Case Number: 1400974/2021

EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Peter Connell	**Aspirations Financial Advice Limited**

Held at: Exeter by Video **On: 20, 21 and 22 September 2022**

Before: Employment Judge Smail
Mrs C. Monoghan
Miss G. Mayo

Appearances
Claimant: Mr T. Tyndall, Solicitor
Respondent: Miss S. Clarke, Counsel

JUDGMENT having been sent to the parties on 26 September 2022 and written reasons having been requested, the following reasons are provided:

REASONS

THE PRELIMINARY ISSUE

1. By a claim form presented on 26 February 2021, the claimant claims unfair dismissal, age discrimination, redundancy pay, and holiday pay. In his claim the claimant contends continuity of service between 5 February 2010 and 1 December 2020.

2. The claimant was employed by the respondent as a Financial Advisor. Fundamentally, the respondent asserts continuity from 1 June 2019 only. The effect of this, if correct, is that the claimant could not claim unfair dismissal or a statutory redundancy payment.

3. This hearing was due to be a four day in person hearing in Bristol. By reason of the Queen's funeral, a day was lost, and the hearing was converted to three days by video. It was agreed, after discussion, that the question of length of service would be determined as a preliminary issue.

4. The claimant alleges he was employed as a Financial Advisor by a Company solely owned by him called "Moneythatworks Ltd" from 15 February 2010. That was how he traded. He alleges he introduced his clients to the

respondent, and that much is common ground. At first, he did so pursuant to an 'appointed representative' agreement dated on or around 13 August 2018. He brought his clients to the respondent, who administered the policies sold to his clients in return for a 40% commission, the claimant retaining 60% of fees and/or commissions from the proceeds of business written with those clients.

5. Thereafter, on 1 June 2019, he became a direct employee of the respondent and on 13 August 2019, he sold his shares in Moneythatworks Ltd together with the proprietary interest in his clients to the respondent for a consideration minimally of £200,000 and maximally of £240,000. The claimant submits that by one or a series of transactions there was a transfer of an undertaking of his business to the respondent meaning his length of service with Moneythatworks Ltd is to be added to the terms of his contract of employment with the respondent, such that he does have sufficient length of service to claim unfair dismissal and a statutory redundancy payment.

6. That is the preliminary issue we have decided to take first: whether there was a transfer of an undertaking with that effect.

THE FACTS

7. When operating Moneythatworks Ltd, the claimant tells us he paid himself salary just below the national insurance threshold and drew dividends from the company as a shareholder which he tells us were taxed at 20%. He has no payslips from this time and he has no written contract of employment between himself and Moneythatworks Ltd. He tells us that his remuneration towards the end of his time from Moneythatworks, taken in that way, approximated £73,000 on a PAYE equivalent. That was the basis for his salary negotiations with the respondent. He tells us that the financial arrangement he made from Moneythatworks Ltd was lawful. It seems that the respondent accepts that the claimant was employed by Moneythatworks Ltd throughout this period notwithstanding the absence of a written contract and payslips.

The Appointed Representative Agreement

8. The Claimant operated in this way until on or around 13 August 2018 when he entered the 'appointed representative's' agreement with the respondent. His dealings with the respondent throughout were in contemplation of his eventual retirement. Under the appointed representative agreement, he transferred the 'agency' in respect of his clients to the respondent. What this means is that the respondent oversaw the FCA compliance aspects of dealing with the provision of the service to the clients.

9. At Schedule 4 to the appointed representative agreement the claimant was to be paid by the respondent sixty percent on all business written including new and re-occurring income yearly. The respondent therefore took a commission of forty percent. The relationship between the respondent and the claimant was expressly stated not to be of employer and employee at clause 1.9 but instead was described as principal and appointed representative.

10. At clause 4.5 it was provided that the appointed representative shall be a self-employed person or a limited company employee with the responsibility for the payment of his own income tax, national insurance contributions and all expenses incurred in the running of the appointed representatives' business. It seems to be understood by the parties that the claimant retained proprietary interest over his clients he introduced under this agreement. We see express provisions that the 'client bank' as it is described was sellable by him in the case of ill health or by his personal representatives in the case of death. This arrangement operated for approximately ten months. During the course of this period, it is accepted by the respondent that he remained employed by Moneythatworks Ltd.

The Contract of Employment

11. In the Spring of 2019, the claimant had discussions with Andy Harris, Commercial Director and Adam Palmer, Managing Director of the respondent, in which it was proposed that he take on some of Mr Palmer's clients in addition to his own. It was stated by the respondent, and agreed by the claimant, that for this to work - that is to say for the company to protect its proprietary interest in its clients - the claimant would have to become an employee.

12. The way Mr Palmer describes the overall proposal in his witness statement rings true in a colloquial sense to us. He says that they suggested they 'would buy his clients and he would work for us'. In addition to him becoming employed to look after those of the respondent's clients they wanted him to look after, the respondent would buy his clients and he would come to work for the respondent as an employee. As we have already observed, all of this was in preparation for the claimant's retirement. He hoped to work for something like three years for the respondent before retiring. In the event he became furloughed during covid and in the further event he was made redundant. That selection for redundancy is challenged by way of the desired unfair dismissal claim but also by an age discrimination claim which does not require the continuity of service.

13. In keeping then with the intentions, on 1 June 2019, a contract of employment was entered by the claimant with the respondent. The commencement date is expressly stated to be 1 June 2019 and at clause 2.2 it expressly provides "no employment with a previous employer counts towards the employee's period of continuous employment with the company."

14. It is clear that the claimant at this point did not consider that his continuity stretched back to 2010. Otherwise it would have been in the contract. His duties became to devote his whole time to the business of the respondent as a financial advisor. He was to be paid a salary of £73,000 per annum. He got 24 days holiday plus bank holidays, all paid, and he got the statutory minimum employer's pension contributions.

15. At appendix 1 to the contract there was a series of post termination restrictions intending to protect the business of the company after the termination of employment.

16. It was envisaged that the claimant would continue to work as an employee for the period prior to retirement. The sale of his clients would be brought forward so that the sale of his clients did not happen at the same time as his retirement.

The Share Sale and Purchase Agreement

17. On 13 August 2019, the parties entered into the share sale and purchase agreement. The respondent would buy the shares in Moneythatworks Ltd in return for a consideration of between £200,000 and £240,000 depending on the recurring gross income paid in respect of the acquired clients business. The minimum was expressly stated to be £200,000. £3,000 a month was due to be paid over 36 months with a minimum payment of £92,000, maximum £132,000, to be paid upon the expiry of the three years. We understand it is not relevant for present purposes that that sum is yet to be paid. Schedule 5 to the agreement sets out the terms as to consideration for the purchase of the shares and the acquired clients.

18. Mr Tyndall has submitted that this schedule is important in the context of whether any economic entity retained its identity following any transfer of an undertaking. We set out with some care, then, the terms of Schedule 5 entitled 'Consideration'.

> The purchase price payable by the buyer to the seller for the shares shall be and shall not exceed the sum of £240,000 which shall be paid in instalments without set off withholding or deduction for any reason save as set out below, at the rate of £3,000 per month for 36 months starting with the completion date and then every month thereafter on the same day of the month for a further 35 months, with an additional maximum final balance of £132,000 payable on the expiry of 36 months from the completion date, provided the recurring gross income paid in respect of the acquired clients is not less than £80,000 in the previous twelve monthly period excluding any increases as a result of new business and the amount of any increases in the percentage fee charged.
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> If the recurring gross income in the previous twelve month period is less than this figure of £80,000, the final balance will be paid but reduced by £3 per £1 of shortfall provided such reduction shall not exceed the sum of £40,000. This means for example that if the recurring gross income in the previous twelve month period is £70,000, then the final balance shall be reduced by £30,000 to £102,000. If the recurring gross income in the previous twelve month period is £55,000, then the final balance would not be reduced by £75,000 but would be capped at a reduction of £40,000 leaving a balance of £92,000. This means that in any event the final balance shall be no less than £92,000 and thus the total purchase price is no less than £200,000.
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> Recurring gross income means the periodic income paid by a product provider or buyer client or any other source to the financial advisor that arises from the provision of financial advice or other financial services provided.
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> Acquired clients means the clients which the seller on behalf of the company advised prior to the sale of the company to the buyer and which are to be taken over by the buyer following the purchase of the company and which the buyer or company intends to service (that regardless of which individual employee or representative of the buyer services of the clients).
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> For the avoidance of doubt the consideration is payable by the buyer irrespective of whether the seller continues to work for the buyer in any capacity.

> If the seller ceases to work for the buyer the seller shall have a right to review and inspect the way in which the calculation of the maximum final balance is made including granting a right of inspection of the relevant figures, data processors and paperwork.

19. Under this clause the seller is the claimant, the buyer is the respondent. The point we observe is that the consideration for the sale of the shares and the acquisition of the acquired clients does not depend on the claimant remaining in employment with the respondent.

20. By Schedule 4 to the August 2019 agreement, the seller's obligations on completion were set out. On completion the seller shall:

> Deliver to the buyer letters of resignation in the agreed terms executed by the person resigning as director of the company pursuant to para 1.3.3 of Schedule 4.
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> Procure upon such appointment that resignation of the seller as Director of the company both from its respected office and as employee.

21. The claimant has signed a director's resignation and that has been recorded at companies House. He did not sign a letter of resignation as an employee but told us he assumed that by signing the 2019 share sale and purchase agreement, that amounted to the same thing, and that he had resigned his employment with Moneythatworks Ltd.

22. There was a disclosure statement with this agreement. In clause 15 it is stated by the claimant that the company Moneythatworks does not have and never has had any employees save that the seller is an employee. The seller has been paid a salary and NICs as appropriate have been paid. There is no formal contract of employment and no other formalities have been observed in respect of such employment.

23. At 12.3 the disclosure statement states that all recent income has been paid by the respondent as the current sponsoring IFA company to the company Moneythatworks Ltd in respect of the agreed share of income arising from the IFAs services provided by the seller. All client relationships are conducted through the sponsoring IFA company. That was under the August 2018 appointed representative agreement.

24. We note that the claimant in his witness statement has purported to deal with the position upon being employed by the respondent in June 2019 and prior to the completion of the sale in August 2019. He tells us in that period 'I was an employee of both MTW and Aspirations. I work concurrently on not only the urgent need in respect of Mr Palmer's clients but also on the [my] clients to facilitate their incorporation in the respondent's business'.

25. The idea of a dual employment is not how Mr Tyndall has submitted the case to be, attempting to make it work under TUPE. He has submitted that there was a transfer of an undertaking either under the August 2018 or the June 2019 contract of employment when the respondent assumed the control of the clients of the company. He has suggested that that concept of control of the clients is consistent with the analysis of a series of transactions that took place in North Wales Training and Enterprise Council Ltd trading as Celtec v Astley and Others 2006 UKHL 29 House of Lords.

THE LAW

26. We now turn to the law. The claimant contends that there has been a transfer of an undertaking under Regulation 3(1)(a) of the Transfer of Undertakings Protection of Employment Regulations 2006. By Regulation 3(1)(a) the Regulations apply to a transfer of an undertaking or business or part of an undertaking or business situated immediately before the transfer in the UK to another person where there is a transfer of an economic entity which retains its identity.

27. It is common ground that there is no question that we are dealing with a service provision change. It has to be a transfer of an undertaking under Regulation 3(1)(a).

28. By Regulation 3(2), in this Regulation economic entity means an organised grouping of resources which has the objective of pursuing an economic activity whether or not that activity is central or ancillary.

29. By Regulation 3(6) a relevant transfer (a) maybe affected by series of two or more transactions and (b) may take place whether or not any property is transferred to the transferee by the transferor.

30. Regulation 4 deals with the effect of a relevant transfer on contracts of employment. Regulation 4(1) provides that 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.

31. By Regulation 4(2) without prejudice to paragraph (1) but subject to paragraph (6) (criminal liabilities) and Regulation 8 (Insolvency) and Regulation 15(9) (failure to inform and consult), on the completion of a relevant transfer - (a) all the transferors' rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this Regulation to the transferee.

32. By Regulation 4(7), paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

DISCUSSION

33. The claimant's position in this case is that the only contractual term which transferred across was as to continuity of service; in effect the start date of the unwritten contract of employment between himself and Moneythatworks Ltd. No other terms under that contract are said to be transferred; certainly not as to remuneration - salary as such was about 7 x the salary at Moneythatworks Ltd, ignoring share dividends as shareholder. It is said there was essentially a renegotiation of all those other terms in the June 2019

contract. The claimant's position is that notwithstanding the June 2019 contract purported not to include any previous employment, and notwithstanding the August 2019 contract required him to resign his employment with Moneythatworks Ltd, the contract between him and Moneythatworks Ltd did transfer in respect of continuity.

34. On any view this position was not envisaged by the parties to 2018 and 2019 contracts including the claimant. Mr Tyndall in effect submits that whatever was envisaged, continuity transfers by operation of law applying the facts to the law.

35. There has to be then for the claimant to potentially succeed a transfer of an economic entity which *retains its identity* post transfer. It is common ground that before any transfer the claimant advising his clients on financial matters constituted an economic entity. The proposed transaction we find was best described by Mr Palmer in his witness statement where he says we would buy his clients and he would work for us. That did include two contracts, the June 2019 contract of employment and the August 2019 share sale and purchase agreement. That the claimant was to work with the respondent's existing clients was an important reason for that contract of employment, in truth the predominant reason why a contract of employment was entered into.

36. Under the 2018 agreement the claimant retained the proprietary interest in his clients, and we reject the suggestion that that contract represented an arguable transfer of an economic entity. The claimant kept his clients and there was express provision to the effect that there was no employment between the claimant and the respondent. The claimant remained under that agreement as the employee of Moneythatworks Ltd.

37. We are concerned with the position established by the 2019 contracts, the June and the August 2019 contracts. Under the share sale and purchase agreement the claimant was expressly selling his client bank to the respondent and the consideration for that expressly did not require him to continue to work for the respondent. In terms of whether there was a transfer of an economic entity retaining its identity, we are reminded by the authority of Cheeseman and Others v R Brewer Contracts Ltd [2001] IRLR 144 (EAT) that we are to look at all factors and circumstances to come to a multi-factorial view.

38. In favour of there being a transfer of an economic entity retaining its identity is the feature that before and after the 2019 contracts the claimant was advising clients introduced by him. However, against the notion of an economic identity retaining its identity are the following features.

39. First, the claimant was expressly expected to advise clients of the respondent that he had not introduced the respondent's clients generally and those of Mr Palmer whose clients were the respondent's clients.

40. Secondly, the share sale and purchase agreement envisaged under the terms of its consideration that employees other than the claimant could advise the clients that he had introduced.

41. Thirdly, the whole point of the share sale and purchase agreement was that the claimant was selling his client bank to the respondent for a consideration of between £200,000 and £240,000 irrespective of the claimant working there.

42. The fact that there was a change in the claimant's working practices even when he was working there is set out by him in his witness statement. At paragraph 9 he states:

> "When I became the employee of the respondent my salary was fixed at £73,000 to ensure my take home income was no less than it would have been in my employment and ownership of Moneythatworks. In addition, we agreed a performance related bonus structure which incorporated credits for mentoring one of the respondent's trainee advisors Steve Totton and also for looking after the clients of Mr Palmer as described above.
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> "The contract of employment recording the basic arrangement is dated 1 June 2019 and was signed before completion of the sale of Moneythatworks on 13 August 2019. From the commencement of my employment and up to the onset of the pandemic and being placed on furlough I continued to look after my own clients and Mr Palmer's clients. I also started to mentor Steve Totton who, as part of the process of the integration of Moneythatwork's business with that of the respondent, had subject to my supervision, started to service some of my lower net value clients to provide him with experience and the opportunity to develop those clients (para 10).
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> "I had agreed with Mr Harris to gradually transition some of my less profitable clients over to Steve Totton to facilitate me concentrating my client facing activities on my more profitable clients, together with those clients of Mr Palmer who had been allocated. The financial consideration for this arrangement was recorded in an email from Mr Harris on 10 June 2020 in which he confirmed that I would receive a percentage of any income generated by Mr Totton on my clients towards my bonus target threshold. We also verbally agreed that I would receive a credit towards my annual target of £10,000 for my mentoring work with Mr Totton and a further credit of £50,000 towards my bonus target for the work I was doing for Mr Palmer's clients. It is of note that there was a significant level of trust on my part at this stage that I accepted the proposals of Mr Harris without seeking written contract. (para 11)."

43. The parties' intentions in the two contracts 2019 contract were clear. The claimant would sell his client bank to the respondent. It was expressly required of him to resign his contract of employment with Moneythatworks, and the claimant understands he did that upon signing the share sale and purchase agreement. He would be employed on a new contract with wider obligations to clients that he had not introduced. The remuneration terms, indeed all terms, were very different from those contained in the unwritten contract he had with Moneythatworks. Having sold his clients, it was not

technically right for him to call them his clients, although of course he still had introduced them.

CONCLUSIONS

44. It seems to us, doing the best we can, that one economic entity was sold by the claimant and bought by the respondent and absorbed into the respondent's business, without retaining its identity as a going concern. The claimant was given a new contract of employment, not one that transferred. The economic entity that existed prior to sale, ceased upon sale and was absorbed into the respondent's economic entity, which provided a new contract of employment for the claimant. He was required to resign his old contract of employment.

45. These questions are not easy. Mr Tyndall's submissions are clever. We cannot help thinking that the submissions are artificial as against what the parties clearly intended in the agreements made in June and August 2019.

46. We bear in mind that the claimant is not someone who was disadvantaged in terms of equality of bargaining power; there was no inequality of bargaining power from his position. With his business experience as a financial advisor, he can be taken to have intended what he entered into, and to have known what he was doing. There is no question of there being any sham here.

47. We regard what the parties plainly intended as being effective to bring about the sale of one economic entity, its absorption into the respondent such that it did not retain its identity post sale as a going concern.

48. If we are wrong about that, then we are attracted by Miss Clarke's submissions about, in effect, tracking the contract. The contract of employment that would have been transferred upon completion of the transfer - and completion of the transfer involves completion of both agreements on our analysis - would have been the unwritten contract of employment with Moneythatworks Limited. That was resigned by the claimant following the transfer. There was a separate contract of employment that had been entered into on 1 June 2019. We accept the submission that this was a separate contract and not the one contract of employment that might have transferred by operation of law under the TUPE rules; that contract the claimant had resigned.

49. Miss Clarke invites us to add to that analysis that in effect the claimant is to be taken as objecting to that particular contract of employment transferring by having entered into the earlier contract of employment on 1 June 2019, which has terms and conditions which are far more beneficial to the claimant in terms of remuneration, not just the salary but paid holiday and pension.

50. Given the artificiality of what we are invited to find by Mr Tyndall, it is no more artificial to find that in effect the claimant objected to his transfer of his old Moneythatworks contract, instead preferring the new contract of June 2019.

51. Our primary conclusion, however, is there was not a transfer of an economic entity which retained its identity post transfer for the reasons we have given.

52. If we are wrong about that, then secondly, the claimant resigned any contract that might have transferred - the Moneythatworks contract - and replaced it with the prior and more favourable contract of employment dated 1 June 2019.

53. He is to be taken thereby, insofar as is necessary, thirdly, as objecting to the transfer of that Moneythatworks contract of employment.

54. For all those reasons, we find that the claimant did not have continuity of service stretching back to 2010. Accordingly, his claims for unfair dismissal and for a statutory redundancy payment are dismissed.

Employment Judge Smail
Date: 11 October 2022

Reasons sent to the Parties: 17 October 2022

FOR THE TRIBUNAL OFFICE