



EMPLOYMENT TRIBUNALS

Claimants: (1) Ms R Santucci
(2) Ms C Thorne
(3) Ms L Hamilton

Respondents: (1) S&K Fruit and Veg
(2) S.K. Fruits Ltd
(3) Ramy Bader

RECORD OF A PRELIMINARY HEARING

Heard at: Bristol (in public, by video - CVP) **On:** 24 October 2024

Before: Employment Judge Livesey

Appearances

For the Claimants: Mr Street, solicitor
For the Respondents: Did not attend

JUDGMENT

1. The transferee of the Second Respondent's business was the First Respondent.
2. The claims against the Third Respondent and the complaints of failure to provide itemised pay statements are dismissed upon withdrawal.
3. The Claimant shall, on or before 7 November 2024, indicate to the tribunal whether they continue to pursue claims under regulation 15 of the TUPE Regulations and, if so, on what basis and against which Respondent. If so, the Tribunal will take steps to give further directions in relation to that matter and, if not, it will issue a further judgment dismissing those claims.
4. The Claimants' claims against the First Respondent succeed as follows;
 - a. The First Claimant;
 - (i) The Claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of £17,854.80;

- (ii) The Claimant was unfairly dismissed and is entitled to the further sum of £482.06;
 - (iii) The First Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay her the gross sum of £1,220.80;
 - (iv) The Claimant was dismissed in breach of contract in respect of notice and the First Respondent is ordered to pay damages to her in the net sum of £6,179.28;
 - (v) The Respondent has failed to pay the Claimant's holiday entitlement and is ordered to pay her the sum of £333.28.
- b. The Second Claimant;
- (i) The Claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of £3,028.35;
 - (ii) The Claimant was unfairly dismissed and is entitled to the further sum of £355.17;
 - (iii) The First Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay her the gross sum of £556.40;
 - (iv) The Claimant was dismissed in breach of contract in respect of notice and the First Respondent is ordered to pay damages to her in the net sum of £1,775.85;
 - (v) The Respondent has failed to pay the Claimant's holiday entitlement and is ordered to pay her the sum of £239.66.
- c. The Third Claimant;
- (i) The Claimant was dismissed by reason of redundancy and is entitled to a redundancy payment of £8,190;
 - (ii) The Claimant was unfairly dismissed and is entitled to the further sum of £263.00;
 - (iii) The First Respondent has made an unauthorised deduction from the Claimant's wages and is ordered to pay her the gross sum of £218.80;
 - (iv) The Claimant was dismissed in breach of contract in respect of notice and the First Respondent is ordered to pay damages to her in the net sum of £2,801.72;
 - (v) The Respondent has failed to pay the Claimant's holiday entitlement and is ordered to pay her the sum of £385.59

5. The recoupment regulations do not apply in respect of any of the Claimants.

REASONS

Relevant background

1. By a Claim Form presented on 11 August 2023, the Claimants issued a claim against the following Respondents;

- 1.1 S&K Fruit and Veg;
 - 1.2 S.K. Fruits Ltd;
 - 1.3 Ramy Bader;
 - 1.4 Elsayed Abdelmotaleb;
 - 1.5 Ramy Bader and Elsayed Abdelmotaleb (a partnership);
 - 1.6 Gardeners Patch Ltd.
2. In the Grounds, it was alleged that the Claimants had been employed by the Second Respondent until, on 3 March 2023, they were informed that the shop where they worked in Frome was to have been 'taken over' by the Third Respondent and that he was going to have employed them on the same terms as before.
 3. The Claimants met the Third and Fourth Respondent on 6 March and were told that they were to have been paid weekly, a change in the previous monthly arrangements. They also then claimed to have suffered a reduction in their hours of work, non-payment of their pensions and, apart from an initial payslip, no further payslips were received..
 4. The Claimants alleged that the First Claimant was dismissed in a voice message on 6 May 2023, the Third Claimant was dismissed verbally on 8 May by the Fourth Respondent and Second Claimant the following day, again by the Fourth Respondent.
 5. The Claimants' claims were of;
 - (a) Unfair dismissal;
 - (b) Redundancy pay;
 - (c) Notice pay;
 - (d) Holiday pay;
 - (e) Unauthorised deductions from wages;
 - (f) Breach of regulations 13 and 14 of TUPE (failure to inform or consult);
 - (g) Failure to provide itemised pay statements.
 6. It was stated in box 15 of the Claim Form that "*the Claimants have had difficulty identifying their employer post TUPE transfer*".
 7. ACAS EC certificates were obtained in respect of all Respondents save that the Certificate obtained in respect of the First Respondent named it as

'S&K Fruit and Veg Ltd', a small difference from the name in the Claim Form.

8. Responses were received from the Second, Third and Fourth Respondents in which the Third and Fourth Respondents asserted that they never employed anyone themselves and that the First Respondent was the correct party. The Second Respondent's response told a different story;
 - Mr Brown stated that he had been running the company for a number of years due to the health and age of his father. He decided that he too could no longer run it due to his own medical issues. We therefore tried to find someone to take it on;
 - He knew a 'Mr Mohammed' from Bristol Market who agreed to take all of the shops and staff on. No money changed hands;
 - Mr Brown was going to oversee the handover himself, but he suffered an accident and was unable to do so;
 - He expressed regret over the fate of some of the staff, who he valued.
9. No response was received from the First or Sixth Respondents. The service documents were returned to the Tribunal in respect of the Sixth Respondent.
10. The Responses were served upon the Claimants by the Tribunal on 27 October 2023. Employment Judge Frazer indicated that, since the Claimants had suggested that the First Respondent had been shown on their payslips, it was likely to have been the employing entity. They were asked whether they were happy to continue their claims against the First and Second Respondents only as the transferee and transferor respectively.
11. The Claimants' representatives replied on 3 November, stating that, whilst they had no wish to overcomplicate matters, they had seen the transfer paperwork which suggested that the shop where they had worked had been transferred to the Third Respondent, Mr Bader. They consented to the dismissal of the claims against the Fourth, Fifth and Sixth Respondents (a dismissal Judgment was issued on 11 December 2023) and sought a default judgment against the First Respondent as a result of its failure to file a response.
12. Schedules of Loss were subsequently provided but Employment Judge Roper pointed out that a default judgment could not be issued unless or until the Claimants confirmed whether they were seeking judgment against the First Respondent, otherwise hearing would have to be listed to determine who the correct party was.
13. On 24 May 2024, the Claimants' position was clarified; it was asserted that they were told that their employments were transferring on 6 March 2023 from the Second Respondent to the Third Respondent. Paperwork was submitted supporting their assertion. They nevertheless asserted that "*The First Respondent is therefore liable for all losses as a result of the termination of their employment...*" and that they were "*entitled to protective*

awards in relation to the two TUPE transfers.” It appeared to have been asserted that there had been a further transfer from the Third to the First Respondent because the Claimants received a payslip with the First Respondent’s name on it.

14. On 18 June, therefore, Judge Roper wrote out again in the following terms;

“The claims as presented by the three Claimants can only be pursued against the legal entity which employed them as at the time of termination of their employment. There is one exception to this, namely if there has been a relevant transfer under the TUPE Regulations in which case the claim for failure to consult on the transfer can be pursued against both the transferor and the transferee....

The latest letter from the Claimants’ solicitor dated 24 May 2024 appears to confirm that the Third Respondent is the transferee and the correct Respondent, but nonetheless that judgment should be entered against the First Respondent, which is inconsistent. The options open to the Claimant appear to be these. First, the Claimants could withdraw their claims against the Second and Third Respondents and seek judgment against the First Respondent only under rule 21.

Alternatively, the matter can be listed for a Preliminary Hearing by video with a time estimate of two hours to determine which one or two of the three Respondent(s) are the correct Respondent to the Claimant’s claims.”

15. The Claimants’ representatives agreed with the Judge’s approach and the matter was duly listed for hearing today. Perhaps oddly, no directions were given in respect of evidence, whether documentary or otherwise (witness statements), but the Claimants provided a bundle of documents and witness statements in any event.

Factual findings

16. During the course of the hearing, I heard oral evidence from all three of the Claimants and received a bundle of documents, references to which have been cited below in square brackets. The following factual findings have been made on the balance of probabilities.
17. The three Claimants were three of five employees who worked in a fruit and vegetable shop in Frome. The shop was initially owned and run this more by the Second Respondent. Mr Stuart Brown was a director but, when he became unwell, his son, Mr Nicholas Brown, ran the business. There were two other shops which were also run by the business and the Second Respondent’s Financial Statements submitted to Companies House showed a total of 22 employees [86].
18. On 3 March, the Claimants received a handwritten letter from their employer indicating that the Third Respondent would be ‘taking over’ the Frome shop [74A]. Amongst other things it said that “*Mr Bader will employ*

you with the same terms and conditions as SK fruits Ltd.” on 4 March, a handwritten agreement was signed by the Third Respondent confirming the fact that he was taking over the shop on 6 March [74]. The agreement stated as follows;

“I hereby agreed to take on all of the current staff working in this shop with the same terms and conditions that they have now.”

19. Following the transfer, the Claimants met the Third Respondent and Mr Abdelmotaleb, the former Fourth Respondent at the shop. Other men also attended from time to time ('Omar' and 'Mohammed').
20. The Claimants received one payslip which bore the First Respondent's name [75-7], although there were never informed of a transfer from the Third to the First Respondent.
21. The First Respondent company was incorporated on 3 March 2023 and the Third Respondent was and still is the sole director [62-73].
22. It appeared to have been Mr Abdelmotaleb who was instrumental in the dismissal of all three Claimants.

Discussion and determination

23. At the start of the hearing, Mr Street clarified his position; that the Claimants were alleging that the effective transferee of the Second Respondent's business was the First Respondent. The claims against the Third Respondent were therefore dismissed upon withdrawal.
24. Further on in the hearing, Mr Street was unclear of his position in respect of the claim under regulation of TUPE. The Judgment above contains a direction for that issue to be clarified.
25. There was no doubt or dispute that the Claimants were employed by the Second Respondent prior to the events of March 2023.
26. There could also have been no doubt that the Claimants were at least *told* that the transferee was the Third Respondent. The reality, however, appeared to have been a little more nuanced. When Mr Bader referred to himself, in person, as the transferee it seemed reasonable to consider that those references were intended to indicate that his new business was going to own and run the shops going forward. That may have been why the business had sought to mimic the Second Respondent transferor's name, it was no doubt why it appeared as the payee on the Claimants' payslips and it no doubt also why the business was named by him as the employer in the Fourth Respondent's response form.
27. The Second Respondent's response suggested that the transferee had been a man named 'Mohammed' and, to that extent, it was inconsistent

with the signed transfer document and of little help in my task in establishing the correct transferee.

28. Rather than suggest that a separate, second transfer occurred subversively between the Third and First Respondent, the more realistic interpretation of these facts was that the loose language used at the point of transfer was an inelegant way of describing the fact that the Third Respondent was going to *manage* and/or *run* the shops going forward on behalf of the company which he had just set up for that purpose and which served that purpose thereafter. He was acting for an undisclosed principal at the point of the transfer, a principal which then became disclosed when the Claimants received their payslips and realised who their employer truly was.

Disposal

29. Claims against the First Respondent were capable of being finalised since it and rule 21 applied. Evidence was heard from each Claimant in support of the witness statements and Schedules of Loss and the judgment sums set out above were awarded in each case.

Employment Judge Livesey

Date 24 October 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON

16 December 2024

Jade Lobb
FOR THE TRIBUNAL OFFICE