



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms A Eccleston

**Respondents:** 1. Barrow Nesbitt Supervision Limited (R1)  
2. Dr P K Bhatnagar (R2)

**Heard at:** Liverpool **On:** 9 October 2018

**Before:** Employment Judge T Vincent Ryan

## REPRESENTATION:

**Claimant:** Mr J Halson, Solicitor  
**Respondents:** Mr B Hendley, Consultant

**JUDGMENT** having been sent to the parties on 26 October 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. By judgment of 30<sup>th</sup> August 2017, sent to the parties on 5<sup>th</sup> September 2017, the first respondent was adjudged liable for making unauthorised deductions from the claimant's wages and breaching the claimant's contract of employment regarding the payment of bonuses and commissions. The parties were unable to deal with remedy at that time. An issue arose as to whether there was a TUPE transfer from the first to the second respondent and therefore as to which respondent ought to compensate the claimant. The claimant also produced a schedule of losses where there was an issue as to whether commission due from either respondent ought to have been calculated on a 0.5% or 0.3% basis (all other factors in the calculation being agreed). In those circumstances the following agreed issues arose (as set out at page 135 of the trial bundle, to which all page references refer unless otherwise stated):

- 1.1 What consultations took place prior to the change in employer?
- 1.2 Whether the claimant (and other staff) were dismissed

- 1.3 whether the claimant (and other staff) were given/sent P 45s
- 1.4 whether the period 25 October 2017 to 29 October 2017 was a break in the claimant's employment or whether it was "unpaid leave"
- 1.5 whether there are any other factors surrounding the change in employer that are consistent with or inconsistent with a TUPE transfer
- 1.6 the calculation of the amount of the unauthorised deductions from wages/breach of contract

2. The evidence of Dr Bhatnagar (R2) was uncertain at times and by his admission, it was often unchecked guesswork and supposition; he relied frequently on what he said he had been told by others but they did not give evidence. He accepts that the claimant was paid as she alleged but says there were errors in those payments. He says he has notes of the key meeting on 24 March 2017 which he subsequently typed up, but he only typed them up in July or August 2018 and he has not disclosed the notes, whereas he has disclosed handwritten notes of other meetings. All these matters raised questions as to R2's credibility and reliability.

3. Ms Eccleston's evidence was clear and consistent, to the point of making a concession that her rate of commission payment had been reduced from 0.5% to 0.3% which was detrimental to her case. She came across as honest and straightforward. Over-all I found that Ms Eccleston's evidence is more credible and reliable than that of R2, and where there was any factual dispute between them I favoured her evidence.

### **The Facts**

4. The claimant was employed by various employers over many years, all loosely emanations of R2, his companies/firms or him as a sole trader. He devised complex legal structures of various companies over the years dealing with his various businesses and handling of assets. In September/October 2017 the claimant was employed by the first respondent. The claimant was employed as an administrator at Birkdale Clinic, Crosby, dealing with surgical operations. It became clear that R1 was in financial difficulty and that because of the company's difficulties R2, the second respondent, was considering his options on how to manage the situation without giving up his medical practice.

5. R2 met with the claimant on 24 October 2017 and he explained that he could not afford for R1 to make her redundant formally and to pay her any redundancy money, but he gave her the opportunity to continue working for him personally as he intended to carry on the Practice as a sole practitioner. He indicated that her alternative would be to apply to the Insolvency Service for redundancy money; the option was however given to her to carry on as before but working for him under a different guise, that he would be a sole proprietor in his own name rather than practicing as R1.

6. The claimant needed time to think about this; it was agreed that she could take time off work to think it over; it was agreed that this time would be treated as unpaid leave, and that was confirmed in text messages. The claimant considered that this was yet another in a long series of TUPE transfers, and nothing was said or

done to disabuse her of that understanding. She returned to work on 30 October 2017 having taken advice. She decided to take a chance and to carry on at the clinic and she has carried on to this day working exactly as before but working for R2 as a sole practitioner.

7. The business has changed its name slightly. It was the New Birkdale Clinic, it is now the Birkdale Clinic of Ophthalmology (although ophthalmology is one of the medical disciplines that is not practised). In fact, R2 offers the same services as far as the claimant's duties are concerned as before, and in the same premises. The practice did not close when ownership transferred from the R1 to R2; it has the same clientele. R2 is carrying on as he was before that transfer when he practiced as R1; the claimant is doing the same work for R2 as she did for R1 and she receives the same pay. There was one month when she did not receive the correct wages and in Dr Bhatnagar's own words "that was corrected", and her salary and commission was reinstated as before, that is as before when she was employed by R1. At no time did the claimant sign a form of consent for, or otherwise indicate in writing to, either R1 or R2 that it or he could make deductions from her pay.

### **The Law**

8. The law on the matter is set out in the TUPE Regulations 2006. A relevant transfer includes:

- "3(1) Transfer of an undertaking or business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity.
- 3(2) An economic entity means an organised grouping of resources which has the objective of pursuing an economic activity whether or not that activity is central or ancillary."

9. By virtue of Regulation 3(6) the transfer of assets is not essential for there to be a relevant transfer.

10. Where there is a transfer of an undertaking the effect on contracts is set out at Regulation 4, effectively contracts of employment transfer. Regulation 8 applies to vary such effects when there are insolvency proceedings against a transferring employer but there was and is no formal insolvency proceeding in respect of R1.

11. The unauthorised deduction from wages law is set out in the Employment Rights Act 1996 at section 13; there can be no lawful deduction without a prior signed consent from the employee or otherwise in specific circumstances not relevant to these proceedings.

### **Application of Law to Facts**

12. Applying that law to the facts and answering the six questions posed by the parties (set out above) I find as follows:

- 12.1 Consultation – this was limited to the effect that the claimant was given an option that she could stay or leave; it was her choice. She could

remain at the clinic doing the same work in the same place or opt out. That is consistent with a TUPE transfer where an employee has the right to opt out of a transfer; the claimant did not.

- 12.2 The claimant was not dismissed by R1, neither did she resign, on 24 October or subsequently. The claimant was not dismissed by either of the two respondents (albeit others were).
- 12.3 The claimant did not receive a P45, notice of dismissal, confirmation of dismissal, new terms and conditions or a letter of a new appointment from either of the named respondents.
- 12.4 The period between 25 October 2017 and 29 October 2017 was agreed unpaid leave and not a break in the claimant's employment.
- 12.5 The situation described is wholly consistent with a TUPE transfer, the claimant continuing to do the same work, in the same premises, for the same clientele and for the same pay, on the same conditions upon her return to work as before it. There was an activity that retained its identity and a transfer of that business from R1 to R2 on 25 October 2017, at which point the claimant's employment transferred, albeit she was on agreed unpaid leave until Monday 30 October 2017.
- 12.6 The claimant's schedule of loss calculation of unpaid commission is based on 0.5% commission; by her own honest concession, and consistent with an earlier judgment of the Tribunal in relation to certain of her colleagues, the calculation ought to be at 0.3%. I have checked the documentation regarding the claimant's colleagues and co-claimants at the commencement of these proceedings; I have checked the reasons that were given on the day of their final hearing. The respondents' then representative, Mr West, agreed (for the respondents) that the correct percentage for the calculation was 0.3%, and the awards were worked out jointly on that day on that basis.

13. Pursuant to the liability judgment of 30 August 2017 where I found that R1 had made unauthorised deductions from the wages of the claimant (and her co-claimant's and former colleagues Miss Griffiths and Ms Traynor), I now find that the liability transfers to R2, and the amount awarded against R2 is the commission claimed calculated at 0.3%. The claimant's schedule totalling £11,972.32 (page 36) was erroneously calculated based on entitlement to 5% commission. The claimant confirmed in evidence that the commission ought to have been paid at 3%. The parties agreed (on that basis, my findings above and in the liability judgment) that the figure ought to have been £10,753.92.

14. In consequence of this judgment the second respondent shall pay to the claimant the sum of £10,753.92 subject to deduction and payment of tax and national insurance.

Dated: 04.02.19  
Employment Judge T Vincent Ryan

REASONS SENT TO THE PARTIES ON

11 February 2019

FOR THE TRIBUNAL OFFICE

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