



EMPLOYMENT TRIBUNALS

Claimant: Ms L Sheppard
Mr R Locke
Mr P Worman
Mr G Yarwood

Respondent: 1. Whiting and Hammond Ltd (In liquidation)
2. WH Pubs Limited

OPEN PRELIMINARY HEARING

Heard at: London South Employment Tribunal (by CVP)

On: 27 and 28 February 2023

Before: Employment Judge Truscott KC

Representation:

For the Claimants: In person
For the First Respondent: Mr J Suresh for the liquidator
For the Second Respondent: Ms A Crush solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The principal claim was not presented with the support of an Early Conciliation certificate against the second respondent. The claims are dismissed as against the second respondent as the Tribunal has no jurisdiction to adjudicate the claims.
2. In any event, the employment of the claimants did not transfer from the first respondent to the second respondent by operation of Regulation 3 (1) (a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and this claim falls to be dismissed.
3. A case management hearing will be listed to address the continuing claim against the first respondent.

REASONS

Appearances and documents

1. The claimants represented themselves. The liquidator of the first respondent was represented by Mr Suresh and the second respondent was represented by Ms A Crush solicitor.
2. The administrative arrangements for this hearing were far from optimal but the efforts of the parties meant that the Tribunal was able to proceed with this hearing.
3. A case management hearing on 30 June 2022 identified the issues for this hearing: for each employee to determine as follows:
 1. Was there an undertaking, business or part of an undertaking or business situated immediately before the transfer in the UK?
 2. Was there an economic entity before the transfer? i.e. Was there an organised grouping of resources which has the objective of pursuing an economic activity?
 3. Has that economic entity retained its identity.
4. There was also an issue as to the validity of the claims against the second respondent because of the EC Certificate of the claimant.
5. The Tribunal had a bundle running to 115 pages to which additional documents were added during the hearing.
6. The Tribunal heard evidence from each of the claimants and Mr Whiting managing director of WHLBJ Limited.
7. The second respondent provided closing written submissions, supplemented orally and the claimants provided oral submissions, the essence of which was that they had been treated very unfairly.

Relevant findings of fact

1. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents referred to by them and taking into account the Tribunal's assessment of the witness evidence.
2. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in this judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. The Tribunal has not referred to every document it read and/or was taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant to an issue in the case.

3. The claimants worked for the first respondent, Whiting and Hammond Ltd, which operated a number of pubs. Some worked at the Head Office which is located in an outbuilding next to the Little Brown Jug in overall management roles while others worked in particular pubs.
4. In March 2020, all pubs were forced to close by Covid 19 Regulation. The employees were furloughed.
5. On 28 May 2020, the second respondent was incorporated.
6. On 26 June 2020, one of the first respondent's pubs, the Chaser Inn's 20 year lease came up for renewal. It was decided to renew the lease for The Chaser Inn into a different company "The Chaser Inn Ltd". All of the staff who worked at the Chaser Inn were transferred to that company.
7. On 4 July 2020, pubs were allowed to reopen under restrictions. The first respondent decided to reopen only three of the sites. In addition to the Chaser Inn which also re-opened. A separate company, Chaser Inn Ltd was formed on 31 July 2020 and operated the business.
8. On 6 August 2020, WHCRIC Ltd and WHRC Ltd were incorporated and on 7 August 2020, WHLBJ Ltd. was incorporated, all with the second respondent and Mr Whiting as director. Each pub obtained a Lease to Occupy from the first respondent and The Cricketers Inn was transferred to WHCRIC Ltd, The Little Brown Jug was transferred to WHLBJ Ltd and The Rose & Crown transferred to WHRC Ltd. The employees who worked at the respective sites were transferred to the respective new companies. A sample letter is provided dated 24 September 2020 transferring Gareth Nixon to WHLBJ Ltd although no heading is evident on the sample. The intention was for each pub to run itself as a separate entity rather than have one company running them. Each individual site used outsourced accounts and HR functions and had its own manager.
9. On 1 October 2020, the first respondent entered administration. The four sites which did not reopen were: The Mark Cross Inn, The Blue Ball. The Farm @ Friday Street, The Kings Head as well as Head Office.
10. The second respondent did not employ anyone or participate in any running of the individual sites although it administered the payroll for each site. Goodwill and assets were transferred from the first respondent to each of the respective new limited companies. There was no transfer of any economic entity from the first respondent to the second respondent. No assets, goodwill or staff transferred to the second respondent.
11. Mr Graham Yarwood was Head Chef at The Farm @ Friday Street which did not reopen. Mr Rob Locke was General Manager at The Kings Head which did not reopen. Ms Lisa Sheppard was assistant to the HR manager Terri Turner and ran the

payroll for the first respondent and the separate companies. Her function did not transfer to the second respondent and she was not assigned to any of the three economic entities (pubs) that transferred its business to new entities. Mr Paul Worman was Area Manager responsible for coordination and management between all eight sites of the first respondent. This function did not transfer anywhere and he was not assigned to any of the three economic entities (pubs) that transferred its business to new entities.

12. On 5 October 2020, Ms Sheppard received an EC Certificate naming the first respondent. On 29 October 2020, Ms Sheppard lodged an ET1 naming Brian Whiting and the first respondent as respondents, the other claimants were listed on the multiple schedule attached to the ET1. On 23 December 2020, Ms Sheppard received an EC Certificate naming the second respondent as a respondent. On 31 December 2020, Ms Sheppard wrote to the Tribunal requesting that the second respondent was added to her claim. On 17 May 2021, the Tribunal ordered that the claim be served on the second respondent. On 11 June 2021, the Tribunal accepted the response from the second respondent.

Law

The early conciliation certificate

13. The Employment Tribunals Act 1996 provides:

18A Requirement to contact ACAS before instituting proceedings

(1) Before a person (“the prospective claimant”) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.

This is subject to subsection (7).

(7) A person may institute relevant proceedings without complying with the requirement in subsection (1) in prescribed cases.

The cases that may be prescribed include (in particular)—

(a) cases where the requirement is complied with by another person instituting relevant proceedings relating to the same matter;

(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).

(12) Employment tribunal procedure regulations may (in particular) make provision—

(d) treating the requirement in subsection (1) as complied with, for the purposes of any provision extending the time limit for instituting relevant proceedings, by a person who is relieved of that requirement by virtue of subsection (7)(a).

14. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 provide:

Exemptions from early conciliation

3.—(1) A person (“A”) may institute relevant proceedings without complying with the requirement for early conciliation where—

(a) another person (“B”) has complied with that requirement in relation to the same dispute and A wishes to institute proceedings on the same claim form as B;

(b) A institutes those relevant proceedings on the same claim form as proceedings which are not relevant proceedings;

15. The claimant must obtain an early conciliation certificate before making a claim to the Tribunal. Only one certificate is required in respect of 'proceedings relating to any matter' in ETA 1996 s 18A(1) and any additional certificate issued by ACAS in relation to that same matter will have been issued outside the statutory scheme and have no relevance to the other statutory provisions relating to early conciliation (**Commissioners for HM Revenue & Customs v. Garau** [2017] ICR 1121 EAT and **E.On Control Solutions Ltd v. Caspall** UKEAT/0003/19 (19 July 2019, unreported) at [51]).

Adding a respondent to an existing claim

16. In **Patel v. Specsavers Optical Group Ltd** UKEAT/0286/18/JOJ, the EAT held that a claimant could not add a respondent to a tribunal claim where there was no EC certificate in respect of that respondent. This case emphasises that the Tribunal only has a discretion to add or substitute respondents under rule 34 ET Rules, which it may or may not choose to exercise, depending on the facts.

17. In **Pryce v. Baxterstorey Ltd** [2022] EAT 61, the Employment Appeal Tribunal held that providing an EC certificate after submission of the ET1 does not constitute re-representation of the claim form and does not rectify the defect. Here, Ms Pryce submitted her ET1 form, ticking the box that she did not have an EC number and, incorrectly, that she did not need an EC number. The same day she contacted ACAS and was advised that she did need an EC number. Four days later, ACAS issued an EC certificate and Ms Pryce emailed the tribunal, requesting that the EC number be added to her claim form. In error, the tribunal accepted the claim form. At a preliminary hearing, the judge noted that the claim had been presented at a time when there was no EC certificate and dismissed the claim. The EAT reluctantly upheld that decision. It held that inclusion of an EC number is a statutory requirement for submission of a claim and, without one, it should have been rejected immediately. Ms Pryce's email enclosing the ACAS certificate could not be considered as a re-representation of the claim, as rule 8(1) of the ET Rules requires a claim to be presented by sending a completed ET1, a requirement that cannot be waived.

18. The Tribunal considered **Mist v. Derby Community Health Services NHS Trust** [2016] ICR 543 EAT in order to see whether the rationale of that case might permit the addition of the second respondent but it did not appear to do so. There the claimant notified Acas of a potential claim against a second respondent, a second

certificate was issued, and an employment judge granted an application by the claimant, under rule 34 of the Employment Tribunals Rules of Procedure 2013, to amend the claim to join the second respondent as a respondent. The Employment Appeal Tribunal did not address the validity of the EC Certificate as against the second respondent.

19. In a multi-claimant case, the claim form does not need to have an EC number for each claimant, or even an EC number from each EC certificate (where there has been more than one EC certificate). Although rule 10(1)(b) requires the claim form to contain the name and address of "each" claimant and respondent, rule 10(1)(c) only requires it to contain "an" EC number. The EAT has held that it is sufficient that the claim form contains an EC number from a certificate on which the name of one of the prospective claimants appears (**Clark v. Sainsburys Supermarkets Ltd** [2022] EAT 143).

20. Where the claim is erroneously accepted by the tribunal in breach of rule 10 or 12, it remains incumbent on an employment judge considering the claim at a later stage to reject the claim under rule 12 as it was not validly presented (**E.ON Control Solutions Ltd v. Caspall** above).

Transfer of Undertaking

21. The Transfer of Undertakings (Protections of Employment) Regulations 2006 Reg 3 – A relevant transfer

(1) These 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;

and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation "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.

22. The definition of an 'economic entity' in regulation 3(2) of the 2006 Regulations is reflected in **Cheesman v. R Brewer Contracts Ltd** [2001] IRLR 144 EAT. In this case the Employment Appeal Tribunal reviewed some key European Court of Justice decisions and distilled from these a number of factors for determining in relation to TUPE 1981 whether there was an undertaking and, if so, whether it had transferred. The EAT held:

"(i) As to whether there is an undertaking ... an organised grouping of persons and assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective ...

(ii) ... such an undertaking ... must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible;

(iii) in certain sectors, such as cleaning and surveillance, the assets are often reduced to their most basic and the activities are essentially based on manpower;

- (iv) an organised grouping of wage-earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity;
- (v) an activity of itself is not an entity; the identity of an entity emerges from other factors, such as its workforce, management style, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it."

23. As to the question of whether there had been a transfer, the following factors were highlighted by the EAT in **Cheesman**:

- "(i) ... the decisive criteria for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated ... by the fact that its operation is actually continued or resumed; ...
- (iii) in considering whether the conditions for ... a transfer are met, it is necessary to consider all the factors characterising the transaction in question, but each as a single factor and none is to be considered in isolation;
- (iv) amongst the matters ... for consideration, are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended;
- (v) account has to be taken ... of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on;
- (vi) where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction ... cannot logically depend on the transfer of such assets;
- (vii) even where the assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer; ...
- (x) the absence of any contractual link between the transferor and transferee may be evidence that there has been no relevant transfer, but it is certainly not conclusive as there is no need for any direct contractual relationship;
- (xi) when no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer."

24. This guidance was approved by the Court of Appeal in **McCarrick v. Hunter** [2013] ICR 235 CA.

25. Regulation 4(1) provides that the transfer of the undertaking does not, of itself, terminate the contract of employment of an employee who is 'assigned' to the organised grouping of resources or employees that is the subject of the relevant transfer. Assigned means assigned 'other than on a temporary basis' (Regulation 2(1))

26. In **Duncan Webb Offset (Maidstone) Ltd v. Cooper & others** [1995] IRLR 633 EAT, the Employment Appeal Tribunal acknowledged that an employee could be treated as being assigned to a particular undertaking (or part) if they predominantly work in it, even though their employer may technically (and legally) be another firm or company.

Analysis and decision

Early Conciliation Certificate

27. There is a valid EC Certificate by Ms Sheppard against the first respondent which includes the claims by the other claimants. The Tribunal had to consider whether there was a valid claim against the second respondent. The email from Ms Sheppard to the Tribunal to add the second respondent mentions 'my claim' and her claim number alone but does not mention the other claimants. The email is not copied to the other parties which was a feature of this case throughout. The Tribunal did not at any stage address the issue of whether or not to allow the amendment, so there was no application of the relevant legal principles.

28. The sequence of events here does not comply with the exception under 18A (7), exemption (a) does not apply as the claimants did not seek to commence any proceedings after the EC Certificate was issued, exemption (b) does not apply as no claim was issued after the EC certificate was issued and it does not refer to past claims issued against other parties.

29. The Tribunal concluded that the Early Conciliation requirements had not been complied with by Ms Sheppard and the other claimants as against the second respondent. As has been said in other cases considering these provisions, their application can bring about injustice. These claimants received little information about what had taken place from the first respondent and, as they represented themselves, were left to their own devices as to compliance with the EC requirements. The Tribunal considered whether it might address the question of amendment or extend any relevant time limit but concluded that it could not do so at this late stage in proceedings. In order to consider the extent of the injustice suffered by the claimants because of this finding, the Tribunal proceeded to address the TUPE issue.

Transfer of undertakings

30. There is no dispute that the first respondent constituted an economic entity as a business running a number of pubs. The claimants were either assigned to a specific pub or the Head office which was in an outbuilding at the Little Brown Jug.

31. Broadly, the claimants' position is that they were taken over by the second respondent but the second respondent operates as a holding company for four of the eight pubs previously run by the first respondent which are now run through its own limited company. None of those companies are parties in these proceedings although, even if they had been, the outcome would have been no different.

Mr Locke and Mr Yarwood

32. Mr Locke usually worked at the Kings Head in Sevenoaks but worked on a temporary basis at the Cricketers, the Rose and Crown and the Little Brown Jug for eight weeks from 4 July to 6 September. Mr Locke agreed in his evidence that he fully

expected to return to the Kings Head had it re-opened. Mr Locke assisted the administrator.

33. Mr Yarwood usually worked at the Farm @ Friday Street in Eastbourne. When some of the pubs opened, he worked at Rose and Crown in Orpington from 13 July to 27 September 60 miles away from his usual pub. Mr Yarwood covered annual leave for the Sous and Head Chefs, but he still identified with 'his' pub, the Farm, as on 2 October in his text he is saying 'we are not opening again'. Mr Yarwood agreed in his evidence that he fully expected to return to The Farm @ Friday Street had it re-opened.

34. Mr Yarwood and Mr Locke claim they should have transferred to WH Pubs Ltd. They assisted at other pubs for a period of two or so months. They did not perform their contracted roles of head chef or General Manager. They would have returned to their 'home' pub if it had re-opened. Their principal places of work were still the pubs at which they were originally employed. It was there they would have returned to duty full time had the pubs reopened. There must be a greater association with the other business than their usual one and there was not. As such, the claimants were not assigned to the parts of the business being transferred, but only worked there on a temporary assignment, as such, TUPE will not apply to transfer the employment of Mr Locke or Mr Yarwood. Even if they had, it would not have been to the second respondent.

Ms Sheppard and Mr Worman

35. Ms Sheppard and Mr Worman held positions in Head Office and worked across the whole business of the first respondent. They continued to work in this way up until the administration. Ms Sheppard ran the payroll for the first respondent and the separate companies. Mr Worman supported the open sites. Ms Sheppard's and Mr Worman's employment did not transfer to the second respondent.

36. The Tribunal considered to what entity any the claimants might have been assigned to. There must be a greater association with the other business than their usual one. The claimants were not assigned to the second respondent.

37. The claims continue against the first respondent and the Tribunal will fix a case management hearing in order to further address the claims.

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EMPLOYMENT JUDGE TRUSCOTT KC

Date 08 March 2023

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