



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant** **and** **Respondent**

**Mr B Brealy**

**A M Clarke Limited**

**HELD AT: Croydon (by CVP)**

**ON: 8-10 March 2021**

**BEFORE: Employment Judge K Bryant QC**

**Appearances:**

**For the Claimant: Mr A Bate (McKenzie Friend)**

**For the Respondent: Ms Y Montaz (Consultant)**

## RESERVED JUDGMENT AND REASONS ON LIABILITY

### JUDGMENT ON LIABILITY

1. The Claimant's claim for holiday pay is dismissed on withdrawal.
2. The Claimant was constructively dismissed and that dismissal was unfair within the meaning of regulation 7(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

## REASONS

### Introduction

1. In this case, which was heard by CVP, the Claimant brings a claim for constructive unfair dismissal under regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') and section 98 of the Employment Rights Act 1996 ('ERA').
2. There was also a claim for unpaid holiday pay but the Claimant confirmed in closing submissions that this was no longer pursued and was therefore withdrawn.
3. As discussed with the parties during the course of the hearing, the issues for the tribunal are, in summary, as follows:

#### Constructive dismissal

- 3.1 Did the Respondent fundamentally breach the Claimant's contract of employment?
- 3.2 If so, did the Claimant resign in acceptance of that breach?
- 3.3 If so, had the Claimant, between the date of the breach and his resignation, affirmed his contract of employment such that he was no longer entitled to accept the breach?

#### Unfair dismissal

- 3.4 If the Claimant was constructively dismissed, was the sole or principal reason for his dismissal the TUPE transfer of his employment to the Respondent?
- 3.5 If the Claimant was constructively dismissed but his dismissal was not automatically unfair under regulation 7 of TUPE:
  - 3.5.1 Can the Respondent show that his dismissal was for a potentially fair reason within the meaning of section 98 of the ERA?
  - 3.5.2 If so, was the dismissal fair or unfair in all the circumstances of the case?
4. The tribunal notes that there is no dispute that there was a relevant transfer within the meaning of regulation 3 of TUPE with effect from 1 August 2017 and that the Claimant's employment transferred to the Respondent on that date pursuant to that transfer. There is also no dispute, as confirmed by the Respondent during the hearing, that his employment ended on or around 30 October 2017 as a result of his resignation.
5. What is very much in dispute is the contractual job that the Claimant was undertaking at the time of the TUPE transfer. One effect of a relevant transfer is that all relevant entitlements and obligations under the contracts of employment of transferring employees transfer under TUPE and any attempt to vary those terms will be void if the sole or principal reason is the transfer, unless it is also an economic, technical or organisational reason entailing changes in the workforce (see regulation 4(4) and (5) of TUPE).

6. The Claimant says that he was employed prior to the transfer as Head Chef and that post-transfer the Respondent effectively demoted him, which was a fundamental breach of his contract which he accepted by resigning. The Respondent denies that the Claimant was ever Head Chef, even pre-transfer.

**Evidence and findings of fact**

7. As agreed with the parties at the start of the hearing, the tribunal has heard evidence and submissions on liability only at this stage of proceedings.
8. The tribunal was provided with an agreed bundle of documents and has read and taken into account those documents to which it was referred by the parties and their witnesses.
9. Witness evidence was called on behalf of the Claimant from the Claimant himself, Lauren Walker (former colleague) and Heidimarie Brealy (the Claimant's mother and former employer). Each gave evidence by reference to a written witness statement. In addition to his witness statement, the Claimant relied on a 'Further Particulars of Claim' document and a chronology. The Claimant also produced two further statements, but one of those appeared to be a previous version of the Further Particulars document and the other to be restricted to remedy issues, and so the tribunal has not taken them into account for the purposes of this liability judgment.
10. The Claimant also relied on witness statements from Mike Davies (former Area Development Manager for Shepherd Neame), Louis Roberts (friend of the Claimant), Megan East (former colleague) and Samuel Brealy (the Claimant's brother). These witnesses were not called to give live evidence on the basis that the Respondent, as confirmed at the start of the hearing, had no questions for those witnesses.
11. In turn, the Respondent called evidence from Alan Clarke (co-owner and director of the Respondent), Stephen Thurlow (former General Manager), Chloe Chrascina (current General Manager) and Michele Clarke (co-owner and director). Each gave evidence by reference to a written witness statement.
12. In light of all the evidence read and heard, the tribunal makes the following findings of fact:
  - 12.1 Since 1 August 2017 the Respondent has held the tenancy of a pub known as The Chestfield Barn in Chestfield, near Whitstable, Kent.
  - 12.2 From 1 March 2012 until the Respondent took over, the pub tenancy was held by Mrs Brealy, the Claimant's mother.
  - 12.3 The pub is owned by Shepherd Neame, a brewery.
  - 12.4 There is no dispute that the Claimant worked in the pub from 1 March 2012, that his employment transferred to the Respondent under TUPE with effect from 1 August 2017, and that he continued to work at the pub until some time in October 2017.

- 12.5 There is also no dispute that the Claimant worked throughout his employment in the pub as a chef; as noted above, what is in dispute is whether he was the Head Chef at any material time.
- 12.6 The Claimant started work in the kitchen of the pub from the start of his mother's tenancy in March 2012. He was issued with a written contract of employment in around October 2012 which gave his job title as Head Chef and his rate of pay as £7.50ph. The Claimant was asked about this contract in cross-examination but it was not put to him that this document was not genuine or that it had not been issued to him on the purported date.
- 12.7 The tribunal also notes the content of the record of a local authority hygiene inspection in 2016 which the Claimant signed, giving his job title as Head Chef.
- 12.8 The tribunal has also seen statements from a number of witnesses who worked at the pub before (and in one case also after) the transfer to the Respondent and also from a former brewery Area Development Manager, all of whom state that the Claimant was Head Chef prior to the transfer.
- 12.9 The Respondent has sought in its submissions to cast doubt on the credibility of the statements relied on by the Claimant even though, as noted above, most of the Claimant's witnesses were not called to give live evidence on the basis that the Respondent had indicated that it had no questions for them. It is true that there is an apparent discrepancy in many of the Claimant's witnesses' statements in that they purport to have been signed in December 2018 but the typed heading refers to a hearing date in 2020 which was not known about until March 2019. This, the Respondent says, is suspicious, although it was unable to suggest what would be gained by witnesses pretending to have signed statements in 2018 when in fact they were signed some time later.
- 12.10 The tribunal finds that the most likely explanation for this discrepancy is not that the statements are not genuine evidence from those witnesses but, as suggested by Ms Walker in her evidence, that she and the other witnesses signed their statements in December 2018 and the typed heading was then added some time later once the 2020 hearing date (which was subsequently postponed) was known. The discrepancy does not, in the tribunal's judgment, cast doubt on the veracity of the statements.
- 12.11 There is also nothing, in the tribunal's judgment, in the point raised by the Respondent that the signature on Ms Walker's witness statement appears to be different from the signature on her resignation letter or in the fact that she made a mistake as to her resignation date in her statement. The tribunal accepts that the latter was a genuine mistake, and there is simply insufficient evidence before the tribunal from which it could reach a finding that Ms Walker did not in fact sign her own witness statement.
- 12.12 The only statement relied on by the Respondent from anyone who was working at the pub before the transfer is from Ms Chrascina. She started in around 2015 as a part-time member of front of house staff, and was still in that role at the time of the transfer. Her statement says that the Claimant worked in the kitchen as a 'cook/chef' and that she

did not know that he was meant to be 'Head Chef'. In her evidence to this tribunal she said, in effect, that she did not concern herself with what went on in the kitchen or the status of those working in there.

- 12.13 The Respondent has said that the quality of the food served by the pub before the transfer was poor, but that, in the tribunal's view, is irrelevant to the Claimant's contractual status. In any event, Mr Thurlow's evidence was to the effect that post-transfer he considered the Claimant to be a good chef.
- 12.14 The Respondent has said that it understood that the Claimant was the sole chef working in the kitchen. Again, that of itself would not alter the Claimant's contractual status, but in any event it seems clear from the totality of the evidence that the Claimant was not the sole chef prior to the transfer; there were various other chefs in the kitchen at various times, and at least one working up to, or nearly up to, the transfer date but who did not wish to transfer to the Respondent.
- 12.15 The Respondent has also said, in effect, that it had not been told prior to the transfer that the Claimant was Head Chef. It says that no contracts of employment had been provided to it in advance of the transfer date. This is disputed by the Claimant, but on balance the tribunal finds it more likely than not that the Respondent was not provided with any contracts in advance of the transfer. However, whilst a failure to provide employee liability information to the Respondent, whether in the form of contracts of employment or otherwise, may have amounted to a breach of Mrs Brealy's obligations under TUPE which could have been the subject of a separate claim (see, eg, regulations 11 and 12 of TUPE) it could not alter the Claimant's contractual status at the time of the transfer.
- 12.16 Similarly, the Respondent says that the Claimant did not tell them, when Mr and Mrs Clarke visited the pub in advance of the transfer, that he was the Head Chef. The context of that meeting will be discussed further below, but even if it is true (as to which the tribunal makes no finding at this stage) that the Claimant did not declare in clear terms before the transfer that he was the Head Chef, that again could not alter his contractual status.
- 12.17 The Respondent does accept that contracts of employment, including one for the Claimant, were left in the office at the pub on the day of the transfer. Mr Thurlow recalls seeing the Claimant's contract of employment and he accepted in evidence that it may have given his job title as Head Chef and it may have been an updated version of the 2012 contract. He cannot be definitive one way or the other on these points. The only point on the contract of which he is sure is that it gave an hourly pay rate of £10.50 but he says, and the tribunal accepts, that this stuck in his mind only because that was the rate at which the Claimant was subsequently paid.
- 12.18 It is said by the Respondent that although a contract of employment for the Claimant was there on the first day, it disappeared a few days later. There has been no suggestion from either party as to how the contract came to disappear, but it seems unlikely that the Claimant or someone acting on his behalf would have removed it. Since the Claimant's previous contract from 2012 gave his job title as Head Chef it seems

unlikely that an updated version would have included a different title, and certainly not one of lesser status, but if the updated version did say 'Head Chef' then it would have been in the Claimant's interests for the updated contract to remain available.

- 12.19 In the circumstances, and taking into account all of the evidence presented, the tribunal has no hesitation in concluding that the Claimant's contractual job title at the time of the TUPE transfer was Head Chef of the pub, and it was in that role that he transferred to the Respondent's employment with effect from 1 August 2017.
- 12.20 The tribunal should also say something here about the Claimant's rate of pay both pre and post-transfer. The Claimant's hourly rate was initially £7.50 but was increased to £9 in March 2017.
- 12.21 As noted above, the written contract of employment left in the office by Mrs Brealy on the day of the transfer gave the Claimant's hourly pay rate as £10.50. This was not a rate that he had ever in fact been paid by Mrs Brealy. It is the Claimant's case, which the tribunal accepts, that he had receive a number of non-contractual benefits in kind when working for Mrs Brealy, including use of a vehicle, including fuel, and a certain amount of free food and drink at the pub. Mrs Brealy accepted in evidence that those benefits were non-contractual. The Respondent made much in evidence and submissions of entries in a spreadsheet produced by the Claimant for this hearing which refer to him being paid 'less Tab'. This, the Respondent suggests, shows clearly that the Claimant was not given free food and drink. However, the spreadsheet does show clearly that the Claimant was reimbursed for fuel on at least one occasion in mid-2017, and the fact that the Claimant may have had a bar tab deducted from his pay on occasions is not, in the tribunal's judgment, inconsistent with him being given some free food and drink but then having to reimburse his employer once he had exceeded a certain amount.
- 12.22 The Claimant says that he would not have received such benefits after the transfer to the Respondent and so agreed with his mother that his hourly rate would be increased by £1.50 to compensate him for that loss of benefits. Whether that variation to his contract at the time of the transfer was void under regulation 4 of TUPE is not something that the tribunal needs to decide at this liability stage of proceedings, although it may well be relevant to any remedy stage. However, the increased pay rate, which the Respondent honoured, is relevant at this stage in that the Respondent saw it as unreasonably high when taken in conjunction with the high number of hours being worked by the Claimant.
- 12.23 Mrs Brealy's tenancy of the pub was due to expire in around March 2017, ie 5 years from its commencement, but was extended until 1 August 2017. By March 2017 Mr and Mrs Clarke had already been in discussions with the brewery about taking over the tenancy but the takeover was then delayed as a result of the tenancy extension.
- 12.24 However, by around March 2017 Mr Clarke had already, as he put it in evidence, 'headhunted' someone to be his head chef, ie Tony Davis. He already had Mr Davis lined up to run the kitchen before he had even met any of the existing staff or, in particular, before he knew anything about the roles of the existing kitchen staff. He did not think much of

the food offering at the pub and wanted his own head chef to be put in place. In effect, even if the pub already had a head chef in place, the Respondent intended to replace him or her with Mr Davis.

- 12.25 Mr Thurlow was recruited by the Respondent around a month before the transfer to be General Manager of the pub. He confirmed in evidence that, by the time he was recruited, Tony Davis had already been taken on.
- 12.26 There was a meeting at the pub on around 6 July 2017, apparently in the garden, between the Clarkes, Mr Thurlow, Mr Davis, Mrs Brealy and various of the existing staff. This was only a few days after Mr Thurlow had been recruited. There is a dispute as to whether the Claimant was told at this meeting that Mr Davis would be the new head chef, or whether the Clarkes were told at this meeting or on other visits to the pub that the Claimant was the existing head chef. The tribunal notes that Mr Thurlow accepted in evidence that the words 'head chef' may not have been used and that it was more a general chat around the table about menus and the like.
- 12.27 On balance, the tribunal finds that there was no clear statement to the Claimant at any time prior to the transfer that Mr Davis would be head chef, and conversely no clear statement from the Claimant that he was already head chef. As Mr Thurlow confirmed, discussions were relatively informal and more of a general chat.
- 12.28 Following the transfer, the pub was closed for a few days for refurbishment, and then reopened on 4 August 2017.
- 12.29 During the closed period, on around 2 August 2017, the Respondent held a meeting with all staff. It was said that TUPE rights would be honoured. It was at this meeting that Mr Davis was introduced for the first time as the new head chef.
- 12.30 The tribunal accepts that the Claimant did not say at this meeting that he was already the head chef or that Mr Davis was taking his job. However, the tribunal finds that the status of the Claimant in light of Mr Davis's arrival was not entirely clear at this stage. As the Respondent said in closing submissions, just because Mr Davis was head chef did not necessarily mean that the Claimant could not also be joint head chef.
- 12.31 The tribunal further finds that in the weeks following the transfer, there remained a lack of clarity as to the Claimant's status in the kitchen. This led to friction between the Claimant and Mr Davis. Mr Davis thought that he had been recruited as sole head chef. The Claimant thought that he should have retained his status as head chef and so continued to behave as though he were in charge of the kitchen.
- 12.32 Mr Thurlow approached the Claimant shortly after the transfer with a proposed new contract which gave the Claimant's job title as 'Chef' and provided for a salary of £22k per annum (with no pay for overtime) rather than an hourly rate. Although the salary offered would be roughly equivalent to £10.50 per hour if he worked a regular 40 hour week, the Claimant was in fact working many more hours than that. The Claimant did not accept this new contract.

- 12.33 Mr Thurlow offered the Claimant another new contract in early September 2017 as 'second chef' with a salary of £24k pa. Again, the Claimant did not accept.
- 12.34 There is clear evidence, principally from Mr Thurlow but also from contemporaneous documents, that the Claimant's relationship with Mr Davis remained difficult. For example, a diary entry for 20 September 2017 records '*Tony really pissed off – feeling very undermined by Ben*'. The Claimant was also raising concerns at around this time that he had with Mr Davis's work, for example saying that he was relabelling food and that there were issues with kitchen hygiene. Mr Thurlow said in evidence that he largely sided with the Claimant on these issues, but also that matters reached the point where he tried to put the Claimant and Mr Davis on different shifts so that each could run the kitchen in the absence of the other.
- 12.35 On 22 September 2017 there was a meeting involving, amongst others, the Clarkes, Mr Thurlow, Mr Davis and the Claimant. Notes from that meeting suggest that the Claimant now realised that as far as the Respondent was concerned Mr Davis was the sole head chef and the Claimant was not. The Claimant said at this meeting that Mr Davis was not doing his job and that he (the Claimant) wanted to be head chef. Mr Davis in turn said that it was his (ie Mr Davis's) kitchen. There was then discussion about how roasts should be presented, Mr Davis saying that he wanted it done a certain way, the Claimant being 'vocal' about how he had always done it a different way, and Mr Davis then reiterating that 'he is head chef'.
- 12.36 It seems that matters did not improve, and further meetings were held on 4 October 2017 between Mr and Mrs Clarke, a manager from the brewery, and, separately, the Claimant and Mr Davis. Notes of those meetings were taken by the Respondent's assistant manager which suggest that when they were both asked what was their objective, the Claimant said words to the effect that he wanted to be head chef as his contract with his previous employer had stated. Even if they had not been on notice before this time that the Claimant was saying that his contractual status was as Head Chef at the time of the transfer (which, in light of the evidence outlined above as to the contract left in the office at the time of the transfer, is unlikely) the Respondent must have been aware of the Claimant's position following this meeting.
- 12.37 Mr Davis left the Respondent's employment that same evening. It is unclear whether he was dismissed (as a text message from Mr Thurlow to the Claimant suggests) or resigned (as Mr Clarke says), but it is unnecessary to make a finding on this point.
- 12.38 On 6 October 2017 the pub was subject to another local authority hygiene inspection. Although the inspector was shown round the kitchen by the Claimant, the report was signed this time by Mr Thurlow as the most senior member of staff present. The pub retained its pre-transfer 5 star rating.
- 12.39 Later the same day there was another staff meeting at which Mr Davis's departure was announced. The Respondent says that the chefs, of whom there were by now a number in addition to the Claimant, were asked whether any of them wanted to apply to be head



chef but that they all agreed that they did not need a head chef and that they would work together as equals. The tribunal finds this unlikely. The Claimant had said in clear terms only two days before this meeting that he wanted to be head chef and that this was his contractual status before the transfer. The Respondent, in asking whether anyone wanted to apply for the position of head chef, was indicating clearly that it did not intend to treat the Claimant as head chef and that he would have to apply if he wanted that role. The tribunal accepts that the Claimant did not reiterate his position clearly at the meeting on 6 October 2017, but only because he had already set out his position on 4 October 2017 but which the Respondent showed no sign of accepting. This was exacerbated when it was also said at the meeting on 6 October 2017 that the head chef position would be advertised.

- 12.40 The Claimant continued to work but after completing a double shift on 13 October 2017 he left and the following day a letter was hand-delivered to the pub on his behalf.
- 12.41 The Claimant's letter, dated 14 October 2017 and clearly written following legal advice, was headed 'Breach of Contract / Constructive Dismissal'. It said in clear terms that the Claimant had been Head Chef at the pub since 1 March 2012, that he had transferred under TUPE on 1 August 2017 still with that contractual role, that his contract had been breached by the Respondent not honouring his contractual role as Head Chef and that to be told, following Mr Davis's departure, that he could apply for the position along with the other chefs had put him in an unworkable position. He asked the Respondent to rectify matters and said that he would not return to work until his contract and position as Head Chef had been confirmed.
- 12.42 The first response to the Claimant's letter was a Facebook message the following morning from Mrs Clarke. Even though the Claimant had given no indication that he was not prepared to work for the Respondent, her message said '*Hi Ben I'm sorry u feel u can't work with us anymore, I thought it was all sorted with Tony leaving*'. There was no indication in this message that the Respondent was prepared to engage with the Claimant's concerns or to treat him as Head Chef.
- 12.43 On 16 October 2017 Mr Thurlow wrote a letter which he described in evidence as a 'cooling off letter'. He accepts that he posted the letter to the wrong address, albeit in the right road, and for that or some other reason the letter was never received by the Claimant.
- 12.44 In any event, although the letter did say that '*perhaps we can meet to talk things over*' it also referred to the Claimant as having '*left the Barn*' and ended saying that if he did not hear from the Claimant within 14 days of the letter he would assume that the Claimant would not be returning to work. Again, even if the letter had been received, it would have given no real indication to the Claimant that the Respondent was prepared to engage with his concerns or to treat him as Head Chef.
- 12.45 The Respondent's unwillingness to engage with the Claimant over his contractual status is also consistent with the fact that on 18 October 2017 the Respondent's accountant, on Mr Clarke's instructions, filled out a P45 in the Claimant's name giving a leaving date of 21 October 2017. Mr Clarke accepts that this was probably the result of a

discussion between him and the accountant and that he 'had a short fuse' at that time.

- 12.46 The evidence presented to the tribunal is consistent, the tribunal finds, with the Respondent realising by early October 2017 if not before that Claimant was saying in clear terms that his contractual position at the time of the TUPE transfer had been Head Chef, that this was inconsistent with their vision for the pub kitchen going forward, and when the Claimant left at the end of a double shift on 13 October and sent in the letter of 14 October, with this giving them the opportunity to remove him, and what they saw as his excessive pay rate, from their business.

### **Applicable law**

13. The tribunal has reminded itself of the applicable statutory provisions, including, in particular, those of TUPE and of the ERA. The most relevant are set out below.
14. Regulations 4 and 7 of TUPE provide, in so far as material, as follows:

**'4 Effect of relevant transfer on contracts of employment**

- (1) *Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*
- (2) *Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—*
- (a) *all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and*
- (b) *any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.*
- (3) *Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.*
- (4) *Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.*

- (5) Paragraph (4) does not prevent a variation of the contract of employment if—
- (a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or
  - (b) the terms of that contract permit the employer to make such a variation.

...

**7 Dismissal of employee because of relevant transfer**

- (1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.
- (2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.
- (3) Where paragraph (2) applies—
- (a) paragraph (1) does not apply;
  - (b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—
    - (i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
    - (ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.
- (3A) In paragraph (2), the expression “changes in the workforce” includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).

...’

15. The key provisions of section 98 of the ERA are as follows:

- ‘(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
  - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it—

- (a) *relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
  - (b) *relates to the conduct of the employee,*
  - (c) *is that the employee was redundant, or*
  - (d) *is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*
- (3) *In subsection (2)(a)—*
- (a) *'capability', in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and*
  - (b) *'qualifications', in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.*
- (4) *Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*
- (a) *depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
  - (b) *shall be determined in accordance with equity and the substantial merits of the case.'*

## **Submissions**

16. Both parties made oral submissions.
17. Respondent's submissions  
The Respondent said that the main issue to determine was whether the Respondent fundamentally breached the Claimant's contract of employment by demoting him from the position of Head Chef. The first question was whether the Claimant was actually head chef prior to the TUPE transfer on 1 August 2017.
18. The evidence showed that he was the son of the previous tenant and that he worked in the kitchen as a chef. But, it was said, there was no 'proper' evidence of his status. The tribunal has seen what is said to have been his original 2012 contract but this was unsigned and also states £7.50 ph which is the same rate as he was on almost 5 years later, which was only around 30p above minimum wage by 2017. It was said that Mrs Brealy tried to fob this off by saying that the Claimant had other benefits, eg free food and drink, but a spreadsheet produced by the Claimant for this hearing and which refers to him being paid 'less tab' shows that this was clearly untrue.
19. The Respondent said that the Claimant's rate of pay does not suggest that he was Head Chef and that Mrs Brealy confirmed that she didn't tell the Respondent that her son was Head Chef because she saw no reason to. If

- the Claimant had really been the head chef, it was said, this would have been clearly pointed out to the Respondent prior to the transfer.
20. Even if the Claimant had been employed by his mother as head chef, he was made aware on 1 or 2 August 2017 that there was to be a new head chef, Tony Davis. When pushed on this point, the Claimant said that he told the Respondent that he was the head chef, he confirmed that he thought that he, the Claimant, was in charge of the kitchen and that he was responsible for the ordering, the hygiene etc, ie what makes up the position as head chef. At one point in its submissions, the Respondent said that it appeared that both the Claimant and Mr Davis were working as joint head chefs.
  21. On 6 October 2017, the Respondent said, the Claimant had the opportunity to put his hand up and say he wanted to be head chef but he didn't say that on that occasion. It was only on 14 October that he wrote to the Respondent regarding a breach of contract and saying that he was the head chef, some 2½ months after he had been informed that Tony Davis was going to be working as head chef.
  22. The Respondent said that, in any event, the Claimant affirmed his contract of employment by continuing to work for 2½ months after he knew that Mr Davis was to be head chef.
  23. It was also the Respondent's submission that the Claimant did not resign in acceptance of any breach. It was said that he resigned because he wanted to go and work for his father on a building site.
  24. The Respondent also made various submissions concerning credibility and what were said to be discrepancies in the Claimant's evidence and that of his witnesses.
  25. The Respondent submitted that if the Claimant was constructively dismissed then it was for an economic, technical or organisational reason entailing changes in the workforce, the reason being a need to reorganise due to the dramatic increase in the number of people going to the pub which meant, the Respondent said, that the Claimant would have needed to have gone onto a salary. When asked to explain this submission, the Respondent said that if a chef, head or otherwise, were to remain on an hourly rate in the medium term that would not work; as demonstrated by the Claimant sometimes working 80 hours pw, having a fixed salary without overtime would mean that the chef's income would remain the same whatever the hours he or she worked, including during the less busy times.
  26. Claimant's submissions  
The Claimant submitted that it had been confirmed in evidence that contracts were handed over at the latest on the day of the transfer, although Mrs Brealy says they were handed over on 28 June, so the Respondent did have written contracts for transferring employees, including the Claimant.

27. The Respondent had said during the hearing that it wanted its own staff and made it clear that it had no intention of acknowledging the Claimant as head chef. By not accepting the Claimant as the head chef they didn't allow him to manage the kitchen as he had done since 2012.
28. The Respondent's suggestion in closing that there were two head chefs was said to be a last ditch attempt but was inconsistent with the Respondent saying on 6 October that any of the chefs could apply to be head chef and if they didn't want to take up that offer then the role would be advertised.
29. The Respondent had already awarded the position to their chosen head chef as far back as March 2017 which was prior to any due diligence in relation to transferring staff.
30. The formal letter which the Claimant sent on 14 October 2017 outlined his case, saying that there had been a breach of contract and offering a resolution, but there was never any resolution after that. By not rectifying the Claimant's concerns as set out in his letter, there was a fundamental breach of the Claimant's contract of employment; a clear constructive unfair dismissal. As no resolution was offered in response to the Claimant's letter, he felt that he couldn't return to work and at that point he was forced to resign.
31. With regard to the alleged economic, technical or organisational reason relied on by the Respondent, it was said that they were clutching at straws and raising at the last minute the possibility that there could have been two head chefs. But this goes back to the point that all the chefs were asked to apply; the Respondent did not accept that the Claimant was the head chef or a joint head chef.

### **Discussion and conclusions**

32. The tribunal has already found that the Claimant's contractual position pre-transfer was as Head Chef at the pub. Pursuant to regulation 4 of TUPE, that contractual position transferred with the Claimant's employment with effect from 1 August 2017. Contractually, he remained Head Chef once his employment had transferred to the Respondent.
33. The Respondent had headhunted Mr Davis to be its new Head Chef some months before the transfer. The intention was that Mr Davis would be running the kitchen, irrespective of the Claimant's position. Quite how the Claimant was intended to fit into the hierarchy of the kitchen was not clear to him for some time after the transfer. It seems clear that he did not accept that Mr Davis was in charge of the kitchen as sole Head Chef, and it reached the point where Mr Thurlow tried to keep them on separate shifts, each running the kitchen on their respective shift. However, the Claimant's position that he had transferred to the Respondent as Head Chef and was contractually entitled to remain as such was made clear by 4 October 2017 if not before, and the Respondent's rejection of that position was also made clear two days later when the Claimant, along with the other chefs, was told that now Mr Davis had left he could apply for the head chef post.

34. Only a few days later, the Claimant set out his position again, clearly, in writing in the letter of 14 October 2017 and asked the Respondent, in effect, to respect his contractual rights under TUPE. The Respondent gave no indication that it would respect his contractual rights and so the Claimant resigned, his employment terminating on 30 October 2017.
35. The effect of regulation 4 of TUPE was that the Claimant's contractual position as Head Chef was preserved following the transfer of his employment to the Respondent. Although it was unclear to the Claimant how the Respondent saw him fitting into its plans for the kitchen for a period after the transfer, the Respondent's position was made clear at the meeting of 6 October 2017. Treating the Claimant as a chef of the same status as the other chefs then employed, and as someone who would have to apply for the Head Chef role if he wanted it, the Respondent gave a clear indication that it did not intend to abide by the Claimant's existing contract of employment. That was a fundamental breach of contract.
36. The Respondent has argued that even if there was a fundamental breach, the Claimant affirmed his contract of employment by continuing to work in a chef's, rather than Head Chef's, role. However, as the tribunal has already found, the Claimant's position and the Respondent's intentions with regard to his position, were not clear until early October 2017. Once the Respondent's position was made clear on 6 October 2017, the Claimant reiterated his position, ie that contractually he was still the Head Chef, in his letter of 14 October 2017. Nothing he did between 6 and 14 October 2017 was sufficient to affirm the contract; working for another week or so while he considered his position and took legal advice was not, in the tribunal's judgment, anywhere near enough for an effective affirmation.
37. The Respondent has also argued that the Claimant did not resign in response to any fundamental breach, but rather left because he wanted to work on a building site for his father. As pointed out to the Respondent during its closing submissions, the Claimant had been cross-examined on this point but he gave a consistent denial and the Respondent itself has not put forward any evidence in support of this aspect of its case.
38. In the circumstances, the tribunal finds that the Claimant resigned in acceptance of a fundamental breach of his contract of employment, and that he was therefore constructively dismissed with effect from 30 October 2017.
39. That leaves the question of whether the Claimant's dismissal was unfair. It is clear that the sole or principal reason for the constructive dismissal in this case was the TUPE transfer from Mrs Brealy to the Respondent; the reason was the Respondent's desire to install its own Head Chef and, as a consequence, to employ the Claimant in a lower status role in the kitchen, all of which was part of the transfer.
40. Indeed, the Respondent has not sought to argue otherwise, instead arguing that the reason was an economic, technical or organisational reason entailing

changes in the workforce within the meaning of regulation 7(2) of TUPE. However, the reason put forward by the Respondent (for the first time in closing submissions) does not get even close to being a reason within regulation 7(2). As noted above, the Respondent's argument was that there was a need to reorganise due to the dramatic increase in the number of people going to the pub which meant that the Claimant would have needed to have gone onto a salary. The tribunal does not understand why there is said to be any causal link between how busy the pub was and the need for the Claimant to be put on a salary rather than paid an hourly rate, unless the Respondent is suggesting that if he was on a salary it could have required him to work as many hours as he was working but would not have had to pay him as much. In any event, the reason put forward by the Respondent did not entail changes in the workforce and so could not fall within regulation 7(2).

41. That being so, the tribunal has concluded that the Claimant's dismissal was automatically unfair pursuant to regulation 7(1) of TUPE.
42. It is not, therefore, necessary for the tribunal also to consider whether the dismissal would have been unfair within the meaning of section 98 of the ERA, although the tribunal notes that the Respondent has put forward nothing that would have amounted to a potentially fair reason for dismissal. The tribunal would therefore have found that the dismissal was unfair pursuant to section 98 of the ERA in any event.
43. The tribunal has already listed this case for a remedy hearing on 7 April 2021 which will take place unless the parties are able to resolve remedy issues before then without the tribunal's intervention.

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Employment Judge K Bryant QC  
15 March 2021 – Croydon