



EMPLOYMENT TRIBUNALS

Claimant: Ms S Percival

Respondents: A&P Tools and Products Ltd (in liquidation) R1
FG Motorsports Limited (in liquidation) R2
Certa Precision Engineering Ltd (R3)
Secretary of State for Business and Energy (R4)

Heard at: London South **On:** 23/1/2020

Before: Employment Judge Wright

Representation:

Claimant: In person

Respondent 1: No representation

**Respondents 2
and 3:**

Mr C Davey – counsel

Respondent 4: Written representations

LIABILITY JUDGMENT

It is the Judgment of the Tribunal on the preliminary issue of who was the claimant's employer that she was an employee of R1. As R1 has not presented a response to the claim, a Judgment has been made based upon the available material. R1 is liable to the claimant for the following sums:

A redundancy payment of £21,100 (subject to the allowance provided for under Part 6 Chapter 3 of Income Tax (Earnings and Pensions) Act 2003);

Three months' notice pay £8,312.49 (this is a gross sum and the claimant must account to HMRC);

Holiday pay £1,882.07 (it is not clear if this is a gross or net sum, if gross then the claimant must account to HMRC and if net, it should be grossed up in order that the claimant receives the net sum and can then account to HMRC.

The claimant is to account for any payment on account which has been paid.

R2 and R3 are dismissed from the proceedings.

REASONS

1. The claimant presented a claim on 19/6/2019. She initially brought her claim against R1 and R2 and said there was a TUPE¹ transfer from R1 to R2 on or about March 2018. For R1 the period of early conciliation was 9/5/2019 to 6/6/2019 and for R2 it was 29/5/2019 to 18/6/2019.
2. The response was due to be presented by the 13/9/2019. The response from R2 was presented on 11/9/2019. R2 defended the claim stating that she claimant was not an employee of R2 and that there was a share sale of R1 on or around 18/2/2018; and it denied there was a TUPE transfer.
3. There was no response presented by R1.
4. The identity of the R2 as named by the claimant was unclear. The claimant referred to R2 as F G Motorsport t/a Certa Precision Engineering Ltd.
5. Mr Davey said that the R2 as identified by the claimant was in fact two separate subsidiary companies. Mr Yasar Khan was director of Corporate Publishing Limited (06188385) and he had at least three subsidiary companies. They included R1 (00415532), R2-FG Motorsports Limited (08082315) and R3-Certa Precision Engineering Limited (09337752).
6. Mr Davey said the claimant's case her employment had TUPE transferred from R1 to R2 or R3 was simply incorrect. She had been and remained employed by R1. It was also said on behalf of Mr Khan that at the time the claimant was made redundant, R1 had ceased trading. That was correct at the time the claimant was made redundant. At the hearing however, the Tribunal was told later Mr Khan had decided to put R1 into a CVA. It is noted that Mr Khan gave instructions in respect of R2 and R3, but did not do so and did not present a response in respect of R1. That position is unsatisfactory.
7. The claimant agreed with what Mr Davey said. She said that R1 was in financial difficulties had Corporate Publishing Limited not bought the shares, it

¹ A transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

'probably would have closed'. She did however dispute that she worked for R1 and contended she had transferred to either R2 or R3. She was unclear who her employer was, but her payslips had R1's name on them.

8. It was decided to determine whether or not there was a TUPE transfer and if so, to whom as a preliminary issue. It was suggested that as there was no response from R1, a Rule 21 Judgment could be entered against it. If however it was found there was a TUPE transfer from R1 to R2 or R3, the correct course of action would be to dismiss R1 from the proceedings, irrespective of the failure to present an ET3 as R1 would have no liability.
9. The Tribunal then proceeded to hear evidence from the claimant and Mr Khan and had submissions from Mr Davey on behalf of R2 and R3. The claimant's submission was short. She said when Mr Khan took over, all bills were paid up-to-date, including HMRC. She referenced a mortgage taken out the previous October and referred then to financial difficulties. She concluded by saying – the whole thing was set up to be as confusing as a spider's web².
10. Mr Davey submitted that the claimant was confused and she was mistaken over the position. When she was asked why she believed she had transferred to R3, it came down to an internet page, where she was shown as part of the team of R3. That was the way the team was presented to customers. The claimant never suggested she was an employee of R3 and she never asked that question; it may just be wishful thinking on the claimant's part. It was clear from the facts that she was not an employee of R2 and R3.
11. Judgment on the preliminary issue was reserved. From late-January 2020 the Covid-19 pandemic began to take hold. On 24/1/2020 there was a direction to ask the parties for their comments in respect of joining the Secretary of State to the proceedings. That letter was not sent until 3/3/2020. R2 and R3 took a neutral stance. There did not appear to be a response from the claimant.
12. Shortly after this, the first national lockdown came into force on 23/3/2020. This had the knock-on effect of Tribunal staff and Judges not being able to attend the office. As such, progress was slowed. The claim was not served upon R4 until June 2020 by post. The claimant did make enquiries of the progress of the case during summer 2020. During that period of time however lockdown restrictions still applied.
13. By September 2020 and due to the fact many offices were closed and many employees were working from home, it was decided to re-serve the ET1 on R4 via an email address which resulted from a search on 'contacting BEIS'. The website stated that R4 was unable to respond promptly to letters sent by post and requested correspondence be sent by email. That was done, however it appears from the response that some documents were missing from those sent to R4.

² The 'spider's web' comment came from the claimant, not from the Judge.

14. The file was then referred to an Employment Judge on 2/11/2020 and was considered on 14/1/2021. The claimant was asked for her views on 15/1/2021 and she responded on 19/1/2021. The claimant was still engaging with the Tribunal during this period. Another Employment Judge considered the referral and it appears it was not made clear that a hearing had already taken place. Due to that misunderstanding, the case was listed for a preliminary hearing (presumably to decide the issue which had been identified on 23/1/2020 and which was under consideration).
15. The file was further referred and the instruction was again given to list the case for a preliminary hearing on 19/4/2021. The claimant's email of 24/3/2021 in which she said she was baffled why the case would be listed for a preliminary hearing, when a hearing had taken place in January 2020 had not at that point, found its way onto the file and therefore was not before the Judge.
16. The preliminary hearing listed for 28/5/2021 was not allocated to a Judge and therefore the parties were informed that it may not take place on the relevant date. It should be noted that there was no input or response from R2 or R3 at this stage evident from the file.
17. Counsel instructed by the claimant then began to correspond with the Tribunal in June 2021 and solicitors for R3 also referred to a reserved Judgment which was awaited.
18. A further response was received from R4 dated 8/10/2021, although it is not clear what prompted this. It may have been the notice of hearing dated 21/9/2021.
19. At a preliminary hearing on 10/2/2022 Employment Judge Harrington decided, with the agreement of the parties, that the outcome of this hearing should be produced and the preliminary hearing did not proceed.
20. The Tribunal sincerely apologises for the delay in providing this reserved judgment. There was some delay due to matters outside of the Tribunal and parties' control. There was also unfortunate delay in the file being referred to the correct Judge and then in producing these written reasons.
21. TUPE does not apply to a share sale. The BIS Guide states: 'To qualify as a business transfer, the identity of the employer must change. The Regulations do not therefore apply to transfers by share take-over because, when a company's shares are sold to new shareholders, there is no transfer of a business or undertaking: the same company continues to be the employer'.
22. Based upon the evidence heard and taking into account there was little factual dispute, the Tribunal finds that the claimant was employed by R1. There was no transfer to either R2 or R3. Apart from the webpage, there was nothing to indicate the claimant worked for anyone other than R1. All the correspondence in respect of the redundancy and the payslips were in the

name of R1. In his letter of 28/3/2019 Mr Khan admitted the following sums were due to the claimant:

A redundancy payment of £21,100 (subject to the allowance provided for under Part 6 Chapter 3 of Income Tax (Earnings and Pensions) Act 2003);

Three months' notice pay £8,312.49 (this is a gross sum and the claimant must account to HMRC);

Holiday pay £1,882.07 (it is not clear if this is a gross or net sum, if gross then the claimant must account to HMRC and if net, it should be grossed up in order that the claimant receives the net sum and can then account to HMRC.

Those sums are therefore awarded to the and she is to account for any payment on account which has been paid to offset those sums.

23. In light of the finding that there was no transfer, R2 and R3 are dismissed from the proceedings.

24/2/2022

Employment Judge Wright