



EMPLOYMENT TRIBUNALS

Claimant: Mrs B Cook

Respondent: Zoe Solomon t/a/ Bleadon Café (1)
Alistair House t/a Bleadon Café (2)

Heard at: Bristol in public by CVP

On: 18 July 2023

Before:

Representation

Claimant:

Respondent:

JUDGMENT having been sent to the parties on 25 July 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. The Claimant commenced employment tribunal proceedings against the First Respondent on 24 October 2021. On 3 July 2023 EJ Lumby ordered a preliminary hearing should be held to determine a number of matters.
2. The Tribunal held a preliminary hearing on 18 July 2023 by CVP in order to determine the issues set out in the Case Management Order of Employment Judge Lumby.

3. At the preliminary hearing the Tribunal gave its judgment orally and also the reasons for its judgment on the preliminary issues. The judgments were as follows:

(1) There was a 'relevant transfer' of the Claimant's employment for the purposes of the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE) from the Second Respondent to the First Respondent on or about 1 July 2015.

(2) There was no subsequent transfer for the purposes of TUPE from the First Respondent to the Second Respondent in or about November 2020 or March 2021

(3) Accordingly, as a result of the above judgments, the claim against the Second Respondent is dismissed.

(4) The Claimant was dismissed by the First Respondent on 2 August 2021.

(5) The Tribunal declared that the Claimant was entitled to a statutory redundancy payment in respect of the dismissal for redundancy.

4. Following the hearing the written judgment was sent to the parties and the Second Respondent requested written reasons on 26 July 2023. These are the written reasons.

5. At the preliminary hearing the Claimant and First Respondent represented themselves; the Second Respondent was represented by Counsel, Ms. Beech.

6. The Tribunal was provided with an agreed hearing bundle and it read the documents referred to by the parties contained therein. It read the witness statements of the Claimant, the First Respondent and the Second Respondent and the parties were all given an opportunity to cross-examine the witnesses who gave evidence. The parties had agreed a List of Issues and there was also an agreed chronology.

7. The parties were given an opportunity to sum up their cases at the end of the evidence. All parties did so. Ms. Beech for the Second Respondent submitted a written document setting out the law on TUPE.

BACKGROUND

8. A number of important facts are not in dispute between the parties as follows:
 - a. The Claimant was employed by the Second Respondent on 15 July 2009 at Bleadon Post Office and the associated shop, Bleadon Country Stores.
 - b. On or about 1 July 2015, the First Respondent leased the Bleadon Post Office and shop from the Second Respondent. The Claimant's employment transferred to the First Respondent.
 - c. In July 2018, the First Respondent surrendered the Post Office and shop to the Second Respondent. The First Respondent entered into a new lease with the Second Respondent for three years for a café only.
 - d. On 14 October 2020, the Second Respondent gave one month's notice of termination of the café lease to the First Respondent. This, however, was disputed and it did not lead to the termination of the lease.
 - e. The First Respondent gave notice to quit the lease on the café to the Second Respondent on 25 February 2021 and returned the keys on 3 March 2021.
 - f. The First Respondent furloughed her employees including the Claimant from October 2020 and the Claimant continued to receive furlough payments until July 2021

- g. the First Respondent offered the Claimant employment opportunities at her new premises which including at Lympsham Pavilion and Hutton Garden Centre between February 2021 and April 2021.
- h. The Second Respondent opened a take-away and coffee shop at Bleadon Post Office and Country Store and advertised for a cook/chef/kitchen manager and he approached the Claimant to undertake the role.
- h. On 12 July 2021 The Second Respondent employed the Claimant as Farm Shop Café Kitchen Supervisor
- i. 13 July 2021 the First Respondent offers the Claimant employment with her in her business at 14 Baker Street, Weston-Super-Mare.
- j. On 20 August 2021 the First Respondent issued a P45 form to the Claimant with a termination date of 29 July 2021.

THE ISSUES BETWEEN THE PARTIES

- 9. The Claimant alleges that her employment continued with the First Respondent until it was terminated by submission of the P45 to her on 20 August 2021. She claims she was made redundant by the First Respondent and entitled to a redundancy payment.
- 10. The First Respondent alleges that the Claimant's employment transferred into the employment of the Second Respondent, by him having served notice to quit in November 2020 or by the First Respondent having returned the keys to the café in March 2021.
- 11. The Second Respondent was joined into the proceedings by the Tribunal. He and the Claimant deny that any transfer of the Claimant's employment from the First Respondent to him took place in November 2020 or subsequently.

12. I now set out the relevant legal principles.

LEGAL PRINCIPLES

LAW

TUPE TRANSFER

13. Regulation 3 TUPE 2006 states as follows:

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;”

14. One can distil the above into four conditions which must be fulfilled for a relevant transfer to have occurred::

a. A transfer must be to another person;

b. The transfer must be of an economic entity;

c. The economic entity must retain its identity following the transfer;

d. The undertaking or business which originally housed the economic entity must have been in the United Kingdom immediately before the transfer.

15. The Tribunal notes that conditions a. and d. are not in issue. The relevant legal principles on conditions b. and c. are now set out herein.

WHAT IS AN ECONOMIC ENTITY?

16. The Tribunal was referred to the well-known case of **Cheesman and ors v R Brewer Contracts Ltd [2001] IRLR 144** in which the following passage was relied upon by Ms. Beech:

“We shall attempt, although it is not always a clear distinction, to divide considerations between those going to whether there is an undertaking and those, if there is an undertaking, going to whether it has been transferred. The paragraph numbers we give are references to the numbering in the IRLR reports of the ECJ's judgments. Thus:

(i) As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective - Sanchez Hidalgo paragraph 25; Allen paragraph 24 and Vidal para 6 (which, confusingly, places the reference to "an economic activity" a little differently). It has been held that the reference to "one specific works contract" is to be restricted to a contract for building works - see Argyll Training infra EAT at paras 14-19.

(ii) In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible - Vidal paragraph 27; Sanchez Hidalgo paragraph 26.

(iii) In certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity is essentially based on manpower - Sanchez Hidalgo paragraph 26.

(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 - Vidal paragraph 27; Sanchez Hidalgo paragraph 26.

(v) An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the

operational resources available to it - Vidal paragraph 30; Sanchez Hidalgo paragraph 30;

WHAT DOES A RETAINED IDENTITY MEAN?

17. Ms. Beech referred to the lead case of **Spijkers v Gebroeders Benedik Abattoir CV and anor [1986] 2 CMLR 296**, in which the ECJ set out the following principles:

*It follows that the decisive criterion for establishing the existence of a transfer within the meaning of the directive is whether the entity in question retains its identity. Consequently it cannot be said that there is a transfer of an enterprise, business or part of a business on the sole ground that its assets have been sold. **On** the contrary, in a case like the present, 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 activities”*

18. It is correct that the ECJ identified the following factors to consider when answering the question of whether there was an economic entity still in existence:

- a. The type of undertaking or business in question;*
 - b. The transfer or otherwise of tangible assets such as buildings and stocks;*
 - c. The value of intangible assets at the date of transfer;*
 - d. Whether the majority of the staff are taken over by the new employer;*
 - e. The transfer or otherwise of the circle of customers;*
 - f. The degree of similarity between activities before and after the transfer;*
- and*

g. The duration of any interruption in those activities.

19. The ECJ also emphasised that this assessment must:

“take account of all the factual circumstances of the transaction in question” and “each of these factors is only a part of the overall assessment which is required and therefore they cannot be examined independently of each other.”

20. The Court stated that tribunals must consider whether, in view of all the facts about the transaction, *“the business was disposed of as a going concern”* as indicated, amongst other factors, by the fact of the business continuing or because it is resumed in a same or similar guise by the new owner.

21. Ms Beech referred to **Mathieson and another v United News Shops Ltd EAT 554/94**, the *Spijkers* test was applied to a hospital shop which had been redeveloped. The Tribunal found that there had not been a relevant transfer, an outcome upheld by the EAT, on the basis that:

a. There was a difference in stock..

b. They had different trading hours.

c. The new shop, unlike the old shop, was run on a commercial basis.

22. Ms Beech further referred to **Aino (UK) Ltd v Turner and anor EAT 0349/15**, the EAT held that the intention of the putative transferor and transferee to create a transfer could be a relevant factor amongst others when determining whether there had been a relevant transfer, albeit that an intention alone could not create a transfer.

23.

WHO TRANSFERS?

24. Regulation 4(1) and (3) TUPE 2006 state as follows:

(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 [emphasis added].*

(2)

(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.”*

WHO IS ASSIGNED?

25. Assignment should be interpreted as set out in **Botzen and ors v Rotterdamsche Droogdok Maatschappij BV [1986] 2 CMLR 50**, ECJ:

The only exception I would admit to the requirement that an employee must be “wholly” engaged in that part of the business [which transfers] would be where an employee was required to perform other duties to an extent which could fairly be described as de minimis [i.e. so minor or trivial as to be legally insignificant]. On the other hand, if a worker in fact is engaged in the activities of the whole business or in several parts then he cannot be

regarded for the purposes of the Directive as an employee “of” the part of the business transferred.

WHAT DOES REDUNDANCY MEAN?

26. Section 139 Employment Rights Act 1996 sets out the legal definition of redundancy as follows:

“139 Redundancy.

(1) 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

(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

(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.....”

WHEN DOES A TERMINATION BY DISMISSAL TAKE PLACE?

27. A termination by dismissal can only occur when the decision to terminate has been communicated to the employee see **Brown v Southall and Knight 1980 ICR 617.**

WHO IS ENTITLED TO A REDUNDANCY PAYMENT?

28. Employees who are made redundant and who have sufficient qualifying service i.e. two years continuous service are entitled to a statutory redundancy payment. There are exceptions to this rule but the only one which is potentially relevant is where the employee refuses an offer of suitable alternative employment see s.141 (2)-(4) ERA 1996.
29. The Tribunal needs to assess whether the job offer was suitable and reasonable for the employee to have accepted see **Jones and anor v Aston Cabinet Co Limited 1973 ICR 292.** It is important to view the reasonableness of a refusal of a job offer from the perspective of the employee see **Executors of JF Everest v Cox 1980 ICR 415.**

FINDINGS OF FACT

30. The Tribunal has made the findings of fact based on whether there was agreement of them or when necessary when there is a dispute of fact having reached a judgment on the balance of probabilities as to what occurred. The Tribunal has not made findings on every disputed issue: only those issues which are relevant for the determination of the issues.

31. The Claimant was employed as a cook at the Second Respondent's premises in Bleadon near Weston-Super-Mare on 15 July 2009. On 1 July 2015, a lease was granted of the post office, a café and the shop at the premises to the First Respondent and her father, Mr. Solomon who was her business partner and at or about that time, I accept the evidence of the Claimant unchallenged as it is that there was a meeting at which she and other employees of the Second Respondent attended, along with the First Respondent and Mr Solomon, at which they were told that their employment would continue on effectively the same terms and conditions.
32. In other words, they would be TUPE transferred from the Second Respondent to the First Respondent. This was indeed a TUPE transfer to the First Respondent. The Claimant and her fellow employees continued to work at the café thereafter.
33. At one time the First Respondent denied that there had been a TUPE transfer in July 2015, but actually in her witness statements, and indeed in cross-examination, she confirmed that that was no longer an issue and that she accepted that she became the employee of the Claimant as a result of a transfer.
34. In 2018, it seems that the business changed outlook because the café became the sole focus of the First Respondent's business, the post office and shop were taken back by the Second Respondent and the Claimant continued to work in the café during the period up until the Covid lockdown in March of 2020, when due to the pandemic, of course, premises such as the First Respondent had to close due to the lockdown provisions. The First Respondent then ensured that the Claimant was furloughed from her employment and she would be paid furlough under the HMRC Furlough scheme.

35. The consequence of Covid was that with the First Respondent's business not producing much of an income, if any income, and the First Respondent fell behind with various payments, the extent of which is unnecessary for me to determine. However, the Second Respondent believed that the Claimant was in breach of her lease in respect of payment of rent etc.
36. In any event, by 14 October 2020, the Second Respondent was seeking an end to the lease, and at that point was contemplating operating the café business as a going concern. Arguably at that point, had that remained the case it might have been that there would have been a TUPE transfer of the Claimant to the Second Respondent, but in fact, what happened was that the First Respondent continued to operate her business in the premises: there was no surrender of the lease or by the First Respondent at that time. She continued, as she said in evidence, to be responsible for the business in that premises.
37. However, by the end of February 2021, the dispute about the terms of the existing lease had not been resolved. Accordingly, there was an agreement between the First and Second Respondents that the First Respondent would surrender the lease to the café. I find that the lease ended and the business ceased operation on or around 3 March 2021. The keys were handed back and the Second Respondent took possession of the premises but there was no café business still ongoing. The café had closed. There was no 'going concern'.
38. Indeed, the First Respondent intended to re-open her business in other premises. There is clear evidence to support such a finding.
39. The Tribunal is quite satisfied that the business at the café premises had ceased and there was no business for the Second Respondent to acquire as

of March 2021. In effect, all the Second Respondent took possession of was the premises itself. There was no transfer of an economic entity to the Second Respondent: it was intended that the economic entity would be re-opening elsewhere by the First Respondent.

40. Thereafter, the First Respondent sought to open the café business in other premises which she was seeking to acquire and also hoping to employ the Claimant in those premises. One can see from the messages passing between them that she was on very good terms with the Claimant, who was a loyal employee. The Tribunal finds that on 6 April 2021 the First Respondent offered the Claimant employment on less favourable terms to her existing role working from a mobile van. Before she could respond to that offer on 7 April 2021 the First Respondent offered the Claimant a £3000 redundancy payment as a one-off payment to be paid when the furlough scheme came to an end. **[Page 69]** Although the First Respondent made various attempts at opening up the new business elsewhere, which for various reasons, which I need not go into, there was initially no success.

41. During this period, the Claimant remained on furlough from the First Respondent's business. She continued to be treated by the First Respondent as her employee although the First Respondent removed her from "*my payroll on 31st July 2021 as she refused every offer ...*" The Claimant and the First Respondent intended and believed that the Claimant should continue to be the employee of the First Respondent until that time. The documentation and all the correspondence between them, including the text messages, indicates that they both considered there to be an ongoing contractual employment relationship which was maintained as far as the Claimant was concerned until ultimately a P45 was sent to the Claimant on 20 August 2021. See for example the messages on **page 71-72**.

42. The Tribunal finds that after some considerable deliberation and a not insubstantial period of time, the Second Respondent decided that he was going to reinstitute a business in the café premises. It was also a food outlet, albeit it had more of the hallmarks of a deli with a niche take out option initially. The Tribunal accepts the evidence of the Second Respondent about his intentions and business model as per his witness statement at paragraphs 47-52.
43. The Tribunal accepts the evidence of the Claimant and the Second Respondent that the new business which initially opened in July 2021 was initially not a sit in café. The Claimant was offered work there which she accepted and she commenced employment there on or about 12 July 2021.
44. Almost simultaneously, the First Respondent offered the Claimant employment in her new café premises in Weston-Super-Mare. The Tribunal accepts the reasons why the Claimant was not interested in working for the First Respondent i.e. the reasons in the email of 19 July 2021. **[Page 89]** The Tribunal does not accept that the offer of employment was suitable or reasonable for the reason advanced by the Claimant.
45. Thereafter, on 20 August 2021 the First Respondent issued the Claimant with a P45 confirming the end of the employment as being 29 July 2021. There was no other notice of termination of employment served by the First Respondent on the Claimant and the first that the Claimant knew of the termination of her employment was the receipt of the P45, so there was no communication of any termination of her employment until that point.
46. The Claimant did receive her furlough wages until 29 July 2021, which is the date on the P45 and she is therefore claiming pay from that date until the

issue of the P45 and I note from the case management order case summary, that the First Respondent allegedly accepts that the Claimant is owed the sum of £180.

47. In effect, when the First Respondent surrendered the lease in March 2021 the Claimant was potentially redundant but the only reason why there was no termination of employment at that time was because the Claimant was continuing to be employed by the First Respondent albeit on furlough. Arguably, that should not have occurred.
48. The Tribunal accepts that the statutory definition of redundancy was met by the events set out above and that as of 20 August 2021 the Claimant, having not unreasonably rejected offers of alternative employment, was redundant, her place of work having closed.
49. As a result of the evidence which I have read and heard and on the admission of the First Respondent, the Second Respondent ceased to be the employer of the Claimant on or about 3 July 2015. He only resumed his role as employer of the Claimant on 12 July 2021.
50. There is, therefore, no basis upon which a claim can be made against the Second Respondent and the claim against him is dismissed. The Claimant was dismissed because the First Respondent who remained the employer, terminated her employment on 20 August 2021 for redundancy. The offers of employment from the First Respondent were not suitable and it was reasonable for her to reject them.

Employment Judge Walters
Date: 02 November 2023

Reasons sent to the Parties on 23 November 2023

For the Tribunal Office