



EMPLOYMENT TRIBUNALS

Claimant: Ms H Abson

Respondent: Okan Koseoglu (“Second Respondent”)
Vohra Group Ltd (“Third Respondent”)

Heard at: Watford Employment Tribunal (in public by video)

On: 4 October 2021

Before: Employment Judge Quill (Sitting Alone)

Appearances

For the Claimant: Ms C Bilbao, solicitor
For the Second Respondent: In person
For the Third Respondent: No appearance or representation

JUDGMENT

1. There was a relevant transfer, as defined by the Transfer of Undertakings (Protection of Employment) Regulations 2006, to the Third Respondent (Vohra Group Ltd) on or around 30 June 2019. The Claimant was employed by the transferor immediately before the transfer and she was dismissed because of the transfer. The Claimant was unfairly dismissed.
2. The dismissal was not an act of sex discrimination or an act of race discrimination.
3. The Claimant was not employed by the Second Respondent immediately prior to the transfer, and claims against Deniz Toprak Ltd (previously the First Respondent) were dismissed on 30 March 2021. The Third Respondent is wholly liable to the Claimant for the compensation for the unfair dismissal.
4. The Third Respondent is ordered to pay to the Claimant the sum of £2153.26. The breakdown is: Basic award of £788.16; Compensatory award of £1365.10.

The recoupment provisions apply and I refer to the annex attached.

For the purposes of the recoupment provisions:

1. The total monetary award is £2153.26
2. The prescribed element is £1005.10
3. The period to which the prescribed element relates is 30 June 2019 to 31 December 2019
4. The total monetary award exceeds the prescribed element by £1148.16

REASONS

1. Oral reasons were given during the hearing and written reasons were requested. These are those reasons.
2. The claim had originally been presented against three respondents, none of whom had entered a response within the relevant time limit, or at all. A decision was made that a hearing under Rule 21 was required to determine liability and remedy. Following a withdrawal of the claim against the First Respondent, the claim continued against only the Second and Third Respondents.
3. This hearing took place fully remotely by video. The Respondents were entitled to notice of the hearing, but only entitled to take part in the hearing to the extent permitted by me. (Rule 21(3)).
4. The Third Respondent did not attend. The Second Respondent did, and made an application to participate. I allowed him to ask questions to the Claimant and to make submissions during the hearing. I did so because the claims included discrimination, and it was in the interests of justice to allow questions to be put to the Claimant based on an alternative theory about what had occurred and why. I did not allow him to give witness evidence. He did not seek to introduce any documentary evidence.
5. The Claimant's representative had prepared a 69 page pdf, and I also had a 4 page witness statement from the Claimant signed 25 September 2021. These were sent to the Second Respondent by the Claimant's representative during the hearing. The Claimant gave evidence on oath and was questioned by me and by the Second Respondent.

Facts

6. The claimant was previously and employee of Deniz Toprak Ltd ("R1"), which was, at one stage, the First Respondent to these proceedings. Her employment started in August 2014. Mr Okan Koseoglu ("R2"), the Second Respondent, was involved in that company. He was not the employer of the claimant, because the company was her employer.
7. In 2019, there were plans for a sale of the business, which is an off-licence, by R1 to another company called Vohra Group Ltd ("R3"), the Third Respondent. On 29 June 2019, the claimant was told by R2 and that he had been told by the new business owners and that the claimant would not be taken on by them. He paid the claimant her wages up to the end of her employment, which was 29 June 2019 and gave her an additional £300.
8. As a result of R2's word and actions, the Claimant was dismissed with immediate effect. The claimant was not given any reasons for her dismissal, other than R2 told her that R3 was not going to take on any of R1's employees. In fact, that turned out not to be true and at least one of R1's employees carried on working in the business for R3 after the sale from R1 to R3. That person had approximately six months service, as opposed to the four years of service which the claimant had. The Claimant relies on that person as a comparator.

- 8.1. The comparator is a different race to the claimant. She describes her race as white British. She describes the comparator's race as being of Turkish descent.
- 8.2. The comparator was also a different sex. The claimant is female and the comparator is male
9. After the end of her employment, the claimant commenced work in a new job with effect from August 2019.
10. No warning given to the claimant about her potential dismissal. On 29 June, she was simply asked to step outside and she was told that her employment was terminated. The claimant had had a good disciplinary record with R1. She had never received any warnings for conduct or for any other reason.
11. The claimant has had no contact with R3 despite writing to them and asking for an explanation of the reasons for dismissal. As far as the claimant is aware, R3 took over the business immediately following her dismissal, and that is the reason that she wrote to R3 asking for an explanation.
12. The business was an off licence while the Claimant was employed and it continued as an off licence after she was dismissed and after R3 took it over.

Law

13. The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") define a "relevant transfer".
 - 3.— A relevant transfer
 - (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;
14. There are other transactions that can meet the definition of "relevant transfer". However, for the one cited above, the essential requirements are that there is a change of ownership of an economic entity, and that that entity retains its identity before and after the change of ownership. When deciding that question, all relevant factors must be taken into account, including: whether the operations performed by the business continued without a break and the period, if any, in which they were suspended; whether or not tangible assets were transferred; whether or not the majority of employees are taken over by the new owner; whether or not customers are transferred; the degree of similarity between the activities carried on before and after the transfer.
15. Where there is a relevant transfer, the contracts of employment of all the employees are automatically transferred to the new owner ("the Transferee"), subject to the employees right to prevent this happening by objecting.
16. Regulation 7 of TUPE states:
 - 7.— Dismissal of employee because of relevant transfer
 - (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—
 - (a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

(2) This paragraph applies where the sole or principal reason for the dismissal is a reason connected with the transfer that 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) shall not apply;

(b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), the dismissal shall, for the purposes of sections 98(1) and 135 of that Act (reason for dismissal), be regarded as having been for redundancy where section 98(2)(c) of that Act applies, or otherwise for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

(5) Paragraph (1) shall not apply in relation to the dismissal of any employee which was required by reason of the application of section 5 of the Aliens Restriction (Amendment) Act 1919 to his employment.

(6) Paragraph (1) shall not apply in relation to a dismissal of an employee if the application of section 94 of the 1996 Act to the dismissal of the employee is excluded by or under any provision of the 1996 Act, the 1996 Tribunals Act or the 1992 Act.

17. A dismissal which takes effect prior to the transfer can be automatically unfair within this provision if the reason for the dismissal is the transfer itself (or a reason connected with the transfer). In other words, a dismissal by the old business owner (the Transferor) can fall within Regulation 7(1).
18. Where an employee is dismissed by the Transferor prior to a relevant transfer, then even though she is not employed by the Transferor immediately before the transfer, Regulation 4 transfers liability for the dismissal to the Transferee if the dismissal was carried out in the circumstances described in Regulation 7(1). Similarly, in those circumstances, other liabilities which the Transferor had to the employee will transfer to the Transferee.
19. Direct discrimination is defined in section 13 of the Equality Act 2010 (“EQA”).
 - (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
20. Direct discrimination contravenes in the employment context contravenes EQA as described in Part 5.
21. The burden of proof provisions of EQA are contained in section 136. The tribunal must first find facts on the balance of probabilities, taking into account all the evidence it receives, including the witness evidence, which includes responses given to questions in cross-examination. Once the tribunal has found facts on the balance of probabilities, it must ask itself if, from those facts, in the absence of an explanation from the respondent, it could infer that a contravention of EQA had occurred. If that is the case, then the burden of proof shifts to the respondent and, the tribunal must hold that the contravention occurred unless the Respondent can show that it did not.

22. Both sex and race are protected characteristics. When considering whether the reason for any less favourable treatment was, as the case may be, sex or alternatively race, the tribunal must consider any unconscious motivations of the decision-makers, as well as any conscious motivations. If the burden of proof does shift, it is necessary for the Respondent to show that sex or race (as the case may be) played no part whatsoever in the reasons for the Respondent's actions.
23. Unfair dismissal is governed by part X of the Employment Rights Act 1996 ("ERA"). Section 98 deals with fairness. There are potentially fair reasons set out in section 98 and it is for the respondent to demonstrate why the claimant was dismissed and to demonstrate that that particular reason was one of those potentially fair reasons. Potentially fair reasons include, for example, redundancy or, for example, some other substantial reason.
24. If the respondent does demonstrate that the claimant was dismissed for a potentially fair reason, then section 98 sets out the approach which the tribunal must take and when deciding whether, in all the circumstances, this particular dismissal was fair or not. The size and resources of the respondent is something that will be taken into account when considering fairness, as is the procedure which the respondent followed before making its decision
25. Where a decision to dismiss is one which no reasonable employer would have made and then that dismissal will be unfair. Likewise, if the process followed prior to taking the decision to dismiss is one which no reasonable employer would have followed the dismissal will be unfair. However, when applying this analysis, it is important for the tribunal to remember that it is applying a "band of reasonable responses" test, and that it must avoid substituting its own decisions for that of the employer.

Analysis

26. In this case, on the claimant's own evidence, she was told by R2 that he had been told to dismiss her. The claimant has offered no explanation for why he would have lied; in other words, for why he would have said that it was R3's decision if it was really his own decision.
27. On the claimant's own evidence, to the best of her knowledge and belief, the new employer did take over the business immediately after her dismissal. Given that the Claimant had been employed for several years, it is more likely that not that R2's explanation to the Claimant was true; that is, he was dismissing her because R3 told him to, rather than because of a decision that he had made.
28. Thus, the discrimination - if there was any discrimination – was discrimination by R3. It is R3's motivations for the termination which have to be considered.
29. Claims against R2 fail. The discrimination claims fail because I am satisfied by the evidence that he was informing the Claimant that she was dismissed because of R3's decision and the unfair dismissal claims fail because he was

not, at any time, the Claimant's employer.

30. R3 played no part in the proceedings. They have not put forward any explanation for the dismissal. Any argument, based on R2's cross-examination and submissions, that the claimant may have been dismissed for misconduct fails, because there was no evidence presented from which I could conclude that the Claimant was dismissed for such a reason.
31. More generally, no evidence was presented (by R3, or at all) to demonstrate the particular set of opinions or beliefs which R3's employees held which caused them to instruct R2 to dismiss the Claimant prior to the transfer.
32. There can be various reasons why a new employer might prefer to, or decide to, dismiss an employee at the time of a TUPE transfer, including simple ignorance of the law or including and the fact that they believe a redundancy dismissal is justified. Furthermore, there are hypothetical reasons that a Transferee might be willing to accept some of the Transferor's employees and not others. It might, for example, decide that it is low risk to take on employees who have much less than 2 years' continuity of service, but that it wishes to avoid taking on employees who have already acquired the right not to be unfairly dismissed, or to receive redundancy pay. The opposite is also true; some Transferees might be happy to accept longstanding and experienced employees, but not those who require training or who have not established a track record of good work and reliability.
33. No facts have been proven from which I could infer that the reason that the new employer decided to keep on the comparator and to dismiss the claimant because of the claimant's sex or because of the claimant's race. The mere fact alone that there is a difference in sex, or a difference in race, is not sufficient. There needs to be something more. My decision is that the facts have not demonstrated that there is "something more" in this case. The dismissal of one employee in a relatively small business, even in circumstances where another employee is kept on, is not so unusual as to make me suspicious.
34. I am satisfied that there was a relevant transfer. No details of what stock, if any, was transferred have been provided. However, the business is an off-licence. It traded as an off-licence before and after the sale from R1 to R3. The Claimant's opinion – and I accept it is her genuine opinion and based on several years knowledge of the business – is that the shop simply carried on trading without a break. There is no reason for me to infer that the shop's customers changed because of the transfer. At least one employee moved over. I am satisfied that the entity retained its identity.
35. Further, I am satisfied that the Claimant was dismissed because of the transfer. As discussed above, I have decided that R2 did not dismiss the Claimant of his own volition for his own reasons, and I have not upheld the argument that R3 dismissed the Claimant because of her sex or race. In the circumstances, it is more likely than not that the reason that R3 decided it wanted R2 to terminate the Claimant's employment was because of the imminent purchase of the business. I do not need to speculate about whether

they were ignorant about TUPE and thought that this would mean that they incurred no liability to the Claimant, or whether they hoped that the Claimant would just accept the situation and not bring a claim. However, my inference from the facts is that R3 decided that a condition of its purchase of the business was that R1 had to terminate the Claimant's employment before the transfer.

36. The dismissal was automatically unfair because Regulation 7(1)(a) applies to it, and none of the exceptions apply. R3 therefore assumes the liabilities that R1 had to the Claimant immediately before the date of the transfer, which was just after 29 June 2019.
37. As well as being automatically unfair because of Regulation 7, the dismissal was also unfair because of section 98 ERA. The employer has not proven it had a potentially fair reason to dismiss. Furthermore, no process was followed of any description. If there had been a process followed, it is not clear what the outcome would have been (given that R3's particular reasons for not wanting to take the Claimant on are unknown); however, even on the assumption that R3 wanted to retain some staff and get rid of others, it is at least potentially possible that a fair process to decide which employees to keep and which to dismiss might have led to the Claimant's being retained. It is also possible that a fair process might have resulted in her being fairly dismissed for an economic, technical or organisation reason. Alternatively, it is conceivable that new working arrangements could have been implemented which were not to the claimant's liking, and then she might have resigned.
38. In terms of the claimant's income and based on the payslips and for April and May, my finding is that her gross pay was £197.04 per week prior to the dismissal of the.
39. The basic award given her age and length of service is 4 multiplied by £197.04 and that £788.16.
40. According to the same payslips, net pay was £193.31.
41. The Claimant did not contribute to her dismissal by any blameworthy conduct.
42. Doing the best I can with limited information, I am going to make a 10% Polkey reduction to reflect the possibility that there might have been a fair dismissal immediately after the relevant transfer if R3 had acted fairly, or that there might have been a resignation shortly afterwards.
43. The compensatory award is calculated as follows.
 - 43.1. For loss of statutory rights, I award the claimant the sum of £400.
 - 43.2. For loss of earnings, I am satisfied based on the evidence, taking into account at the sums that the claimant was earning prior to dismissal, taking into account the comparatively few hours that she was working for the new employer from 1 August 2019 onwards, that the claimant would have been

able to find a new job which completely replaced the loss of earnings from the old job with effect from 1 January 2020. Her failure to find such a job by 1 January 2020 was an unreasonable failure to mitigate her losses. Therefore the period for which I am awarding compensation is the period 30th of June 2019 to 31st of December 2019, inclusive. The claimant's from the old employer in that period, therefore would have been 26 weeks and three days at the rate of £193.31 and that comes out to £5108.91.

43.3. For the same period based on the payslips for August, September, October, November and December 2019, the claimant received the net sum of £3692.13 from the new employer.

43.4. Therefore, the difference between what she would have earned with the old employer and what she did receive with the new employer is £5108.91 minus £3692.13 which is £1416.77.

43.5. She was also paid £300 cash by R2 when he told her she was being dismissed. Therefore, that leaves a net loss of income as £1116.77.

43.6. So, applying the 10% Polkey reduction the total compensatory award is

$$[£400 + £1116.77] \times 0.9 = £1365.10$$

Employment Judge Quill

Date: 23 December 2021

JUDGMENT SENT TO THE PARTIES ON

30/12/2021

N Gotecha

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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.

**ANNEX TO THE JUDGMENT
(MONETARY AWARDS)**

Recoupment of Benefits

The following particulars are given pursuant to the Employment Protection (Recoupment of Benefits) Regulations 1996, SI 1996 No 2349.

The Tribunal has awarded compensation to the claimant, but not all of it should be paid immediately. This is because the Secretary of State has the right to recover (recoup) any jobseeker's allowance, income-related employment and support allowance, universal credit or income support paid to the claimant after dismissal. This will be done by way of a Recoupment Notice, which will be sent to the respondent usually within 21 days after the Tribunal's judgment was sent to the parties.

The Tribunal's judgment states: (a) the total monetary award made to the claimant; (b) an amount called the prescribed element, if any; (c) the dates of the period to which the prescribed element is attributable; and (d) the amount, if any, by which the monetary award exceeds the prescribed element. Only the prescribed element is affected by the Recoupment Notice and that part of the Tribunal's award should not be paid until the Recoupment Notice has been received.

The difference between the monetary award and the prescribed element is payable by the respondent to the claimant immediately.

When the Secretary of State sends the Recoupment Notice, the respondent must pay the amount specified in the Recoupment Notice to the Secretary of State. This amount can never be more than the prescribed element of any monetary award. If the amount is less than the prescribed element, the respondent must pay the balance to the claimant. If the Secretary of State informs the respondent that it is not intended to issue a Recoupment Notice, the respondent must immediately pay the whole of the prescribed element to the claimant.

The claimant will receive a copy of the Recoupment Notice from the Secretary of State. If the claimant disputes the amount in the Recoupment Notice, the claimant must inform the Secretary of State in writing within 21 days. The Tribunal has no power to resolve such disputes, which must be resolved directly between the claimant and the Secretary of State.