



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103524/2023

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Held in Glasgow via Cloud Video Platform (CVP) on 13 November 2023

Employment Judge Brewer

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| 10 | Ms N Morgan | Claimant In Person |
| 15 | RT Nitro Solutions Limited | First Respondent No attendance and No representation |
| 20 | GHSL Limited | Second Respondent No attendance and No representation |
| | Racetrack Pitstop | Third Respondent No attendance and No representation |

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is:

1. The First Respondent is dismissed from the proceedings and the claims against it are dismissed.
2. The Third Respondent is dismissed from the proceedings and the claims against it are dismissed.
3. The claims against the Second Respondent fail and are dismissed.

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REASONS

Introduction

1. The claimant attended the hearing in person. She produced one document which I shall refer to below. The claimant gave brief evidence and at the end of the hearing I explained that given the legal position was reasonably complex I would put my decision in writing.

Issues

2. The claimant claims unfair dismissal, wrongful dismissal (notice pay), redundancy pay and holiday pay.
- 10 *Unfair dismissal/redundancy pay*
3. There is a time limit issue in this claim.
4. For reasons which follow I limit the remaining issues to:
- a. What was the reason for dismissal,
- b. If the claimant was dismissed by reason of redundancy, what is the amount of the redundancy pay due to the claimant?

Notice pay

5. Is the claimant owed notice pay?
6. If so, how much?

Holiday pay (unauthorised deductions from wages)

- 20 7. Is the claimant owed pay for accrued untaken holiday?
8. If so, how much?

Relevant Law

9. I shall set out briefly the law.

Unfair dismissal

10. Redundancy is defined in S.139(1) of the Employment Rights Act 1996 (ERA)
The section provides that:

5 *'For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —*

(a) *the fact that his employer has ceased or intends to cease —*

(i) *to carry on the business for the purposes of which the employee was employed by him, or*

10 (ii) *to carry on that business in the place where the employee was so employed, or*

(b) *the fact that the requirements of that business —*

(i) *for employees to carry out work of a particular kind, or*

15 (ii) *for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.'*

11. Under section 139(1)(b) it is the requirement for employees to do work of a particular kind which is significant. The fact that the work is constant, or even increasing, is irrelevant. If fewer employees are needed to do work of a particular kind, there is a redundancy situation — **McCrea v Cullen and Davison Ltd 1988** IRLR 30, NICA.

12. The test I must apply was set out in **Safeway Stores plc v Burrell** 1997 ICR 523, EAT where Judge Peter Clark set out a simple three-stage test. A tribunal must decide:

25 a. was the employee dismissed?

- b. if so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish?
- c. if so, was the dismissal of the employee caused wholly or mainly by the cessation or diminution?
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13. The test set out in the **Burrell** case was widely acclaimed as bringing light and clarity to a previously dark and muddled area of redundancy law and was subsequently endorsed by the House of Lords in **Murray and anor v Foyle Meats Ltd** 1999 ICR 827, HL.
- 10 14. For a dismissal to be by reason of redundancy, a redundancy situation must exist. However, it is not for tribunals to investigate the reasons behind such situations (**Moon and ors v Homeworthy Furniture (Northern) Ltd** 1977 ICR 117, EAT).
- 15 15. In **Williams and ors v Compair Maxam Ltd** 1982 ICR 156, EAT, the EAT laid down guidelines that a reasonable employer might be expected to follow in making redundancy dismissals. These were
- d. whether the selection criteria were objectively chosen and fairly applied
- e. whether employees were warned and consulted about the redundancy
- 20 f. whether, if there was a union, the union's view was sought, and
- g. whether any alternative work was available.

Notice Pay

2. What notice period was the claimant entitled to?
3. Was the claimant paid for her notice?
- 25 4. If not, what payment is she entitled to?

Holiday Pay

16. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

5 *'An employer shall not make a deduction from wages of a worker employed by him.'*

17. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).

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18. In order to bring an unlawful deductions claim the claimant must be, or have been at the relevant time, a worker. A 'worker' is defined by section 230(3) ERA as an individual who has entered into or works under (or, where the employment has ceased, has worked under):

- 15 a. a contract of employment (defined as a 'contract of service or apprenticeship'), or
- b. any other contract, whether express or implied, and (if express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.
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19. Section 27(1) ERA defines 'wages' as:

'any sums payable to the worker in connection with his employment'

25 20. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract *'or otherwise'*.

21. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term ‘or otherwise’ does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

5 22. Finally, there is a need to determine what was ‘properly payable’ on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and**
10 **Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

First Respondent is dissolved

15 23. In relation to the First Respondent there are issue related to its dissolved status.

Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE)

24. Regulation 3 TUPE defines “relevant transfer” and sets in the following terms:

20 **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; ...*

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(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. ...*

(4) *Subject to paragraph (1), these Regulations apply to -*

(a) *public and private undertakings engaged in economic activities whether or not they are operating for gain; ...*

5 25. For the reasons set out below it is not necessary for me to set out further details of TUPE law.

Findings in fact

26. Of necessity these are brief findings.

27. The claimant was employed by the First Respondent (R1) from 8 March 2021.

28. R1 apparently ceased trading in late February 2023.

10 29. The claimant received a letter by email on 13 March 2023 stating that her employment had been terminated. The date of the letter was 28 February 2023.

15 30. I find as a fact that the first the claimant knew of her dismissal was 13 March 2023 which was therefore the effective date of the termination of her employment (the EDT). It follows that as at the EDT the claimant had more than 2 years continuous service with R1. She does therefore qualify to claim unfair dismissal.

31. The claimant commenced early conciliation in respect of R1 on 25 April 2023. She received her early conciliation certificate on 6 June 2023.

20 32. The claimant commenced early conciliation in respect of the Second Respondent (R2) on 2 May 2023. She received her early conciliation certificate on 13 June 2023.

25 33. The claimant commenced early conciliation in respect of the Third Respondent (R3) on 8 May 2023. She received her early conciliation certificate on 19 June 2023.

34. The claim form citing all three respondents was presented on 30 June 2023.

35. R1 was dissolved, and consequently removed from the Register of Companies on 30 May 2023.
36. R3 is not a corporate entity, it is a brand name owned by R2.
37. Thus, at the date the claim was presented, the only possible respondent was R2. For R2 to be liable for any of the claimant's claims she would have to have been employed by R2 at the EDT. The claimant confirmed that she was not employed by R2 but she indicated that some employees of R1 remained employed after R1 ceased trading but there is no evidence that any of R1's former employees remained employed after R1 was dissolved.
38. Although there was the possibility of a transfer of an undertaking from R1 to R2 (under the Transfer of Undertakings (Protection of Employment) Regulations 2006), the most the claimant could say was that she believed that the business of R1 was continued, potentially by R3.
39. Given that R1 was essentially an IT company and R3 is a retailer of petrol and runes forecourt shops, it seems inherently unlikely that R3 took on the business of R1, but even if it was possible, the fact is that there is no evidence that this is what occurred.
40. It is also possible, as the claimant argued, that R1's business was transferred to a new company, but again, there is no evidence of that before me.
41. I conclude that R1 ceased trading in late February 2023 and was dissolved and removed from the register on 30 May 2023 without it transferring its business to any other business undertaking.
42. The reason for the claimant's dismissal would appear to be, and I find as a fact that it was, the cessation of the business of R1 which was clearly a redundancy dismissal. No procedure was followed in implementing the dismissal.
43. The claimant was not paid for her accrued untaken holiday.
44. The claimant was not paid notice pay.

Decision

45. Given that R1 is dissolved, the claims against it cannot proceed and they are therefore dismissed.
46. R3 is a brand name and cannot be liable for any claims the claimant has. The
5 claims against R3 are therefore dismissed.
47. There is no evidence of a TUPE transfer of R1 to R2 or therefore that R2 is or could be liable for the claims being pursued by the claimant and the claims against R2 are therefore dismissed.
48. For the avoidance of doubt therefore all of the claims against each respondent
10 are dismissed.
49. However, given that the claimant may be able to recover some of the unpaid money she is owed from, for example the Insolvency Service I set out here my judgment on the merits of the claims themselves, had there been a viable respondent. The following findings are relevant:
- 15 a. in brief, given the entire lack of process I find that the claimant was unfairly dismissed. As a result, she would be entitled to a basic award (2 weeks' pay) and appropriate compensation,
- b. given that the dismissal was by reason of redundancy she would be entitled to 2 weeks' pay by way of statutory redundancy pay (although
20 not if she had been paid a statutory redundancy payment),
- c. there was an unauthorised deduction from the claimant's wages in respect of her notice pay and she should have been paid for 2 weeks' notice, and

- d. there was an unauthorised deduction from the claimant's wages in respect of her holiday pay and she should have received 2.6 days' pay in respect of accrued untaken holiday as at the EDT.

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Employment Judge: M Brewer
Date of Judgment: 13 November 2023
Entered in register: 15 November 2023
and copied to parties