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EMPLOYMENT TRIBUNALS

Claimant: Mr A Murillo Gomez

Respondent: (1) Busy Bees Cleaning Services Limited
(2) Atlas Cleaning Limited

Heard at: East London Hearing Centre

On: 20 and 21 April 2022

Before: Employment Judge Elgot

Members: Ms A Berry
Ms G Forrest

Representation

Claimant: In person. The Claimant had the assistance of an interpreter in Spanish

Respondent: First Respondent – Mr D Charity, Consultant
Second Respondent – Mr P Chadwick, Solicitor (written submissions on 21 April 2022 on remedy only)

JUDGMENT

The Tribunal gave unanimous judgment as follows :-

- 1 The Second Respondent's response is DISMISSED under Rule 38 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 as a result of its failure to comply with an unless order made by Employment Judge Burgher on 7 July 2020. No application for set aside has been made. The Tribunal decided under Rule 21 that the Second Respondent was entitled to participate in the Hearing to the extent that it was permitted to make written submissions on remedy having seen the Joint Bundle of 215 pages and other available material. Those written submissions are dated 21 April 2022.
- 2 The Claimant's application dated 4 September 2020 to amend his claim and the agreed List of Issues to include a complaint that the Second Respondent has failed

to comply with the requirements of sections 188-188A Trade Union and Labour Relations (Consolidation) Act 1992 SUCCEEDS.

- 3 The last of the dismissals of the relevant employees as redundant in accordance with section 195 of the 1992 Act took place on 4 April 2019. The Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented during the initial three month time limit and that it is reasonable to extend time to 4 September 2020 when the application to amend and add this claim was formally made by the Claimant.

4 Unfair Dismissal

- 4.1. The complaint of unfair dismissal against the Second Respondent SUCCEEDS. We are satisfied that the Claimant's contract of employment transferred under Regulations 3 and 4 Transfer of Undertakings (Protection of Employment) Regulations 2006 (the TUPE Regulations) (as amended) to the Second Respondent on 15 March 2019. He was dismissed on 4 April 2019 for the principal reason of the transfer and this is automatically unfair under Regulation 7 of the TUPE Regulations.

He was not dismissed for the sole or principal reason of redundancy by either Respondent. The claim of unfair dismissal against the First Respondent DOES NOT SUCCEED.

There is no evidence that the Claimant objected to the transfer of his contract of employment from the First Respondent to the Second Respondent.

- 4.2. The compensation to which the Claimant is entitled is calculated as follows :-

Basic award

Weekly gross pay is £ 512.23

The multiplier is 7.5

The basic award is £ 3841.73

- 4.3. Compensatory award

The period of the compensatory award runs from the end of the 5 week notice period which is 9 May 2019 until 4 April 2020 (47 weeks)

We are satisfied that during this period the Claimant took reasonable steps to mitigate his losses which are:

Net weekly pay £407.70

Employer's pension contribution £10.24 per week

Employee's pension contribution £ 9.65 per week

Total weekly loss £ 427.59

£427.59 x 47 = £ 20,096.73

Less earnings during the same period from temporary and part time employment recorded on HMRC documents as follows:-

Estrada UK Cleaning Limited- £ 8652.75 in tax year 2019/20 giving an average weekly wage of £ 166.40 for 47 weeks from 9 May 2019 to 6 April 2020 = £7820.80

Mitie Limited- £ 2278.64 in tax year 2019/20 giving an average weekly wage of £43.82 for 47 weeks from 9 May 2019 to 6 April 2020 = £2059.54

Total Earnings in mitigation - 7820.80 + 2059.54 = £9880.34

Immediate Losses is £ 10,216.39 (20,096.73 less 9880.34)

Add Loss of statutory employment rights £500

TOTAL Compensatory Award £ 10,716.39

5 Notice Pay

The Claimant was dismissed by the Second Respondent without notice or pay in lieu of notice. His claim for damages for breach of contract (failure to pay notice pay) SUCCEEDS against the Second Respondent. The First Respondent is not liable to pay all or any part of these damages.

He is entitled to 5 weeks' notice pay and loss of employer's pension contribution.

£512.23 +£10.24=£522.47 x 5 = £ 2612.35

The total damages payable is **£ 2,612.35** payable by the Second Respondent.

6 Unpaid Wages

The Claimant is entitled to unpaid wages from the Second Respondent from the date of transfer until the date of his dismissal (20 days from 16 March 2019 until 4 April 2019 at a rate, calculated by reference to his annual salary, of £72.98 per day gross = £ 1459.60. payable by the Second Respondent.

Tax and national insurance may be deducted from this sum as appropriate.

7 Holiday Pay

The claim for holiday pay SUCCEEDS against the Second Respondent.

The liability to pay accrued and unpaid holiday pay in accordance with the Claimant's contract of employment transferred to the Second Respondent on 15 March 2019. On termination of the Claimant's employment on 4 April 2019 he was entitled to be paid outstanding holiday pay.

The amount is **£ 549.19** payable by the Second Respondent.

8 Failure to Inform and Consult under the TUPE Regulations 2006

- 8.1. The Tribunal DECLARES that both the First and Second Respondents have failed in their duty under TUPE Regulations 13-15 to inform and consult affected employees including the Claimant about the relevant transfer in this case.

- 8.2. Neither Respondent raises any special circumstances defence.
- 8.3. The First Respondent has conceded its failure under Regulation 14 of the TUPE Regulations to elect employee representatives. There was no independent recognised trade union at either Respondent.
- 8.4. The Tribunal does not consider it just and equitable having regard to the seriousness of the First Respondent's failure to comply with this duty to order it to pay any compensation to the affected employees.
- 8.5. The Second Respondent's failure of the duty to inform and consult affected employees is total. None of the required steps were taken and having regard to the seriousness of the Second Respondent's failure to comply it is ORDERED to pay compensation to the description of employees consisting of all those working at Brick Lane whose contracts of employment transferred to the Second Respondent during a series of transactions occurring between 11 and 15 March 2019 and who were affected by the transfer or measures taken in connection with it.
- 8.6. The amount of compensation is 13 weeks' pay for each employee within the description in paragraph 8.4 above. Those employees including the Claimant may make an application under Regulation 15 (10) in respect of any failure to pay.

9 Protective Award

The Tribunal finds and DECLARES in accordance with section 189 of the 1992 Act that there has been a failure of the Second Respondent to comply with sections 188-188A in relation to the description of employees actually dismissed or whom it was proposed to dismiss in accordance with the proposal of the Second Respondent to dismiss as redundant 20 or more employees at the establishment of Digitaslb Limited at 146 Brick Lane, London E1 6RU ('Brick Lane'). There was no recognised trade union at that establishment and no appointment or election of employee representatives took place under section 188 (1B).

- 10 The Claimant falls within this description of employees who are entitled to be paid remuneration at the rate of a week's pay for each week of the protected period as set out in section 190(2).
- 11 The failure of the Second Respondent to consult in relation to the redundancies was total. The protective period commences on 4 April 2019 and it is just and equitable in all the circumstances having regard to the seriousness of the Second Respondent's default to fix a protected period of the maximum of 90 days.
- 12 The Second Respondent has raised no special circumstances defence by reference to section 189(6) of the 1992 Act.
- 13 The Second Respondent is ordered to pay within 28 days the remuneration under the protective award to all employees including the Claimant who fall within the

description set out in paragraph 4 above. The said employees have a right under section 192 of the 1992 Act to make a separate complaint if there is a failure to pay.

14 The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to this protective award and there is an annex to this Judgment which gives directions to the Second Respondent in this respect.

15 Grand Total

The grand total of compensation payable by the Second Respondent to the Claimant within 28 days of the date on which this Judgment is sent to the parties is **£ 19,179.26**

(3841.73+10,716.39+2612.35+1459.60+549.19)

The Claimant may also, as an affected employee, present a further complaint under regulation 15(10) TUPE Regulations and/or section 192 of the 1992 Act if the compensation for failure to inform and consult about the transfer and/or the protective award is not paid to him by the Second Respondent.

16 Recoupment

The Employment Protection (Recoupment of Benefits) Regulations 1996 apply to the compensatory award as calculated in paragraph 4.3 above. This has been explained to the parties. The relevant information as required by the 1996 Recoupment Regulations is as follows :-

- i) Total monetary award £ 10,716.39
- ii) The amount of the prescribed element £ 10,716.39
- iii) The dates of the relevant period are 4 April 2019 until 6 April 2020
- iv) The amount by which the monetary award exceeds the prescribed element is nil.

Employment Judge Elgot

4 May 2022