Appeal against the decision of the Employment and Discrimination Tribunal, on whether the Respondent had sufficient continuity of employment to bring a claim of unfair dismissal against the Appellant.

[2021]GRC002

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

On appeal from the Employment and Discrimination Tribunal

Case No: ED008A/19

Between:	**SAHARA CITY CO LIMITED**	**Appellant**
	-and-	
	MARK CHIVERTON	**Respondent**

Date of hearing: 6th January 2021

Decision handed down: 17th February 2021

Before: Richard James McMahon, Esq., Bailiff

The Appellant appeared through its director, Daniel Elsadany

The Respondent appeared in person

Legislation and cases referred to:

The Employment Protection (Appeals and References) Order, 2006
The Employment Protection (Guernsey) Law, 1998
The Employment Protection (Guernsey) (Amendment) Law, 2005
Da Mata v George (unreported, 7 July 2008)
Burford v Flybe Limited [2009-10] GLR N-10
The Employment Rights Act 1996

Introduction

1. By a Notice of Appeal dated 10 September 2020, Sahara City Co Ltd (the Appellant) appeals against the decision of the Employment and Discrimination Tribunal that dealt with an issue remitted to it following an earlier appeal in these proceedings. That issue relates to whether Mark Chiverton (the Respondent) had sufficient continuity of employment to be qualified to bring a claim for unfair dismissal against the Appellant. The Tribunal heard this issue on 17 July 2020. The parties confirmed that the Tribunal did not hear any oral evidence at that

hearing, but had regard what had been provided to it before, to further written materials and to the submissions of the parties.

2. Because this appeal was a second appeal in these proceedings, the hearing on 6 January 2021 was listed without any prior directions hearing taking place. The Appellant appeared through a director, Daniel Elsadany. Neither party was represented by Counsel. At the start of the hearing, the further materials that had been before the Tribunal were copied and the Respondent confirmed that he was prepared to proceed with the appeal being heard without needing time to consider further these materials and prepare his submissions. The Appellant should have taken responsibility for ensuring that what needed to be placed before the Court had been provided in advance, although Mr Elsadany explained that he assumed the Tribunal would have done this, even though he should have been aware from what happened in the first appeal that this would not be the case. In the event, it did not much matter because the hearing was very brief, being concerned only with a narrow issue.

3. At the end of the hearing, in accordance with article 9 of the Employment Protection (Appeals and References) Order, 2006, which provides that this Court's decision "*shall be in writing, signed and sealed by the Greffier and transmitted by him to the Secretary*", I was again obliged to reserve judgment.

Proceedings before the Tribunal

4. As the Tribunal's Extended Reasons explain, the sole issue for its determination was to re-visit the preliminary issue relating to continuity of employment. The background to the case being advanced by the Respondent and how this particular aspect came to be addressed in the first appeal are set out in the previous judgment I delivered in these proceedings on 19 December 2019 ("the first appeal"). I do not repeat that background here. It is common ground that the Respondent had been employed by La Trelade Hotel Limited for several years prior to 31 March 2018 and was then employed by the Appellant from 1 April 2018. Copies of the two contracts of employment had been before the Tribunal throughout and these contracts were included in the bundle before the Tribunal last summer. Because the Respondent was dismissed in December 2018, he needed to establish that he had continuity of employment extending into the time when he was employed by La Trelade Hotel Limited in order to satisfy the one-year period of employment before he could institute his claim for unfair dismissal (section 15(1), Employment Protection (Guernsey) Law, 1998, as amended).

5. The Tribunal stated that it took into account what had been set out in the judgment on the first appeal and concluded that para. 7(6) of the Schedule to the 1998 Law (as substituted by section 23 of the Employment Protection (Guernsey) (Amendment) Law, 2005) did not assist the Respondent. Accordingly, its focus was on para. 7(2) only, which provides:

> "*If a trade or business, or an undertaking (whether or not established by or under an enactment), is transferred from one person to another –*
>
> *(a) the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and*
>
> *(b) the transfer does not break the continuity of the period of employment.*"

6. The primary document before the Tribunal relating to the relationship between La Trelade Hotel Limited and the Appellant is a licence agreement. As the Tribunal states (at para. 2.12 of its Extended Reasons):

> "*This document describes in extensive detail the responsibilities of the licensee from payment of all utilities to upkeep of all wood, iron and other surfaces. It commenced*

on 1st April 2018 and subject to the licensee is due to terminate on 31st October 2030. At no point does it refer to the employees or any responsibility for the new employer to transfer them into Sahara City Co Ltd. It does however require the hotel to be run as a '3-star hotel'."

7. The only additional witness statement to which the Tribunal refers is from Michael Doughty. It is dated 30 January 2020. In para. 2.13, the Tribunal records that Mr Doughty "*has confirmed to the Tribunal that he placed no requirement on Sahara City Co Ltd to take any of the employees of La Trelade Hotel Limited. He stated that he offered the choice to all of his employees to terminate their employment contracts with his company or to accept new employment with Sahara City Co Ltd.*" The Tribunal appears to have been concerned that to find that these circumstances amounted to what it described as "*a total rupture between the past and new employments and thus no continuity of employment*" was what had been addressed in the substituted Schedule to the 1998 Law. At para. 2.14 it feared that otherwise there would be a loophole to be exploited:

> "*If [Mr Elsadany of Sahara City Co Ltd] is correct in his belief that businesses can be taken over, or passed on, either via operation of a licence, by a sale or any other financial arrangement from one employer to another without reference to the employees, or the Employment Protection (Guernsey) Law, 1998, as amended, then it is open to any party to defeat the presumed rationale for this element of the legislation and deprive employees of continuity of employment at will.*"

The Tribunal added (in para. 2.16):

> "*The Tribunal is of the opinion that Mr Doughty would have clarified the situation prior to 1 April 2018 if he had written to each of the employees and described their options; this did not happen. Further if Mr Doughty had the intent to end employee contracts prior to their taking up employment with Sahara City Co Ltd then it would seem that contractual notice payments were due at this time. The evidence from Mr Chiverton, and other employees in the original hearing, confirmed this did not happen. It should be noted that the issue of payment of contractual notice, or non-payment, is not within the remit of this Tribunal's powers."*

It then concluded (in para. 2.17):

> "*Mr Elsadany stated that employees were free to accept or decline their new employment contracts, thus in his mind there was a definitive rupture between the old and new employment; however, this is not the determinant as to whether continuity of employment was lost or maintained. In effect there was not even a single days' gap between the old and new employments and the evidence in the original hearing confirms an almost seamless transfer of business of activities of the 3-star hotel from Mr Doughty on 31st March to Mr Elsadany on 1 April 2018. The overarching outcome is that a transfer of the business from one person to another occurred and would seem to satisfy sub paragraph (2) of section 7 of the 'Schedule Continuous Employment'.*"

The grounds of appeal

8. The Appellant has set out the grounds of its appeal in a letter dated 9 September 2020. It points out that the Appellant should not be held responsible for any failings of the Respondent's former employer, from which I infer that the Appellant is arguing that the Tribunal erred when regarding the absence of any termination of the Respondent's employment with La Trelade Hotel Limited as supporting its conclusion that there had been continuity of employment. The Appellant also explains that the Tribunal has ignored that new employment contracts were issued by the Appellant to staff, including the Respondent, who

had previously been employed by La Trelade Hotel Limited without any reference being made to that earlier period of employment being treated as continuous. Although it may not have been set out as clearly as it could have been, it is apparent that the appeal is squarely directed at the conclusion of the Tribunal resulting from a finding that cannot be supported by reference to the evidence that was before it. I am satisfied that the Respondent understood that this is the basis of the appeal.

9. In his submissions at the hearing, Mr Elsadany pointed out that the Tribunal seemed to have overlooked the evidence of Mr Doughty that there had been no agreement at all about the employees of the company he controlled, La Trelade Hotel Limited, being included as part of the transaction between the companies. The Appellant was a new business and there was no connection at all with Mr Doughty's company, apart from the terms of the licence agreement.

10. In response, the Respondent drew attention to the other witness statements on which the Appellant had relied, but which had not been mentioned by the Tribunal, being irrelevant because they related to a previous agreement that had led to the restaurant on the hotel site being licensed to the Appellant company, rather than relating to any transfer of business with effect from 1 April 2018. He further noted that the hotel had honoured all the bookings that had been made prior to the commencement of the licence agreement, which supported the Tribunal's conclusion that it had been a full transfer of the business. Any changes to contractual arrangements, including employment contracts, only occurred after he had been dismissed in December 2018. Although it appears that this was not evidence before the Tribunal, the Respondent added that the licence agreement was a document that Mr Doughty had modified for these purposes from other arrangements that had been entered into when he chose to create licences in relation to other parts of what took place at the hotel site. For example, there have been various licences relating to the health suite and the restaurant had been licensed to the Appellant some months earlier in September 2017. In short, he submitted that the finding of the Tribunal was one it was entitled to reach and so it should not be overturned.

The law

11. Section 25(1) of the 1998 Law (as substituted by the 2005 Law) provides:

> "*A person aggrieved by a decision or award of the Tribunal on a question of law may, subject to the provisions of subsections (2) and (3), appeal therefrom to the Royal Court in such manner and within such period as may be prescribed by order of the Royal Court.*

12. This provision only gives rise to what was described in *Da Mata v George* (unreported, 7 July 2008) as an appeal of "*very limited*" scope. Given the nature of the Appellant's appeal, it really amounts to a challenge to the Tribunal's finding of fact that there had been a transfer as required by para. 7(2) in the Schedule to the 1998 Law and so it must contend that that decision is such that it is perverse, irrational or one that no decision-maker properly directing itself could have reached.

13. As I indicated in my decision on the first appeal, it remains important to recognise that the Tribunal is constituted by lay persons doing their best. To the extent that the terminology is not described in exactly the same way as a legally-qualified judge would be expected to set out the reasoning, there is a degree of latitude afforded to this Tribunal. This is apparent from *Burford v Flybe Limited* [2009-10] GLR N-10. As I also indicated on the first appeal, these are quite difficult questions to resolve. As I stated in para. 28, to which Mr Elsadany has referred, the issue "*really depends on looking more fully at the question of whether there has been a transfer of the trade, business or undertaking, which ought to involve considering the terms on which the Appellant has contracted with Mr Doughty and/or Mr Doughty's company*". This followed what I had set out in para. 27: "*Reference was also made by Mr*

Doughty to Mr Esladany (or perhaps more accurately the corporate vehicle he was using) becoming tenant of the hotel premises. The arrangements may, therefore, not have extended to transferring the business itself, and with it any employee."

Analysis

14. The starting point for considering whether the Respondent has managed to bring himself within the terms of para. 7(2) is to ascertain whether there is some agreement that shows that there has been a transfer of a trade, business, or undertaking from one person to another. In the absence of an agreement, it will be considerably more difficult for an employee to argue that there are facts surrounding a change of employer that mean that there has been a transfer of a trade, business or undertaking. In the present case, there is an agreement to consider, but there are also the surrounding circumstances because, as the Tribunal properly acknowledged, the agreement alone does not assist the Respondent.

15. Because the terms of the written agreement need to be construed as the starting point, what the Tribunal has not stated explicitly is that the licence agreement dated 1 April 2018 is an agreement relating to the premises only. From this agreement, it is apparent that Mr Doughty owns the land and buildings on which La Trelade Hotel sits and that La Trelade Hotel Limited enjoys what is described as "*an unwritten tenancy*" from Mr Doughty. La Trelade Hotel Limited is defined as "the Licensor" and Sahara City Co Limited is described as "the Licensee". In addition to those parties, Mr Elsadany is also personally a party as "the Guarantor". However, the licence agreement is permission from the lawful exclusive occupier of the premises, being La Trelade Hotel Limited under the terms of its tenancy from Mr Doughty, to the Appellant company to occupy the hotel premises and to make use of its contents. One of the Licensee's covenants (found in clause 3(9)) is "*to use the said premises for the purpose of carrying on a hotel business in the said premises and not for any other purpose and not to permit the carrying on therein of any improper or illegal use or anything which may render an increased insurance premium to be payable in respect of the said premises*". In addition, clause 5(6) contains a mutual covenant between the parties that "*In accordance with the requirements for a 3 star Hotel the Licensee shall provide to both Hotel residents and guests cooked and continental breakfast and a 3 course set menu for lunch and dinner with a minimum of 3 choices of starter, main course and coffee for a fixed price determined by the Licensee*".

16. There is nothing in the licence agreement that indicates that there was any transfer of a business as a going concern, which I consider to be a central point for establishing that there has been a transfer as set out in para. 7(2) of the Schedule to the 1998 Law. The wording in this sub-paragraph is identical to section 218(2) of the Employment Rights Act 1996, so the principles that attach to how that subsection has been construed can, in my view, guide how to approach para. 7(2). There is an important distinction between an agreement that transfers an asset of a business and an agreement that transfers a business.

17. In para. 2.15 of its Extended Reasons, the Tribunal indicated its understanding that using the word "business" refers to the totality of the operation. I am satisfied that this was a correct legal approach for the Tribunal to take. It has not, therefore, misdirected itself on the law. However, the evidence from Mr Doughty included his confirmation "*that there wasn't any arrangement or condition for the licensee to take on any liability of any employees or trading debit of my Business Prior to the start date of the licence*". When taken with the other parts of Mr Doughty's evidence to which the Tribunal referred in para. 2.13 (which has already been quoted), there does not appear to be anything approaching the transfer of any going concern.

18. There have been instances where it has been found that an agreement to transfer an asset of a business really amounts to the transfer of the business because the asset in question is effectively the business. It is possible that this is how the Tribunal chose to view what

happened in 2018. In other words, the licence agreement for the hotel premises, including the obligation for the Appellant to run a 3-star hotel from those premises during its occupancy, must mean that there has been a transfer of the Licensor's business as well. This is why, viewed in the round, the Tribunal concluded that there was "*an almost seamless transfer of business activities of the 3-star hotel*" from one day to the next. The difficulty with that conclusion is that it ignores the evidence of Mr Doughty and Mr Elsadany that what was being transacted between them and the corporate entities they controlled was confined to occupying the hotel premises and that the way the hotel business was run by La Trelade Hotel Limited and by the Appellant was unconnected. Aside from operating a 3-star hotel from the premises, the Appellant had no obligations to La Trelade Hotel Limited as to how its undertaking of a hotel business at the premises needed to be performed.

19. From a starting point of looking at the terms of the agreement between La Trelade Hotel Limited and the Appellant, which does not in itself amount to a transfer of the former's business to the latter, the evidence suggesting that there has been a transfer comes from the Respondent explaining that he was not dismissed by his former employer, continued doing the same work as before and the Appellant was able to honour the bookings made with the hotel by customers. The Tribunal has not explained why it has rejected the evidence of Mr Doughty that the extent of the agreement related to the premises alone. The Tribunal has not explained why it has rejected the evidence of Mr Elsadany confirming that he was starting a new venture and not having transferred to the Appellant company the whole business of La Trelade Hotel Limited. The Tribunal has not considered what other elements of the hotel business would be involved in a transfer of the business, eg, supply contracts for goods and, if applicable, services associated with running the business of a hotel. Accordingly, whilst the Tribunal records that it asked itself the correct question, it has reached a conclusion that, in my judgment, is unsupportable on the evidence before it.

20. In particular, the Tribunal has not properly analysed the terms on which the parties to the alleged transfer of the business actually contracted. I take the view that it has glossed over the fact that the agreement was confined to being a licence agreement for premises and its contents. The Tribunal has not considered properly whether there has been some change internally in the ownership of the business. It has not properly considered whether the business of operating a hotel at the premises that was operated by La Trelade Hotel Limited simply ceased and a fresh hotel business operated by the Appellant company commenced. Instead, it has given undue weight to the fact that the Respondent continued to do the job that he was doing for La Trelade Hotel Limited, which apparently indicated to the Respondent that there had been some transfer of his employment and a continuation of the same work, albeit for a different legal entity, allowing that perception of the Respondent to prevail over the position in law that there could not have been a transfer, as required by para. 7(2), other than the transfer of an asset to be used in the Appellant's business. By not approaching the issue it had to resolve in the correct manner in the light of all the evidence before it, the Tribunal has reached a conclusion about the Respondent's continuity of employment that is not supported by the evidence from which it was reached.

21. The piece of the jigsaw missing during the first appeal was knowing the terms on which La Trelade Hotel Limited had contracted with the Appellant company. As I indicated in para. 27 of that earlier decision, in order to reach the conclusion that there had been a transfer falling within para. 7(2), the Tribunal really "*needed to see the basis on which such a transfer, if that is what it was, had been effected*". As I have explained, now that the licence agreement has been produced, and it has been supplemented by Mr Doughty's further witness statement about the terms on which he and his company contracted, I consider that this points clearly towards there not having been a transfer of a trade, business or undertaking. Indeed, on the evidence adduced before the Tribunal, I am satisfied that the only conclusion that could be reached is that the Respondent did not have the required 12 months of continuous employment.

22. I am conscious that the Tribunal has expressed its concern that such a conclusion would enable any party to circumvent para. 7(2), thereby breaking the continuity of employment and defeating the qualification period for a claim of unfair dismissal, but that is a matter for the legislature to address rather than the Tribunal or the Courts. Further, I do not believe that the lacuna to which the Tribunal has referred is as problematic as it believes it to be. The initial premise is that a person brings a claim against that person's employer relating to the dismissal by that employer. There are several situations addressed in para. 7 of the Schedule to the 1998 Law that enable periods of employment to be aggregated so as to satisfy the one-year qualification period, because otherwise para. 7(1) is applicable, which limits the computation of a period of continuous employment "*to employment by the one employer*". Where someone is employed by two associated employers, the opportunity to terminate that employee's employment to defeat a claim for continuous employment is lost. That will probably cover a lot of the situations about which the Tribunal appears to have had concerns. If there is an arm's length transaction between employers who are not associated, then what matters is whether there is some element of agreement showing that an employee is also being transferred under the business transfer. This situation can be achieved through an enactment (eg, para. 7(3)) or it involves looking carefully at the terms of the agreement between the two businesses. However, even if there is no transfer from a former employer to a subsequent employer of the employees, as I am satisfied was the case with this Respondent, that does not mean that the employer is without remedy; it just means that the remedy lies against the former employer rather than the subsequent employer. The Tribunal appears to have been unduly swayed by the fact that the Respondent did not have his employment terminated by his earlier employer as a reason why that employment must have been transferred to the Appellant, but the consequence of non-compliance with what the Respondent's former employer should have done will not justify an incorrect conclusion on the facts where the evidence is that no transfer of the business took place.

Conclusion

23. For the reasons I have given, I have decided that this appeal should be allowed. Having considered the licence agreement, which does not purport to transfer any employee, in the light of the additional evidence that fell to be considered by the Tribunal, I am satisfied that the only conclusion, however much sympathy one might have for the Respondent's position, is that his complaint should have been ruled as inadmissible because he did not prove that he had the one-year period of continuous employment required. I have given consideration as to whether this is a matter that needs to be remitted to the Tribunal for it to consider this preliminary issue further, but I am satisfied that from what both parties have said that they have adduced as much evidence in respect of this issue as is available and the evidence will always fail to overcome the terms on which La Trelade Hotel Limited and the Appellant contracted. There simply never was the transfer of the business as is required by para. 7(2) of the Schedule to the 1998 Law. As such, the Respondent's claim for unfair dismissal does not satisfy section 15(1) of the Law and must be rejected without being entertained further.

24. Costs normally follow the event in this Court. The Appellant has succeeded on this appeal and so I would be minded to award the Appellant its costs against the Respondent. Because the Appellant appeared through Mr Elsadany, those costs should be confined to the fees the Appellant has had to pay to bring the appeal and for the single hearing in this appeal. Unless the Respondent indicates to the Greffe within 14 days of receipt of this judgment that he wishes to argue for a different order, I will make an order that the Respondent pay the Appellant's costs on the recoverable basis. I merely add that, if such an order is made, it remains a matter for the Appellant as to whether it wishes to enforce the costs award against the Respondent. The Appellant may take the view that, although it has been put to time and expense to achieve this outcome, this is a situation where it might exercise a little compassion and refrain from doing so.