



EMPLOYMENT TRIBUNALS

Claimant

Mrs. J.P. Hewitt

v

Respondent

**Tracy Wilde and Jayne Cotton
trading as TJ's Cosy Café
Limited (1)**

**Cats Whiskers Café Limited
(2)**

Heard at: Birmingham

On: 5 August 2024

Before: Employment Judge Wedderspoon

Representation:

Claimant: In Person

Respondent (1): No attendance

Respondent (2): Mr. J. Flanagan, Director

JUDGMENT

1. The claimant was unfairly dismissed by reason of redundancy by the First respondent, Tracy Wilde and Jayne Cotton trading as TJ's Cosy Café Limited on or about 30 July 2023.
2. The claimant is awarded a basic award of £7,800.
3. The claimant is awarded loss of statutory rights of £500.
4. The claimant is awarded £2,860 notice pay.
5. The claimant is awarded £8,060 in loss of earnings.
6. The total judgment against the first respondent is £19,220
7. The total monetary award payable to the claimant for unfair dismissal is £16,360.
8. The prescribed element is £8,560.
9. The period of the prescribed element is 28 July 2023 to 5 August 2024.
10. The difference between the total award and prescribed element is £10,660
11. The second respondent is dismissed from the proceedings.

REASONS

1. By claim form dated 15 September 2023 the claimant brings complaints of unfair dismissal and a claim for notice pay. ACAS conciliation was started on 10 August 2023 and completed on 22 of August 2023 against both the First and Second respondents. The first respondents emailed the Tribunal on 2 August 2024 at 16.50 to state they were unable to attend the hearing but to proceed in their absence.

2. The Tribunal was provided with a 64 page bundle and a witness statement from the claimant. The second respondent relied upon its sequence of events document as a witness statement and relied upon a 17 page additional bundle of documents. The Tribunal heard from the directors of the second respondent, Mr. Flanagan and Miss. Parkins.

Facts

3. The circumstances of this case are unusual. The claimant was employed as a catering assistant from 1 April 2000 by TJ's Cosy Cafe and contracted to work 20 hours per week. On 1 October 2015, the claimant was provided with a contract of employment setting out her working hours of 25 hours per week.
4. On 3 August 2022 Tracy Wilde one of the owners of TJ's Cosy Cafe told the claimant they had sold the café. The claimant's husband enquired with Jayne Cotton, another owner of TJ's whether it was true the business was sold. She responded that they were bringing in new managers to run the café who want to buy the café but the sale of the business could take 6 months to go through. The claimant continued to work at the café with no break in her employment at any time.
5. On 8 August 2022 the claimant saw Tracy Wilde of TJ's Cosy Cafe showing around John Flanagan and Michelle Parkins, the directors of Cats Whiskers Cafe Limited the café and how to use the equipment at the café.
6. The second respondent was intending to purchase the business from the first respondent. Whilst sale negotiations were ongoing the second respondent entered into an agreement to take over the management of the café. The agreement dated 5 August 2022 with effect from 8 August 2022 was in place until the sale of the cafe concluded. The length of the agreement was for three months when the parties had the option to revisit and renew the agreement. It was agreed that the managers namely Cats Whiskers Cafe Limited would run the cafe on a daily basis and pay for all stock, employees' wages as well as other items needed to successfully run the cafe. The managers were to pay the owners of TJ's Cosy Cafe the running costs which included rent, water, electricity and insurance calculated at a cost of £388 per week. It was a term of the agreement that the second respondents were to transfer the sum of £390 every Sunday into the TJ's bank account in advance. The managers were to continue to run the cafe under the name of TJ's Cosy Cafe until the business sale concluded.
7. The first respondent asserted in its ET3 that there was a meeting with both respondents and the claimant on 4 August 2022 to discuss the situation but the second respondent and the claimant disputed this and the Tribunal rejected the first respondent's assertion.
8. The second respondents therefore paid the first respondent rent and agreed to pay the claimant her wages. The second respondent had not purchased the first respondent's business so were not permitted to change the name of the café from TJ's. The first respondent informed the second respondent they had paid the claimant one weeks' notice and ended her employment. This was untrue; the first respondent did not pay the claimant one weeks' notice pay and did not serve a P45 on the claimant until 8 June 2023.
9. Under heads of terms of sale dated 10 June 2022, the second respondent was to purchase the goodwill and assets of the business trading as TJ's Cosy Café. On conclusion of the sale all the staff of the business would

- transfer with the sale under TUPE to the second respondent. The sale was not concluded.
10. Negotiations to purchase the business entity by the second respondent from the first respondent were not fruitful. The second respondent was not willing to accept the dilapidations report and the second respondent was finding the cost of the business significant.
 11. On request of their accountant, the second respondent sought information from the first respondent about the claimant and commenced paying the claimant via pay slips from October 2022 with the name Cats Whiskers Cafe Limited. Also, from 5 January 2023 £391.82 was credited by the second respondent to the claimant's nest pension account. In their ET3 the first respondent stated that this was a mistake by their accountant. In fact it should have been a payment for outstanding wages to the claimant owed to her by the first respondent.
 12. The claimant received a P45 from the first respondent on 8 June 2023 with an alleged termination date of 6 August 2022.
 13. The second respondent determined not to go ahead with the purchase. In the circumstances they determined to leave the café and relinquish management of it. Pursuant to their agreement they requested that the first respondent put the claimant back on their books to which the first respondent agreed. This is supported by a text message from the first respondent to Ms Parkins on 30 May 2023. In order to complete the paperwork, the second respondent requested from the first respondent a specific date when this would be done. The first respondent said they could not confirm a date so the second respondent "*should pay the claimant cash until they could give a date*". The second respondent was very concerned as to the legality of this suggestion and were concerned it would not protect the claimant in terms of the national insurance she should be paid. In the circumstances they served a P45 on the claimant with effect on 27 July 2023 and her employment was returned back to the first respondent via a further service provision change.
 14. The second respondent vacated the café on 30 July 2023 and left stock in the café for the use of the first respondent. The first respondent did not contact the claimant at all and simply locked up the café and returned the keys to the landlord and determined not to trade. Due to the fact that the first respondent did not contact the claimant, the claimant contacted the first respondent who stated they did not owe her anything and she was now employed by the second respondent.

The Law
Dismissal

15. The burden of proof falls on the employee on the balance of probabilities to show that she was dismissed. Where language or circumstances are ambiguous the Tribunal must consider all surrounding circumstances and whether a reasonable employee would have considered they were dismissed. In the case of **Kirklees MBC v Radecki 2009 ICR 1244** the Court of Appeal held the removal of a claimant from the payroll whilst suspended and then negotiating a settlement agreement was a sufficiently unequivocal statement of intention to terminate the employment contract. The question for the Tribunal is what terminated the employment contract.

Unfair dismissal

16. Pursuant to Section 98 (1) of the Employment Rights Act 1996 an employer has the burden of showing the reason for the dismissal and that the reason falls within subsection (2) or some other substantial reason of a kind so as to justify dismissal.
17. In relation to the fairness of the dismissal section 98 (4) states 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 reasons shown by the employer (a) depends on whether the in the circumstances including the size of the administrative resources of the employees 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.

Transfer of Undertakings

18. Pursuant to regulation 3(1)(a) of the Transfer of Undertakings Regulations 2006 a relevant transfer is defined as 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.
19. By regulation 3 (2) an economic entity is defined as an organised grouping of resources which has the objective of pursuing an economic activity whether or not that activity is central or ancillary.
20. It is further made clear by Regulation 3 (6) that a relevant transfer (a) may be affected by a series of two or more transactions and (b) may take place whether or not any property is transferred to the transferee by the transferor.
21. The requirement under regulation 3(1)(a) that there should be a transfer of an economic entity which retains its identity was made clear in the case of **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. Further it is necessary to take account of all the factual circumstances of the transaction in question including the type of undertaking or business in question, the transfer or otherwise of tangible assets such as building 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 transport otherwise of the circle of customers and degree of similarity between activities before and after the transfer and the duration of any interruption in those activities... 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.
22. In the case of **Cheesman and others v R Brewer Contracts Limited 2001 IRLR 144** it states as to whether there is an undertaking there needs to be found (i) 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 (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 (iii) in certain sectors such as cleaning and surveillance the assets are often reduced their most basic and the activity is essentially

based on manpower (iv) or an oil guys 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 5 and 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 the work is organised his operating methods and whether appropriate the operational resource is available to it. In respect of whether there has been a transfer of that economic entity in **Cheesman** it was stated whether there is any relevant transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity as indicated in by the fact that its operation is actually continued or resumed. In a labour intensive sectors it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question by also taking over a major part in terms of their numbers and skills of the employees specially assigned by its predecessors to that task that follows on from that.

23. A service provision change is defined under regulation 3(1)(b) of TUPE as a situation in which (i) activities cease to be carried out by a person "a client" on his own behalf and are carried out instead by another person on the client's behalf "a contractor" (ii) activities ceased to be carried out by a contractor on a client's behalf and are carried out instead by another person on the client's behalf a subsequent contractor or (iii) activity ceased to be carried out by a contractor or a subsequent contractor on a client's behalf and are carried out instead by the client on his own behalf and in which the conditions set out in paragraph three are satisfied. The conditions in paragraph three are (a) immediately before the service provision change there is an organised grouping of employees situated in Great Britain which has its principal purpose the carrying out of the activities concerned on the behalf of the client; (b) the client intends that the activities will following the service provision change be carried out by the transferee other than in connection with a single specific event or task of short term duration and (b) the activities concerned do not consist wholly or mainly of the supply of goods for the clients use. In the case of **Eddie Stobart Limited v Moreman 2012 ICR 919** at paragraph 19 it was stated no doubt the broad purpose of TUPE is to protect the interests of employees by ensuring that in a specified circumstances "they go with the work". In *Ceva Freight UK limited v Seawell Limited 2013 CSIH 59* the Inner House provided guidance as to the approach that the Tribunals to take when determining whether there has been a SPC for the purposes of regulation 3(1)(b); it stated in considering whether this condition may be satisfied in a particular case an appropriate starting point will be the activities. The term activities is of course also used in paragraph one of regulation 3 as a central element in defining a service provision change, in that context it is our view that evident that it refers to the prestations by way of service or services which in the variety of the service provision change in the present case required to be provided by the contractor in terms of his contractual arrangements with the client and which following the cessation of those arrangements are then performed by the client himself on his own behalf. Approving the Judgment in *Eddie Stobart* it stated that the concept of an organised grouping implies that there be an element of conscious organisation by the employer of his employees into a grouping of the nature of a team which has as its principal purpose the

carrying out de facto of the activities. Regular 2 (1) of the 2006 Regulations makes clear that organised grouping of employees can include a single employee.

Conclusion

24. There was no transfer of an undertaking between the first and second respondent in August 2022 pursuant to Regulation 3 (1)(a) of the Transfer of Undertakings Protection of Employment Regulations 2006; there was no transfer of an economic entity. The second respondent did not purchase the business from the first respondent and the contractual agreement between them was that the second respondent would manage the café and simply pay the claimant her salary if and until the second respondent purchased the business.
25. However, the Tribunal finds that the reality of the situation is that there was a service provision change pursuant to section 3(1)(b)(i) of the 2006 Regulations. The first respondent carried out the business of providing cafe services namely catering services to members of the public as customers of TJ's Cosy Cafe.
26. By agreement dated 8 August 2022 the second respondent agreed to carry out the catering services of the café. The claimant in her role as a catering assistant ordinarily carried out those activities. The first respondent organised that the claimant was “an organised grouping of employees” carrying out catering work (see Regulation 2 (1)). The activities carried out by the claimant whilst working for the first respondent were fundamentally the same as those she carried out whilst working for the second respondent.
27. The service of the P45 dated 6 August 2022 by the first respondent on the claimant in June 2023 did not in effect terminate her employment. The Tribunal accepts the claimant’s evidence that the claimant simply continued turning up for work and conducting her role as a catering assistant working for the first respondent and then for the second respondent in August 2022. There was no break in the continuity of her employment.
28. Before the transfer there was an organised grouping of employees which has its principal purpose the carrying out of the activities on behalf of the first respondent namely the claimant carried out catering assistant work at the cafe.
29. Following the second respondent’s decision not to purchase the business in May 2023 it sought and obtained the first respondent’s agreement to place the claimant back onto the first respondent’s payroll. This is corroborated by the text message received from the first respondent by Miss. Parkins in May 2023. Cats Whiskers Cafe Limited served the claimant with a P45 dated 27 July 2023. At this point of time the second respondent terminated its management of the café and handed back the keys of the cafe to the first respondent on or about 30 July 2023. A service provision change of the claimant carrying out catering assistant duties resumed with the first respondent as it had done since the start of the claimants employment in 2000.
30. The claimant’s employment was returned to the payroll of the first respondent. The first respondent failed to communicate with the claimant at all and took the keys back from the 2nd respondent and determined to close the business and hence terminate the claimants employment.

31. The Tribunal determined it was the first respondent that dismissed the claimant following a service provision change taking place on 30 July 2023. The claimant in her role as a catering assistant ordinarily carried out those activities. The first respondent organised that the claimant was “an organised grouping of employees” carrying out catering work (see Regulation 2 (1)). The activities carried out by the claimant whilst working for the first respondent were fundamentally the same as those she carried out whilst working for the second respondent. At the end of July 2023 the second respondent who organised the claimant as an organised grouping to carry out catering work at the café was due to resume her duties with the first respondent on the second respondent terminating its management of the business.
32. The business having been closed by the first respondent there was no longer a need for the claimant to conduct work as a catering assistant so that the first respondent ceased to carry on the business for the purposes of which the employee was employed by them in accordance with section 139 of the Employment Rights Act 1996. The claimant was redundant. The first respondent did not engage with any process provide any consultation or warning to the claimant. The Tribunal determines that the dismissal was unfair.
- Remedy
33. The claimant had continuous employment with the respondents from 1 April 2000. The claimant was born on the 23 of March 1959 and had more than 20 years service at the date of her termination. Her remuneration amounted to £260 gross per week. The claimant is entitled to a redundancy payment of £7,800 and a loss of statutory rights award of £500. The claimant is also entitled to a notice payment of £2860. The award is unchallenged and the Tribunal make this award.
34. In addition, the claimant was unable to find work for a period of 31 weeks prior to having an accident and hurting her ankle whereby she can no longer work. The unchallenged sum sought by the claimant is £8060. The Tribunal makes this award.
35. The claimant was in receipt of job seekers allowance following the termination from 20 September 2023. In the circumstances the total judgment against the first respondent is £19,220. The total monetary award payable to the claimant for unfair dismissal is £16,360. The prescribed element is £8,560. The period of the prescribed element is 30 July 2023 to 5 August 2024. The difference between the total award and prescribed element is £10,660.
36. The second respondent is dismissed from the proceedings.

Employment Judge Wedderspoon

06/08/2024

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