



EMPLOYMENT TRIBUNALS

Claimant: Mr A Cohen

Respondents: 1. Atlas One Limited
2. Eddisons Commercial Limited

Heard at: Manchester **On:** 4 February 2020

Before: Employment Judge Ross

REPRESENTATION:

Claimant: Mr D Kessler, Counsel
Respondent: Miss J Hughes, Counsel

JUDGMENT having been sent to the parties 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. The claimant brought claims that either he was automatically unfairly dismissed by R2 pursuant to Regulation 7 TUPE regulations 2006 or he was unfairly dismissed by R1 pursuant to s95 and s98 Employment Rights Act 1996. He also brought a claim of a failure to inform and consult against R1 and R2 pursuant to Reg 13 and 15 TUPE 2006. He brought a claim for unpaid wages and a claim for holiday pay against R1, but against R2 if there was a TUPE transfer. He brought a claim for wrongful dismissal because he did not receive the correct notice pay against R1, but against R2 if there was a TUPE transfer.

2. The key issue for the Tribunal to decide was whether there a relevant TUPE transfer within the meaning of Reg 3(1)(a) TUPE 2006 from R1 to R2. Neither party referred to the service provision change provision at 3(1)(b) TUPE 2006.

3. R2 conceded at the outset of the hearing that if there was a relevant transfer between R1 and R2, then the claimant had been automatically unfairly dismissed by R2 pursuant to Reg 7 TUPE 2006.
4. Both the claimant and R2 were ably represented by counsel.
5. R1 had never filed a response to the claim, had not participated in the proceedings and was not represented at the hearing.
6. I heard from the claimant. For R2 I heard from Mr Foster, Mr Staveley and Mr Silas. Mr Foster is a finance director of R2, Mr Staveley until the week before the Tribunal hearing was an employee and non-executive director of R2. He is now self-employed. He was also a director and employee of R1. Mr Silas is an employee of R2. He too was an employee and director of R1.

FACTS

7. I find the following facts.
8. The claimant was employed by the first respondent from 2 May 2017 until his employment was terminated by a letter dated 30 August 2019 which was received by the claimant on 12 September of 2019. Although he was originally employed as an unqualified surveyor, latterly he had been working essentially as an Administrator for the first respondent. I find the first respondent was a Chartered firm of Surveyors providing property valuation advice to a range of lender clients and these clients were described as secondary lenders. The largest client was a bank named "Together" which accounted for 60% of their business. This client and the other clients of R1 were listed at page 52.
9. In August of 2019 the first respondent realised it was in difficulties because it was having problems renewing its Professional Indemnity Insurance on the open market. The first respondent entered into discussions with the second respondent Eddisons Commercial Limited. I find the second respondent is a firm of Chartered Surveyors providing a full range of real estate services including property valuation to a range of corporate clients on a national basis. I find Mr Foster, Finance Director of the second respondent presented a proposal to their board in August 2019 that the second respondent should employ the staff and purchase the name and the assets of the first respondent. The proposal specifically stated that R2 would offer employment contracts to the staff of Atlas One and acquire the name, brand and job records for a nominal sum. (p52)
10. I find that the Board of the second respondent was concerned about acquiring the firm for nominal consideration because they considered if they did this they would be responsible for any liability outstanding in relation to any sums owed relating to any historic professional indemnity claim. Although Mr Foster didn't expressly say so in cross examination I find it is likely the reason why the second respondent was concerned it may be responsible for the liabilities of the first respondent is by reason of TUPE 2006 because Regulation 4 TUPE 2006 makes it clear that any duties or liabilities in connection with a contract of employment pass

from the transferor to the transferee on the transfer of an undertaking. Mr Foster said the second respondent was “cognisant” of its responsibilities under TUPE.

11. I find that the second respondent therefore decided to proceed as follows. They would offer the qualified Surveyors employed by the first respondent employment on the basis the Surveyors would bring work from R1’s client lists: “Atlas One-Agreed to progress on the basis of employment offers if Together confirm workflow.” See Action Points from board meeting on 30.8.19 p60. I rely on the minutes of the board meeting on 30 August 2019 which stated: “no historic liabilities are being required, plan is to offer employment contract to all the relevant staff, low risk on this basis”. It then goes on to say that the staff are to be recruited and the plan is in addition to dealing with Atlas One’s existing relationships they will “assist Eddisons to service lower end bank work”. p58

12. I find that in August 2019 the first respondent employed seven people: the claimant (who worked as an Administrator), a Trainee Surveyor and five Chartered Surveyors. It was agreed that all the Surveyors were offered a job with the second respondent. Mr Foster explained that the second respondent didn’t need an administrator or a trainee surveyor and so the claimant and the trainee surveyor were not offered employment. I rely on the evidence of Mr Foster and Mr Staveley that they both had spoken to the first respondent’s main client “Together” to check that they had that client’s assurance that the workflow (and thus revenue) from that client would follow the Surveyors to R2. I find the motivation to take on the Surveyors was because the second respondent wanted to obtain work from the first respondent’s clients.

13. I rely on the evidence of Mr Staveley that the surveying business is a labour-intensive business, it is not a business with substantial physical assets such as equipment. I find the assets of a professional business of this type was indeed its people. Mr Staveley agreed the first respondent did not own but leased premises and that the surveyors worked primarily outside those premises and the lease terminated in September 2019.

14. He also explained that the valuation work the surveyors did for their clients was short term in the sense that each valuation project could take from a few hours to up to 4 days. I find it was the workflow of instructions and consequent revenue stream which was important-namely that the first respondent’s clients such as Together sent regular instructions to R1 to carry out property valuations. Mr Staveley stressed the personal connection between himself and the surveyors with their clients.

15. Although the claimant was told when his employment terminated that the first respondent’s business was imminently going into liquidation, it is still as of the date of today’s hearing showing active on the Companies House website. Mr Staveley said the first respondent’s outgoings now exceed any income, he remains a director but there are no longer any employees. He agreed he worked for R2 from 2 October 2019. The other surveyors started work for R2 on 23,24 and 30 September 2019. (p67,69,76)

16. Mr Staveley said at Tribunal it is still his intention to appoint a liquidator for R1 but of course that is what he told the claimant in the Summer of last year. Both Mr

Staveley and Mr Silas were directors of the first respondent, Mr Staveley was non-executive director of the second respondent as well as an employee but he told us that within the last week he has now become self-employed.

17. Mr Staveley agreed R1 has not paid the claimant a redundancy payment. There was no evidence that either respondent consulted the claimant about a TUPE transfer. The claimant wrote to R1 by email on 30 August 2019 expressing his concerns about TUPE, consultation and his employment situation. p55-6. It is not disputed he never received a reply.

The Law

18. The relevant law is Regulation 3(1) of TUPE 2006 which states: "*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*"

19. Counsel very helpfully prepared a bundle of authorities for me which included the key authorities of **Spijkers v Gebroeders Benedik Abattoir CV and anor 1986 2 CMLR**, **Cheesman and ors v Brewer Contracts Ltd 2001 IRLR 144** as well as **Kerry Foods v Creber 2000 ICR 556** and **Whitewater Leisure Management Ltd v Barnes 2000 ICR 1049**. I was also referred to **Kuzel v Roche 2008 ICR 799** for the burden of proof in a claim for automatically unfair dismissal.

Applying the law to the facts

20. The first question is: was there an economic entity? It was agreed there was.

21. The second question is: has that economic entity retained its identity? The third question is: was there a transfer to another person? These 2 questions are the heart of the dispute in this case. To answer the second and third question, I must be clear about the nature of the economic entity. What was the organised grouping of resources which had the objective of pursuing an economic activity whether or not that was central or ancillary? (Reg 3(2) TUPE)

22. In considering the second question I had regard to the guidance in **Whitewater Leisure Management Ltd v Barnes 2000 ICR 1049**. I find the economic entity in this case was a small group of 7 staff working to provide property valuation advice to a range of lender clients, the largest being a bank called Together. This was a labour-intensive business and it is undisputed that the economic entity's key assets were its people, in particular the 5 members of staff who were qualified chartered surveyors.

23. I remind myself of the guidance in **Spijkers v Gebroeders Benedik Abattoir CV and anor 1986 2 CMLR**. I turn to consider the guidelines set out in **Cheesman and ors v Brewer Contracts Ltd 2001 IRLR 144** in order to answer the second question: did the entity retain its identity?

24. I find the Surveyors who transferred to R2 continued to carry out property valuation advice for lender clients in particular the client Together. It was confirmed in cross examination that this was indeed the case. The fact that these Surveyors subsequently additionally also did other similar work for R2 does not mean the entity did not remain its identity when considering that the nature of the entity was a group of skilled wage earners working on the task of providing property valuation advice to secondary lenders.

25. The guidance in the Cheesman case expressly states that in a labour-intensive sector it is to be recognised that a group of workers engaged in joint activities on a permanent basis may exist on its own as an economic entity.

26. The Cheesman guidance requires me to look at other relevant factors such as tangible and intangible assets. It is agreed that in this case there are no other substantial tangible assets of the economic entity, such as equipment or property. It is agreed that although there was an office base, the Surveyors by the nature of their work, frequently worked away from that base. The office was not owned, it was leased and the lease ended in September 2019. The surveyors were based in the second respondent's premises in Manchester once they transferred to R2.

27. I turn to consider other factors-did the majority of employees carry over? Was there any delay in the period in which the activities were carried out, was there any suspension of activities? I find the majority of the employees did carry over. The economic entity employed 7 people. 5 of those 7 were offered employment with the second respondent. One chose not to accept, the other 4 surveyors transferred. The second respondent suggests it is significant that the contracts of employment of the surveyors with R2 do not grant continuity of employment of their service with R1. I am not satisfied that is significant. R2 does not accept TUPE applies. It is clear the Board of R2 proceeded on the basis TUPE did not apply. It is therefore unsurprising they did not give the surveyors who transferred to them continuity of service, a right provided under TUPE.

28. I must look at the reality of the situation. I heard no evidence of any suspension of activities in providing valuation reports to clients. Mr Staveley candidly admitted the delay in his start date of 3 weeks was because he took annual leave. That is not a factor suggesting delay. The start dates of the surveyors' contracts of employment does not suggest any significant delay. They began working for the respondent within a few weeks of the critical board meeting of R2 on 30.8.19.

29. I turn to the issue of intangible assets. An area of dispute in this case is the weight to be attached to the relationship between Mr Staveley, Mr Silas and the other Surveyors and their lender clients. I find this relationship or "goodwill" was a key reason why the second respondent wanted to employ the Surveyors and is relevant to the issue of whether or not there was a transfer of an undertaking under the Cheesman guidelines.

30. I find the second respondent was not simply trying to recruit individual Surveyors for its business as was suggested. The second respondent had a specific proposal, namely to purchase R1, see Mr Foster's proposal at page 52. I find that the second respondent was concerned it was likely they would be responsible for

any historic claims relevant to the professional indemnity insurance if they accepted this proposal: Mr Foster say they were cognisant of their responsibilities under TUPE. What happened next was R2 went ahead with the proposal to take the staff they wanted, namely all the surveyors, making sure that they would retain the same level of instructions from the key client, see page 53, page 60 and Mr Staveley's evidence. It chose not to pay a nominal sum to formally acquire the business. It looks rather from the outside as if they may have wished to avoid any TUPE liability.

31. Turning back to the guidance in *Cheeseman* I am satisfied there was an intangible asset which came with the group of surveyors as an intrinsic part of the economic entity: that their clients would continue to instruct them to provide valuation advice.

32. The second respondent relied on the fact that the relevant client lenders had a panel of surveyors whom they instructed and R2 was also on this panel, as well as R1. I am not satisfied this is relevant to determining whether there was a transfer of a relevant economic entity. I find it is relevant that the economic entity as I have defined it transferred to the respondent. The fact that R2 was also on the panel of those lender clients is not directly relevant.

33. Therefore having regard to the factors in this case as outlined above I find there was an economic entity which retained its identity. I find the answer to the second question is yes.

34. I turn to the third question. Was there a transfer "to another person"? I find the answer is yes. There does not have to be a contract between the transferor and transferee. There does not have to be a transfer of property- Reg 3(6)(b). There must be a transfer of an economic entity which retains its identity and I am satisfied that there was a transfer of the economic entity I have described above to the second respondent on or around 30.8.2019.

35. Finally, I will deal with the burden of proof, which was raised by R2. It is quite right that where a claimant brings a claim of automatic unfair dismissal it is for the claimant, in accordance with the guidance in **Kuzel v Roche**, to discharge an evidential burden to show, without having to prove, that there is an issue which warrants investigation and which is capable of establishing the automatically unfair reason.

36. In this this case the claimant says he was unfairly dismissed automatically by reason of TUPE and the respondent says the real reason was that there was a redundancy by the first respondent

37. I took into account the fact the claimant has never been paid a redundancy payment by the first respondent and there appears not to have been any meaningful consultation with him in relation to the redundancy by the first respondent. I find these are factors which could suggest redundancy was not the real reason for dismissal.

38. Finally, of the seven staff working for the first respondent five were offered a job with the second respondent within a very short time of the claimant being notified his employment was at an end which is evidence which could suggest that the real reason for dismissal was Regulation 7 TUPE.

39. I am satisfied these factors are sufficient to discharge the evidential burden.

40. Having found there was a relevant TUPE transfer within the meaning of Reg 3(1)(a) TUPE and the second respondent having agreed at the outset of the hearing this outcome means he was automatically unfairly dismissed, it was necessary to determine compensation for this and the claimant's other claims ie failure to inform and consult(TUPE), wrongful dismissal (notice pay) and unlawful deduction from wages. (wages, holiday pay).

41. Following a short break after delivery of oral reasons, the parties appeared to have agreed settlement avoiding the need to call the claimant to give further evidence or to relist to deal with the outcome of the remaining claims and remedy.

42. I suggested, as is usual, that the case was stayed to allow terms of settlement to take effect and dismissal on withdrawal to take place after that date. However, the respondent then indicated it may wish to appeal and sought these written reasons.

43. The case was therefore stayed for 28 days from the date of Judgment in the terms identified in Judgment.

Employment Judge Ross

7 February 2020

REASONS SENT TO THE PARTIES ON

17 February 2020

FOR THE TRIBUNAL OFFICE

[JE]