



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case no: 4107957/2020

Held remotely by CVP on 18 February 2022

Employment Judge R King

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Mr Lee Harrison

**Claimant
In person**

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Caledonia Gym Limited

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that

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1. the claimant was unfairly dismissed and is entitled to a basic award of £600 and a compensatory award of £3,812; said compensatory award to be paid gross, the claimant being liable to HMRC for any payments of income tax and national insurance thereon.

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2. the claimant is entitled to payment of the gross sum of £810 in respect of accrued but unpaid holiday pay as at the date of the termination of his employment; said payment to be paid gross, the claimant being liable to HMRC for any payments of income tax and national insurance thereon.

REASONS

1. In this case there were originally two respondents. The claim against the first respondent was struck out and remained pursued against the second respondent, which is now the only respondent.
- 5 2. By a judgment dated 29 November 2021 it was found that the claimant's employment had transferred from Caledonian Health & Fitness (Scotland) Limited (the previous first respondent) to the respondent on 31 August 2020.
- 10 3. As the respondent subsequently failed to engage and actively pursue the proceedings its response was struck out under on 26 January 2022 under Rule 2.
- 15 4. The claimant's claim against the respondent is for unfair dismissal, wrongful dismissal, and holiday pay. He also seeks a redundancy payment if the Tribunal find that redundancy was the true reason for his dismissal. In addition, he seeks an uplift in compensation in respect of the respondent's alleged failure to follow the ACAS Code of Practice on Disciplinary and Grievance procedures.
- 20 5. Although the respondent's response had been struck out it was notified of the hearing date and provided with joining details. In the event it did not attend the hearing and nor was it represented. The claimant gave evidence on his own behalf and produced a number of documents during the course of the hearing.

Relevant law

- 25 6. Section 94 of the Employment Rights Act 1996 provides the claimant with the right not to be unfairly dismissed by the respondent. It is for the respondent to prove the reason for the dismissal and that it is a potentially fair reason in terms of section 98 of the Employment Rights Act 1996.
- 30 7. If the reason for dismissal is potentially fair, then the Tribunal must determine in accordance with the equity and the substantial merits of the case, whether the dismissal was fair or unfair under section 98(4) of Employment Rights Act 1996. This depends on whether in the

circumstances (including the size and administrative resources of the respondent's undertaking) the respondent acted reasonably or unreasonably in treating is as a sufficient reason for dismissing the employee.

5 **TUPE**

8. Regulation 7 of The Transfer of Undertakings (Protection of Employment) regulations 2006 provides -

10 *“7 - (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

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

Holiday pay

9. Regulation 14 of The Working Time regulations 1998 provides –

20 *“14.—(1) Paragraphs (1) to (4) of this regulation apply where—*

(a) a worker's employment is terminated during the course of his leave year, and

25 *(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.*

30 *(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).*

(3) The payment due under paragraph (2) shall be—

(a) *such sum as may be provided for for the purposes of this regulation in a relevant agreement, or*

(b) *where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—*

$$(A \times B) - C$$

where—A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.”

Issues

15 10. The issues for the Tribunal to determine were as follows: -

- (1) What was the reason for the claimant's dismissal?
- (2) If his dismissal was related to the TUPE transfer, was the reason for the claimant's dismissal (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?
- (3) If the claimant was unfairly dismissed what is the amount of the basic award and the compensatory award due to him by the respondent?
- (4) If the claimant was unfairly dismissed, is he entitled to an uplift in terms of the ACAS Code of Practice in disciplinary and grievance procedures?
- (5) Was the claimant dismissed in breach of his contractual notice and therefore wrongfully dismissed?
- (6) Is the claimant due accrued but unpaid holiday pay as at the date of the termination of his employment?

Findings in fact

11. Having heard evidence from the claimant the Tribunal makes the following findings in fact.

Background

- 5 12. The claimant commenced employment with Caledonia Health and Fitness (Scotland) Limited, Panbride House, Panbride, Carnoustie, Angus DD7 6JR on 15 December 2017. He was both a director and employee in the business, which he set up with Calum Owens, his former business partner and co-director.
- 10 13. The claimant's job role was Gym Instructor, and he managed the day-to-day running of the facility including dealing with memberships, managing staff, and running gym classes. His salary was £1,300 gross per calendar month, and he was paid £300 gross per week/£60 gross per day. He did not receive pay slips. His contract of employment provided for a minimum
15 notice period of 4 weeks.
14. During the currency of his employment, he provided a loan to Caledonia Health and Fitness (Scotland) Limited, of £13,250, which represented his life savings. Unfortunately, the company did not repay this loan and he had to raise proceedings, eventually obtaining decree at Dundee Sheriff
20 Court for £13,250 in or around early 2020.

TUPE transfer

15. The claimant's co-director Calum Owens transferred the business and assets of Caledonia Health and Fitness (Scotland) Limited to the respondent Caledonia Gym Limited on 31 August 2020. This was a
25 relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1996. No consultation whatsoever took place with the claimant in relation to the transfer.
16. Until 31 August 2020 the claimant and the majority of the employees of Caledonia Health and Fitness (Scotland) Limited had been furloughed.
30 However, post transfer, the respondent opened the gym fully on 1 September 2021 and began to trade as normal, albeit with certain

restrictions in place to reduce the risk of transmission of Covid. Upon the reopening there remained a requirement for the claimant's role of Gym Instructor.

Dismissal

- 5 17. On 3 September 2020, the claimant received a letter from Mr Owens in the following terms: -

"Dear Mr Harrison,

10 *As of Monday 31 August 2020, Caledonia Health and Fitness (Scotland) Limited will no longer be applying for furlough through the Government Job Retention Scheme. This is also your notice of redundancy effective immediately."*

18. This letter did not come completely out of the blue for the claimant because he suspected that Mr Owens was attempting to avoid paying him the money due by Caledonia Health and Fitness (Scotland) Limited in terms of the Sheriff Court decree. The claimant suspects that Mr Owens engineered the transfer in order to ensure that the claimant could not enforce his decree against that company.

19. No consultation took place in relation to the claimant's dismissal, and he was not given a right of appeal. He was summarily dismissed and received no notice pay or redundancy pay.

Holidays

20. The claimant's holiday entitlement for 2020 was 28 days. As at the date of termination he had therefore accrued 18.5 days holiday but had taken only taken five days holiday. Upon termination of his employment, he was therefore due to be paid for 13.5 days accrued but untaken holidays, amounting to £810 gross, but he received no holiday pay at all.

Earnings post dismissal

21. After his dismissal the claimant became a self-employed Fitness Instructor. His gross monthly earnings for the period after his dismissal were as follows: -

	September 2020	£733.50	
	October 2020	£1,370.00	
	November 2020	£1,560.00	
	December 2020	£495.00	£4,158.50
5	2021		
	January	£1,065.00	
	February	£1,225.00	
	March	£2,625.00	
	April	£542.50	
10	May	£1,023.00	
	June	£895.00	
	July	£655.00	
	August	£1,465.00	
	September	£634.00	

- 15 22. Had the claimant remained in employment with the respondent during that 13-month period his gross earnings would have been £16,900, whereas he actually earned the gross amount of £14,288, meaning he suffered a gross loss of £2,612.
- 20 23. As of October 2021, the claimant has maintained a steady income of approximately £1,200 gross in circumstances where his customer base has solidified, and he obtains a regular income from their providing him with payment through standing orders. He therefore continues to suffer a gross ongoing loss of £100 per month.

Discussion and decision

25 *What was the reason for the claimant's dismissal?*

24. The Tribunal had no hesitation in finding that the reason for the claimant's dismissal was connected with the transfer of the business of Caledonia Health and Fitness (Scotland) Limited to the respondent, coinciding as it did with the transfer, immediately after which the gym reopened. The Tribunal also accepted the claimant's evidence that there was no genuine redundancy situation in relation to his role of Gym Instructor. In the circumstances the claimant's dismissal was for a reason connected with
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the transfer that was not an economic, technical, or organisational reason entailing changes in the workforce and was automatically unfair.

25. The claimant was also dismissed in breach of his contractual notice period and was wrongfully dismissed.

5 26. The claimant is therefore entitled to the following award:-

Basic award – as the claimant had completed two full years of employment as at the date of dismissal, he is entitled to a basic award of two weeks gross pay at £300 per week = £600

10 Compensatory award – the Tribunal finds that it is just and equitable to make an award of compensation for gross loss of earnings from the date of dismissal until the date of the hearing as follows –

- Loss of earnings between date of dismissal and 30 September 2020 - £2,612
- Loss of earnings between 1 October 2021 and hearing date - £450
- 15 • Future loss of earnings - £450

Loss of earnings award - £3,512

In addition, the Tribunal makes an award in relation to the claimant's loss of his statutory rights in the sum of £300

The total gross compensatory award is therefore £3,812.

20 **Acas uplift**

27. Having found that the dismissal was for a reason connected to the transfer and not for a reason such as misconduct or poor performance, the Tribunal concludes that the Acas Code did not apply and that it would not be appropriate to award an uplift to the compensatory award.

25 **Holiday pay**

28. The Tribunal accepts the claimant's evidence that he had only used five days of his accrued 18.5 days holiday entitlement for 2020 as at the date of termination. It also accepts that he was not paid for his 13.5 days

accrued and unused holiday and that he is therefore entitled to a gross payment of 13.5 x his daily rate of £60 = £810.

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Employment Judge:
Date of Judgment:
Date sent to parties:

R King
15 March 2022
16 March 2022