



EMPLOYMENT TRIBUNALS (SCOTLAND)

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**Case No: 4108981/2021 Hearing by Cloud Video Platform (CVP) on 10
January 2022**

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**Employment Judge: M A Macleod
Tribunal Member: M Watt
Tribunal Member: A Ward**

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Ross Glanville

**Claimant
In Person**

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Mariusz Batog trading as Batog Cleaning Service

**Respondent
In Person**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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**The unanimous Judgment of the Employment Tribunal is that the claimant's
claim of unfair dismissal succeeds, and that the respondent is ordered to
pay to the claimant the sum of Three Thousand Four Hundred and Fifty
Seven Pounds and Sixty Pence (£3,457.60).**

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REASONS

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1. The claimant presented a claim to the Employment Tribunal on 7 April 2021 in which he complained that the respondent had unfairly dismissed him.
2. The respondent submitted an ET3 in which they resisted the claimant's claim.
3. A Hearing was listed to take place by CVP on 10 January 2022. The claimant appeared on his own behalf, and the respondent appeared on his own behalf, assisted by a Polish language interpreter, Ms Beata Czekaj-

Kubikowska. Her assistance was of considerable help not only to the respondent but also to the claimant and the Tribunal.

4. Each party gave evidence on their own account, and referred to some documents which were presented to the Tribunal.
5. Based on the evidence led and the information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

6. The claimant, whose date of birth is 6 May 1987, commenced employment with Accelerate Cleaning Solutions Limited (ACS) on 1 June 2017, as a Cleaning Operative, employed to clean an office in Thistle Street, Edinburgh, on a part-time basis.
7. He was offered additional hours to carry out cleaning duties in an office at 76 George Street, again by ACS. He was required to carry out two separate sets of duties. First, he was contracted to clean the tenanted offices within the building; and second, he was contracted to clean the common areas of the building, namely the reception, basement and corridor areas.
8. The hours of work in respect of the contract to clean the common areas of 76 George Street were 2 per day, Monday to Friday, thus amounting to 10 hour per week.
9. He was paid £8.91 per hour and therefore £89.10 per week for this work.
10. No contract of employment was produced by the claimant in respect of his employment relationship with ACS.
11. ACS did not own either building in which the claimant worked, but was contracted to provide the cleaning services by Galbraith, the company which was responsible for managing the building at 76 George Street.
12. On 9 November 2020, the claimant attended work at 76 George Street. While there, 3 men arrived at the door of the building. He did not permit them to have access to the building, as he had no authority or authorisation

to do so. One of the 3 men was Mr Batog, the respondent in this case. He asked the claimant what was happening with the cleaning. He explained that he was there to do all the common areas, stairs, kitchens, toilets and clean the inside windows in all offices. The claimant replied that that was his own job, which he had been doing for 3 years.

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13. When the claimant advised Mr Batog that he was not permitted to allow him to have entry to the building, Mr Batog advised that he would contact the person whom he had been contracted with, and would confirm the position. When Mr Batog and his colleagues left, the claimant phoned his manager, Sharon, based in Glasgow. He explained what had happened, and the conversation he had had with Mr Batog. Her reaction was that she had not been informed of any contract changes and advised him to carry on as normal while she would seek to investigate the matter.

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14. On the following day, 10 November 2020, the claimant attended work as normal, but Mr Batog and his colleagues did not attend. However, on 11 November, the claimant attended the office, and Mr Batog and his colleagues arrived. He repeated his understanding that he had been contracted to carry out the cleaning of the common areas of the building, and that he had also been told to move the claimant's materials from the cleaning cupboard.

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15. The claimant then showed Mr Batog around the building and explained the areas which he was accustomed to cleaning.

16. The claimant continued to attend the office in order to carry out his cleaning duties, on the basis that he had been told to continue to do so until informed otherwise. While he was there, Mr Batog would also attend.

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17. On 12 November 2020, Gary Morgan of ACS emailed the claimant, with a copy to Sharon Hutton (C2). He apologised for the situation that they found themselves in, given the landlord sale of the property.

18. With regard to the cleaning of 76 George Street, Mr Morgan stated:

5 *“Your two hour per day role is current and still in the same as far as Accelerate is concerned, we are currently seeking clarification if the new managing agent – Galbraith are serving termination of this contract, if so then we have made them aware of the statutory legal obligations surrounding TUPE and we believe your role is protected and in scope for a transfer over to the new provider if you so wish.”*

19. The claimant was by this time aware of Galbraith and their role in the management of the building, but he had not previously heard of them.

10 20. On 13 November 2020, Mr Morgan emailed the claimant again, copying the email to Ms Hutton (C3):

15 *“Just to confirm the landlord cleaning at 76 George Street will end with Accelerate on the 31st January 2021, and in our opinion your role will be subject to TUPE legislation. We have requested the new providers details to pass on your ELI information and will of course keep you updated on progress.”*

20 21. The claimant therefore understood that his employment with ACS in relation to the common parts of 76 George Street would end on 31 January 2021. He had been advised that his employment should transfer to the new provider of the service, but had been unable to obtain any response from Mr Batog about this. He wrote to Galbraith on 24 January 2021 (C4). In that letter he pointed out that he knew nothing of any service change until “your chosen provider” (namely Mr Batog) arrived on site with 2 other gentlemen on 9 November 2020. He explained in detail the duties which he had carried out, including assisting the police with issues relating to homeless people and drug abuse which affected the premises.

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22. He went on:

“I am now fully aware of TUPE legislation. Typically, any new service provider automatically becomes the incoming employer of existing in-house staff where a change in provider is taking place. Granted you have refused

the transfer yourself as you employ a company to provide this service for you.

...I should not simply be made redundant and especially not without any level of recompense when my position is currently as it has always been. “

5 23. The claimant received no reply from Galbraith to this letter.

24. The claimant's employment under this contract – to clean the common parts of 76 George Street – came to an end on 31 January 2021. He was not paid thereafter, and although he attended the building on 1 February 2021, he did not carry out any work in relation to this part of his previous contract.

10 25. The claimant contacted Mr Batog in December to find out his view but Mr Batog told him that it was nothing to do with him.

26. He made contact with ACAS on 13 January 2021 to start early conciliation but without any success, and accordingly he raised the Tribunal proceedings.

15 27. Mr Batog is a self-employed businessman trading as Batog Cleaning Services. He denied in evidence before us that he employs any staff, but said that he does, from time to time, hire other self-employed people if he needs assistance with any contracts. He said he was unaware that there was anyone else employed to carry out the cleaning work which he was
20 asked to take over.

28. He was advised by Yvonne Hay, of Galbraith, on 27 October 2020 (R1) that they had taken over another building, and that there was 10 hours cleaning per week in the property. They offered him the opportunity to carry out that work.

25 29. Mr Batog responded to this message on 5 November 2020 (R4) to say that
“We can start this weekend with deep cleaning of the basement as well as the general stairwell and the entrance cleaning (76 George Street)...We can start cleaning regularly from Monday only if that suits you. I would also like to add that in Rutland Sq office we also wash windows every 2 months and

the cost is £80.” The message concluded “Thank you, Mariusz” “Kind regards BCS Cleaning”

30. Mr Batog made clear in his evidence that he is not an employee of Galbraith, but that he is self-employed and responsible for the cleaning of the building on the basis that he has been contracted as an independent contractor by Galbraith.

Discussion and Decision

31. The claimant complains that he was unfairly dismissed by the respondent. The respondent denies not only that he is responsible for dismissing the claimant, but also that he had any responsibility for the claimant or any knowledge of his position with regard to the cleaning of 76 George Street.

32. We found the claimant to be clear and honest in his evidence, and we were prepared to accept his evidence as being both truthful and accurate. He was able to explain that despite the change of contractor for the cleaning of the building, he had been left entirely unaware as to what was happening from 31 January 2021 onwards, and was not consulted at all by the respondent.

33. We found Mr Batog’s evidence to be more difficult to accept. It is plain that he runs a business, by himself, in which he takes on contracts to clean buildings across Edinburgh. In doing so, we found it impossible to believe that he has had no prior knowledge of the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). However, since ignorance of TUPE is not of itself unlawful, we have to determine how these events should be categorised in law.

34. The claimant was employed by ACS to provide a cleaning service at 76 George Street, looking after the common parts, from 28 February 2018. At some point shortly before 31 January 2021, ACS lost the contract for that building, which it is understood was with the company previously responsible for that building, and Galbraith, who took over that building,

then decided to contract with the respondent, as a self-employed sole trader, trading as Batog Cleaning Services.

35. It is clear from the evidence that the service which the claimant had been responsible for – the cleaning of the common parts of 76 George Street –
5 was then transferred to Batog Cleaning Services with effect from 31 January 2021.

36. A relevant transfer under TUPE is defined in Regulation 3 as applying 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
10 another person where there is the transfer of an economic entity which retains its identity;

(b) a service provision change, that is a situation in which –

(i) activities cease to be carried out by a person (‘a client’) on his own
behalf and are carried out instead by another person on the client’s behalf
15 (‘a contractor’);

(ii) activities cease to be carried out by a contractor on a client’s
behalf (whether or not those activities had previously been carried out by
the client on his own behalf) and are carried out instead by another person
(‘a subsequent contractor’) on the client’s behalf; or

(iii) activities cease to be carried out by a contractor or a subsequent
20 contractor on a client’s behalf (whether or not those activities had previously
been carried out by the client on his own behalf) and are carried out instead
by the client on his own behalf.”

37. In our judgment, the service – the cleaning of the common parts of 76
25 George Street – was carried out by ACS, and then ceased to be carried out
by ACS with effect from 31 January 2021; they were the contractor
providing the service, employing the claimant, to BNP Paribas, who were
previously responsible for the management of the building; then the service
was carried out by the respondent, contracted to Galbraith, who took over

responsibility for the building. This was therefore a service provision change under Regulation 3(b)(ii) of TUPE.

38. Regulation 3(3) goes on to provide that there must be, immediately before the service provision change, an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client. In our judgment, the claimant clearly had that purpose.

39. As a result, we have concluded that the claimant was subject to a relevant service provision change at 31 January 2021, and should have had his contract of employment transferred from ACS to the respondent, who took over the primary responsibility for providing the service which he had been engaged in. Albeit that the claimant is an individual, rather than a grouping, his principal purpose in relation to that contract was to provide the service which was taken over by the respondent.

40. The respondent has protested innocence and ignorance of this matter. However, the facts are clear: the claimant was engaged in the service which was transferred, and should have transferred to the employment of the respondent with it. The respondent is a sole trader, and not an employee of Galbraith. Had he been an employee, the service provision change may have been to Galbraith rather than to his business, but he was adamant that he was a self-employed independent contractor to Galbraith, and in the absence of any contradictory evidence we must accept that to be the case.

41. Under Regulation 4 of TUPE, the relevant transfer under Regulation 3 shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of employees which is the subject of the transfer – in this case, the claimant – and the claimant's contract of employment shall have effect after the transfer as if originally made between the transferee and the employee. In this case, the effect of the service provision change was to transfer the claimant's contract of employment from ACS to the respondent. The claimant attempted to attend for work on 1 February 2021, and in advance to clarify his ongoing position with the respondent, but without success.

42. The effect of the respondent's actions were therefore to dismiss the claimant.

43. Regulation 7 then provides that where either before or after a relevant transfer, an employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the Employment Rights Act 1996 as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

44. In this case, we are persuaded that the claimant's dismissal was for the sole reason of the transfer having taken place. The respondent simply failed to acknowledge his contract of employment, and his employment with them, and therefore his contract was terminated with effect from 31 January 2021. His dismissal was related only to the transfer, and was therefore unfair.

45. The respondent must therefore pay to the claimant compensation in relation to his dismissal.

46. Firstly, the respondent must pay to the claimant a basic award. The claimant was earning £89.10 per week, and had been employed for 2 completed years by the transferor up to the date of the transfer, in carrying out the cleaning of the common parts of 76 George Street. The claimant was 34 years of age as at the date of dismissal, and accordingly his basic award is £178.20.

47. Secondly, the claimant claims a compensatory award. Following his dismissal, he made a number of attempts to obtain alternative employment, applying for jobs he found on websites which he searched for the purpose. He did eventually find employment commencing on 6 September 2021 with Changeworks Recycling as a Recycling Collections Operative, working full time 40 hours per week at £10.36 per hour. Prior to that, he continued to carry out his other cleaning duties on contract to ACS, but was unable to find employment to supplement that income.

48. We were persuaded that the claimant did make reasonable efforts to mitigate his losses by seeking to obtain alternative employment. The

burden of proof for demonstrating that he failed to do so rests with the respondent, who did not challenge the claimant on this matter.

49. Accordingly, it is our judgment that the claimant should be awarded compensation in relation to the period from 31 January 2021 until 6
5 September 2021, a period of 31 weeks at £89.10, which brings out a sum of £2,762.10.

50. In addition, it is just and equitable to award the claimant the sum of £250 in relation to the loss of employment rights.

51. The claimant was also due 25 days' outstanding holiday accrued but
10 untaken as at the date of dismissal, amounting to $25 \times £17.82 = £445.50$.

52. In total, therefore, the respondent must pay to the claimant the sum of £3,457.60.

53. The claimant's claim therefore succeeds.

15 Employment Judge: Murdo Macleod
Date of Judgment: 11 February 2022
Entered in register: 15 February 2022
and copied to parties

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