



# EMPLOYMENT TRIBUNALS

*Claimant*  
Ms Susan Main

*Respondent*  
Ms Bonnita Riley

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS

ON 23<sup>rd</sup> February 2017

EMPLOYMENT JUDGE GARNON (Sitting Alone )

### *Appearances*

Claimant: Mr P Lott Solicitor

Respondent: in person

## JUDGMENT

The judgment of the Tribunal is:

1. The complaint of breach of contract (notice pay) is well founded. I award damages of £ 826.80 on which no tax is payable .
2. The claimant is entitled to a redundancy payment of £ 3888 payable by the respondent.
3. I make an additional award of two week's pay under s 38 of the Employment Act 2002 ( the 2002 Act) being £432
4. I make a costs order limited to the respondent paying to the claimant the amount of the hearing fee of £230.

## REASONS

### 1.The Facts

1.1 The claimant , born 21<sup>st</sup> July 1957 , was employed as a shop assistant initially by a Mr David Hutchinson in his fruit and vegetable shop from 1<sup>st</sup> May 2004 without any break in service until 28<sup>th</sup> November 2013 when Mr Hutchinson ceased trading due to financial difficulties . The running of business was taken over by the landlord's brother for a few days until 3<sup>rd</sup> December 2013 and then transferred as a going concern to a Mr Onur who ran it until 2<sup>nd</sup> April 2016. The claimant's employment continued without any break. The respondent took over the business as a going concern on 6<sup>th</sup> April 2016.

The claimant's employment continued again without any break. Her pay at termination was £216 per week gross £ 207 net for a 30 hour week .

1.2. She was never given a written statement of terms and conditions of employment (which I will call a "s1 statement ") as required by s1 of the Employment Rights Act 1996 (the Act) . The respondent purchased the business with a £20000 loan from Virgin Bank. She had some accountancy advice but no solicitor acted for her in the purchase. Someone from Virgin Bank told her to get the staff to sign a document. The claimant agrees she did . None of the staff were given a copy, but the original was kept on file. The claimant's has been lost and the respondent did not bring a copy of the standard form but from both parties description it may well have been a s1 statement . The respondent says someone at Virgin Bank advised her of the existence of what she called "TUPE" but that, if staff agreed, previous service with earlier owners of the business would not be her concern.

1.3. On 30<sup>th</sup> July 2016 the claimant and Ms Karen Lowdon also employed in the business received a text message saying the respondent was ceasing to trade with immediate effect and their employment was terminated. As the respondent says in her response form the claimant was aware weeks earlier the business was in difficulties, but the decision to close was " a last minute decision" as she could not afford to buy stock.

1.4. The facts set out above are wholly uncontested by the parties. The claimant gave evidence and I questioned her about her income in the notice period .. The respondent said she had nothing to add to her response form. I read the statements of her witnesses , Ms Lowdon, Ms Pauline Brown and Ms Nila Brown . Mr Lott said he had no questions for any of them or challenge to their statements. I accept all involved were friends or relatives and have acted honestly .However, I am not here to adjudicate on what is fair or substitute anyone's view of what the law should be for what it actually is. The claims are for a redundancy payment and notice pay. The respondent's only defence is that the claimant's employment started with her on 6<sup>th</sup> April 2016 so she cannot be liable for redundancy payments or notice pay calculated on the basis the claimant's "continuous employment" dates from 1<sup>st</sup> May 2004.

## **2. The Relevant Law**

2.1. The law provides a contract of employment may be brought to an end only by reasonable notice unless the claimant is guilty of gross misconduct, which she was not . Damages for not giving that notice are the net pay due to the employee during the notice period less any sums earned or received as benefits payable to unemployed people in that period The statutory minimum period of notice set out in Section 86 of the Act in this case is 12 weeks. Notice of termination at a specific date must be given, it is not enough to tell an employee of a possibility of closure at some unspecified date.

2.2. Redundancy is defined in s 139 which says dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to the fact the employer has ceased to carry on the business for the purpose of which the employee was employed

by him either generally or in a particular place. If dismissal is for that reason the employee is entitled to a statutory redundancy payment calculated by a formula in s162.

2.3. "Continuous employment" is defined in sections 210 -219 of the Act. The relevant parts are

*211. Period of continuous employment.*

*(1) An employee's period of continuous employment for the purposes of any provision of this Act—*

*(a) .. begins with the day on which the employee starts work, and*

*(b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.*

*212 Weeks counting in computing period.*

*(1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.*

*218 Change of Employer*

*(2) If a trade or business, or an undertaking ..., is transferred from one person to another—*

*(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and*

*(b) the transfer does not break the continuity of the period of employment.*

A similar provision had existed in statutes which preceded the Act . In essence this has been the law for over 50 years.

2.4. The Transfer of Undertakings ( Protection of Employment ) Regulations 2006 (TUPE) ,so far as relevant, say;

Reg 3. — *(1) These Regulations apply to—*

*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;*

*(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*

*Reg 4.*

*(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;*  
An earlier version of TUPE made similar provision in 1981 , so this alternative route has been the law for 36 years.

2.5. Collison v BBC 1998 ICR 669 confirmed continuous employment was a statutory concept and parties cannot alter the start date by agreement. The Act contains:

*203 Restrictions on contracting out.*

*(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as it purports—*

*(a) to exclude or limit the operation of any provision of this Act,*  
and TUPE contains in Reg 18 a restriction on contracting out

*Section 203 of the 1996 Act (restrictions on contracting out) shall apply in relation to these Regulations as if they were contained in that Act, ...*

2.6. Section 38 of the Employment Act 2002 says:

*(3) If in the case of proceedings to which this section applies—*

*(a) the employment tribunal makes an award to the employee in respect of the claim to which the proceedings relate, and*

*(b) when the proceedings were begun the employer was in breach of his duty to the employee under section 1(1) or 4(1) of the Employment Rights Act 1996,*

*the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.*

*(4) In subsections (2) and (3)—*

*(a) references to the minimum amount are to an amount equal to two weeks' pay, and*

*(b) references to the higher amount are to an amount equal to four weeks' pay.*

*(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.*

For over 50 years every employee has been entitled by s 1 to be given a written statement of terms and conditions of employment and by s 4 written particulars of any change, which would include a change in the identity of the employer .

**3. Conclusions.**

3.1. Whichever legal route is taken, the claimant's period of continuous employment started on 1<sup>st</sup> May 2004 and the liability to pay redundancy and notice pay now rests with this respondent. Any agreement to "break" continuity is void.

3.2. It follows for calculating her redundancy payment entitlement and notice period under s 86, the claimant had at termination twelve years continuous employment. During each such year she was over the age of 41. Her redundancy payment is 1.5 weeks gross pay for each of those years £216 x 18 = £3888. Her damages for breach of contract are net pay for 12 weeks of £207 = £2494.56 less what she earned during that period and/or received by way of universal credits paid because her income and hours had dropped. I calculated that sum at £1657.20, leaving £ 826.80 .

3.3. As for the uplift under s38 of the 2002 Act, the claimant was not **given** a s1 or s4 statement but at least the respondent tried to comply with the law . I find that merits the minimum award. That said , this whole case should never have been necessary had the respondent familiarised herself with the basic principles of her legal obligations as an employer which have been settled law for many years when she acquired the business. If she was told what she says she was, the advice was wholly wrong.

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED ON

23<sup>rd</sup> February 2017

SENT TO THE PARTIES ON

1 March 2016

G Palmer

FOR THE TRIBUNAL OFFICE