



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4104163/2018

Held in Glasgow on 25 September 2018

Employment Judge: Michelle Sutherland (sitting alone)

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Lesley McCleary

**Claimant
In Person**

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**Andrea Galloway
T/A Aromas**

**Respondent
In Person**

JUDGEMENT OF THE EMPLOYMENT TRIBUNAL

15 The judgement of the Tribunal is that –

- 1) The claim for unfair dismissal, having been withdrawn by the claimant, is dismissed.
- 2) The claim for breach of contract through failure to give statutory notice of termination succeeds and the Respondent is ordered to pay the Claimant the sum of £1,885.95 (gross).
- 3) The claim for statutory redundancy pay succeeds and the Respondent is ordered to pay the Claimant the sum of £4,372.50 (gross).
- 4) The claim for holidays accrued but taken at the termination date fails and is dismissed.
- 5) The sums are to be paid without deduction and it is for the Claimant to account to the Inland Revenue for any income tax and national insurance due.

REASONS

Introduction

1. The Claimant presented complaints of unfair dismissal and failure to pay redundancy pay, holiday pay and notice pay.
2. The Claimant and the Respondent accept that the Claimant was dismissed by reason of redundancy.
3. A final hearing was held on 25 September 2018.
4. The complaint of unfair dismissal was withdrawn at the start of the final hearing and is accordingly dismissed.
5. The Claimant lodged a set of productions.
6. The Claimant and the Respondent gave evidence on their own behalf.
7. Neither the Claimant nor the Respondent made written or oral submissions.

Findings of Fact

8. The tribunal makes the following findings of fact –
9. The Claimant was employed by David Sinclair Galloway ('DSG') trading as Aromas from 22 August 1998 until 1 March 2014 (DSG ownership). The Claimant was employed by Robert O'Prey ('ROP') trading as Aromas from 3 March 2014 until 30 April 2016 (ROP ownership). The Claimant was employed by the Respondent trading as Aromas from 2 May 2016 until 31 March 2018 (Respondent ownership).
10. Throughout the entire period, from 22 August 1998 until 31 March 2018, Aromas has operated as a delicatessen selling prepared meals (e.g. take away food) and prepared food (e.g. meats and cheeses). Throughout the entire period the Claimant has worked at Aromas preparing and selling meals and food. Throughout out the entire period the claimant worked 22 hours a week (with some limited overtime that was neither guaranteed nor

compulsory) and was paid the national minimum wage, latterly £165 a week gross. Throughout the entire period the Claimant was not provided with a written contract.

5 11. During the period of DSG ownership, and also Respondent ownership, there was no café style seating in Aromas delicatessen. During the period of ROP ownership there was café style seating accommodating up to 6 people and accounting for less than 10% of their trade.

10 12. Throughout the entire period the Aromas delicatessen operated from premises owned by DSG. During DSG ownership these premises were owner occupied. These premises were subsequently leased to ROP and then to the Respondent during their respective periods of ownership of Aromas delicatessen. The fittings, equipment and stock in trade of Aromas and its
15 trading name were transferred from DSG to ROP and then from ROP to the Respondent at the end of their respective periods of ownership.

13. The nature and standard of the prepared meals and food has changed in line with the changes in ownership. During DSG ownership Aromas sold higher
20 end fayre. During ROP ownership Aromas sold more basic fayre. Under Respondent ownerships Aromas sold somewhere between higher end and basic fayre. During DSG ownership Aromas trade was split equally between prepared meals and prepared food. During ROP ownership trade was initially split equally between prepared meals and prepared food but this split changed
25 a few months prior to the impending transfer to 75% prepared meals and 25% prepared food. This change occurred because of and in preparation for the impending transfer to the Respondent.

14. During DSG and ROP ownership Aromas had around 5 employees including
30 the Claimant. Staff were advised that their employment was transferring under 'TUPE' from DSG to ROP and accordingly that they were not therefore eligible for redundancy pay. The Claimant did not object to that transfer. During Respondent ownership Aromas had 1 employee, the Claimant. Work previously undertaken by the other 4 ROP employees was undertaken by the
35 Respondent, her family and a volunteer. The other 4 ROP employees were

dismissed and paid redundancy pay where due. The Claimant was advised by ROP that her employment was transferring under 'TUPE' from ROP to the Respondent and accordingly that she was not therefore eligible for redundancy pay. The Claimant did not object to that transfer.

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15. The Respondent operated the holiday year in line with the financial year from 5 April to 4 April. The Respondent permitted the Claimant to take 5.2 weeks holiday in each holiday year and the Claimant had taken 5.2 weeks as at the termination date. The Claimant took 1 week's holiday at Easter (17 to 24 April 2017), 1 week's holiday in the Summer, 1 week's holiday in October and 2 weeks holiday at Christmas (20 December 2017 to 4 January 2018) and 2 occasional days holiday during the holiday year.

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16. The Respondent took the decision to cease trading and to close the Aromas business in the face of mounting debts. On 27 March 2018 the Respondent gave the Claimant notice that her employment was to terminate on 31 March 2018. The relevant premises are no longer used as a delicatessen.

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17. The Claimant's date of birth is 23 March 1962 and the Claimant was age 56 at the termination date.

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Relevant law

Continuous employment

18. Under Section 218 of the Employment Rights Act ('ERA') 1996 if a business or an undertaking is transferred from one person to another, the period of employment of an employee at the time of the transfer in the business or undertaking counts as a period of employment with the transferee and the transfer does not break the continuity of the period of employment.

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19. Under Regulation 3 of the Transfer of Undertakings (Protection of Employment) ('TUPE') Regulations 2006 there is a relevant transfer of an undertaking or part of an undertaking to another person where there is a transfer of an economic entity which retains its identity. An economic entity is

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an organised grouping of resources which has the objective of pursuing an economic activity.

20. Under Regulation 4 of TUPE Regulations 2006 except where an employee objects, a 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, shall have effect after the transfer as if originally made between that person and the transferee.

A week's pay

21. Under Section 221 of the ERA 1996 where an employee has normal working hours, and where their pay does not vary either with the time of that work (shift work) or the amount of the work done (piece work), a week's pay for the purpose of calculating redundancy pay, holiday pay and notice pay is the amount which is payable if the employee works those normal working hours.

22. Under Section 227 of the ERA 1996 a week's pay is subject to a statutory cap of £479 for the purposes of calculating redundancy pay (but not notice or holiday pay).

Statutory Notice

23. Under Section 86 of the ERA 1996 an employee is entitled to one week's notice for each year of continuous employment up to a maximum of 12 week's notice.

24. A claim for statutory notice may be brought as a contract claim under Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994. Under Article 7 a contract claim must be brought within 3 months of the effective date of termination.

Redundancy Pay

25. Under Section 135 of the ERA 1996 an employer shall pay a redundancy payment to an employee if the employee is dismissed by reason of

redundancy. Under Section 162 of the ERA 1996 the amount of a redundancy payment for every whole year during which the employee had been continuously employed is 1 week's pay for each year of employment below the age of 41 and 1.5 week's for years at or over age 41.

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26. Under Section 164 of the ERA 1996 a claim for redundancy payment must be made before the end of 6 months of certain specified events including presenting a complaint of unfair dismissal.

Holiday Pay

10 27. Under Regulations 13 and 13A of the Working Time Regulations ('WTR') 1998 a worker is entitled in each leave year to a period of 5.6 weeks leave. A worker's leave year starts on the date provided in a relevant agreement, failing which 1 October (if their employment commenced prior to 1 October 1998), failing which the date on which their employment begins. Under Regulation 2,
15 a relevant agreement means in summary an incorporated collective agreement or a written agreement. Under Regulations 14 and 16 of the WTR 1998 where a worker's employment is terminated during the course of their leave year the employer shall make a payment of a week's pay in respect of each week of accrued but untaken leave pro-rated accordingly. Under
20 Regulation 30 a claim must be made within 3 months, or if not reasonably practicable, within such further reasonable period.

Discussion and decision

Continuous employment

28. Aromas delicatessen amounted to an organised grouping of resources which
25 had the objective of pursuing an economic activity. The fittings, equipment and stock in trade of Aromas and its trading name were transferred from DSG to ROP and then from ROP to the Respondent at the end of their respective periods of ownership. All of the staff transferred from DSG to ROP but only the Claimant transferred from ROP to the Respondent. Although the work of
30 all the staff continued the Respondent could not afford to take on all the staff and instead this work was undertaken by her family and a volunteer. The activities of Aromas delicatessen during DSG ownership, ROP ownership and

Respondent ownership were broadly similar. There was therefore the transfer of an economic entity which retained its identify on transfer to ROP and to the Respondent. Accordingly there was a transfer of an undertaking under TUPE Regulations 2006 from DSG to ROP and from ROP to the Respondent.

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29. The Claimant was assigned to the organised grouping of resources and/or employees that transferred from DSG to ROP and from ROP to the Respondent. An organised grouping can include a single employee. The Claimant's contact of employment with DSG and then with ROP had the effect after the transfers as if originally made between the Claimant and the Respondent. Accordingly the Claimant had 19 whole years of continuous service.

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A week's pay

30. The Claimant had normal working hours, her pay did not vary with the time of that work or the amount of the work done, and accordingly a week's pay for the purpose of calculating her entitlement to redundancy pay, holiday pay and notice pay is the amount which is payable if she worked those normal working hours, namely £165 a week (gross).

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Statutory Notice

31. The Claimant is entitled to one week's notice for each year of continuous employment up to a maximum of 12 week's notice. The Claimant has 19 years of continuous service and is therefore entitled to 12 week's notice. The Claimant received 4 days (0.57 weeks) notice and therefore is entitled to the balance of 11.43 weeks' notice. A week's pay is £165 gross. Accordingly the Respondent is due to pay the Claimant notice pay in sum of £1,885.95 (gross) (£165 x 11.43 weeks).

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32. The claim for statutory notice was made on 19 April 2018 and accordingly was in time.

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Redundancy Pay

33. The Claimant was dismissed by reason of redundancy. The amount of a redundancy payment for every whole year during which the employee had been continuously employed is 1 week's pay for each year of employment below the age of 41 and 1.5 week's for years at or over age 41. The Claimant had 4 years' service below age 41 and 15 years service' at age 41 and over. The Claimant is therefore entitled to 26.5 weeks redundancy pay (4 years + (15 years x 1.5)). Accordingly the Respondent is due to pay to the Claimant redundancy pay in sum of £4,372.50 (gross) (£165 x 26.5 weeks).
34. The claim for redundancy pay was made on 19 April 2018 and accordingly was in time.

Holiday Pay

35. The Claimant is entitled to 5.6 weeks leave in each leave year. There was no collective or written agreement regarding the leave year and there was therefore no relevant agreement. The Claimant's employment commenced prior to 1 October 1998 and accordingly her leave year started on 1 October. By the termination date of 31 March 2018 the Claimant had accrued 2.8 week's leave (5.6 x 6 months/ 12 months). By the termination date the Claimant had taken 3 weeks of leave (1 week in October and 2 week's at Christmas) and accordingly the Claimant is not due any payment in respect of accrued but untaken leave and the claim is dismissed.

36. Parties expressed concern about the Respondent's ability to pay. Parties are urged to seek independent legal advice and to contact the Redundancy Payments Service.

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10 Employment Judge: Michelle Sutherland
Date of Judgment: 30 September 2018
Entered in register: 12 October 2018
and copied to parties