



EMPLOYMENT TRIBUNALS

Claimant: Miss K Jones

Respondent: Waterloo Barber Shop Ltd

Heard at: Manchester, by video

On: 14 June 2024

Before: Employment Judge Barker

REPRESENTATION:

Claimant: In person

Respondent: In person, Mr S Hasan: Ex-Director

JUDGMENT

The claimant's employment with Waterloo Barber Shop did not transfer to the respondent when the business was sold. The claimant was not an employee of the respondent at the time to which these proceedings relate. Her employment was terminated by the previous owners at the time the business was sold, which was on 13 March 2023. Any claims lie with the previous owners of the business and not the respondent. Her claims against the respondent therefore fail and are dismissed.

REASONS

1. The claimant brings claims of unfair dismissal, notice pay, holiday pay and arrears of pay, including statutory sick pay, against the respondent in a claim form sent to the Tribunal on 16 August 2023. The parties engaged in ACAS Early Conciliation from 9 June 2023 to 21 July 2023.
2. There was no agreed list of issues for the Tribunal to decide. However, for a claimant to claim unfair dismissal and notice pay from a respondent, that claimant must have been an employee of the respondent. For a claimant to

claim statutory sick pay, holiday pay and arrears of pay from a respondent, that claimant must have been engaged by that respondent as a worker. It is agreed that Miss Jones never actually worked for Mr Hasan in the barbers shop. However, Miss Jones was clearly an employee of Mr and Mrs Anderson, the sellers to Mr Hasan. She had a contract of employment that was before the Tribunal in evidence.

3. Miss Jones alleges that her employment transferred to Mr Hasan when he took over the shop where she worked. This does not happen automatically but happens only if the Transfer of Undertakings (Protection of Employment) Regulations 2003 (the so-called "TUPE Regulations") apply to the takeover. The TUPE Regulations only apply if there is a transfer of a stable business (an "undertaking") or part of a business from the buyer to the seller. The mere sale of assets of the business is not enough for TUPE to apply.
4. If there has not been a TUPE transfer, the employee does not become the responsibility of the buyer. Her employment is terminated on the day of the sale of the business and any money or other employment rights she has with the seller remain the responsibility of the seller. Because the seller, Mr Anderson, told Miss Jones that her employment transferred to Mr Hasan, Miss Jones has taken his assurances as fact. However, this Tribunal needs to make findings of fact to consider whether there is any evidence that what Mr Anderson asserts happened did in fact happen.
5. Neither party was represented by legal representatives. Neither party addressed the Tribunal on the TUPE Regulations or raised it in their arguments, but I did not need them to do so. The TUPE regulations were referred to in terms of the legal principles that apply by the parties, which was sufficient. Given that the hearing was listed for one day, and had already been postponed once, it was not in the interests of justice to postpone it further to allow the parties to address the Tribunal on the issue of TUPE specifically, given that it is a complex and technical area of the law and a Tribunal would not expect parties without legal representatives to make such arguments anyway.
6. The parties had provided me with information about what happened at the time of the sale, including a witness statement from Mr Anderson about what was agreed with Mr Hasan, and a letter Mr Anderson allegedly wrote to Miss Jones about the impact of the sale on her at the time. I asked the parties further questions around this issue when they were giving sworn evidence under oath. The information that the Tribunal needed to consider the issue was discussed and the findings of fact on the issue are set out below. However, if either party has any further evidence or submissions about the application of the TUPE Regulations of the sale to Mr Hasan, they are welcome to make an application for reconsideration of this to be considered.

7. The parties had supplied the Tribunal with documents in support of their respective positions. They had also provided the Tribunal with written statements. Miss Jones and Mr Hasan provided sworn evidence to the Tribunal and Miss Jones asked Mr Hasan a series of questions that she had prepared in advance. There were also questions from the Tribunal for each party.
8. A short witness statement had been provided by Mr Anderson, the former owner of the respondent, in support of the claimant, but Mr Anderson did not attend the Tribunal to give any further evidence.
9. The Tribunal's decision involved some careful findings of fact. There is very little evidence of the key conversations and events from the time they happened. The Tribunal was helped by Miss Jones and Mr Hasan's recollections of these key events and key conversations, but the passage of time and the effect of being involved in a dispute with one another has inevitably led each of them to remember these events and conversations differently. This is no criticism of either of them but simply an effect of the passage of time.
10. It is unfortunate that Mr Anderson took the trouble to provide a statement for Miss Jones, but did not talk in that statement about what he said to Mr Hasan about the terms of her employment at the time Mr Hasan took over the business. I have had the benefit of Mr Hasan's recollection of those conversations, but there is no written evidence of their discussions and Mr Anderson says in his statement that discussions about the sale of the business were done orally. From this I accept that nothing was written down about what was included in the sale of the business, or about what Mr Anderson told Mr Hasan about the staff at the barbershop.
11. I have made careful findings of fact about this crucial issue, and about the conversations between Mr Hasan and Miss Jones on 20 March 2023 and 27 March 2023. I have the benefit of text messages between them on other dates in March 2023. The findings of what happened are made on the "balance of probabilities", meaning that the Tribunal only needs to be satisfied that it was more likely than not that something happened. In percentage terms, if a judge decides that it is 50% likely that the claimant's case is right, then the claimant will lose. If the judge concludes that it is 51% likely that the claimant's case is right then the claimant will win. This is different from the standard of proof in criminal cases, which is "beyond reasonable doubt" and is therefore much higher.
12. Both parties were given several opportunities to ask questions of each other and the judge, and provide information and evidence during the hearing. The Tribunal is therefore satisfied that both party had an opportunity to put their case forward. However, if either party considers that there is further evidence available or further arguments that need to be made but were not made during

the hearing, as stated above they may ask the Tribunal to reconsider the decision in the light of the new information.

Findings of Fact

13. The respondent is a limited company which was owned by Mr Hasan, who was also the sole director. He has resigned from that directorship. The business was formed at the time that Mr Hasan took over the Waterloo Barber Shop in north Liverpool. He took over the shop on 13 March 2023 and the company was incorporated on 23 March 2023. Mr Hasan is no longer involved in the Waterloo Barber Shop, which business has been taken over by someone else and trades under a different name. Mr Hasan works as an employee for a separate barber's business elsewhere in Liverpool.
14. The claimant worked as a barber at the Waterloo Barber Shop from 2001, when it was run and owned by Mr and Mrs Anderson as a partnership. She worked full time. In 2023 Mr and Mrs Anderson ceased to own the business. The Tribunal heard that Mr Anderson works part-time in his son's shop, Son of a Barber, where the claimant now works on a self-employed basis four days per week. The claimant has worked at Son of a Barber since 4 April 2023. The claimant and Mr and Mrs Anderson, and their son, have had a long working relationship with one another that continues to this day.
15. The claimant had a long-standing problem with her back which required time off work. She became absent from work on 7 February 2023 and was paid statutory sick pay by Mr and Mrs Anderson. She was still off work at the time that Mr Hasan took over the business, so she did not meet him in person until long after the transfer, on 27 March 2023.
16. Miss Jones told the Tribunal that Mr Anderson told her that her employment with the business would continue after it was owned by Mr Hasan. He has produced a written statement for the Tribunal which says "*I can confirm that I signed a contract with Miss K Jones that began on 26/2/2001 and then revised the contract on 1/4/2015. It was verbally agreed that on the sale of the business to Mr Samav Hasan, Mr Hasan would be keeping the employees on and continue there employment under the same terms. In the case of Miss K Jones her contract would continue under Mr Hasan's employment.*" [emphasis added]
17. The claimant's evidence to the Tribunal also included an undated letter from Mr Anderson that is said to have been sent to the claimant at the time the business was sold. It states "*The new employer Mr Simav Hasan will be continuing your employment from 13-3-2023 with you on the same terms and conditions. Mr Hasan will contact you in due course to discuss your return to work.*"

18. Mr Hasan's evidence, which I accept, was that he did not receive any written information about the staff from Mr Anderson at the time of the sale. Mr Anderson's statement notes that it was "*verbally agreed*" that Mr Hasan would be keeping the employees on. It strikes me as noteworthy that Mr Anderson would go to the trouble of writing to Miss Jones to confirm this, who he had a long-standing relationship with that had lasted decades, but that he did not put anything in writing to Mr Hasan to confirm this. Miss Jones' evidence was that Mr Anderson had been looking to sell the business for some years, as she had discussed buying it from him herself at one stage. He had a written contract with Miss Jones but there is no evidence that he gave a copy to Mr Hasan. Miss Jones accepts that she had a copy of the contract but did not give this to Mr Hasan. His evidence, which I accept, was that he first saw her contract as part of these proceedings. There is no evidence that Mr Hasan agreed to keep Miss Jones on as an employee on her previous terms and conditions, as I accept that he was not told what they were.
19. Mr Hasan's evidence was consistently that Mr Anderson told him that he did not need to keep any of the staff on if he did not want to. Whether this was as a result of a miscommunication or whether Mr Anderson intended to mislead Mr Hasan is unclear. Mr Hasan's evidence, which I accept, was that he did not know until the claimant told him herself after the sale on 20 March 2023 that she had worked for Mr Anderson for 22 years. I also find that Mr Hasan did not know that any of the staff had any employment rights. There were 4 other staff working for Mr Anderson at the time of the sale, according to Miss Jones; one was self-employed and the others all had short terms of service with Mr Anderson. She was the only one with long service. We have no evidence as to whether any of the other staff had a contract of employment with Mr Anderson.
20. Mr Hasan's evidence was that he did not buy the whole business from Mr Anderson. His evidence was that he took over the lease of the shop and paid Mr Anderson for the mirrors and chairs and some equipment. He said that he had considered turning the shop into a coffee shop if the barber's business did not work out. I asked Mr Hasan if he had paid Mr Anderson anything for the business name itself and the goodwill and he said that he did not. He asked the other staff if they were going to stay on with him and none of them did. Mr Hasan had one other member of staff working for him at the time.
21. It was the claimant's evidence that she had discussed buying the whole business from Mr Anderson over a period of years but had not been able to afford the price for the business as a going concern. She told me that she had last discussed this with him about three years ago. She said that the price Mr Anderson had quoted her was approximately £45,000, which she said she had not been able to afford but that had Mr Anderson simply sold her some furnishings and had she just had to take over the lease, she would have bought it. I find that Mr Hasan did not pay Mr Anderson such a sum for the business; had he done so, I find that both parties would have been much more thorough

in their negotiations and that Mr Anderson would have written the agreement down, given that he had entered into written agreements with the claimant for her employment. I accept on the balance of probabilities that Mr Anderson assigned the lease to Mr Hasan and that Mr Hasan paid him a small sum for some furnishings and that he did not tell Mr Hasan that the claimant's employment rights would be his responsibility after the sale.

22. After the sale, Mr and Mrs Anderson stopped paying the claimant's statutory sick pay. Mr Hasan did not pay her any SSP either, as I find that he did not know that he needed to. Miss Jones contacted Mr Hasan on 15 March and messaged him again on 20 March 2023, to introduce herself. They spoke on the phone later on 20 March 2023 and Miss Jones informed him that she was off sick and that he had a legal obligation to pay her sick pay. She suggested that he take legal advice about this obligation. She also told him that she had worked for Mr and Mrs Anderson for over 20 years. He said that he would investigate and call her again. Miss Jones messaged him the following morning to arrange a time to speak.

23. Mr Hasan replied "*Hello Kelly, actually we have enough staff!! We don't need more staff. I hope you get better soon.*" Miss Jones replied "*What do you mean Sam?*" Mr Hasan replied "*I mean I can't offer you job. Sorry.*" Miss Jones took this as a dismissal by Mr Hasan. Mr Hasan made contact again on 27 March 2023. His evidence was that he had thought about what she had told him about having worked in the business for over 20 years, and so he decided to offer her a job. Her evidence was that she declined, saying that she did not trust Mr Hasan, and they agreed that she would come into the shop. Miss Jones' evidence was that she began collecting her belongings while waiting for Mr Hasan to finish with a customer. When they spoke they both agreed that he offered her the opportunity to work and she declined. She asked again to be paid her SSP. They agree that Mr Hasan told her to come back to work. Mr Hasan's evidence was that he told her to come back to work and he would sort the SSP out. Miss Jones' evidence was that she felt like the conversation was going round in circles, with her asking to be paid SSP and Mr Hasan telling her to come back to work, so she left and took up the offer of work with Mr Anderson's son. She subsequently started this claim, having first engaged in ACAS Early Conciliation. She still works for Mr Anderson's son at the time of this hearing.

The Law

24. The Transfer of Undertakings (Protection of Employment) Regulations 2006 SI 2006/246 (commonly known as "TUPE") safeguard employees' rights in the event of transfers of undertakings, businesses or parts of businesses from one owner to another. The main objectives of the TUPE provisions are that when a relevant transfer (or sale) of a business takes place, the contracts of employment of the employees assigned to the business transfer automatically from the 'transferor' (the old employer) to the 'transferee' (the new employer),

with their terms and conditions intact. This safeguards pay, terms and conditions and continuity of service, and both the transferor and the transferee inform and consult with representatives of those of their respective employees who might be affected by the transfer.

25. For TUPE to apply, there has to be the transfer of an “economic entity” (that is, the sale of a business, regulation 3(1)(a)) or a “service provision change” (Regulation 3 (1)(b)). An “economic entity” is transferred if, broadly, it “retains its identity”. What this means was set out by the Employment Appeal Tribunal in the case of *Cheesman and ors v R Brewer Contracts Ltd 2001 IRLR 144 EAT* and the factors to be considered are set out in the case of *Spijkers v Gebroeders Benedik Abattoir CV and anor 1986 2 CMLR 296, ECJ*.
26. The business “retains its identity” if its operation is actually continued or resumed. In a labour-intensive sector the new employer usually does not simply carry on the relevant business but also takes over a majority, in terms of their numbers and skills, of the employees assigned by the seller to that business.
27. Also among the matters to be considered are the type of business, whether or not its tangible assets are transferred (such as equipment), the value of its intangible assets at the time of transfer (such as its reputation, business name or goodwill), 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. When no employees, or very few employees are transferred, the reasons why that is the case can be relevant as to whether there was a transfer; and
28. One of the relevant factors identified in *Spijkers* was ‘the type of business or undertaking’. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer will vary according to the activity carried on. (*Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice 1997 ICR 662, ECJ*).

Application of the law to the facts found

29. Miss Jones assumed that her employment transferred to Mr Hasan after the sale. This does not happen automatically but happens only if the Transfer of Undertakings (Protection of Employment) Regulations 2003 (the so-called “TUPE Regulations”) apply to the sale. The TUPE Regulations only apply if there is a transfer of a stable business (an “undertaking”) or part of a business from the buyer to the seller and that business is identifiable as the same or a similar business after the sale.
30. It is important to put the legal provisions in the context of the business in question. A barbers’ shop is more dependent on its staff and less dependent on machines, equipment or technology than other businesses would be. The

goodwill or the name of the shop is also important in the context of a barbers' for the business to carry on in the same or a similar way after the sale, due to the importance of the reputation of a barbers to its customers.

31. The sale of assets of a barbers' business is not enough, I find, for TUPE to apply. Mr Hasan took over the shop lease and paid for chairs and mirrors and some other fixtures and fittings. He did not pay for the name or the goodwill of the shop. He was told he did not have to take on the staff, and that they were not being sold as part of the business. The sale to Mr Hasan was not the "transfer of an undertaking" within the scope of the TUPE regulations. It was the sale of some assets only.
32. If there has not been a TUPE transfer, any employees of the business do not become the responsibility of the buyer. Their employment with the seller would end on the day of the sale and any money they are owed, or other employment rights they have such as the right to a redundancy payment, remain the responsibility of the seller.
33. Miss Jones told the Tribunal that Mr Hasan did not provide her with a P45 after her employment ended. Mr Hasan told the Tribunal that she did not ask for one, which Miss Jones accepted. She told the Tribunal that she asked the seller, Mr Anderson's, accountant for a P45 instead, and a copy of it was before the Tribunal in evidence. The P45 is for "Waterloo Barber Shop" at the business address and the P45 itself is dated 5 April 2023, which is the day after Miss Jones started work for Mr Anderson's son.
34. However, notably the accountant has put Miss Jones' leaving date as 12 March 2023, the day before the sale to Mr Hasan. If the claimant's employment was transferred to Mr Hasan, the P45 would have been his responsibility and her employment would not have ended with the sale but would have transferred to Mr Hasan, to continue. The fact that the accountant identified 12 March 2023 as the date she left suggests that Mr Anderson's accountant did not consider that TUPE applied to the sale to Mr Hasan. Otherwise, his instructions to Miss Jones would have been to ask Mr Hasan for the P45, as it was not Mr Anderson's responsibility to provide it. I find that this is evidence that Mr and Mrs Anderson, via their accountant, knew that Miss Kelly's employment was not transferred to Mr Hasan on the day of the sale.
35. I found Mr Hasan's evidence on this point to be credible and consistent. From his ET3 response form to his witness statement to his evidence under oath at this hearing, he has consistently said that Mr Anderson did not tell him that he needed to take on any employees. He told me that he asked the staff other than Miss Kelly if they wanted to stay, and they told him they did not.
36. Mr Hasan told me that he took on the lease of the shop and the fixtures, fittings and furniture of the shop. He did not pay Mr and Mrs Anderson for the goodwill

or the name of the business. He considered that if he could not make the shop work as a barbers, he may use the space for a coffee shop. All of these facts lead me to conclude, on the balance of probabilities, that there was not a transfer of the business such that the TUPE Regulations apply.

37. I note that Miss Jones told me that Mr Anderson was considering how to reduce his involvement in the business for some time. If he had simply closed the business, he would have owed Miss Jones a very large sum in a redundancy payment, due to the fact that she had worked for him full time as an employee for a very long time. Simply selling the lease and the fixtures would mean that he would still have had to pay her a considerable redundancy payment.
38. Had he sold the entire business so that TUPE applied, Miss Jones's employment status would have been a considerable and expensive liability of the business for the new owner to take on. A long-serving employee is a significant liability due to the right to longer notice periods, significant redundancy pay and unfair dismissal rights, and this may make a business more difficult to sell.
39. Without having the benefit of any evidence from the sellers themselves, I cannot make any findings on the point of intention, but I note the advantages, in theory, to a business owner who does not provide clear information to a seller or their staff in the event of a business sale. This is why the TUPE regulations contain rules for consultation of staff on the transfer, and for the provision of employee liability information to any buyer.
40. Both Miss Jones and Mr Hasan agree that once Miss Jones told Mr Hasan that she had been working at the Waterloo Barber Shop for over 20 years, he offered her a job. I find that had Mr Hasan known that he was responsible for the claimant, and known about her 22 years' service and contract of employment, he would have respected this obligation from the outset in his dealings with Miss Jones.
41. In conclusion, I find on the balance of probabilities that Miss Jones' employment with Mr and Mrs Anderson's partnership did not transfer to Mr Hasan on 13 March 2023. Mr Hasan took over the lease of the shop and bought some furniture from them. Miss Jones' employment remained with Mr and Mrs Anderson. However, I make no finding of liability against Mr and Mrs Anderson as Miss Jones' claim is against Mr Hasan and they are not parties to it.
42. Miss Jones was offered work by Mr Hasan on 27 March 2023 but declined. She found work with Mr Anderson's son and began working for him on 4 April 2023. Mr Hasan is not liable for any loss of earnings sustained by Miss Jones as a result of the ending of her working relationship with Waterloo Barber Shop.
43. Her claims are therefore dismissed.

Employment Judge Barker
5 July 2024

Judgment sent to the parties on:

10 July 2024

For the Tribunal:

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