

## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100821/2017 Hearing at Edinburgh on 19 October 2017

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Employment Judge: M A Macleod (sitting alone)

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Shaun Cassidy

Claimant

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Secretary of State for Business, Energy &  
Industrial Strategy

First Respondent

Airport Shuttle Limited

Second Respondent

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Graham Peter Hanson Pender

Third Respondent

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### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claim of unlawful deductions from wages succeeds as against the first respondent, and is dismissed as against the second and third respondents; and that the first respondent is ordered to pay to the claimant the sum of **Two Thousand Seven Hundred and Seventy Two Pounds (£2,772)**.

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### REASONS

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1. In this case, the claimant submitted a claim to the Employment Tribunal in which he sought recovery of notice pay, holiday pay and arrears of pay in respect of which he asserted he had suffered unlawful deductions from wages. His claim was initially directed at the first and second respondents.

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2. The first respondent alone submitted an ET3 response to the claim. The second respondent did not submit a response. At the request of the first respondent, the proceedings were served on two additional respondents,

ETZ4(WR)

the third respondent (who did not submit an ET3) and Chauffeurline (UK) Limited, care of Brian Milne and Linda Barr, French Duncan, Business Recovery, 133 Finnieston Street, Glasgow G3 8HB. It was subsequently established that Chauffeurline (UK) Limited had been dissolved, and accordingly the claim was dismissed insofar as directed against them.

3. A hearing was fixed to take place on 19 October 2017. The claimant appeared on his own behalf, and gave evidence to the Tribunal. Mr Hunter appeared for the respondent, and called no witnesses. A bundle of productions was presented and relied upon in the hearing.
4. Based on the evidence led and the information provided, the Tribunal was able to find the following facts admitted or proved.

### **Findings in Fact**

5. The claimant, whose date of birth is 17 April 1979, commenced employment with Chauffeurline (UK) Limited on 3 June 2015. He was provided with a contract of employment (215) in which his job title was identified as Operator.
6. Chauffeurline (UK) Limited was a company which provided chauffeured cars to clients, and in particular carried out aircrew transfers from the airport to the hotel.. The claimant's role, when he started, was to work in the office, and take charge of affairs for the company there, take calls from clients and relay information to drivers.
7. The claimant signed his contract of employment on 1 September 2015, and Graham Pender, the third respondent, signed the contract on behalf of Chauffeurline (UK) Limited, as its Managing Director.
8. The claimant's role changed in approximately May 2016, when he was promoted to Operations Manager by Mr Pender, following a meeting.

9. The claimant's pay when he started was at the rate of £8 per hour, and although his contract did not specify hours of work, he worked 40 hours per week over 5 days.
10. The claimant's holiday year ran from 1 April until 31 March, and he was  
5 entitled to 28 days' annual leave and 8 days' public holiday.
11. On being promoted, the claimant's pay was increased to £9 per hour, and his hours would tend to vary, but in most weeks he worked more than 40 hours for the company.
12. At the start of September 2016, the staff employed in the business received  
10 a visit from French & Duncan. The claimant and his colleagues had been aware for some time that the business was experiencing financial difficulties. The directors of the business at that time were Mr Pender, George Devine (who retired in May 2016), Douglas Morrison and Alastair Grant, the operations manager. The claimant understood that Mr Pender  
15 had asked the others to leave the building.
13. At that time, the company employed two people in the operations room, Mr Pender would be in his office, and two accountants were also present in the building down the corridor.
14. The representatives from French & Duncan, who were administrators  
20 appointed to look after the affairs of the company, met with Mr Pender, the claimant and Sharon O'Donoghue. They asked questions in order to find out information about the company, and looked at documents available in the office.
15. The administrators removed documents and left. The claimant continued to  
25 work for the company for another two weeks, and was then told by Mr Pender that the company had no more money and could not pay staff any more. He advised the claimant and the other staff in the office, including some drivers, that they should seek alternative employment.
16. A note of the meeting was produced (120), though no witness spoke to it.  
30 In that note Mr Allison, of French & Duncan, stated that "*When queried who*

*they were working for now, they advised that they were working for Airport Shuttle Services, with effect from 1 September 2016.*" The claimant strongly denied this was accurate.

5 17. Around 8 or 9 September, the claimant noticed that a new sign had been put up at the office, with the name Airport Shuttle Limited. He did not ask anyone about this as he considered that he had already been told that he would not be paid.

10 18. Between the visit from the administrators and the claimant's last day in the office (21 September 2016), the claimant did not work but attended the office in the hope of receiving outstanding pay and holiday pay. He received pay on 2 September, but none thereafter.

15 19. The claimant said that when the payments were changed by the company from weekly to fortnightly, the company missed a week's payment to him, and when they changed it back to weekly pay, they failed to account for that missed week. He also claims 12 days lie time, though accepted that nothing was said in the contract about this.

20 20. The claimant took no holidays from the start of April 2016 until the termination of his employment. The company was very short staffed and he required to attend each day in order to help keep the business going.

20 21. He confirmed to the Tribunal that he is not seeking any award in respect of notice pay.

25 22. The claimant was aware that Mr Pender had another company, Airport Shuttle Limited, which was mentioned during his time working in operations. No mention was made to the claimant at any time of the relevance or operation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). He raised the proceedings against Mr Pender because he was the majority shareholder in Chauffeurline (UK) Limited.

30 23. Following the termination of his employment, the claimant submitted a claim to the first respondent via an RPI claim form (121) dated 29 September 2016. In that, he stated that his last day working with Chauffeurline (UK)

Limited was 13 September 2016, which was the date on which his employment officially ended.

24. On 11 November 2016, the administrators submitted a form RP18 to the Insolvency Service (110). In that form, they confirmed that the sale or transfer was made to Airport Shuttle Limited, at the address given in the instance. Attached to that form was a list of employees transferred (113), whose names were Sharon O'Donoghue, Terry Ward, James Alexander, Kenny Chisholm, Louise Murdochy and Richard Chyla. Again, the claimant professed no knowledge of this.

25. On 20 January 2017, the first respondent (in the person of Christopher Dalgleish) wrote to the claimant (130) to advise him that his application had been rejected, and that he was not entitled to receive from the Insolvency Service any payments in respect of arrears of pay, redundancy pay, holiday pay or compensatory notice pay. The reason given was that the Insolvency Service believed that prior to the insolvency date of Chauffeurline (UK) Limited, the business in which the claimant was employed was transferred to Mr Graham Hanson (which is understood to be a reference to Mr Pender) or Airport Shuttle Limited within the meaning of TUPE. As the new owner would take over full liability for the debts of the old business, the liability for the payments sought would fall upon Mr Pender or Airport Shuttle Limited.

26. At the end of that letter, Mr Dalgleish wrote that if he disagreed with this decision, the claimant could complain to an Employment Tribunal. In particular, he said: *"There are strict time limits for making a complaint about our decision to an Employment Tribunal so if you do decide to complain you should do so as soon as possible. However, a complaint made within three months of the date of this letter will be in time. There is no time limit if your complaint is confined only to our rejection of your claim for Redundancy Payment."*

27. The claimant sought advice from the Citizens' Advice Bureau, in Leith, and Lorraine Adams wrote on his behalf to Mr Dalgleish in reply (136). The

letter is undated but Ms Adams attached a mandate signed by the claimant dated 4 February 2017 to the letter.

28. In that letter, Ms Adams asked Mr Dalglish to reconsider his decision. She pointed out that the last day on which the claimant worked for the company was after the date upon which French & Duncan were appointed as administrators. As a result, she said, Regulations 4 and 7 of TUPE should not apply. She pointed out that the information from French & Duncan demonstrates that they had made an assumption of transfer based only on visual perception, at odds with the information that the staff were still working in a building leased to Chauffeurline (UK) Limited according to the landlord.

29. Mr James Alexander submitted an RP1 form on the same day as the claimant (157), 29 September 2016. In that form, he identified Airport Shuttle Limited as his new employer from 1 September 2016. The claimant was unable to explain why Mr Alexander was taken on with the other employees but he was not.

30. The claimant submitted his ET1 claim form to the Tribunal on 23 May 2017.

### **Submissions**

31. The claimant elected not to make a submission.

32. For the first respondent, Mr Hunter asked the Tribunal to appreciate that the Insolvency Practitioner's evidence was accurate and credible. He contended that there was a transfer to Mr Pender on 1 September 2016, and then to Airport Shuttle Limited on 7 September 2016 when it was incorporated. The operation of TUPE meant that the liabilities were transferred, in turn, to Mr Pender and to Airport Shuttle Limited, and therefore that the first respondent is not liable for the payments sought by the claimant.

### **Discussion and Decision**

33. This is a difficult case. The evidence before me has been incomplete, since the only witness available was the claimant.

34. The fundamental issue for determination by the Tribunal is which respondent, if any, is responsible for the outstanding sums due to the claimant on termination of his employment with Chauffeurline (UK) Limited. There is no dispute as to the amounts sought by the claimant, but the first respondent, the only respondent to submit a response to the claim, denies that they are responsible for any payments due from that now dissolved company.

35. Mr Hunter, in his submission, asked the Tribunal to find that the evidence of the Insolvency Practitioner should be regarded as accurate and credible. Of itself, this is a submission which I cannot sustain. I have not heard from Mr Allison in evidence. I cannot make any assessment of credibility of his evidence without actually witnessing him giving evidence.

36. That then gives rise to a wider question, which is how much weight should be given to documents to which no witness has spoken as the author or recipient. The Tribunal is not bound by the rules of evidence applicable to the civil courts, but seeks to apply, in all fairness, the principles which underpin the rules of evidence.

37. It is for the claimant to prove his case. His argument is clearly that he was employed by Chauffeurline (UK) Limited as at the date of termination of his employment, and that he was told nothing about any TUPE transfer.

38. Although I can make no assessment of credibility of Mr Allison, I can assess the claimant's credibility and reliability. His evidence in this case is curious. He maintains that he did not know anything about any transfer to Airport Shuttle Limited, but said that when he and his colleagues completed their RP1 forms, they did so together. Mr Alexander's form, to which the claimant was referred in evidence, clearly states that his employment transferred to Airport Shuttle Limited as at 1 September 2016.

39. The claimant professed no knowledge of the details of that transfer, yet was aware that a new sign had gone up at the office showing Airport Shuttle Limited as the business there. He said he asked no questions at all about that, as it was after the meeting with French & Duncan, but this seems very surprising for a senior employee who worked directly to Mr Pender, the managing director. I find it extremely unlikely that he was not concerned about this matter and did not raise it, but at the same time I can make no findings of fact on this as there is simply no evidence other than that of the claimant.

40. The claimant gave very unclear evidence as to when his employment ended with Chauffeurline (UK) Limited. He suggested that it was 13 September on his RP1, but also spoke of finishing either on 21 September or the week ending 29 September. He was very unclear about what he was doing in that period after 2 September which represented the last payment date of his employment.

41. It is stated on the RP18 form that a number of employees transferred to Airport Shuttle Limited on 1 September 2016. His name, according to the Insolvency Practitioner, was not included, which appears to be at odds with the short note taken of the 1 September meeting by Mr Allison, in which he recorded that "they" (whoever "they" actually were) were employed by Airport Shuttle Limited from 1 September. The claimant was present and appears to have been included within "they", but his name, according to Mr Allison, was not included within the list of transferring staff.

42. If there was truly the transfer of an undertaking here from Chauffeurline (UK) Limited to Airport Shuttle Limited on 1 September 2016, the claimant was, in my judgment, clearly part of that undertaking. The other names listed included office staff who worked alongside the claimant, including Ms O'Donoghue who was present when they were told that the business was shutting down.

43. The new business appears to have carried out the same business as Chauffeurline (UK) Limited, though very little evidence was available upon



which the Tribunal can make any findings about this. Mr Hunter's submission threw matters further into confusion, however, by suggesting that the transfer under TUPE took place firstly to Mr Pender and then to Airport Shuttle Limited which was incorporated on 7 September 2016.

5 44. Having reflected upon this case, and the information available to the Tribunal, I am unable to find that the claimant was or should have been subject to a TUPE transfer on 1 or 7 September 2016. There is insufficient evidence upon which to conclude that the claimant transferred, or should have transferred on either of those dates. The matter is very unclear and  
10 confused, and the suggestion that there was, in effect, a double transfer is one which is without any basis in evidence before me.

45. Although I was not entirely impressed with the claimant's evidence as to his understanding of the matter at the time, I cannot find that he was entirely lacking in credibility.

15 46. As a result, it appears to me that on the evidence, and in the interests of justice, the first respondent should be held responsible for the payment to the claimant of the outstanding sums he claims in this complaint. There is insufficient evidence for the Tribunal to find that the claimant was transferred to Airport Shuttle Limited or Graham Pender by the operation of  
20 TUPE, and in that absence, I find that the first respondent is ordered to pay to the claimant the sum set out in the ET1 (£2,772) which sum was not disputed by the first respondent in the course of the hearing.

47. The claimant's claim therefore succeeds as against the first respondent, and is dismissed insofar as directed against the second and third  
25 respondents.