EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101062/2022

Held in Glasgow on 3, 4 and 5 May 2022

Employment Judge P O'Donnell

Mr John Easton	**Claimant** **Represented by:** **Ms Kochar -** **Solicitor**
Polmont Golf Club Limited	**First Respondent** **Represented by:** **No appearance or representation**
Braes Golf Centre Limited	**Second Respondent** **Mr Matthews -** **Lay Representative**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is:

1. The claim under the Transfer of Undertaking (Protection of Employment) Regulations 2006 that the First and Second Respondent failed to consult with the Claimant was lodged out of time and the Tribunal is not prepared to exercise its discretion to hear this claim out of time. The Tribunal does not, therefore, have jurisdiction to hear this claim and it is hereby dismissed.

2. To the extent that the remaining claims are brought against the First Respondent, they are dismissed because the Claimant's employment had transferred to the Second Respondent under the 2006 Regulations.

3. The Claimant was dismissed by the Second Respondent and that dismissal was unfair. The Tribunal awards the Claimant the sum of £19332.79 (Nineteen thousand, three hundred and thirty two pounds, seventy nine pence) in respect of the unfair dismissal claim.

4. The claim for statutory redundancy pay is not well founded and is hereby dismissed.

5. The Second Respondent breached the Claimant's contract of employment by dismissing him without notice. No compensation is awarded in respect of this claim for the reasons set out below.

6. The breach of contract claim in respect of pension contributions is not well founded and is hereby dismissed.

7. The claim for unlawful deduction of wages in respect of the wages due for 4-6 October 2021 is not well-founded and is hereby dismissed.

8. The Claimant was entitled to pay in lieu of untaken holidays on the termination of his employment and is awarded the sum of £3014.40 (Three thousand fourteen pounds and forty pence) in respect of this.

REASONS

Introduction

1. The Claimant has brought complaints of unfair dismissal, redundancy pay, wrongful dismissal, breach of contract, unlawful deduction of wages, holiday pay and failure to consult against both Respondents.

2. The First Respondent (R1) has not entered an ET3 and was not represented at the hearing. The Second Respondent (R2) resists all the claims as set out in their ET3.

Postponement application

3. At the outset of the hearing, R2 made an application to postpone the hearing. A similar application was made in advance of the hearing. This was not granted but it was left that the application could be renewed at the outset of the hearing.

4. The basis of the application was that the Claimant had not complied with the terms of an Order made by the Tribunal for parties to exchange the documents which they sought to rely on 28 days in advance of the hearing.

This had not been done and R2 had only seen the Claimant's bundle 6 days before the hearing with 9 additional pages being provided on the morning of the first day of the hearing.

5. On being asked what prejudice this caused to him, Mr Matthews stated that it was the volume of documents rather than any individual document which caused him difficulty. He confirmed that he had no documents to rely on and would rely on those in the Claimant's bundle.

6. As an aside, it did emerge that R2 did have documents which it sought to rely on when Mr Matthews sought to show pictures to the Claimant in cross-examination which had not been produced in a bundle before the Tribunal or provided to the Claimant in advance. However, the Tribunal does not consider that Mr Matthews was in any way being dishonest about not having any documents but, rather, as a layperson, had not appreciated what was meant by the term "document" and what should appear in a bundle.

7. Mr Matthews submitted that there was no prejudice to the Claimant in postponing the hearing who had the support of his trade union. On the other hand, Mr Matthews was representing R2 on his own without the benefit of legal representation.

8. In reply, Ms Kochar submitted that the bundle was the responsibility of both parties and that she had contacted R2 on 13 April 2022 asking for any documents they wished to include in the bundle but had no reply. The documents in the bundle relate to the case being mainly internal communications between the parties. There was no prejudice to the Respondent who has been aware of the case since it was lodged in February 2022 and they have had time to obtain legal representation. A postponement would cause significant prejudice to the Claimant in terms of delay. If there are no documents to be added then it is the same bundle that will be used.

9. The Tribunal refused the application to postpone the whole of the hearing for the following reasons:-

a. It is correct that the Claimant had not complied with the Order of the Tribunal but that is not, in and of itself, determinative of the application. The question is the prejudice to the parties.

b. It is noted that R2 is not legally represented and has had a relatively short period of time to review the bundle.

c. However, that is balanced by the fact that much of the bundle is comprised of documents which must be in R2's corporate knowledge (for example, the ET1, ET3, Tribunal correspondence and correspondence between the parties during the period when the events giving rise to the claim occurred).

d. R2 could not point to any specific prejudice other than the volume of documents. They did not, for example, suggest that the late provision of the bundle caused any difficulties in identifying any witnesses they wished to call.

e. Delay is prejudice in and of itself regardless of whether either party is incurring any expense.

f. Delay is a prejudice to both parties as it leaves the case hanging over both of them for a further period.

10. The Tribunal did bear in mind that some documents had only been provided to Mr Matthews that morning. It, therefore, postponed the start of the hearing proper to 2pm on the first day to allow him time to digest those documents.

Evidence

11. The Tribunal heard evidence from the following witnesses:-

a. The Claimant.

b. Robert Deavy (RD) – the Claimant's trade union representative.

c. Stephen Matthews (SM) – the owner and manager of R2.

12. There were a number of other individuals whose names came up in evidence but who were not witnesses. The Tribunal considers that it would be useful to identify them here:-

    a. Richard McCluckie (RMcC) – who was R2's general manager from early 2020 to August 2020.

    b. Dougie Morrison (DM) – who was a director of R2.

    c. Drew Matthews (DM2) – who was also a director of R2.

    d. Daniel McCluckie (DMcC) – who was a manager at R2 and came into the business after RMcC had left.

13. There was a bundle of documents lodged by the Claimant and page numbers below are references to pages in that bundle.

14. This is not a case where there was any real dispute between the parties in relation to the relevant facts as set out below. The Tribunal found all three witnesses to be honest and credible witnesses whose evidence was supported by the contemporaneous documents.

15. Where there was a lack of detailed recollection of events then the Tribunal considers that this was due to the passage of time since those events affecting the memory of the witnesses.

Findings in fact

16. The Tribunal made the following relevant findings in fact.

17. The Claimant was employed as head greenkeeper by R1 from 1 April 2002. As its named suggests, R1 operated a golf club in Polmont.

18. In late 2019, R1 found itself in financial difficulty; the Claimant was informed on a Friday by the treasurer that R1 was going into liquidation and he should not turn up to work. Shortly after that, the Claimant attended an extraordinary general meeting in his capacity as a member of the club. At that meeting, SM and DM were introduced as local businessmen who were interested in rescuing the golf club.

19. There was a dispute as to whether these events took place in October or November 2019. However, nothing turns on this and there was no dispute about the relevant sequence of events.

20. In the event, R1 did not go into liquidation at this time, the golf club continued to operate and the Claimant continued to work at the club.

21. SM and DM formed a new company, R2, which took over the golf club from R1 on or around 1 January 2020. It is a matter of concession that the Claimant's contract of employment transferred from R1 to R2 at this time. The Claimant was not specifically consulted by either R1 or R2 about this change of ownership and his transfer from one employer to the other. From his perspective, he continued to work for the golf club.

22. The Claimant recalled that there was some discussion at the EGM of staff being retained if the club was taken over and he specifically recalled the term "TUPE" being used. He was aware that the golf club started to trade under the name "Braes Golf Centre" in early 2020 but was not aware that a new company owned the business and employed him. He was aware that SM, DM and DM2 became involved in the running of the golf club and they had not been involved with this previously.

23. In March 2021, the effects of the coronavirus pandemic were taking hold and the whole country was moving into the first lockdown to prevent the spread of the virus.

24. The Claimant was contacted by RMcC (who had been appointed as the general manager of the golf club sometime in February 2020) by letter dated 21 March 2020 (p60). This letter purports to be in the name of R1 even though R2, as set out in their ET3, had taken over the running of the golf club some months ago. This letter sought the Claimant's agreement to being laid off due to the effects of the pandemic on the business. It provided information about what this would mean for the Claimant if he agreed to being laid off.

25. Around the same time, the Claimant received a letter from the NHS advising him to shield as he was considered to be a vulnerable person in relation to the coronavirus.

26. The Claimant was concerned about the impact on him of agreeing to being laid off and sought advice from his trade union, GMB. He spoke to RD who sent a letter to RMcC (p61) in response to the suggestion of the Claimant being laid off. This letter provided links to various government websites with guidance on the Coronavirus Job Retention Scheme (CJRS) and related matters. It asked RMcC to consider using the CJRS to furlough the Claimant.

27. In the event, the Claimant was furloughed from April 2020 until 30 September 2021. During this period, the Claimant had no contact from R2 and he did not make contact with R2. He received furlough payments throughout this period.

28. The CJRS was to end on 30 September 2021, something of which the Claimant was aware due to reports in the media. He had not heard anything from the golf club about a return to work and so, on the advice of RD, the Claimant sent an email on 20 September 2021 to SM, DM, DM2 and the general manager email address (p67). This email was directed to SM and thanked him for the support the Claimant had received in the form of furlough. It went on to ask for a meeting to discuss the Claimant's return to work in light of the fact that the furlough scheme was coming to an end. It also raised the possibility of a phased return to work and training given the length of time that the Claimant had been furloughed.

29. There was no response to this email and so the Claimant sent it again, in the same terms and to the same people, on 28 September 2021 (p68). There was no response to this email.

30. On the advice of RD, the Claimant attended for work at the golf club on Monday 4 October 2021. He could not access the shed where the tools he would use were stored because it was locked and he had returned his keys when he went on furlough. He walked round the course to see what work needed done. He spoke to DM2 to say that he was attending for work. DM2

replied that the Claimant did not work there as it was now Braes Golf Centre and not Polmont Golf Club.

31. The Claimant contacted RD on the same day to inform him of what had happened when he attended for work. RD sent a letter to DM by email on 4 October 2021 (p70). This set out the emails which the Claimant had sent in September regarding his return to work and the fact that the Claimant had not been allowed to return to work that day. It identified that there was a suggestion of a change of ownership of which the Claimant was unaware and raises the issue of there being a *"TUPE transfer".* It concludes by asking for confirmation that the Claimant will be allowed to return to his job.

32. The letter was sent to DM but the address includes the name of R1. This was because RD was using the contact details from RMcC's letter of 21 March 2020 and had no knowledge of R2. DM replied to the email (p69) stating that he did not know why it had been sent to him as he had resigned from R1 in June 2020. DM repeated this position in a later email (p78) after the Claimant had submitted a grievance and also contacted DM regarding payslips and P60s.

33. The Claimant again attended work on 5 October 2021. No-one spoke to him and he could not access his tools to allow him to do any work; he waited three hours and then went home.

34. The Claimant returned to the golf club on 6 October 2021 and spoke to DMcC who said that the Claimant did not work there any longer. The Claimant tried to phone DM who did not reply and also phoned DM2 who replied *"what are you calling me for"* and then hung up.

35. The Claimant again sought advice from RD who emailed SM, DM and the general manager email address on 6 October 2021 (p72) enclosing a grievance from the Claimant about the failure to allow him to return to work (pp73-74). The grievance, which is in the name of the Claimant albeit on GMB headed paper, sets out the sequence of events relating to the Claimant's attempt to return to work from the Claimant's perspective. The grievance

was addressed to R1 as neither the Claimant nor RD were, at that stage, aware that he had transferred to R2.

36. There was no substantive response to this; no-one disputed the sequence of events set out by the Claimant and no meeting was convened to discuss the grievance.

37. The only replies came from the email identified above from DM at p78 and an email from SM on 8 October 2021 (p76) in which he stated that he had never been a director of R1 and that RD should direct his correspondence to them and not involve him.

38. On 8 October 2021, the Claimant emailed DM to say that he had received a payment of £215.59 direct into his bank account from DM and asked for this week's payslip. There was no reply to this email and no explanation has ever been provided by R2 as to what this payment represented.

39. Having received no substantive reply to his grievance, the Claimant sent an email on 21 October 2021 (p83) to SM, DM, DM2 and the general manager email address stating that he considered that he had been dismissed from his employment with the golf club. The email goes on to state that there had been a failure to acknowledge the Claimant's calls, emails and letter including his grievance. He, therefore, considered that he could reach no other conclusion than that he had been dismissed. He asks for payment of any outstanding monies and for his payslips and P45 to be sent to him.

40. There was no response to this email from any of the recipients.

41. The Claimant was provided with a contract by R1 and this is produced at p87. It sets out terms relating to hours, wages, holidays, meal breaks, sick pay and time sheets. It is otherwise silent as to any other terms and conditions. A disciplinary policy was also produced at pp88-90.

42. At the time of his dismissal, the Claimant was 62 years old and had 19 complete years of service. He was paid £468.64 a week gross and £372.66 a week net. The Claimant commenced a new job on 15 December 2021 and was paid £414.76 a week net in that new employment.

43. The Claimant was in a pension scheme in his employment at the golf club. The employer's contribution was 3%. The Claimant's new employment also includes a pension scheme with the same contribution. However, he was not entitled to join that scheme until after 3 months' service.

Claimant's submissions

44. The Claimant's agent provided written submissions which she supplemented orally.

45. Ms Kochar started by setting out the various claims brought by the Claimant and then went on to set out the relevant statutory provisions and caselaw in relation to constructive dismissal.

46. It was submitted that the Claimant was constructively dismissed on 21 October 2021 due to the breach of contract by the employer in relation to the duty of trust and confidence. The submissions go on to set out the factual matters which it is said amount to conduct which caused the breach of trust and confidence.

47. In terms of the reason for dismissal, it is submitted that the Claimant's dismissal was because of a relevant transfer in terms of the TUPE Regulations and is, therefore, automatically unfair.

48. The submissions then go on to address the claim relating to the duty to inform and consult under TUPE; the relevant statutory provisions and facts are set out and Ms Kochar makes submissions in relation to these with reference to the evidence heard by the Tribunal.

49. Ms Kochar addressed the issue of the failure by R2 to follow the ACAS Code of Practice, setting out what the failure was and making submissions as to the amount of the uplift.

50. The written submissions addressed the claims of redundancy pay, notice pay and holiday pay setting out what it was said the Claimant was entitled in respect of each of these claims.

51. Ms Kochar concluded her submissions by addressing the issue of time limits in relation to the claim in relation to the failure to consult. She set out the facts she relied on in relation to the Claimant's knowledge about the TUPE transfer and the duty to consult. It was accepted that this claim was not lodged in time but that the Tribunal should exercise its discretion to hear the claim out of time because it had not been reasonably practicable to submit the claim in time in the circumstances of the case. Reference was also made to the relative prejudice to each party in allowing the claim to be heard or not.

Respondent's submissions

52. Mr Matthews made oral submissions on behalf of the Second Respondent.

53. He questioned why the Claimant waited until 21 October to resign when he had not returned to work after 6 October and had claimed benefits on 11 October. He posed the question of how long is too long in this context. In relation to the implied duty of trust and confidence, it was submitted that this went two ways.

54. It was said that it was not true that RMcC had said that the Claimant had to agree to be laid off but that he could not speak for RMcC.

55. He only accepted that he received one of the September emails. He had given reasons for not responding to the union and submitted that RD had lied when he said that had not spoken to SM. There was an irregularity in the Claimant's phone log. The EGM was in October 2019 and November 2019.

56. The Claimant did not attempt to contact them. It was accepted that the Claimant turned up to work on 5 and 6 October 2021. The Claimant just wanted to extract the maximum amount of money and this is why he made reference to a painter, joiner and electrician working for R1. The Claimant did not think to check the integrity of the Facebook post at p180.

57. It was submitted that the Claimant was unreliable and made up a version of events. He failed to contact Mr Matthews and did not make contact during furlough. Reference was made to handwritten marks made on the Claimant's contract.

Relevant Law

58. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) makes provisions for what happens to employees when the undertaking in which they work is transferred from one person to another. The primary protection is that their employment (on the same terms and conditions) transfers with the undertaking and they become employees of the transferee.

59. TUPE also includes provisions requiring consultation with any employees affected by the transfer and if there is a failure to comply with this obligation then the affected employees (or their representatives) can bring a claim to the Tribunal seeking what is described as a "protective award".

60. Regulation 15 provides that any such claim must be lodged within 3 months of the date of the transfer. The Tribunal has a discretion to hear a claim outwith this time limit where they consider that it was not reasonably practicable for the claim to be presented within the 3 month time limit and it was presented within a further period that the Tribunal considers to be reasonable.

61. Under s207B ERA, the effect of a claim entering ACAS Early Conciliation is to pause the time limit until the date on which the Early Conciliation Certificate is issued. The time limit is then extended by the period the claim was in Early Conciliation or to one month after the Certificate is issued if the Early Conciliation ends after the normal time limit.

62. The burden of proving that it was not reasonably practicable for the claim to be lodged within the normal time limit is on the claimant (*Porter v Bandridge* Ltd [1978] IRLR 271).

63. In assessing the "reasonably practicable" element of the test, the question which the Tribunal has to answer is "what was the substantial cause of the employee's failure to comply" and then assess whether, given that cause, it was not reasonably practicable for the claimant to lodge the claim in time (*London International College v Sen* [1992] IRLR 292, EAT and [1993] IRLR

333, Court of Appeal and *Palmer and Saunders v Southend-on-Sea Borough* Council [1984] IRLR 119).

64. One of the most common reasons why a claimant will not lodge their claim within the normal time limit is either ignorance of, or a mistake regarding, the application of the relevant time limit. The leading case on this is *Wall's Meat Co Ltd v Khan* [1978] IRLR 49 where, at paras 60-61, Brandon LJ stated :-

"the impediment [to a timeous claim] may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable."

65. The test for whether it was reasonable for the claimant to be aware of the time limit is an objective one and the Tribunal should consider whether a claimant ought to have known of the correct application of the time limit (see *Porter, Khan, Avon County Council v Haywood-Hicks* [1978] IRLR 118).

66. Ignorance or mistake *"will, further, 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"* (as per Brandon LJ in *Khan*).

67. Where the Tribunal concludes that it was not reasonably practicable for the claimant to have lodged his claim in time then it must go on to consider whether it was lodged in some further period that the Tribunal considers reasonable.

68. This is a question for the Tribunal to determine in exercising its discretion (Khan) but it must do so reasonably and the Tribunal is not free to allow a claim to be heard no matter how late it is lodged (*Westward Circuits Ltd v Read* [1973] ICR 301).

69. In assessing the further delay, the Tribunal should take account of all relevant factors including the length of the further delay and the reason for it. It will also be relevant for the Tribunal to assess the actual knowledge which the

claimant had regarding their rights (particularly the application of the time limit) and what knowledge they could reasonably be expected to have or investigations they could reasonably be expected to make about their rights (*Northumberland County Council v Thompson* UKEAT/209/07, [2007] All ER (D) 95 (Sep)).

70. Section 94 of the Employment Rights Act 1996 makes it unlawful for an employer to unfairly dismiss an employee.

71. Under s95(1)(a) of the 1996 Act, an express dismissal is defined as the employer terminating the contract of employment with or without notice.

72. The general rule is that unambiguous words of dismissal (or resignation) should be taken at face value with no need for analysis of the surrounding circumstances (*Sothern v Franks Charlesly & Co* [1981] IRLR 278).

73. Where there are ambiguous words or conduct then an employee should investigate further before jumping to the conclusion that they have been dismissed (see, for example, *Leeman v Johnson Gibbons Tools Ltd* [1976] IRLR 11). The same principle applies where an employer relies on ambiguous words or conduct in arguing that there has been a resignation.

74. Section 95(1) of the 1996 Act also states that dismissal can arise where:-

"the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

75. The circumstances in which an employee is entitled to terminate their contract by reason of the employer's conduct is set out in the case of *Western Excavating v Sharp* [1978] ICR 221. The Court of Appeal held that there required to be more than simply unreasonable conduct by the employer and that had to be a repudiation of the contract by the employer. They laid down a three stage test:-

a. There must be a fundamental breach of contract by the employer

b. The employer's breach caused the employee to resign

c. The employee did not delay too long before resigning thus affirming the contract

76. A breach of contract can arise from an express term of the contract or an implied term. For the purposes of this case, the relevant term was the implied term of mutual trust and confidence.

77. The test for a breach of the duty of trust and confidence has been set in a number of cases but the authoritative definition was given by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 462 that an employer would not, without reasonable or proper cause, conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.

78. The "last straw" principle has been set out in a range cases with perhaps the leading case being *Lewis v Motorworld Garages Ltd* [1985] IRLR 465. The principle is that the conduct which is said to breach trust and confidence may consist of a series of acts or incidents, even if those individual incidents are quite trivial, which taken together amount to a repudiatory breach of the implied term of trust and confidence.

79. The "last straw" itself had to contribute something to the breach even if that is relatively minor or insignificant (*Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833).

80. The test for unfair dismissal can be found in s98 of the Employment Rights Act 1996 (ERA). The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98.

81. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

82. In considering s98(4), the Tribunal should take into account all relevant factors such as the size and administrative resources of the employer. There are

two matters which have generated considerable case law and which are worth highlighting.

83. First, there is the question of whether an employer has followed a fair procedure in dismissing the employee. The well-known case of *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 it was held that a failure to follow a fair procedure was sufficient to render a dismissal unfair in itself (although the compensation to be awarded in such cases may fall to be reduce to reflect the degree to which the employee would have been fairly dismissed if the procedural errors had not been made – the so-called "Polkey" reduction).

84. Second, the Tribunal needs to consider whether the dismissal was a fair sanction applying the "band of reasonable responses" test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess whether the sanction applied by the employer fell within a reasonable band of options available to the employer.

85. Section 135 of the Employment Rights Act 1996 provides that an employee is entitled to redundancy payment where they are dismissed in circumstances where they are redundant.

86. The definition of redundancy can be found in section 139 of the Employment Rights Act 1996.

87. An employee is entitled to notice of the termination of their employment. The amount of any such notice can be found in the contract of employment or by way of the minimum statutory notice to be found in section 86 of the Employment Rights Act 1996 which is based on length of service.

88. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the salary they have lost for the relevant period.

89. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.

90. Section 13 of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from a worker's wages unless this is authorised by statute, a provision in the worker's contract or by the previous written consent of the worker.

91. In terms of s13(3) ERA, a deduction of wages arises in circumstances where the total amount of wages paid by an employer to a worker on any occasion is less than the total amount of wages properly payable on that occasion.

92. Regulations 13 and 13A of the Working Time Regulations 1998 (WTR) make provision for workers to receive 5.6 weeks' paid holidays each year.

93. In normal circumstances, annual leave under the Regulations must be taken in the relevant leave year. However, The Working Time (Coronavirus) (Amendment) Regulations 2020 amend the 1998 Regulations to allow for annual leave to be carried over where it was not reasonably practicable for a worker to take annual leave in the relevant leave year due to the effects of the pandemic.

94. Where a worker leaves employment part way through the leave year then Regulation 14 of the 1998 Regulations provides for compensation to be paid to the worker in respect of untaken holidays in the following terms:-

Decision - general

95. There are a number of different claims before the Tribunal which it will address in turn before coming to the issue of remedies.

Decision – failure to consult

96. It is quite clear that the claim regarding the failure by R1 and R2 to consult regarding the transfer under TUPE has been lodged out of time; Regulation 15 requires such a claim to be lodged within 3 months of the transfer which, in this case, took place on or around 1 January 2020 (as conceded in R2's

ET3); the ordinary time limit expired on 30 April 2020 but ACAS Early Conciliation was not engaged until December 2021 (some 20 months later) and the claim lodged in February 2022 (approximately 22 months after the time limit expired). There is no question that this claim was lodged out of time and Ms Kochar did not seek to argue otherwise.

97. The Tribunal is asked by the Claimant to exercise its discretion to hear the claim out of time which requires it, first, to assess whether it was not reasonably practicable for the claim to be lodged in time. The Claimant's explanation for why the claim was not lodged timeously is that he was ignorant of his rights in relation to TUPE and, specifically, the duty to consult. He does not advance any other impediment as explaining why he did not bring this claim earlier.

98. The Tribunal does not consider that this ignorance was reasonable. The Claimant took no steps whatsoever to investigate his rights at the time at which the transfer was being announced and new ownership taking over. He did not contact his trade union for information or take any other steps (for example, searching on the internet) to find out what rights he had.

99. The Tribunal considers that a reasonable employee in circumstances where they had been told that the business in which they worked was insolvent, was about to close down meaning they would be out of a job and was then informed that it was being taken over would have taken steps to find out what rights they had.

100. In particular, even though the Claimant was not specifically aware of the existence of R2 as a limited company taking over the club, he was aware that new people (that is, SM, DM and DM2) were taking over and running the club.

101. Further, there had been discussion of staff being retained and reference to the term "TUPE" with which the Claimant was not familiar. The Tribunal considers that a reasonable employee would have taken steps to find out what this meant for them.

102. For these reasons, the Tribunal considers that a reasonable employee would take steps to find out about their rights in these circumstances.

103. The Claimant did not do so and the Tribunal considers that, in such circumstances, his ignorance is not reasonable. Had he taken steps to find out the position, particularly with his trade union, the Tribunal considers that it is more likely than not that he would have learned of the duty to consult under TUPE. It was, therefore, reasonably practicable for him to have lodged this claim in time.

104. In any event, the Tribunal considers that the claim was not lodged within such further period as is reasonable when the following factors are taken into account:-

    a. The delay in the claim being lodged is considerable being nearly two years after the time limit expired.

    b. The issue of who owned and operated the golf club was clearly in play at the point when the Claimant's employment came to an end. The Claimant was receiving assistance from his trade union at this time in October 2021 but the claim was not lodged for approximately another five months in February 2022.

    c. No explanation was advanced by the Claimant as to why the claim was not lodged earlier than February 2022. The TUPE transfer and failure to consult had clearly been identified by the time the ET1 was lodged as the ET1 pleads this claim. However, there was no evidence as to when these matters had been identified.

105. In these circumstances, the Tribunal is not satisfied that the claim was lodged within such further period as is reasonable. If the Tribunal had found that it had not been reasonably practicable for the claim to have been lodged in time then it would still not have exercised its discretion to hear the claim out of time.

106. The claim under TUPE has been lodged out of time and the Tribunal is not prepared to exercise its discretion to hear the claim out of time. The Tribunal

does not, therefore, have jurisdiction to hear this claim and it is hereby dismissed.

Decision – remaining claims against the First Respondent

107. To the extent that any of the remaining claims are brought against R1 then the Tribunal does not consider that they are the correct respondent.

108. It is conceded by R2 in their ET3 that there was a relevant transfer under TUPE from R1 to them and that the Claimant's contract of employment transferred to them on or around 1 January 2020. They were, therefore, the Claimant's employer from that point onwards and liability for the remaining claims lies with them.

109. The remaining claims against R1 are, therefore, dismissed.

Decision – unfair dismissal

110. The first question is whether or not the Claimant was dismissed by R2. This is denied by R2 in their ET3 in which they assert that the Claimant repudiated his contract of employment.

111. The ET3 is not entirely clear as to how the Claimant is said to have repudiated his contract; it is said that the Claimant did not carry out any of his duties after he was due to return to work on 1 October 2021 and R2 treated this as a repudiation of the contract.

112. At best for R2, they are seeking to rely on ambiguous conduct from the Claimant but took no steps to investigate this at all. They had ample opportunity to do so; the Claimant attended the golf club on 4-6 October and spoke to a director (DM2) and a manager (DMcC), neither of whom asked him about 1 October or enquired about his intentions; the Claimant and his trade union representative sent numerous communications to R2 and its officers regarding his employment but there was little response to those communications and certainly no attempt to clarify the position; the Claimant sent a final email on 21 October in which he asserted his belief that he was

dismissed and had R2 considered otherwise then they could have disputed this at the time but did not do so.

113. The Tribunal, therefore, considers that R2 has failed to properly investigate the Claimant's intentions and, if they did consider that the Claimant had repudiated his contract, they have jumped to this conclusion, which is unsustainable on the facts.

114. In particular, the Tribunal does not consider that the Claimant's conduct is capable of being conduct, even ambiguous conduct, that he had repudiated his contract. He had sent two emails to various people in R2 in September 2021 regarding a return to work at the end of furlough. He attended work on 4-6 October but was given no work to do. There were communications from his union representative asking for clarification of the position. These are not the actions of someone who was not intending to return to work and there was no basis on which R2 could have, reasonably and objectively, reached such a conclusion.

115. Turning to the question of whether there was a dismissal by R2, the Tribunal does consider that the Claimant was expressly dismissed by R2 as a result of what was said to him by DM2 and DMcC on 4 and 6 October. In particular, if there had been any doubt that what was said by DM2 on 4 October were unambiguous words of dismissal then the words used by DMcC on 6 October were unambiguous in informing the Claimant that he did not work for R2. The Tribunal, therefore, finds that the Claimant was expressly dismissed on 6 October 2021.

116. If we are wrong about that and there was any ambiguity in the words used, the Claimant did not jump to any conclusion that he had been dismissed. He and his trade union representative contacted R2 to seek clarification of the position but received no substantive reply. In particular, the Claimant sent a final email on 21 October asserting that he believed that he had been dismissed and the reasons why. If R2 sought to dispute that the Claimant had been dismissed then this was their opportunity to do so but they did not.

117. For whatever reason, R2 and its officers did not substantively respond to any of the communications from the Claimant and his representative. Rather, they sought to take advantage of the fact that some of these communications were addressed to R1 even though, as conceded in their ET3, the Claimant was their employee. At best, this suggests that R2 itself was confused about the TUPE position (which does not reflect well on them given that if anyone would know the correct position it was them) but, given the concession in the ET3, the Tribunal considers that this is more likely a disingenuous attempt to put the matter into the long grass in the hope that it would somehow go away.

118. In these circumstances, if there was any ambiguity in R2's words and actions, the Tribunal considers that the Claimant did take all reasonable steps to clarify the position and by 21 October was entitled to reach the conclusion that he had been dismissed by the Respondent.

119. If the Tribunal is wrong that there was not an express dismissal either on 6 October or by 21 October and, rather, the Claimant's email of 21 October is a resignation then the Tribunal considers that this was a dismissal as defined in s95(1)(c) ERA.

120. The complete failure by R2 to provide the Claimant with any work after the end of furlough would, on its own, be enough to amount to a fundamental breach of contract; the obligations on an employer to provide work and an employee to do that work is at the very heart of the employment relationship.

121. However, that failure along with the failure to substantively respond to the communications from the Claimant and his representative would be more than sufficient to breach the *Malik* term especially where the only responses from R2 sought to deflect the Claimant to R1 in circumstances where R2 concedes that the Claimant was their employee. Such conduct, when taken as a whole, clearly damages or destroys the employment relationship.

122. To the extent that the Claimant's email of 21 October amounts to a resignation, he has clearly resigned as a result of this conduct. The Tribunal also considers that the Claimant resigned as soon as reasonably practicable; he gave R2 an opportunity to respond to correspondence and his grievance

and the Tribunal does not consider that he delayed for an unreasonable period of time.

123. Having found that the Claimant has been dismissed by R2, the Tribunal turns to the issue of whether that dismissal was fair.

124. The first question for the Tribunal in determining the fairness of the dismissal is whether there is a potentially fair reason for dismissal. The burden of proving that is on the Respondent and the Tribunal considers that R2 has failed to discharge that burden.

125. R2 has not advanced any reason for the Claimant's dismissal and has led no evidence whatsoever as to why they dismissed the Claimant. They make a number of assertions in the ET3 about the Claimant's performance but led no evidence that this was the reason for their actions in October 2021 which the Tribunal has found amounted to a dismissal. In particular, they assert the Claimant was subject to "a number of oral warnings" but led no evidence whatsoever to support this bare assertion.

126. The only basis for this assumption is a handwritten asterix beside one of the examples of gross misconduct in the copy of R1's disciplinary policy at p89 which it was suggested in cross-examination of the Claimant proved that he had been subject to disciplinary action for this reason. The Claimant denied this and explained it was already marked on the document when he was given it. The Tribunal has no reason to doubt the Claimant given the lack of any evidence to support R2's assertion.

127. At most, the Tribunal considers that the assertions in the ET3 are no more than reasons why the Claimant could have been subject to disciplinary action rather than the actual reason for his dismissal.

128. In circumstances where R2 has failed to discharge the burden of proving that there is a potentially fair reason for dismissal then the Tribunal finds that there was no fair reason and that the Claimant's dismissal was unfair.

129. The Tribunal notes that the Claimant asserts that the transfer between R1 and R2 is the reason for his dismissal and so the dismissal is automatically unfair.

This is somewhat academic given the Tribunal's finding that R2 has not discharged the burden of proving a potentially fair reason. However, there was no evidence whatsoever before the Tribunal that this was the reason for the Claimant's dismissal and it finds that this was not the reason for dismissal.

130. Similarly, the Claimant has asserted that redundancy was the reason for his dismissal in the context of a claim for redundancy pay. Again, there was no evidence before the Tribunal that a redundancy situation (as defined in s139 ERA) existed. The only evidence before the Tribunal regarding what had happened to the work done by the Claimant was a Facebook post (p180) suggesting that someone else held the role of head greenkeeper although R2 disavowed this post and said it was not true. The Tribunal finds that there is no evidence that the Claimant was dismissed by reason of redundancy.

131. This would be enough to dispose of the unfair dismissal claim but the Tribunal, for the sake of completeness, would also find that the dismissal was unfair under s98(4) ERA even if there had been a potentially fair reason. There was a complete failure by the Respondent to follow any procedure, let alone a fair procedure, in dismissing the Claimant. They simply did not engage with him or his representative at all other than the attempts to deflect him to R1 as described above.

132. Further, the lack of any explanation for the Claimant's dismissal and the failure to engage in any form of procedure means that there was no basis on which the Tribunal could conclude that dismissal was in the band of reasonable responses open to R2.

133. For the reasons set out above, the Tribunal finds that the Claimant was dismissed and that this dismissal was unfair.

Decision – Redundancy Pay

134. As set out above, there was no evidence that the Claimant was dismissed by reason of redundancy and so he would have no entitlement to a statutory redundancy pay.

135. In these circumstances, the claim for statutory redundancy pay is not well founded and is hereby dismissed.

Decision – Breach of Contract (wrongful dismissal)

136. Having found that the Claimant was dismissed, the Tribunal also finds that he was dismissed without any notice at all. There was no real dispute by R2 on this point and the facts found by the Tribunal are that no notice was given.

137. This was not a case where R2 was entitled to dismiss the Claimant without notice.

138. The Tribunal, therefore, finds that the Respondent breached the Claimant's contract by dismissing him without notice

Decision - Breach of Contract (pension contributions)

139. This claim relates to the fact that there is a gap in the employer pension contributions for a period from September 2020 to May 2021.

140. The difficulty for the Claimant is that he has led no evidence that he had a contractual entitlement to a pension. To the extent that he relies on any entitlement arising from his contract with R1 he has produced no evidence of this (the copy of the contract in the bundle is silent as to pension) and, in any event, Regulation 10 of the TUPE Regulations excludes pension entitlements transferring under the Regulations.

141. No evidence was led about any separate contractual agreement with R2 as to pension entitlement and the extent of any contributions which R2 agreed to make.

142. In these circumstances, the Tribunal does not consider that the Claimant has discharged the burden of proving that he had a contractual entitlement with R2 for them to make the contributions in question into his pension scheme.

143. This breach of contract claim is, therefore, dismissed.

Decision – unlawful deduction of wages

144. This relates to the wages for 4-6 October 2021 when the Claimant attended work but was given no work to do.

145. The Tribunal considers that the Claimant was entitled to be paid for those days when he made himself available for work. He seeks £71.77 for each of those days amounting to £215.31 in total.

146. The Tribunal notes that a payment of £215.59 was made to the Claimant on 8 October 2021. No explanation has been advanced by R2 as to what this payment represents but, for the following reasons, the Tribunal considers that this must be a payment for the three days the Claimant worked in October 2021:-

    a. The Claimant does not complain that he was due any payments for the period he was on furlough or that he is due any other wages except for his holiday pay.

    b. The sum paid to the Claimant correlates with the sum he says he is due for the three days' work he did.

    c. The timing of the payment, coming at the end of the week in which the work was done.

147. Although it could be said that the October payment reflects a payment in respect of pay in lieu of untaken holidays, the Tribunal does not consider this is a likely explanation given the amount and timing of the payment.

148. In any event, the Claimant must give credit for the payment made on 8 October or he would receive a windfall. If it did not represent payment for the work done in October and was a payment of holiday pay then it would reduce the amount of holiday pay the Tribunal would award. Whether the 8 October payment is set against the wages due for the work done or against pay in lieu of untaken holidays, it has the same impact on the total amount awarded to the Claimant.

149. In these circumstances, the Tribunal finds that the Claimant was paid for the work done on 4-6 October 2021. The claim of unlawful deduction of wages

in relation to the wages for that work is, therefore, not well-founded and is hereby dismissed.

Holiday pay

150. The Claimant is entitled, under Regulation 14 WTR, to receive pay in lieu of untaken holidays on the termination of his employment. None was paid to him by R2.

151. The question is whether, under the provisions of the 2020 Regulations, the Claimant should be permitted to carry over the holidays from the 2020/2021 holiday year. The Tribunal considers that it was not reasonably practicable for the Claimant to have taken any holidays during that holiday year because he had been advised to shield and he was on furlough for the whole of the holiday year. The Tribunal, therefore, finds that the Claimant is entitled to carry over those holidays and is entitled to pay in lieu of those holidays as well as for the untaken holidays in 2021/2022.

152. There was no dispute in relation to the calculation of the sum for holiday pay as set out in the Claimant's schedule of loss and so the Tribunal accepts the Claimant's calculation. It, therefore, awards the Claimant the sum of £3014.40 in respect of pay in lieu of untaken holidays.

Remedies

153. There were a number of issues that the Tribunal required to determine in considering what compensation it would be just and equitable to award in respect of the claim for unfair dismissal.

154. First, the Tribunal considers that there is no basis to reduce any award for contributory fault as the Claimant did not contribute to his dismissal at all and, in fact, was seeking to return to his job. Similarly, there is no basis to make a "Polkey" deduction to reflect the prospects of the Claimant having been dismissed anyway if a fair procedure had been followed. In circumstances, where there was no fair reason for dismissal, there is no basis on which the Tribunal could conclude there was any prospect of the Claimant being dismissed at all.

155. Second, there is no question of a failure to mitigate the Claimant's loss. The burden of proving this lies on R2 who has advanced no evidence or argument to discharge this burden. In any event, the Claimant secured better paid employment in December 2021 and the Tribunal considers that this demonstrates that he had discharged the duty to mitigate his loss.

156. Third, and finally, the Claimant sought an uplift to his compensation in relation to a failure by the Respondent to follow the ACAS Code of Practice. The Tribunal considers that R2 wholly failed to comply with the ACAS Code, both in respect of the complete lack of any dismissal procedure and the failure to deal with the Claimant's grievance. This failure was wholly unreasonable; there was no explanation why R2 did not follow a procedure in dismissing the Claimant and they had multiple opportunities to do so but did not, seeking instead to deflect the Claimant to R1; in relation to the Claimants grievance, the only explanation given by R2 was in the evidence of SM where he stated that he did not recognise trade unions but the grievance clearly came from the Claimant and there is no good reason why R2 did not deal with the grievance. An uplift is, therefore, appropriate.

157. In terms of the amount of any uplift, the Tribunal considers that the wholesale failure by R2 to act in accordance with the Code in two respects means that it is appropriate to award a 25% uplift. In coming to that view, the Tribunal has taken into account the actual amount represented by that percentage.

158. Turning now to the calculation of the award to be made and starting with basic award. The Claimant was 62 years of age when he was dismissed and had been employed with the Respondent for 19 complete years. The Claimant's gross wage was £468.64. He was therefore entitled to a basic award of 28.5 weeks' wages at £468.64 per week = £13356.24.

159. Turning to the compensatory award, there are a number of heads of damages; loss of wages; loss of pension; loss of statutory rights. The Tribunal will address each of these in turn before considering whether the statutory cap applies.

160. In respect of the loss of wages, the Tribunal considers it appropriate to award this from the date of dismissal (6 October 2021) to when the Claimant secured a new job and the loss ceased (15 December 2021). This is 10 weeks at £372.66 a week = £3726.60.

161. The Tribunal has not deducted the state benefits received by the Claimant from this sum as they will be subject to recoupment provisions.

162. The Claimant also sought damages for loss of the pension contribution made by the Respondent. The Claimant receives a pension from his new employer which makes contributions at the same rate but was only entitled to join the pension scheme with his new employer after 3 months. The Tribunal therefore calculates the loss of pension contributions over a period of 22 weeks comprised of the 10 weeks between his dismissal and securing his new job and 12 weeks representing the period until he was entitled to join the new scheme.

163. The employer contribution was 3% of gross pay which amounts to £14.06 a week. The sum awarded is, therefore, calculated as 22 weeks at £14.06 a week totalling £309.32 in respect of pension loss.

164. The Claimant sought £745.32 (that is, two weeks' net wages) in respect of loss of statutory rights and the Tribunal considered that this was an appropriate sum to award in respect of this head of compensation given the very lengthy period of employment and the statutory employment rights which the Claimant had built up as a result.

165. The total unadjusted compensatory award is, therefore, £4781.24. This is less than the Claimant's annual earnings and so the statutory cap does not apply.

166. The total unadjusted compensatory award for unfair dismissal is £4781.24. The Tribunal awards a 25% uplift to that as set out above which amounts to £1195.31. This brings the total compensatory award to £5976.55.

167. In these circumstances, the Tribunal makes a total award (basic award and compensatory award) for unfair dismissal of £19332.79 (Nineteen thousand, three hundred and thirty two pounds, seventy nine pence).

168. The Tribunal does not make any award of compensation for the failure by R2 to give the Claimant notice of his dismissal because the notice period is covered by the period for which the Tribunal has awarded loss of wages under the unfair dismissal claim and the Claimant would receive a windfall by way of double-counting if it also awards compensation for loss of wages during the notice period.

Employment Judge: Peter O'Donnell
Date of Judgment: 23 May 2022
Entered in register: 24 May 2022
and copied to parties