



# EMPLOYMENT TRIBUNALS

***Claimant***

Ms L Marshall

***Respondents***

Mr Andrew Bird and Ms Gillian Bird t/a Bird's Taxis

Ms Gillian Bird t/a Gillian Bird Taxis

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT MIDDLESBROUGH

ON 9<sup>th</sup> April 2018

EMPLOYMENT JUDGE GARNON

***Appearances***

For Claimant : Ms R Pattison

For Mr Andrew Bird Ms J Kirkley

For Ms Gillian Bird Mr A Hallam

### JUDGMENT

The claim form is amended to add Ms Gillian Bird t/a Gillian Bird Taxis as second respondent

The claimant is entitled to a redundancy payment, payable by the second respondent only, in the sum of £1836.

### REASONS

1. A preliminary issue was whether the Tribunal is prevented from awarding a redundancy payment because the claim was presented outside the primary time limit for doing so. The applicable law is in section 164 of the Employment Rights Act 1996 (the Act) which as far as relevant says

*(1) An employee does not have any right to a redundancy payment unless, before the end of the period of six months beginning with the relevant date—*

*(c) a question as to the employee's right to, or the amount of, the payment has been referred to an employment tribunal,*

*(2) An employee is not deprived of his right to a redundancy payment by subsection (1) if, during the period of six months immediately following the period mentioned in that subsection, the employee—*

*(b) refers to an employment tribunal a question as to his right to, or the amount of, the payment, or*

*and it appears to the tribunal to be just and equitable that the employee should receive a redundancy payment.*

*(3) In determining under subsection (2) whether it is just and equitable that an employee should receive a redundancy payment an employment tribunal shall have regard to—*

*(a) the reason shown by the employee for his failure to take any such step as is referred to in subsection (2) within the period mentioned in subsection (1), and*

*(b) all the other relevant circumstances.*

*(5) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsections (1)(c) and (2).*

2. The earliest relevant date is 31<sup>st</sup> March 2017 Section 207B of the Act provides for extension of time limits to facilitate Early Conciliation (EC) through ACAS. The claimant contacted ACAS on 5<sup>th</sup> June 2017. ACAS sent the EC Certificate on 5<sup>th</sup> July . The claim was validly presented on 8<sup>th</sup> February 2018 so any analysis the claim is about 3 months outside the time prescribed in section 164(1) .

3. The claimant sought advice when the EC Certificate whether to start a tribunal claim. She did not due to the fees. On 27<sup>th</sup> July 2017 a Supreme Court decision, R (on the application of Unison) v Lord Chancellor [2017] UKSC 51, held fees were unlawful and struck down the legislation. Lord Reed placed emphasis on low value claims thus:

*96. Furthermore, it is not only where fees are unaffordable that they can prevent access to justice. They can equally have that effect if they render it **futile or irrational** to bring a claim. .... Many claims which do seek a financial award are for modest amounts, as explained earlier. If, for example, fees of £390 have to be paid in order to pursue a claim worth £500 ... **no sensible person** will pursue the claim unless he can be virtually certain that he will succeed in his claim, that the award will include the reimbursement of the fees, and that the award will be satisfied in full. **If those conditions are not met, the fee will in reality prevent the claim from being pursued, whether or not it can be afforded.***

When I explained the relevant factors to the respondents, both agreed it was just and equitable to consider this claim .

4. The next preliminary point was also agreed when I explained the problem. The claimant had named only the first respondent, a partnership of Ms Gillian Bird and her nephew Andrew. The substantive issue to be resolved today is whether, on or about 1<sup>st</sup> April 2017, there was a "relevant transfer" under the Transfer of Undertakings ( Protection of Employment ) Regulations 2006 (TUPE) of part of its undertaking to Ms Bird as a sole trader. If there was, she may be liable solely rather than jointly and severally as a partner. Rule 34 of the Employment Tribunal Rules of

Procedure 2013 permits the addition of a respondent without the need to undergo separate EC . It was plainly right to add Ms Bird in her sole capacity.

5..TUPE ,so far as relevant, says in regulation 2 "relevant transfer" means a transfer to which the regulations apply and Regulation 3 contains :

*(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;*

*(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.*

*(6) A relevant transfer—*

*(a) may be effected by a series of two or more transactions; and  
(b) may take place whether or not any property is transferred to the transferee by the transferor.*

6. Case law governs the question of whether or not there is a transfer of an economic entity which retains its identity. The lead case in European Law is Spijkers –v- Gebroeders Benedik Abattoir and in the United Kingdom, building on the Spijkers decision, Cheeseman –v Brewer. I have to look at the following criteria

Whether the type of business remains the same

Whether there is a significant transfer of tangible or intangible assets

Whether staff are taken on

Whether customers transfer

Whether there is a similar activity before and after the transfer

Whether any interruption of the activities is of short or planned duration.

7. Fairhurst Ward Abbott –v-Botes Building 2004 ICR 919 held for a relevant transfer to take place of **part of** an undertaking the part in question does not of itself need to exist as a discrete economic entity prior to the transfer. It may come into being at the time of the transfer.

8. Regulation 4 includes:

*(1) ... 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 would be terminated by the transfer but any such contract shall have effect after the transfer as it were originally made between the person so employed and the transferee.*

*(2) Without prejudice to paragraph (1), ..., on the completion of a relevant transfer—  
(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee;*

9 Regulation 18 says there can be no contracting out of TUPE other than in specific circumstances none of which apply in this case.

10. The claimant was born on 13 April 1955 and started working for Bird's Taxis on 1 September 1999 as a taxi driver. The business was located in the small town of Shildon in County Durham. Latterly, the partners were Andrew Bird and his aunt Gillian Bird. They decided to end their partnership. Negotiations were through solicitors: for Ms Bird , Anthony Walters, and for Mr Bird BHP Law. I declared to the parties I knew Mr Walters and none of them felt this would impair my impartiality.

11. Today I heard all parties. Mr Bird produced a full witness statement to which he attached several documents. In these proceedings for a redundancy payment only the claim form was served on Mr Bird and Ms Bird separately. In her response Ms Bird accepts the partnership is liable to the claimant to pay a redundancy payment Mr Bird says the partnership ceased business on 31 March 2017 which was the end of its financial year. He then asserts from the following day the business was split into two separate businesses being Gillian Bird Taxis a sole tradership and Bird's Taxis Ltd a company incorporated by him. It is common ground no employee was expressly told on or before 31<sup>st</sup> March their employment was ended

12 The main source of work provided to the partnership was Durham County Council for the transportation of children to school and adults to day care centres. The Council wanted the same staff employed to do the same jobs if its contracts were to continue. Therefore it was agreed as part of a much wider agreement to divide the assets , tangible and intangible, of the partnership, Ms Bird would retain the work done by the claimant, Ms Humble.. Sheila Douthwaite, Joanne Bird, Debra Simpson and Ms Bird herself. Birds Taxis Ltd would retain the work done by Mr Bird, Ms Julie Rowley and Ms Anne Huntley. That part of the proposed division of partnership assets was not only agreed but approved by the Council.. By 31<sup>st</sup> March Ms Bird had in place all insurances necessary to enable her to trade alone. In the week commencing Monday 3 April she did trade using vehicles of the former partnership and, to the limited extent of work available at the time, the staff she had agreed to use, including the claimant. On or about 31 March 2017 the claimant received a P45 from Bird'sTaxis . Such a document is a copy to an employee of the notification to Her Majesty's Revenue and Customs (HMRC) **that** employer is no longer liable for tax and NI deductions. It is not in itself a dismissal.

13. In between 31 March and 10 April the broader plan amicably to divide the assets of the partnership failed for several reasons. The parties today were interested in telling me what those reasons were and whose fault it was. That does not matter. The plain fact is starting on 1 April Ms Bird, for at least a week, acted in a manner in which all of the tests in Spijkers were satisfied. Using assets that belonged to the partnership, notwithstanding her arrangement to buy them subsequently collapsed,

she did exactly the same work as the partnership had been doing before in respect of certain of its contracts which she had agreed to continue. She had in place the necessary insurance. She employed the necessary staff. Part of the former undertaking which were not separately identifiable before the transfer (but it does not have to be) became so after it and the economic entity retained its identity

14. On 10 April, because agreement had not been reached on the financial part of the wider partnership division, mainly the price for the vehicles Ms Bird was using, Mr Bird served a notice of dissolution. He insisted through his solicitors the vehicles of which Ms Bird had had use be returned to be sold. Thereafter with no vehicles neither Ms Bird herself nor any of the ladies she had agreed to employ had any work to do, so they were all dismissed as redundant upon the failure of the business of Ms Bird trading as Gillian Bird Taxis.

15. The claimant is friendly with Ms Bird and would have preferred my decision to be that the partnership was liable. I must emphasise TUPE operates whether the parties want it to or not. As I said to them at the outset if I find that at a specific date the tests for a relevant transfer are satisfied, subsequent events cannot undo part of the series of transactions which leads to a transfer. Following the collapse of Ms Bird's business there was no further transfer. Mr Bird says had he known what was happening to the staff he may have been able to employ the ladies who moved across to his aunt's business. The point is academic. At the time of their dismissal their employer was Ms Bird only and she is solely liable for the redundancy payment

16. I make two closing points. First, I find no fault with the legal advice given to either side in the process of the partnership division. This was a situation the solicitors were trying to avoid happening. Ms Bird kept saying today the transfer had never been "completed" and the solicitors agreed that was the case. The words in Regulation 4 (2) ***on the completion of a relevant transfer*** do not mean completion in the sense used by property and commercial lawyers to mean bringing the whole division of partnership assets to a binding conclusion. Regulation 3 means that when as a matter of fact, and irrespective of any agreement, or lack of one, between the parties part of an business transfers to another person where there is a transfer of an organised grouping of resources which has the objective of pursuing an economic activity which retains its identity, the transfer for the purposes of TUPE is complete.

17. Secondly, on 12 December 2017 a colleague of the claimant Ms Doris Humble obtained a judgment from Employment Judge Shepherd sitting at this tribunal that there was no relevant transfer from the partnership to Ms Bird, Ms Humble was dismissed by reason of redundancy by the partnership and the claim against Ms Bird as a sole trader was dismissed. As today, she was represented by Mr Hallam, who like the other two representatives was not legally qualified. Mr Bird did not appear before Employment Judge Shepherd. The sole reason for my decision being diametrically opposed to his, as the parties agreed, is that he was not told all the information which I have been given today as to what Ms Bird did in the week commencing 3 April nor did he see the large number of documents produced to me

today by Mr Bird. There is nothing novel about the points of law I have applied . Had he had the same facts, I am quite sure Employment Judge Shepherd would have decided as I have . Mr Bird has only himself, or his advisors, to blame for not attending the earlier hearing

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**Employment Judge Garnon**  
**JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 9<sup>th</sup> April 2018**