



EMPLOYMENT TRIBUNALS

Claimant
Mr David Fenwick

Respondents
Lyndon-Dykes Ltd (L-D)
Mr Martin Robert Hindmarsh
Mr Kristofer Walton
The Leven, Hotel Restaurant & Spa Limited (LHRS)

JUDGMENT (Liability and Remedy) Empolymnt Tribunals Rules of Procedure 2013 –Rule 21

1. The claim of unfair dismissal and for a redundancy payment are dismissed, as are all claims against Mr Martin Robert Hindmarsh and Mr Kristofer Walton personally.
2. The claim for unlawful deduction of wages is well founded against LHRS. I order it to repay **£1025.72** gross of tax and National Insurance.
- 3 The claim of breach of contract (notice pay) is well founded. I award damages to the claimant payable by LHRS of **£1582.24** gross of tax and National Insurance (NI).
4. The claim failure to inform and consult under TUPE is adjourned to a date to be fixed following the claimant's reply to the question asked in the final paragraph of the reasons

REASONS

1. I have today given judgment under Rule 21 of the Employment Tribunal Rules of Procedure 2013 (the Rules) in case number 2504330/19 brought by Mr Camilleri and, considered together, case numbers 2501460/20 and 2501560/20 brought by Ms Muniz-Porley and Ms Johnson. Like this claimant all were employed at Chapters Hotel in Stokesley, North Yorkshire (the Hotel). L-D is a hotel operator based in Chorley, Lancashire. From 9 January 2018 until 18 October 2019 it operated the Hotel. It ran into serious financial difficulty.
2. A Companies House search confirms on 14 October 2019, Mr Martin Robert Hindmarsh formed a new limited Company, LHRS, in which only 1 share with a nominal value of £1 was allotted and that was to himself. Its registered office is the same as the Hotel, 27 High Street, Stokesley, Middlesbrough, TS9 5AD. A limited liability company registered at Companies House is a legal **person** in its own right. The people who manage it, Directors, and those who "own" it, shareholders, are not personally responsible for its debts. Although it is possible, there is no evidence Mr Hindmarsh personally ever took over the Hotel.

3. On 18 October 2019 Hotel staff were told by Mr Andrew Lyndon-Dykes, director of L-D, the business was going to be run by Mr Hindmarsh. Mr Callum McCartan, Area Manager of L-D would be reporting to him. That day many were given new contracts of employment with the employer shown as LHRS and a commencement date for new employment of 18 October 2019. On the same day LHRS paid £20,000 for the fixtures and fittings at the Hotel. From that date staff were paid by LHRS and their payslips show it as their employer.

4. My judgment in case number 2504330/19 sets out the full history. There was undoubtedly a relevant under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), which may have taken place by a series of transactions and may only have been completed in December 2019, from L-D to LHRS.

5. Reg 4 of TUPE includes

*(1) ... 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.*

(2) Without prejudice to paragraph (1), ...on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

6. Case law governs whether there is a transfer of an economic entity which retains its identity. The lead case in European Law is Spijkers-v-Gebroeders Benedik Abattoir and in the UK building on Spijkers is Cheeseman-v-Brewer. One has to look at whether (i) the type of business remains the same (ii) there is a significant transfer of tangible or intangible assets (iii) the majority of staff are taken on (iv) customers transfer (v) there is a similar activity before and after the transfer (vi) any interruption of the activities is of short or planned duration. Landsorganisationen i Danmark-v-Ny Molle Kro and P.Bork International-v-Forenigen Af Arbejdsledere i Danmark held a short interruption of activities does not prevent there being a transfer. Forenigen Af Arbejdsledere i Danmark-v-Daddy's Dance Hall is a good example of a planned closure for refurbishment not preventing there being a series of transactions. Artificially engineered breaks in the activities are to be disregarded see Longden-v-Ferrari Limited. The Tribunal will disregard criterion (iii) if it concludes the failure to take on staff was designed to prevent TUPE from operating, ECM Vehicle Delivery Service Ltd-v-Cox. **Among the best examples of an economic entity which retains its identity are pubs and hotels which change hands .**

7. Mr Kristofer Walton became a director of LHRS on 20 December 2019 and resigned on 17 January 2020. Companies House shows Waltons Hospitality Ltd has a registered office Francis House, Humber Place, The Marina, Hull, HU1 1UD. It was incorporated on **17 February 2020**. Its directors were Catherine and Kristofer Walton. Although it is possible, there is no firm evidence, that company, still less Mr Walton personally, ever took over the business of the Hotel. On 23 March 2020 staff were furloughed due to the Covid 19 Pandemic "lockdown".

8. Ms Muniz-Porley and Ms Johnson were made redundant in June 2020 due the current situation and hospitality future being uncertain the business was closing A message to them finished "**Kris will be making a statement about his company**" Later that day Mr Walton sent a message "*due to the ongoing pandemic and hospitality industry we have taken the difficult decision to **not go ahead with the purchase of the Leven***". The message was signed off by Kris and Cat Walton. On 11 May 2020 MH Hospitality & Leisure Ltd was incorporated and Mr Hindmarsh is its sole director and holder of its one £1 share. It changed its registered office from 27 High Street Stokesley to 31 High Street Stokesley on 13 July 2020.

9. LHRS is shown as active but a proposal to have it struck off the Register of Companies was lodged on 28 August 2020 signed by Mr Hindmarsh. Strike off has been suspended on application from another claimant to enable these proceedings to complete. The extent of concealment of the chain of transactions which was undoubtedly a transfer was considerable.

10. In September 2020 I decided to hold a telephone hearing with other claimants and respondents invited to see if together more light could be shed on the situation by considering what everyone had to say. Other claimants who participated on 25 September included this claimant, Mr Camilleri, represented by a Mr Graham Ms Muniz-Porley and Ms Johnson were both represented by Mr McDermott, an experienced CAB Employment law advisor. None of the invited respondents attended save for L-D represented by employment consultants Avensure

11. Mr Fenwick had presented his claim on 7 April 2020 against L-D, Martin Hindmarsh and Kris Walton **personally** but not against LHRS. He claimed unfair dismissal, a redundancy payment. breach of contract, unlawful deduction of wages, holiday pay and failure to inform and consult under TUPE. He only had been employed since 1 March 2019 so had no right to claim unfair dismissal or a redundancy payment. His account did not differ from the others. He was constructively dismissed in that his employer LHRS was repeatedly failing to pay his wages which is a fundamental breach of contract and he resigned in response

12. Mr Hindmarsh presented no response but one was received from Walton's Hospitality Ltd signed by Mr Walton which said (i) there had been a "break" in trading so no TUPE transfer (ii) if anyone was liable it was Waltons Hospitality Limited not him personally (iii) Mr Fenwick was on a "zero hours contract". None of these arguments have any merit.

13. I ordered LHRS be joined as a respondent. It was served on 2 October 2020, a response was due by 30 October but none was received.

14. I explained the options to those present and gave them time to decide how best to proceed. Mr McDermott emailed on behalf of the two claimants he represented withdrawing their claims for unfair dismissal if a Judge issued Rule 21 judgments on all their claims for Redundancy Pay, Notice Pay and Holiday Pay. That is a wise practical decision. On behalf of Mr Camilleri his representative did similarly save he wished to continue a claim for failure to inform and consult under TUPE against L-D. His claim was brought within the time limit. Mr Fenwick's was not, however he may be able to show it was not reasonably practicable for him to do so

15. Mr Fenwick replied in an email addressed to me which includes

First and foremost I would like to take this opportunity to thank you for allowing me to add an additional respondent namely 'The Leven Restaurant Hotel and Spa Limited to my claim. At the end of the day, all I am asking for is for monies rightfully owed to me be paid in full as well as loss of earnings that are due (if entitled) because of a failure to continue my employment and contract conditions which should have occurred with TUPE which is meant to protect the employee.

I was working an average of 36 hours per week at The Leven but then with a continuous failure by The Leven to pay the staff any wages despite working in excess of 9 weeks without pay, I was extremely concerned to continue turning up to work as a considerable amount was already owed to all staff and no-one in their right mind would continue to work with no sign or guarantees of any payments being received. I did return on Christmas Day 2019 as Martin Hindmarsh and Callum McCartan (General Manager) pleaded with me and assured me that I would be paid in full if I turned up for work but as always they were empty promises.

... From mid May 2019 all of my shifts with Lyndon-Dykes were at Chapters Hotel, Stokesley, now renamed The Leven Restaurant Hotel and Spa. ..

As I did so much for the hotel and had a huge knowledge of the Lyndon-Dykes business as a whole and subsequently The Leven, I was extremely surprised not to hear from Mr Hindmarsh, Mr Walton or The Leven regarding my shifts, employment or any updates regarding outstanding monies owed. Just as this case has had no response from Mr Hindmarsh, I have had no success since end of December 2019, despite numerous phonecalls, emails, recorded post to the hotel and his home etc. I have never received a P45 from the Leven or a P60. My contract with Lyndon-Dykes I would be entitled to 4 weeks notice if I was no longer required for employment. This would have been the same under TUPE to the Leven.

I also had to pay extra Child Maintenance because The Leven processed my wages on the paperwork side of things but I never received the money. I've never had a single payslip from them. The Child Maintenance understandably thought I had received the money but I could prove with my bank statement that wasn't the case. However they wouldn't return the over payment to me as they don't do refunds!

What I am claiming for :

£415.63 Unpaid Wages and purchases for The Leven Hotel

£1582.24 4 Week's notice (Average 36hrs X £8.21/hr)

£238.09 Holiday Pay accrued (29hrs X £8.21)

£3000 Loss of wages due to TUPE not carried out and my shifts continued

£372 Over payments to the Child Maintenance

I have NEVER been asked by the Court or Tribunal to send or provide any supporting evidence to back up my claim but please find attached further information which may be of benefit to my claim. They include a copy of my contract, ...

As I stated at the start of this email, I would be obliged if I am able to receive whatever is due to me, be it all or part of my above claim.

16. No response has ever been received from LHRS. An Employment Judge is required by Rule 21 of the Employment Tribunals Rules of Procedure 2013 (the Rules) to decide on the available material whether a determination can be made and, if so, obliged to issue a judgment which may determine liability and remedy. I have in the claim form and further information provided in response to questions from the Tribunal sufficient to enable me to find two claims proved on balance of probability and determine sums to be awarded.

17.1 Section 27(1) of the Act includes

(1) ...“wages”, in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

17.2. Section 13 includes

(1) An employer shall not make a deduction from wages of a worker employed by him

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.

17.3. “Properly payable” means contractually. Agarwal-v-Cardiff University held a tribunal does have jurisdiction to construe a contract to see what was payable and when. If the contract says a payment is due if, and only if, certain conditions are met and they are not, no tribunal can find an unlawful deduction on the basis the claimant “deserved” payment. I view the claims for holiday and other pay as claims of unlawful deduction.

18. When Mr Fenwick writes **£3000** *Loss of wages due to TUPE not carried out and my shifts continued*, that is a sum I could only award as compensation for unfair dismissal and he lacks the length of service so it cannot be done. His claim for failure to inform and consult under TUPE could in theory be maintained against L-D and/or LHRS but (a) he would have to overcome the problem of it being out of time, (b) there is little chance of him being paid by either and (c) it is not as obvious a failure as it was in Mr Camilleri’s case . I therefore need him to inform the Tribunal within 14 days of this judgment being sent whether or not he wishes to proceed with it.

EMPLOYMENT JUDGE T M GARNON
JUDGMENT AUTHORISED BY THE EMPLOYMENT JUDGE ON 23 NOVEMBER 2020