EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106549/2020

Heard in Glasgow on 2 February 2022

Employment Judge: L Wiseman

Mr Thomas Martin	**Claimant** **In Person**
Fernglen Ltd	**Respondent** **Represented by:** **Ms S Monan** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Tribunal decided:

(i) to dismiss the claim for a redundancy payment because the reason for the claimant's dismissal was not redundancy and

(ii) to find the claim for an unauthorised deduction from wages to be well founded and to order the respondent to pay to the claimant the sum of £69.76.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 21 October 2020 alleging he was entitled to be paid a redundancy payment and wages.

2. The respondent entered a response in which it sought to have Eyekon Services UK Ltd joined as a second respondent because, it was said, Eyekon had employed the claimant at all material times.

3. Eyekon Services UK Ltd was joined as a second respondent and argued there had been a relevant transfer to Fernglen Ltd.

4. A Preliminary Hearing took place on 14 October 2021 to determine whether there had been a relevant transfer from Eyekon Services UK Ltd to Fernglen Ltd. The Tribunal decided there had been a relevant transfer on 14 July 2020 and that the claimant's employment transferred from Eyekon Services UK Ltd to Fernglen Ltd on that date.

5. The claimant (and one of the other four claimants) at the commencement of the hearing informed the Employment Judge that two of the claimants had accepted an offer from the respondent to settle their case. The claimant and the other remaining claimant indicated they now wished to accept the offer from the respondent. The Employment Judge allowed time for the respondent's representative to take instructions regarding whether the offer remained open for the claimants, and if so, for the claimants to consider their position.

6. The claimants subsequently informed the Employment Judge that they wished to accept the offer but this was subject to seeing the terms of the COT3 agreement. Further time was allowed for the respondent's representative to draft the terms, and for the claimants to consider them.

7. The claimant (Mrs Cochrane) confirmed she wished to accept the offer of settlement to resolve her case.

8. The claimant (Mr Martin) confirmed he wished to proceed with his case. The claimant was given further time to ensure he had properly considered the position. The claimant confirmed he wished to proceed with his case.

9. I heard evidence from the claimant, and I was also referred to a number of documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

10. The claimant commenced employment on 1 April 2010. He was based at Callendar Square shopping centre, where he worked 20 hours per week (4 hours per day) cleaning.

11. The claimant did not recall when his employment transferred to Eyekon Services UK Ltd, but there was no dispute regarding the fact that he was employed by Eyekon Services UK Ltd immediately before transferring to Fernglen Ltd on the 14 July 2020.

12. The claimant was furloughed by Eyekon Services UK Ltd, who continued to pay the claimant furlough until the end of July 2020.

13. Mr Virani, of Fernglen Ltd, sent a letter to the claimant (and others) on the 2 July 2020 to explain the Centre was due to re-open on the 13 July 2020 with reduced opening hours (9am to 7pm Monday to Saturday and 9am to 5pm on Sunday) because the gym would be unable to reopen at that time. The letter confirmed the claimant was now a Fernglen Ltd employee on the same terms that were in place immediately prior to furlough. The letter continued:

> 'We *would like you to return to work from Tuesday 14th July in accordance with the rota enclosed.."*

14. The letter invited the claimant to sign a copy and return it to Fernglen to confirm his acceptance of the employee transfer, and asked the claimant to call, text or email Mr Virani to confirm he would be returning to work.

15. The claimant did not sign and return a copy of the letter but he did return to work on 13 July to carry out two shifts (8 hours) before being informed by Eyekon Services UK Ltd that he was to be furloughed again. The claimant did not thereafter attend for work.

16. The claimant's employment terminated on the 14 July 2020.

Claimant's submissions

17. The claimant felt he had been badly treated by the respondent.

Respondent's submissions

18. Ms Monan referred to section 139 Employment Rights Act, which sets out the definition of redundancy. She also referred the Tribunal to the cases of ***Safeway Stores pic v Burrell 1997 ICR 523*** and ***Murray v Foyle Meats Ltd 1999 ICR 827.***

19. Ms Monan submitted there were three questions to be asked by the Tribunal: firstly, was the employee dismissed. Secondly, was the reason for dismissal because the requirements of the business for employees to carry out work of a particular kind had ceased or diminished, or were they expected to cease or diminish and thirdly, was the dismissal of the employee caused wholly or mainly by the cessation or diminution.

20. Ms Monan confirmed the respondent accepted the claimant had been dismissed. In response to the second question, Ms Monan referred the Tribunal to the Judgment of the Tribunal at the Preliminary Hearing. In particular at paragraph 63 the Employment Judge stated '7 *find that there was no substantial change in the amount of work to be carried out after 14 July 2020 such that the post transfer activity could be said to be different to the pre transfer activity as in the Huke case. I am not satisfied that the need for cleaning and security services from 14 July 2020 was significantly reduced in comparison with the need immediately prior to March 2020, when those services had already been pared back in order to reduce costs."*

21. Ms Monan also referred to paragraph 62 of the Judgment where it was recorded that the respondent had recruited 4 or 5 temporary staff to carry out the cleaning and security services from 14 July 2020 onwards.

22. Ms Monan acknowledged the claimant (and others) had been told the Centre was to close, but this did not in fact happen. The work did not cease or diminish. The claimant was made an offer to work, but he did not respond to this offer. The reason for the termination of the claimant's employment was not redundancy, but some other substantial reason, being the fact the claimant did not report for work.

23. Ms Monan submitted the dismissal of the claimant was not caused wholly or mainly by a cessation or diminution in the work. The claimant, accordingly, was not entitled to receive a redundancy payment.

24. Ms Monan invited the Tribunal to also dismiss the claim in respect of wages on the basis the claimant had been in receipt of furlough payments from Eyekon Services UK Ltd at the time.

Discussion and Decision

25. The claimant has brought a claim for payment of a redundancy payment. A redundancy payment must be made by an employer to an employee when an employee is dismissed by reason of redundancy. The issue for the Tribunal to determine is whether the reason for the claimant's dismissal was redundancy: if it was, then a redundancy payment will be due; if the claimant was dismissed for some other reason, then a redundancy payment will not be due.

26. I had regard to section 139 Employment Rights Act which sets out the definition of redundancy, and essentially it covers three situations, being (i) the closure of a business; (ii) the closure of the employee's workplace and (iii) a diminishing need for employees to do the available work.

27. The claimant's employment transferred to the respondent on 14 July 2020. The previous Tribunal which considered the issue of whether there had been

a relevant transfer, referred to the uncertainty during July and August, regarding this matter. This was demonstrated by the fact Eyekon continued to pay furloughed employees, and some employees refused to respond to Mr Virani's letter until such time as they were directed to do so by Eyekon.

28. A key finding made by the previous Tribunal, however, was that there was no diminution of the work required to be done following the transfer, albeit the shopping centre had closed for a period due to lockdown and employees had been furloughed.

29. I was referred to the cases of ***Safeway Stores pic v Burrell*** and ***Murray v Foyle Meats Ltd*** and to the questions which, it was said, a Tribunal must decide in answering the question whether a dismissal was for reasons of redundancy.

30. The first question is, was the employee dismissed. The answer to that question was yes.

31. The second question is, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish. The answer to that question was "no" for the following reasons. The claimant was one of a small number of employees whose employment transferred to the respondent on 14 July 2020. There had been rumour the shopping centre was going to close, but that did not in fact happen. There was, accordingly, a need by the respondent for employees to carry out the cleaning and security work at the shopping centre when it was allowed to reopen. This work had not ceased or diminished.

32. The letter from Mr Virani on 2 July informed employees there was a small reduction to the opening hours of the shopping centre, because the gym would not yet be permitted to open. There was no suggestion however that this small reduction to opening hours would impact on the need for employees to carry out cleaning and security work.

33. I was satisfied the respondent needed the employees who had transferred to carry out the work at the Callendar Square centre. I considered that I was

supported in that conclusion by the fact that if the employees would not return to work for the respondent, then the respondent would have to recruit others to do the work (and this is what in fact happened).

34. Mr Virani's letter of 2 July not only confirmed the claimant was an employee of the respondent on the same terms and conditions as previously, but also invited him to return to work from 14 July in accordance with the rota which had been enclosed. The claimant received the letter. The claimant did not respond to it but turned up to work two shifts at the Centre (8 hours) on the 13 July, before being told he was to be placed back on furlough.

35. The claimant offered no explanation why he had not signed and returned the letter to Mr Virani.

36. I acknowledged there was some confusion regarding the transfer to the respondent, and I also acknowledged the claimant was furloughed and being paid by Eyekon, but also being asked by the respondent to return to work on 14 July. The claimant felt he had not been well treated. I explained to the claimant, at the start of the hearing, that the fairness or otherwise of what happened to him was not an issue for this hearing. I must decide only whether the reason for dismissal was redundancy.

37. I have set out above the fact the business did not close; the place where the employee worked did not close, and the need for employees to carry out the work had not reduced or diminished. There was no redundancy situation. The respondent needed the employees who had transferred to carry out the work at the Callendar Square centre.

38. I decided the reason for the dismissal of the claimant was not redundancy. I accordingly decided the claimant was not entitled to be paid a redundancy payment I dismissed this part of the claim.

39. I next considered the claimant's claim that he had worked 8 hours but not been paid for them. I accepted the claimant's evidence that he had attended at work and worked 8 hours, although he was uncertain of the date when that happened. The respondent argued wages were not due because the claimant

was in receipt of furlough. The claimant accepted he had been furloughed by Eyekon, and paid by them until the end of July. There was however no evidence before the Tribunal regarding whether he had come off furlough in order to return to work.

40. The respondent produced no evidence to support their position that not only was the claimant on furlough but that he had been continuously paid furlough. I accordingly was satisfied that the claimant had been asked to return to work; he had done so; he had worked 8 hours and was entitled to be paid wages of £69.76.

Employment Judge: L Wiseman
Date of Judgment: 04 February 2022
Entered in register: 18 February 2022
and copied to parties