



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Rakulan Velayutham

**Respondent:** Mr Dunsten Herose Vijaykanthan

## FINAL HEARING

**Heard at:** Leicester

**On:** 1 August 2018

**Before:** Employment Judge Camp (sitting alone)

### Appearances

For the claimant: Mr M Anastasiades, solicitor

For the respondent: in person

## REASONS

1. This is the written version of reasons given orally at the hearing.
2. This is a curious unfair dismissal and wrongful dismissal case where the case put forward on paper on the claimant's behalf by his solicitors, presumably on instructions, is substantially different on a number of important points from what he has told me in evidence today.
3. The claimant worked from 2003 as a cashier at what was, at the relevant time, an ESSO-branded garage on Upper Bond Street in Hinckley. He went through various employers before, around 1 April 2016, the respondent took over.
4. The claimant's case is that his employment was continuous back to 2003 and that he transferred pursuant to the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE") into the respondent's employment.
5. Pausing there, the first issue in the case is whether the claimant's employment did indeed transfer from the respondent's predecessor.
6. The respondent's predecessor was apparently a woman called Mrs Cavitha. The claimant's case on paper was that (and I am quoting from the claimant's witness statement here, which he swore on oath was true) the contention that all the employees were dismissed and given a P45 by the old owner was, "*simply not true. I was not dismissed by the old owner. Had I been dismissed, I would have left.*"

7. The claimant's solicitor confirmed at the start of the hearing that the claimant's case was indeed that he had never been given a P45. However, the claimant confirmed in oral evidence, quite readily, that he was given a P45 by the previous owner and that there was about two weeks between this happening and him starting to work for the respondent. So, on the claimant's own evidence, there was a dismissal and therefore, potentially, a break in continuity of employment.
8. Of course, if there was a TUPE transfer and the dismissal was because of it then TUPE regulation 7 would make it an unfair dismissal and TUPE regulation 4 would effectively invalidate that dismissal and mean that the claimant's employment did transfer to the respondent, even though the respondent's predecessor had dismissed the claimant. So: was there a TUPE transfer?
9. This garage is a franchise operation. There is little evidence about what happened when the respondent took over and about how this franchise operated. If the burden of proof is on the claimant to show that there was a TUPE transfer of his employment, then he has singularly failed to discharge that burden of proof. However, I shall proceed on the basis that the burden of proof on that issue is on the respondent to show that there was not a TUPE transfer.
10. Based on the limited information I have, it seems to be a conventional franchise to run a shop attached to a garage, effectively under licence from a third party called Malthurst Ltd.
11. On the evidence, the previous franchise holder gave up her franchise, or her franchise was terminated, around mid-March 2017. The respondent began his new franchise on 1 April 2017. The franchise was not given by the previous owner to the respondent; it was not in her gift. There was not, therefore, a conventional TUPE transfer, with the previous owner passing an undertaking to the respondent. What happened instead was that the business encompassed within the franchise closed for a short period of time and went back to the franchise holder, Malthurst. It then passed from Malthurst to the respondent. Therefore, if TUPE applied at all, this would have to be a service provision change TUPE transfer under TUPE regulation 3(1)(b).
12. The essence of a service provision change is that there is a client and at least one contractor. The client is the person on whose behalf services are carried out. The contractor is the person who carries out those services. If the scenario we have in the present case were a service provision change, we would be dealing with a case coming under regulation 3(1)(b)(ii). Regulation 3(1)(b)(ii) is as follows:

*A relevant transfer*

*3.(1) These Regulations apply to—*

*.... (b) a service provision change, that is a situation in which—*

*.... (ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf ...*

13. In this scenario, the client would be Malthurst, the contractor would be Mrs Cavitha, and the subsequent contract would be the respondent.
14. But this was not a service provision change. It was not a service provision change because neither Mrs Cavitha nor the respondent was running the shop in the garage for Malthurst. They were running the shop in the garage for their own benefit as a business and paying Malthurst a licence fee for the privilege. They were no more carrying out activities on Malthurst's behalf than a tenant is occupying the rented property on the landlord's behalf.
15. Accordingly, the claimant only had continuous employment under the Employment Rights Act 1996 from around the start of April 2018. This means he cannot bring an unfair dismissal claim and that the most he could gain from his wrongful dismissal claim would be one week's pay.
16. There are potentially a number of other issues that could be considered along the way, but I shall come straight to the termination of employment. I shall consider the allegation that the claimant was dismissed and dismissed unfairly as if the claimant had at least two years' continuous service with the respondent, notwithstanding the fact that I have just decided he did not.
17. It is common ground that the respondent issued the claimant with a P45 on or around 30 July 2016. The claimant's case on paper in paragraph 13 of his witness statement is: *"I received my P45 in the post which stated that the effective date of termination of my contract was 30th July 2016. I treated receiving my P45 as a dismissal."*
18. His solicitor confirmed on his behalf at the start of the hearing that his case was indeed that the P45 had come out of the blue. The claimant's case in his Claim Form was that he suddenly found out he was dismissed when his P45 was sent in the post which stated that the effective date of termination of his contract was 30 July 2016.
19. Once again, the claimant's true case is completely different. In his oral evidence, he confirmed that the reason the respondent sent him his P45 was that he had asked the respondent to do so, because he needed it so that he could start a new job he had secured. I note, in passing as it were, that his new job started on 1 August 2016 and yet he was claiming compensation (and had previously been awarded compensation) on the basis that he had not started until 11 August.
20. It is therefore beyond dispute that what happened was that, around 28 July 2016, the claimant asked the respondent to send him his P45 and the respondent did so. I find that the respondent did so on or before 30 July 2016.
21. As another aside, there was a dispute of fact as to whether the claimant's wife also requested the respondent send the claimant a P45, but I do not think I need to resolve that dispute because it is agreed that, whether or not she did so, the claimant certainly did so, on or about 28 July 2016.
22. How is this situation – this essentially agreed set of facts – to be analysed legally? I note that the claimant has never advanced a constructive dismissal case, either in evidence or in submissions, and has never suggested anything other than that he was dismissed by being issued with a P45.

23. During the course of closing submissions, I put to the claimant's representative that the claimant could not have it both ways. Either issuing a P45 was effective to terminate employment, in which case a request for a P45 is tantamount to a resignation and for that reason there is no basis for a claim, or a P45 is not effective to terminate employment, in which case the claimant's employment did not terminate and again there is no basis for a claim.
24. The claimant's representative sought to suggest that the claimant must have been confused and cannot have intended to resign. He pointed to text messages sent on 31 July 2016 by the claimant to the respondent asking whether there were shifts the following week and asking for a contract. The claimant's solicitor suggested that the respondent should have invited the claimant to a meeting to discuss why he was asking for a P45 when it appeared that he wanted to continue working for the respondent. He added something to the effect that issuing a P45 uncontrovertibly demonstrated an intention on the part of the respondent to terminate employment and that therefore the claimant was dismissed and did not resign.
25. I am afraid I cannot accept that the claimant was confused given what he says in his witness statement at paragraph 13 that he treated receiving his P45 as a dismissal. Again, he cannot have it both ways. If, as he effectively swore on oath he did, he took the issuing of a P45 as confirmation of termination of employment, then it logically follows that when he asked for a P45 to be issued, he was asking for his employment to be terminated.
26. I note that he does not say he changed his mind between asking for the P45 and sending the text messages on 31 July 2016 about wanting a P45 to be issued. He wanted and needed the P45 for his new job. If I am wrong about that, then I note that a communication potentially relating to the termination of employment is to be judged objectively, taking into account all the circumstances pertaining at the time. Objectively, when, on 28 July 2016, the claimant asked the respondent for a P45, the claimant was saying to the respondent 'I want my employment to end' and was resigning whether he realised this or not.
27. If I am wrong about that, then I go back to my earlier point. If the claimant did not mean to resign when he requested a P45 be issued and if such a request is not tantamount to a request to end employment, then the claimant's employment cannot have ended when he received the P45, nor can he have thought it did. If his employment did not end when the P45 was issued or received, there is no evidence before me to show that it ended prior to the issuing of proceedings and therefore the claim would fail for that reason. Whichever way I look at it, the claimant was not dismissed and therefore his claims, which are unfair dismissal and wrongful dismissal, must fail.
28. Further, if I am wrong about all of that, I find that if the claimant was dismissed the dismissal was fair.
29. This is a very unusual situation. The reason for dismissal, if dismissal it was, was the claimant's request for a P45. It seems to me that would come within "*some other substantial reason*" under section 98(1) of the Employment Rights Act 1996. It would be grossly unfair to the respondent to punish him for doing nothing more than the claimant had asked him to do and wanted him to do. I do

not accept the submission that the respondent should have interrogated the claimant about what he really wanted, given that the claimant was unequivocally saying, 'Please issue a P45 to facilitate my employment with someone else'. In all the circumstances, for the respondent to issue a P45 at the claimant's express request was a fair and reasonable thing to do and was well within the so called band of reasonable responses.

30. For all of those reasons, I dismiss the claimant's claims.

Employment Judge Camp

16 October 2018

Sent to the parties on:

For the Tribunal: