EMPLOYMENT TRIBUNALS

Heard at: Southampton (by video) **On:** 5 & 6 December 2022

Claimant: Mrs Susan Perolls

Respondents: (1) AKS Forcort Limited

(2) Tankerford Limited

(3) JMN Retail Limited

Before: Employment Judge E Fowell

Representation:

Ms Courtney Step-Marsden of counsel, instructed by Thompsons Solicitors, for the claimant

Mr Carl Geary of counsel, instructed by Biscoes Solicitors, for the first and second Respondents

Mr Devon Shaw, Solicitor's representative, for the third respondent

JUDGMENT

1. The claimant was dismissed because of a relevant transfer, contrary to regulation 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, and so her dismissal was automatically unfair.

2. The dismissal was in breach of contract.

3. The claimant suffered an unlawful deduction from wages.

4. There was a failure to pay holiday pay to the claimant, contrary to regulation 13 Working Time Regulations 1998.

5. The dismissal took place on 19 June 2020. At the time of her dismissal the claimant was employed by the first respondent.

6. The service provision change in question took effect on 1 July 2020, at which point the third respondent inherited all of the duties and obligations in her contract of employment.

7. Accordingly, the third respondent is solely liable to the claimant in the sum of £29,242.10, comprising.

   (a) compensation for unfair dismissal in the sum of £21,846.44

   (b) unlawful deduction from wages in the sum of £1,694.20

   (c) breach of contract (notice pay) in the sum of £4,691.64

   (d) holiday pay of £1,009.82

8. NB. The award announced at the hearing has been varied under the slip rule for the reasons given at paragraph 52 below.

9. For the purposes of the recoupment provisions, the protected period was from 19 June 2020 to 18 March 2021. The amount awarded in the protected period was £9,811.46

10. The total amount awarded exceeded this sum by £19,430.64.

REASONS

Introduction

1. These written reasons are provided at the request of the third respondent following oral reasons given earlier today.

2. This case concerns a petrol station in Portsmouth, All Saints Service Station on Commercial Road. It is a BP garage, and Mrs Perolls worked there for many years. She started on 16 June 2003, so by the time her employment ended in June or July 2020 it had lasted for about 17 years. The business changed hands a number of times, but for the last ten years or so it was owned by a Mr Sreecumaar. He then sold it to the second respondent, Tankerford Limited, in March 2020, at around the time of the first lockdown.

3. Tankerford is owned by Mr and Mrs Nanthakumar. Mr Subramaniam Nanthakumar is the director, and the business model is to buy petrol stations and then let them out to others to run them. It has about nine petrol stations in all, but no employees.

4. One of these stations is in Guildford. It was being run by the first respondent, AKS Limited. The owner and director of AKS is Mr Kirupakaran Sithamparanathan. He agreed with Mr Nanthakumar to take over the running of All Saints as well, on the

same terms, and so AKS took over the existing staff from the beginning of April 2020. No one is disputing that this was a TUPE transfer, and that AKS then became Mrs Perrolls' employer.

5. Shortly afterwards, the effects of lockdown began to be felt. Mr Sithamparanathan decided to pull out of the agreement as there were no customers and he/AKS was not making any money. Mr Nanthakumar then arranged that another company would run the garage, the third respondent, JNM Retail Limited. JNM is owned by Mr Veerahaththipllai Jeagatheshcumar.

6. The dispute is essentially this: the first respondent, Mr Sithamparanathan/AKS says that Mrs Perolls' employment should have transferred to the third respondent, Mr Jeagatheshcumar/JMN, at that stage, but they would not agree to take her on. The only real question here is whether they were obliged to do so, applying the Transfer of Undertakings (Protection of Employment) Regulations 2006.

Legal Background

7. There are two types of transfer under the regulations. One is where a business changes hands, and the other where there is a "service provision change", where a contract is awarded to another company. It is clear that Tankerford owned the petrol station. They entered into contracts to run it, first with AKS, then with JNM, so this was not a case of them selling the business on to someone else; it was a service provision change, and that is the basis on which all parties approached the matter.

8. A service provision change is defined at regulation 3 as follows:

> (1) These Regulations apply to — …
>
> (b) a service provision change, that is a situation in which— …
>
> (ii) activities 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; …
>
> and in which the conditions set out in paragraph (3) are satisfied.
>
> (3) The conditions referred to in paragraph (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;…;

9. If there is such a service provision change then by regulation 4, her contract of employment

> "(1) … shall have effect after the transfer as if originally made between the person so employed [Mrs Perrolls] and the transferee [JNM]. …

10. So the new employer takes over the employees on the same terms. Further, at paragraph (2):

> "(a) all of the transferors 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 in relation to the transfer or 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."

11. These are sweeping provisions, and there is no requirement that the transferee is aware that it is a service provision change. It simply requires that there is a service provision change, and that immediately beforehand the employee was employed as part of an organised grouping of employees.

12. Regulation 11 sets out in detail the information which the outgoing contractor is required to provide about the staff to the new contractor, and regulation 13 provides an obligation on both of them to inform and consult with representatives. These provisions give rise to separate potential claims between the parties. The transferee can sue the transferor for failing to supply that employee liability information. But it does not follow that if the transferor ignores these requirements there is no service provision change. As Mr Geary submitted, that would defeat the whole purpose of the regulations. It would enable unscrupulous employers to conspire to ignore them. During the course of this hearing it was not clear to me on what basis the third respondent believed that there was no service provision change but it became clear during closing submissions that they relied on a mistaken belief that because the employee liability information was not provided, or because there was no real opportunity to inform and consult, they could not be liable. That is simply not the case. In fact, regulation 4 (2) makes clear that:

> 'A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.'

13. I also note that no claim has been brought by the third respondent against the other parties for failure to supply that employee liability information.

14. There is also a specific protection where an employee is dismissed because of the transfer. Clearly the outgoing contractor could also to try to get around TUPE by dismissing staff before the transfer, but that is prevented by regulation 7, which provides:

> (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated … as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

15. There is then an exception at paragraph (2) where

> "the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer."

16. Where there is such an economic, technical or organisational reason ("ETO reason") – perhaps because the new contractor operates in a different way, by using different methods or technology – it may then be possible to justify dismissal. Paragraph (3) goes on to make clear that even in those circumstances the normal requirements of fairness in section 98 of the Employment Rights Act 1996 still have to be complied with. But there is no need for me to go on to consider any such arguments because no such ETO reason was suggested at any stage.

17. It follows that if an employee is dismissed before the transfer, for an unconnected reason like gross misconduct, liability to pay compensation will *not* pass to the transferee. But if the employee is dismissed by either side because of the transfer – i.e. where the transfer is the sole or principal reason for dismissal – that is an automatically unfair dismissal under regulation 7, and liability will pass. Again, that seems not to have been appreciated by the third respondent who agreed that Mrs Perrolls was dismissed because of the transfer, and hence it was an automatically unfair dismissal.

18. In those circumstances, the end result is clear even without documenting the events in question, but I do so for completeness.

Procedure and evidence

19. I heard evidence from Mrs Perolls, Mr Sithamparanathan of AKS, Mr Nanthakumar of Tankerford, and Mr Jeagatheshcumar of JNM. His wife also provided a short statement, to support his evidence that they were not informed about any employees, but there were no questions for her. There was also a bundle of 210 pages.

Findings of Fact

20. Shortly after the first lockdown began, at the end of March 2020, Mrs Perrolls found out that AKS would be taking over the garage. Her outgoing employer, Mr Sreecumaar, told her about it and she met the new manager, Mr Sithamparanathan, on or about 1 April. He explained that not only did they need her to stay but her hours of work were increased from 40 per week to 45, then to 54. Her colleague

had left and she was the only remaining member of staff. She makes no complaint about the increase in hours.

21. It was a very quiet time. After a few weeks, on or about 13 May, she was told by a Mr Sithamparanathan that they would be closing for refurbishments. He expected this to last a week or two and asked her to use her holidays to cover that. The shutdown began on 20 May. From then on she was not receiving any pay. Understandably, over the next few weeks she began to send series of messages to Mr Sithamparanathan, asking when the site would open up again.

22. He had decided that he could not afford this new venture and had discussions with Mr Nanthakumar about pulling out. There was never any question of Tankerford taking over the operation itself, so this would need someone else to come in and run it. Fortunately Mr Nanthakumar knew Mr Jeagatheshcumar of JNM and contacted him about taking over.

23. In the meantime, Mrs Perrolls was kept in the dark. She spoke to Mr Sithamparanathan on the phone on 15 June, and he told her that the business would be taken over by someone called Raju, who would be in touch. He also asked her for a reference. This strongly suggests that the incoming manager, Mr Jeagatheshcumar (Raju), wanted to know if she was reliable before taking her on. Mr Sithamparanathan denied asking her for a reference but I am satisfied that he did, because she referred to it in her chasing messages at that time, and she then went back to her previous manager, Mr Sreecumaar, to get one. It is at page 148, dated 17 June, two days later. So, having provided that, Mrs Perrolls got in touch with Mr Jeagatheshcumar and arranged to come in and meet him on 19 June.

24. Given this reference, and the planned meeting, I am satisfied that Mr Jeagatheshcumar did know that she had been working there and he was not taken by surprise when he told her this. That is supported by the evidence of Mr Nanthakumar, which I accept, that he told Mr Jeagatheshcumar about her during their discussions. There would be no reason for him not to. The two men were friends at the time so he would have no wish to take advantage of Mr Jeagatheshcumar. They were also both very familiar with the normal operation of TUPE and would appreciate that this could expose him to a costly liability.

25. The fact that Mr Jeagatheshcumar was at the garage on 19 June also supports the evidence of Mr Nanthakumar that he was closely involved in the refurbishment. Mr Nanthakumar explained that retail is seen as an art, and that the manager of a store will generally want to have things organised their way, which he was happy to allow. Hence, Mr Jeagatheshcumar was involved in the business from soon after the refurbishment began.

26. The meeting did not go well and Mr Jeagatheshcumar was quite clear that he would be using his old staff so there was no place for her. (He had been operating another

garage with three established members of staff and proposed to use them all at All Saints.)

27. If Mr Jeagatheshcumar had genuinely been surprised to find out about Mrs Perrolls I would expect him to have immediately taken this up with Mr Sithamparanathan or Mr Nanthakumar to find out what was going on and why they had not told him. But none of them claim to have had any discussions of that sort.

28. After that meeting Mrs Perrolls went back to her car and called Mr Sithamparanathan. She wanted to know whether she was being dismissed. As far as she knew, Mr Sithamparanathan was still her manager. She says that he put the phone down on her. He denied this but it seems most likely in the circumstances. There was plenty of opportunity for him afterwards to confirm her position and explain that JMN were supposed to be taking over as her employer, but he did not do so. The next she heard from him was a text on 29 June to say that he had been under a lot of pressure and would get back to her as soon as possible.

29. Mrs Perrolls, by this stage very anxious, tried her best to communicate with all three of the respondent managers to find out what was going on. Mr Nanthakumar was also concerned. Again, all three of them knew how TUPE operates and there was an obvious problem here. It may have been expected that Mrs Perrolls was retiring shortly and so this would not become an issue, but clearly that was no longer correct. (She had in fact talked about retiring but when she looked into it she needed to carry on working for another couple of years.) So, Mr Nanthakumar urged Mr Sithamparanathan and Mr Jeagatheshcumar to sort something out between them. No doubt some discussions went on behind the scenes. They do not seem to have borne any fruit because on 1 July JNM signed the agreement with Tankerford to take over running the business. It is a contract entitled Retailers Agreement, and deals with good many things but there is no mention of employees or TUPE.

30. In the meantime, Mrs Perrolls had contacted her union, who had in turn contacted Mr Nanthakumar to find out what was going on about her employment. Given the evasive or negative responses from Mr Sithamparanathan and Mr Jeagatheshcumar, I can understand why he did so. She did not regard Mr Nanthakumar or Tankerford as her employer, but he had leverage with both contractors. He may have exercised it, because on 8 July Mr Sithamparanathan went to visit Mrs Perrolls at her house. Before doing so he popped into the garage and spoke to Mr Jeagatheshcumar. Perhaps he hoped that Mr Jeagatheshcumar would come with him. He did not, but he was happy for one of his members of staff to go. I can only interpret this as him sending along a representative of the company.

31. At that meeting Mr Sithamparanathan offered Mrs Perrolls a job at his other garage in Guildford. Again, that is consistent with Mr Nanthakumar telling them to sort something out for her. But Guildford was 40 miles away and Mrs Perrolls does not

drive so that was not remotely viable. There matters were left, with Mrs Perrolls simply out of a job.

32. On 6 July 2020, just before that last meeting at her house, Mr Sithamparanathan sent Mrs Perrolls her P45. It was backdated to 31 May. He explained at this hearing that he thought the transfer to JMN happened on 1 June and so he dated it the day before (an indication of the connection) but no real explanation was given for why he was providing a P45 at all. This was because JMN were refusing to take over the payroll, and under those circumstances it is illegal obligation. It follows that this was not an act of dismissal. AKS was no longer her employer by then, and no letter of dismissal was ever issued to her from AKS or JMN.

33. Mrs Perrolls was still not sure at the time that she had been dismissed and hoped for some further weeks that she might be reinstated. After that she began to look about for another job, in a petrol station, and which she could get to without driving. She had no luck and applied for Job Seekers Allowance, which she began to receive from 9 September 2020. The UK entered the second period of lockdown at about that time and in practise her job hunting efforts were limited to reviewing a list of vacancies supplied to her every fortnight by the Benefits Agency. Sometime after Christmas 2020 she gave up any active or independent efforts to find an alternative job. Her benefits lasted until 8 March 2021, after which she still had some savings left and made arrangements to start drawing her pension from May 2021.

34. I should add that JMN ended the Retailers Agreement on 18 January 2021. I heard no evidence about what happened to the petrol station from then on, but that ought to have resulted in a further service provision change and so that date does not bring an end to Mrs Perrolls' claim for losses. All Saints itself is still in business.

Conclusions

35. I conclude that the date of the dismissal was 19 June 2020, when Mrs Perrolls went into the garage and was told that her services were no longer required. That is open to the objection that Mr Jeagatheshcumar was not her employer by that date, even though he made clear that he would not be taking her on when he did take over. But she then telephoned Mr Sithamparanathan to clarify the position. In those circumstances, his action in refusing to answer and then putting the phone down on her can only be interpreted as confirmation of that decision. By this stage she had not been paid for the last month, since 20 May. The upshot of these exchanges was that she was out of a job. It is perfectly possible for a dismissal to be effected by conduct rather than by express words, and I find that this was the inescapable implication here.

36. From then on both Mr Sithamparanathan and Mr Jeagatheshcumar acted on the basis that for better or worse she had been dismissed from her employment by AKS. Hence there was a meeting on 8 July at her home to offer her alternative work for

them. Mr Sithamparanathan was well aware by then that AKS was no longer involved in running the garage.

37. However, that does not absolve JMN from liability. The only reason for dismissing Mrs Perrolls, insofar as any reason has been suggested, is that Mr Jeagatheshcumar was refusing to take her on. Hence, it was because of the transfer. As already noted, that was accepted by the third respondent. In all the circumstances therefore this was an automatically unfair dismissal for which liability must pass to JMN Retail Limited. It is important however to specify the date of the transfer, which was the date of the Retailer's Agreement, 1 July 2020.

38. No other reason was suggested as to why the regulations would not apply. JMN did not change anything when they took over. The petrol station ran just as before but with different staff. The service was not just fundamentally the same but exactly the same.

39. For the avoidance of doubt, regulation 3(6) TUPE provides that 'a relevant transfer may be effected by a series of two or more transactions'. There seems to be no reason to rely on that provision here since Tankerford contracted with AKS then JNM in succession, and in fact JNM were contacted specifically with a view to taking over from them. There may have been an interval in time during the refurbishment but that is not significant. The situation is similar to the leading case of **Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S** 1988 IRLR 315, ECJ. There, the lease of a restaurant/bar was terminated by the landlord, which then concluded a new lease with Daddy's Dance Hall. The transfer of the restaurant took place in two phases, rather than a single transfer, but that did not exclude the applicability of the Acquired Rights Directive, on which the TUPE regulations are based.

40. It remains to assess remedy. Mrs Perrolls is not seeking reinstatement or reengagement at All Saints, so this is limited to compensation.

Compensation

41. The starting point is that Mrs Perrolls has an obligation to mitigate her loss by making reasonable efforts to find another job, something suitable to her skills, experience and location. Secondly, it is for the employer to produce evidence if they wish to dispute that she has made the required efforts.

42. That does not mean that I ignore what Mrs Perrolls had to say about her efforts to find another job; her evidence is the starting point in deciding on the appropriate period of compensation. It is for the employer to persuade me that those efforts were inadequate, which is usually done with the production of job adverts to show that she could have got another job sooner, or at all. That has not been done.

43. I bear in mind that this was during the Covid period. During the summer of 2020 things opened up again, so for example she was able to go into the garage to talk to

Mr Jeagatheshcumar about being taken on, and so there was a period then when she could have done some job-seeking, but she had been left in a very uncertain position, half expecting that she might have her old job restored to her, and some allowance has to be made for that fact.

44. Allowance also has to be made for her age and the fact that she does not drive. In those circumstances it is not surprising that she was unsuccessful by 9 September, less than three months after she realised that her job was at risk, in finding a job, and that she signed on to Job Seekers Allowance.

45. Having done so, the Benefits Agency is very insistent on claimants taking steps to look for alternative employment. There is, for example, usually a diary to be kept of efforts to find a job and a number of steps to be done each day. It may be that during Covid those measures were relaxed, but that underlines the fact that job hunting was more difficult. Given that she was in regular contact with the Benefits Agency during that period, and that they were sending her lists of jobs, none of which appeared to be suitable, I accept that she was making reasonable efforts to mitigate her loss.

46. That period ended on 8 March 2021, when her entitlement to benefits ended. By then she had given up, as she frankly accepted, her efforts to look for alternative work, and it follows that from then on the third respondent cannot be liable to compensate her for her old wages, week after week. I also bear in mind that this was a job in retail, at national minimum wage rates, and that this was now about nine months since she lost her job. Some line has to be drawn, and it seems to me that 8 March 2021 is the appropriate date to end her entitlement to compensation.

47. Turning to the other elements of her claim, it does not seem to me appropriate to make any reduction on the basis that she began to draw her pension early. The basis of being allowed to do so is that it is drawn over a longer period but at a slightly reduced rate, with no overall reduction in the amount paid. The employer should get no credit for that. In any event she did not draw her pension by 8 March 2021.

48. A claim is made for an uplift for failure to comply with the ACAS Code of Practice. Such an uplift does not apply to a whistleblowing dismissal. In **Ikejiaku v British Institute of Technology Ltd** UKEAT/0243/19/VP the Employment Appeal Tribunal held that the disciplinary procedure aspects of the Code did not apply to a dismissal on the ground of a protected disclosure, as such a disclosure cannot properly be a ground for disciplinary action. The same principle appears to me to apply to an automatically unfair dismissal on TUPE grounds, or any case which does not actually involve any disciplinary proceedings. It was suggested that her various chasing messages amounted to a grievance, and so a grievance procedure should have been followed, but that was not suggested to any of the witnesses and in my view none of these messages do amount to a written grievance.

49. There is a claim for loss of statutory rights and - a point I canvassed - loss of long notice rights. On reflection however, these do not have any application in a case where the claimant did not get another job. In a more usual case, where the claimant does find other employment, it is to compensate for the fact that even if there is no pay difference, the new employment is in some respects worse than the old one: the claimant will need to work for two years to have any protection against unfair dismissal and will need to work for at least 12 years to have the same entitlement to notice that she previously enjoyed.

50. On that basis the relevant sums were agreed as follows:

(a)	Unlawful deduction from wages	£1,694.20
(b)	Wrongful dismissal	£4,691.64
(c)	Holiday pay	£1,009.82
(d)	Basic Award	£12,034.98
(e)	Compensatory Award	£7,913.78
(f)	Total	**£27,344.42**

51. In the course of finalising these reasons an error became apparent, which I correct under the slip rule. The calculation of compensatory award was reduced to reflect the benefit payments made to Mrs Perrolls, which amounted to £1,897.68. That sum should not have been deducted. Instead, the total loss of earnings should be included in the compensatory award. The figure of £1,897.68 may however be recouped from the total. Otherwise Mrs Perrolls would be at risk of this element being taken away twice.

52. The amended figures are therefore as follows:

(a)	Unlawful deduction from wages	£1,694.20
(b)	Wrongful dismissal	£4,691.64
(c)	Holiday pay	£1,009.82
(d)	Basic Award	£12,034.98
(e)	Compensatory Award	£9,811.46

53. The total amount due is therefore **£29,242.10**

Employment Judge Fowell
Date 06 December 2022

Judgment & reasons sent to the parties: 12 December 2022

FOR THE TRIBUNAL SERVICE