



EMPLOYMENT TRIBUNALS

Claimants: Mr Simon Tilley
Mr Ian Walker
Mr Steven Woodward
Mrs Carol McRae

Respondent: My View Ltd

Heard at: Exeter by CVP **On:** 27 – 29 September 2022

Before: Employment Judge Smail

Representation

Claimants: Mr S. Tilley (Lead Claimant)

Respondent: Miss M. Cook (Director)

RESERVED JUDGMENT

1. There was no transfer of an undertaking between Douglas Stafford Limited and My View Ltd.
2. The Claimants' claims against My View Ltd are therefore dismissed.

REASONS

Preliminary Hearing of 4 March 2022

1. By a Judgment made on 4 March 2022, Employment Judge Bax held at an earlier preliminary hearing that these claimants were not employees of Douglas Stafford Ltd such that the Tribunal did not have jurisdiction to entertain their claims of unfair dismissal, notice pay and for a redundancy payment. Those claims were dismissed. However, Judge Bax ruled that they were workers within the meaning of Section 230 of the Employment Rights Act 1996. The Tribunal had jurisdiction to hear their claims for unlawful deductions from wages and holiday pay.

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2. Further, as workers, he ruled they were employees within the wider meaning of Regulation 2 of the Transfer of Undertakings Protection of Employment Regulations 1996 (as working for another person whether under a contract of service, apprenticeship *or otherwise*) and so were able to contend that monies owed to them by Douglas Stafford Ltd, which has now been wound up, passed to the respondent as liabilities upon an alleged transfer of undertakings.

The present preliminary issue

3. The issues as to whether there was a transfer of an undertaking between Douglas Stafford Ltd ('DSL') and My View Ltd ('MVL'), and if so, whether the claimants' work was assigned to the relevant transfer, have been listed before me for determination in the present preliminary hearing.
4. DSL was and MVL is in the mystery shopper business. Workers of DSL paid in-person/telephone/online visits to clients of DSL to report back on the customer experience.

The Claimants

5. Mr Tilley worked for Douglas Stafford Ltd ("DSL") in respect of its client GLH Hotels between July – November 2019 performing covert overnight audits at hotels. He tells me that he was asked in October 2019 by DSL to delay all of his visits for the GLH client until November 2019. This had the result of pushing the fee payments for this work onto the payment run on 31 December 2019.
6. In the event, Mr Tilley was not paid because DSL ceased trading no later than 30 December 2019. He claims £2,663 of unpaid wages for work undertaken between November and December 2019. He also claims six and a half years backdated holiday pay.
7. Mr Walker worked for DSL as a mystery shopper both visual and report. Visual means working with a concealed camera. Report means working without a camera but giving a written report as to what is seen. He claims £1,338.93 for work undertaken between November and December 2019 for DSL as a mystery shopper. He was not paid these amounts when DSL ceased trading. He claims two and a half years of backdated holiday pay.
8. Mr Woodward is owed £3,168.93 for work undertaken on behalf of DSL between November and December 2019. He was a mystery shopper in the same way that Mr Walker was. He claims eight years and ten months' worth of backdated holiday pay in the sum of £21,479.94.
9. Mrs McRae undertook telephone mystery shopping on behalf of DSL. She claims £374 for unpaid wages for work undertaken between November and December 2019 before DSL ceased trading. She further claims six and a half years of backdated holiday pay in the sum of £2,582.97.

The Winding Up of Douglas Stafford Ltd

10. DSL dismissed its forty-eight employees properly-so-called on 30 December 2019. The reason given was insolvency. It says it started consultation on 20 December 2019, administrators were appointed on 8 January 2020. On 2 December 2021, the company was subject to compulsory liquidation and has been wound up. It did not trade during the period of its administration.
11. The employees of DSL within the meaning of section 230 of the Employment Rights Act 1996 have been paid out by the Insolvency Service and the Redundancy Payments Office in respect of their entitlements upon termination on 30 December 2019. The Redundancy Payments Office paid redundancy payments and the Insolvency Service has paid other liabilities.
12. It is noteworthy, but it is not conclusive, that the Secretary of State responsible for those bodies has not contended that there was a transfer of undertaking between DSL and MVL. The employees have been paid out by the relevant statutory funds.
13. As workers but not employees, of course, the claimants do not benefit from entitlements from these statutory funds. Accordingly, they seek to establish a transfer of undertaking between DSL and the respondent so as to be able to claim liabilities they say have transferred to the present respondent.
14. DSL was incorporated on 26 July 2004. In 2019 its sole Director was Nigel Douglas Cook. He was a 50% shareholder along with Dianne Jane Cook , his wife. Its registered office in the last twelve months of its existence was 4000 Lakeside, Western Road, Portsmouth PO6 3FT. The company trading address was 2000 Lakeside, Western Road, Portsmouth PO6 3EN. Nigel Cook is the father of Madelaine Cook, the sole Director of the respondent company.

The incorporation of My View Limited

15. Madelaine Cook incorporated the present respondent, MVL, on 19 November 2019. She is 51% shareholder; her father Douglas Cook is 49% shareholder. She accepts she incorporated the company in the knowledge that DSL had deep financial difficulties and was likely to cease trading. She incorporated MVL in order to set up in the same sort of business and to salvage as many clients from DSL as she could. She had worked as the Accounts Operations Director of DSL for many years. It was announced on 6 November 2019, that Madelaine Cook was to leave DSL in December 2019 to set up her own business.
16. On 5 December 2019, Nigel Cook circulated an email to his clients stating that commencing January 2020 DSL would no longer continue to conduct video mystery shopping. After thirty years he had decided to retire and the business will close. He goes on to state the following in the email:

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“Our sister company ‘My View Ltd’ with a fantastic, enthusiastic and knowledgeable team, will be picking up the baton and providing report based mystery shopping, auditing and training. My View will provide you with a modern state of the art, online, analytical data platform. This is a vast improvement on the Douglas Stafford Insight (DSI) online platform, which has done very well, bearing in mind it is over twenty years old.”

17. At the end of the email, he invited any customers who wished to discuss how they could be supported in 2020 to ring Crystal Campbell or Madelaine Cook. Plainly, that would be in connection with services that might be offered by My View Ltd.
18. It is a matter of upset to the claimants that on 22 November 2019, DSL managers were instructed to communicate to workers plans for January, February and March 2020, as though DSL would still trade.
19. On 4 December 2019, DSL offered enhanced bonuses of up to £100 for each visit completed by workers with a sense of urgency for completion. This was more than double the usual standard payment. All work had to be completed by 13 December 2019. That work, as we know, was not paid by DSL and the workers such as the claimants remained unpaid.
20. It seems that Madelaine Cook left employment on 20 December 2019, and Mr Tilley submits that it is likely that between 5 December when the email went out and the date for her departure, she would be receiving calls while working with DSL from DSL clients but with view to work being conducted in 2020 on those clients’ behalf by MVL. He is likely right about that.
21. On 13 December 2019, DSL emailed its workers announcing its closure at the end of the year. There is no suggestion in this communication that the workers might transfer to MVL. In the communication of 13 December 2019, Mr Cook made reference to the fact that DSL had been competing with a company called Performance In People. Indeed Mr Michael Dalloz, the MD of Performance In People, gave evidence to the Tribunal in the course of this case. He volunteered that his success in taking business from those who had previously been clients of DSL likely contributed to the downfall of DSL. Madelaine Cook accepted that as a proposition. MVL and Performance In People remain competitors to this day.
22. Mr Cook wrote this in the communication of 13 December 2019:

“Unfortunately, this type of mystery shop is no longer viable for us. We are paying you less than we were ten years ago, despite the complexities of the shops increasing, and what makes it equally alarming is that we are charging our clients thirty percent less than we did ten years ago. You have Performance in People to thank for that. The business model does not work for us, to the extent that we have been refusing contracts that have been offered to us from existing clients, because of the price reductions they have been requesting. Other companies seem to be able to do it for less, but for us, it is not sustainable, sensible or viable. Costs have increased and margins have diminished and this is not going change going into 2020”.

23. Mr Cook says at the end of his communication:

“Closing a business, particularly one that has been going for thirty years, is complicated. We have to try and make sure all our employees receive their correct redundancy packages, suppliers are paid and the business closes in an orderly fashion. I have commissioned specialist consultants to advise on this. You have been paid as normal month in month out for every month you have been a sub-contractor for us without fail. Some of you have been with us for many years. Your question now will be “Am I going to get my final payment?” Unfortunately, this will not be paid as normal, you will be kept updated on the position.”

24. Administrators were appointed on 8 January 2020. DSL had debts from unsecured creditors of £264,043.

The business launch of MVL

25. Within a short period of the closure of DSL, Madelaine Cook recruited eight staff, including herself, who had previously worked for DSL. Not all were there in January 2020 but by the end of February 2020, a complement was up to eight. DSL of course, had forty-eight employees at the time of insolvency. As from 2 January 2020, Madelaine Cook, Crystal Campbell and she tells me John Fieldhouse, three of the eight, were in place and started to seek to obtain business from those who had been clients of DSL.

26. MVL has disclosed its invoices for the first six months. Eight out of DSL’s twenty-seven clients worked with MVL during that period. No contracts carried over from DSL to MVL. MVL did negotiate new contracts with 8 out of 27 of those that had been clients of DSL. Contracts with Scania Great Britain Ltd were negotiated on 6 January 2020. Contracts with SUEZ Recycling and Recovery UK Ltd were negotiated on 16 January 2020. Contracts were negotiated with SUEZ on 10 January 2020; with Wren Kitchens Ltd on 15 January 2020; with DAF Trucks Ltd on 17 January 2020. Contracts were negotiated with Kier Living South West on 6 February 2020. Contracts were negotiated with Knight Frank on 9 March 2020, although some work had been done with Knight Frank covered by emails rather than contracts in February 2020.

27. Nigel Cook had given Madelaine Cook his list of customers. He had given her his contractual templates. We have no reason to believe that she was prevented from access to any of the information held by Nigel Cook. Because of this, the administrators thought it advisable to make MVL Ltd pay for certain assets of DSL. This was to reflect the reality that MVL had acquired. On 16 July 2020, for £1,500 plus VAT, MVL bought Douglas Stafford Ltd trading name; website contents to include the uniform resource locator; telephone numbers; email addresses; customer database; supplier database; apple mac and I mac.

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28. Mr Dalloz informed us that Performance In People were also competing for the work previously done by DSL insofar as it had not already obtained that work. It obtained important work from BMW/Mini, for example.
29. Madelaine Cook told me, and I accept, that when it first started, My View Ltd did not do video customer audits, it also did not do overnight hotel audits. It seems that covid, with the first lockdown at the end of March 2020, impeded the early months.
30. As the sale of assets documents suggest, and we see from the papers, MVL did launch from the trading address, previously used by DSL and did use DSL's telephone numbers.

The Law

31. The claimants contend 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.
32. 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).
33. 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.
34. 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.
35. 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.
36. 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.

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37. Regulation 8 deals with insolvency. By regulation 8(7) Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner. It seems that was the aim of the administration commenced on 8 January 2020.
38. Employment Judge Bax has already ruled that the Claimants were 'employees' within the meaning of the interpretation Regulation 2 of the 2006 Regulations because they were individuals who work for DSL 'under a contract of service or apprenticeship 'or otherwise'. They did not work under self-employed contracts for services. Accordingly, theirs were 'contracts of employment' for the purposes of these Regulations.
39. There was no objection to being transferred by any of the Claimants, so the question is whether there was a transfer of an economic entity which retained its identify, with economic entity meaning an organised grouping of resources which has the objective of pursuing an economic entity. The Claimants submit that happened between DSL and MVL. The Respondent submits DSL closed down by reason of insolvency and MVL opened and they were separate entities.
40. As Harvey on Industrial Relations reminds us, the requirement under reg 3(1)(a) that there should be a transfer of 'an economic entity which retains its identity' may be traced back to *Spijkers v Gebroeders Benedik Abattoir CV*: 24\85 [1986] 2 CMLR 296 and is contained in Art.1(b) of Directive 2001/23/EC. The ECJ said in *Spijkers*:

"It is necessary to determine whether what has been sold is an economic entity which is still in existence, and this will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer, with the same economic or similar activity."

The court in *Spijkers* laid down specific guidance, stating that it is important to consider, in each case, the following matters, namely:

- (1) the type of undertaking or business concerned;
- (2) whether assets, tangible or intangible, are transferred;
- (3) whether employees are taken over;
- (4) whether customers are transferred;
- (5) the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended.

These are all single factors in the overall assessment that must be made, and they cannot, therefore, be considered in isolation.

41. In *Cheesman v R Brewer Contracts Ltd* [2001] IRLR 144 the EAT reviewed some key ECJ decisions. As to the question of whether there had been a transfer, the following factors were highlighted by the EAT:

(i) The decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, *inter alia*, by the fact that its operation is actually continued or resumed.

(ii) In a labour-intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity.

(iii) In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question, but each is a single factor and none is to be considered in isolation.

(iv) Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended.

(v) In determining whether or not there has been a transfer, account has to be taken, *inter alia*, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on.

(vi) Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets.

(vii) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer.

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(viii) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer.

(ix) More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor.

(x) The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer, but it is certainly not conclusive as there is no need for any such direct contractual relationship.

(xi) When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.

(xii) The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one subcontractor and the start by the successor.

Discussion and Conclusions

42. MVL started trading no later than 2 January 2020. That enables the Claimants to argue there was a transfer of undertaking on that date which was 6 days prior to DSL going into administration. They may argue, therefore, that this alleged transfer was not caught by the insolvency provisions of Regulation 8.
43. In favour of the Claimants' argument that there was a transfer is the fact that MVL is in the same industry as DSL – mystery shopping. The business did not start identically, however; MVL did not do video customer audits, it also did not do overnight hotel audits.
44. There is no doubt, further, that once DSL was closing, MVL was given a springboard to launch to challenge for the business of DSL's clients. Nigel Cook gave his daughter full access to his customer information. MVL did launch from the trading address, previously used by DSL and did use DSL's telephone numbers. It used DSL's company templates. In recognition of this, MVL had to buy this confidential information and intellectual property from DSL's administrators, at the admittedly token price of £1,500 .
45. Does all of this mean that MVL is the continuation of DSL, that MVL is DSL's transferred economic entity with its identity retained; that it transferred as a going concern?

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46. DSL ended because it could not compete with Performance in People. There is a clear explanation for its becoming insolvent. Mr Dalloz proudly confirmed that.
47. Performance in People and MVL now compete generally but also for DSL's clients. Nigel Cook gave his daughter (and himself as minority owner) a springboard from which MVL could tout for business from DSL's clients.
48. Importantly, no contracts transferred from DSL to MVL. MVL had to negotiate new contracts with any of DSL's former clients who were prepared to contract with them. 8 out of 27 were prepared to negotiate new contracts. In this respect, MVL is in the same position as Performance in People. Performance in People has continued successfully to conclude contracts with those who were DSL's clients.
49. It is significant, though not conclusive in my Judgment, that none of the contracts under which DSL was paid in respect of the work undertaken by the Claimants transferred to MVL. The Claimants cannot say emotively that MVL has been paid historically for the work that they did.
50. On the first day of trading – 2 January 2020 – 3 out of 48 employees came across from DSL to MVL. By the end of February 2020, 8 out of 48 had come across. All of these who were entitled had received redundancy payments in respect of their service with DSL. Continuity of employment was broken. Continuity with MVL commenced for these employees in 2020.
51. So, after a period of trading, 29.62% of DSL's former clients had entered into new contracts with MVL and 16.66% of DSL's former employees had come across. Those percentages are significantly short of the proportions required to sustain an argument that MVL is DSL's transferred economic entity with identity retained.
52. Again, it is significant, though not conclusive, that the 48 employees have been paid out by the Insolvency Service and the Redundancy Payments Office in respect of DSL liabilities on the basis that there was no transfer of an undertaking between DSL and MVL.
53. I come to the conclusion that MVL is a new and separate economic entity. DSL was out-competed by, in particular, Performance in People and had to cease trading. It was insolvent. Nigel Cook gave his daughter the springboard from which to do business with DSL's former clients. MVL was a small fraction of the size of DSL. It was a new and separate company seeking to do business in a smaller area of the market and starting afresh, with significantly smaller resources. It was given a springboard but it is not, in my Judgment, DSL's transferred going concern.
54. The Claimants have genuine grievances concerning the fact they were unpaid for the work they did in the final weeks of DSL. They were badly treated. That provides every reason for considering carefully whether there was a transfer of an undertaking between DSL and MVL.

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55. The proposition is arguable. I have concluded, however, that there was no such transfer. DSL could not sustain the competition from Performance in People. It became insolvent and ceased trading. MVL was incorporated in an attempt to remain active in the sector broadly defined, having to tout for new contracts from DSL's old clients and others. No contracts transferred. A springboard was provided to it for that task. The limited success of those efforts is documented above. MVL, however, was a new, separate and different entity from DSL. There was, as a matter of fact, no transfer of an undertaking between DSL and MVL.

Employment Judge Smail
Date: 14 December 2022

Reasons sent to the parties: 22 December 2022

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