



THE EMPLOYMENT TRIBUNALS

Claimant: Miss H Fowler

Respondent: Metro Inns (Teesside) Limited
Metro Inns Limited
Metro Lodgings Limited

Heard at: Teesside Justice Hearing Centre
North Shields Hearing Centre

On: 29th & 30th January 2019
Deliberations: 27th February 2019

Before: Employment Judge B N Speker OBE DL

Members:

Representation:

Claimant: Mr N McDermott (Employment Advisor)
Respondent: Mr A P Drummond (Group Company Secretary)

JUDGMENT

1. The claimant was not employed by any of the three respondents.
2. The claims of unfair dismissal and unpaid wages are dismissed.

REASONS

1. This claim has a complex history which relates substantially to difficulties which were envisaged in identifying the claimant's employer. Initially the respondents had been named as Metro Logistics and Metro Hub Limited, both of whom had been dismissed from the proceedings as respondents. As at the time of the preliminary hearing before Employment Judge Shepherd on 2nd July 2018, the respondents were shown as follows:-

Metro Logistics
Metro Hub
Metro Inns (Teesside) Limited
Metro Inns Limited

At that preliminary hearing Metro Lodgings Limited was joined as a respondent but it was recorded in the case management summary that Mr McDermott on behalf of the claimant withdrew the claim against Metro Hub Limited which had been named as second and third respondents as that company was then in liquidation. Metro Logistics was recognised as not being a legal entity and the claim against it was withdrawn.

2. The case was listed as a contested hearing to deal with all issues including the identification of the correct respondent and also the hearing of the constructive dismissal claim by Miss Fowler and her claim for outstanding wages.
3. I was provided with a bundle of documents ultimately consisting of 224 pages. The claimant gave evidence herself. On behalf of the respondents oral evidence was given by Jacqueline Joan Agnes Kirkpatrick-Stagg who had been the sole director of Metro Hub Limited. She attended pursuant to a witness order and despite being in poor health and having a history of serious health problems which have led to her ceasing being involved in the running of the relevant hotel in which the claimant had worked. Evidence was also given by Mr Patrick Docherty a consultant with Metro Inns Limited the holding company. He was identified as the father of the two directors of Metro Inns Limited namely Christopher and Jonathan Docherty. The final witness was Lynsey Brown the sole director of Metro Lodgings Limited, which is and was from late 2017 the company running the hotel stated.
4. The majority of the documentation within the bundle related to the various companies involved and the agreements between them. The position of the three remaining respondents was that they all denied having ever employed the claimant and in the case of the third respondent, their case was that there had been no TUPE transfer which would render the third respondent responsible for the claim. The claimant herself gave evidence as to her understanding with regard to the companies' structures, as well as the events leading up to her resignation. The only direct evidence given for the respondents with regard to the circumstances leading up to the termination of employment was that given by Mrs Kirkpatrick-Stagg in her role as sole director of Metro Hub Limited on the basis that she accepted that the claimant had been employed by that company up the date of resignation.
5. The task of unscrambling the legal entities involved in this case was made more difficult by lack of clarity in relation to various documents, the lack of any explanatory statement or structure with regard to the manner of operation of the hotels and the services provided in them as between the holding company, the owners of the various hotels and the arrangements made for them to be operated. There were also difficulties arising out of the fact that a number of documents were unclear and irregular and that portions of key documents were missing. It was clear that the complex picture presented within this company organisation was a matter of extreme confusion as far as the claimant herself was concerned.
6. At the conclusion of the two days of evidence on the 29th and 30th January it was directed that both parties provide detailed written submissions which were to be exchanged and then filed in the Tribunal by 18th February 2019. Both

representatives complied with this. On the basis of the oral evidence, the bundle of documents and the written submissions, I found the following facts:-

- 6.1 Metro Inns Limited is a holding company presiding over a substantial property organisation. According to Mr Patrick Docherty this consists of residential property, fourteen hotels, various care homes and other assets. It appeared that Patrick Docherty himself had been involved in this business but he has been disqualified from being a company director since 2014. The relevant directors are his two sons Christopher Docherty and Jonathan Docherty. The modus operandi appeared to be that each of the hotels is owned by a separate company and those companies in turn negotiate operating agreements. Each operator deals with the employment of staff and the actual running of the hotels in exchange for which a fee is paid by the operator for the privilege of running the hotel. This claim involves a hotel in Stockton-on-Tees referred as the Metro Inn Teesside and situated at Teesway, North Tees Industrial Estate, Stockton-on-Tees.
- 6.2 Mrs Kirkpatrick-Stagg had held the operating agreement for that hotel prior. An earlier company owned by her was called Metro Ops Limited. As from 1st July 2015 by virtue of an operating agreement between Metro Inns (Teesside) Limited and Metro Hub Limited, the latter company was granted a licence to operate the hotel for a period of six years from 1st July 2015. As stated Mrs Kirkpatrick-Stagg was the owner of that company.
- 6.3 The claimant commenced her employment as a housekeeper at the hotel in 2009 and her employment transferred to Metro Hub Limited with the making of the 2015 operating agreement referred to.
- 6.4 During 2017 Mrs Kirkpatrick-Stagg became seriously ill. It was clear to her and to the licensor that she would not be able to continue running the hotel and there were discussions as to whether another of the operators involved in this set of companies would take over the operation of the Stockton hotel on the basis that Metro Hub Limited would surrender its agreement and the new agreement would be entered into with another company.
- 6.5 The arrangements by which that was to happen which gave rise to the significant issue in this case as to whether the claimant's contract of employment transferred by reason of the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). As stated earlier, Metro Hub Limited went into liquidation and is no longer a party to these proceedings.
- 6.6 It was the respondent's case that the claimant was not employed at any time by any of the three respondents. In particular with regard to the third respondent, it was suggested that the employment of the claimant did not transfer from Metro Hub Limited to Metro Lodgings Limited by virtue of TUPE because it was the respondent's case that the transfer of the operating agreement and with it the employment contracts of the hotel staff, did not pass until 1st December 2017 by which date the claimant had already resigned from her employment.

- 6.7 Various key documents were presented in particular an operating agreement between Metro Inns (Teesside) Limited and Metro Lodgings Limited dated 1st November 2017 stating that, Metro Hub Limited having surrendered its agreement, the licence to operate the hotel was granted to Metro Lodgings Limited from 1st December 2017. A further document headed Minute of Agreement re Operating Agreements made on 16th October 2017 was produced, the stated intention of which was to delay the commencement of the operating agreement to be effective from 1st December 2017 and not 1st November 2017. The claimant's position with regard to these documents was that the effective date of the transfer was indeed 1st November 2017 as stated in the agreement and that the minute of agreement dated 16th October 2017 was a document upon which there should be no reliance and that it had been concocted in such a way as to suggest that the operative date had been deferred and that the minute of agreement was irregular in many respects and could not be relied upon. These were important issues to be resolved because the question of by whom the claimant was employed at the relevant time and whether there was a TUPE transfer depended upon it.
- 6.8 With regard to the employment itself, the claimant had worked satisfactorily as a housekeeper from the commencement of her employment until 7th November 2016 when she had suffered an accident at work during the course of changing beds. This led her to be off work. There was a back to work interview held by Katerina Mikusova following which Miss Mikusova the hotel manager wrote to the claimant stating that it was not possible for her to return to undertake light works in her capacity of housekeeper and that therefore she was suspended with no pay pending a full investigation. Following this, Miss Mikusova spoke to Mrs Kirkpatrick-Stagg and as a result a letter was sent to the claimant the following day 21st November 2016 stating that the previous letter had been a mistake, that the claimant was not suspended without pay but that she was to remain on sick leave until her doctor deemed that she was fully recovered. Reference was made to the fact that the claimant had attended the return to work interview using elbow crutches.
- 6.9 Following this the claimant instructed solicitors to commence a personal injury compensation claim against the hotel and the letter from the claimant's solicitors was addressed to Metro Hub Limited and was dated 16th January 2017. The claimant did produce fit notes during Spring 2017.
- 6.10 On 27th March Miss Mikusova wrote to the claimant acknowledging her wish to return to work and asking her to attend a further return to work interview.
- 6.11 A letter dated 12th April 2017 from Mrs Kirkpatrick-Stagg to the claimant was produced at the tribunal and it suggested that the information provided by the claimant was inadequate and that she could not therefore return to work until she had provided further medical certificates. The claimant denied having received that letter and I find on hearing the claimant's evidence that she did not receive it.
- 6.12 The claimant made further attempts to contact someone at the company in relation to her employment and eventually sent a handwritten letter dated 23rd

September 2017 addressed to Mr Patrick Docherty at Metro Inns Limited office in Newcastle upon Tyne. This stated that she worked for Metro Hub Limited and raised the fact that she had been waiting for a decision as to when she could return to work in the hotel but was being “fobbed-off”. She stated that she was being treated unfairly and was asking for clarification about her employment and her wages. No reply was sent.

- 6.13 The claimant then instructed an employment law consultant Mr Norman McDermott who sent letters on 24th November 2017 both to Metro Inns (Teesside) Limited and Metro Hub Limited stating that the claimant was being prevented without payment from attending work on light duties or at all and had not been able to obtain a response and that she had submitted a written grievance (23rd September 2017) without response. The letter then stated that the claimant regarded her employment position as having become “untenable” and resigned from her employment with immediate effect. Subsequent to that, the claimant presented her employment to the Tribunal alleging constructive unfair dismissal and claiming outstanding wages.

SUBMISSIONS

- 7.1 On behalf of the claimant it was submitted that the attempt being made by the respondents to suggest that there had not been a TUPE transfer was unreliable. It was alleged that the minute of agreement dated 16th October 2017 confirmed in clear terms the transfer to Metro Lodgings Limited had not been postponed to 1st December 2017. Accordingly on the date when the claimant resigned, namely 24th November 2017, Metro Lodgings Limited had already taken over the management of the hotel and had become the claimant’s employer by virtue of TUPE. Therefore Metro Lodgings Limited was the employer and was responsible for the claim made by the claimant. Mr McDermott also explained the basis of the unfair dismissal claim and admitted that there had been what amounted to a fundamental breach of the employment contract by the hotel not allowing the claimant to return to work, failing to operate any fair procedure in order to assess the ability of the claimant to return to work, failing to pay her wages and failing to make any realistic enquiries as to her fitness to work.
- 7.2 On behalf of the respondent Mr Drummond set out why neither Metro Inns (Teesside) Limited nor Metro Inns had any responsibility as neither of those companies have ever employed the claimant. As to Metro Lodgings Limited he conceded that there were various aspects in which the documentation provided was unsatisfactory, most particularly with regard the minute of agreement dated 16th October 2017. He asked that the tribunal address the reality of this situation and/or the evidence which showed that Metro Lodgings Limited had not actually taken over the operation of the company until 1st December 2017. Furthermore he suggested that the minute of agreement, although stated to have been dated 16th October 2017, was actually effected on 16th November 2017 and that this was a clear administrative error which did not affect the substance of the agreement.

THE LAW

- 8 As well as taking into account general principles of contract law and company law, it was necessary to consider the application of the Transfer of Undertakings (Protection of Employment Regulations) 2006, most particularly regulations 3 and 4.

FINDINGS

- 9 It is not necessary for the purposes of this decision to go through the convoluted company structures and the inter-relation between the various companies. What is clear is that Metro Inns Limited is a holding company. Metro Inns (Teesside) Limited owns the physical hotel at Stockton. That company grants operating agreements to companies which undertake the operation. With regard to the Stockton hotel an agreement had been granted to Metro Hub Limited which was owned by Mrs Kirkpatrick-Stagg. She was clearly experienced in running such companies as evidence was given as to her operating other companies around the country on the same basis. Under the operating agreement granted to Metro Hub Limited on 1st July 2015, that company became the employer of the claimant and it was her employer at the time when she suffered her accident at work and became absent. It was Metro Hub Limited which dealt with issues arising out of her absence and made decisions as to whether it allowed her to return to work during the time when they considered she was still suffering from the effects of her injury. It was the decision of Metro Hub Limited through Mrs Kirkpatrick-Stagg that the claimant could not undertake the light duties suggested by her GP because the position of housekeeper was not one which could be performed by a person who needed to undertake light duties. Although there was discussion as to the possibility of the claimant undertaking some reception duties whilst not fully fit to be a housekeeper, the company did not have any availability and therefore the claimant was not allowed to return to work. The position as to the claimant's employment dragged on and there was no regular communication between the respondent Metro Hub Limited, Mrs Kirkpatrick-Stagg, the hotel manager and the claimant. Ultimately some months later the claimant, having been unable to make progress or obtain satisfactory response from her employer, made the decision on advice to resign from her employment. That was on 24th November 2017.
- 10 The crucial question to determine is, by whom was Miss Fowler employed as at 24th November 2017. Was she still an employee of Metro Hub Limited? Had her employment been transferred to Metro Lodgings Limited by virtue of a transfer of undertaking namely the transfer of the operation of the hotel from Metro Hub Limited to Metro Lodgings Limited by virtue of a new agreement between Metro Inns Limited and Metro Lodgings Limited.
- 11 It is necessary to identify the time of the transfer of undertaking namely when Metro Lodgings Limited took over the operation of the hotel and with it assumed responsibility for the contracts of employment of all of the members of staff, including the claimant if she was employed.
- 12 Under Regulation 4(3) of the TUPE regulations it is necessary to consider the effect of a relevant transfer on a contract of employment which is a reference to a person so employed "immediately before the transfer or would have been so employed but

for a dismissal related to the relevant transfer as referred to in Regulation 7. “ It was not part of the claimant’s case that there was in fact a dismissal related to the transfer, as this is a case where the claimant herself resigned.

- 13 In order to determine whether the claimant was employed immediately before the transfer, it is necessary to make a specific finding as to when the transfer of undertaking occurred. The operating agreement is dated 1st November 2017 and expressly states that the operating period runs from and was effective from 1st November 2017. The document states that it includes as a schedule a list of all of the current employees at the Stockton hotel who would be affected by the agreement and transferred with it. Unfortunately that list of employees whose names were said to be listed in schedule 6, was not included in the copy of the agreement provided to me. Indeed it was somewhat contradictory in that there was indeed a schedule 6 included in the agreement which was headed Obligations. No explanation was given as to why the schedule of the employers was not included. Had it been produced and if the claimant’s name was included in it, then this may well have been a significant piece of evidence. However I did not have the assistance of that list. There was then the question of the minute of agreement referred to above which was dated 16th October 2017. There was contradictory evidence with regard to that document. On the one hand it was said by witnesses that it had been prepared by solicitors and on the other that Mrs Kirkpatrick-Stagg said that she had prepared it herself by cutting and pasting which was an unusual suggestion bearing in mind that at the relevant time Mrs Kirkpatrick-Stagg said that she was very unwell and not able to conduct her business activities. The respondents maintained that the date on the document was incorrect and that it should have read 16th November 2017 which would be consistent with other evidence to the effect that there were discussions about delaying the commencement of the operating agreement in favour of Metro Lodgings Limited until 1st December 2017 and that it would be illogical for minutes to have been prepared in advance of the effective date of operating agreement. The evidence of the respondent’s witnesses was to the effect that there had been this deferral, that the actual transfer did not take place until 1st December 2017 and that this was the actuality and that it was not a ruse in order merely to defeat the claimant’s case.
- 14 The evidence presented was by no means wholly consistent. There were various respects in which pieces of evidence should have been made available which would have assisted in reaching a decision. However I do find on taking a reasoned approach to the totality of the evidence that the transfer of the undertaking, namely the operation of the Stockton hotel by Metro Lodgings Limited, did not take place until 1st December 2017. This is in spite of the fact that the two documents referred to give a different impression. I accept on balance and taking into account all of the evidence and the circumstances that the operation of the company by Metro Lodgings Limited was from 1st December 2017.
- 15 That is a misfortune as far as the claimant is concerned because it is clear that she had resigned from her employment on 24th November 2017. It cannot be said therefore that she was employed by Metro Lodgings Limited immediately before the transfer. Had the schedule to the operating agreement been produced showing that she was included as an employee, the position may have been different. Bearing in mind my conclusion with regard this crucial point, the claimant was the employee of

Metro Hub Limited on 24th November 2017, she did not transfer to Metro Lodgings Limited and her claim is against Metro Hub Limited. Sadly for her that company is in liquidation and is no longer a party to these proceedings in any event. On the basis of this finding namely that the claimant was not in an employee of any of the three respondents, her claim against them is dismissed.

- 16 It is not appropriate or necessary for me to determine whether she was unfairly constructively dismissed by Metro Hub Limited who I have found was her employer at the time of her resignation. That is because Metro Hub Limited, as stated, is not a party to these proceedings and in any event is in liquidation.

EMPLOYMENT JUDGE SPEKER OBE DL

**JUDGMENT SIGNED BY EMPLOYMENT
JUDGE ON 19 March 2019**

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