



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs Nicola Doyle

AND

Respondents

Mr David Longman (1)

Mr Adam Clay (2)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY

ON

15 December 2022

By Video Hearing service (VHS)

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant:

In person

For the First Respondent:

Mr Chehaly, Consultant

For the Second Respondent:

Mr Henry, Consultant

JUDGMENT

The judgment of the tribunal is that:

1. (As agreed by all parties) there was a relevant transfer under the TUPE Regulations of the claimant's employment from the first respondent to the second respondent on 6 April 2021; and
2. The effect of Regulation 4(2) is that all rights, powers, duties and liabilities under or in connection with the claimant's employment passed from the first respondent to the second respondent on that date; and
3. Accordingly the first respondent is dismissed from these proceedings; and
4. Under an ACAS COT3 agreement dated 21 September 2021 between the claimant and the second respondent all the claimant's claims against the second respondent have already been compromised; and
5. Accordingly the claimant's claims are also dismissed against the second respondent.

RESERVED REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not there was a relevant transfer of the claimant's employment under the TUPE Regulations; who is the correct respondent to these proceedings; and whether the claimant has already compromised her claims.
2. This has been a remote hearing on the papers which has been consented to by the parties. The form of remote hearing was by Video Hearing Service (VHS). A face-to-face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing. The documents to which I was referred to are in a bundle of 232 pages, the contents of which I have recorded.
3. I have heard from the claimant. I have heard from the first respondent Mr David Longman, and from his wife Mrs Karen Longman on his behalf. I have also heard from Mr Adam Clay the second respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The first respondent Mr David Longman is a publican based in Swindon. The first respondent ran the New Inn Pub at Swanborough in Swindon ("the Pub") from 4 September 2017. The first respondent employed the claimant as a General Assistant with effect from 25 November 2018. On 29 July 2019 the claimant was promoted from General Assistant to the Pub Manager with a live-in position. The parties agreed that a deduction would be made from her wages to cover the rent and bills for that accommodation.
5. In March 2020 the first respondent's premises closed because of the national Covid-19 lockdowns. The claimant continued to stay in the premises and was placed on furlough leave. In November 2020 the first respondent decided to close the business, and to hand the tenancy of the Pub back to the brewery. There was correspondence between the parties about a possible resignation by the claimant and the vacation of the premises, but the claimant was persuaded to stay.
6. The first respondent then had discussions with the second respondent Mr Adam Clay about the second respondent taking on the tenancy for the Pub. They reached agreement in March 2021 to the effect that the Pub and all relevant employees would be transferred over to the second respondent. There was then a relevant transfer of the Pub business and all employees, including the claimant, on 6 April 2021.
7. This preliminary hearing was listed firstly to determine whether or not there was a relevant transfer of the Pub business and the claimant's employment from the first respondent to the second respondent on 6 April 2021. All parties to these proceedings now agree that there was. That conclusion is consistent with the background facts. Accordingly, I conclude that there was a relevant transfer of the Pub business and the claimant's employment on 6 April 2021 from the first respondent to the second respondent.
8. Meanwhile the claimant had been concerned about how she had been treated, and on 20 March 2021 she issued these proceedings (under Tribunal reference 1401172/2021) against both Mr Longman as the first respondent, and Mr Clay as the second respondent. These proceedings claimed accrued but unpaid holiday pay, and unlawful deduction from wages, which related to the amounts and the manner in which the accommodation payments had been deducted from wages otherwise due, including furlough payments. This may have involved an alleged breach of the National Minimum Wage provisions
9. Following the transfer of the Pub, the second respondent then decided that he did not wish to have a live-in Pub Manager, and he terminated the claimant's employment by reason of redundancy. On 2 August 2021 the claimant then issued further Employee Tribunal proceedings against the second respondent only (Mr Adam Clay). These are referred to in this judgment as the Second Proceedings and were under Tribunal reference 1402735/2021, and the claimant's claims were for unfair dismissal, statutory redundancy payment, notice pay, holiday pay, and unlawful deduction from wages.
10. With the assistance of ACAS, the claimant and the second respondent Mr Clay then reached agreement to settle these Second Proceedings. On 21 September 2021 they

entered an ACAS COT3 Agreement (“the COT3 Agreement”). The terms of that COT3 Agreement included the following provisions: “1 ... The respondent shall, without admission of liability, pay to the claimant the sum of £1,170 in respect of redundancy, £780 in respect of notice pay and £2,811.54 in respect of holiday pay ... 3. The payment referred to in clause 1 above is in full and final settlement of all claims filed under Employment Tribunal claim number 1402735/2021 and all, if any, other claims which the claimant has or may have against the respondent whether arising out of or in connection with the claimant’s employment with the respondent or its termination”. Subclause 3.1 then defined “all claims” and this definition specifically included claims under the Employment Rights Act 1996, the Working Time Regulations 1998, the National Minimum Wage Act 1998, and the Transfer of Undertakings (Protection of Employment) Regulations 2006. The second respondent paid to the claimant the sums due under that COT3 Agreement.

11. The claimant now pursues these first proceedings against both respondents, and she claims loss of earnings during the furlough period, and “over payment of rent”, together with her solicitor’s fees, in respect of the period prior to the transfer and her dismissal. The claimant asserts that despite the COT3 Agreement the parties continued to negotiate behind the scenes and that she was expecting a further settlement sum in respect of the matters now claimed in her statement, or possibly in connection with a failure to consult. She says that she did not understand the effect of the COT3 agreement. She has not sought to argue that the COT3 Agreement is a nullity and/or to repay the sums received under it.
12. The first respondent’s position is that these sums are not due as claimed, but in any event the effect of the TUPE transfer has been to transfer all liability in connection with the claimant’s contract of employment to the second respondent.
13. The second respondent’s position is that it accepts that the TUPE transfer has indeed transferred all liability in connection with the claimant’s contract of employment to Mr Clay as second respondent, but the effect of the COT3 Agreement is that whatever claims the claimant may have, these have already been compromised and they should be dismissed.
14. Having established the above facts, I now apply the law.
15. The relevant regulations are the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“the Regulations”).
16. Regulation 3(1) provides that the Regulations apply to – (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity.
17. Regulation 3(2) provides that “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.
18. Regulation 4(1) provides that: Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
19. Regulation 4(2) provides that: Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer – (a) all the transferor’s 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 transferor in respect of that contract or a person assigned to the organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
20. Regulation 4(3) provides that: Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1)...

21. I have considered the following cases, namely: Spijkers v Gebroeders Benedik Abattoir CV 24/85 [1986] 2 CMLR 296; and Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 EAT.
22. Under section 203 of the Employment Rights Act 1996 any provision in an agreement which purports to contract out of the employment protection afforded by that Act, or from pursuing Employment Tribunal proceedings, will be void. There are three exceptions which are where an agreement is set out in the judgment of the Tribunal; where there is an ACAS conciliated agreement (usually completed on the COT3 form); or a settlement agreement (formerly known as a compromise agreement) which satisfy certain legal conditions including that the employee has received independent legal advice.
23. A business transfer pursuant to the wording of Regulation 3(1)(a) requires four key elements, namely that there is (i) a transfer to another person; (ii) that there is an identified economic entity that transfers; (iii) that the economic entity is situated in the UK immediately before the transfer; and (iv) that the economic entity retains its identity after the transfer.
24. These four elements were all in place in this case, and I find that there was a relevant transfer of the Pub business from the first respondent Mr Longman to the second respondent Mr Clay on 6 April 2021. All parties to these proceedings agree with that finding.
25. The effect of Regulation 4(2) is that all rights, powers, duties and liabilities under or in connection with the claimant's employment passed from the first respondent to the second respondent on 6 April 2021. Again, all of the parties to these proceedings agree that that was the effect of Regulation 4(2). That being the case the first respondent is not the correct respondent to these proceedings, and I therefore dismiss the first respondent from these proceedings.
26. The correct respondent to these first proceedings under reference 1401172/2021 is therefore the second respondent only, namely Mr Clay. The claim as currently presented is limited to unpaid holiday pay, and unlawful deduction from wages relating to the amounts and manner in which the accommodation payments were deducted from the claimant's wages otherwise due, including her furlough payments. This may have involved an alleged breach of the National Minimum Wage provisions. In her statement the claimant refers to loss of income, loss of income received from furlough, her overpayment on accommodation, and solicitors' fees. There is no mention of any claim relating to failure to consult in connection with the prospective transfer.
27. The question which now arises is the extent to which these claims under these first proceedings under reference 1401172/2021 have been compromised under the ACAS COT3 Agreement which settled and compromised the Second Proceedings under reference 140235/2021.
28. The claimant asserts that these claims have not been compromised either because there were continuing without prejudice negotiations and discussions with ACAS behind the scenes for further potential payments, and/or because she did not understand the effect of the COT3 Agreement.
29. In my judgment it is clear first of all that all and any claims which the claimant may have had in connection with her employment at the Pub became vested in the second respondent because of the relevant transfer on 6 April 2021, and the effect of Regulation 4(2). This conclusion is not disputed by any of the parties. The second respondent is therefore the correct respondent to any of the claimant's claims arising from her employment at the Pub, and the second respondent alone is in a position to seek to compromise those claims.
30. Secondly, in my judgment the terms of the COT3 Agreement are clear. Apart from paying approximately £4,000 to settle the specific claims mentioned under the Second Proceedings, that payment was also made in full and final settlement of all and any claims which the claimant may have had against the second respondent: "whether arising out of or in connection with the claimant's employment with the respondent or its termination".
31. Employees have statutory protection in the context of settlement agreements which will be void unless one of the exceptions is satisfied. In this case the relevant exception is an ACAS conciliated agreement which has been concluded under the COT3 Agreement. The claimant had access to advice and an explanation of the proposed terms from an

- independent ACAS officer before the COT3 Agreement was concluded, and which therefore afforded the claimant the relevant statutory protection.
32. I see no valid reason to conclude that the COT3 Agreement in this case was in any way ineffective. It set out to compromise the Second Proceedings together with all and any employment related claims which the claimant had against the second respondent. The second respondent paid the sums due under that Agreement.
 33. For these reasons I conclude that any and all employment claims which the claimant might have had against the second respondent have already been compromised by the COT3 Agreement, and they are all hereby dismissed.
 34. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 13; a concise identification of the relevant law is at paragraphs 15 to 23; how that law has been applied to those findings in order to decide the issues is at paragraphs 24 to 33.

Employment Judge N J Roper
Date: 15 December 2022

Judgment sent to Parties: 29 December 2022

FOR THE TRIBUNAL OFFICE