



EMPLOYMENT TRIBUNALS

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE F SPENCER

BETWEEN: MRS S COKER,
MR G BUTT,
MR M AHMED

CLAIMANTS

AND

**EMPRESS MOTORS LTD
(IN VOLUNTARY LIQUIDATION) (1)
THE SECRETARY OF STATE FOR BUSINESS,
ENERGY AND INDUSTRIAL STRATEGY (2)**

RESPONDENTS

ON: 11th and 12 October 2018

Appearances

For the Claimant: in person

For the Secretary of State: Mr Soni,

For EML: no appearance

JUDGMENT

The Judgment of the Tribunal is that there was the transfer of an undertaking from EML to Trevor Barnes (trading as Barnes Coaches) on 3 January 2017 and that accordingly the Secretary of State is not liable to make payments to the Claimants under the provisions of sections 166-170 and 182-188 of the Employment Rights Act 1996.

REASONS

1. This was a preliminary hearing to consider whether, by virtue of the Transfer of Undertakings (Protection of Employment) Regulation 1996 (TUPE) there was a

transfer of an undertaking from Empress Motors Ltd to Empress Coaches 1923 Ltd. The hearing had also been listed to consider whether the Claimants were employees covered by the provisions of Regulation 4 of TUPE, and the issue of time limits. However, in the light of my findings below, there is no need to consider those matters.

2. Originally there had been 8 Claimants and 6 Respondents to this litigation. By the time the matter came before me, 5 of the Claimants had withdrawn their claims. The remaining 3 Claimants have claims against Empress Motors Ltd and the Secretary of State for Business, Energy and Industrial Strategy and have withdrawn claims against Trevor Barnes or Empress Coaches 1923 Ltd. It is accepted therefore that if my judgment is that there has been a TUPE transfer the Claimants will not now pursue the transferee for the remedy.
3. The Claimants' remaining claims are against EML for unfair dismissal, unpaid wages, redundancy pay, holiday pay and notice pay. As EML is insolvent a claim has also been made against the Secretary of State. The Insolvency Service has rejected the Claimants claims on the basis that there had been a relevant transfer to Empress Coaches 123 Ltd, which is not insolvent, and it is therefore Empress Coaches 123 Ltd which is liable for any claims which they may have. The Claimants maintain that the Insolvency Service remains liable for those payments.
4. EML itself had not submitted a formal response. Solicitors acting for the joint liquidators had submitted a letter confirming that the liquidators did not intend to take part in the proceedings to save costs. However, the view of the liquidators, on the advice of their solicitors, was that there had been a transfer of resources assigned to the business retaining its identity. They also opined that, as the date of transfer predated the relevant insolvency proceedings, Regulation 8(7) of TUPE did not apply (107). (I note however that the liquidators had on 23rd March 2107 been of the view (695) that TUPE did not apply.)
5. At the preliminary hearing, I had a significant number of documents (exceeding 2000 pages) many of which had become irrelevant following the withdrawal of most of the claims. Mr Soni, for the Secretary of State helpfully took me through some of the documentation and made submissions. I had short statements from Mr Butt and Mr Ahmed and a longer statement from Mrs Coker. Much of Mrs Coker's statement details what she believes to be mismanagement by both EML and Begbies Traynor but that was not an issue before me. The Claimants were able to dispute any of the factual allegations made and to say why they believed that there had not been a TUPE transfer.

The relevant facts.

6. The Claimants all worked for Empress Motors Ltd (EML). Mr Butt and Mr Ahmed were drivers and Mrs Coker was employed as an administrator/account

handler. EML was in the business of providing coach hire services and tours primarily in the London and South East areas. It had 2 sites, one in Bethnal Green and one in Woolwich, which were largely managed and operated separately. The 3 Claimants all worked from the Bethnal Green site. As I understand it EML had 10 employees including the Claimants, 6 of whom worked at the Bethnal Green (E2) site. At the E2 site there was a short-term lease with an option to terminate on 6 months' notice. (678) The Statement of Affairs produced by EML in connection with the creditors voluntary liquidation notes that at the E2 site there were 18 vehicles, 3 office staff and 3 drivers plus contract drivers.

7. Invoices in the bundle dated 3 January 2017 evidence two sales on that date between EML and Mr T Barnes, trading as Barnes Coaches. The first invoice is for the sale of 8 coaches, sold as seen, for a price of £42,000 inclusive of VAT. The 2nd invoice, for £48,000 is for
 - a. the sale of the goodwill of EML to include EML's customer list and diary of work;
 - b. 2 telephone numbers and one fax number;
 - c. Empress Coaches website and advertising hosted by HIBU Yell;
 - d. the rights to the email accounts of Empress Coaches hosted by local life;
 - e. the email address info@Empresscoaches.co.uk; and
 - f. The trading names Empress Coaches and Empress of London.
8. The Claimants say that the invoice relating to the sale of coaches was later cancelled and the coaches sold to Mr Barnes by ITC valuers on behalf of Begbies Traynor the liquidator on 9 January 2017 for £42,000. I was referred to page 2038 where there is an invoice from ITC valuers to Mr T Barnes trading as Barnes Coaches for the sale of 8 coaches for £42,000. However, in a questionnaire submitted by Ms Baxter of Begbies Traynor on 22 March 2017 to the Insolvency Service (697) EML stated that there had been a sale of goodwill and motor vehicles on 3 January 2017. Further the ET3 submitted by Empress Coaches and Trevor Barnes (111) at paragraph 17 states that the 2nd and 6th Respondents (i.e. Trevor Barnes and Coach and Bus Travel Ltd) purchased 8 coaches belonging to EML on 3 January 2017 facilitated by ITC Valuations. I conclude therefore that the sale of the vehicles took place on 3rd January.
9. At that time Mr Barnes ran a coach business. He was the sole director of a company called Coach and Bus Travel Ltd. Empress Coaches 1923 Ltd was incorporated on 4 January 2017. Its sole director is Mr Barnes. He is recorded as owning over 75% of the shares.
10. The Statement of Affairs presented by Begbies Traynor in respect of EML identifies that the directors of EML approached Begbies Traynor on 4th January for advice as to the company's financial position. The board passed a resolution the same day that the company was unable to pay its debts and it then ceased

to trade. The same day, in the presence of the insolvency practitioners Begbies Traynor, all the employees were dismissed by reason of redundancy and advised that EML was insolvent. The Claimants were informed that they should submit claims to the Insolvency Service. Mrs Coker was not present at work on 4th January and was dismissed the following day on 5th January.

11. EML operated from premises in E2. Mr Butt lived at the company's premises. Shortly after he had been dismissed it became clear to him that business was still being carried out from the Bethnal Green premises and that drivers were operating from that site. Mr Butt therefore made enquiries as to the possibility of being employed by the operators of that business and both he and Mr Ahmed were offered employment by Empress Coaches 1923 Ltd on 30th January. Mr Butt, Mr Ahmed and a 3rd employee Mr Westwood (who has now withdrawn his claim) began work with Empress Coaches on 2 February 2017. Mrs Coker was offered employment on 31st January and began on 8 February 2018. The papers indicate that two other drivers (possibly on zero hours contracts), formerly employed by EML, were also taken on by Empress Coaches.
12. I understand that there was a short hiatus before the buses purchased by Mr Barnes/Empress Coaches Ltd could be used until Mr Barnes had been granted an operator's licence in respect of those buses.
13. On 6 February 2017 Empress Coaches 1923 took a six-month lease of the premises in Bethnal Green. Empress Coaches 1923 is still operating from that site.
14. As advised, the Claimant's duly made a claim for redundancy and insolvency payments to the Insolvency Service. In Mrs Coker's claim she identifies that her new job role at Empress Coaches was the same as her previous role, that she was dealing with the same customers and that her terms and conditions had not changed. In her witness statement Ms Coker makes the point that Empress Coaches had not intended to employ any staff from EML. She also states that no customer lists were given to Empress Coaches and that the reason that she was employed was because she had knowledge of their customers.
15. As set out above all the employees were informed that they were redundant on 4th January 2017. Notice of a shareholders meeting was issued on 11th January 2017 proposing a special resolution that joint liquidators be appointed for the purposes of a creditors voluntary winding up. The shareholders and creditors resolutions were passed on 3 February 2017 and the joint liquidators were formally appointed on that day.

The relevant statutory provisions.

16. Regulation 3 of the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE) defines a relevant transfer as, (so far as relevant to

this case) “the 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 economic entity which retains its identity.”

17. Regulation 3 (6) provides that “A relevant transfer (a) may be affected by a series of 2 or more transactions; and (b) may take place whether or not any property is transferred to the transferor by the transferee.”
18. If there is a relevant transfer then, by virtue of Regulation 4, the contracts of employment of those who worked in the transferor business do not come to an end but are transferred to the buyer or transferee.
19. The leading case in identifying whether there has been a relevant transfer and in particular whether there has been the transfer of a business which retains its identity following a transfer is *Cheeseman v R Brewer Contracts Ltd* 2001 IRLR 144.
20. The decisive criterion for establishing the existence of a transfer is whether the entity in question retained its identity by the fact that its operation is actually continued or resumed.
21. In considering whether there has been a transfer it is necessary to consider all the factors characterising the transaction in question including whether or not the tangible assets have been transferred, whether the intangible assets have been transferred, whether the majority of the employees are taken over by the new entity, whether or not the customers are transferred, the degree of similarity between the activities carried on before and after the transfer and the period if any in which they are suspended. The degree of importance to be attached to the various criteria will depend on the activity carried on by the business.
22. The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work done by one contractor and the start by the successor
23. It is not necessary for there to be a contract between the transferor and the transferee, although in this case there was one.
24. In certain insolvency situations Regulation 8(7) of TUPE disapplies Regulation 4. Regulation 8(7) provides that “Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner.” In *Ward Bros (Malton) Ltd – v –*

Middleton and others EAT 0249/13 it was made clear that a person can only be acting as an insolvency practitioner for the purposes of Regulation 8(7) once he or she has actually been appointed to that role. In this case the insolvency practitioner was not formally appointed to that role until 4 February 2017. Although Begbies Traynor was engaged by EML as early as 3 January 2017 they could not be said to have been "acting as insolvency practitioner" for the purposes of Regulation 8 (7) until 4 February 2017.

25. The Secretary of State is liable for redundancy payments and certain debts (defined in section 184 of the Employment Rights Act 1996) payable to the employees where an employer has become insolvent. For that obligation to arise where a company is the employer, the company must be "in liquidation", in administration, an administrative receiver has been appointed or there has been a CVA.

Submissions

26. Mr Soni submitted that there had been a relevant transfer from EML to Empress Coaches 123 Ltd on 3 January 2017. He referred to the relevant statutory provisions, to the case of Cheeseman (above) and submitted that from the relevant facts, the business, or that part of the business which operated from the premises in E2, was sold as a going concern, as indicated by the fact that the operation was continued by Empress Coaches. He referred to the invoices and to the fact that 6 employees of EML had been offered employment with Empress Coaches. Further he submitted that Regulation 8(7) did not operate to disapply the provisions of TUPE because the transferor was not subject to insolvency proceedings at the time of transfer had taken place.
27. The Claimants submitted that Empress Coaches had never intended to employ any staff from EML. They had approached Empress Coaches. Mr Coker also submitted that, despite the invoice referred to above, EML had not transferred clients and customers to Empress Coaches. Customer lists were not held on a computer and Mr Barnes was not able to obtain records of clients. The Claimants had been advised by Begbies Traynor that they would be able to claim through the Insolvency Service.

Conclusions

28. I am satisfied that there was a transfer of a business from EML to Empress Coaches. I note that the invoices referred to above are for sales to Mr Barnes and that Empress Coaches was not incorporated until the day after those invoices i.e. 4 January 2017. Legally therefore it appears to me that there must have been a transfer of the business from EML to Mr Barnes and (presumably) then a subsequent transfer from Mr Barnes to Empress Coaches. Either way there was a relevant transfer away from EML on 3rd January 2017.

29. Trevor Barnes purchased at that time the goodwill, website, trading name telephone numbers and customer lists. At the same time there was a contract to buy coaches. The following day Empress Coaches 1923 Ltd was incorporated. The name of that company was clearly intended to benefit from the goodwill attaching to the Empress name. After a short gap Empress Coaches carried on trading at the same premises, with many of the same coaches, some of the same drivers, in the same business and using trading name Empress. Although Mrs Coker says that customer lists were not in fact delivered, she was able, through her own knowledge, to ensure that Empress Coaches was able to deliver a service to many of the same customers. On any analysis this is the transfer of an undertaking which retains its identity.
30. I accept the Claimants' submission that Trevor Barnes/Empress Coaches did not intend to take over the staff of EML. However that does not change the legal analysis. If there is a TUPE transfer, then the contracts of employment will transfer by operation of law. It follows that at the time that the Claimants' contracts of employment were terminated, their employment had already transferred to Trevor Barnes, who was not bankrupt or insolvent. Moreover, the liquidators were not formally appointed till 4th February 2017 so that EML was not under the supervision of an insolvency practitioner as at the date of transfer and the Claimants cannot benefit from the provisions of Regulation 8(7).
31. I accept that it will seem odd to the Claimants that the law provides that their contracts have transferred to a new business about which they knew nothing at the time. The TUPE regulations have however been designed to protect the interests of employees, so that they may retain their jobs after the sale of a business. They did have rights against Trevor Barnes/Empress Coaches for any lost wages that they have suffered in the intervening period between January and early February but have chosen not to pursue those rights. I sympathise with them, especially when they were advised that they would have claims against the Insolvency Service. That advice was however incorrect, and any remedy lies against Trevor Barnes or Empress Coaches.
32. The claims are dismissed.

Employment Judge F Spencer
12 October 2018