

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No S/4105302/2016

Held in Glasgow on 16 May 2017

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Employment Judge: F Jane Garvie

Miss J Frood

**Claimant
In Person**

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Ms Fiona Burton (formerly T/a The Stag Bar)

**Respondent
Represented by:
**Mr L Moodie -
Solicitor****

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that, on reconsideration, the decision (“the original decision”) is taken again and is hereby revoked and the present respondent is directed to submit a response, (an ET3) and to do so within **28 days** of the date of issue of this Judgment and thereafter the claim will be served on Hawthorn Leisure Ltd which is to be sisted as a second respondent.

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REASONS

Background

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1. The claimant presented a claim, (the ET1) on 9 November 2016 in which she gave the date of termination of her employment as 19 June 2016. An ACAS Certificate was provided with a date of receipt of 13 October 2016 and date of issue of 3 November 2016. This was in relation to the employer being the Stag Bar.

2. The claim was accepted by Employment Judge Frances Eccles on the basis that the difference in the name and address of the respondent as it appeared in the ET1 from the ACAS Certificate was minor and it would be appropriate and in the interests of justice to accept it. It was also noted that the claim appeared to be time barred. The Notice of Claim and Final Hearing issued on 11 November 2016 drew the parties' attention to this issue.
3. There was then a further ACAS Certificate submitted by the claimant under cover of an e-mail of 17 November 2016 which has a date of receipt of 12 October 2016 and a date of issue of 12 November 2016. The prospective respondent there is Ms Burton not The Stag Bar. This was referred to Employment Judge Mary Kearns who confirmed that it should be treated as an amendment to the claim.
4. Separately, Notices for the Hearing were then issued on 21 November 2016 and the respondent was directed to submit a response, (the ET3) by 19 December 2016.
5. The file was then referred to me and on 29 December 2016 and I directed that the claimant clarify if she was employed by Fiona Burton, t/a The Stag Bar. She was also directed to specify how much was sought for the redundancy payment and notice pay being the complaints set out in the ET1. A reply was received dated 1 January in which the claimant sought the sum of £432 for notice pay and the same amount for redundancy pay. She also indicated that correspondence should be sent to the respondent at her home address and not the Stag Bar.
6. Thereafter, a default Judgment in terms of Rule 21 was issued awarding the claimant the sums sought in relation to notice pay and redundancy and an order to the respondent to pay to the claimant the lodging fee of £160. This was issued under cover of correspondence dated 5 January 2017.
7. By e-mail dated 10 January 2017 Mr Moodie explained that he was acting for the respondent and attached an application to reconsider the Judgment. The claimant then provided a reply under cover of a letter of 16 January

2017. This was acknowledged under the direction of Judge Eccles by letter dated 18 January 2017.

8. The file was then referred to me and I directed that there should be a Reconsideration Hearing on the basis that the application for reconsideration had not been refused. Letters to that effect were issued on 1 February 2017.
9. Mr Moodie was asked to provide comments on the claimant's letter of 16 January 2017 and a reply was received dated 3 February 2017, setting out comments and attaching two e-mails and a spreadsheet.
10. I directed that a Reconsideration Hearing be arranged. The claimant replied explaining that she had dates which she would have to avoid because of other commitments. A letter was sent to Mr Moodie on 9 February 2017 asking for clarification if it was being suggested that there should be a second respondent. A reply was received dated 9 February 2017 which was acknowledged on the directions of Judge Ian McPherson.
11. Thereafter, the claimant wrote by e-mail of 1 March 2017 seeking an update. Notices for the Reconsideration Hearing were issued on 8 March 2017 directing that the Hearing would take place on 7 April 2017. The claimant sent a reply on 12 March 2017, seeking an alternative date. Mr Moodie had no strong views about a postponement and the postponement was then granted and an alternative date arranged for the Reconsideration Hearing to be held on 16 May 2017.

The Reconsideration Hearing

12. At the start of the Reconsideration Hearing I explained to the claimant that having re-read the file, I noted that the point of time bar had been raised. She confirmed that her last date of employment was 19 June 2016 and she did not approach ACAS until 12 October 2016. Accordingly, the claim in relation to notice pay was time barred and the claimant accepted that this was the case since she would have had to approach ACAS by no later than 18 September 2016 in order to have the benefit of the time extension under

Section 207B of the Employment Rights Act 1996 whereas contact with ACAS was first made on 12 October 2016.

- 5 13. The claimant accepted that the complaint in relation to notice pay was therefore time barred and she does not seek to insist on her claim for notice pay. Since she has accepted this that complaint in relation to notice pay is therefore treated as withdrawn and is accordingly dismissed. As the claimant pointed out, the claim for redundancy payment has a different time limit, namely six months. Accordingly, that complaint which is the second part of the claim was submitted in time.
- 10 14. Mr Moodie explained that the background to this case was that the present respondent was a sole trader trading as The Stag Bar. There was an assignment of the lease of the premises where The Stag Bar operated. Originally, the landlords had been Belhaven Green King Ltd but in June 2014 his understanding was that the premises which form The Stag Bar were sold to Hawthorn Leisure Ltd, Touchstone, Pinewood Business Park, 15 Coleshill Road, Marston Green, BH37 7HG. Mr Moodie's understanding is that although the lease was never formally assigned they became the de facto landlords.
- 20 15. The present respondent's lease was due to come to an end on 27 July 2016. She gave notice to Hawthorn Leisure. She understood from then that they wanted to take possession of the pub early, that is before the end of the lease and they would run it themselves and let it to another party. A transfer date of 20 June 2016 was agreed and before that date the present respondent provided a list of employees, including the claimant who were 25 employed by her at the Stag Bar to them.
16. It was suggested that thereafter, for whatever reason, Hawthorn Leisure decided not to continue trading in the premises operating as the Stag Bar.
17. The present respondent's position is that she was not the claimant's employer as at 19 June 2016.

18. As the Tribunal understood it, the claimant was then on maternity leave so she was not at work in June 2016 but she thought that the last day the Stag Bar was operational was 19 June 2016.
19. In relation to the Notice to lodge a response, (the ET3) the present respondent had not understood that this required her to lodge a formal response, despite it saying so in the covering letter. At the time, she had been unwell and had problems from orthopaedic issues and so she failed to submit a response.
20. In all the circumstances, the Tribunal concluded that it was appropriate to reconsider the Judgment and that the decision that is “the original decision” should be revoked and the decision retaken.
21. Having been revoked it was therefore retaken and, on retaking the decision, the judgment of the Tribunal is that the present respondent should be allowed to submit a response that is an ET3 and should do so within **28 days** of the date of issue of this Judgment. The Tribunal further understood that the present respondent wishes to have Hawthorn Leisure Ltd sisted as an additional respondent. Accordingly, the Tribunal directs that once the response is received from the present respondent then the claim (the ET1) and the response, (the ET3) will be served on Hawthorn Leisure and it will be sisted as a second respondent.
22. It was explained that it may be necessary to hold a Preliminary Hearing at which a Tribunal will have to determine whether there was in law, a transfer of employment of the claimant from the present respondent to the second respondent, that is to Hawthorn Leisure Ltd. This will depend on the contents of any response, (the ET3) which is submitted by the second respondent once the claim, (the ET1) with a copy of the present respondent’s response, (the ET3) has been served on them.
23. As indicated above, the background has been set out in considerable detail in order to clarify for the second respondent the history of this case.

24. It does seem to the Tribunal that the issues which will arise for consideration will be as follows:-

1. Was there a Tupe transfer from the present respondent to Hawthorn Leisure Ltd?

5 2. If so, on what date did that transfer take effect?

3. If there was no transfer then did the claimant remain an employee of the present respondent until termination of her employment?

10 Since the claimant has accepted that her complaint in relation to notice pay is time barred, it follows that this complaint for notice pay must be dismissed following upon her oral acceptance to the Tribunal on 15 May 2016 that it cannot succeed and is therefore treated as withdrawn, with the one remaining complaint being that of entitlement to a redundancy payment which depending on the conclusions reached on the above three issues, will be payable either by the present respondent or Hawthorn Leisure Ltd.

15 A copy of this judgment will be sent to ACAS for information.

20 Employment Judge: Ms FJ Garvie
Date of Judgment: 18 May 2017
Entered in register: 22 May 2017
and copied to parties

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