



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Atkinson

First Respondent: Maxim Studio Ltd ('R1')
Second Respondent: Iyere Studio Ltd ('R2')
Third Respondent: Secretary of State for Business, Energy and Industrial Strategy ('R3')

Heard at: Southampton **On:** 8/3/2018

Before: Employment Judge Wright

Representation:
Claimant: Mr G Self of Counsel
First Respondent: No Representation
Second Respondent: Mr M Atkinson- Director
Third Respondent: Mr J Hunter- Representative

JUDGMENT ON PRELIMINARY HEARING

The judgment of the Tribunal is that the claimant's employment transferred from R1 to R2 on or about the 16/11/2016.

R3 is dismissed from these proceedings.

Reasons

1. This was a Preliminary Hearing listed to determine whether there was a relevant transfer within the meaning of Regulation 3(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE') on or around 16/11/2016; as per 2.1 of the Case Management Summary, following the telephone preliminary hearing on 10/8/2017.
2. The respective positions were set out.
3. The claimant said she was in the dark about precisely what had happened and she had two alternative arguments:

- a. she was an employee of R1 until it went into liquidation on 19/1/2017. If that is correct, her remedy will lie with R3; or in the alternative
 - b. if there was a transfer under TUPE from R1 to R2, her employment would have transferred automatically (whatever the parties themselves thought had happened) and if she has been dismissed or made redundant, her remedy lies with R2
4. R2 took the position that there had been no transfer from R1 to R2.
5. R3 contended there was a transfer from R1 to R2 on or about 16/11/2016 and so the claimant, her contract and any liabilities lie with R2. At the time of the transfer, there was no insolvency and therefore there is no assistance applicable from the National Insurance Fund. The obligation therefore lies with R2; and R3 agrees with the claimant's option (b)
6. The claimant and Mr Atkinson, a Director of R2 had been married and together they ran R1. R1 was incorporated on 18/8/2006 and it had traded prior to that, with the claimant's employment commencing in 1997. Mr Atkinson manufactured the product (described as dental restoration work; crowns, bridges, implants and the like). The claimant ran the office to support the manufacture. They were both directors and the claimant was also company secretary.
7. The claimant and Mr Atkinson separated in July 2015 and they subsequently divorced. There was evidence that besides R1, the couple had also taken on a dental surgery in April 2015. In supporting that business venture, R1 began to fail.
8. The couple were going through matrimonial financial mediation. The claimant became ill and was signed off long-term as unfit for work on 6/2/2016 by her GP.
9. The claimant says she was effectively froze out of the business from that time. She says she was not paid properly and she accessed R1's bank account to transfer monies to herself in lieu of pay. In July 2016 Mr Atkinson stopped her accessing the account.
10. The claimant says she was not consulted about the financial state of the business, although she was aware that it was in dire straits from her knowledge prior to her illness and also through information which was disclosed in the divorce proceedings. She was asked to sign some papers as a Director in order that R1 could be placed in voluntary liquidation; she said Mr Atkinson wrote to her in October 2016. Randell Thompson were appointed liquidators. At the request of a creditor, the liquidator was subsequently changed to Beagies Traynor. The claimant says she signed the papers in December 2016 to authorise voluntary liquidation.
11. Mr Atkinson says the last day anyone did any work for R1 was 31/10/2016. He says employees of R1 were dismissed on 16/11/2016.
12. R2 was incorporated on 18/8/2016, with Mr Atkinson as a director. There was a dispute between the claimant and Mr Atkinson as to when he first earned income from R2, but that was not a point relevant to the issue of whether there was a transfer of the claimant's employment under TUPE/
13. R2 started trading on 17/11/2016.
14. In December 2016 the decision was taken to place R1 into voluntary liquidation. The claimant submitted her claim for a redundancy payment from R3 arising from her employment with R1 on 16/1/2017.
15. In closing submissions, R3 repeated the position which it has taken, that there was a transfer from R1 to R2 on or about 16/11/2016 under Regulation 4 of TUPE. As such it was submitted the claimant's contact transferred to R2.

16. In closing submissions from R2, again the position was adopted that the claimant did not transfer to R2.
17. In respect of closing submissions for the claimant, it was stated that she did not agree with R3 that her employment with R1 was terminated on 16/11/2016. It is for the Tribunal to make a determination whether the claimant transferred or not. From her perspective, it is not an attractive option for her claim to be against R2, a company run by her ex-husband, following the insolvency of R1 and which is just about breaking even (according to Mr Atkinson's evidence) It is of course more attractive for the claimant to seek remedy from R3.
18. Mr Self said it was clear that the claimant was not expressly or impliedly dismissed by Mr Atkinson at any point in time. Mr Atkinson said that he didn't think he had the authority to do so. As a director of the claimant's employer, it is clear he does have that authority. As a consequence, absent a transfer from R1 to R2, her employment ended on 19/1/2017 when R1 was wound up. As a result, any remedy is against R3 as clearly the definition of redundancy under s. 139 Employment Rights Act 1996 is met and the payments the claimant seeks should be paid.
19. It is helpful to look at the tests to be applied in Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 and to consider whether there was a transfer of an economic entity which retained its identity. There may not have been an intention that the entity transferred, but that does not necessarily mean it might not happen.
20. It was submitted there was some doubt as to whether or not there was an economic entity which did transfer. It was correct to say R1 stopped trading, it was not at that stage insolvent and R2 started trading shortly after that. It was correct three employees, including Mr Atkinson were offered jobs, yet two other employees did not go to work for R2. Some equipment, but not all transferred. Some equipment was sold.
21. It is ironic that TUPE which is supposed to safeguard the rights of employees, if found to apply will do the complete opposite here, as it will leave the claimant seeking payment of a judgment from her former husband, which will be a difficult task.
22. It was submitted that there was not a stable economic entity, no organised grouping of persons and the assets of R1 and R2 were different. Such that R2 did not retain its identity in sufficient terms for a transfer to be made out.
23. There was a material change in the place where R2 traded. In understanding R3's objection, there were some assets transferred, some of the staff, some of the customers, but it was submitted that was not sufficient for a transfer.
24. There was no question of being offered employment as if there was a transfer, no offer was required. There is then the question, if employment did transfer, of when did it end? It has clearly ended, but when?
25. Mr Self said this was a difficult argument, but on balance he invited the Tribunal to find a statutory novation had not taken place and there no transfer from R1 to R2 of the claimant's employment.
26. The Tribunal makes the following findings
27. It was not an issue to be determined when the claimant's employment ended. The sole issue to be decided was whether or not the claimant's employment has transferred to R2 under Regulation 3(1) of TUPE. R1 did not enter into insolvency under 19/1/2017. It had contracts to manufacture dental restoration work. Some of those contracts transferred from R1 when it stopped trading on 31/10/2016 to R2.

28. There was an organised grouping of employees. There are five employees referred to in the RP14 form at pages 75-77. Mr Atkinson says that is information which the Insolvency Practitioner provided; that information however must have come from somewhere- whether it was Mr Atkinson himself, the accountant or from other documentation.
29. There were some assets. Mr Atkinson gave evidence that Cad Cam equipment which was the subject of a personal guarantee was now stored at R2, although not all of the equipment was necessarily used by R2. He said that some assets transferred from R1 to R2.
30. Mr Atkinson also said that he had 'tried to keep going'. His wife paid the landlord £5,000 (as R1 was three months behind in its rent) so that equipment could be released. Mr Atkinson said the business then moved to other premises in order that it could operate.
31. In respect of the staff, the claimant aside, Mr Atkinson said he discussed with Tina King her going to work for R2, but she did not want to travel the distance to the new premises. Mr Atkinson said Antonio Cardinali wanted to give it a trial. In respect of Michael Gaskin, Mr Atkinson said he had heard from R3 that Mr Gaskin has not wanted to go and work for R2, but he did. Mr Atkinson said he had 'tried to keep going.'
32. The report to creditors and embers states the registered office of R1 changed from Basingstoke, to Fleet (page 85). The relocation and the fact R2 operated from different premises to R1 is not fatal to a finding that there was a transfer under Regulation 3.
33. Furthermore, the Insolvency Service wrote to Mr Atkinson I respect of a claim by a former employee of R1. Mr Atkinson replied that the employees of R1 were dismissed on 16/11/2016 (page 97). He said Mr Gaskin and Mr Cardinali had 'gone to work for the company/ individual sated in Q5 [sic]'; although no company name was set out at Q5. Mr Atkinson said 'no sale or transfer was made.' He went onto say that the date they were 'offered new employment' was 17/11/2016 (page 99).
34. Mr Atkinson said in an email dated 29/10/2017 sent to Redundancy Payments Online (page 177):

"The last day that any employee turned up for work was the 31/10/2016 and there last pay slip and payment for work was also the 31/10/2016. I had to make the decision that from a financial standpoint, [R1] was unable to employ anyone beyond that date. The important point to note is that the initial insolvency practitioners Rendell Thompson and I were urgently waiting for agreement form co-direction [the claimant] to liquidate [R1] which she agreed to eventually after she had a meeting with Rendell Thompson who pointed out that [R1] should be put into liquidation otherwise there was a real danger that it would trading illegally. I was only able at that point to give notice to the employees and administer there P45's ad these were dated 16/11/2016. Of course because of delays in getting [the claimant] to agree to the liquidation I was only able to cease trading for [R1] once she agreed to liquidate. I was then informed by Rendell Thompson that I could start trading [R2], we started trading on the 17/11/2016 [R2] was formed in August 2016 but as I have said did not start trading until 17/11/2016. Two of the employees were offered a job and they accepted by now they travel more than twice the distance they used to.' [sic]
35. Form RP14a at pages 78 to 82, records Mr Atkinson, Ms King, Mr Cardinali and Mr Gaskin were all given notice on 16/11/2016 and their employment ended on that date. In respect of the claimant, her start date is given as 30/3/1997. Her

- basic weekly pay is given as '£NIL' however and the date notice was given to her or the date her employment ended is left blank.
36. Mr Atkinson said some clients of R1 sent work to R2 once it began to trade.
 37. In applying the judgment of Chessman v R Brewer Contracts Ltd [2001] IRLR 144. The Tribunal has to consider whether there is an undertaking. There needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitation) the exercise of an economic activity which pursues a specific objective.
 38. There is no need to have significant assets and an organised grouping of wage-earners who are specifically and permanently assigned to a common task, may in the absence of other factors amount to an economic entity.
 39. An activity of itself is not an entity; the identity of an entity emerges from other factors, such as its workforce, management staff, the way in which the work is organised.
 40. Although R1 was struggling financially, the evidence heard points to finding that it was a stable economic entity.
 41. The next consideration is whether or not there was a transfer? According to Chessman, the decisive criterion is whether the entity in question retained its identity. The judgment refers to, in a labour-intensive sector, the new employer taking over not only the activities, but also the major part of in terms of their numbers and skills, the employees assigned by the predecessor to that task.
 42. No single factor should be considered in isolation. Other considerations are whether or not tangible assets are transferred, the value of the intangible assets, whether or not customers are transferred and the degree of similarity between the activities carried on before and after the transfer. In a case where assets do not pass, that does not preclude a transfer. Equally, the fact the service is similar between the old and new undertaking does not justify the conclusion there has been a transfer. The absence of any contractual link between the transferor and transferee may be evidence there has been no relevant transfer. There is no particular importance attached to the gap between the end of the work by one entity and the start by its successor.
 43. In this case, we have the transfer of three staff from R1 to R2. Ms King in effect objected to the transfer as the commute did not suit her. All the staff, the claimant apart (it is not clear why Mr Atkinson disregarded the claimant's status as an employee, besides her role as director and company secretary, unless he assumed that since they had by that time divorced and the claimant was no longer present in the business, he could do so) either transferred and began to work for R2; or objected.
 44. The evidence was some of the contracts transferred from R1 to R2 as did some of the assets; including the most expensive asset, the Cad Cam equipment. Indeed Mr Atkinson blamed the high expenditure as one of the reasons R1 failed (page 86).
 45. As pointed out by R3, both R1 and R2 list the nature of the business at Companies House as 'dental practice activities.'
 46. There was Mr Atkinson's evidence that he had 'tried to keep going'.
 47. For those reasons, the Tribunal finds that the entity did retain its identity as the service provided continued being provided by R2 once R1 ceased trading and the finding is that there was a transfer for the purposes of Regulation 3(1) of TUPE from R1 to R2. Assets, staff, contracts all moved from R1 to R2. As pointed out by R3, apart from holiday entitlement, an employee of R1/R2 stated

- that since working for R2, his rate of pay, his job in terms of duties and responsibilities, hours, immediate supervisor, had all remained the same. He went onto say was using the same machinery and dealing with the same customers (page 198).
48. For those reasons, the finding is that there was a transfer of an economic entity which retained its identity. The judgment on the issue to be determined at the preliminary hearing is that the claimant's employment transferred from R1 to R2 on or about 16/11/2016.
 49. As such, R3 is dismissed from these proceedings.
 50. At the conclusion of the hearing, consideration was given to whether any case management could take place, pending the outcome of the reserved judgment. As much depended upon whether or not there had been a transfer from R1 to R2 (in which case R3 would no longer be a party) or if there had been no transfer from R1, it was decided that if necessary, a short telephone case management hearing could be listed, at which the matter can be listed for a final hearing.
 51. By way of house-keeping, the claimant confirmed all discrimination claims had been withdrawn.
 52. In respect of paragraph 3 of the Case Management Summary of the hearing on 10/8/2017, the following claims are pursued:
 - 3.1 Ordinary unfair dismissal
 - 3.2 Six weeks accrued holiday pay
 - 3.3 Unpaid wages between July 2016 and the effective date of termination-whatever that date is found to be
 - 3.4 [Withdrawn]
 - 3.5 [Withdrawn]; and
 - 3.6 [Withdrawn]
 53. The claimant wished it to be noted that potentially, she intended to make an application to amend her claim to add a claim for a failure to inform and consult under Regulation 13 of TUPE and for Wrongful Dismissal. Mr Self contended that it would not be in accordance with the overriding objective to make such an application until the issue of whether or not there had been a relevant transfer had been determined.
 54. R3 wished it to be recorded that it appeared the claimant was being paid less than the National Minimum Wage and should the liability be found to lie with it, then the applicable minimum wage at the relevant time would need to be applied.

Employment Judge Wright

Date: 3 April 2018