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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107015/2020

Public Final Hearing held in Glasgow by Cloud Based Video Platform
(CVP) on 13 January 2022

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Employment Judge Mr A Tinnion

Mr Archibald McFarlane

Claimant
In person

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T&C Bars Ltd.

1st Respondent
Mr. Dobbin (Director)

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Mrs Margaret Gallagher

2nd Respondent
No attendance or rep.

RESERVED JUDGMENT

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1. The Claimant's claim for a redundancy payment, breach of contract/notice pay and unpaid annual leave pay arrears against the 2nd Respondent is well-founded.

2. The 2nd Respondent shall pay the Claimant the following sums totalling £4,972.11:

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a. redundancy payment in sum of £2,677.50;

b. notice pay in sum of £1,652;

c. holiday pay in sum of £642.61.

3. The claim against the 1st Respondent is not well founded and is dismissed.

REASONS

Claims

1. By an ET1 presented on 4 November 2020 and a paper apart entitled “*Claimant Notes*”, the Claimant (“**Mr. McFarlane**”) asserted three claims against the 1st and 2nd Respondents (by an Order dated 7 December 2021, the Tribunal removed Mr. Dobbin as a 3rd Respondent in a personal capacity under Rule 34):
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2. First, a claim for a redundancy payment under s.164 of the Employment Rights Act 1996 (**ERA 1996**).
3. Second, a holiday pay claim for annual leave accrued during his last holiday year under s.14(2) of the Working Time Regulations and s.13(1) of ERA 1996.
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4. Third, a claim for breach of contract (wrongful dismissal/notice pay) under para. 3 of the Industrial Tribunals Extension of Jurisdiction (Scotland) Order 1994.
5. In his ET1, Mr. McFarlane did not allege he had been unfairly dismissed.
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Evidence

6. The final hearing (“**Final Hearing**”) was held on 13 January 2022 via video/CVP. Mr McFarlane and Thomas Dobbin (“**Mr. Dobbin**”), a director of the 1st Respondent (“**T&C Bars**”), gave evidence. Both sought to assist the Tribunal by giving their honest recollection of events. Mr. Dobbin told the Tribunal “*everything*” Mr. McFarlane had said in his evidence was accurate..
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7. The 2nd Respondent Mrs. Margaret Gallagher (“**Mrs. Gallagher**”) – who did not present a response to the ET1 – did not attend the Final Hearing and was not represented. Correspondence in the Tribunal file dated 23 March 2021 notes “*Correspondence sent 09/03 from 2nd Respondent Mrs. Gallagher, strongly refuting the content of the 3rd Respondent’s correspondence. States there was no TUPE agreement, requests that 3rd R provide copy of paperwork of agreement when transferring the business.*” Thus Mrs. Gallagher has known since March 2021 that the 1st Respondent intended to argue that there
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had been a “*TUPE transfer*” of Mr. McFarlane’s employment from it to her. Based on the information before it, the Tribunal was satisfied that Mrs. Gallagher was on notice of the Final Hearing and chose not to attend or be represented. On that basis the Tribunal was content to hear and determine the Claimant’s claim against her notwithstanding her absence under Rule 47.

8. The documentary evidence in this case consisted of a small number of documents consisting of approximately 10 pages (total).

Findings of fact

9. The Tribunal makes the following findings of fact, including those in its Discussion/Conclusions section, on the balance of probabilities.
10. The claim concerns a public licenced premises situated at 70 Main Street, Cleland, Motherwell (the “**Premises**”). The owner of the freehold of the Premises was at all relevant times a Mr. Brian Curley (“**Mr. Curley**”).
11. In October 2012, Mr. Curley was running a public house from the Premises which traded under the name “**Kelly’s Bar**”. On 15 October 2012, Mr. Curley employed Mr. McFarlane as Assistant Manager at Kelly’s Bar. At all relevant times, Mr. McFarlane normally worked 30 hours per week.
12. On about 24 April 2017, T&C Bars took over Kelly’s Bar pursuant to a lease of the Premises dated 24 April 2017 (“**Lease**”), a copy of which was not put before the Tribunal. There was no break in trading. Mr. Dobbin had a trade union background, and considered and acted upon the basis that the contracts of employment of the employees working at Kelly’s Bar at the time – including Mr. McFarlane – had transferred from Mr. Curley to new employer T&C Bars under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**).
13. In the period May 2017 – February 2020, Mr. McFarlane continued to work 30 hours per week (on average) at Kelly’s Bar. T&C Bars’ holiday year ran from 1 March to 28 February. Mr. McFarlane was contractually entitled to 4 weeks annual leave per year. In the 2019-2020 holiday year, Mr. McFarlane took all

his annual leave entitlement. For his 30 hours/week shift, Mr. McFarlane was paid a weekly wage of £255 (gross), £236 (net).

14. In March 2020, Kelly's Bar had only two employees: Mr. McFarlane and a Mr. Bernard Foyer. T&C Bars employed a number of temporary staff who worked there as and when required, including Margaret Gallagher (2nd Respondent), Ms. Jackie McCormick and Ms. Angie McGee.
15. Prior to Kelly's Bar's closure in March 2020, T&C had contracts and was trading with (1) Tennent Caledonian (which supplied alcoholic and non-alcoholic beverages) (2) Booker Cash 'n' Carry (which supplied wholesale food services) (3) Abergas (which supplied bar gases to pressurize drinks).
16. Following the onset of the Covid-19 pandemic in March 2020, Kelly's Bar temporarily closed. T&C Bars put its two employees on temporary furlough. While on furlough, Mr. McFarlane took no annual leave.
17. In summer 2020, Mr. Dobbin asked Mr. Curley to find someone else to take over Kelly's Bar and its lease. In June 2020, Mr. Curley told Mr. Dobbin he had found someone (at the time, Mr. Curley intimated it would be Mr. Paul Gallagher, Mrs. Gallagher's husband). Mr. Dobbin and Mr. Curley agreed T&C Bars would continue to trade Kelly's Bar from the Premises until Mr. Gallagher was in a position to take over.
18. On Friday, 18 September 2020, Mrs. Gallagher – not her husband Paul Gallagher - reopened the Premises and, using its existing fixtures and fittings, began to run her own public house from it which traded as "**Delaney's Bar**", Mrs. Gallagher did not take on either of Kelly's Bar's two employees. However, she continued to trade with and accept services from Kelly's Bar's previous suppliers (Tennent Caledonian, Booker Cash 'n' Carry, Abergas).
19. Although the date when she did so is not clear, on the balance of probabilities the Tribunal accepts Mr. Dobbin's evidence that Mrs. Gallagher entered into a new lease of the Premises with Mr. Curley, likely in September 2020 (a copy of which has not been put before the Tribunal). The Tribunal accepts Mr. Curley's evidence that Tennent Caledonia would not trade with Mrs. Gallagher

unless it was satisfied there was, or shortly would be, a lease in place giving her control over the Premises and clear responsibility for the commercial activities conducted on-site. By letter dated 13 July 2021, Mrs. Gallagher wrote to the Tribunal describing herself as “*the new lease holder and owner of Delaney’s Bar*”, so there is no dispute about those particular facts.

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20. Neither T&C Bars (as a commercial entity) nor Mr. McFarlane (as a former employee) had any involvement in the reopening of the Premises on 18 September 2020 or its subsequent trading as a public house under Mrs. Gallagher’s ownership/stewardship. The Tribunal finds as a fact that her husband Mr. Paul Gallagher assisted her in running her new business and had both her actual and ostensible authority to employ and dismiss staff.

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21. T&C Bars’ disengagement from the Premises was formalised by the execution by Mr. Curley and Mr. Dobbin (as director of T&C Bars) on 21 September 2020 of a legal instrument entitled “Renunciation”, clause 2.1 of which provided (giving the defined terms their effect) that T&C Bars renounced the Lease with effect from 21 September 2020. By clause 2.2, Mr. Curley accepted that renunciation and (subject to clause 2.3 concerning rent) discharged T&C Bars of all its obligations under the Lease whether arising before, on or after 21 September 2020.

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22. Mr. McFarlane became aware the Premises was trading again, and on Sunday 21 September 2020 went to Delaney’s Bar to find out what was going on and whether he still had a job. There, he spoke to Mr. Gallagher, who told him there was no job for him. Mr. Gallagher added “*There will be no [expletive] permanent employees in this place.*” Hearing that, Mr. McFarlane chose not to argue with Mr. Gallagher, and left the Premises. Mr. McFarlane understood his job had ended. No prior notice of dismissal was given.

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23. On 23 September 2020 at 17:15, Mr. Dobbin sent a text message to Mr. McFarlane and Mr. Foyer stating: “*Alright Bernie/Archie – just to let you know that as [] has now opened up the Delaney’s Bar my lease has formally been surrendered. Your furlough pay will end with immediate effect. Thanks for all of your support over the last 3 years and good luck for the future.*” Mr.

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McFarlane understood from this that he was no longer employed by T&C Bars.

24. As of 21 September 2020, Mr. McFarlane had taken no annual leave in the holiday year that began on 1 March.

5 Relevant law

Redundancy

25. A qualifying employee dismissed on grounds of redundancy has a statutory right to a redundancy payment calculated in accordance with s.162 of ERA 1996. Section 163(1) of ERA 1996 provides that any question as to (a) the right of an employee to a redundancy payment, or (b) the amount of a redundancy payment, shall be referred to and determined by an employment tribunal. Section 163(2) of ERA 1996 provides that for the purpose of any such reference, an employee dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy.

15 26. Section 139(1) of ERA 1996 states (in relevant part) that for the purpose of that 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) the fact that his employer has ceased or intends to cease (i) to carry on the business for the purposes of which the employee was employed by him, or (ii) to carry on that business in the place where the employee was so employed, or (b) the fact that the requirements of that 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.

TUPE

27. Reg 4(1) of TUPE provides that, except where objection is made under reg 4(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.

5 28. Reg 4(2) of TUPE provides that without prejudice to reg 4(1), but subject to
regs 4(6), 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
10 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.

15 29. Reg 3(1) of TUPE provides that TUPE applies 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
20 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
25 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 reg 4(3) are satisfied.

30 30. Reg 4(2) of TUPE provides that "*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.

31. Reg 4(3) of TUPE provides that the conditions referred to in reg 4(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.
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- 10 32. Reg 4(6) provides that a relevant transfer (a) may be effected by a series of two or more transactions; and (b) may take place whether or not any property is transferred to the transferee by the transferor.

Issues

33. First, was Mr. McFarlane dismissed, and if so, by who and when.
- 15 34. Second, who was Mr. McFarlane's employer at the time of any dismissal (this issue is linked to the first issue since an employee can ordinarily only be dismissed by their employer).
35. Third, if Mr. McFarlane was dismissed, given Mr. McFarlane's claim for a redundancy payment in his ET1/paper apart and the statutory presumption in s.163(2) of ERA 1996, has Mr. McFarlane's employer proved Mr. McFarlane was not dismissed by reason of redundancy. If it has not, what redundancy payment is Mr. McFarlane entitled to, and has he been paid it.
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36. Fourth, was Mr. McFarlane entitled to notice of dismissal, and if he was, how much notice of dismissal was he given, and if he was not given notice or was given notice falling short of his entitlement, has his employer paid him for his notice period.
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37. Fifth, at the date of any dismissal, had Mr. McFarlane accrued any unused annual leave entitlement in the 1 March 2020 – 28 February 2021 holiday year, if yes how much entitlement, has his employer paid him for that

entitlement, and if not how much money for that unused annual leave entitlement was due to Mr. McFarlane on dismissal.

Discussion / Conclusions

5 38. First, the Tribunal concludes that Mr. McFarlane was dismissed by Mr. Paul
Gallagher when Mr. McFarlane attended Delaney's Bar on 21 September
2020 to find out if he still had a job. At the time, Mr. Gallagher had Mrs.
Gallagher's actual authority to dismiss Mr. McFarlane. The words Mr.
Gallagher said to Mr. McFarlane that day were clear and unambiguous and
10 constituted an express dismissal. If they did not, and were in any way
ambiguous, Mr. Gallagher's words gave Mr. McFarlane the reasonable
impression his employment was terminated. Neither Mr. McFarlane nor Mr.
Dobbin claimed or gave evidence that Mr. McFarlane had been dismissed by
Mr. Dobbin or T&C Bars before 21 September 2020, and the Tribunal makes
15 a finding of fact that they did not.

39. Second, the Tribunal concludes that by 21 September 2020 – the date of
dismissal - Mrs. Gallagher not T&C Bars, was now Mr. McFarlane's employer,
given the legal effect of reg 4(1) of TUPE, and therefore that Mc McFarlane's
20 dismissal by Mr. Gallagher on that date was legally effective. The Tribunal
reaches that conclusion on the following grounds:

a. in the period May 2017 – February 2020, T&C's public house at the
Premises constituted a business and economic entity which employed Mr.
25 McFarlane as an integral part of its operations;

b. that business/economy entity retained (and did not lose) its distinctive
identity during the period March – September 2020 when it had to
temporarily cease trading (through no choice of its owner) during the
30 Covid-19 pandemic, with its two employees Mr. McFarlane and Mr. Boyer
both temporarily furloughed under the Coronavirus Job Retention
Scheme;

- c. before 18 September 2020, Mrs. Gallagher and/or her husband Mr. Gallagher made business arrangements with Mr. Curley for her to take over that business entity, including all its on-site fittings and fixtures;
- 5 d. before 18 September 2020, Mr. Dobbin made related business arrangements with Mr. Curley permitting T&C Bars to surrender its Lease to Mr. Curley and be released from all its past and future legal obligations to him arising under the Lease (other than in relation to rent), thereby permitting Mrs. Gallagher to take over the public house business;
- 10 e. in September 2020 Mrs. Gallagher did take over the business entity previously trading from the Premises as Kelly's Bar and reopened it for trading on 18 September 2020 under the new name Delaney's Bar;
- 15 f. following Mrs. Gallagher's 'takeover' of Kelly's Bar, which the Tribunal finds took place on about 18 September 2020, on 21 September 2020 Mr. Dobbin and Mr. Curley formalised their agreement by executing T&C Bars' renunciation of the Lease;
- 20 g. other than a change in name, the public house business Mrs. Gallagher traded at the Premises in October 2020 was substantially identical to the public house business T&C Bars traded at the Premises prior to its closure in March 2020;
- 25 h. there was a *de facto* transfer of the leasehold interest in the Premises from T&C Bars to Mrs. Gallagher, and the fact this transfer was effected via T&C Bars' surrender of the existing lease of the Premises to Mr. Curley and Mr. Curley's grant of a new lease to Mrs. Gallagher rather than by an assignment of the existing Lease from T&C Bars to Mrs. Gallagher does
- 30 not prevent a TUPE transfer from having taken place (see regs 3(6)(a)-(b) of TUPE);
- i. as this transfer formed part of essentially one consensual transaction, the fact Mrs. Gallagher took possession of the Premises and began trading

from it 3 days before T&C Bars formally surrendered its Lease does not prevent a TUPE transfer from having taken place;

5 j. on the balance of probabilities, some former customers of Kelly's Bar likely remained customers of Delaney's Bar when it reopened for business on 18 September 2020;

10 k. on about 18 September 2020 there was a transfer of an undertaking and/or business situated immediately before the transfer in the United Kingdom from T&C Bars to Mrs. Gallagher which retained its identity post-transfer falling within the terms of reg 3(1)(a) of TUPE;

15 l. on about 18 September 2020 Mr. McFarlane's employment contract transferred from T&C Bars to Mrs. Gallagher by operation of reg 4(1) of TUPE;

m. it is not a necessary condition for a TUPE transfer to take place that there be a direct contract between the TUPE transferor and the TUPE transferee agreeing/providing for a TUPE transfer.

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40. Third, Mrs. Gallagher has not proved Mr. McFarlane was not dismissed by reason of redundancy, and has not satisfied her burden on that issue arising under s.163(2) of ERA 1996. There is no evidence which justifies, on the balance of probability, making that finding. It follows that Mr. McFarlane is entitled to a redundancy payment, which he has not been paid. Given his age on dismissal (54), his years' continuous service (7), and his gross weekly pay (£255), the Tribunal calculates Mr. McFarlane's redundancy pay entitlement at £2,677.50.

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30 41. Fourth, on 21 September 2020 Mr. Gallagher summarily dismissed Mr. McFarlane. Applying ss.86(1)(b) and 86(3) of ERA 1996 and his 7 years continuous employment as of 21 September 2020, Mr. McFarlane was entitled to 7 weeks' notice of dismissal. Mrs. Gallagher has not paid Mr. McFarlane any pay in lieu of notice. In these circumstances, the Tribunal

calculates Mr. McFarlane's notice pay entitlement to be £1,652 (£236 net/week x 7 weeks).

5 42. Fifth, in the period 1 March 2020 - 21 September 2020 Mr. McFarlane had accrued 94.4 hours unused statutory annual leave entitlement. His employer at the date of dismissal – Mrs. Gallagher – did not pay any sum to Mr. McFarlane in satisfaction of that entitlement. Mr. McFarlane's net hourly wages was £7.87 (£236 divided by 30 hours). The Tribunal calculates Mr. McFarlan's entitlement under this head to be £642.61 (94.4 x £7.87).

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Employment Judge: Antoine Tinnion
Date of Judgment: 30 January 2022
Entered in register: 01 February 2022
15 and copied to parties