EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107813/2022

Preliminary Hearing Held at Edinburgh on 11 April 2023 by CVP

Employment Judge Murphy

Ms C Courtney	**Claimant** **In Person**
BXL Ltd t/a Brass Monkey Grange	**Respondent** **Represented by** **Mr M Proudler,** **Director of the** **Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:

(i) The claimant's complaint of an unauthorised deduction of wages relating to a week's pay for shifts worked in the week commencing 30 May 2022 is dismissed. The Tribunal, having determined that the claimant lodged her complaint out of time and not being satisfied that it was not reasonably practicable to lodge it in time, has no jurisdiction to hear the complaint.

(ii) The claimant's complaint of an unauthorised deduction of wages relating to accrued untaken annual leave alleged to have accrued from 15 November 2021 to 24 August 2022, when her employment terminated, is dismissed. There was no 'relevant transfer' between Grange Road Trading Limited ("GRTL") and the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). The respondent is not liable to pay the claimant in lieu of untaken annual leave which accrued during the claimant's employment with GRTL.

REASONS

Issues

1. The claimant worked for GRTL trading as No 1 The Grange from around 15 November 2021 until around 6 June 2022 when GRTL ceased to trade at the licensed premises on Grange Road which closed for business on or about that date.

2. The name of the respondent is amended to BXL Ltd trading as Brass Monkey Grange.

3. The respondent took a lease over the premises after GTRL ceased to trade there. After a period of refurbishment, the respondent opened the premises to trade again on or about 11 July 2022. The claimant worked for the respondent from on or about 18 July until on or about 24 August 2022 when her employment terminated by reason of her resignation.

4. The claimant has presented a claim for unauthorised deductions from wages. She claims £157.50 for £15.75 hours worked for GRTL in the week commencing 30 May 2022, for which she was due to receive payment on 7 June 2022.

5. The claimant also claims an unauthorised deduction from wages in respect of the respondent's failure to pay her £854.67 on the termination of her

employment as a payment in lieu of accrued untaken holiday under the Working Time Regulations 1998 ("WTR"). The parties agreed that, if there was a TLIPE transfer of the claimant's employment from GRTL to the respondent, the value of the claimant's holiday pay claim (before credit for receipts) would be £854.67 (i.e. 4.31 weeks x £198.30 per week). The claimant acknowledged that she had received from the respondent £256.20 on or about 10 April 2023. She, therefore pursued a claim for an outstanding unauthorised deduction in the amount of £598.47 in respect of holiday pay.

6. The respondent resists both claims on the basis that there was no TLIPE transfer from GRTL to the respondent. The respondent denies any duties or liabilities in connection with the claimant's contract with GRTL transferred to it.

7. The claimant initiated the Early Conciliation process with ACAS on 8 November 2022. An Early Conciliation Certificate was issued on 13 December 2022. The claimant presented an ET1 on 18 December 2022. Anything that happened before 9 August 2022 is therefore, potentially out of time.

8. A final hearing took place by CVP on 11 April 2022. The issues for determination were discussed and agreed with the parties during the preliminary discussion, as follows:

    a. Was the unauthorised deduction claim in respect of £157.50 for work in w/c 30 May 2022 made within the time limit in section 23 of the Employment Rights Act 1996 ("ERA")? The Tribunal will decide:

        i. Was the claim made within three months (plus early conciliation extension if applicable) of the date of the deduction? The claimant asserts the deduction was made on 7 June 2022. Early Conciliation was not begun before the 3 months expired on 6 September 2022 and so did not operate to extend time. The claim was presented on 18 December 2022. The claimant accepts the claim was not made within this time limit.

ii. If not, was there a series of deductions and was the claim made to the Tribunal within 3 months (plus EC extension, if applicable) of the last one?

iii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

iv. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

b. Was there a transfer of the undertaking or business operated by GRTL at 1 Grange Road to the respondent at some point between 6 June and 11 July 2022 in circumstances where there was a transfer of an economic entity which retained its identity?

i. If so, was the respondent liable to pay the claimant in lieu of her untaken holiday accrued while working for GRTL in the relevant leave year on the termination of her employment with the respondent?

ii. Subject to the time limitation issue set out above, was the respondent liable to pay the claimant's wages for the week commencing 30 May 2022, while working for GRTL prior to the transfer?

9. I heard oral evidence from the claimant and from Mr Proudler. Mr Proudler joined the video hearing from Mauritius. I gave permission for him to give evidence from abroad in circumstances where it had been established prior to the hearing through my investigations with HMCTS that Mauritius is a state which has confirmed it has no objections to the taking of evidence in British proceedings from a witness located there. Both parties had lodged a number of documents electronically. These were not organised in a paginated bundle of productions but, in the event, only a small number of the documents were referred to.

Findings in Fact

10. Having considered the evidence, I found the following facts to be proved on the balance of probabilities.

Background and the business operated by GRTL

11. The claimant was employed by GRTL for a period of around 28 weeks from 15 November 2021 until on or about the 6 June 2022. She worked as front of house staff, waiting tables and serving behind the bar at an establishment at 1 Grange Road, Edinburgh. At least in the initial period of her employment, because of Covid restrictions and / or the Covid measures operated by GRTL, only table service was offered so that there was a heavy emphasis on waiting tables in the claimant's duties.

12. The business traded as No 1 the Grange ("No 1"). To the claimant's knowledge, the primary share holder of GRTL was an individual called Daniel Allen, who she also believes was a director of that limited company. The claimant was given no written contract of employment or any other written document governing the arrangements under which she was employed by GRTL.

13. She had no normal hours of work but worked hours allocated by a rota prepared by her manager, Michaela Saigal. She was paid weekly on a Tuesday for the preceding week ending on the Sunday. She was initially paid an hourly rate of £9 per hour. She took no paid holidays throughout the whole period of her employment with GRTL.

14. When she began working for GRTL, the company employed approximately 10 or 11 members of staff. These included four waiting / bar staff (including the claimant), 2 supervisors, the manager, Ms M Saigal, and three or four members of kitchen staff. The premises were licensed and offered indoor seating only. Mr D Allen took a hands off approach to operational matters and he attended at the premises sporadically. The claimant generally took instruction from Ms Saigal, as did her colleagues, or at least those employed as front of house staff. The claimant

understood that Mr Allen's company, GRTL, leased the premises from a landlord, but she had no direct knowledge of the arrangement or of the landlord's identity. When the claimant began her employment, she believes No 1 had been trading for at least a year, if not longer.

15. No 1 operated as a pub which had a heavy emphasis on food sales. The claimant described it as having a gastro pub vibe. It sold traditional pub fare prepared to a high standard. Typical dishes on the menu included beer battered haddock, lamb rack, beef bourguignon and burgers. The clientele was relatively middle aged; No 1 was not frequented by many younger customers. The most popular selling drinks were beer and wine.

GRTL financial issues and closure in June 2022

16. Latterly in her employment with GRTL, the claimant noticed that the business was experiencing financial difficulties. From around 12 May 2022, the claimant began to be paid in cash from the takings. The claimant understood this to be because the business was not doing well and was experiencing cash flow difficulties. The business became cash only meaning it would only accept cash payments from customers and began paying the staff entirely in cash. The number of staff had, by then, dwindled. Most of the claimant's colleagues had left the business. As far as front of house staff went, the claimant was still employed, as was her colleague, Ms B Makan. They were joined in the front of house by a recent colleague, M Kemp who began employment with GRTL around May 2022. They were still managed by Ms M Sagail. These four individuals were, by then, the only front of house staff.

17. The claimant worked 15.75 hours in the week commencing 30 May 2022. She was due to be paid on Tuesday 7 June. By this time her hourly rate had increased to £10 per hour and she ought to have been paid £157.50. She was not paid these wages on 7 June 2022 or at all.

18. The doors to No 1 closed on or about 6 June 2022, unexpectedly. When the claimant did not receive her pay for the preceding week, she contacted Ms Saigal. The staff were concerned to understand what was happening with the business. Ms Saigal told the claimant she would get her wages but at that point in time, Ms Saigal herself remained in the dark about what was happening with the business. The claimant contacted Mr S Allen on 23 June 2022 using Facebook messenger. She told him she was wondering about her wages and about holiday pay and asked if there was any chance of it coming in soon.

19. Mr Allen respondent on 25 June to the claimant and other members of staff in a group chat. He said:

> *Evening folks, firstly I'd like to apologise about the lack of contact and clarity surrounding the position within the business. This hasn't been good enough on my part, however, there were circumstances which (through no fault of any of you) have impacted on this.*
>
> *I've handed back the keys to the pub as you will clearly know, Covid 19 took a huge toll financially on the business and myself personally 9for staff wages). I simply couldn't afford to keep the business running hence contacting the landlord to hand the keys back - the reason I done this was also to allow the new operator to transfer your employment from my company to theirs. This is called TUPE.*
>
> *Regarding wages and holiday pay this will be paid however I'm awaiting a payment from the landlord for stock, fixtures and fittings which I should have more clarity on this Monday. I will update when I hear (I will actively chase up).*

It's been a pleasure working with you all and I couldn't have asked for a better team.

Sorry to have put you all temporarily out of pocket but please be [sic] rest assured I'll do everything I can to sort this.

If anyone has any questions, please contact me or go through Michaela.

Thanks for your patience guys.

20. This was the last contact the claimant ever received from Mr Allen. GRTL was not at that time, or by the date of the hearing, subject to any insolvency proceedings either with a view to the liquidation of GRTL's assets or otherwise. The claimant never received any payments from GRTL in relation to her wages for week commencing 30 May 2022 or in respect of any accrued untaken holiday.

The business operated by the respondent (from July 2022)

21. Martin Proudler and his wife are directors of the respondent. Mr Proudler operates other licensed premises (not through the respondent) and has experience in this sector. He runs a bar called the Brass Monkey on Drummond Street, Edinburgh. That public house is well established, having opened in 2000. It is very much a drinking establishment, attracting a relatively youthful clientele. It does not serve food.

22. Mr Proudler lives locally to No 1 the Grange. He noticed that the premises had closed relatively soon after the doors shut on or about 6 June 2022. Mr Proudler did not know the previous business owner, Mr Allen, but he knew the landlord of the building, a company called Caledonian Heritable Ltd ("CHL"), as a result of his knowledge of the sector. CHL owned the premises which it previously leased to GRTL. CHL was not a brewery

business and had no tie up with any brewers which previously supplied GRTL.

23. When he noticed the closure of No 1, Mr Proudler identified a potential business opportunity and approached CHL to discuss taking a lease over the premises. Mr Proudler's vision for the business was to capitalize on the good will built up over a number of years for the establishment on Drummond Street called Brass Monkey by creating an offering with a similar look and feel to that bar. He also wanted to utilize the brand associated with its trading name and wanted to re-name No 1 the Grange as 'Brass Monkey the Grange'.

24. Mr Proudler wished to substantially reduce the reliance on food sales at Brass Monkey the Grange but not to eliminate food sales entirely. He regarded food sales as a 'necessary evil' in order to retain customers who may visit initially for drinks but, in the absence of any food offering, may go decide to leave to go elsewhere to eat. He wished to introduce a reduced and simplified menu which would appeal to a younger clientele in terms of both pricing and selection. His concern over food service related to the high cost of chef wages and kitchen overheads, resulting in a relatively low profit margin.

25. He liaised with the landlord and negotiated a lease which was signed on 29 June 2022 with entry on 1 July 2022. He obtained the keys on that date and began refurbishment works at the premises. The landlord introduced Mr Proudler to Ms M Saigal in the week commencing 29 June. The basis of the introduction, so far as Mr Proudler understood it, was that M Saigal had worked as a manager of the premises for the previous business owner and that Mr Proudler may be interested in interviewing her for employment with his company. CHL did not suggest or stipulate to Mr Proudler that he was obliged to employ Ms Saigal or any other member of staff, whether as a result of TUPE or any contractual arrangement between the respondent and CHL.

26. Mr Proudler confirmed to Ms Saigal that he was happy to employ her as manager at Brass Monkey the Grange. He confirmed that she was in charge of recruiting other staff but that he was, in principle, happy for her to bring on board other employees who had worked with her for GRTL. Ms Saigal contacted the claimant. She told the claimant that someone was taking over the business. She told the claimant as well as B Makan and M Kemp that they'd be keeping their jobs.

27. The claimant met M Saigal for a drink in the week the respondent had received the keys. The refurbishment works were underway at the premises. Ms Saigal took the claimant into the premises to meet Mr Proudler. They had a brief chat about the business and his refurbishment plans. Mr Proudler did not interview the claimant; the chat was on the basis that it was already understood she would be joining the respondent to work at the refurbished premises in due course.

28. There was no discussion with the claimant regarding her hourly rate and her hours of work by M Saigal or Mr Proudler. The claimant then left for a holiday which coincided and overlapped with the reopening of the premises following the refurbishment. Brass Monkey the Grange opened its doors in the week of 11 July 2022. The claimant returned from her holiday and began working shifts for the respondent in the week of 18 July 2022. She was joined by her colleagues, B Makan and M Kemp as well as M Saigal. As before, M Saigal prepared rotas which allocated the claimant and the others their shifts. The claimant and her colleagues were not provided with written contracts of employment or written statements of employment particulars by the respondent. The claimant did not receive payslips from the respondent.

29. Mr Proudler also brought in a few members of staff from other establishments he is involved in and a personal friend named Amalia 'helped out' front of house when the premises were reopened by the respondent.

30. Mr Tanzie was a chef who had previously been employed by GRTL. Mr Tanzie had left his employment with that company before it closed its doors on 6 June 2022. The respondent employed Mr Tanzie to work at the premises when it opened in the week commencing 11 July 2022. There had previously been four members of kitchen staff working for GTRL at one stage, though it is not clear that GTRL employed this many kitchen staff by the time it closed around 6 June. The respondent did not employ or 're-employ' any of the other former members of kitchen staff.

31. Mr Proudler told Mr Tanzie he wanted him to restrict the menu to quick food that could be prepared on a single flat plate grill so that the whole food offering would be cooked using one piece of equipment only. The menu required to be restricted given the constraints on resources for its preparation, including the fact there would only be one member of kitchen staff. The menu comprised burgers (with a wider range of patties and toppings available than previously), hot dogs, fries and nachos. The pricing was cheaper than the menu offered by GRTL.

32. The refurbishment works before the reopening of the premises included redecoration, the sanding of the floors, the creation of booths, the introduction of many more bar stools and general repairs. The respondent made significant changes to the lighting of the premises which was more dimply lit to create a difference in ambience. The art work was replaced with light hearted pub paraphernalia. The respondent introduced a new surround sound music system.

33. Under the terms of the lease with CHL, the respondent was required to purchase drink stock which had been left at the premises by GRTL on closure. This was a relatively small amount of stock of low value. The premises occupied by the respondent also included a number of fixtures and fittings which had been used by GTRL. These included till stations and a large central bar which remained intact following the refurbishment with little or no modification. The leased premises were also furnished with tables and chairs for customer use which had been used by GTRL and continued to be used the respondent on the reopening of the venue.

Ownership did not pass between the GTRL and the respondent of these fixtures and fittings and moveable assets which were owned by CHL throughout.

34. No supplier contracts were assigned or novated from GRTL to the respondent. The respondent set up its own new accounts with all its suppliers including utilities suppliers and suppliers of stock. The respondent changed its draught product offering. They introduced more mainstream drinks offerings rather than specialized products. They changed their wine and spirits suppliers and sold wine more cheaply than GRTL had. There was, however, some crossover in the identity of suppliers with those who had supplied GTRL, for example with the main brewery, Tennents.

35. The respondent introduced other changes to how the business operated. The respondent's directors had a longer term ambition to change the clientele to a younger one and to reduce the food revenue to 30% of the business's takings. With these objectives in mind, they began a shift away from table service towards counter service. The respondent did not instruct staff to refuse table service if seated customers asked for it, but nor were they encouraged to offer it proactively. If a new customer entered the premises, the front of house staff were encouraged to greet them with a "Hi" or a "Hello" as opposed to "Can I get you a table? Are you here for dinner?" As a result of this, the claimant's duties and those of her front of house colleagues changed to more work behind the bar and less table waiting.

36. The respondent changed the opening hours of the establishment. Although GRTL had been licensed to open until midnight on week days and until 1 am on Thursdays, Fridays and Saturdays, in practice latterly, it had frequently closed at 9pm after dinner service because there were no customers remaining. When the respondent began operating the business, it kept its doors open until midnight or 1 am as applicable, even if the bar was quiet late in the evening.

37. The respondent also changed the music played in the establishment. The play list changed and the volume changed. It was no longer bland 'background' music but was more alternative 'foreground' music, intended to be heard and enjoyed by the customers.

38. The respondent introduced student discounts on drinks in the 9pm - midnight / 1 am slot to try to increase trade during this period of opening.

39. The respondent also introduced pub quizzes at the premises which had not been held by GRTL previously. Mr Proudler used a quiz master who had hosted quizzes at Brass Monkey (Dummond Street). This individual had a large student following to whom he could advertise directly on social media.

40. As a result of the changes made, there was a noticeable difference in the customer base at the premises with more younger customers and fewer middle-aged customers. The change was gradual but noticeable reasonably quickly, including during the relatively short period when the claimant worked for the respondent in July / August 2022.

The claimant's actions regarding her unpaid wages for w/c 30 May 2022

41. As the claimant had received no further contact or payment from Mr Allen following their exchange of messages on 23 and 25 June 2022, she raised the matter of her unpaid wages with Martin Proudler. The claimant had decided to resign from her employment because she was moving to another city to attend university. Her last working day was 24 August 2022. Before she left, on 17 August 2022, the claimant sent Mr Proudler a text message in which she asserted there had been a TUPE transfer and asked him about the sum of £814.83 which she indicated she believed she was due, comprising accrued holiday pay and the unpaid week's wages for the shifts worked in w/c 30 May 2022.

42. Mr Proudler responded. He asserted it was incorrect that TUPE applied. The basis on which he asserted this appeared to be that he suggested GRTL had gone bust and had ceased trading. In fact, GTRL was not

subject to any insolvency proceedings at the time. Mr Proudler said words to the effect that because GRTL had closed its doors and had not been trading for a matter of weeks, as opposed to days, TUPE did not apply.

43. Mr Proudler asked the claimant after one of her shifts between the 17 and 24 August 2022 if she had any more queries and they had a further discussion. He told her that everyone who worked for him would be paid every penny they were due. The claimant understood him to mean that he continued to deny TUPE's application but that she would be paid in full for shifts worked for the respondent after the premises reopened. She knew the respondent did not intend to pay her for the week's pay for shifts worked by GRTL in May / June and that it did not intend to pay her for any untaken holiday which accrued during the period she had worked for GRTL.

44. As at 6 September 2022, the claimant had not presented a claim to the Employment Tribunal nor initiated Early Conciliation proceedings in respect of any prospective respondent in relation to the unpaid week's pay (or any other claim). The claimant at this time was uncertain as to which company owed her the money. She did some research on her own to try to understand how TUPE worked.

45. She believed that the three-month time limit would run from the date she left the respondent's employment, not from the date the deduction was made. She was not told that by anybody. She did not seek any legal advice or attempt to obtain free advice from possible sources such as the CAB or a Law Centre or a University Law Clinic.

46. Her understanding came from her own reading of ACAS literature. The claimant did not produce to the Tribunal any particular publication by ACAS which led to her misunderstanding. She did not claim that ACAS had published wrong or misleading information.

47. The claimant was unaware of the possibility of raising a claim against both companies as respondents in the event she was in doubt as to which company was liable. She did not seek any advice on this matter and was

not misled by the respondent or any other person with respect to her options.

48. On 17 October 2022, the claimant and her colleague, B Makan, sent an email to the respondent, noting, in the claimant's case, that she had not received her holiday pay or the unpaid week's pay and asking to receive her P45 which had not been issued. A few days later, the respondent sent the claimant her P45 but gave no further substantive response in relation to the payments the claimant sought.

49. The claimant initiated the ACAS Early Conciliation process on 13 November 2022. An EC Certificate was sent to her by ACAS on 13 December 2022. The claimant presented her ET1 on 18 December 2022.

50. She took no paid holidays throughout her time working for either respondent. Her average weekly pay throughout the period of employment by both employers was £198.30. On or about 10 April 2022, the respondent transferred to the claimant's account the sum of £256.20.

Observations on the evidence

51. I found both the claimant and Mr Proudler to be credible and reliable witnesses who gave their evidence in an honest and straightforward way. There was no material dispute between them as to the facts.

Relevant Law

Unauthorised deductions: time limit

52. The law relating to time limits in respect of unauthorised deductions from wages is set out in the Employment Rights Act 1996 ("ERA"), Section 23, which, so far as relevant, provides as follows:

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or

(b) ….

(3) Where a complaint is brought under this section in respect of—

(a) a series of deductions or payments, or

(b) …,

the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.

(3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).

(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

53. S.207B of ERA provides for an extension to the three-month time limit in certain circumstances. In effect, s.207B(3) of ERA 'stops the clock' during the period in which the parties are undertaking early conciliation and extends the time limit by the number of days between 'Day A' and 'Day B' as defined in the legislation. This 'stop the clock' provision only has effect if the early conciliation process is commenced before the expiry of the statutory time limit. Where a limitation period has already expired before the conciliation commences, there is no extension **(Pearce v Bank of America Merrill Lynch** UKEAT/0067/19).

54. Where a claim has been lodged outwith the three-month time limit, the Tribunal must determine whether it was not reasonably practicable for the claimant to present the claim in time. The burden of proof lies with the claimant. If the claimant succeeds in showing that it was not reasonably

practicable, then the Tribunal must determine whether the further period within which the claim was brought was reasonable.

55. In **Lowri Beck Services Ltd v Brophy** 2019 EWCA Civ 2490, the Court of Appeal summarised the approach along the following lines.

    1. The test should be given a "liberal interpretation in favour of the employee".

    2. The statutory language is not to be taken only as referring to physical impracticability and might be paraphrased as to whether it was "reasonably feasible" for that reason.

    3. If an employee misses the time limit because he or she is ignorant about the existence of the time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will not have been reasonably practicable for them to bring the claim in time. Importantly, in assessing whether ignorance or mistake are reasonable, it is necessary to take into account enquiries which the claimant or their adviser should have made.

56. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee **(Dedman v British Building and Engineering Appliances Ltd** [1974] ICR 53).

57. The test of reasonable practicability is one of fact and not of law **(Palmer and Saunders v Southend-on-Sea Borough Council** [1984] IRLR 119).

58. With respect to ignorance of the time limit, in **Wall's Meat Ltd v Khan** [1978] IRLR 499, Brandon LJ held that ignorance or mistake will not be reasonable "if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made." In

Dedman, Scarman LJ explained that relevant questions for the Tribunal would be:

> *"What were his opportunities for finding out that he had rights? Did he take them? If not, why not? \/\/as he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of his rights, would it be appropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance."*

Transfer of Undertakings

59. Regulation 3 of TUPE provides, in so far as relevant:

> 3- *A relevant transfer*
>
> *(1) These Regulations apply to -*
>
> *(a) 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;*
>
> *(b) …*
>
> *(2) In this regulation "economic entity" means an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*
>
> *…*
>
> *(6) A relevant transfer -*
>
> *(a) may be effected 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.

60. Regulation 4(1) of TLIPE provides that (unless the employee objects) the effect of a relevant transfer will be that 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 shall have effect after the transfer as if originally made between the person so employed and the transferee."*

61. The requirement in regulation 3(1)(a) can be traced back to the decision of the European Court of Justice ("ECJ") in **Spijkers v Gebroeders Benedik Abattoir CV:24/85** [1986] 2 CMLR 296. Guidance was laid down that in each case, it is important to consider the following matters:

(1) The type of undertaking or business;
(2) Whether assets, tangible or intangible, are transferred;
(3) Whether employees are taken over;
(4) Whether customers are transferred;
(5) The degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended.

62. In **Cheesman v R Brewer Contracts Limited** [2001] IRLR 144, the EAT reviewed some key decisions of the ECJ on the definition of an 'economic entity'. It held:

> *"(i) As to whether there is an undertaking … an organised grouping of persons and assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective …*
>
> *(ii) …such an undertaking … must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible;*

(Hi) in certain sectors, such as cleaning and surveillance, the assets are often reduced to their most basic and the activities are essentially based on manpower;

(iv) an organised 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;

(v) an activity of itself is not an entity; the identity of an entity emerges from other factors, such as its workforce, management style, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it."

63. In determining whether there had been a transfer, the EAT highlighted the following factors:

"(i) … the decisive criteria for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated …by the fact that its operation is actually continued or resumed; …

(Hi) in considering whether the conditions for … a transfer are met, it is necessary to consider all the factors characterising the transaction in question, but each as a single factor and none is to be considered in isolation;

(iv) amongst the matters … for consideration, are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken overby 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 are suspended;

(v) account has to be taken … of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on;

(vi) where an economic entity is able to function without significant tangible or intangible assets, the maintenance of its identity following

the transaction … cannot logically depend on the transfer of such assets;

(vii) even where the assets are owned and are transferred to run the undertaking, the fact that they do not pass does not preclude a transfer;

(x) the absence of any contractual link between the transferor and transferee may be evidence that there has been no relevant transfer, but it is certainly not conclusive as there is no need for any direct contractual relationship;

(xi) when no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.

64. A temporary closure or cessation of business will not necessarily preclude there being a relevant transfer **(Gaines v Picturedrome Theatres Limited** UKEAT/0661/95 (unreported)).

65. The fact that there are two phases to a transfer, such as the transfer of an undertaking to a landlord by an outgoing lessee followed by the granting of a lease by that landlord to a new lessee does not preclude a transfer. The Acquired Rights Directive (the parent directive of the TUPE Regulations) will apply so long as the economic unit retains its identity **(Foreningen Af Arbedjsledere I Danmark v Daddy's Dance Hall A/S** [1988] IRLR 315.

Submissions

66. Neither party made a submission.

Discussion and Decision

Unauthorised deduction of wages for w/c 30 May 2022: time limitation

67. It was common ground that the claimant's wages for the week commencing 30 May fell due for payment on 7 June 2022 (albeit the respondent disputed that it had any liability for these wages which it asserted were owed by GRTL).

68. The claimant did not assert that this was one of a series of deductions, the last of which took place less than three months before ACAS was notified to commence Early Conciliation. Nevertheless, I considered whether the deduction of pay for her shifts in that week might be capable of being linked with the alleged deduction of a payment in lieu of accrued untaken holidays on termination in order to bring the earlier deduction within the time limit.

69. I concluded that it could not. There was not sufficient similarity of subject matter as between these two alleged deductions. The first alleged deduction related to wages payable for shifts worked. The second related instead to a payment in lieu of accrued holiday which is a liability that can only arise on the termination of the employment by virtue of the Working Time Regulations 1998. The second deduction arises not out of circumstances whereby a worker has worked for a period and has not been paid for his but from circumstances where she has not taken her full pro-rated holiday entitlement in the leave year when the employment terminates. I find that there is not a sufficient factual nexus between the two types of deduction complained of by the claimant to enable them to be characterized as a 'series' for the purposes of the legislation.

70. Therefore the 3-month time limit expired on 6 September 2022. The claimant did not commence Early Conciliation through ACAS before that date, so the time limit did not fall to be extended in terms of s.207B(3) of ERA.

71. I, therefore, required to consider, first of all, whether it was reasonably practicable for the claimant to have presented her claim for the week's pay due on 7 June to the Tribunal by 6 September 2022. Only if I were to conclude it was not, would it be necessary to consider the question of whether the claim was lodged within a reasonable time thereafter.

72. The claimant was unaware of the three-month time limit at the material time, or at least was unaware that the time limit ran from the date of the deduction as opposed to the date her employment terminated. The question is, therefore, whether her ignorance of that requirement was reasonable in the circumstances.

73. I was satisfied that the claimant was aware of the right generally to complain to an Employment Tribunal about deductions from wages though she had a mistaken understanding of the position regarding time limits. The claimant's misunderstanding, though genuinely held, was not of anyone else's making.

74. She was not misled or deceived as to the position regarding time limits by the respondent or by anyone else. The respondent did not give the claimant any cause for false optimism that they might pay her the wages for the week commencing 30 May 2022 without her having to resort to Tribunal proceedings. The respondent had been clear to her within the normal time limit that its position was it did not accept it had any liability.

75. I considered whether the claimant had taken opportunities available to her to acquaint herself with the correct position as to time limits. I concluded that she had not. I found the claimant to be an articulate, able and resourceful witness. She had not attempted to access any free sources of advice. Though she mentioned forming her understanding on the basis of ACAS literature about time limits, my impression was that the claimant was not particularly focused on this issue of procedure. Rather, my impression, based on her evidence was that her key focus at the time was seeking to understand the substantive legal position with respect to TLIPE's application or otherwise.

76. Had she applied herself to researching the position on time limits with diligence, I consider it is very probable that she would herself have identified the correct position based on her own online research. Similarly, if she had made enquiries of a source of free legal advice on the time limit question, I believe it is likely she would have obtained a correct steer. I find it would have been reasonable for her to take one of these actions. I conclude that the claimant's ignorance of the time limit was not reasonable in all of the circumstances of the case. I have sympathy for the position in which she finds herself but, unfortunately for the claimant, the test of reasonable practicability is a relatively stringent one.

77. Having found that it was reasonably practicable for her claim to have been presented (or for early conciliation to have commenced) within the three-

month time limit, there is no discretion available to the Tribunal to extend the time. The Tribunal lacks jurisdiction to hear the complaint with respect to the wages payable for the week commencing 30 May 2022 which were deducted on 7 June 2022, and that claim is dismissed.

Claim for accrued holiday pay: Did TUPE apply?

78. It was common ground that the claimant had been paid in lieu of accrued untaken holiday which accrued in the period between 18 July and 24 August 2022 when she was employed by the respondent. Whether the respondent is liable to her for the outstanding sum of £598.47 referable to the period she worked for GTRL turns on whether there was a 'relevant transfer' between the two employers. There is no time limitation issue in relation to this alleged deduction which was payable on 29 or 30 August 2022, following the termination of the claimant's employment on 24 August. The claimant commenced Early Conciliation before the three-month time limit expired and the complaint was presented to the Tribunal within the time limit as thereby extended.

79. The claimant asserts that, under Regulation 4 of TUPE, her contract of employment transferred to the respondent at some point between 6 June and 18 July 2022 so that the duties and liabilities of GRTL also transferred to the respondent. The respondent denies there was a relevant transfer. This is not a case where a so-called 'service provision change' situation is asserted and the provisions of regulation 3(1)(b) of TUPE have no application. The question is, therefore, whether there was a transfer of an economic entity which retained its identity pursuant to Regulation 3(1)(a) of TUPE.

80. In its ET3 response, the respondent placed considerable reliance on the absence of any contractual nexus between it and GTRL to refute TUPE's application . In previous correspondence with the claimant in August 2022, Mr Proudler also appeared to suggest the GTRL's problematic financial position and / or the period of closure before the respondent reopened the premises doors to trade undermined her assertion of a TUPE transfer. Though

not irrelevant, neither of these points are, in and of themselves, determinative of the question.

81. I reminded myself of the principles and guidance in **Spijkers** and **Cheesman.** I had regard to all of the factors characterizing the transaction in question and did not focus on any of these in isolation. I found the question of whether there was the transfer of an economic entity which retained its identity to be a finely balanced one on the facts of this particular case. I had regard to the following factors:

a. **Tangible Assets.** The types of undertaking carried on by GRTL and the respondent had similarities to the extent that both operated licensed premises, selling hot food and beverages including alcohol to their clientele. To operate an undertaking of this kind, it is necessary to have the use of but not necessarily ownership of certain tangible assets. Importantly, these include physical premises as well as the required fixtures, fittings and furnishings to allow the preparation and service of food and drinks as well as the comfortable accommodation of customers. Other than a relatively small amount of drink stock, the ownership of the tangible assets did not transfer between GTRL and the respondent, as the heritable property, fixtures, fittings and a significant level of furnishing were owned by the landlord throughout. Nevertheless, those same tangible assets were utilised both by GRTL and the respondent. They were highly important to the offering of both companies, albeit with changes in decor, artwork and the introduction of supplementary furniture by the respondent.

b. **Intangible assets:** In terms of the intangible assets, it is doubtful how far the goodwill of GRTL's customer base transferred to the respondent. While there was some continued patronage by customers who had visited when the premises were run by GRTL, these customers dwindled relatively quickly as the respondent worked to attract a different profile of clientele. As far as brand recognition was concerned, the respondent did not seek to trade on the branding created by GRTL. Instead, on taking over occupancy, it sought to align the brand of the Grange Road

establishment with that of another bar operated by the respondent's director, namely Brass Monkey on Drummond Street, a known drinking establishment which had traded as such for some twenty years.

c. **Transfer of Employees.** In terms of the employees, all of the remaining front of house staff were taken over by the respondent. One member of kitchen staff was also re-employed, though it is true that there had previously at one time at least been a much bigger compliment of kitchen staff working for GTRL. Based on the evidence before me, I find that a majority of the staff who remained employed by GTRL on 6 June 2022 transferred over to the respondent's employment. Whether this was Mr Proudler's intention or not, it was not initially made clear to those staff by the manager, Michaela Saigal, whether the basis of their employment with the respondent was being characterised as transferred employment or 'new' employment. The outgoing employer's Mr Allen characterised the situation as a TUBE transfer.

d. **Transfer of Customers.** As discussed, although some of GTRL's previous customers initially visited the premises after it reopened, trade from the old customer base soon reduced.

e. **Similarity of activity.** As to the similarity or otherwise between the activity carried on by the respondent as compared with GTRL, they both operated licensed premises serving hot food and drinks to customers who consumed these goods within the premises. However, a more nuanced view of the activities is required. There was a number of immediate differences and an ambition on the respondent's part to develop and expand those differences to change the balance of its revenue streams as between food and drink and to change the profile of its customer base. These objectives underpinned changes in the way the work was organised and the respondent's operating methods. In line with the aim of attracting a younger 'drinking' crowd, the late opening hours were observed even in the early period of the respondent's reopening when trade was particularly poor. The drink and food selections were different,

albeit with overlap, and the price points were reduced. Counter service, as opposed to table service, was encouraged and the lighting and music were altered to be more consistent with the type of ambience the respondent was seeking to create. Student aimed promotions and pub quizzes of a kind specifically designed to attract students were introduced.

f. **Period of suspension of the activities.** There was a period of closure during which the respondent took on the lease and carried out refurbishment works. The period lasted just over a month from 6 June to approximately 11 July 2022.

82. Having regard to all of these factors in the round, I conclude that there was no transfer of an entity which retained its identity. I considered carefully the factors which might militate in favour of a relevant transfer which included the fact the employees largely transferred as did the use of significant tangible assets as well as the ownership of some drink stock. However, on stepping back to appreciate the whole picture, I was not persuaded that there was sufficient similarity in the activities such that the identity of an economic entity had been retained.

83. I was wary of concluding too readily that the activity had changed. It would be contrary to the principles underpinning TUPE and the parent directive if the rights conferred could be too easily circumvented by employers by making minor modifications such as dimming the lights and turning up the music. However, having regard to all of the factors, I conclude that the differences in activity in this case run deeper. It is relevant to have regard to the type of undertaking carried on, and in the bar / restaurant sector, matters such as the ambience and clientele are extremely important characteristics of an undertaking. These may be much less important, for example, in certain other retail settings. The changes made by the respondent to the operating methods and to the food and drink offering aligned closely with its successful aim of attracting a different crowd which would generate higher bar revenues

and lower food revenues. Its adoption of a new trading name associated with a well-established existing brand known to attract a different clientele also tended away from a view that the respondent's modifications were superficial or mere 'window dressing'. In all of the circumstances, the identity of the economic entity operated by GRTL was not retained intact following the respondent's occupation of the premises.

84. In the absence of a relevant transfer for the purposes of Regulation 3 of TUPE, the liabilities of GTRL did not transfer to the respondent and the claimant's claim for accrued untaken holiday pay referable to her employment with that company cannot succeed.

Employment Judge: **L Murphy**
Date of Judgment: **19 April 2023**
Entered in register: **20 April 2023**
and copied to parties