EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4107703/2021

Final Hearing held remotely on 30 November 2021

Employment Judge: R Sorrell

Mrs A McCulloch	**Claimant** **Represented by:** **Mr B Thornber** **Thornber HR Law**
Watch Us Grow	**Respondent** **Represented by:** **Mr G Millar** **Solicitor**

FINAL HEARING

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim for failure to elect appropriate representatives and the duty to inform and consult brought under Regulation 15 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 is well founded and upheld and the respondent is ordered to pay to the claimant the sum of £2,750.00. (Two Thousand, Seven Hundred and Fifty Pounds).

REASONS

Introduction
E.T. Z4 (WR)

1 The claimant lodged a claim for the failure to elect appropriate representatives and the duty to inform and consult with those representatives under Regulations 13 and 14 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE Regs 2006').

2 This hearing was scheduled to determine the claim. It took place remotely given the implications of the COVID-19 pandemic. It was a virtual hearing held by way of the Cloud Video Platform.

3 Parties lodged a joint bundle of productions.

4 The claimant gave evidence. The respondent called two witnesses, Mr Tom Fisher, Chair of the respondent and Mr Tom Harten, respondent Manager.

5 It was agreed that the respondent witnesses would give their evidence first.

Findings in Fact

The following facts are found to be proven or admitted;

6 The claimant's date of birth is 3 October 1953.

7 The claimant commenced employment with the respondent on 23 March 1999. She set up the respondent as a charity and company limited by guarantee providing employment opportunities to adults with disabilities in North Lanarkshire. Its main operation is within Palacerigg Visitor Centre and gardens. She was employed as the charity's manager until 31 December 1999.

8 From 1 January 2020 she worked in a new part-time role as a Project Assistant for the respondent in its 'Baby Steps' initiative. This was a charity shop based in Falkirk specialising in children's clothes, toys and accessories. She worked 20 hours per week. Her gross weekly wage was £250.00.

9 Mr Tom Harten replaced the claimant as the charity's manager. Around May 2020, Mr Harten undertook a review of the financial viability of 'Baby Steps' as it appeared that the shop was losing money.

10 Following discussion with the respondent's Board of trustees, an agreement was reached on 11 June 2020 to close the shop on 22 December 2020. (D35)

11 After the announcement was made, the claimant approached the respondent to enquire whether she would be able to take over the operation of 'Baby Steps' as a new entity. A meeting took place on 12 June 2020 to discuss this further. The claimant, the Chair of the respondent, Mr Tom Fisher, two other Board members and Mr Harten were present at this meeting. (D36)

12 A Board meeting was held on 16 June 2020 at which it was agreed, wherever feasible, the board would help towards the claimant taking over the operation of 'Baby Steps' and that the position would be reviewed at the end of October. (D36)

13 The claimant played a key role in setting up 'Baby Steps 20+.' On 3 August 2020 the claimant emailed Mr Harten to advise that she was working on the new governing documents for 'Baby Steps 20+' to submit to OSCR. She also sought confirmation of the Board's decision to close 'Baby Steps' as of 22 December 2020, that there was no objection to the new organisation continuing to use the 'Baby Steps' name and whether the respondent wished to retain any of the 'Baby Steps' assets. (D37-8)

14 On 1 September 2020 the claimant provided an update to the respondent Board and Mr Harten in respect of the progress made towards 'Baby Steps 20+.' She informed them that a Board of trustees had been established, a new constitution drafted and that the landlord had been contacted to discuss the transfer of the lease. She also advised that a discussion had taken place with 'Awards for All', bridge funding applications were in hand, that all supported staff and their carers had been informed 'Baby Steps' would not be closing, and that Mr Harten had agreed the asset transfer would include all fixtures and fittings, although a decision on electrical equipment was still to be made. She further noted that discussions were required between the respondent and 'Baby Steps 20+' regarding staff transfers and the condition of the property when the respondent vacated it. (D39-40)

15 On 12 October Mr Fisher wrote to the trustees of 'Baby Steps 20+' regarding the matter of transitioning 'Baby Steps' supported staff to 'Baby Steps 20+.' He advised that the respondent Board had identified two options to achieve this outcome which were the transfer of their employment to 'Baby Steps 20+' under 'TUPE Regs 2006' or to make the staff redundant. He asked them to inform him as to which option they would prefer. (D41-2)

16 On 16 October 2020 Kathleen Szemis, a trustee of 'Baby Steps 20+' responded on behalf of her Board and advised that the trustees viewed redundancy as the best option for the staff. (D43)

17 On 10 November 2020 Mr Harten wrote to the claimant to inform her that she had been selected for redundancy and that she was not entitled to statutory redundancy pay due to her current contract starting on 1 January 2020. (D45-6)

18 On 13 November 2020 the claimant appealed against the decision to make her redundant on the basis that she had been in continuous employment with the respondent since 1999 and was therefore entitled to at least 21 year's redundancy pay, the lack of offer of alternative employment which she believed was discriminatory and the decision not to consult with her on the possibility of redundancy which contravened employment legislation. (D47-8)

19 Mr Harten held an appeal hearing with the claimant on 17 November 2020 which was recorded by the claimant. On 1 December 2020 the claimant wrote to Mr Harten as she had not been informed as to the outcome of her appeal. (D54) On 1 December 2020 Mr Harten responded that the Board were still discussing her appeal and requested a copy of the recording she had made of the appeal hearing. (D53)

20 On 30 November 2020 Mr Fisher wrote to the claimant stating that legal advice had been taken as to the terms of her redundancy appeal letter and that the letter of 10 November 2020 from Mr Harten notifying her of redundancy was sent in error because her role was not in fact redundant. He apologised for the inconvenience and upset the letter had caused and

confirmed that any notice of termination was revoked. He further advised that on the basis the claimant was taking over the lease of the 'Baby Steps' shop in Falkirk and that the stock, assets and goodwill of the shop were all being transferred to her under the terms of 'TUPE Regs 2006,' that this represented a relevant transfer and therefore her existing terms and conditions of employment would transfer to her as the new owner of the shop. (D55-56)

21 The claimant did not receive this letter and had no further communication with the respondent. She was unaware of this material change in the respondent's position and did not know that her employment had in fact been transferred until she was in receipt of the response to her Tribunal claim.

22 The claimant's employment transferred from the respondent to 'Baby Steps 20+' with effect from 23 December 2020. She is not the owner of 'Baby Steps 20+' or a trustee.

23 The respondent did not elect any appropriate representatives to inform and consult regarding the claimant's relevant transfer of employment as an affected employee under the 'TUPE Regs 2006.' The respondent did also not have any discussions with the trustees of 'Baby steps 20+' about the terms of the claimant's employment after the transfer.

24 On 23 December 2020 the claimant posted a Christmas and New Year message on the face-book page of 'Baby Steps 20+' and advised that although the shop would be closed during the Covid lockdown, it would continue trading as a click and collect service in the New Year. (D59) Subsequent postings dated 29 December 2020 and 13 January 2021 on the face-book page advertised the click and collect service. (D60-61)

Respondent's Submissions

25 Mr Millar submitted on behalf of the respondent that while this claim relates to the respondent's obligations under the 'TUPE Regs 2006,' the Tribunal should bear in mind in reaching its decision the more than active part the claimant played. Although the claimant has positioned herself as nothing more than a facilitator, the reality was that she was the driving force behind 'Baby Steps

20+.' Therefore, she was aware of any information that was provided to her by the respondent trustees or 'Baby Steps+' regardless of which hat she was wearing. In terms of her knowledge of what would happen post transfer, she was in complete control of that. She was never just an employee as suggested, she was in control of how the shop operated and who worked in it.

26 Regulation 13 (2) of 'TUPE Regs 2006' gives a list of items the employer is obliged to inform the employees about. This includes the fact that the transfer is to take place, the date of the transfer and the reasons for it. (13 (2) (a)). At the meeting of 12 June 2020 the claimant was made aware of the respondent's decision to close the shop with effect from 22 December 2020. At that point she should have been aware of the intention to transfer her employment on exactly the same conditions. The claimant was aware of the implications as required under 13 (2) (b) as a letter was sent to trustees giving them two options and the claimant advised the trustees about these options. She therefore knew that she would be transferred on the same preserved conditions.

27 In terms of 13 (2) (c), the claimant's evidence is that she was enormously keen on preserving the continuity of running the shop exactly as it was before, at the same location with the same support staff and supervisors of those staff; namely herself and Lynda. It was made abundantly clear in her letter at page 39 of the bundle and in the unchallenged evidence of Mr Fisher and Mr Harten, that no changes were being anticipated. Whilst it is acknowledged that the process and procedure were awkward and confusing at times, the reality was that Regulation 13 (2) was complied with.

28 The issues were probably not helped by Mr Harten withdrawing the redundancy notice on 10 November 2020, but he was candid in his explanation to the Tribunal in that the support staff had elected redundancy and something had to be done. He wrongly assumed that he had to go down the redundancy route but this was effectively cleared up by Mr Fisher's letter at pages 55-56 of the bundle. It is acknowledged that the claimant did not

receive the letter, but in cross-examination she accepted that the paragraphs relating to TUPE was all information she had previously been provided with, including the option letter at page 41 of the bundle.

29 It will be suggested that the closure of the shop was for rebranding purposes. The claimant has been less than candid about it. The reason the shop was closed was due to covid and not for that reason which can be seen from the postings on face-book. The claimant suggested she didn't want to notify anyone of the rebranding but there is an email in March thanking someone for doing the flooring. Covid has created the difference here rather than TUPE.

30 In respect of the claimant's knowledge of the legal, economic and social implications, the legal implications have been analysed through various case law. The effect of TUPE on the claimant's contractual rights were spelt out at page 41 of the bundle. The amount of benefits the claimant might expect was within her gift. If it was not for covid, she would have been doing exactly the same job with the same staff as before the transfer. The case of ***Grindrod v Excel Europe Ltd and anor ET Case No.2702651/06*** held that social implications can be a change of hours or shift patterns, but there were no social implications about the transfer.

31 It is accepted that the respondent should have organised appropriate representatives, but what they did do is consult with trustees and parents of those affected other than the claimant. This is a minor technical breach as the claimant was aware of what was happening and can be considered in terms of compensation.

32 Compensation is required to be determined on the basis of what is just and equitable. The maximum amount of compensation payable is 13 week's gross pay. The claimant's gross pay was £250 per week. The guidelines in the case of ***Susie Radin Ltd v GMB and ors 2004 ICR 893, CA*** apply. These provide that compensation is a sanction and not to compensate for loss. Compensation is discretionary and the Tribunal is required to focus on the seriousness of the employer's default. This can vary from a technical breach

to a complete failure, whether the failure was deliberate and if the employer sought legal advice. If there has been no consultation, the maximum award can be made and then mitigating circumstances considered. ***Todd v Strain and ors 2011 IRLR 11, EAT*** held at paragraph 29 that the maximum award should not be applied mechanically where some consultation and information has been given. The question is what was in the knowledge of the parties at the time. It was held in ***Shields Automotive Ltd v Langdon and anor EATS 0059/12*** that the breach was at the more technical end of the spectrum and compensation of 3 week's pay was awarded.

33 It is for the Tribunal to decide whether this is a technical breach. The obligation in this case was not to consult but to inform because it was made clear by the claimant from the start that no changes were anticipated so no measures were anticipated and the claimant acknowledged that continuity was particularly important for staff. The claimant knew exactly what was happening and the implications and impact of that. It is submitted that if the breach is a minor one, in accordance with ***Shields Automotive Ltd v Langdon and anor EATS 0059/12***, 3 week's compensation would be an appropriate sum.

Claimant's Submissions

34 Mr Thornber submitted on behalf of the claimant there were no employee representatives elected. This is a failure under Regulation 14 of 'TUPE Regs 2006' and there is a failure to consult those representatives under Regulation 13 (2). The respondent has conceded that it is not a micro business so the duty to consult elected representatives does apply. There were no discussions between the respondent and any representative or the claimant herself regarding TUPE.

35 There have been no special circumstances under Regulation 13 (9) and there are none. The respondent's submissions relate to a general defence. It is true that the claimant was aware of the TUPE transfer discussions, but she was not aware that TUPE would have been applied to her as she was never told that.

36 Page 42 of the bundle was never given to the claimant and was only indirectly seen by her so this is a failing. Once the trustees decided to make the claimant redundant there was no reason why she thought TUPE would apply to her and she believed she would be made redundant with the rest of the employees. She also said she had no real understanding of TUPE at all and did not understand what that meant in terms of continuity of employment or her terms and conditions of employment, or any other change that the respondent was envisaging. That does not constitute information.

37 There was an absolute failure to inform the claimant let alone consult with her about it. The claimant's employment was terminated by letter of 10 November by reason of redundancy. This was connected with the transfer due to the circumstances.

38 In terms of Regulation 13 (2) (c), the measures taken by the respondent were making the claimant and others redundant and consultation was required. If consultation had taken place, issues such as length of service and whether being retired would have been picked up. That is the point about consultation. However, there was no attempt to resolve the situation and the respondent just deemed that her employment would be terminated. The crucial point is that it doesn't matter if the claimant's employment terminated because of redundancy or whether she was informed or consulted about it. It is the measures that were taken relating to the transfer.

39 The letter of redundancy to the claimant was misleading because it didn't mention TUPE or transfer of employment and her terms and conditions of employment. There was a deliberate intention to mislead her about TUPE. The draft of the letter from Mr Fisher of 30 November 2020 was never received by the claimant. This highlights the importance of consultation as the fact the letter was not received would have been picked up. Mr Fisher also knew that the claimant had not retired, but Mr Millar has been silent on that point.

40 The fact that the claimant was involved in the transferee charity and had complete control is nonsense. She was aware of it and wanted it to happen, but it is the respondent's obligation to talk to their staff and say what is going

on. In cross-examination the claimant said that she knew about TUPE but had no understanding about how it related to her in terms of her employment which is the whole point of TUPE obligations. The respondent did not comply with their obligations to find out about any measures after the transfer. There was also a change in circumstances due to covid which had an impact.

41 The respondent has submitted that the claimant and the transferee were the same person so there was no need to discuss these issues. Mr Harten was quite high handed about this and said he had no inclination to speak to her. Mr Fisher didn't think he would even follow up on the letter which he should have done. The respondent had a continuing obligation to consult and inform employees but did neither. There was no information given to the claimant about the two key measures. These were the redundancy which she was given no information about until her termination letter and the temporary closure of the business in January which was something to discuss and consult employees about.

42 There was a clear breach of these obligations by the respondent on multiple levels which go way beyond a technical breach and are at the top end of failure. It would be in keeping with this failure to give the claimant the maximum award of 13 weeks.

Relevant Law

43 Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 provides as follows:

13 (1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it, and references to the employer shall be construed accordingly.

13 (2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of –

(a) The fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) The legal, economic and social implications of the transfer for any affected employees;

(c) The measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) If the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

44 The requirements for the election of employee representatives under Regulation 13 (3) are set out in Regulation 14. Regulation 13 (6) requires that where an employer envisages that measures will be taken, he shall consult with the appropriate representative of an affected employer with a view to their seeking agreement to the intended measures and 13 (7) sets out how that shall be done.

45 In respect of the duty to inform, following the decision ***in R v SOS for Trade & Industry ex parte Unison 1996 ICR 1003, QBD,*** it was held ***in Russell v Bacon's College and anor EAT 98/99,*** that there is a primary duty on employers to inform employee representatives under Regulation 13 (2) of the 'TUPE Regs 2006' and that if employers do not inform the appropriate representatives they are, on the face of it, in breach, whether or not such representatives exist.

46 In the decision of ***Institution of Professional Civil Servants and ors v SOS for Defence 1987 IRLR 373, ChD***, Mr Justice Millett discussed the meaning of 'measures' and 'envisages' in the context of the duty to consult. He considered that 'measures' is a word of the widest import and included any action, step or arrangement and that 'envisages' meant 'visualises' or 'foresees.'

47 The case of ***Howard v Millrise Ltd (in liquidation) and anor 2005 ICR 435***, ***EAT*** held that an affected employee had standing to bring a claim under Regulation 15 for a breach of Regulation 13 of the 'TUPE Regs 2006' where an employer had failed to invite affected employees to elect representatives or, in the absence of any election, to provide the requisite statutory information to the employee. It was further held in ***Independent Insurance Co Ltd (in provisional liquidation) v Aspinall and anor 2011 ICR 1234***, ***EAT*** that it is not open to an individual employee to claim compensation on behalf of a group of affected employees.

48 The nature of compensation to be awarded under Regulation 15 of the 'TUPE Regs 2006' was considered in ***Sweetin v Coral Racing 2006 IRLR 252, EAT*** and mirrors the approach taken in ***Susie Radin Ltd v GMB and ors 2004 ICR 893, CA***. This held that the award is intended to be punitive and therefore the amount of the award should reflect the nature and extent of the employer's default and any mitigating circumstances. The maximum award of 13 weeks may be regarded as the starting point. It was held in ***Todd v Strain and ors 2011 IRLR 11, EAT*** that this should not be approached in a mechanical manner where some information has been given and some consultation has taken place.

Issues to be Determined by the Tribunal

49 The Tribunal identified the following issues required to be determined:-

(i) Did the respondent fail to inform and consult with the appropriate representatives of the claimant as an affected employee in respect

of her transfer of employment and fail to elect appropriate representatives for that purpose?

(ii) If so, how much compensation is the claimant to be awarded?

Conclusion

50 Overall, I considered that the claimant and the two respondent witnesses gave their evidence in a clear way giving an honest account of events as they remembered them.

51 It was apparent that relations between the claimant and respondent had deteriorated due to the events that occurred which led to some evidence being heard that did not materially assist in determining the relevant issues.

52 Most of the facts were not in dispute. However, it was difficult to marry some of the evidence given by Mr Fisher and Mr Harten. Mr Fisher's evidence was that he assumed the claimant was being transferred under the 'TUPE Regs 2006' all along. Yet, the only documentary evidence of that was Mr Fisher's letter to the claimant dated 30 November 2020 which I accepted the claimant did not receive. In fact, prior to that Mr Harten had issued a redundancy letter to the claimant on 10 November 2020. Mr Fisher could also not explain why his letter of 30 November 2020 to the claimant was written before Mr Harten's letter to the claimant of 1 December advising that the Board were still considering her redundancy appeal.

53 I considered that in these circumstances, combined with the fact the supported staff who worked in the shop were being made redundant, it was reasonable for the claimant to assume that she was being made redundant. Whilst this evidence was not material, it provided a context as to the events which occurred that ultimately led to these proceedings and revealed notable shortcomings in the respondent's understanding of their legal responsibilities towards the claimant as an employee and in their overall approach to communication during this process.

54 The respondent accepted they did not elect appropriate representatives to inform and consult about the claimant's transfer of employment under the 'TUPE Regs 2006,' but submitted this was a minor technical breach as the claimant was aware of what was happening.

55 However, I found that the failure to elect appropriate representatives had wider legal implications. This is because it is clear from the decision in ***Russell v Bacon's College and anor EAT 98/99,*** that such a failure amounted to a breach of the primary duty on the respondent to inform appropriate representatives of the claimant about her relevant transfer of employment under Regulation 13 (2) of the 'TUPE Regs 2006.'

56 The respondent further submitted that the statutory duty to consult with the claimant's appropriate representatives about measures it envisaged would be taken under Regulation 13 (6) of the 'TUPE Regs 2006' did not apply because it was made clear by the claimant from the start that no changes were anticipated for continuity purposes and therefore no measures were envisaged.

57 I found that the respondent had failed to consult appropriate representatives in respect of the claimant's transfer of employment. This is because apart from the fact the respondent had failed to elect appropriate representatives to inform and therefore consult with in any event, I considered that the respondent did envisage that it would take measures in connection with the claimant's transfer, which amounted to a foreseeable 'action, step or arrangement' as defined in the case of ***Institution of Professional Civil Servants and ors v SOS for Defence 1987 IRLR 373, ChD***, by making a decision regarding the claimant's employment status after 22 December 2020 and not consulting her on the same options given to the supported staff. There were also no discussions with the trustees of 'Baby steps 20+' about the terms of the claimant's employment after the transfer and therefore the respondent had no knowledge of any foreseeable measures about that.

58 For these reasons the claim for failure to inform and consult the claimant about her relevant transfer of employment and elect appropriate representatives for that purpose is well founded and upheld.

Compensation

59 In accordance with ***Sweetin v Coral Racing 2006 IRLR 252, EAT***, the starting point in awarding compensation under Regulation 15 of the 'TUPE Regs 2006' is the maximum award of 13 week's gross pay subject to the nature and extent of the employer's default and any mitigating circumstances.

60 The respondent did not elect appropriate representatives to inform or consult about the claimant as an affected employee regarding her relevant transfer of employment to 'Baby Steps 20+' under the 'TUPE Regs 2006.' Whilst I accepted the claimant played a key role in setting up 'Baby Steps 20+' and that she knew the date of and reasons for the transfer as well as the arrangements for the transfer of the shop lease and assets, she was not at any point informed or consulted by the respondent about her transfer of employment as an employee under these Regulations. On the contrary, she was led to believe that she was being made redundant and did not know that her employment had in fact been transferred until she was in receipt of the response to her Tribunal claim.

61 Having carefully considered these factors and weighing them in the round, I am satisfied that the claimant should be awarded compensation to the sum of 11 week's gross pay.

62 The award is calculated on the basis of the claimant's gross weekly pay of £250.00. The claimant is therefore awarded 11 week's x £250 = £2,750.00.

Employment Judge: Rosie Sorrell
Date of Judgment: 21 January 2022
Entered in register: 28 January 2022
and copied to parties