



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
MRS J ADAMS

AND

Respondent
FABPOST LTD

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 7TH / 8TH AUGUST 2023

EMPLOYMENT JUDGE MR P CADNEY
(SITTING ALONE)

MEMBERS:

APPEARANCES:-

FOR THE CLAIMANT:- MS J LINFORD (COUNSEL)

FOR THE RESPONDENT:- MS S YOUNIS (SOLICITOR)

JUDGMENT

The judgment of the tribunal is that:-

1. There was a transfer from the respondent within the meaning of the TUPE Regulations 2006 of the business being operated by it from 10 The Street Bibury.
2. By reason of the application of TUPE Regulations 2006 the claimant's employment transferred to the transferee.
3. By reason of the application of the TUPE Regulations 2006 liability for the claimant's claims of unfair dismissal, wrongful dismissal and a redundancy payment transferred to the transferee.
4. The claimant's claims of:
 - i) Unfair Dismissal;

- ii) Wrongful Dismissal
- iii) Redundancy Payment

against the respondent are dismissed.

Reasons

1. By this claim the claimant brings claims of unfair dismissal, wrongful dismissal, the failure to pay a redundancy payment, and the failure to make a bonus payment (although this is not pursued as a free standing claim but as part of the remedy for unfair dismissal in the event that that claim succeeds).
2. The tribunal has heard evidence from the claimant, and Mr Richard Williams on behalf of the respondent; and considered a bundle of 72 pages, together with a number of documents that were supplied during the hearing itself.
3. This is an unusual case in which the central dispute concerns the application of the TUPE regulations, and whether there was a TUPE transfer, but in which not all the potential parties are parties to the claim. If there was a TUPE transfer, which the respondent asserts but the claimant disputes, the respondent was the transferor. However, neither party at any stage in the litigation has sought to join the alleged transferee (which may be Sir Christopher Evans and/or Lady Ann Evans and/or Number Eleven Bibury Ltd), or to call them to give evidence, and no application was made by either party to me to adjourn this hearing in order to do so. Why neither party sought to do so I do not know given the potential ramifications, but I have to determine the case as it is presented before me.
4. As a result I do not therefore know whether, whichever would be correctly identified as the potential transferee, it or they would accept or dispute the fact of a TUPE transfer, and/or whether the claimant's employment transferred, and/or whether it or they accept that the claimant was dismissed in connection with the transfer, and if so whether it or they would have advanced an ETO reason to contend that any such dismissal was fair.
5. It follows that insofar as I have made findings of fact in respect of the involvement of the potential transferees, they are based solely on the evidence before me from the claimant and respondent. For convenience sake I will refer to them in this judgement as "the transferee", although it is not clear whether in fact if all or any were joined as parties to the claim which would be correctly identified as the transferee in the event that I conclude that there had been a TUPE transfer.

Background Facts

6. The respondent company owned the freehold of 10 The Street, Bibury, which it operated as a shop and Post Office, until 4th August 2022. The claimant was employed by the respondent as a post office assistant/shop assistant working three days a week. She had been employed by the respondent's predecessor from June 1996. In 2003/ 2004 the village shop was purchased by the then owner of the Post Office and integrated into one business. The respondent company purchased the business in October 2008 and as a result of a TUPE transfer the claimant's employment transferred to it.
7. In or about 2021 Sir Christopher and Lady Anne Evans purchased 11 The Street, the property next door to the Post Office/ shop. It had been and continued to operate as a tea room/coffee shop via a limited company, Number Eleven Bibury Ltd, the manager being Ms Amii Taylor.
8. In the early part of 2022 discussions began between them and Mr. Williams on behalf of the respondent as to the potential for them to purchase number 10. The discussions were somewhat protracted but by a point in July 2022 an agreement had been reached, and on the 4th August 2022 the parties exchanged and completed on the sale of the freehold of No 10 The Street. The evidence of Mr. Williams, which I accept, is that Sir Christopher Evans purchased the freehold of the shop and in addition paid some £12,000 for the stock of the shop. There was no payment for the stock of the Post Office which at all times remained the property of the Post Office. The respondent was permitted to carry on trading from the shop and Post Office until the 12th August 2022. On that day the respondent ceased trading. It has since applied for a voluntary strike off from the register which is suspended following an objection lodged by the claimant.
9. The circumstances leading to the dismissal of the claimant are as follows. It is not in dispute that during the discussions in the early part of 2022 between Mr Williams and Sir Christopher Evans, the claimant did not commit herself to continuing to work in the shop/ Post Office if it were purchased by the transferee. The respondent's evidence is that there was a degree of ill feeling between the claimant and Lady Ann Evans which led the claimant to be reluctant to transfer. However the claimant's evidence is that on or about the 29th June 2022 she told Mr. Williams verbally that she was intending to transfer. Whether that is correct or incorrect, and whatever the position as to any earlier reluctance, following a discussion on the 22nd July 2022 between the claimant and Mr Williams she confirmed in writing that she intended to transfer. There is no dispute therefore that at a point, which all parties agree was and prior to the purchase, and therefore prior to any transfer the claimant had indicated that she intended to transfer, and therefore necessarily had no objection to doing so.
10. By an undated e-mail, which Mr. Williams gave evidence was sent on the 8th August 2022 following his return from holiday, he informed Ms Taylor that the claimant did want to transfer to the employment of the transferee. Ms Taylor replied on the 10th August 2022 stating that this came as something of a shock as the claimant had resisted transferring throughout the process, and that this was not part of their plans,

particularly given that they intended to close the property for some five months for refurbishment.

11. At some point thereafter Mr Williams received a message from Ms Taylor stating that Lady Anne Evans would like him to dismiss the claimant. On 12th August 2022 the claimant was informed that this would be the last day of trading, and that at the close of business she should lock all of the Post Office property in the safe, and put her keys back through the letterbox. On the 17th August Mr. Williams wrote: *“Dear Julie I hope you're enjoying your time off. It transpires that the new owners of the business are correct in that you were too late in applying to continue with your employment with them under TUPE therefore your employment will be terminated at the end of this month. It's unfortunate but I personally think that a fresh start might be better for you especially considering your strong feelings regarding lady Anne thanks very much again for all your work over the years and I hope your content with the package that I have offered.”* In consequence the claimant's employment ended on 31st August 2022.
12. The reference to the package is a reference in part to an offer made by the respondent to pay the claimant a bonus payment reflecting her years of service with them. It is not in dispute that this has not been paid.
13. The evidence before me as to what happened thereafter is that, firstly it is not in dispute that the Post Office has remained shut since 12th August 2022, and Mr Williams remains technically the Postmaster. An application has been made by Ms Taylor to become the Postmaster, which has not yet been resolved. The premises are currently shut for refurbishment and the intention is, subject to her being appointed, for the Post Office to re-open following refurbishment with Ms Taylor as the Postmaster.
14. Similarly it is not in dispute that after some time following the closure, the claimant's evidence is a couple of weeks, the shop re-opened. The claimant's evidence is that although she does not live in the village she has been informed it has only been open intermittently. Mr Williams' evidence is that it has been open and has only shut for two periods in February 2023, firstly for electrical work and secondly for the removal of asbestos. It is currently shut for the complete refurbishment of the premises. .
15. In respect of the refurbishment an application for planning permission was made in May 2022 by the purchasers part of which described keeping both the shop and Post Office as going concerns. In my judgement it is clear that it was at least at that point, the intention of the purchasers to continue to operate both the shop and Post Office following refurbishment. As set out above I have no evidence from the purchasers / transferees as to why, but as a matter of fact the refurbishment which was intended to take place immediately following the sale has been delayed by at least a year.

Unfair Dismissal

16. The central dispute in relation to the claim for unfair dismissal is whether the claimant's employment transferred to the transferee. The respondent contends that it

did and that she was subsequently dismissed by the transferee, or that at the very least ability for the dismissal transferred to the transferee. The claimant contends that there was no transfer and/or if there was that her employment did not transfer and/or that in any event liability for her dismissal remains with the respondent.

TUPE Regulations 2006

17. The liability of the respondent depends upon the effect of the TUPE Regulations 2006. The relevant Regulations are set out below.:

A relevant transfer

3. —(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

(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.

Effect of relevant transfer on contracts of employment

4. —(1) *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.*

(2) 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;

(3) 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), including, where the transfer is effected

by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

Dismissal of employee because of relevant transfer

7. —(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

18. There are therefore a number of issues to be determined:

- i) Whether there was a transfer within the meaning of Reg 3(1);
- ii) If so whether the claimant was assigned to the undertaking immediately prior to the transfer;
- iii) Whether the claimant's employment transferred;
- iv) Whether the claimant was dismissed (and if so by whom) in connection with the transfer;
- v) Whether the dismissal was unfair;
- vi) If so did liability pass to the transferee.

Transfer

19. The fundamental question is whether there has been “*a transfer of an economic entity which retains its identity*” (Reg 3(1)(a)). Both parties have referred in the written submissions to the *Spijkers* test (*Spijkers v Gebroeders Benedik Abattoir CV [1986] 2 CMLR 296*); and to the well-known guidance in *Cheesman* (*Cheesman v R Brewer Contracts Ltd [2001] IRLR 144.*)

20. The ECJ held in *Spijkers*:

"It is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activity."

In addition, in order to decide whether such retention of identity has occurred, 'it is necessary to take account of all the factual circumstances of the transaction in question', including:

- *the type of business or undertaking*
- *the transfer or otherwise of tangible assets such as buildings and stocks*
- *the value of intangible assets at the date of transfer*
- *whether the majority of the staff are taken over by the new employer*
- *the transfer or otherwise of customers*
- *the degree of similarity of activities before and after the transfer, and*
- *the duration of any interruption in these activities.*

21. In Cheesman the EAT held (I have only set out the factors relevant to this case) :

- *the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, among other things, by the fact that its operation is actually continued or resumed;*
- *in determining whether the conditions for the existence of a transfer are met, it is necessary to consider all the factors characterising the transaction in question, but each is a single factor and none is to be considered in isolation;*
- *among the matters falling 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 were suspended;*
- *in determining whether there has been a transfer, account must be taken of, among other things, 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;*
-

when no employees are transferred, the reasons why that is the case can be relevant as to whether there was a transfer; and

- *the fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of work by one subcontractor and the start of work by the successor.*

Claimant's Submissions

22. The claimant contends that there was no transfer firstly because the identity of the employer did not in fact change. She asserts that she remained employed by the respondent and that the respondent, or at least Mr Williams, remained responsible for the Post Office in that he remained and is still the designated Post Master and will be until the purchasers are able to secure the appointment of Ms Taylor as the Post Master.
23. This is a contention that I find difficult to follow. Mr Williams was not challenged as to the fact of the sale of the freehold of No 10, nor the sale of the stock of the shop, nor that he had not, since the respondent ceased trading on 12th August 2022, played any part in operating or decision making in respect of the shop/Post Office. Fundamentally his evidence, that since 12th August 2022 the respondent company has both ceased to trade as the shop/Post Office from No 10, The Street, and in fact ceased to trade completely is not challenged. Even if it were, I accept that evidence and accept that the respondent ceased to trade from 12th August 2022.
24. The second submission is that there was no transfer because the economic entity did not retain its identity post transfer. Prior to the transfer the business being operated from no10 The Street was a combined shop/Post Office. Since 12th August 2022, on any analysis the only business being conducted from No 10 is the shop. It is more than a year since the sale and the Post Office has not re-opened. A combined shop/Post Office is not the same entity as a shop, even if the shop business has essentially remained the same.
25. In respect of the respondent's submission that the closure of the Post Office was just a temporary cessation, the claimant submits that it has not been open for a year and there is no indication or evidence as to when it will open, and that a cessation for that period is simply too long to be regarded as temporary.

Respondent's Submissions

26. The respondent essentially contends that the distinction between the shop and Post Office is artificial, and that the Post Office was "integrated" into the shop. This is demonstrated by the claimant's employment itself, which meant that she had to serve customers of the shop or Post Office at any point as the case may be. Mr Williams evidence is that the shop occupied about ninety percent of the customer base and income. The claimant did not dispute that the majority of the work was related to the

shop. It follows that the essential nature of the business did not change simply because the Post Office part of the shop was not open. On this analysis the economic entity was a single undertaking which offered a number of different services to the public, of the sale of goods and Post Office Services.

27. The respondent submits in addition that even if the two elements of shop/Post Office are to be considered separately that all that has occurred is the temporary cessation of the activity in relation to the Post Office. It appears from Ms Taylor's communication with Mr Williams that the original intention was to shut the premises completely for refurbishment for some five months before re-opening both the shop and Post Office. For reasons about which I have no evidence, a decision was clearly made not to shut completely at that point, but to keep the shop open and only close the Post Office, and the complete closure for refurbishment has only happened recently. In support of the proposition that a temporary cessation of business does not in and of itself mean that a transfer cannot take place it relies on *Colino Siguenza v Ayuntamiento de Valladolid*; and *Mustafa v Trek Highway Services Ltd*.

Conclusions

Economic Entity

28. An economic entity is defined by regulation 3 (2) as an organised grouping of resources which has the objective of pursuing an economic activity whether or not that activity is central or ancillary.
29. The Spijkers/Cheesman questions are set out above. In this case in my judgement there clearly was an economic entity prior to sale insofar as there were shop premises whose purpose was sale of goods, and also the provision of post office services. Both parties agree that the Post Office was integrated into the shop. There were four employees of the respondent, Mr Williams, his wife Dorothy Williams, the claimant who worked three days a week, and Ms Sarah French at who worked at the weekends. In my judgement this is self-evidently an economic entity.
30. The real issue is whether the economic entity retained its identity post transfer. The evidence before me is that at the time of the planning application in May 2022 the transferee intended a significant refurbishment of the premises which would require them to be shut for some time. This is also reflected in the message sent by Ms Taylor to Mr. Williams in August 2022 that they intended to shut for some five months to carry out the refurbishment. However the evidence is that that did not occur. Both parties agree that the Post Office closed after the 12th August 2022 and has never reopened. Ms Taylor has applied to be appointed as the post mistress and has been assisted to an extent by Mr. Williams. His evidence is that it is an extremely lengthy process and can take six months to a year. In respect of the shop the evidence is that it did not immediately reopen after 12th August 2002 but did so a couple of weeks later. The evidence of Mr Williams, which I accept is that his effectively remained open ever since apart from 2 periods in February 2023 when it was closed firstly for some electrical works, and secondly for the removal of asbestos, and more recently because it has been shut for the substantial refurbishment works to be carried out.

The claimant has no direct evidence but says she has been informed by friends in the village that the shop has been intermittently open during this period.

31. Applying the Spijkers /Cheesman questions, in my judgement the following facts tend to demonstrate a transfer:

- i) The type of business is broadly similar reflecting the intention of transferees to continue to operate the shop / Post Office post purchase;
- ii) The tangible assets of the premises and stock of the shop were transferred;
- iii) The shop has continued to trade following a relatively brief interruption.

32. The only significant factors mitigating against the conclusion that there was a transfer are:

- i) None of the employees transferred;
- ii) The Post Office has not re-opened.

33. Looked at overall I have to balance the competing factors and apply the Spijkers test : *"It is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activity"*

34. Of the factors potentially indicating that there was not a transfer I bear in mind that the failure of the employees to transfer is not itself determinative, but the reason for the failure to do so may be weighed in the balance. I have no direct evidence, but on the basis of the message from Ms Taylor to Mr Williams, there are two specific reasons given in the case of the claimant; and it also appears that it was intended that Ms Taylor take over Mr Williams role. In my judgement whilst this may have given any potential transferee an ETO defence, it does not in and of itself affect the question of whether there was a transfer. I also accept the respondents submission that the fact that the Post Office has not re-opened does not fundamentally alter the nature of the business being conducted from the premises.

35. In my judgement it is clear that at very least the economic entity is still in existence, given that its operation is actually being continued with at least a similar activity, even if the absence of the Post Office means that the economic entity is not identical to that pre-transfer. It follows that there was in my judgement a transfer within the meaning of the TUPE regulations.

Date of Transfer

36. The second question is, if there was a transfer, when it took place, given that the sale took place on 4th August and the respondent did not cease trading until 12th August

2022. In my judgement this is not fatal to the fact of there being transfer. The most logical analysis, in my view, is that the transfer took place on 4th August 2022 but that as the transferee did not intend to trade immediately that it permitted the respondent carry on trading for a relatively short period until 12th August 2022. This conclusion is bolstered by the fact that during this period Mr Williams received an instruction from Lady Anne Evans to dismiss the claimant, which necessarily presupposes that the transfer had occurred by that point.

37. It follows that in my judgement there was a TUPE transfer which occurred on 4th August 2022.
38. If I am wrong about that the transfer must have occurred on the 12th August 2022 when the respondent ceased trading from the premises. As is set out below the issue is somewhat academic as on any analysis the claimant was employed by the respondent on the 4th August 2022, if that is when the transfer occurred, or 12th August if it occurred at that point.

Was the claimant was assigned to the undertaking immediately prior to the transfer?

39. In respect of this question Regulation 4(3) provides that references to an individual assigned to the organised grouping of resources or employees subject to the relevant transfer is a reference to a person so employed immediately before the transfer. There is no dispute that the claimant was employed by the respondent on 4th August 2012 (and on 12th August 2022 if I had held that the transfer had occurred on that day when the respondent ceased trading from the premises).
40. In my judgement it follows automatically that the claimant was assigned to the undertaking immediately prior to the transfer.

Did the claimant's employment transfer?

41. The effect of regulation 4(1) is to preserve the fact of and the terms of the employment contract as between the employee and the transferee. It appears to me again to follow automatically that the claimant's employment transferred to the transferee on 4th August 2022, or at the latest on 12th August 2022.

Dismissal

42. It equally follows that at the date on which she was given written notice, 17th August 2022, that the claimant was an employee of the transferee and remained so until the end of her notice period on 31st August 2022.

Unfair Dismissal

43. On the face of the message received from Ms Taylor it is clear that the claimant was dismissed for a reason connected with the transfer, as the transferee expressly determined (although the legal basis for this conclusion is not at all clear) that her expression of agreement to transfer was too late as it had not been made or

communicated more than 28 days prior the transfer; and also that they intended to shut the premises for refurbishment.

44. It is possible that had the transferee been joined as parties they might have been able to show an ETO reason rendering any dismissal fair. However here is no such assertion or evidence before me and it follows that the dismissal is automatically unfair as it falls with Reg 7(1)(a).

Liability

45. The ordinary effect of Reg 4(2)(a) would be that any liability flowing from the claimant's dismissal would transfer to the transferee. Indeed on the basis of my findings the claimant was in fact dismissed by the transferee in any event.
46. However the claimant submits that the transferor can remain liable and relies on *Greater Glasgow Health Board v Neilson* in support of that contention. However in my judgement that submission does not assist the claimant in the circumstances of this case. It is not necessary to set out the facts but the relevant points are set out in the judgment of Lord Fairlie :

43. Unnecessary complexity has been added to this case by the Claimant's erroneous approach to the issue of allocation of liability for a dismissal that is automatically unfair by virtue of Regulation 7(1) of TUPE. That approach, in turn, led the Tribunal into error.

*44. Specifically, there was a failure by the Tribunal properly to apply Regulation 4 of TUPE in determining which party bore the liability for an automatically unfair dismissal in terms of Regulation 7(1). As was made clear by the House of Lords in **Litster** and by the Inner House of the Court of Session in **Allan**, where Regulation 4(1) of TUPE applies, all of the transferor's liabilities, whether accrued or continuing, pass to the transferee and the transferor is no longer subject to any of those liabilities. These principles are also apparent in the clear words of Regulation 4(2) and (3). As Mr Hay correctly submitted, there can be cases where a dismissal is automatically unfair under Regulation 7(1), but Regulation 4(1) is not engaged. One such situation would be where the Claimant was not "assigned" to the relevant organised grouping of resources or employees. In that situation, the combined effect of Regulation 4(1) and Regulation 7(4) would be to leave liability for the unfair dismissal with the transferor. Another possible exception is seen within the opening words of Regulation 4(1), which deal with the issue of employee objection to the transfer under Regulation 4(7).(My underlining)*

45. In this case, however, the Claimant's position was that he was assigned to the relevant organised grouping which transferred, that his dismissal was by reason of the transfer and that it was automatically unfair in terms of Regulation 7(1). The latter two points were determined - at least against the Appellant - by its concession of 6 June 2018 and were reflected in the Tribunal's subsequent Judgment of 3 September 2018. Assignment, however, remained a contested issue at the hearing on 3 and 4 October 2019.

46. *In its Reasons of 20 January 2020, the Tribunal concluded that Claimant was “assigned” to the relevant organised grouping in terms of Regulations 2(1) and 4(1). Having come to that conclusion, there was no basis in law on which the Tribunal could properly have made any further remedies order against the Appellant in respect of the unfair dismissal of the Claimant. The inevitable consequence of the conclusion on assignment, applying Regulation 4(1) to (3) of TUPE, and the dicta in Litster, and Allan was that sole liability for the unfair dismissal of the Claimant passed to the LP as the transferee. Had the Tribunal found instead that the Claimant was not assigned to the relevant grouping, liability for the consequences of the unfair dismissal would simply have remained with the Appellant in terms of Regulations 4(1) and 7(4) of TUPE.*
47. The underlined passage above reflects the fact that Regulation 7(1) can render the dismissal of any employee dismissed by reason of the transfer unfair (subject to an ETO defence). That may include employees who do not transfer, in respect of whom liability will remain with the transferor. However, where there is a finding that there has been a transfer, and that the claimant’s employment transferred, “*The inevitable consequence of the conclusion on assignment, applying Regulation 4(1) to (3) of TUPE, and the dicta in Litster, and Allan was that sole liability for the unfair dismissal of the Claimant passed to thetransferee.*” (Nielsen para 46 above).
48. Given that I have found that there was a transfer and that the claimants employment transferred, it follows inevitably that liability for her dismissal transferred to the transferor, and equally that her claims against the current respondent are bound to be dismissed as it bears no legal liability.

Bonus

49. The claimant has confirmed that the bonus claim is not pursued as a separate claim but as part of the remedy for unfair dismissal in the event that that claim was successful.

Employment Judge Cadney
Dated: 20th August 2023

Copies sent to the parties on 13 September 2023

For the Tribunal Office