



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr Ray Martin

**Respondent:** GDSPL Limited

**Heard at:** Birmingham (by video)

**On:** 20 May 2025

**Before:** Employment Judge Choudry (sitting alone)

## Appearances

For the claimant: In person (Claimant)

For the respondent: Mr Mark Masiak (Director)

## RESERVED JUDGMENT

1. There was a transfer of undertaking from TNJ Holdings Ltd t/a NEC to the respondent on 1 May 2024 to which the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") apply.
2. The claimant's dismissal was for a reason connected to the TUPE transfer and the claimant's claim for automatically unfair dismissal is well founded and succeeds.
3. The parties are invited to agree the final compensation payable to the claimant based upon the Tribunal's conclusions in paragraph 15 of this Judgment failing which the matter will be listed for a remedy hearing.

## REASONS

### Background

- (1) By a claim form dated 2 January 2024 the claimant brought a claim for unfair dismissal (both ordinary and automatically unfair by reason of TUPE), notice pay, holiday pay and breach of contract/unlawful deduction of wages in relation to company car allowance, pension payments and commission following the termination of his employment with effect from 31 August 2024.
- (2) By a judgment dated 7 November 2024 the claimant's claim for ordinary unfair dismissal was struck out on the basis that he did not have the requisite service to bring such a claim. The rest of the claimant's claims were not affected by this judgment.

## **Documents**

- (3) The claimant presented a bundle containing 125 pages including his statement. The respondent produced two statements from Mr Mark Masiak together with an evidence bundle of 361 pages from the respondent.

## **Evidence**

- (4) I heard evidence from the claimant and for the respondent from Mr Masiak, a director of the respondent.

## **Issues**

- (5) The issues for the Tribunal to consider are:

- 5.1 Did the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") apply to the acquisition, by the respondent of certain assets, of TNJ Holdings Ltd t/a NEC pursuant to a sale and purchase agreement dated 1 May 2024? In considering whether TUPE applies the Tribunal would need to consider whether there was a stable economic entity, whether there was a transfer of that entity; and whether the economic entity retained its identity.
- 5.2 Was the claimant's dismissal automatically unfair as a result of a transfer pursuant to the TUPE?
- 5.3 If so, did the respondent breach the claimant's contract by failing to give him two months' notice of termination and by paying him in lieu of notice;
- 5.4 If so, what losses flow from this breach?
- 5.5 Did the claimant receive a payment in respect of any accrued but untaken holiday on the termination of his employment;
- 5.6 Were commission payments and pension payments properly payable to the claimant?

## **Facts**

- (6) I make the following findings of fact:

- 6.1 The claimant commenced employment with TNJ Holdings Limited trading as NEC Visual Communications ("NEC") on 16 September 2022. NEC was a printing business undertaking large format printing. The claimant was employed as Business Development Director, with responsibility selling for pop up stands and display boards to NEC's clients.
- 6.2 Pursuant to an offer letter dated 16 September 2022, the claimant's salary was £55,000. On a net basis he received £4,583.33 per month. In addition, he was entitled to a company car allowance (although it appears that he received a company car rather than a car allowance), a pension with a company contribution of 2% and a personal contribution of 3%. He was also entitled to two months' notice of termination and 25 days' holiday in addition to bank holidays.
- 6.3 The claimant asserts that he was also entitled to a commission of 3% on the total value of all completed work. Whilst the offer letter does not refer to the commission payments, the claimant has produced pay slips from his

employment at NEC which show that he received a commission payment. The claimant asserts that he is entitled to unpaid commission of 3% in respect work place by Printflow Communications and Konica Minolta to the value of £66,000 between 1 May 2024 to 31 August 2024 amounting to £1,980.

- 6.4 In the last quarter of 2023 and in the first quarter of 2024 NEC began to receive various demands from creditors and HMRC who by letters dated 27 February 2024 required security for monies owed to in respect of unpaid VAT and PAYE. Payment was required by 7 April 2024.
- 6.5 On 10 April 2024 NEC appointed Quantuma Advisory Services ("Quantuma") to provide advice in relation to its financial situation resulting in an accelerated sales process commencing on 10 April 2024 with a deadline for offers set for 14 April 2024.
- 6.6 NEC entered into insolvency proceedings on 30 April 2024 and Nicholas Simmonds and Richard Easterby at Quantuma were appointed as Joint Administrators. All employees received a letter on the same day from Paul Robbins, a director of NEC, informing them that their employment was being terminated with immediate effect on the grounds of redundancy. They were also provided with information on how to apply to the insolvency services for redundancy payments and any outstanding pay.
- 6.7 On 1 May 2024 the respondent, also a printing business which also produces large format print, acquired NEC's business and assets at a cost of £45,000 through a pre-pack sale of pursuant to a sale and purchase agreement (SPA). Assets acquired by the respondent included goodwill for £30,000, office furniture and equipment for £5,000; plant and equipment (including those subject to finance agreements) for £5,000 and stock for a further £5,000. Book debts were excluded from the sale and were to be recovered by Bibby Commercial Finance Limited. In addition, the respondent entered into a Licence to Occupy NEC's two premises with the Joint Administrators for a period of 6 months whilst a new lease was negotiated with the landlord.
- 6.8 NEC had 36 employees. The SPA does not mention what would happen to the employees. However, the Administrators, in their report pre pack disclosure report dated 2 May 2024 noted that:

*"The benefits of achieving a pre-packaged sale were the transfer of employees and potentially the lease on the trading premises and the absence in supply of goods and services, which would enable a value to be achieved for goodwill and ensure a more effective debt collection process".*

- 6.9 The purchase of NEC was by a connected person as Mr Masiak was a director and had significant control of NEC as well as of the respondent. As such an Evaluator's Report was required under the Administration (Restriction on Disposal to Connected Persons) Regulations 2021. The Evaluator's report relating to the sale of NEC to the respondent referred to the sale being a TUPE transfer: *"I am advised that the Purchaser will be taking a TUPE transfer in respect of employees"*.
- 6.10 The claimant's evidence was that he began working for the respondent with effect from 1 May 2024, immediately after being told by the joint administrators that his role was redundant undertaking the same work he had done for NEC. The claimant indicated that he worked in the same factory, using the same equipment and with the same clients. His evidence, which is

supported by the Evaluator's Report, was that the respondent agreed that all outstanding work in progress would be completed, that it would finalise invoicing on other works and remit funds received, less the respondent's costs to the Joint Administrators. The claimant's evidence, which I accept, is that there was no break in the passage of work through the company and he continued to do the same work post the sale as he had done prior to the respondent purchasing NEC. However, the claimant's evidence was that his company car was taken away when the respondent took over NEC, with the claimant being informed that the car would be replaced in due course but the respondent could not afford it just yet. The claimant was paid his salary in full for May 2024 by the respondent.

- 6.11 Mr Masiak, in his evidence, asserted that NEC had ceased trading on 31 March 2024 and that following the SPA being entered into the respondent employed the claimant on similar but not identical and entirely separate terms to those which were included in the contract of employment with NEC. I have not seen any evidence of NEC ceasing trading on 31 March 2024. On the contrary Quantuma were not appointed to provide advice on NEC's financial situation until 10 April 2024 and the insolvency proceedings did not take place until 30 April 2024. As such, I do not accept Mr Masiak's assertion that NEC ceased trading on 31 March 2024. The employees remained employed, undertaking work for NEC's clients through this period. I have also seen no evidence that the work undertaken by NEC was fundamentally different to the work undertaken by respondent.
- 6.12 Mr Masiak stated that the offer of employment by the respondent was communicated to the claimant on 6 May 2024 and that his employment with the respondent commenced work on 13 May 2024. However, no contract of employment was signed by the claimant nor did Mr Masiak specify the differences in the terms upon which the claimant had been engaged in this evidence, apart from holidays where Mr Masiak indicated that employees of the respondent only received 20 days' holiday. Indeed, no paperwork was produced informing the employees that they would be starting on 13 May 2024 which Mr Masiak indicated was done by telephone. Mr Masiak also indicated in his evidence that the claimant was provided with a company vehicle which was used by him throughout his employment with the respondent. However, the bundle only evidenced the hiring of a vehicle from 28 June 2024 to 3 July 2024 for a site visit the claimant undertook. In relation to the pension Mr Masiak indicated that there was a significant delay with HMRC setting up the Respondent's Employee PAYE and issuing the relevant tax codes which impacted the setting up of the pension arrangements which was eventually set up on 27 July 2024 and that the claimant's payments were all up-to-date as at his termination date but I have seen no written evidence of this.
- 6.13 Mr Masiak indicated that although NEC had been acquired on 1 May 2024 it did not start trading until 13 May 2024 as the business was being set up. He also referred to the fact that the respondent never used the domain names, website or logos of NEC and that it had to obtain its own insurance policies and could not rely on any insurance policies that NEC had.
- 6.14 The claimant and other employees applied to the Insolvency Service for their salaries and other monies due to them. Similarly, it entered into new agreements with customers and supplies and there was no novation of any contracts that NEC had entered into.

- 6.15 On 21 May 2024 the claimant was informed by the insolvency service that he was not entitled to a redundancy payment as he did not have the requisite service. In addition, he was not entitled to a payment in lieu of accrued holiday pay or notice pay as the Insolvency Service believed that the business, or part of the business that the claimant had been employed in by NEC was transferred to the respondent under TUPE. This meant that the claimant had not been dismissed by reason of redundancy and therefore was not entitled to notice pay and that his holidays and continuity of service should be honoured by the respondent. This decision was based on the information provided by the claimant and the Insolvency Practitioners to the Insolvency Service.
- 6.16 On 21 August 2024 the claimant was informed on the telephone by Mr Wayne Darch, Sales Manager for the respondent that his employment was being terminated on the grounds of poor performance. The claimant was not given the opportunity to respond to the concerns about his performance nor afforded the right to be accompanied. I have not seen evidence to support any assertions of poor performance by the claimant.
- 6.17 On 23 August 2024 the claimant wrote to Mr Masiak and Paul Robbins in which he indicated to Mr Masiak that he had tried to call and WhatsApp him repeatedly but that he had received no response nor written confirmation of his dismissal. In his letter the claimant indicated that Mr Darch had informed him that Mr Masiak was “not interested” in paying notice. The claimant attached the letter that he had received from the Insolvency Service informing him that their view was that the transfer of the business from NEC to the respondent was a TUPE transfer which would mean that his terms and conditions of employment with NEC transferred to the respondent. The claimant indicated that he had received no new contract or notice to confirm any changes. He attached a copy of his contract of employment which confirmed that he was entitled to two months’ notice. The claimant indicated that he was also entitled to retain his car for his notice period and was seeking payment for the 4 month period that he had no car despite him being contractually entitled to receive a car which, at £600 per month equated to £2,400 and including his notice period amount to £3,600. The claimant also sought a payment for his accrued but untaken holidays. Finally, the claimant also sought payment for payments due to his company pension and asserted that no payments had been made into his company pension for 14 months despite deductions being made in respect of his personal contributions.
- 6.18 The pension contributions amount to £1,942.17.
- 6.19 Whilst employed by the respondent the claimant took 11 days’ holidays on 1 and 2 July 2024 and 15 to 25 July 2024. The claimant asserts that he is entitled to a further 14.5 days accrued but untaken holidays for the period January to August 2024. This equates to £2,185.00.
- 6.20 On 29 August 2024 the claimant received a letter dated 22 August 2024 confirming the decision to dismiss him.
- 6.21 The claimant’s employment came to an end on 31 August 2024.
- 6.22 On 3 September 2024 the claimant wrote to Mr Masiak asking for written reasons for his dismissal. The claimant also pointed out that he was entitled to two months’ notice.
- 6.23 Mr Masiak responded to this letter but a complete copy was not provided in the bundle. The extract seen by this tribunal indicated that as the claimant did not have two years’ service he was not entitled to a redundancy payment.

The letter ends with Mr Masiak personally thanking the claimant for his service and with Mr Masiak wishing him well for the future.

6.24 The claimant received a payment of £3,946.97 on termination but was subsequently informed that he had been overpaid by £248.52 and should, in fact, have been paid £3,456.14.

### Submissions on behalf of the Respondent

- (7) Mr Masiak's second witness statement contained a number of submissions in relation to the question of TUPE which Mr Masiak supplemented with oral submissions. In summary, Mr Masiak indicated that advice had been taken by the respondent from its legal advisers that the SPA only concerned the purchase of assets. I reminded Mr Masiak that any legal advice was privileged and should not be disclosed. However, he indicated that he was happy to disclose the advice he had received and referred me to it in the bundle. Secondly, the Administrators Progress Report which was dated November 2024 that the SPA concerned the sale of assets and that the administrators had tried to assist the employees in securing payments from the insolvency service. I was also referred to a number of cases as follows: **Oakland -v- Wellswood (Yorkshire) Ltd [2009]**; **Abellio London Ltd -v- Musse & Ors [2012]**; **Celtec Ltd -v- Astley -v- [2006]** and **Secretary for Trade and Industry -v- Slater [2007]** in support of the contention that TUPE did not apply where a new employer started similar operations to the original employer who had ceased trading, that TUPE did not apply where there was a gap between old and new service providers and that continuity is a key requirement for TUPE to apply.
- (8) Mr Masiak was of the view that TUPE did not apply for a number of reasons set out in paragraph 6.12 above. In addition, Mr Masiak submitted that due to the fact that NEC ceased trading on 31 March 2024, administrators were appointed on 10 April 2024, employees were made redundant before the assets were purchased and the respondent did not commence trading until 13 May 2024. He referred to employees being paid for the whole of May as a "gesture of goodwill". Mr Masiak asserted that continuity of service had been broken as the employees had been dismissed and re-hired afterwards. Further, that there was no functional continuity in the business as everything had changed – the respondent had had to enter into new contracts with suppliers and customers. He asserted that the respondent was a standalone business and there was no economic entity to which TUPE could apply.

### Claimant's submissions

- (9) The claimant, in his submissions asserted that he had worked continuously for NEC and then for the respondent in good faith. He took no time off nor was there a break in his employment. He never received a P45, new contract or offer letter. He also pointed to the fact that he had received no redundancy payment, notice pay or holiday from the Insolvency Service. As such, he was seeking his notice pay, holiday pay, compensation for loss of company car, pension payments and commission. In relation to the latter the claimant referred to the fact that he had generated £66,000 worth of work for which he should receive commission.

## The Law

(10) Section 3(1) of TUPE provides:

*“3.—(1) These Regulations apply to—*

*(a) 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;*

*(b) a service provision change, that is a situation in which—*

*(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.*

*(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.”*

(11) In considering whether TUPE applies the Tribunal needs to consider whether there was a stable economic entity situated in the UK, whether there was a transfer of that entity; and whether the economic entity retained its identity after the transfer. Guidance was given by the EAT in the case of **Cheesman -v- R Brewer Contracts Ltd [2001] IRLR 144** known as the “Cheesman Principles” which set out a non-exclusive list of factors for the Tribunal to consider in deciding whether or not TUPE applies. Guidance is provided at paragraph 11 of the decision:

*“As for whether there has been a transfer:-*

*(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 - Vidal paragraph 22 and the case there cited; Spijkers -v- Gebroeders Benedik Abattoir C.V. [1986] ECR 1119 ECJ; Schmidt -v- Spar-und Leihkasse [1994] IRLR 302 ECJ para 17; Sanchez Hidalgo paragraph 21; Allen paragraph 23.*

*(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 - Sanchez Hidalgo paragraph 32.*

*(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*

- **Vidal** paragraph 29; **Sanchez Hidalgo** paragraph 29; **Allen** paragraph 26. 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 - **Sanchez Hidalgo** paragraph 29; **Allen** paragraph 26.

(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 - **Vidal** paragraph 31; **Sanchez Hidalgo** paragraph 31; **Allen** paragraph 28.

(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 - **Vidal** paragraph 31; **Sanchez Hidalgo** paragraph 31; **Allen** paragraph 28.

(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 - **Allen** paragraph 30.

(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 - **Vidal** paragraph 35.

(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 - **Sanchez Hidalgo** paragraph 30.

(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 **Sanchez Hidalgo** paragraphs 22 and 23.

(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 - **ECM** page 1169 e-f.

(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 - **Allen** paragraphs 32-33".

## Conclusions

- (12) I have considered the evidence which has been presented to me and the oral submissions made by the claimant and Mr Masiak. I have also considered the cases to which I have been referred by the respondent.



- (13) In considering whether TUPE applied to the sale of certain assets of NEC to the respondent I need to consider whether (1) there was a stable economic entity situated in the UK; (2) whether there was a transfer of that entity; and (3) whether that economic entity retained its identity following the transfer.
- (14) I am satisfied on the evidence before me that the pre-pack sale of NEC to the respondent did amount to a TUPE. There was a stable economic entity – a large format printing business based in the UK, which transferred from NEC to the respondent on 1 May 2024. I am also satisfied that economic entity retained its identity following the pre-pack sale to the respondent. I make this decision for the following reasons:
- 14.1 there was a transfer of employees who continued to undertake the same work for the respondent as they had done for NEC prior to the pre-pack sale to the respondent. There was no break in the continuity in service as despite the employees being told on 30 April 2024 that their employment with NEC was being terminated, they immediately started work for the respondent on 1 May 2024 doing the same work, in the same location, for the same clients as they had done prior to NEC entering into insolvency proceeding;
  - 14.2 good will was acquired by the respondent;
  - 14.3 office furniture and equipment was acquired by the respondent;
  - 14.4 plant and equipment was acquired by the respondent;
  - 14.5 stock was acquired by the respondent;
  - 14.6 the respondent entered into a Licence to Occupy NEC's two premises for a period of 6 months whilst a new lease was negotiated with the landlord;
  - 14.7 both the Administrators and the Evaluator's Report referred to the sale of NEC's business and assets as being a TUPE transfer;
  - 14.8 I accept the claimant's evidence that following the sale of NEC's business and assets to the respondent he carried on doing the same work as he had done before the pre-pack sale for the same customers and from the same premises. Whilst the respondent did not acquire the work in progress of NEC it did reach an agreement with the administrators that this work would be completed by it and that it would sort out invoicing for this work and remit any funds received for the work in progress to the administrators following deduction of its costs;
  - 14.9 Employees were paid in full for the month of May. I do not accept Mr Masiak's evidence that this was done as a gesture of goodwill, they were paid as they were undertaking work for which the respondent was being remunerated;
  - 14.10 I also don't accept Mr Masiak's evidence that employees were told that they would start work on 13 May 2024 nor was any evidence to show that new contracts were provided to employees.
  - 14.11 I note Mr Masiak's evidence that the respondent did not use the domain names, website or logos of NEC and that it had to obtain its own insurance policies. However, this is not unusual and does not in my view prevent TUPE from applying. Further, it is not unusual for new insurance arrangements to be entered into given that the business as new owners.

- (15) No credible evidence has been adduced as to the reasons for the claimant's dismissal other than TUPE. Given this, having found that TUPE applied to the pre-pack sale of NEC to the respondent, I find that the claimant was dismissed for a reason connected to TUPE and that therefore that his dismissal was automatically unfair. As such, he is entitled to 7 weeks' notice pay (having already received 1 weeks' notice), accrued but untaken holiday for the period 1 January 2024 to 31 August 2024, pension contributions of £1,942.17; commission of £1,980 (3% on sales of £66,000) and compensation for loss of his company car at £3,600 (for the period May to August 2024 and for his 2 months' notice period). All payments, save for the pension contributions, are subject to PAYE. The parties are invited to agree the sums due in respect of holiday pay and notice pay failing which the matter will be listed for a remedy hearing before me to determine the same.

**Employment Judge Choudry**

**Approved on 20 July 2025**

**Recording and Transcription**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

<https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>