



EMPLOYMENT TRIBUNALS

Claimant: Mr Barnett

Respondent: (1)AJSHM Limited
(2) EtchTech Limited
(3) Jason McKnight t/a Mars Autos

Heard at: Watford ET by CVP **On:** 8 October 2021

Before: EJ Cowen

Representation

Claimant: Mr Sykes (representative)

Respondent: First Respondent - Mr S McCallion (company director)

Second Respondent – Mr Alev (counsel)

Third Respondent – Mr McKnight (in person)

RESERVED JUDGMENT

- 1 The Claimant was employed by the first respondent.
2. The second and third respondent are dismissed from the proceedings.
- 3 A final hearing with a time estimate of one day will be held on 15 July 2022.

REASONS

Introduction

1. By way of a claim issued on 7 March 2020, the Claimant claimed unfair dismissal, redundancy pay, notice pay and outstanding holiday pay from his employment as a mechanic the first and/or second respondent at their workshop at Saint Neots. A case management preliminary hearing was held on 27 April 2020, where EJ Warren, added the second and third respondents. As a result of this, an Open Preliminary Hearing was listed to decide;
 - a) who the claimant's employer was and
 - b) whether the claimant was subject to a transfer of undertakings (TUPE).

EJ Warren also listed a final hearing to take place in December 2021 (of which more later).

2. The hearing was listed to take place in person and was changed to CVP two days before the hearing. This message was not received by all the parties and meant that the respondents all attended at Cambridge Employment Tribunal as ordered and the claimant's representative and myself attended by CVP. I must apologise for the lack of communication over this arrangement and any inconvenience caused to the respondents. But we were able to conduct the hearing in this way and all parties had the opportunity to participate.
3. The Tribunal was provided with a bundle of documents of 226 pages, a supplemental bundle of 70 pages, a further additional bundle from the claimants of 11 pages, and a skeleton argument on behalf of the claimant. The first respondent did not have access to the papers in the case, but was provided with a spare laptop in order to be able to access them and follow the proceedings. The third respondent only had access to the documents on his mobile phone, but this was a workable solution. All the parties then had access to the documents which they had provided and to those provided by others.
4. Unfortunately, the parties had not provided witness statements despite the orders of EJ Warren, save for the claimant and Mr Sam McCallion director of the second respondent. Oral evidence was heard from the Claimant and Mr Sam McCallion. The Tribunal agreed to hear submissions from the first and third respondents, despite not hearing evidence on oath from them.
5. An order was made for written submissions from all parties to be submitted to the Tribunal and other parties by 22 October 2021. Each party was allowed to provide a rebuttal of the others, by 29 October 2021. These submissions were received as follows:-
 - a. On 22 October 2021, submissions were received from the claimant, first, second and third respondent
 - b. On 22 October 2021, rebuttal (of R1 and R3) submissions were received from the claimant,
 - c. On 29 October 2021, submissions were received in rebuttal from the first and third respondent.
6. There has been subsequent correspondence between the parties; the claimant complains that it did not receive the second respondent's submissions, so have in turn not sent their submissions to the second respondent. The second respondent complains that they have not received the claimant's submissions, so cannot file a rebuttal to them. The correspondence subsequently requests and objects to respective applications to strike out. As can be seen from the chronology above, the relevant submissions were received by the Tribunal and have been considered prior to the decision of this judgment.
7. The both the claimant and the second respondent have failed to serve their submissions on each other. Neither have therefore had the opportunity to respond to the other's submission. They have both equally failed to abide

by the order made at the end of the last hearing. Given that they have both made full submissions, their positions are clear to the Tribunal. I am not going to use up further time to allow further submissions.

8. Unfortunately, the retrieval of all these documents has taken quite some time and has led to a delay, which meant that the final hearing which had been listed by EJ Warren, could not be heard. I would like to apologise to all parties for any inconvenience this has caused.

The Facts

9. The claimant worked as a mechanic at a garage in Little End Road, Eaton Socon, Saint Neots, PE19 8JH. He commenced work in the week beginning 22 January 2018 (specific date unknown). His contract of employment was initially commenced with Service Centre Limited and moved to AJSHM on 18 January 2019, by way of a TUPE transfer, according to the documents he received. He was dismissed on 23 January 2020.
10. The first respondent is a car repair business, as is the third respondent. The second respondent is a manufacturer of engineering components for a variety of purposes, none of which are related to cars. The second respondent does not carry out car repairs as part of its business.
11. The first and second respondent's businesses were connected by the fact that the shareholders and directors of both companies are within the McCallion family. The receptionist was shared between the two companies in an office which sat above unit 31. The second respondent also rented machinery and premises to the first respondent. They were located in adjacent premises at Little End Road. The first respondent occupied unit number 27 and the second respondent occupied units 28-30. Invoices show that the second respondent was invoicing the first respondent's predecessor (in the same Service Centre Ltd) in October 2018 and January 2019 for rent and admin services.
12. Mr Sam McCallion is the son of Mr Steve McCallion. Steve McCallion is a Director of both the first and second respondent. He has day to day control of the first respondent, whereas Sam McCallion and his mother Angela McCallion have day to day control of the second respondent. Steve McCallion is asked to help with technical engineering issues when they arise.
13. The claimant was asked by Mr Steve McCallion to work on various cars which were brought to the premises for repair. At no time did Sam McCallion ask the claimant to carry out work on a car, or ask him to carry out any other work. The claimant's timesheets carry the name Service Centre.
14. The claimant required access to the second respondent's premises in order to pass paperwork to the receptionist who worked for both companies. The claimant had keys to the first respondent's premises but not to the second respondents. He had a key fob which allowed some access, once the alarm at the second respondent's premises was deactivated.

15. The claimant's payslips show that up to April 2019 he was paid by SA Service Centre Ltd; April to June 2019 he was paid by AJSHM trading as Service Centre. From July to December 2019 he was paid by AJSHM Limited and in January – February 2020 he was once again paid by AJSHM trading as Service Centre. At no time was the claimant paid directly by the second respondent.
16. On 18 January 2019, the first respondent bought the assets of SA Service Centre Limited. The agreement includes (at paragraph 4) a specific agreement that the employees of SA Service Centre Ltd would TUPE transfer to the first respondent.
17. On 22 January 2020 the claimant was suspended. He was handed a letter by Steve McCallion, which was printed with a letterhead from the second respondent. This was an error by Steve McCallion as he had used a laptop, in the shared office, belonging to the second respondent, as the one belonging to the first respondent was not working.
18. The claimant's dismissal letter was sent from the first respondent, on their own letterhead. It too was signed by Steve McCallion.
19. The third respondent started to use the premises of the first respondent's garage (including use of the ramp) shortly after the claimant was suspended in January 2020. There was no transfer of assets from the first to the third respondent.

Law

Employment Status

20. s. 230(1) defines an 'employee' as '*an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment*'
21. The authority on whether there is a contract of employment was set out in Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance 1968 1 All ER 433, QBD. Where it was stated: '*A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.*'
22. There is now considered to be an irreducible minimum required for a contract of employment to exist; these are
 - a. Control by the employer
 - b. Personal service by the employee

c. Mutuality of obligation by both sides.

Corporate Veil

23. The corporate veil is a principle under which the separation of the identity of a company from another, or from the people who control it is maintained. The limited circumstances in which a court can pierce the veil to consider the actions of one person, as being those of the company are limited and set out in *Prest v Petrodel Resources* [2013] UKSC 34; “ when a person was under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evaded or the enforcement of which he deliberately frustrated by imposing a company under his control.”.

TUPE

24. Reg 3 Transfer of Undertakings (Protection of Employment) Regulations 2006 states;

“(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;”

25. To have the protection offered by the TUPE regulations, a person must be employed under a contract of employment immediately before the transfer or would have been so, had they not been dismissed for an automatically unfair reason, regulation 2(1).

Decision

26. The documentary evidence showed that the claimant was hired to work as a car mechanic by SA Service Centre Limited. His employment was TUPE transferred to the first respondent on 18 January 2019. There is no documentary or other evidence to support the suggestion that his employment transferred from the first respondent to the second respondent.

27. I have also considered whether the evidence discloses direct employment of the claimant by the second respondent in the manner set out in *Ready Mixed Concrete* and the further authorities. I considered that the claimant’s discussions in respect of his contract were with Steve McCallion on behalf of the first respondent, not Sam McCallion on behalf of the second respondent and that the claimant was never asked to undertake the type of work carried out by the second respondent by either of the Messrs McCallion.

28. The claimant was paid via SA Service Centre initially, in accordance with his contract and subsequently by the first respondent, sometimes with a 'trading as' name, sometimes not. The claimant was never paid directly by the second respondent. Whilst this is not conclusive of employer, it is part of the evidence which was considered.
29. The claimant's own evidence showed that control of his work was directed by Steve McCallion, a director of the first respondent. The claimant did not suggest that he was directed to work by Sam McCallion, nor that he was asked to work on any projects or items produced by the second respondent. The claimant also carried out his work in unit 27 which was a garage, repairing cars which were brought into the business. He supplied some of his own tools which were stored in the unit and used the tools (such as a ramp) which were hired or purchased by the first respondent for use within their business. These points all satisfy the control and personal service elements of the irreducible minimum test.
30. As to mutuality of obligation; the claimant did not suggest that he was in any way bound to accept work from the second respondent, nor that they were obliged to offer work to him. There is therefore no evidence to support the proposition that there was mutuality between the second respondent and claimant. The evidence of the provision of work, via text or WhatsApp messages came from Steve McCallion with regard to the car garage business, as proffered by the first respondent.
31. I considered the fact that the first and second respondent shared an office space and a receptionist. It was necessary for the claimant, during the course of his duties as a car mechanic to enter the premises of the second respondent to use a computer (to look for car parts online etc) and to speak to the receptionist. The fact that the claimant went into the second respondent's premises to do so, is not an indicator that he was employed by the second respondent.
32. Nor is it sufficient to say that because Mr Steve McCallion was a director of both the first and second respondent, that he could not separate his instruction to the claimant between one company and the other. The first and second respondents are separate legal entities. Many businessmen have multiple interests, shareholdings or directorships in separate legal entities. This does not mean that employees move their employment between these companies. Steve McCallion was running the first respondent business on a day to day basis and engaged with the claimant with regard to that company. There is no evidence to suggest, including no assertion by the claimant, that he either did work, or was capable of doing work carried out by the second respondent.
33. The claimant raised the issue of payments moving between the second and first respondent which he asserted could be for the purpose of paying his salary. The evidence showed that there were payments moving between companies, but there was no evidence to support the assertion that this was to pay the claimant's salary. In any event, the fact that the second

respondent gives money to the first to pay the claimant, is not conclusive of employment status. This was also insufficient evidence to consider it appropriate to lift the corporate veil.

34. The claimant's submission that the first respondent was a "subsidiary and dependent enterprise" does not fit with the fact that the first respondent was a separate legal entity. This submission is dismissed.
35. The claimant's argument that he was employed by the second respondent centred around the suspension letter of 22 January 2020. I accept that Steve McCallion printed this out in the office and that he failed to notice that it was the second respondent's letter heading which printed onto the letter. The fact that one letter was printed on the header of a different company does not indicate that the claimant's employment had transferred to the second respondent. This was a simple, one-off error. The dismissal letter was printed on the first respondent's letterhead in the appropriate manner. All the remaining features of the employment relationship indicate that the claimant was employed by the first respondent.

TUPE

36. The second issue to decide was whether there was a TUPE transfer from the first/second respondent to the third respondent.
37. I considered whether there was a TUPE transfer between the first and third respondents due to the finding above that the second respondent was not the employer of the claimant.
38. The evidence of an email from Steve McCallion on 24 January 2020 to the claimant asking him to collect his tools, "As with me closing AJSM I need to clear the unit" indicates that the first respondent is going to cease trading. The date is not clear from the email.
39. The evidence of the claimant was that when he visited the premises on 28 January 2020 there appeared to be a new toolbox laying in the garage. He also gave evidence that when a friend of his enquired for him at the premises, he was told that the claimant no longer worked there.
40. There is no evidence which points to a transfer of undertakings between the first and third respondent. There is no evidence of a contract between them, nor of any due diligence which suggested that the claimant was an employee of the first respondent prior to any purchase. Mr McCallion was aware of the requirement for such paperwork, given that this had occurred when the first respondent had taken over from SA Service Centre in 2019.
41. There is no evidence to support a transfer having occurred. The evidence indicated that the claimant never had contact with the third respondent and hence there was no evidence of an employment relationship there either.
42. I therefore dismiss the allegation that the claimant had transferred to the third respondent, or that he would have done so, but for the dismissal on 23 January 2020.

Next steps

43. The parties have engaged in long and detailed correspondence requesting strike out and default judgment. None of this correspondence is helpful to the Tribunal, nor to the parties themselves. It serves to increase costs without actually shortening the length of time over which the case is litigated.
44. All parties have complied with the orders of the Tribunal to provide written submissions. These may have not reached the parties in a timely manner, but they have reached the Tribunal. All parties have had ample opportunity to put their submissions to the Tribunal. There is therefore no reason to strike out any of the parties for unreasonable conduct, or failure to comply with an order.
45. The second respondent is dismissed from the proceedings, as neither an employer, nor a transferee under TUPE, liability for the allegations cannot sit with them.
46. A final hearing for one day will occur on 15 July 2022. Directions as to the preparation for that hearing are attached.

Employment Judge Cowen

Date 7 January 2022

JUDGMENT SENT TO THE PARTIES ON

26 January 2022

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