



EMPLOYMENT TRIBUNALS

Claimants: (1) Marie Blaskovic (1400431/2018)
(2) Ian Stribley (1400432/2018)
(3) Dominic Richards (1400433/2018)

Respondents: (1) Terence and Karen Schofield formerly trading as
Quayside design and print
(2) Charlotte an Barry West trading as Quay design
and One Stop Printers

Heard at: Bodmin Magistrates Court **On:** 26th February 2019

Before: Employment Judge Mr. M. Salter

Representation:
Claimants: In person;
Ms. Blaskovic did
not attend
Respondent: (1) Mr. Schofield
(2) Mr. West

JUDGMENT

There was a relevant transfer from the First Respondent to the Second respondent on the 7th November 2017. The Claimant's claims for redundancy and notice payments are, therefore dismissed.

REASONS

References in square brackets below are unless the context suggests otherwise to the page of the bundle. Those followed by a with a § refer to a paragraph on that page and references that follow a case reference, or a witness' initials, refer to the paragraph number of that authority or witness statement.

References in round brackets are to the paragraph of these reasons or to provide definitions.

INTRODUCTION

1. These are my reasons given orally at the final hearing on 26th February 2019. In accordance with Rule 62(3) of Schedule 1 of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (“the 2013 Regulations”) written reasons would not be provided unless they are asked for by any party at the hearing or by a written request presented within 14 days of the sending of the written record of the decision.
2. At the Request of the Claimants these written reasons have been produced.
3. The Employment Tribunal is required to maintain a register of all judgments and written reasons. The register must be accessible to the public. It has recently been moved online. All judgments and reasons since February 2017 are now available at: <https://www.gov.uk/employment-tribunal-decisions>. The Employment Tribunal has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the Employment Tribunal for an order to that effect under Rule 50 of the Tribunal’s Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness.

BACKGROUND

The Claimant’s case as formulated in their ET1s

4. The Claimant’s complaint, as formulated in their Form ET1, presented to the tribunal on 1st February 2018, is in short, they were entitled to redundancy payments and notice pay after their employment ended with the Terence Schofield and Karen Schofield, who traded as Quay side Design and Print (“First Respondent”).

The Respondents’ Responses

5. In the Form ET3, received by the tribunal received 6th March 2018, the First Respondent denied that the Claimants were so entitled and contends that there had been a relevant transfer of the claimants’ employment to

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Charlotte and Barry West, Trading as Quay Design and One Stop Printers (“the Second Respondent”).

6. The Second Respondent was added as a party after at a Preliminary Hearing held by Employment Judge Roper; their response was that there was no relevant transfer and that the employees were unemployed in November 2017 and latterly became employed by them in January 2018 after an upturn in their business.

Relevant Procedural History

7. The matter came before E.J Gardiner on 29th May 2018 for a Preliminary Hearing and again before E.J. Roper for a further Preliminary Hearing on 26th September 2018 at this second Preliminary Hearing the First Respondent did attend and the Second Respondent was added as a party.

THE FINAL HEARING

General

8. The matter came before me for Final Hearing, it had a one-day time estimate. The Claimants represented themselves, Mrs Blaskovics did not attend, however, her absence was expected and explained and neither her nor any other party sought to adjourn the hearing. The First Respondent was represented by Mr. Schofield, and the Second Respondent by Mr. West.

Particular Points that were Discussed

9. As all parties were litigants in person I explained it was not for me to run their cases, although I would ensure as far as I could that none of them were disadvantaged by the process. I explained to them the need to put their case to the other witnesses. At various times I had to remind Mr. Schofield of the requirement to put his case to the witness and that if he did not I would accept the issue as agreed.

DOCUMENTS AND EVIDENCE

Witness Evidence

10. I heard evidence from the Claimants who attended and read Mrs Blaskovic’s witness statement. I also heard evidence from the following witnesses on behalf of the Respondents: Mr. Schofield as First Respondent and Mr. West as Second Respondent.

11. All witnesses gave evidence by way of written witness statements that were read by me in advance of them giving oral evidence. All witnesses were cross-examined. I gave such weight as I thought appropriate for those witnesses who did not attend namely Mrs. Blaskovics.

Bundle

12. To assist me in determining the matter I have before me today an agreed bundle consisting of some 75pages I refer to this bundle by reference to the relevant page number.

SUBMISSIONS

13. The claimants made brief submissions that the evidence was before me and that they were entitled to redundancy and notice payments. Neither respondent made any submissions to me.

MATERIAL FACTS

General Points

14. From the evidence and submissions, I made the following finding of fact. I make my findings after considering all of the evidence before me, taking into account relevant documents where they exist, the accounts given by Mr. Schofield, Mr. Stribley, Mr. Richards and Mr. West in evidence, both in their respective statements and in oral testimony. Where it has been necessary to resolve disputes about what happened I have done so on the balance of probabilities taking into account my assessment of the credibility of the witnesses and the consistency of their accounts with the rest of the evidence including the documentary evidence. In this decision I do not address every episode covered by that evidence, or set out all of the evidence, even where it is disputed.
15. Matters on which I make no finding, or do not make a finding to the same level of detail as the evidence presented to me, in accordance with the overriding objective reflect the extent to which I consider that the particular matter assisted me in determining the identified issues. Rather, I have set out my principle findings of fact on the evidence before me that I consider to be necessary in order to fairly determine the claims and the issues to which the parties have asked me to decide.

Credibility

16. I take the unusual step of pausing her to comment on the evidence I heard. I must admit to feeling unhappy with all the evidence I heard and do not feel that any witness was fully open in their evidence, which contained gaps, was unclear and often unsupported by contemporaneous material.

The Respondents

17. The First Respondent ran a printing business in Truro, it was based in Quay Street and was called "Quay side Design and Print". The Second Respondent is also a printing business also in Truro, based in Lemon Street. They were in competition. I am not told that whilst in competition they were personally particularly friendly or close.
18. What is clear is that by the time of the tribunal hearing they clearly were not on good terms with Mr. West refusing to sit next to Mr. Schofield.

The Claimants

19. It is agreed that all the Claimants were employees of the First Respondent.
20. The First Respondent was in financial difficulties, so much so that in the end of 2017 he ceased trading. The circumstances of the First Respondent's financial difficulties are undisputed.
21. The Claimants tell me, an Mr. Schofield is unable to dispute, that they only received notice of the ending of their employment with the First Respondent by way of letter dated 29th September 2017 that was only provided to them on 3rd November 2017 [11-13]. He is unable to account for the properties document on [14] that shows the letter to Ms. Blaskovics would appear to have been created on 3rd November 2017.
22. Both Mr. West and Mr. Schofield accept there was no agreement for Mr. West to take the debts or business of the First Respondent. The only agreement that was in place was an agreement for Mr. West to clear the premises of the First Respondent of its machinery [54]. This would save Mr. Schofield a sum of money on shop clearing as he was returning the property to the landlord. I am not told that Mr. West has any previous experience in clearing shops.

23. From the evidence I have before me I am told that Mr. West had his choice of what machinery he took and what remained on the First Respondent's premises which they were returning to the landlord.
24. I accept the evidence of MR. Schofield that, by the time of this agreement, it appeared to him that Mr. West had already spoken to the Claimants. Indeed, whilst Mr. West was removing the machinery, a banner was placed into the window pronouncing that "We've Moved", it contain cartoon representations of the Claimants and states "we will still be the same production team offering the same products pus more" it gives the address of Mr. Wests' business. In a series of 8 photographs the cartoons direct the reader from the Frist Respondent's address to the Second Respondent's premises in Lemon Street [57-58] it contains an email address of sales@quaysidedesignandprint.co.uk and has the same telephone number as the First Respondent (01872 222202) [12 and 58].
25. I am told the Claimants themselves erected this in an attempt to gain work for Mr. West so that he would take them on as employees. I find this is an odd turn of events as Mr. West would have had to come to some form of agreement with the Claimant's to allow them to work on his premises for any period of time for a seemingly competing business if Quayside Design and Print was separate from his business.
26. The Claimants state in their et1's that their employment with the First Respondent ended on 7th November 2017 [Box 5.1]
27. On 7th November 2017 [61, 63, 65, 74] Mr. Richards sent, what appears to be a group email to customers identifying that the Claimants, who are Mr. Schofield's entire work force, would be working at the Lemon Street address. This was sent from an email address which identified the First Respondent as its sender. The email identified all three claimants working at the Second Respondent's address and that they had moved "with all the equipment and trading as Quay design and print...we still have all your artwork archives and account history so everything from your point of view will remain as it is" [65]. The emails are sent from Quay Design and Print

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team. I am not told what form the entity of “Quay Design and Print” took from 7th November 2017 onwards e.g. a partnership, a limited company etc.

28. On the 9th November 2017 Mr. West signs the agreement to clear the First Respondent’s premises, that is two days after the First Respondent ceased employing the Claimants and two days after the emails sent by Mr. Richards to customers.
29. On 15th November [70] Mr. Richards sends an email to a customer stating “I need to change the login and payment details over to where we are now” it identified him as a Graphic designer for “Quay Design and print and One Stop Printers”, the Second Respondent’s trading name, and indicates a change in the identity from the emails of a week earlier; yet the email address is the First Respondent’s email address and the email contains the First Respondent’s telephone number.
30. On 27th November Mr. Richards sent an email, again from the “Quay design and Print” email address, to Allen-Heath.com [68] stating “Please find attached letter which list our new contact and payment details”; yet again he is described as a Graphic designer for “Quay design and print and One Stop Printers”; I find, as a fact therefore that, therefore within three-weeks of the closure of the First Respondent it customers are being provided with details to make payments to the Second Respondent by staff who were originally at the First Respondent but who were identified as now being connected with the Second Respondent.
31. Mr. Schofield’s wife is called Karen. She was involved in the running of the First Respondent indeed she is a party to these proceedings. She sends text messages to Mrs. Blaskovics and latterly the other claimants in November and December 2017 at time when she is aware, Mr. Schofield, tells me that the First Respondent considers the claimants were working of the Second Respondent, she is discussing the potential insolvency of the First Respondent and apologising for its impact on the claims. as of 5th December 2017, there is still no resolution and no “insolvency number” being provided to the Respondent. it does say “I believe you have to apply for redundancy within 6 months of the business ceasing to trade. We had to

fill out the date you ceased work etc we did say we believed you started work the next day with your new employer and you all had the relevant paper work” [15]

32. In questioning of Mr. Stribley, Mr. West elicited he, (Mr. Stribley), was working on for the Second Respondent on the basis of a “probationary period”.
33. Mr. Richards worked, he says, as a freelancer whilst trying to generate work for Mr. West, hence the emails regarding work he sent from his work computer which identified it as coming from the First Respondent, who, I am asked to accept had stopped existing by then. This was done as a result of the work he was undertaking for Mr. West. I have not been provided with any evidence of self-employment from either Mr. West or Mr. Richards.
34. The Second Respondent states he employed the Claimants as employees in January 2018 owing to an increase in the work he was the beneficiary of.
35. The Second respondent changed its name to Quay Design and One Stop Printers in March 2018 and registered as a limited company, that is the same identity as in the emails from Mr. Richards of the middle of November 2017 some four months earlier

THE LAW

Regulation

36. So far as is relevant the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) state:

3 A relevant transfer

(1) These Regulations apply to—

- (a) a transfer of an undertaking, 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

...

(2) In this regulation “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.

...

(6) A relevant transfer—

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- (a) may be effected by a series of two or more transactions; and
 - (b) may take place whether or not any property is transferred to the transferee by the transferor.
37. Whether there is an economic entity that retains its identity is a multifactorial question: Cheeseman and others v R Brewer Contracts Ltd [2001] IRLR 144
38. If TUPE applies then there is a statutory novation of the contracts of employment from the First Respondent to the Second, the parties' intentions and understandings are generally irrelevant, although it has been recognised that in limited circumstances (that do not appear to apply here) it may be of assistance if the matter is finely balanced as a firm statement prior to the transaction that TUPE applied could throw light on the true nature of the transaction: Lightways (Contractors) Limited v Associated Holdings Ltd [2000] IRLR 247, Ct Sess (Inner House).

CONCLUSIONS ON THE ISSUES

General

39. Having regard to the findings of relevant fact, applying the appropriate law, and taking into account the submissions of the parties, I have reached the following conclusions on the issues the parties have asked me to determine.

Credibility

40. I do not find any witness in the matter convincing and cannot help but feel there is something going on in this matter.

Findings on the Issues

41. The Claimants deny there was a relevant transfer, if they are right then they could proceed with their claims for redundancy payments and payments for notice periods; Mr. West denies there was a transfer, if he is right then he will not have responsibility for the Claimants' pensions transferring and will not have engaged employees with lengthy periods of employment; Mr. Schofield claims there was a transfer, if he is right then he will avoid the risk of having to make any payments to the Claimants. There is a dispute of fact.
42. I do not have any agreement between the Respondents regarding their relationship in early November, beyond the machinery acquisition schedule on [54] which is signed after the First Respondent ceased trading. I

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therefore need to look at other circumstances and see what, if any conclusions, I can draw from them

43. In accordance with the guidance in the Cheeseman case, I find there was a printing business in the hands of the First Respondent with the assets set out in [54] and the three members of staff (the claimants).
44. There is no contract to the effect of a transfer between the Respondent. However, I must remember the purposive approach to TUPE and I do not consider it would be controversial to find that a written agreement is not necessary for any there to be a transfer within the meaning of r3(1)(a), otherwise the protections in TUPE would be robbed of any meaningful content by transferors and transferees not putting their agreements into writing.
45. From what, if anything, therefore can I draw conclusions?
46. It is accepted that the Second Respondent takes the equipment so that the First Respondent does not have to pay for shop clearance, but equally the First Respondent would not benefit from the sale of that property. This I consider to be an odd development for two rivals who are not particularly close to agree to this. The plant of the First Respondent therefore goes to the Second Respondent.
47. I also bear in mind the contemporaneous material which would appear to indicate that the First Respondent's business was going to the Second Respondent: the poster in the First Respondent's widow, the emails sent by Mr. Richards, the fact the claimants were working in some capacity for the Second Respondent immediately after their employment with the First Respondent ends.
48. I remind myself that the Second Respondent and Mr. Stribley accept that Mr. Stribley was working on a probationary period for the Second Respondent. I remind myself that Mr. Richards, was sending emails to customers and expressly identifying the Claimants as working at the Second Respondent's address offering the same services, and that he

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himself is identified as a Graphic Designer for the Second Respondent. This is all occurs after the erection of the poster in the First Respondent's premises.

49. I am left with the situation that the Claimants are, I am asked to believe, not direct employees of the Second Respondent yet are expressly stating they are connected to the business and offering services from its address and dealing with accounts and payment matters of the Second Respondent.
50. Further during this period of time there are emails from the Mr. Richards to customers that emanate from the Quay side design and Print email address, yet no-one has told me what happened to any income generated from the which no longer existed but which, was carrying out business at R2.
51. I find therefore that the employees of the First Respondent therefore are engaged by the Second Respondent, the First Respondent's machinery is taken by the Second Respondent and the customers of the First Respondent are taken by the Second Respondent and provided with new accounts to pay into.
52. There is, in my view, therefore an economic entity that retains its identity. Looking at the material I have before me, the conclusion I reach is that there was a transfer from the First Respondent to the Second Respondent and that the Claimants' employment did transfer to the Second Respondent on 7th November 2017. As such they are not entitled to redundancy payments or notice pay from the First Respondent as claimed: they were not dismissed, their terms and conditions of employment transferred to R2. Their claims are dismissed therefore.

Employment Judge M. Salter

Date: 10th April 2019