



# EMPLOYMENT TRIBUNALS

**Claimant:** Matthew Worthy

**Respondent:** 1) JD Fitness Group Limited  
2) N&S Fitness Limited

**Heard at:** Reading

**On:** 6 and 7 March 2024

**Before:** Employment Judge Liz Ord  
Tribunal Member Janice Wood  
Tribunal Member Joanna Smith

**Representation:**

Claimant: In person  
Respondent: 1) Not attending  
2) Not attending

**JUDGMENT** having been given orally on 7 March 2024 and the written record having been sent to the parties, subsequent to a request for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure, the following reasons are provided:

## REASONS

### The Complaints and Issues

1. The issues in this case were originally decided at a Case Management Hearing on 21 September 2023, at which the Claimant and the First Respondent were legally represented. With slight amendments, that were agreed at the hearing, the issues are as follows:
  2. Dismissal
    - 2.1. Was the Claimant dismissed? The Claimant states he was dismissed with immediate effect on 7 November 2022.
    - 2.2. If so, what was the reason or principal reason for the claimant's dismissal?

- 2.3. Was the transfer on about 14 October 2022 the reason or principal reason for dismissal? If so, the claimant will be regarded automatically as unfairly dismissed unless that reason was also an economic, technical or organisational reason.
- 2.4. If the transfer was not the reason or principal reason, was the reason a potentially fair reason?
- 2.5. If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that conduct as a sufficient reason to dismiss the claimant? The tribunal will decide, in particular, whether:
  - 2.5.1. the respondent genuinely believed that the claimant had committed the misconduct;
  - 2.5.2. this belief was based on reasonable grounds;
  - 2.5.3. at the time the belief was formed, the respondent had carried out a reasonable investigation;
  - 2.5.4. the respondent followed a reasonably fair procedure;
  - 2.5.5. the dismissal was within the band of reasonable responses.
- 2.6. If the dismissal was unfair, what remedy is the Claimant entitled to?
3. Wrongful dismissal/Notice pay
  - 3.1. Is the Claimant entitled to be paid for his notice period?
4. Holiday Pay (Working Time Regulations 1998)
  - 4.1. Is the Claimant entitled to be paid for any untaken holiday leave?
5. Unauthorised deductions
  - 5.1. Did the Respondents made an unauthorised deduction from the Claimant's wages and, if so, how much was deducted?
6. Breach of duty to consult under reg.13(2) TUPE
  - 6.1. Did the Respondents fail to comply with their duty to consult?
  - 6.2. If so, what compensation, if any, should be awarded?

## **Evidence**

7. The tribunal had before it a documents bundle (70 pages) and index. Page numbers referenced in this judgment are to this bundle.
8. We had a witness statement from Matthew Worthy, and we heard evidence on oath from Mr Worthy.

9. There was also a strike out judgment of a response.

## The Law

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

#### **10. Regulation 7 TUPE –**

- (1) “Where, either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.
- (2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.
- (3) Where paragraph (2) applies –
  - a) paragraph (1) does not apply;
  - b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of the Act (reason for dismissal) –
    - i. the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
    - ii. in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

#### **11. Regulation 13 TUPE: Duty to inform and consult representatives**

(1) ...

- (2) Long enough before the relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of –
- (a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;
  - (b) the legal, economic and social implications of the transfer for any affected employees;
  - (c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and
  - (d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

#### **12. Regulation 15 TUPE: Failure to inform or consult**

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground –

- (a) ...
- (b) ...
- (c) ...
- (d) in any other case, by any of his employees who are affected employees

...

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) Where the tribunal finds a complaint against a transferor under para (1) well-founded it shall make a declaration to that effect and may –

- (a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

### **13. Regulation 16 TUPE: Failure to inform or consult: supplemental**

(3) “Appropriate compensation” in regulation 15 means such sum not exceeding thirteen weeks’ pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

### **Employment Rights Act 1996**

#### **14. Section 98** provides, so far as is relevant:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

- a) .....
- b) relates to the conduct of the employee

(3) ...

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

15. The **ACAS Code of Practice 1** on Disciplinary and Grievance Procedures 2015 applies to the procedure followed.

### **Working Time Regulations 1998**

#### **16. Regulation 14**

...

- (3) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

### **Findings of Fact**

17. The Claimant was employed by the Second Respondent from April 2015. His contract of employment was transferred to the First Respondent on 14 October 2022 by means of a relevant transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as determined by the judgment of this Tribunal of 21 September 2023). At the time of transfer his salary was £35,000 for a 40 hour week.

18. On 28 September 2022, Neil Bozzoni, the sole director of N&S Fitness, emailed the Claimant (p35) with notice of termination of his employment effective from 16 November 2022. The reason he gave was that the business was facing insolvency.

19. Just over two weeks later on 14 October 2022, the business was transferred to JD Fitness Group Ltd. Two days before that, on the 12 October, the Claimant had a face to face meeting with Joel Beckford (Managing Director of the First Respondent) and Davinder Johal (Director of the First Respondent) who told him that they had taken over the franchise and indicated that his employment would continue with them. On 13 October at 15.48 Mr Beckford emailed the Claimant (p36) offering him an Area Manager's role at £30,000 basic salary with bonus potential of £3,600. It said:

"I would like to keep you on board so let me know what your thoughts are on this ..."

20. The Claimant emailed back the same day at 16.10 requesting further details (p42).

21. On 24 October 2022 at 11.56 Mr Beckford emailed each employee directly (p38), including the Claimant, saying:

22. "We understand that the Transfer of Undertakings (Protection of Employment) Regulations 2006 will apply to the sale. ... We are providing this information to each employee direct because N&S Fitness Limited is classed as a "micro business" with less than ten employees. ... All employees working in the site immediately before the transfer will transfer to JD Fitness Group on their existing terms and conditions of employment (except in respect of occupational pension entitlement), with full continuity of service. ... JD Fitness Group does envisage taking measure in relation to employees who transfer with the undertaking. The measures envisaged are details around a proposal to consider a reduction in the workforce expenditure and commence redundancy consultation."
23. This confirmed the Claimant's understanding that his employment had been transferred from the Second to the First Respondent.
24. Another email of 24 October from Mr Beckford to the Claimant was sent at 11.58, saying:
- "You have an invitation to Consultation tomorrow at 11.30 via Microsoft Teams."
25. At the meeting on 25 October Mr Beckford told the Claimant that he had not been TUPE's across, as the First Respondent had only bought the assets/franchise. However, the Claimant continued working as usual.
26. At no time during all of this was there any mention of the previous communication from Mr Bozzoni.
27. On 7/11/22 Davinder Johal emailed the Claimant at 16.07 (p44). Amongst other things, he said:
- "Since we have taken over on the 14<sup>th</sup> October you have not done the hours agreed in any of our sites, by your own admissions this has been done remotely, why? Who's permission did you seek to do this ...
- ... you have been both disruptive and defiant and have not adhered to any of the changes we have implemented to protect the brand ANYTIME FITNESS.
- As stated on the phone today we do not need your services anymore ...
- ... Anytime fitness will no longer engage in any correspondence with you.
- ... Until this dispute is resolved NO FUNDS will be released to you...
- ... please remove all company details from your laptop..."
28. At the time of notice of termination, the Claimant had seven full years continuous employment. He was dismissed with immediate effect and received no notice pay.
29. He was paid his usual pay until 8 October 2022. He was not paid for work done from 9 October to 7 November 2022.
30. At the time of dismissal the Claimant had not taken his full holiday entitlement up to this date.

31. Upon termination of his employment, the Claimant secured work with another employer, but at a lower salary.

## **Discussion and Conclusions**

### **Dismissal**

32. Mr Bozzoni, Director of the transferor company (Second Respondent), must have known about the transfer before writing the dismissal email to the Claimant on 28 September 2022. Given the closeness in time between these events (about two weeks), we find that the reason for dismissal was the impending transfer. However, the dismissal did not take effect because this communication was overtaken by subsequent communications.
33. The email that followed from Mr Beckford of the transferee company (First Respondent) of 24 October superseded Mr Bozzoni's email and the earlier emails from the First Respondent, which had sought to change the Claimant's terms and conditions.
34. This 24 October email confirmed that the Claimant had continuity of service and his terms and conditions were not going to change (apart from pension). It demonstrates that the First Respondent did not consider the Claimant to be under notice of termination of employment, as otherwise the email would not state he had continuity of employment or refer to redundancy consultations. The Claimant continued working throughout this period, just as he had done previously.
35. The email of 7 November 2022 received from Mr Johal was a notification of dismissal with immediate effect. This terminated The Claimant's employment. From the content of the communication, the dismissal was not because of the transfer but because of the Claimant's behaviour. Conduct is a potentially fair reason.
36. However, there is little evidence before us, apart from bare assertions in the dismissal email, to demonstrate any misconduct on the Claimant's behalf. There was no investigation and the First Respondent did not follow a fair procedure as advised by ACAS or at all. Consequently, the dismissal was not within the band of reasonable responses.
37. Therefore, the Claimant was unfairly dismissed and this part of his claim is well founded against the First Respondent JD Fitness. The unfair dismissal claim against N&S Fitness is not well founded, as the Claimant had been fully transferred at the time of dismissal.

### **Holiday pay, Notice pay, Unauthorised deduction from wages**

38. The Claimant has demonstrated that the monies are owing and there is no good reason to justify not paying him.
39. He is entitled to holiday pay for untaken annual leave, his notice pay for his notice period (seven weeks), and his salary for work done. It follows that the Claimant's claims are well-founded and succeed.

## Consultation

40. Not all the details contained in regulation 13 TUPE were consulted upon, if at all, and the timeframe for consultation was inadequate. The earliest it could be argued there was any consultation was 12 October 2022 and the transfer was on 14 October 2022. Furthermore, there was no opportunity provided for any employee representatives to be elected.
41. Therefore, we find that regulation 13 was not complied with and that the extent of the breach was serious. The Claimant's complaint is well-founded.

## Remedy

### 42. Unfair Dismissal

#### Basic Award

The Claimant was aged 32 years at the date of dismissal. He had 7 full years continuous service from 15/04/2015 to 7/11/2022

Gross weekly pay limit for basic award in November 2022 = £571 per week.

$7 \times 571 = \mathbf{£3,997.00 \text{ gross}}$

#### Compensatory award

Gross pay on Claimant starting new employment = £32,000

Compensatory period = 13/12/22 to 7/3/24 (after notice period)  
Increase of 1,500 from 1/4/23

Daily net rate difference:

From 13/12/22 to 31/3/23

Daily net rate when started new job £99.22 (monthly £2,149.83)

$535.05 - 502.39 = 32.66$  (daily difference = 6.53)

daily difference = £6.53

79 days (excluding weekends) = £515.87

From 1/4/23 to 7/3/23

Gross new rate of pay £33,500 from 1/4/23

Net pay £26,598 – daily rate  $26,598/260 = 102.30$

244 days (excluding weekends)

Daily difference  $107.01 - 102.30 = 4.71$

$244 \times 4.71 = 1,149.24$

No award after remedy hearing

Compensatory award = **£1,665.11 net**

Loss of statutory rights = **£450.00**



The Employment Protection (Recoupment of Benefits) Regulations 1996 do not apply.

**43. Holiday pay**

310 days from 1/1/22 to 7/11/22 = 310 days  
310/365 = 0.85 of a year  
Entitlement = 0.85 x 28 = 23.8 days (round up to 24)  
17 days taken  
24 - 17 = 7 days.  
£535.05/5 = daily rate = net rate 107.01

7 days = **£749.07 net**

**44. Notice pay**

7 weeks from 7/11/22 – takes us to 12/12/22  
Net – not gross  
2 x 535.05 = **£1070.10** 2 weeks full loss of salary  
5 weeks of difference in salary between old and new jobs  
535.05 – 502.39 = 32.66 (daily difference = 6.53)  
5 x 32.66 = **163.30**

Total = **£1233.40 net**

**45. Unauthorised deduction from wages**

Calculated on gross basis and subject to tax  
Pay from 1 October 2022 to 7 November 2022 = 26 days  
(P59 bundle) monthly = £2,916.67 gross = £35,000 per annum  
£35,000/260 = £134.62 per day

26 x 134.62 = **£3,500.12 gross**

**46. Protective award**

13 x £673.08 = **£8750.04 gross**

---

Employment Judge Liz Ord

Date 25 June 2024

JUDGMENT SENT TO THE PARTIES ON  
26 June 2024

.....

.....  
FOR THE TRIBUNAL OFFICE

Notes

**Public access to employment tribunal decisions**

Judgments and reasons for the judgments are published, in full, online at [www.gov.uk/employment-tribunal-decisions](http://www.gov.uk/employment-tribunal-decisions) shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.