EMPLOYMENT TRIBUNALS

Claimant: Mrs S Soffe

Respondent: (1) Group Momentum (Salons) Limited
(2) Graham Webb (Salons) Limited

Held at: London South **On:** 16 September 2021

Before: Employment Judge Barker
Mrs S Dengate
Mr S Townsend

Representation:
Claimant: Mr McNerney, counsel
Respondent: (1) No attendance
(2) No attendance

JUDGMENT

The unanimous decision of the Tribunal is that the claimant's claims succeed against the first respondent and fail against the second respondent.

The first respondent is to pay to the claimant £15,013.06 forthwith, comprised of the following sums:

a. The claimant is to be paid outstanding holiday pay of £1033.32, having accrued untaken annual leave entitlement of 118.5 hours prior to her dismissal;

b. The claimant received no wages payments from the end of her period of "furlough" on 16 September 2020 until the termination of her employment on receipt of her P45 on 31 October 2020, save for a payment of £90 which purported to be for statutory "lay-off". She is therefore entitled to recover the balance of such wages, which is £1255.37

c. The respondent failed to make payments into the claimant's pension for the whole of September and October 2020. She is entitled to recover the sum of £2.41 per week for this period, which amounts to £21.69;

d. The claimant is entitled to be paid compensation for unfair dismissal from the first respondent as follows:

i. Basic award based on 6 years' continuous service, age at dismissal of 39 and a gross weekly wage of £209.28, so £1255.68;

ii. Losses from her date of termination of 31 October 2020 to the date she found alternative employment (1 July 2021), a period of 34 weeks and 4 days at her weekly wage of £209.28, which is £7235.11

iii. Ongoing losses from 1 July 2021 of £65 per week for 11 weeks to the date of the hearing, which is £715

iv. Ongoing loss of employer pension contributions to the date of the hearing of £2.41 per week from the date of her dismissal, and for a future period of six months from the date of the hearing of £172.49

v. Future loss of earnings from the date of the hearing for a period of two months (9 weeks). The claimant will sustain losses of £65 per week for that period, therefore total future losses of £585.

vi. The claimant is awarded £450 for loss of statutory rights

vii. The first respondent entirely failed to abide by any provisions of the ACAS Code of Practice and the maximum uplift of 25% is applied to the claimant's compensatory award for unfair dismissal, which uplift amounts to £2289.40

The Recoupment Regulations do not apply to this judgment and award of compensation.

REASONS

1. The first respondent and the second respondent were not in attendance at this hearing. The Tribunal was satisfied in the circumstances that both respondents were aware that the final hearing of the claimant's claims was listed for today and were aware of the details of the claimant's claims and the evidence she sought to rely on. Our reasons for this are:

(1) The claimants ET1 claim form was served on both respondents at their registered office address, as were copies of the hearing bundle. The

claimant provided evidence that an officer of the first respondent, Sam Blomley, signed for receipt of the bundle for both respondents when it was sent by recorded delivery.

(2) Although it was the first respondent's contention to the claimant in October 2020 that there was no connection between the respondents, this is, we find, untrue. Both respondents share the same registered office address, for example, and Mr Simon Watts was an officer of both companies in the period immediately before 16 September 2020, and Ms Blomley is clearly authorised to accept recorded post on behalf of both respondents;

(3) The first respondent has engaged with the claimant's claims. An ET3 was submitted and the claimant's counsel told the Tribunal that Mr Watts had sent a letter on behalf of the first respondent to the Tribunal and the claimant on 7 September 2021 informing the Tribunal that the time allocated for the hearing was inadequate and required one and a half to two days, that the first respondent wished to call five witnesses. This had not been processed by the Tribunal administration at the time of the hearing and so was not available to the Tribunal to consider, but we accepted Mr McNerney's description of its contents.

(4) Given the close connections between the respondents and the engagement in the process by the first respondent, we find that on the balance of probabilities the second respondent was also aware of both the existence of the claimant's claim and the hearing date of 16 September 2021, but that the second respondent has chosen not to contest the claimant's claim.

(5) No notice of postponement of the hearing has been issued by the Tribunal. On the contrary, all parties were sent a letter by email by REJ Freer on 15 September 2021 notifying them that the claimant's postponement request of 25 August 2021 was rejected. All parties therefore knew that the hearing would go ahead on 16 September 2021.

2. We were also satisfied that the respondents had not failed to attend due to CVP connection issues or other administrative issues or errors. The Tribunal clerk attempted to contact the respondents using the information on the Tribunal file but was unsuccessful and no attempts at contact were made by either respondent on the day of the hearing.

3. The Tribunal was therefore satisfied that the respondents were fully aware of the claim and the hearing but had chosen not to attend. It was not in the interests of justice to delay the process further by allowing the respondents further opportunity to decide whether or not they would engage in the proceedings, given the opportunities already available to them. The Tribunal considered, as part of our decision, what information we did have from the first respondent.

Issues for the Tribunal to decide

4. The claimant provided a witness statement and sworn oral evidence to the Tribunal, as well as a bundle of documents, for which we were grateful. The Tribunal took further sworn evidence from her in relation to evidence of her losses and attempts to mitigate these.

5. The claimant's claims were those of unfair dismissal, deductions from wages, unpaid holiday pay, notice pay, and a failure to consult as part of a TUPE transfer. Given the lack of information available to her from her employers, the claimant's claim was not positively pleaded that there had been a TUPE transfer and she was candid about her lack of knowledge of what had happened to her role and to her colleagues.

6. The issues for the Tribunal to decide were therefore primarily whether there had been a TUPE transfer as alleged by the first respondent to the second respondent on 16 September 2020. The claimant has not attended work for either employer since that date nor received any payments of wages or other benefits. She contends that one or other respondent has dismissed her. The Tribunal must therefore also determine whether this is the case and if so, which respondent is responsible for her dismissal and liable for her claims for compensation.

Findings of Fact

7. The claimant was employed by the first respondent as a receptionist at its Sevenoaks hairdressing salon from 20 October 2014. When the Covid-19 pandemic began and salons were forced to close, the claimant agreed to a period of "furlough" and was informed that this would end on 16 September 2020. Her furlough pay would also end on that date.

8. She then received a letter from the first respondent purporting to apply the statutory lay-off scheme to her for a period of two weeks from 16 September 2020 to 30 September 2020. For this she was paid £90. It is the claimant's contention that she is entitled to her full payment of wages for this period of alleged lay-off.

9. On 1 October 2020 the claimant contacted Julie Gosling, the first respondent's HR Manager by email to ask about her return to work. She did not receive a direct reply to this email but an email was sent to all staff later that day which stated:

"Delighted to inform you that as from Wednesday 16 September 2020 the remaining Graham Webb Salons are once again under the ownership of Graham Webb (Salons) Ltd which has been successfully acquired by a group out of the US. They have secured funding by way of a revolving credit line with a view to opening the salons as soon as possible and providing the company with suitable working capital. The transfer of your employment and contracts is subject to TUPE regulations and as such your current terms and conditions and continuous service will not be affected. The new owners of Graham Webb (Salons) Ltd will be contacting you directly with further information."

10. The claimant received no further information whatsoever until she received an email sent to all staff from Ms Gosling on 12 October 2020 which stated:

"Hi
Following my email dated 1 October 2020, I have received several emails asking for further information which I do not have; I have forwarded all emails sent to me, onto Simon [Watts].
Simon has now asked me to inform you of the following: -

The new owners will be in contact shortly; we have nothing to do with that company and as a result are not able to answer any questions.

I am sorry I cannot help any further.
Julie"

11. No further information was received until 15 October 2020 when the claimant received another email to all staff from Ms Gosling, which stated:

"Hi Everyone
With immediate effect please send all emails to Simon Watts; you will find contact information on the website: -
http://www.groupmomentum.net
Many of you have Simons direct email too.

Back in July when the GWI salons did not re-open, Simon asked me to inform you of that decision. At this time I believed the salons would open at a later date but appreciated what a difficult time it would be. I wanted to make sure you were all kept updated with information. Since then I have done my best to keep you informed; I can only do this when I am informed of any updates.

I am an employee and do not have any influence on what Simon chooses to do with his business.

[…….].

This week I could not go to work as an aggressive man appeared at Head Office asking for Simon or me; apparently this was a partner/husband of a GWi employee.
So, enough is enough, I am stepping back from this now as I am feeling bullied and intimidated, which is not good for me.

[……..]

You will need to direct everything to the company email or Simon, not me as I will not be in a position to forward them.
I wish you all the best for the future.
Julie

12. The claimant received no more information from the first respondent and was never contacted at all by the second respondent. Her evidence was that her

former colleagues, so far as she is aware, were also never in receipt of information. This notwithstanding, the salon at which she worked has reopened as a beauty salon.

13. She received confirmation from the NEST pension provider on 28 October that her contributions to her pension scheme through her employer had ceased, and on 31 October 2020 received her P45 in the post, issued by the first respondent, with a leaving date of 16 September 2020 and an issue date of 26 October 2020. The Tribunal finds that the issuing of this document by the first respondent is not compatible with there having been a TUPE transfer of the claimant's employment to the second respondent on 16 September 2020. The transferor in such situations does not need to issue a P45 as the employee's employment transfers intact to the transferee with continuous service.

14. We therefore find, on the balance of probabilities, that there was never a transfer of the claimant's employment to the second respondent by the first respondent which falls within the scope of the TUPE Regulations. The only evidence of this was an assertion by Simon Watts, passed on by Julie Gosling, which was sent on 1 and 12 October 2020. Given the evidence of abusive messages and threatening behaviour against the first respondent and Ms Gosling in particular as evidenced in her email of 15 October 2020, there is no credible reason why Mr Watts would not also instruct Ms Gosling to provide the contact details of the second respondent to the employees.

15. This is particularly notable in its absence by the fact that publicly available Companies House records show that Mr Watts was both an officer of the first respondent and an officer of the second respondent at the time the alleged TUPE transfer was being negotiated. He was the company secretary of the second respondent but resigned on 16 September 2020, the date of the alleged transfer. He would therefore have been, we find, aware of who the employees should contact for further information. The message from him, which was passed on to the employees by Julie Gosling on 12 October 2020 and which stated "*The new owners will be in contact shortly; we have nothing to do with that company and as a result are not able to answer any questions*" was not true, on the facts before us.

16. Finally, the issuing of the claimant's P45 by the first respondent on 26 October 2020 further demonstrates that at that date her employment had not transferred to the second respondent on 16 September 2020. Had she been a transferred employee on that date, any P45 issued after that date would have been issued by the second respondent, not the first respondent. She has received no further contact from either respondent, other than in connection with these proceedings.

17. The claimant has therefore been dismissed by the first respondent, that dismissal taking effect on the date she was notified of it, which was 31 October 2020 when she received the P45 by post. The first respondent is therefore liable for the claimant's compensation for unfair dismissal and other losses.

The Law

18. Part IX of the Employment Rights Act 1996 (ERA) provides that employees with more than two years' continuous service have a right not to be unfairly dismissed. This means that the employer may only dismiss for one of the potentially fair reasons in s98 ERA and if a fair procedure was followed, as provided for in s98(4) ERA and the ACAS Code of Practice.

19. Part II of ERA and s13 in particular provides that an employee has a right not to suffer unauthorised deductions from their wages.

20. Regulation 14 of the Working Time Regulations 1998 provides that an employee must receive payment on termination of their employment for annual leave that was accrued during the leave year but remains untaken.

Application of the Law to the Facts Found

21. We have found that the claimant's employment remained with the first respondent and it is clear from the first respondent's conduct in not providing the claimant with any work or wages, and then issuing her a P45, that she has been dismissed by them.

22. Dismissal takes effect, when it is done without notice, when an employee becomes aware of her dismissal. We accept that in the claimant's case this was when she received her P45 and was therefore on 31 October 2020.

23. There was a failure on the part of the first respondent to follow any procedure whatsoever in relation to the claimant's dismissal. They have also entirely failed, as part of these proceedings and particularly in their ET3 response, to provide any potentially fair reason for the claimant's dismissal. There has been a wholesale failure to engage at all with the ACAS Code of Practice in relation to dismissals.

24. The claimant has established her entitlement to unpaid wages, including pension contributions and holiday pay through the evidence provided to the Tribunal during this hearing in the form of pay slips, witness statements, oral evidence under oath and schedules of loss.

25. The first respondent is therefore liable to compensate the claimant for unfair dismissal, unlawful deductions from wages and unpaid holiday pay.

Remedy

26. The claimant provided a Schedule of Loss and updated figures to the Tribunal. She has managed to find alternative employment albeit only two days a week as of 1 July 2021, when previously she was working for three days a week. She told the Tribunal that her childcare responsibilities restricted her ability to take on more work during the week and that previously her third day of work had been a Saturday. We accept that this makes fully mitigating her losses much harder and have therefore allowed for a period of future loss of another

two months. We anticipate that the Christmas recruitment drive in retail and hospitality ought to provide opportunities for some work at weekends which will allow her to fully mitigate her loss of wages during that two month period.

27. We also accept that as a consequence of her part-time status, the claimant will struggle to pass the minimum income threshold after which employees benefit from employer pension contributions. Therefore we have provided for an extended period of pension loss of six months from the date of the hearing.

28. Those losses set out in the judgment above are those established by the claimant on the evidence before the Tribunal.

29. We have also awarded the maximum uplift in her compensatory award of 25% due to the first respondent's wholesale failure to follow any procedure whatsoever in relation to the claimant's dismissal.

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Employment Judge Barker

Dated: 23 September 2021