



EMPLOYMENT TRIBUNALS

Claimant: Mr M Holden

Respondent: Secretary of State for Business Energy and Industrial Strategy

Heard at: London South

On: 4 September 2019

Before: Employment Judge Cheetham QC

Representation

Claimant: in person

Respondent: did not attend

JUDGMENT

1. There was no transfer of undertaking from DVG Stone Limited to This Is Stone Limited.
2. The Claimant was employed by DVG Stone Limited at the date of its insolvency.
3. He is entitled to be paid the following sums from the National Insurance Fund:

(i) Redundancy payment: £11,684 (5 x £508 + 12 x 1.5 x £508)

(ii) Notice pay: £6,096 (12 x £508)

Total: £17,780

REASONS

1. This is a claim by Mr Holden for money owed to him by his former employer, DVG Stone Limited. As that company has gone into liquidation, he is pursuing

payment from the National Insurance Funder under the provisions of the Employment Rights Act 1996 ss. 166 and/or 182.

2. As DVG Stone is insolvent, the Secretary of State has been added as a Respondent. In its Response Form, it states that DVG Stone was declared formally insolvent on 18 June 2018. However, it denies liability on the basis that there was a transfer of undertaking between DVG Stone and a company called This Is Stone Limited on or around 25 May 2019. In other words, it contends that the Claimant's employment transferred before the insolvency.
3. At paragraph 14, the Secretary of State says (with the emphasis contained within the pleading):

*"It has been **agreed** that there was a relevant transfer of an undertaking/part of an undertaking for the purposes of TUPE from DVG Stone Limited to This Is Stone Limited on or about 25 May 2019."*

4. However, the Secretary of State does not say between whom it has been agreed and the rest of that section of the Response goes on to argue why the evidence – in the Secretary of State's belief – tends to show that there might have been a transfer.
5. This hearing therefore needed to resolve whether or not there had been a transfer of undertaking. Only Mr Holden attended, together with his friend and carer, who assisted him at the hearing.

Evidence and findings of fact

6. The Claimant told me that he was employed from April 2001 until 18 June 2018. He said that he thought that his employment ended on that date, because that was when DVG Stone became insolvent. DVG Stone carried on the business of stonemasons.
7. He told me that the first time he heard about This is Stone Limited was in September 2018 and that he was told nothing at all about any transfer. The owner of the company of DVG Stone was Maximilian de Viel and, after June 2018, the Claimant was paid his salary from Mr de Viel's personal account, the last payment being made in August. Before that, payments had come from DVG Stone, but as far as the Claimant was concerned, he was simply continuing to work and it was just a case of his salary payments coming from a different account. He was never paid by This Is Stone.
8. I considered the Claimant to be truthful and straightforward in his evidence and I therefore accept his evidence on all of this. Therefore there was no evidence at all from the Claimant suggesting that there had been any transfer.
9. Turning to the documentary evidence, it is easier if I list it as follows:
 - (i) The director's report and statement of affairs for DVG Stone (provided by the liquidators) state that the liquidators were first consulted on 14 March 2018. This followed an HMRC winding up petition (12 March 2018). The directors attributed the company's failure to, "*An inability to increase production or recruit skilled employees to meet the increased*

customer demand” and “*Difficulties in funding trading expenses*”. The company was wound up voluntarily on 18 June 2018.

- (ii) Emailed correspondence between the liquidator (Ian Cooke) and the Insolvency Service, in which he states (email of 17 September 2018) that This Is Stone purchased DVG Stone on 17 July 2018 and in which Mr Cooke gives his opinion that the Claimant’s employment was transferred to, “*either This Is Stone Limited or the Director*”. I note that Parag Soni (at the Insolvency Service) responded with his understanding that, “*The transfer has occurred on 17/07/2018*”. He refers to a “de facto” transfer, whatever that might be.
- (iii) There is a series of emails between the Claimant and Mr Cooke, although it is clear from the occasional use of the third person that the Claimant was helped in writing the emails, presumably by his carer. On 31 August, Mr Cooke asked the Claimant for his details and there was then an exchange in which the Claimant referred to a text from Mr de Viel (undated, but probably early September). This said “*In my mind I hadn’t thought about it till now as I was under the assumption that if I was going to try and make it work again then it was my obligation to transfer employees along with all their accumulated rights to the new company. Which I would do anyway.*”
- (iv) Mr Cooke told the Claimant that the text showed Mr de Viel’s intention to transfer any employees in DVG Stone to a new company. I agree, but I cannot read that text as confirming that he had already done so. In any event, the final email in the chain is from the Claimant (6 September), which said, “*Just had phone call from Max he said he hasn’t transferred to new company*”.
- (v) A print-out of a text message from the Claimant to Mr de Viel, dated 10 September, saying that he was handing in his notice owing to health problems and asking for his P45 and unpaid holiday pay. The Claimant told me that he was confused by what was happening, which is borne out by this text message.
- (vi) The final page of a sale agreement dated 17 July 2018 and signed by Mr de Viel on behalf of This Is Stone.

Conclusion

10. The evidence shows that DVG Stone became insolvent on 18 June 2018 at a time when the Claimant was employed by them. It appears that there was subsequently an asset sale – probably on 17 July – to This Is Stone. In reality, Mr Viel was selling one of his companies to another. However, there is no evidence before me that there was a transfer of undertaking between DVG Stone and This Is Stone, as a result of which the Claimant’s employment transferred. The evidence suggests that Mr de Viel intended that to happen, but there is no documentary or other evidence to suggest that it actually happened.

11. I do not understand upon what basis the Secretary of State contends that it was “agreed” that there was a transfer, when there is no evidence of any agreement.

I also do not understand how it can be asserted with such certainty that a transfer occurred before the insolvency event, when none of the documentation supports that contention.

12. Whether or not it is necessary for an employee to be aware of a transfer of undertaking, nonetheless there was no provision of information, no consultation and nothing was ever said to the Claimant. If there was a transfer, there is no obvious reason why Mr de Viel would not have told him (as opposed to denying there had been a transfer).

13. It appears to me that Mr de Viel carried on paying the Claimant out of his own pocket after DVG ceased trading, without explaining anything, while he tried to sort out his business. However, in my judgment, the Claimant was employed by DVG Stone at the date of insolvency and he is therefore entitled to be paid the payments that he now claims from the National Insurance Fund.

14. As far as I can judge, these sums are:

- (iii) Redundancy payment: £11,684 (5 x £508 + 12 x 1.5 x £508)
- (iv) Notice pay: £6,096 (12 x £508)

Total: £17,780

Employment Judge Cheetham QC

Date 23 September 2019