



EMPLOYMENT TRIBUNALS

Claimant: Miss Shona Felton & Mrs Kerry Smith

Respondent: Britannia Driving School Limited

Heard at: London South Employment Tribunal, Croydon (by video)
On: 16-17 October 2023

Before: Employment Judge Abbott

Representation

Claimant: Mr Charlie Smith, lay representative

Respondent: Mr Ameer Buksh, solicitor

JUDGMENT having been sent to the parties on 2 November 2023 (reasons having been delivered orally on 17 October 2023) and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimants in these joined claims, Miss Shona Felton and Mrs Kerry Smith, were employed by the respondent, Britannia Driving School Limited ("**BDS Ltd**"), from 2003 and 2014 respectively. Mrs Smith alleged that she was dismissed with immediate effect on 1 May 2021, and Mrs Felton purported to resign on 2 May 2021. Both claimants brought complaints of unfair dismissal (in Mrs Felton's case, constructive unfair dismissal), unpaid holiday pay, unlawful deductions from wages, breach of contract in respect of notice pay and failure to provide written pay statements. The claims were resisted by the respondent.
2. At the core of the defence to the claims is an argument that the claimants' employment automatically transferred from BDS Ltd to another company, Britannia Driving School 1992 Ltd ("**1992 Ltd**") prior to their purported dismissals by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**the TUPE Regulations**"). If the respondent is correct in that assertion, all of the claims must fail because all relevant

liabilities of the transferor (i.e., the respondent, BDS Ltd) as regards the claimants' statutory and contractual employment rights have transferred with the "Britannia Driving School" business to 1992 Ltd.

3. The claim came before me for Final Hearing on 16 & 17 October 2023. The hearing was held fully remote through the Cloud Video Platform, with no material issues encountered during the hearing.
4. Oral reasons for dismissing the claim were provided on 17 October 2023, followed by the written Judgment which was sent to the parties on 2 November 2023. The respondent requested written reasons. Because I found that the TUPE transfer issue was dispositive of the claim, these written reasons focus (as did the oral reasons) on that issue only.
5. The claimants were represented by Mr Charlie Smith, the son of the claimant Mrs Smith. Both claimants provided witness statements and gave oral evidence. The respondent was represented by Mr Ameer Buksh, a solicitor and nephew of the sole shareholder of the respondent, Mrs Sanobar Buksh, and her husband, Mr Shafe Buksh. It called evidence from Mr Shafe Buksh, who provided a witness statement and gave oral evidence. I thank all of them for their assistance in this matter. The Tribunal was also provided with a 63-page Bundle of Documents and three videos prior to the hearing, and (further to requests made by me) a range of further materials during the course of the hearing. I considered all of the materials I was provided with when making my factual findings below.

The law: TUPE transfers

6. So far as is relevant to this claim, the TUPE Regulations apply to "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" (Regulation 3(1)(a)). In other words, there will be a "relevant transfer" where the following four questions are answered in the affirmative:
 - i. Was there a transfer 'to another person'?
 - ii. Did an 'economic entity' transfer?
 - iii. Did the economic entity 'retain its identity' after the transfer?
 - iv. Was that entity 'situated immediately before the transfer in the United Kingdom'?
7. In particular in respect of the third question, the Employment Appeal Tribunal (EAT) has laid down guidance in the case of *Cheesman and ors v R Brewer Contracts Ltd* [2001] IRLR 144, EAT. In *Cheesman*, the EAT stated that the following principles apply (see paragraph 11, omitting internal reference to other decisions):
 - i. As to whether there is any relevant sense a transfer, 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. However, whilst no authority so holds, it may, presumably, not be an error of law to consider "the decisive criterion" in (i) above in isolation; that, surely, is an aspect of its being "decisive", although, as one sees from the "inter alia" in (i) above, "the decisive criterion" is not itself said to depend on a single factor.
- 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.
- 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 sub-contractor and the start by the successor.
8. On completion of a “relevant transfer” as set out above, “(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” (Regulation 4(2)). This applies even in circumstances where the employees themselves are unaware of the fact of the transfer or of the identity of the transferee - see *Secretary of State for Trade and Industry v Cook and ors* [1997] ICR 288, EAT.

Findings of fact

9. The role of the Tribunal is to consider all of the evidence, including the oral evidence and the documentary materials I have been referred to, and form a view as to what is most likely to be the true position. It is important to say that, simply because I may disbelieve the evidence of a witness on a particular point, does not mean that I consider they are deliberately seeking to mislead – nor does it mean I must automatically disbelieve them on other points. Ultimately, I have to weigh up all the evidence on all different points and assess it on its merits.
10. The relevant facts are, I find, as follows. Where it has been necessary for the Tribunal to resolve any conflict of evidence, I indicate how I have done so at the relevant point. Only findings of fact that are necessary for me to determine have been referred to in this judgment. I have not referred to every document that I have read and/or was taken to during the hearing in the findings below, but that does not mean such documents were not considered if referred to in the evidence and/or in the course of the hearing.
11. The business that operates under the trading name “Britannia Driving School” began in around 1993. Its primary business is the offering of driving lessons through sub-contracted driving instructors, and training of driving instructors. Since 1993 it has operated under the ownership of different corporate entities. Beginning in around 2014, the relevant corporate owner was the respondent (“**BDS Ltd**”).
12. Miss Felton worked for the business from 2003, and Mrs Smith joined in September 2014. By the time of the events in this case, Miss Felton was

Sales & Customer Service Supervisor, and Mrs Smith was Sales & Customer Service Assistant. Both claimants' roles involved being on reception, booking driving lessons, taking payments, responding to online queries. Mrs Smith was also responsible for adding news / blog posts to the company website and social media channels.

13. The business was, until 2020, jointly run by two brothers, Mr Shafe Buksh (also known as Simon) and Mr Habib Buksh (also known as Alan), though the sole director and shareholder by 2020 was Simon's wife, Sanobar. In the remainder of these reasons, I will refer to the brothers by their anglicized first names for ease of reference, without intending any disrespect. I accept Simon's evidence that the brothers divided responsibility, with Simon being responsible for dealing with instructors and Alan dealing with administration. This is supported by the WhatsApp Round Table chat from June-July 2020 which indicates Alan (and his son Omar) having direct involvement in managing the claimants. Both claimants accepted in evidence that Alan was senior to them, but suggested they regarded Simon as the ultimate boss. Whether or not that was their genuine perception, I do not accept it was correct – I find based on the evidence that Simon and Alan were effectively equal partners in the business, and that the claimants took their instructions mostly (but not exclusively) from Alan.
14. In Summer 2020, Simon and Alan had a dispute regarding another company they jointly controlled. This dispute spilled over into the Britannia Driving School business. Simon was removed from the WhatsApp Round Table chat on 22 July 2020. At some point thereafter, his ability to access the business's online systems was removed, and Simon wrote to the business's accountant on 8 August 2020 asking that he be the sole point of contact for financial matters going forward. Later, the locks to the business's trading office were changed though, due to COVID lockdowns, the office was not being attended and Simon only became aware of this in January 2021.
15. On 18 August 2020, a new company – Britannia Driving School 1992 Limited ("**1992 Ltd**") – was incorporated, with Alan's son Omar and Alan's wife Farzana as the initial directors. At the time, Simon was unaware of this.
16. On 31 October 2020, the Government announced a second national COVID lockdown. Simon gave evidence that, from this point until the end of their employment, he believed that both claimants were on furlough, and that Alan was dealing with that process. In fact, there is no written evidence that the claimants ever agreed to be furloughed (as was a legal requirement) and I find they were not officially furloughed, notwithstanding that claims were made by the respondent under the furlough scheme. I find it very surprising that, given Simon had communicated to the accountant that he wished to be solely responsible for financial decisions, he was prepared to take apparently on face value that Alan was dealing with claims for furlough. Whilst there is evidence that Alan's son Omar was involved in the initial furlough claims made in April-June 2020, the family situation had changed by November 2020. This conduct evidences a lack of diligence on Simon's part in respect of the running of the business. Nevertheless, I accept that, negligent though it was, Simon genuinely believed that the claimants were receiving what pay was due to them under furlough terms and was not aware of any work they were actually doing during this time.

17. On 26 January 2021, when Simon discovered that the office locks had been changed, he messaged both claimants asking what was going on. Mrs Smith directed Simon to contact Miss Felton as she had been in hospital. Miss Felton directed Simon to speak to Alan regarding this and stated she was not aware the locks had been changed. I accept that this was a genuine response from Miss Felton.
18. There was a dispute of evidence over how often Simon and the claimants were speaking during this period from late 2020 into 2021 – Simon’s evidence was that he was checking in approximately once a week (which would be broadly consistent with his evidence of the claimants being on furlough), whereas the claimants originally said they were speaking almost every day, but in later oral evidence both claimants rowed back from that position, with Miss Felton suggesting the calls were every other day, and Mrs Smith that it was more like weekly. I found the claimants’ oral evidence on this topic to be highly unsatisfactory given its inconsistency and absence of any documentary support such as phone records. The only written evidence I have to assist me for this period is the WhatsApp messages between Simon and each claimant, which are for the most part not greatly illuminating. However, I consider the messages on 2 March 2021 between Simon and Mrs Smith do assist. In these messages, Mrs Smith asks Simon why her payslip refers to furlough when she has been working, and Simon responds stating that the office has been closed, nothing has been booked, he had not asked her to work, and she would need to take it up with Alan. I accept that these messages evidence Simon’s genuine belief at that time that the claimants were on furlough, and his surprise at the fact they were working under Alan’s instructions. I therefore accept that, based on the totality of the available evidence, Simon was not giving regular instructions to the claimants regarding work – rather he believed they were on furlough – and to the extent the claimants were working, it was under the primary direction of Alan.
19. At some point after discovering that the office locks had been changed, Simon came to the realisation that the Britannia Driving School business was operating (whereas he had previously considered it to be effectively frozen due to COVID restrictions) but income was being diverted elsewhere than into BDS Ltd’s accounts. On the balance of probabilities this was most likely around early April 2021. As is evidenced in a blogpost on the BDS website on 1 April 2021 posted by Mrs Smith, the BDS office reopened on 6 April 2021 in preparation for the date on which driving lessons restarted in England and Wales following COVID restrictions, that being 12 April 2021. The claimants gave evidence that the office did not in fact re-open on 6 April 2021 and they were still working at home during April 2021, but I do not accept that evidence insofar as it is concerned with the period from 12 April 2021, when COVID restrictions certainly were lifted. It is implausible that the Britannia Driving School business, under Alan, was not taking the earliest legal opportunity to get lessons booked and instructors back on the road.
20. In addition, Simon cannot have failed to anticipate that the business would be resuming operation at that point. It would have been evident to Simon at that point that money was not coming into the BDS Ltd company account. I find that, at around this time, the BDS instructors had been instructed to make franchise payments to a different bank account, one that I infer is controlled by 1992 Ltd. I was shown email correspondence with an instructor confirming

this must have happened prior to 3 May 2021 and, on the balance of probabilities based on the evidence, it most likely happened in early April 2021 as the date on which driving lessons could resume (12 April 2021) approached. Similarly, customer payments were being directed to bank accounts that I infer were controlled by 1992 Ltd from around the same time. While the claimants may not have known of the change of ultimate beneficiary, they cannot have failed to be aware that payments were being directed to different accounts given the nature of their roles.

21. Matters came to a head on Saturday 1 May 2021. Simon wrote WhatsApp messages to both claimants stating they “can start back at work this coming Tuesday 4th May”. To Mrs Smith he also made clear that he would be coming into the office also and asked for the spare key to be available. I find that, when he sent these messages, Simon already strongly suspected, or knew, that the claimants were already back working under Alan’s instruction, and these messages were really intended as a warning shot.
22. The reaction came later that day. Mrs Smith sent a message at 17:27 on behalf of both claimants saying the following: “Simon, we have not been paid, so won’t be working for you. Can you please send our wages ASAP, along with our wage slips, holiday pay and balance of monies owed. AS YOU KNOW WORKING WHILST BEING FURLOUGHED IS ILLEGAL.” The content of this message, in particular the capitalised section, gives an indication that this was a pre-meditated response. I find that the claimants must have known that, at some point, Simon would re-engage and question what was going on with the Britannia Driving School business, and they were ready to react. It is not relevant to my decision the extent to which this reaction was influenced or instructed by Alan.
23. Later on 1 May 2021, Simon sent messages to Mrs Smith purporting to dismiss her with immediate effect for gross misconduct, on the basis of getting money paid into another company whilst employed, and claiming furlough when working.
24. By an email sent at 12:17 on Sunday 2 May 2021, Miss Felton purported to resign, citing being required to work whilst furloughed, non-provision of payslips and non-payment of wages for April 2021 as the reasons. Simon responded on 5 May 2021 refuting the allegations.
25. The Claimants moved rapidly to commence Tribunal proceedings, beginning ACAS Early Conciliation on 5 May 2021. This ended on 6 May 2021, and the first claim was presented on 7 May 2021.
26. Following the purported dismissals, both claimants have purported to commence new employment contracts with 1992 Ltd. The contracts that have been provided to the Tribunal say they began this new employment on 30 July 2021. However, both Claimants accept they were working for 1992 Ltd prior to this date. Mrs Smith’s evidence was that from mid-May 2021 until end of July 2021 she worked *pro bono* for 1992 Ltd. Miss Felton also says she worked *pro bono* for 1992 Ltd during that period. I reject that evidence. It is, in my judgement, wholly implausible that both claimants would leave the respondent primarily because they hadn’t been paid and then agree to work for 1992 Ltd for 2-3 months for free. I find, based on the evidence, that both

claimants essentially continued working for the Britannia Driving School business as prior to the May Bank Holiday weekend, returning to the Britannia Driving School office on Tuesday 4 May 2021 (as is evidenced in videos sent to the Tribunal), and continued to work under Alan's direction. The purported commencement dates in the new employment contracts are, I find, a sham.

27. The business being operated by 1992 Ltd in May 2021 is the Britannia Driving School business. It operates via the same physical premises and the same website. The instructors are, by and large, the same ones as prior to May 2021. The only material change other than the identity of the corporate entity that owns the business is that Simon is no longer involved in the running of the business. In fairness to Miss Felton, she accepted in her evidence that apart from the identity of the company, she was (at least immediately after May 2021) doing exactly the same job, and I accept that is the case.

Application

28. I have already set out the law above. It is now my task to apply the law to the facts.
29. As regards the four questions to be considered under Regulation 3(1)(a), the respondent's position is as follows:
- i. There was a transfer from the respondent 'to another person': 1992 Ltd.
 - ii. The relevant 'economic entity' was the Britannia Driving School business.
 - iii. There has been 'retention of identity' as the business has effectively carried on without any change other than into which corporate entity the income flows.
 - iv. The business was situated in the UK immediately prior to the transfer.
30. I do not detect any real dispute as to whether the Britannia Driving School business as it was prior to May 2021 qualifies as an 'economic entity' for TUPE purposes, nor that it was situated in the UK at that time. The answer to both of these questions is undoubtedly yes. Therefore, the focus is on questions (1) and (3). The claimants say there was no transfer – they worked for the respondent up until 1 and 2 May 2021 respectively, and then for 1992 Ltd from some point thereafter, but they are separate entities and separate businesses. In closing submissions Mr Smith pointed particularly to different bank accounts, digital systems, management and (to some extent) instructors.
31. It is absolutely plain to me, based on the factual findings I have made, that the business in which the claimants now work is the same business as they worked in prior to May 2021. A transfer for TUPE purposes does not require a contract between transferor and transferee, and there is no contract here. However, there is clear evidence supporting there having been a transfer: specifically, the lock-out (both physically and electronically) of Simon following a family disagreement; and the establishment of a new company with Alan's wife and son as initial directors which has, ultimately, become the

operator of the Britannia Driving School business.

32. Applying the *Cheesman* guidelines, there is clear 'retention of identity'. The current Britannia Driving School business operates from the same premises and using the same website. It is offering the same services and the goodwill associated with the Britannia Driving School brand is maintained. The instructors are largely the same, as are the staff. I have rejected on the facts that there was any break in the claimants' service between their purported dismissals and their purported new employment, but I have found they are doing the same jobs. The differences to which Mr Smith pointed in his closing submissions are essentially mere artefacts of the exclusion by Alan of Simon from the running of the business. For all outward purposes other than where payments are directed, it is the same Britannia Driving School business. I am in no doubt whatsoever that, based on the available evidence, there has been a 'relevant transfer' for TUPE purposes.
33. The next question is when the transfer occurred. This is difficult in the unusual circumstances of this case. However, based on my factual findings, by the end of January 2021 Simon was effectively locked-out from the business, and it was thereafter operating under Alan's control. Simon was thereafter checking in with his staff (who he believed to be on furlough) on a regular basis but not directing operations to any material extent. I find that the 'relevant transfer' for TUPE purposes had most likely happened by the end of January 2021, but certainly by early April 2021 once there was no doubt that instructors were being directed to make payments to new bank accounts.
34. The consequence of my findings is that, by operation of Regulation 4(2) of the TUPE Regulations, all the transferor's (BDS Ltd's) rights, powers, duties and liabilities under or in connection with the claimant's employment contracts were transferred to the transferee (1992 Ltd); and any act or omission of the transferor (BDS Ltd) before the transfer was completed, are deemed to have been an act or omission of or in relation to the transferee (1992 Ltd). As regards the claimants' complaints of unpaid holiday pay, unlawful deductions from wages, breach of contract in respect of notice pay and failure to provide written pay statements, that means the proper respondent is 1992 Ltd. The complaints as against this respondent must be dismissed.
35. As regards the unfair dismissal claim, as the purported dismissals occurred after the transfer, the respondent was not the relevant employer of the claimants at that time. Since the contracts of employment had transferred to 1992 Ltd (and now apparently continue), there were no dismissals as a matter of law. In any event, the claimants could not have been dismissed by the respondent in May 2021 as their employment contracts had already transferred to 1992 Ltd prior to that. Accordingly, those complaints must also be dismissed.

Employment Judge Abbott

Date: 6 November 2023

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