



EMPLOYMENT TRIBUNALS

Claimant: Mr C Carr

Respondents: (1) Mr CJ Edwards t/a Edwards Taxis and Minibuses
(2) Mr LJ Edwards t/a LJ Edwards Coach Hire

Heard at: Croydon Employment Tribunal (by CVP) **On:** 5 and 6 July 2022

Before: Employment Judge Heathcote (sitting alone)

Representation

Claimant: In Person.

Respondent: Mr T Goldup, Aversure.

RESERVED JUDGMENT

The decision of the Tribunal is that:

1. The Tribunal does not have jurisdiction to hear the Claimant's claim for unfair dismissal and the claim is dismissed.
2. The Claimant's claim for breach of contract against the First and Second Respondents is dismissed.
3. The Claimant's claim that there was an unauthorised deduction from his wages by the Second Respondent is not well founded and is dismissed.
4. The Claimant's claim that there was an unauthorised deduction from his wages by the First Respondent failing to pay the Claimant's outstanding holiday pay is well founded and the First Respondent is ordered to pay the Claimant the sum of £200.00 gross.

REASONS

1. By a Claim Form presented on 25th March 2019, the Claimant brings a complaint of unfair dismissal, a claim for holiday pay and a claim for notice pay. The claim for unfair dismissal, which is the principal claim in these proceedings is in relation to the termination of the Claimant's employment with the First Respondent on 21st February 2019 (the effective date of termination).
2. The Claimant's case is that he was employed as a driver by the Second Respondent from 12th May 2016 until the closure of the Second Respondent's business in or around March 2018. Whilst the Claimant was signed off work for a period of time due to sickness, he states that he remained an employee throughout. In March 2018, the Second Respondent's business came to an end. At that point, the Claimant claims that his contract of employment was transferred to the First Respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006. He was then employed by the First Respondent as a driver from 16th April 2018 until his dismissal on 21st February 2019.
3. The Claimant says that his dismissal was unfair. On Saturday 16th February 2019, the minibus that he regularly drove for the First Respondent was involved in an accident. It was subsequently 'written off' by the First Respondent's insurance company. The Claimant was not the driver at the time of the accident and there is no dispute here. The Claimant was contacted by the First Respondent and asked to deliver the keys to the First Respondent's office. He did so on Thursday 21st February and was told that as the First Respondent no longer had a van for him to drive, he was being dismissed. The Claimant contends that this dismissal was unfair. He contends that there was no fair selection procedure, that he was not provided with anything in writing, or the opportunity to appeal.
4. In addition, the Claimant contends that he was only paid for one week's notice pay and one week's holiday pay. In both instances, he states that he was entitled to two weeks.
5. The Second Respondent was added as a party to the proceedings by order of Employment Judge Pritchard, dated 7th October 2019.
6. The First Respondent accepts that the Claimant is entitled to a further week's holiday pay of £200 and concedes this claim. The Claimant agreed this sum in the hearing.
7. The First and Second Respondents resist the remaining claims.
8. Both Respondents claim that the Claimant's final working day with the Second Respondent was 17th September 2017. At that point, the Claimant indicated to the Second Respondent that he was suffering from ill health and unfit for work. The Second Respondent states that he was not provided with any Statements of Fitness for Work (sick notes) and did not pay any statutory sick pay to the Claimant. It was only after the Second Respondent contacted the Claimant in November to ask him to return did the Claimant return to work and then did so on an ad hoc, casual basis. On his return, the Claimant was paid 'cash-in-hand' and no payslips were provided. This arrangement continued until the Claimant's final day of work with the Second Respondent in March 2018.

9. The First and Second Respondent allege that the Claimant's claim is tainted by illegality and therefore that the Tribunal does not have jurisdiction to hear the claim. In advancing this argument, they draw attention to the fact that the Claimant was claiming Employment Support Allowance (ESA) and suggest that such a claim was running alongside his cash-in-hand arrangements. The Claimant denies any ill doing in this regard but accepts that he was paid cash-in-hand.
10. The First and Second Respondents claim that in the alternative, the Tribunal does not have jurisdiction to hear the unfair dismissal claim as the Claimant lacks the necessary two-year period of continuous employment. In advancing this argument, they rely on three submissions:
 - 10.1 They accept that a TUPE transfer did occur in respect of the Second Respondent's business, but this was to a different person, not party to these proceedings. Whilst the First Respondent bought two vehicles from the Second Respondent and managed to secure a contract that had previously benefitted the Second Respondent, both Respondents argue that this does not constitute a relevant transfer for the purpose of the TUPE regulations. Accordingly, there was no TUPE transfer from the Second Respondent to the First Respondent.
 - 10.2 In the alternative:
 - 10.2.1 that the Claimant's sickness absence was not a period of sick leave but indicated a break in his service. That break spans the period 18th September 2017 to 16th November 2017; and /or
 - 10.2.2 that there was a gap between the end of the Claimant's employment with the Second Respondent and the commencement of his employment with the First Respondent.
11. The First Respondent argues that if the Tribunal concludes that the Claimant had sufficient continuity of service, that his dismissal was fair and relies on the fair reason of redundancy or some other substantial reason.
12. In the event of the Tribunal finding that there was a fair reason, but that the procedure adopted by the First Respondent was unfair, he argues that any compensatory award should be reduced under the Polkey principle to take account of the fact that the Claimant would have been dismissed in any event.
13. It should be noted that there is uncertainty as to some of the key dates. This is evident in the bundle, the witness statements, the oral evidence and even in the predetermined list of issues described below. I have considered those uncertainties and recorded what I find to be the relevant dates in my findings of fact.

The issues

14. The issues were determined by Employment Judge Pritchard in the Case Management Order dated 7th October 2019. At the commencement of the hearing, all parties confirmed that those issues were correct and that no alterations were necessary. The issues therefore for the Tribunal to decide are as follows:

Illegality

- 14.1 Was the Claimant working for the Second Respondent under an illegal contract because he was paid cash-in-hand during the final period of his employment for the Second Respondent? If so, what effect, if any does this have on his ability to pursue his claims before the Tribunal?

Unfair dismissal

- 14.2 Did the Claimant have sufficient continuity of employment required by section 108(1) of the Employment Rights Act 1996 such that the Tribunal has jurisdiction to consider his unfair dismissal claim?

- 14.3 Did the Claimant's employment transfer from the Second Respondent to the First Respondent under the Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE)?

14.3.1 The Claimant's case is that he commenced employment with the Second Respondent in about May 2016 (not 23rd April as he erroneously stated in his ET1 Claim Form) and remained continuously employed until his dismissal on 28th February 2019, his employment having transferred from the Second Respondent to the First Respondent on 16th April 2018. The Claimant says that during any periods when he was not working, he was either sick or on standby to work if required.

14.3.2 The First Respondent's case is that there were gaps in the Claimant's employment with the Second Respondent as follows:

14.3.2.1 From 18th September 2017 to 16th November 2017.

14.3.2.2 From 31st March 2018 until his employment commenced with the First Respondent on 16th April 2018.

- 14.4 In determining these issues, the Tribunal will have particular regard to:

14.4.1 Section 212 of the Employment Rights Act 1996.

14.4.2 Section 218(2) of the Employment Rights Act 1996.

14.4.3 Regulations 3 and 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

- 14.5 If the Tribunal concludes that the Claimant had sufficient continuity of employment, was he unfairly dismissed? Can the First Respondent show a potentially fair reason for the dismissal (the First Respondent will seek to show the reason was redundancy) and was the dismissal fair in the circumstances?

- 14.6 If the Tribunal concludes that the Claimant was unfairly dismissed, what remedy is he entitled to? The First Respondent will seek to show that he would have dismissed the Claimant by reason of redundancy even if a fair procedure had been followed, either on the date the Claimant was actually dismissed, or shortly thereafter such that any compensatory award should be reduced (under the Polkey principle).

Notice pay

- 14.7 The Claimant was paid one week in lieu of notice. He asserts that, given the length of his employment, he was entitled to two weeks' notice under section 86 Employment Rights Act 1996 and claims damages in the sum of one week's wages. This aspect of the Claimant's claim will depend on the conclusion reached by the Tribunal as to this length of continuous service.

Procedure, documents and evidence heard

15. The hearing was due to commence at 10am on Tuesday 5th July 2022. By the start of the hearing, the Claimant had still not joined. The Clerk telephoned the Claimant to see if he was having connection issues and was advised that the Claimant had thought that the hearing was due to commence on the following day. Nevertheless, he was prepared to join the hearing and attempted to connect. Whilst those in the CVP room could see the Claimant on the screen, he could not see or hear the participants. With the telephone guidance of Tribunal staff, the Claimant was able to join CVP by video, but accessed audio through his telephone. Despite a slight echo on occasions, this worked well and allowed the hearing to commence at 10:49am.
16. There were further connection issues after lunch on the first day of the hearing. The hearing was due to commence at 1:30pm, but the Claimant experienced similar issues to the those he faced in the morning. Similar efforts to connect to CVP utilised successfully in the morning failed and by 2:14pm, the Claimant could only join the hearing by telephone. Mr Goldup raised his objections to the lack of video connectivity as the Claimant was in the process of giving evidence. Nevertheless, most of the issues identified had been addressed and to halt the hearing would have resulted in delay and a possible relisting. Mr Goldup had concluded his cross examination and I had only a number of matters to explore. In the circumstances I decided to proceed, allowing the Claimant to participate by telephone. The hearing recommenced at 2:20pm and the Claimant continued to give evidence until 2:46pm.
17. It was established in the hearing that the Second Respondent had been diagnosed with Alzheimer's disease. His evidence was clear and any confusion over dates or recollection could readily be put down to the length of time that has passed since the matters complained of. Whilst he attended the first day, to give evidence, he was absent on the second day due to his health.
18. On the second day, the Claimant reported that he had an urgent call from his employers to say that he was needed at 1pm. He explained that it was a new job and he did not want to put it at risk. I was content that we were able to deal with the remaining evidence and final submissions in the time remaining and we were able to conclude within time.
19. I heard evidence from the Claimant giving evidence on his own behalf only. I also heard evidence from the Second Respondent, the First Respondent and Mrs Susan Piper, former employee of both Respondents. In coming to my decision, I have had regard to the oral evidence of the witnesses and the contents of their witness statements and the documents in the bundle.
20. I am grateful to the Claimant and to Mr Goldup, on behalf of the Respondents, for their assistance to the Tribunal generally and for their closing submissions.

Findings of fact

21. It is useful to point out early on that the Second Respondent is the father of the First Respondent and of the Respondents' witness Susan Piper, as this helps put some of the facts into context
22. The Second Respondent was the sole proprietor of LJ Edwards Coach Hire, a business that he established over 35 years ago, originally named LJ Executive Car and Coach Hire. The business predominantly involved organised coach holiday excursions. Minibuses were used as a shuttle bus to transfer passengers from their homes and pick up points to the main coaches. The minibuses were also used for private hire and for school transport. In respect of the latter, the Second Respondent was successful in bidding for a tender to provide limited services to the East Sussex Local Authority, who are responsible for school transport. The Second Respondent also owned a small number of cars.
23. The Claimant commenced work for the Second Respondent on 12th May 2016 as a driver. He was employed to undertake some of the Second Respondent's school transport runs. He would pick children up from their homes and drop them off at school in the morning and then return them home in the afternoon. The Second Respondent also employed coach drivers, with Public Service Vehicle Licences (PSV). Other employees had roles in administration and customer service. It was unusual for the Second Respondent to employ someone in the Claimant's position in this way, as he did not have a PSV, merely a taxi licence. The Second Respondent explained that he would often use 'casual' drivers who would undertake trips for him and who would then invoice him for their services. Most of these were described as 'owner drivers' who provided their own vehicles.
24. The Claimant's employment was initially successful. The Second Respondent found him to be reliable and would often turn to the Claimant first to undertake additional work.
25. By September 2017, the Claimant was experiencing family difficulties that were having a negative impact on his mental health. He discussed this with the Second Respondent who advised the Claimant to 'come back when [he's] ready'. The Claimant's last day at work was 17th September when the record of his bookings saw him start work at 7am and end at 8.40am. He did not work on the 18th September or for a number of weeks after that.
26. The Claimant states that when he was off work, he was in receipt of Employment Support Allowance and did not receive any sick pay from the Second Respondent. He subsequently obtained a sick note which covered the period 16th September 2017 to 16th December 2017. Whilst the Claimant states that he provided a copy of his sick note to the Second Respondent, I do not find this to be the case. On his own evidence, the Claimant says he was contacted by telephone by the Second Respondent in November as they were short of drivers and he was asked to 'come back'.
27. The Respondent explained that his loyalties lay with the business and he decided to return, doing so on 17th November 2017. His sick note records that he was assessed by Seaforth Farm Surgery on 27th November 2017. By that time he was back at work and had no reason to provide a copy of this sick note.
28. The Claimant did, however, provide a copy of the sick note to Jobcentre Plus in support of his Employment Support Allowance claim.
29. The Claimant states that he worked for the Second Respondent for the remainder of

November and then worked regular shifts through to March. The bundle shows records of the runs undertaken by the Claimant. On the Claimant's evidence and on that of the Second Respondent, I accept that the Claimant worked regularly for the remaining period.

30. The Claimant obtained a further sick note on 8th January, covering the period 16th December 2017 to 18th March 2018. He again provided this to Jobcentre Plus in support of his Employment Support Allowance Claim. This is clear by the fact that Jobcentre Plus wrote to the Claimant on 12th March 2018, informing him that his sick note was about to expire and that:

'If you do not send us a medical certificate a letter from a GP or hospital this will result in your payment being stopped or suspended'

31. Following his return on the 17th November 2017, the Claimant was paid cash-in-hand. Both the Claimant and the Second Respondent state that he was paid cash-in-hand so that the Claimant could repay a loan made to him by the Second Respondent. This was for the renewal of his taxi licence at an approximate cost of £600.
32. The Second Respondent states that he employed a Mr Maynard to prepare the accounts for the business and to undertake payroll duties and that he thought that the Claimant was getting payslips. He stated that any payments to the Claimant were processed through the payroll. He also stated that most transactions were by cash, or by direct debit from his bank account.
33. The Second Respondent's business had been suffering, and he wanted an exit strategy. He agreed with his stepson, Antony Burkill, that he would sell his business to him. At the time, the Second Respondent employed five drivers and four office staff, not including the Claimant. The five drivers all had PSV Licenses, enabling them to drive large coaches; the Claimant did not.
34. The coaches owned by the Second Respondent were purchased with the assistance of a finance agreement. There was not a lot of equity in the vehicles and the business was failing. A business sale agreement was drawn up by the Second Respondent's solicitors. The agreement included the coaches, existing contracts with customers and staff. The transaction was subject to the TUPE regulations and employed drivers and office staff were transferred to Mr Burkill. There were two exceptions: one driver who objected to the transfer; and Mrs Susan Piper who also objected to the transfer. Mrs Piper's objection was simply because she knew her brother, the First Respondent was intending to set up a taxi and private hire business and she preferred to work with him, also believing that Mr Burkill had too many staff.
35. The sale agreement did not include one coach and two minibuses that Mr Burkill did not want. The Second Respondent sold the coach to a business in South Wales. The First Respondent, having owned a taxi firm in Nottingham and having taken the decision to move back to East Sussex offered to buy the two minibuses from the Second Respondent. He had two vehicles already from his previous venture and was able to secure office premises in Bellbanks Road in Hailsham. His sister, Mrs Piper also had her own vehicle for private hire and agreed to work for the First Respondent, while operating her own business. The ultimate objective was to pool resources and form a limited company. Whilst a company was formed, this was never used.
36. The Second Respondent's last day of trading was 31st March 2018. However, it is likely that the Claimant had not worked for the Second Respondent since 23rd March.

He explained that he was not sure what was happening, that the business was 'being dismantled' and so he 'kept his head down'.

37. The First Respondent was able to successfully secure the Local Authority tender for the school runs that had previously been awarded to the Second Respondent. A letter of support was provided by the Second Respondent to assist. These runs were initially undertaken by the First Respondent personally.
38. The First Respondent contacted the Claimant in early April to see if he wanted to work for him. The Claimant did not accept straight away but stated that he wanted time to think about it. After two weeks, the Claimant confirmed to the First Respondent that he would accept his job offer. A contract of employment was entered into, and the Claimant commenced work with the First Respondent on 16th April 2018. He was given more hours than he had been working previously.
39. In the meantime, Mrs Piper was also looking at expanding her own taxi business. She had purchased a local taxi firm, Hail a Cab in September 2018 and was finalising, or had finalised the purchase of another firm, Jayline, in February 2019. She explained that this did not conflict with her employment with the First Respondent, as she had managers running each firm, from their existing premises and was able to subcontract to the First Respondent on a regular basis. It seemed that there was a fluid use of vehicles across the businesses.
40. The Claimant again undertook school runs and continued to do so until February 2019. On Saturday 16th February, the minibus that was regularly driven by the Claimant was involved in a road traffic accident. The First Respondent's insurance company deemed the vehicle beyond economic repair and wrote it off. At the time, the minibus was being driven by an employee of Mrs Piper's business who Mrs Piper states had been subcontracted to the First Respondent. The employee's taxi licence was suspended as a result of the incident and the employee continued to work for Mrs Piper on telephone and booking duties.
41. The First Respondent stated that he decided not to replace the minibus but needed to continue to undertake the school run to meet his responsibilities with the Local Authority. As a result, the First Respondent stated that he needed to subcontract the service and did so with the permission of the local authority. A minibus owned by Mrs Piper was used, which was driven by her partner, Mr Richard Bunt.
42. On Monday 18th February, the First Respondent contracted the Claimant and asked him to bring the keys to the minibus into the office. He did so on Thursday 21st February. The First Respondent was not available and so the Claimant spoke to Mrs Piper. Mrs Piper told him that the minibus had been written off and that the First Respondent did not therefore have a vehicle for him to drive. Mrs Piper explained that the Claimant's employment was being terminated and that he would receive one week's pay in lieu of notice.
43. The Claimant having enquired about the health and employment status of the driver involved in the collision asked for this to be confirmed in writing.
44. The Claimant wrote to Mrs Piper on 9th March 2019, requesting his P45 and 'the disciplinary and grievance procedure outlined in [his] contract of employment'. Mrs Piper replied on 28th March explaining that the termination of the Claimant's contract of employment was 'due to circumstances beyond our control' and that the P45 had been sent.

Law

Illegality

45. There are a range of authorities that set out the correct approach to the issue of illegality. Some relate to employment disputes, but others do not. The leading non-employment case is that of *Patel v Mirza* [2016] UKSC 42. The key issue to be considered was set out by Lord Toulson:

'The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case).'

46. At para 101, Lord Toulson set out a three-step approach to be taken in assessing whether public interest would be harmed, namely:

'(a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim,

(b) to consider any other relevant public policy on which the denial of the claim may have an impact, and

(c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts'.

47. In determining the third stage, it was stated:

'In considering whether it would be disproportionate to refuse relief to which the Claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. ... I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was marked disparity in the parties' respective culpability'.

48. The impact on employment law cases was addressed in *Robinson v al Qasimi* [2021] EWCA Civ 862. The Court of Appeal held that an employee who had failed to pay income tax and therefore had performed her contract illegally, for a period of seven years, was not prevented from claiming unfair and wrongful dismissal three years after the non-payment was discovered and addressed by the employer. In arriving at that conclusion, the court considered the proportionality step, concluding that the illegal performance of the contract could not be regarded as a sufficient justification for denying the employee's employment rights three years later.

Unfair dismissal

49. Section 94 Employment Rights Act 1996 provides that an employee has the right not to be unfairly dismissed by his employer. Section 108(1) Employment Rights Act 1996 provides:

'Section 94 does not apply to the dismissal of an employee unless he has been

continuously employed for a period of not less than [two years] ending with the effective date of termination’.

50. In considering the ‘fair reasons for dismissal, s98 Employment Rights Act provides:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
- (b) relates to the conduct of the employee,*
- (c) is that the employee was redundant, or*
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.*

...

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
- (b) shall be determined in accordance with equity and the substantial merits of the case.*

51. Redundancy is dealt with under Part 11 of the Employment Rights Act. Section 139(1) states:

(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—

- (a) the fact that his employer has ceased or intends to cease—*
 - (i) to carry on the business for the purposes of which the employee was employed by him, or*
 - (ii) to carry on that business in the place where the employee was so employed, or*

- (b) *the fact that the requirements of that business—*
- (i) *for employees to carry out work of a particular kind, or*
- (ii) *for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*
- have ceased or diminished or are expected to cease or diminish.*

52. In considering gaps in employment, Section 212 Employment Rights Act 1996 provides:

- (1) *Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.*
- (2) . . .
- (3) *Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—*
- (a) *incapable of work in consequence of sickness or injury,*
- (b) *absent from work on account of a temporary cessation of work, [or]*
- (c) *absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose, . . .*
- (d) . . .
- counts in computing the employee's period of employment.*
- (4) *Not more than twenty-six weeks count under subsection (3)(a) . . . between any periods falling under subsection (1).*

53. In addition, Section 218(2) Employment rights Act 1996 provides:

- If a trade or business, or an undertaking (whether or not established by or under an Act), is transferred from one person to another—*
- (a) *the period of employment of an employee in the trade or business or undertaking at the time of the transfer counts as a period of employment with the transferee, and*
- (b) *the transfer does not break the continuity of the period of employment.*

Transfer of Undertaking (Protection of Employment) Regulations 2006

54. Regulation 3(1)(a) of TUPE provides that 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. To determine whether an economic entity has retained its identity, the leading case of *Spijkers v Gbroeders Benedik Abattoir CV 1986 2CMLR 296*.

55. Regulation 3(1)(b) deals with service provision changes, setting out 3 circumstances, commonly known as outsourcing, retendering, and insourcing:

(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 (“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 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,*

and in which the conditions set out in paragraph (3) are satisfied.

...

(3) *The conditions referred to in paragraph (1)(b) are that—*

(a) *immediately before the service provision change—*

(i) *there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;*

(ii) *the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and*

(b) *the activities concerned do not consist wholly or mainly of the supply of goods for the client’s use.*

56. The case of *Cheesman v R Brewer Contracts Limited* [2001] IRLR 144 predates the regulations in their current form, but provides guidance on what constitutes an ‘entity’ and the matters to be considered in terms of service provision changes.

57. The effect of a transfer of undertaking is set out in regulation 4, which provides *inter alia* that

(1) *Except where objection is made under paragraph (7), a relevant transfer 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 resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.*

(2) *Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—*

(a) *all the transferor’s rights, powers, duties and liabilities under or in*

connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

Conclusions

Illegality

58. The Claimant's employment contract with the Second Respondent was a legal contract at the outset. He was employed as a driver and was paid with appropriate deductions. Following the Claimant's sickness absence, he returned to work on an agreement that he would work cash-in-hand.
59. There is a clear public policy in ensuring that tax is properly paid to HMRC and parties should not enter into arrangements that wrongfully avoid tax that is due. Considering the principle of proportionality, the Claimant states that the amount earned meant that he fell below the income tax threshold. Based on his previous wage slips and rate of pay, this would seem to be the case.
60. I accept that the Claimant was asked to return to work by the Second Respondent and the suggestion of cash payments was made by the Second Respondent. There was an imbalance of bargaining power, the Claimant was paid the same amount and did not benefit from this arrangement. Any claim for ESA made by the Claimant was not part of this contract.
61. I do not find that it would be proportionate to deny the Claimant the right to rely on the period from 17th September 2017 to 23rd March in relation to his unfair dismissal claim by reason of actions instigated by the Second Respondent and where there was no clear benefit to the Claimant.

Unfair dismissal and TUPE transfer

62. I find that the Claimant did commence a period of sick leave in November 2017 and remained an employee of the Second Respondent. He had discussed this with his employer and believed that there was an agreement that he would return when he was able. He did not receive sick pay but did not seek to pursue such a claim with the Second Respondent.
63. He returned to work on 17th November and his contract continued until March. On his own evidence, he worked regularly for the Second Respondent.
64. On 31st March, there was a TUPE transfer from the Second Respondent to his son-in-law, Mr Burkill. This was properly dealt with, and legal advice sought. The transfer did not include the Claimant. He did not have a PSV licence and was not needed. What was left of the Second Respondent's business was a small selection of vehicles. Two vehicles were sold to the First Respondent.
65. The First Respondent had secured his own premises and was establishing his taxi business. The fact that he purchased two vehicles falls far short of the requirements of the TUPE regulations. There was no transfer of goodwill, staff (although it is accepted that Mrs Piper went to work with the First Respondent as that was her

preference to the actual TUPE transfer that was taking place to Mr Burkill), or other assets that might tend towards a relevant transfer. The business was similar but had a different focus to that of the Second Respondent.

66. The Local Authority contract was obtained with assistance from the Second Respondent, but this was the only other connection between the two undertakings. This coupled with the purchase of the vehicles does not amount to an entity which is sufficiently structured and autonomous. I do not find that there was an economic entity, nor one that had retained its identity. Nor do I find that the transfer of the Local Authority contract amounts to a service provision change. Whilst one employee can constitute an 'organised grouping', the Local Authority did not need the services of the Claimant alone, but of a number of individuals to carry out the school runs.

67. There was no TUPE transfer that would enable the Claimant to satisfy the two-year qualification requirement.

Redundancy

68. I have considered what the position would be if there was a TUPE transfer, thereby providing the two-year qualifying period for redundancy.

69. The loss of the First Respondent's minibus meant that the requirements of the business had changed. They still needed to service the Local Authority contract but had fewer vehicles to do this with. The First Respondent explained that it was common practice to subcontract a driver and vehicle. In those circumstances, the requirements of the business for employee drivers had diminished.

70. The Claimant claims that he should have been provided with a hired vehicle. It is not for the Claimant to dictate how the First Respondent should run his business. The First Respondent needed to make staff redundant. The Claimant was the only driver he employed. Whilst the Claimant argued that the driver of the minibus who was involved in the collision should have been dismissed instead, that person was not an employee of the First Respondent.

71. The procedure adopted by the First Respondent was flawed and the Claimant is understandably aggrieved. He did not consult with the Claimant, or consider alternative work, but rather chose to summarily dismiss him. However, I find that if a fair procedure had been adopted, the Claimant would have been dismissed in any event and that dismissal would have been within the range of reasonable responses. There would therefore be a 100% Polkey reduction applicable.

72. Whilst the Claimant states that the First Respondent did not follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, he did not need to. This was not a misconduct dismissal. The absence of a right to appeal does not make a redundancy dismissal unfair. In his evidence, the Claimant stated that he submitted a grievance that went unanswered. He did not. He wrote to the First Respondent on 9th March asking for a copy of the 'disciplinary and grievance procedure outlined in my contract of employment'. This was not a grievance and even if it was, it was submitted after the termination of his employment and the First Respondent did not have to deal with it.

Notice Pay

73. Given that there was no TUPE transfer to the First Respondent, the Claimant's employment commenced on 16th April 2018. It was terminated by reason of

redundancy on 21st February 2019. This means that the Claimant is entitled to one week's notice pay and that is what he was paid. His claim is therefore dismissed.

Holiday Pay

74. The Claimant claims for one week's holiday pay. The First Respondent concedes this claim and therefore is ordered to pay the Claimant the sum of £200 subject to the deduction of tax and national insurance contributions.

Employment Judge Heathcote

Date: 29th July 2022