**Case Nos: 1805660/2020**
**1805825/2020**
**1803634/2021**
**1803635/2021**

# EMPLOYMENT TRIBUNALS

**Claimants:** 1) Miss Z Hapeshi
2) Mr S Halliwell

**Respondents:** 1) F & H Coffee Ltd
2) Imperial Catering Services Ltd

**Heard at:** Leeds (by CVP video) **On:** 26 October 2021

**Before:** Employment Judge Parkin

**Representation**
Claimants: Both in person
First Respondent: No responses presented; no attendance or representation
Second Respondent: No attendance or representation

# JUDGMENT AT A RECONSIDERATION HEARING

**Upon reconsideration, the Judgment of the Tribunal is that:**

1) The respondent which was Ms Hapeshi's employer at the date of termination of her employment, 24 June 2020, was Imperial Catering Services Ltd; that respondent is substituted for the original respondent F & H Coffee Ltd in Case No 1805660/2020;

2) Accordingly, the Judgments of the Tribunal in Case No 1805660/2020 are varied. Employment Judge Deeley's Rule 21 Judgment dated 1 December 2020 is varied such that Imperial Catering Services Ltd is ordered to pay Ms Hapeshi the sum of £915.65 and Employment Judge Shepherd's Judgment dated 4 December 2020 is varied such that Imperial is ordered to pay Ms Hapeshi the sum of £954.33. For the avoidance of doubt, Imperial Catering Services Ltd is ordered to pay Ms Hapeshi the total sum of £1869.98;

3) The respondent which was Mr Halliwell's employer at the date of termination of his employment, 24 June 2020, was Imperial Catering Services Ltd and

that respondent is substituted for the original respondent F & H Coffee Ltd in Case No 1805825/2020;

4) Accordingly, Employment Judge Parkin's Judgment in Case No 1805825/2020 dated 3 December 2020 is varied such that Imperial Catering Services Ltd is ordered to pay Mr Halliwell:

   4.1 damages for breach of contract in the sum of £480.64 gross;
   4.2 additional reimbursement of expenses in the sum of £37.00; and
   4.3 payment of wages following unlawful deduction from wages in the total sum of £4,447.25 gross;

5) No award of compensation pursuant to section 24(2) of the Employment Rights Act 1996 is made is made in respect of either claimant;

6) Miss Hapeshi's application to increase the monetary sums sought in her claims is refused;

7) Mr Halliwell's application to increase the monetary sums sought in his claims is refused; and

8) Case Nos 1803634/2021 (Miss Hapeshi) and 1803635/2021 (Mr Halliwell) are dismissed for want of jurisdiction since they are duplications of the claimants' earlier claims.

# REASONS

## 1. The background

These were complicated proceedings involving initial and second claims from Ms Hapeshi (Cases No 1803660/2020, presented on 29 September 2020 and 1803634/2021, presented on 9 July 2021) and likewise from Mr Halliwell (Cases No 1805825/2020, presented on 3 October 2020 and 1803635/2021, presented on 9 July 2021). In Ms Hapeshi's case there was initially a Rule 21 Judgment and then a final hearing and in Mr Halliwell's case there was a final hearing. This Judgment and Reasons must therefore be read alongside the Rule 21 Judgment dated 1 December 2020 and further Judgment dated 4 December 2020 in Miss Hapeshi's Case No 1803660/2020 and the Judgment and Reasons dated 3 December 2020 in Mr Halliwell's Case No 1805825/2020. Each claimant was awarded sums under those Judgments which named F & H Coffee Ltd (which had traded as Fitzwilliam and Hughes) as their employer in each case.

2. Both claimants were then unsuccessful in pursuing enforcement of their awards in circumstances where the directors of F & H claimed to the enforcement agents that any liability did not fall upon that company but on a separate company

Imperial Catering Services Ltd (Imperial) as having been the claimants' ultimate employer. In consequence, the claimants both applied for reconsideration of their judgments such that Imperial be substituted as respondent and therefore liable to them and they also presented fresh claims on 4 July 2021 against Imperial making the same monetary claims.

3. Whereas in both original proceedings no responses had been presented and no active participation of any kind made by F & H, on 5 August 2021 a response was presented to both new claims by Mark Casson on behalf of Imperial. It acknowledged that the claimants were employed by that company (stated to be between January 2020 and June 2020) as baristas but contended the claims were presented outside the relevant 3-month time limit and that there had been no good reason for presenting them out of time. It set out its intention to defend the claims, stating that that the two claimants and a third employee at Leeds had agreed in writing to be placed on unpaid leave from the end of March 2020 due to COVID-19 and that an application for furlough on their behalf had been rejected. No further resistance to the claims or engagement with the proceedings was made and there was no attendance or representation on behalf of either company at this hearing. The Tribunal was satisfied that both respondents had been notified of the date of hearing (which had been put back when the claimants' claims were all combined for hearing together). Regional Employment Judge Robertson appointed Employment Judge Parkin (who had heard the Halliwell final hearing) to sit at this combined hearing including the reconsideration in Miss Hapeshi's case, which he had not previously dealt with.

## 4. The hearing

The original judgments had never been challenged or appealed but the claimants wished to substitute Imperial as liable to pay their award. For the reconsideration hearing, the Tribunal's main determination concerned the proper identity of the employer at the date of termination of employment; if it concluded the original judgments wrongly identified F & H as employer, should it substitute Imperial as being liable? In respect of the second claims, there were questions of jurisdiction and timing.

5. Both claimants joined the hearing by video and gave evidence on affirmation relying upon voluminous documentation each had provided to the Tribunal in advance of both their original hearings and this hearing. Both were compelling witnesses with a very detailed recollection of matters concerning their employment at the coffee house in Leeds known as Fitzwilliam and Hughes or Fitzwilliam and Hughes Spaces within the office premises in Leeds where they worked between July 2019 and 2020. Both were convincing that they had no knowledge by the time of termination of their employment that there had been any change of employer from their original employer F&H to Imperial and that there had been no formal notification of such a change at any point, such as by a revised contract of employment or Statement of Particulars of the main terms of the contract of employment in line with the employer's statutory obligation.

## 6. The key facts

Imperial was incorporated on 14 January 2021, with Mark Casson as Director. Mr Casson was the partner of Darren Hughes, the director of F & H who both claimants recognised and dealt with as their employer and understood to be owner of the business, which traded as Fitzwilliam & Hughes. Thus there was a very close interlinking between the two companies but Imperial could not have been the initial employer since the claimants' employment began in July 2019, about six months before it came into being. Both were initially employed and paid by F & H.

7. Ms Hapeshi received a bank transfer payment into her account on 8 June 2020. That payment named as payer "I Ltd t/as Fitz", although she did not notice this at the time. At the same time, she received her payslip naming the employer as Fitzwilliam and Hughes Spaces Leeds. The name on her payslips had changed over her period of employment from F & H Coffee Ltd originally to Fitzwilliam and Hughes and then to Fitzwilliam and Hughes Spaces Leeds, without any formal notification from the employer.

8. Likewise, Mr Halliwell received payment for the first time from "I Ltd t/as Fitz. Furlough payment" on 8 June 2020, having previously received his salary payments by bank transfer from F & H. Neither claimant received any formal notification from the employer that this change had taken place.

9. Each claimant received a letter notifying termination of employment dated 24 June 2020, giving the trading name or trading style but not the name of employer, in these terms:

> "Employment with Fitzwilliam and Hughes Spaces
>
> Following a review with the Spaces teams in Sheffield and Leeds it is apparent that despite some easing of the lockdowns the tenants of spaces are continuing to work from home for the foreseeable future. This means that there is virtually no sustainability or prospect of reopening the site for some time to come. To this end we are terminating all staff at Spaces Leeds and Sheffield and your employment has now ended. As you are aware all staff were put on unpaid furlough leave from 1 March. We will continue to try and access the furlough retention scheme to cover the aspects of the current period up to the 22nd of June, but be aware we are experiencing the same problem we had last time and this may take time to resolve. We will also forward all relevant documents in the post…"

The email enclosing the 24 June 2020 letter was from Darren Hughes (at his email fitzwilliamandhughescom email address). In fact, the claimants had not agreed to go on unpaid leave but agreed the variation to their contract of being furloughed at 80% payment of wages.

10. Only subsequently during investigation with HMRC and then enforcement procedures in relation to the original judgment did each claimant come to understand that they had a tax account naming Imperial as their employer, apparently from as early as early May 2020 for Mr Halliwell and for Miss Hapeshi

from as early as March 2020 (despite her still receiving payment from F & H at that time), and that the directors of the companies were asserting that Imperial was the final employer when their employment was terminated.

11. Each claimant was still employed by F & H when the variation of contract to commence the furlough arrangements began. Neither claimant received a new contract of employment or statement of main terms and conditions reflecting a change of employer in or about early June 2020.

## 12. The claimants' submissions

In their submissions to the Tribunal, the claimants firmly maintained that no proper notification of change of employer had ever been made to them but that their tax accounts and enforcement procedures revealed that the employer with liability for outstanding wages, at least by the date of termination of employment, was Imperial.

## 13. The Law

The law which the Tribunal applied was primarily found in the reconsideration provisions at rules 70 and 72 of the Employment Tribunals Rules of Procedure 2013; it also had regard to rule 34 dealing with substitution and removal of parties and to its overriding objective at rule 2. Having decided it was necessary to reconsider the judgments in the interests of justice, it had a wide judicial discretion whether to confirm, vary or revoke those judgments. Part II of the Employment Rights Act 1996 and the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 provide the statutory framework for the liability of employers for wages and contractual claims. The Tribunal applied ordinary principles of Company Law, whereby directors act on behalf of their limited company. The Tribunal will often need to determine the identity of the claimant's employer, the date of termination of employment and when any liability arises and here it also applied the change of employer provisions at section 218(2) and (6) of the 1996 Act.

## 14. Conclusion

Having regard to all those provisions the Tribunal was wholly satisfied that the original claims should have been brought against Imperial since that company had taken over the employment of both claimants when it took over the Fitzwilliam and Hughes business shortly before termination of their employment. Miss Hapeshi's and Mr Halliwell's employer changed from F & H to Imperial only in early June 2020 immediately prior to the transfer of a payment into their accounts on 8 June 2020. However, the change was never formally notified to them and is evidenced only by Imperial taking over payment of their wages at that time and, on its own version to the claimants, seeking payments from the Government under the Coronavirus Job Retention Scheme (known as the furlough scheme) maintaining it was their employer and also by the content of HMRC tax accounts for each claimant, which they only saw long after their employment ended. The Tribunal wholly sympathises with the claimant's lack of knowledge of their actual employers

as at 24 June 2020, since this was withheld from them by both their original employer through Mr. Hughes and the new employer. The Tribunal did consider whether the lack of notification undermined its express ruling in Mr Halliwell's case that there had been an agreed variation such that he go on furlough at reduced salary and the implicit finding to the same effect in Miss Hapeshi's case. However, the agreed variation well pre-dated the change of employer, so that the new employer inherited the contract of employment as varied.

15. Notwithstanding the late application to reconsider and substitute a new employer, it is just and proper to replace the original respondent F & H with Imperial in each claimant's case and Judgment. There has been no challenge to the integrity and content of the judgments, which are now made against Imperial.

16. The Tribunal refused the application to amend each claimant's claim to include the sum of £66 enforcement costs paid to Andrew Wilson and Co and Mr Halliwell's application to add the interest sums based upon the original judgment. He also applied to add another month's outstanding furlough payments he said he had omitted from his earlier claim; this application was not made on notice to the respondent but only at this hearing over a year after his original claim was presented. Strictly, it might be that only Mr Halliwell's application to add a further month's non-payment is an application to amend and the other matters are claims for compensation under section 24(2) ERA 1996 following the award of sums as deduction from wages. In any event, these are costs of enforcing judgment or a claim for interest accrued following judgment and the Tribunal concludes that it is not appropriate to order those under the compensatory provisions of section 24. Moreover, it is not in accordance with the overriding objective and much too late to introduce without notice a new claim for additional salary which could always have been included in Mr Halliwell's original claim.

17. Finally, the two new claims are dismissed since they are entire duplicates of the original claims. In view of the successful applications for reconsideration, there is no jurisdiction to consider those claims.

Employment Judge Parkin

Date: 29 October 2021