



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs A Falkowska-Tumiel

**First Respondent:** BM Jewels of London Ltd (in voluntary liquidation)

**Second Respondent:** Studio 13 Jewellery Ltd

**Third Respondent:** The Secretary of State for Business, Energy and Industrial Strategy

**Heard at:** London Central **On:** 20 September 2019

**Before Judge:** Employment Judge A Isaacson

**Interpreter:** Ms D Anderson

## Representation

**Claimant:** In person

**First Respondent:** Did not appear and was not represented

**Second Respondent:** Mr T Hussain, litigation consultant

**Third Respondent:** Mr P Soni, lay representative

# JUDGMENT

The Judgment of the Tribunal is as follows:

1. The claimant was automatically unfairly dismissed. Because of reg 4(1)-(3), liability for the dismissal passes to the transferee, the second respondent.
2. The claimant's claims for notice pay, unauthorised deduction from wages and holiday pay succeed.
3. The claimant's claim for compensation for failing to provide a statement of employment particulars will be decided at a remedy hearing.
4. A remedy hearing has been listed for one day on 6 November 2019.

# REASONS

## Evidence before the Tribunal

1. The Tribunal was presented with a bundle of documents and heard evidence from the claimant and from Mr D Burchell, a Director of the second respondent. The second and third respondents provided written submissions and referred to cases and the parties had the opportunity to give oral submissions. The second respondent produced documents during the hearing. Although the Tribunal was critical of the late discovery, since they were relevant the documents were allowed and all parties had an opportunity to consider them.

## Claims and issues

2. The claimant claims unfair dismissal, redundancy pay, notice pay, an unlawful deduction from wages relating to her salary for March 2018 and pension contributions, holiday pay and a failure to provide a statement of employment particulars.
3. The main issues to be decided by the Tribunal are:
  - 3.1 Was there a relevant transfer of the business of the first respondent to the second respondent?
  - 3.2 What date was the transfer?
  - 3.3 Was the claimant employed by the first respondent at the time of the transfer or immediately before the transfer?
  - 3.4 Is the transfer the sole or principal reason for her dismissal?
  - 3.5 Is the reason economic, technical or organisational (ETO) entailing changes in the workforce?
  - 3.6 Was the first respondent subject to insolvency proceedings as per Regulation 8 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regs) at the time of the transfer?

## The facts

4. The claimant commenced employment at the first respondent on 29 January 2007 as an office manager. The claimant's salary was £22,100 per annum. The first respondent was a diamond setting business and part of the manufacturing process for jewellery. In March 2018 they had 12 employees on their books.
5. Around the end of February 2018 Mr Burchell made contact with BM Advisory LLP (BM the Liquidators) to discuss the first respondent's financial situation. An email dated 19.3.18 from BM confirmed there had

been a recent meeting and that the next step was to confirm terms of engagement.

6. Mr Burchall told the Tribunal that the Liquidators told him “*to release anyone that they didn’t want to keep*”.
7. The second respondent was incorporated on 26.3.18.
8. The claimant, along with the other employees of the first respondent did not receive any pay for March.
9. On the 29.3.18 the claimant was called to a meeting with another member of staff GP, who was a part time delivery driver. Neither were given notice of why they were called to the meeting. At the meeting the claimant was told it was her last day working there and to leave her keys and to leave the premises. She wasn’t sure if the word redundancy was used but she was told to go to the Liquidators to claim any money.
10. Mr Burchall first told the Tribunal that a decision was made to carry on the business under the new name of the second respondent. Mr Lane would be the sole shareholder and a sleeping partner. Mr Burchall later stated that the first respondent ceased trading on the 29.3.18, when all 12 employees were dismissed and the second respondent merely purchased the assets and then re-employed 10 employees.
11. However, Mr Burchall also confirmed to the Tribunal that he only dismissed 2 employees, the claimant and GP. Mr Burchall told the Tribunal that the new company didn’t want to trade with surplus staff so he needed to make two employees redundant. He chose the claimant because there were two office managers doing the same job and he had heard that the claimant was thinking of leaving anyway. The part time driver was made redundant because he was part time and his work could be carried out by an apprentice.
12. On Tuesday 2 April 2018, the first working day after the first respondent ceased trading on 29.3.18, the second respondent began trading. It is not disputed that the economic entity retained its identity. There is no discernible difference between the business being carried out by the first respondent and the second respondent at 13 Hatton Place. The only difference is the name of the company and the fact that Mr Lane is the new sole shareholder. Most of the employees are working there, with no break in continuity and carrying out the same jobs and dealing with the same customers.
13. Mr Lane paid for the assets from the first respondent in instalments between June 2018 and February 2019. However, the second respondent

started trading from 2 April 2018 and employees were paid by the second respondent from that date.

14. The Tribunal finds that there was a transfer of undertaking and the relevant TUPE regulations apply. The first respondent ceased trading on the 29.3.18 and the second respondent commenced trading on the very next working day on 2.4.18. Apart from the claimant and GP all employees continued working for the second respondent, were not dismissed and were paid by the second respondent for work carried out from that date.
15. The claimant sent texts to Mr Burchall regarding her outstanding pay and following advice from ACAS, raised a grievance on 18 April 2018. The claimant was sent a payslip and P45 for March but was not paid for March 18. The claimant chased Mr Burchell but received no reply. The claimant also made enquiries and was told that the claimant's pension contributions had not been paid since May 2017.
16. A resolution was passed on 5 June 2018 that the first respondent be wound up voluntarily. The Tribunal finds this is when the BP Insolvency practitioners were formally appointed.
17. The claimant made a claim against the National Insolvency Fund (NIF) but received a letter from the Insolvency Service, stating that they couldn't pay her because they believed that a TUPE transfer had taken place and that the second respondent was responsible for making payments to the claimant.

## **The Law**

18. TUPE, reg 3 defines the concept of a "relevant transfer". A relevant transfer is a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the UK to another person where there is a transfer of an economic entity which retains its identity.
19. Reg 4 sets out the fundamental rules that (a) any employee assigned to the undertaking or organised grouping of resources or employees subject to the transfer is not dismissed by the relevant transfer but is treated thereafter as having always been employed by the transferee, and (b) all rights and liabilities in relation to her employment pass from the transferor to the transferee. Reg 4(3) provides that this includes employees employed by the transferor and assigned to the transferring organised grouping immediately before the transfer, or would have been so employed if she had not been dismissed in circumstances described in Reg 7(1).

20. Reg 7 protects employees from being dismissed because of a relevant transfer:

**“(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 that 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.**

**(3A) in paragraph (2), the expression “changes in the workforce” include a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act.)”**

21. In P Bork International A/S v Foreningen af Arbejdsledere I Danmark [1989] IRLR 41 the European Court said:

**"In order to determine whether... the reason for the dismissal was the transfer itself, account must be taken of the .... circumstances in which the dismissal occurred and, in particular, in a case like the present one, the fact that it took place on a date close to that of the transfer and that the workers were re-engaged by the transferee. The factual assessment needed in order to determine the applicability of the directive is a matter for the national courts, and having regard to the interpretative criteria laid down by the [European] Court'."**

22. *Bork* was applied by the EAT and Court of Appeal in Hare Wines Ltd v Kaur [2019] EWCA Civ 216, [2019] IRLR 555, where an employee was

dismissed shortly before the transfer, but the motive of the new employer in encouraging the dismissal of the employee was to avoid employing the employee because she had ongoing difficulties in her working relationship with another employee, who would be her supervisor going forward. The EAT and Court of Appeal considered that the sole or principal reason for the dismissal was the transfer, and was therefore automatically unfair.

23. An important factor which may be taken into account in deciding the reason for dismissal is its proximity to the transfer. The Court of Appeal noted that although proximity to the transfer is not conclusive, it is often strong evidence in the employee's favour.
24. Once the claimant has shown some evidence in support of her case the burden lies on the respondent to establish that the reason for dismissal was not TUPE related automatic unfair dismissal. The onus is on the dismissing employer to establish that the reason for dismissal was an economic, technical or organisational one.
25. It is established case law that an economic, technical or organisational (ETO) reason entailing changes in the business must relate to the conduct of the business going forward. If the reason for the dismissal is, in effect, motivated by the desire to obtain an enhanced price for the business, or to achieve a sale, this will not amount to a reason related to the conduct of the business. The dismissal must not be a deliberate measure intended to deprive those employees of the rights conferred on them by the Acquired Rights Directive.
26. In the case of Crystal Palace FC Ltd and another v Kavanagh and others [2013] EWCA Civ 1410 Briggs LJ stated:

**"Reg 7 unambiguously requires a subjective fact-intensive analysis of the "sole or principal reason" for the relevant dismissal, so that the employment tribunal needs to be astute to detect cases where office holders of insolvent companies have attempted to dress up a dismissal as being for an ETO reason, where in truth it has not been. In the present case the employment tribunal carefully assessed and rejected a case by the employees that this is indeed what had occurred, leading to their finding that [the administrator's] ostensible reason for the dismissals was the genuine reason...For the same reason it is important to understand paragraph 47 of Mummery LJ's judgment in the *Spaceright* case in the context of its facts. There the dismissal of the CEO was not because the money to pay him had run out, but solely or principally because it would make the business more attractive to a purchaser, who would naturally wish to put a person of his own choice into the top job. In the present case by contrast, these dismissals made the business of the club not a whit more attractive to a purchaser. It was only because negotiations for the parallel sale of the stadium dragged on beyond the time during**

**which the administrators could continue to pay all the staff these employees had, most unfortunately, to be dismissed."**

27. Even if the dismissal is not automatically unfair under reg 7(1) because, by virtue of reg 7(2), there is an economic technical or organisational reason for dismissal entailing changes in the workforce, this does not make a dismissal fair. A genuine redundancy should amount to an ETO reason for dismissal, but the general principles of unfair dismissal law must still be complied with, including procedural fairness and a fair selection.
28. Reg 8 is designed to remove burdens which would otherwise fall on transferees. The regulation differentiates between two classes of case. In reg 8(6) cases, the transferee gets the employees but is relieved of some of the accrued liabilities relating to their employment. Where reg 8(7) applies, the employees do not transfer, and nor does any accrued liability in respect of them or their dismissal by the transferor.
29. The question whether any particular case falls into the former category or the latter turns on the nature and purpose of the proceedings to which the transferor is subject. Were they “..insolvency proceedings opened.....not with a view to the liquidation of the assets” , or “bankruptcy proceedings or any analogous insolvency proceedings instituted with a view to the liquidation of the assets”?
30. If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings paragraphs 8(2) to (6) apply. “Relevant insolvency proceedings” means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.
31. In Ward Brothers (Malton) Ltd v Middleton UKEAT/0249/13/RN the EAT held that there needed to be a red line drawn on the issue of when insolvency proceedings were under the supervision of an insolvency practitioner. It held that for the insolvency proceedings to be under the supervision of an insolvency practitioner, that practitioner must have been appointed as a liquidator, provisional liquidator or administrative receiver as required by section 388 Insolvency Act 1986.

## Submissions

32. Both the second and third respondents provided written submissions and referred to a number of cases. In summary, the second respondent argues that the claimant was dismissed by the first respondent prior to any TUPE transfer. That reg 8(7) will apply and that the transfer did not take place

until February 2019 because the last instalment for payment for the assets only took place then. Mr Hussain also argued that the insolvency practitioners were appointed prior to the claimant's dismissal.

33. The third respondent argues that there was a relevant transfer and that it took place around 1 April 2018. The business was disposed of as a going concern and since the second respondent was only incorporated on 26 March 2018 it would suggest it was set up with the sole intention of continuing the business of the first respondent. The third respondent argues that the claimant was dismissed because of the transfer and not for an ETO reason within reg 7(2). Finally, Mr Soni argued that the transferor was not subject to insolvency proceedings as per Regulation 8 at the time of the transfer, and therefore no assistance can be offered from the NIF. The debts owed are the responsibility of the transferee.

## **Conclusions**

34. The Tribunal finds that there was a relevant transfer of an undertaking from the first respondent to the second respondent and that it took place on the 2 April 2018. There is no discernible difference between the business carried on by the first respondent and the second in the same premises using the same facilities. The only thing that changed was the name of the company. Most of the employees continued to work at the same address, with no apparent break in continuity, carrying out the same jobs and dealing with the same customers. The second respondent was set up with the sole intention of continuing the diamond setting business.
35. The Tribunal was not impressed with Mr Hussain's submission that, in reliance on the schedule regarding when assets were paid for, the title didn't pass until February 2019. Case law indicates that the date of the transfer is to be ascertained by reference to the practical reality. In Celtic Ltd v Astley [2005] IRLR 647 the ECJ stated:
- “It has been held on several occasions that the Acquired Rights directive applies where there is a change in the legal or natural person who is responsible for carrying on the business regardless of whether or not the ownership of the business is transferred.”**
36. It was on the 2 April 2018 when the second respondent starting trading and the majority of the employees continued working at 13 Hatton Place and were paid by the second respondent for that work.
37. The claimant was employed by the first respondent immediately before the transfer. She was dismissed at the end of the last trading day of the first respondent. The transfer took place the very next working day.



38. The Tribunal finds that the transfer was the principal reason for the claimant's dismissal. This is partly because the dismissal's close proximity to the transfer and because of the evidence given by Mr Burchall that he made the decision to dismiss after the Insolvency practitioners told him to "release anyone he didn't want to keep".
39. Although Mr Burchall told the Tribunal that the reason for the claimant's dismissal was redundancy, because they didn't need two office managers, the Tribunal is not persuaded by his evidence. There was no other evidence before the Tribunal to demonstrate that there was a need for redundancy or that any thought had been given to a need for a reduction in the workforce. The Tribunal finds that the claimant was dismissed because the Liquidators told Mr Burchall to release anyone they didn't want to keep and therefore the claimant's dismissal was to try and avoid the claimant transferring across to the second respondent.
40. In light of the Ward Brothers case referred to above the Tribunal finds that the insolvency proceedings were only under the supervision of an insolvency practitioner when the liquidator was formally appointed on the 5 June 2018 and not when the first respondent first engaged with them.

### **In Summary**

41. The claimant was automatically unfairly dismissed because of the TUPE transfer. Because of reg 4(1)-(3), liability for the dismissal passes to the transferee, the second respondent.
42. The second respondent does not deny the amounts of money owing to the claimant set out in the claimant's witness statement.
43. The Tribunal does not find that the claimant was made redundant so she is not entitled to a redundancy payment but the equivalent sum of £4887.50 will be awarded to the claimant as her basic award. The Tribunal is not able to assess the amount the claimant should receive for a compensatory award without having a further remedy hearing. The Tribunal orders that the claimant provides to the second respondent within a month of this Judgment being sent to the parties an updated schedule of loss setting out the amount of losses she has incurred to date, any income including any benefits she has received since her dismissal and any future loss of earnings she is likely to incur.
44. The claimant's claim for notice pay, unauthorised deduction from wages and holiday pay all succeed. The amount of the pay will be calculated at the remedies hearing but is likely to be the figures set out in the claimant's witness statement.

45. The Tribunal didn't hear any evidence regarding whether the claimant received a statement of employment particulars. This matter will be dealt with at the remedy hearing.
46. A remedy hearing has been listed for one day on 6 November 2019. The Tribunal is hopeful, however, that terms of settlement can be reached to avoid the need for the parties to attend the remedy hearing.

Employment Judge Isaacson

Date 24 September 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

26/09/2019

FOR THE TRIBUNAL OFFICE