped after the claimant was assessed by a healthcare professional for the DWP who determined that the claimant did not have limited capability for work. ESA was paid at a rate of £73.10 per week in 2019.
19. Following this, the claimant received Job Seekers Allowance (“JSA”) for a period of 6 months until December 2019. In order to receive this benefit, the claimant would have had

- to satisfy conditions including looking for work, keeping records of job searched and work, and making herself available for work. JSA was paid at a rate of £73.10 per week in 2019.
20. The claimant then had a short period with no income, before starting a new job in February 2020.
21. The claimant's annual leave year ran from 2 February each year, this being the date her employment started. She says she got 21 days plus bank holidays - I find that is more likely than not that she was entitled to the minimum of 5.6 weeks (28 days) annual leave entitlement provided for by the Working Time Regulations. The claimant states that she had 5 days of leave entitlement left from the holiday year ending 1 February 2019 that the first respondent had allowed her to carry over into the holiday year starting 2 February 2019.

The law

22. The principal UK statutory provisions that are relevant to the issues in this case are to be found in Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") and are as follows:

"A relevant transfer

3. — (1) *These Regulations apply to —*

(a) 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;

(b) a service provision change, that is a situation in which —

(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried

out by the client on his own behalf) and are carried out instead by the client on his own behalf,

and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

(3) The conditions referred to in paragraph (1)(b) are that —

(a) immediately before the service provision change —

(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client’s use.”

“Effect of relevant transfer on contracts of employment

4.— *(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*

(2) *Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—*

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.”

23. Regulation 7(1) provides that:

“where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated... as unfairly dismissed if the sole or principal reason for the dismissal is the transfer’.

24. However, Reg 7(2) and (3) then goes on to stipulate that where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce (‘an ETO reason’) of either the transferor or the transferee before or after a relevant transfer, Reg 7(1) ‘does not apply’ and the fairness of dismissal is to be judged by reference to S.98(4) of the Employment Rights Act 1996 (ERA), which sets out the standard ‘reasonableness test’ that applies to ordinary unfair dismissal.

25. Reg 7(3)(b) specifically states that a so-called 'ETO dismissal' will be deemed to be either for 'redundancy' (assuming it meets the statutory definition of redundancy) or for 'a substantial reason of a kind justifying the dismissal of an employee holding the position which that employee held' (SOSR).
26. The onus is on the dismissing employer to establish that a reason that appears to be connected to the relevant transfer is in fact an ETO reason — see Litster and ors v Forth Dry Dock and Engineering Co Ltd (in receivership) and anor 1989 ICR 341, HL.
27. Also of relevance is the case law, which can be found in abundance in relation to the TUPE regulations and the Acquired Rights Directive of the EU Council, No. 2001/23. I first note the following in respect of a business transfer under regulation 3(1)(a) of TUPE. In Cheeseman v R Brewer Contracts Ltd [2001] IRLR 144, the EAT approved the approach set out in Whitewater Leisure Management Limited v. Barnes [2000] ICR 1049 that it was "quite plain that there are two questions to be asked and answered" as follows:
- "whether or not there was an identifiable business entity constituting an undertaking within the meaning of the Regulations; and, secondly, assuming such could be determined, whether or not there was a relevant transfer"
28. Addressing the first of those questions, economic entity is defined in regulation 3(2) as set out above. In that regard, having considered relevant decisions of both the UK courts and the ECJ, the EAT in Cheeseman set out the following principles with regard to whether an economic entity exists:
- 28.1 "As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective"; (it being noted that the reference to "one specific works contract" is to be restricted to a contract for building works)."
- 28.2 "In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible."
- 28.3 "In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower."

28.4 An organised grouping of wage-earners who are specifically and permanently assigned to a common task may in the absence of other factors of production, amount to an economic entity.”

28.5 An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it.”

29. As for whether there has been a transfer, the EAT set out the following principles:

29.1 “As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed”.

29.2 “In a labour intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity”.

29.3 “In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation”.

29.4 “Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended”.

29.5 “In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on”.

29.6 “Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets.”

29.7 “Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer.”

29.8 “Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer.”

29.9 “More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor.”

29.10 “The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship.”

29.11 When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.”

29.12 The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub-contractor and the start by the successor.”

30. Also of relevance to the question of when an economic entity retains its identity is the guidance in the decision of the ECJ in *Spijkers v Gebroeders Benedik Abattoir C.V.* [1986] ECR 1119 in which (in what has been described as a “multifactorial approach”) it was said that “it is necessary to take account of all the factual circumstances of the transaction in question” including the following:

30.1 the type of business or undertaking;

30.2 the transfer or otherwise of tangible assets;

30.3 the value of intangible assets at the date of transfer;

30.4 whether the majority of the staff are taken over by the employer;

30.5 the transfer or otherwise of customers;

30.6 the degree of similarity of activities before and after the transfer; and

30.7 the duration of any interruption in these activities. That said, the ECJ made clear that these are merely factors in an overall assessment and cannot be considered in isolation; thus suggesting that not all the factors need to be satisfied in order for regulation 3(1)(a) to apply.

31. Finally, and more generally, in *Cheeseman*, the EAT provided additional guidance including as follows:

31.1 “The necessary factual appraisal is to be made by the National Court.”

31.2 The directive applies where, following the transfer, there is a change in the natural person responsible for the carrying on of the business who, by virtue of that fact, incurs the obligation of an employer vis-à-vis the employees of the undertaking, regardless of whether or not ownership of the undertaking is transferred.”

31.3 The aim of the Directive is to ensure continuity of employment relationships within the economic entity irrespective of any change of ownership And our domestic law illustrates how readily the Courts will adopt a purposive construction to counter avoidance.”

32. I have set out ‘the *Cheeseman* guidelines’ above in relation to whether an economic entity exists and whether it retains its identity following a putative transfer. There are, however, two other questions arising from regulation 3(1)(a) of TUPE: namely, whether the entity is “situated immediately before the transfer” in the UK and whether there was a transfer “to another person”.

33. In this case, the answer to the first question is self-evident and nothing more needs to be added. In answering the second question the Courts have taken a purposive approach. It is established, for example, that TUPE can apply to the granting, terminating, surrendering or assigning of a lease of property where a business is intrinsically linked to such property and where as a result the business changes hands and continues to be run as essentially the same business. TUPE can also apply to the conferring of a franchise, licence or concession and where, for example, a licensee enters into a

contractual arrangement to carry out a business activity, the fact that certain key tangible and intangible assets of the business continue to be owned by the person conferring the licence will not necessarily prevent the operation of the regulations.

34. In **Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S** [1988] IRLR 315, the ECJ restated its approach in **Landsorganisationen i Danmark v Ny Mølle Kro** [1989] ICR 330 that the Directive “applies as soon as there is a change of the natural or legal person responsible for operating the undertaking who, consequently, enters into obligations as an employer towards the employees working in the undertaking, and it is of no importance to know whether the ownership of the undertaking has been transferred”. I also note from the first of these decisions that it is irrelevant that there is no contractual or other direct relationship between the transferor and the transferee so long as the undertaking in question retains its *identity*.

Unfair Dismissal – Employment Rights Act 1996

35. *Section 94. The right.*

(1) An employee has the right not to be unfairly dismissed by his employer.

36. *Section 98. General.*

(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(a) the reason (or if more than one the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it- ...

(c) is that the employee was redundant ...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

37. *Section 139. Redundancy.*

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) ...

(b) The fact that the requirements of the business –

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

38. The question of whether a dismissal is rendered automatically unfair by reason of the transfer is primarily one of causation - was the transfer the sole or principal reason for dismissal? A number of issues may be relevant to ascertaining the answer to that question, depending on the circumstances of the particular case. These include:

- the timing of the dismissal
- the reason for dismissal, i.e. the factors operating on the employer's mind; and
- whether the specific transferee had been identified by the time the dismissal took place.

39. Notice – Employment Rights Act 1996

Rights of employer and employee to minimum notice.

86 - (1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more—

(a) is not less than one week's notice if his period of continuous employment is less than two years,

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) is not less than twelve weeks' notice if his period of continuous employment is twelve years or more.

(2) The notice required to be given by an employee who has been continuously employed for one month or more to terminate his contract of employment is not less than one week.

(3) Any provision for shorter notice in any contract of employment with a person who has been continuously employed for one month or more has effect subject to subsections (1) and (2); but this section does not prevent either party from waiving his right to notice on any occasion or from accepting a payment in lieu of notice.

Conclusions

Who was C employed by between 2 February 2015 and 28 February 2019? Was it Mr P Thind or was it The Boundary Plaice (dissolved)?

40. The claimant was employed by The Boundary Plaice (dissolved) from 2 February 2015, until 28 February 2019, as confirmed by the first respondent.

Was there a transfer of an undertaking under the TUPE Regulations and was the Claimant thereby transferred to the transferee (Britain's/ Britain's Best/ Brittain's Best/ Paolo/ Mario) at a point of transfer on 28 February 2019?

41. Applying the legal tests, set out in detail above, to the facts I conclude that:

41.1 There was a stable economic entity because:

41.1.1 the business was sufficiently structured with some tangible assets, as detailed by the first respondent

41.1.2 there was an organised grouping of wage-earners, specifically and permanently assigned to the activities of the business. It is irrelevant whether the claimant was the sole employee at the time of the transfer.

41.2 The economic entity retained its identity because:

41.2.1 the assets required to operate the business of a fish and chip shop were transferred from the first respondent to the second respondent

41.2.2 it is more likely than not that the customers who had previously visited Boundary Plaice continued to frequent Britain's, at least in the short term

41.2.3 the second respondent continued to conduct entirely similar activities after the transfer, namely selling fish and chips (and possibly other food items)

41.2.4 there was no interruption to the activities of the business – the claimant attended the business address shortly after the transfer took place, the shop was open and the second respondent was there

41.3 The economic entity was situated in the UK immediately before the transfer - this is self-evident in this case.

41.4 There was a transfer to another person because:

41.4.1 It is irrelevant that there is no contractual or other direct relationship between the transferor and the transferee so long as the undertaking in question retains its *identity*. Whilst the letter of 6 June 2019 from HMRC to the claimant suggested that she may have been misled in relation to the transfer, that statement was based on there being insufficient evidence so I do not consider it to be conclusive. The second respondent, when attending the previous hearing, confirmed that they had taken over the business from the first respondent.

42. Following the conclusions above, I have determined that there was a relevant transfer from the first respondent to the second respondent on 28 February 2019.

If there was no transfer, was C dismissed by her employer the Boundary Plaice Limited or Mr Thind on 28 February 2019?

43. There was a transfer from the first respondent to the second respondent.

If there was a transfer was C then dismissed by the transferee at about, or shortly after, 28 February 2019?

44. As there was a relevant business transfer, the transferee – the second respondent – the claimant's contract of employment transferred to them on the same terms and conditions, and with her continuity of service. The claimant was then dismissed by the transferee, the second respondent following the transfer.

45. In considering the reason for dismissal, I considered whether the sole or principal reason for the dismissal was an economic, technical or organisational reason entailing changes in the workforce ('an ETO reason'). As the onus is on the dismissing employer to establish that a reason that appears to be connected to the relevant transfer is in fact an ETO reason, and the second respondent has not engaged with the proceedings beyond attending the on 6 April 2020 when this case was previously listed for a full

merits hearing, and confirming his identity, I have no information to determine that an ETO reason existed.

46. Turning to the reason for dismissal, I have to determine what the sole and principal reason was – was it the transfer?

46.1 Timing of dismissal

I have given a lot of consideration to timing of the dismissal – did it occur in June 2019 when the second respondent expressly told the claimant that there wasn't a job for her, or at an earlier point in time following the transfer? It is clear that the claimant still considered herself to be in employment, with an obligation to provide the second respondent with sick notes. The second respondent accepted these, but when they failed to pay the claimant, she would have been entitled to consider herself as dismissed at that point. The DWP determined that the claimant was too unwell to work from 12 March 2019 as they backdated her ESA claim to that date - in order to qualify for ESA she would have either been unemployed, or employed for less than 16 hours per week. I therefore conclude that the claimant was dismissed by the second respondent on 11 March 2019.

46.2 Reason for dismissal

I cannot determine what was in the employer's mind in relation to dismissal, as the second respondent has not engaged with these proceedings in any meaningful way.

46.3 Identity of specific transferee at time of dismissal

This is self-evident in this case. Although the claimant was not aware of the full details of the transferee until these proceedings, there was no issue as to their identity – she spoke to them on more than one occasion at the business premises.

47. In the absence of any intervening change in circumstances, the reason for a dismissal that takes place shortly after the transfer is likely to be found to be linked to the transfer itself. There is no evidence before the Tribunal of any intervening act between the transfer and the claimant's dismissal. Here, the transferee has failed to appreciate the employee's rights under the TUPE Regulations and the effect this had on the preservation of her contractual terms following the relevant transfer. It may be that they had no knowledge of any existing staff to be transferred from the first respondent, so had no thought about dismissal, but that is not relevant.

Who should be responsible for liability in respect of any claims C has which may be successful, including her claims for unfair dismissal, a redundancy payment, damages for failure to give notice, sick pay, unpaid wages, and unpaid holiday pay?

48. As a consequence of the conclusions above, liability for any claims lies with the second respondent. I will deal with each in turn.

Unfair dismissal

49. Having concluded that the reason for the claimant's dismissal was the transfer, the dismissal is therefore automatically unfair.
50. The claimant is entitled to a basic award and a compensatory award – the details of this are to be determined at the remedy hearing on 13 October 2021.

Notice pay

51. The claimant was not given any notice of the termination of her contract by the second respondent. Having been in employment for 4 full years, she is entitled to 1 week pay for each year of service.

Holiday pay

52. The claimant carried over 5 days of annual leave entitlement from the holiday year ending 1 February 2019 – she did not use this entitlement and was not paid in lieu of this. The claimant also accrued annual leave entitlement from 2 February 2019 until the date of termination of the contract, equivalent to 0.47 days per month.
53. The claimant has set out this aspect of her claim for 20 days – in a schedule of loss received by the Tribunal on 22 October 2019 - it is unclear what the basis of this is, and so the total amount of holiday pay remains to be determined at the remedy hearing.

Sick pay

54. Having acquired the claimant's employment contract with the business transfer, the second respondent was liable to pay her SSP from 1 March until the termination of her contract.

Redundancy payment

55. Having determined that the reason for dismissal was the transfer, and not redundancy, this claim is not well founded and is dismissed.

Unpaid wages

56. Having concluded that the second respondent is liable to pay the claimant's sick pay from 1 March 2019 until termination of the contract, I have been unable to identify any other wages that remain unpaid. Therefore, this claim is not well founded and is dismissed.

Employment Judge K Douse

Dated: 22 September 2021.....

Sent to the parties on:

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For the Tribunal Office

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.