



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Mr Andrew Sercombe AND Air Conditioning Maintenance And Servicing Ltd (1)  
Mr Austen Beeney trading as Austen Air Conditioning (2)

**Respondents**

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Plymouth

ON

7 December 2020

EMPLOYMENT JUDGE N J Roper

**Representation**

For the Claimant: In person  
For the First Respondent: Did not attend  
For the Second Respondent: In person

## **JUDGMENT**

The judgment of the tribunal is that:

1. There was no transfer of the claimant's employment from the first respondent to the second respondent, and the second respondent is dismissed from these proceedings; and
2. There was a break in the claimant's period of continuous employment with the first respondent which therefore commenced on 12 February 2018; and
3. The claimant is not entitled to a statutory redundancy payment; and
4. The claimant succeeds in his claim for breach of contract against the first respondent and the first respondent is ordered to pay the claimant one week's notice pay in the net sum of £399.00; and
5. The claimant succeeds in his claim for accrued holiday pay against the first respondent and the first respondent is ordered to pay the claimant six days' pay in the sum of £478.80; and
6. The claimant succeeds in his claim for unlawful deduction of wages against the first respondent and the first respondent is ordered to pay the claimant the sum of £1,498.00, which consists of two weeks' pay in the sum of £798.00; unpaid expenses of £500.00; and an overtime payment of £200.00.

## **RESERVED REASONS**

1. This is the judgment following a Preliminary Hearing to determine the claimant's length of service, and whether or not there was a relevant transfer under the TUPE Regulations of the claimant's employment from the first respondent to the second respondent. This judgment also determines the claimant's monetary claims.
2. I have heard from the claimant. The first respondent is a limited company which entered a notice of appearance, but has not since taken any part in these proceedings. It is still an active company, but with a proposal to strike it off the register of limited companies. I have heard from the second respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
3. The first respondent is Air Conditioning Maintenance and Servicing Ltd. The proprietor was Mr David Elliott. The first respondent had two employees, namely Mr Andrew Sercombe the claimant in this claim, and Mr Austin Beeney who is the second respondent. The business struggled financially, and was often late in paying the two employees their wages which were due. It ceased trading on 16 September 2019.
4. The claimant Mr Sercombe commenced employment with the first respondent as an air-conditioning engineer on 30 June 2015. He worked a normal five day week from Monday to Friday. He was dismissed summarily by reason of redundancy on 16 September 2019 when the first respondent ceased trading. There was a short break in his period of employment with the first respondent in February 2018, when he was fed up with late payment of his wages, and obtained alternative employment with another air conditioning company namely Air Management Solutions Limited. The claimant asserts that he worked there from Monday, 5 February 2018, but was persuaded by Mr Elliott to rejoin the first respondent, which he did on Friday, 9 February 2018.
5. This is not supported by the recollection of the first respondent and the evidence of the second respondent, nor by the contemporaneous documents. I have seen an email dated 10 January 2018 from the first respondent's company secretary Jo Elliott confirming that she knew as of that date that the claimant had handed in his resignation and would "no longer be working for us as of 5.2.18". In its notice of appearance the first respondent asserts that the claimant had resigned by 5 February 2018, and rejoined the first respondent company on 13 February 2018 (which was a Tuesday). The recollection of Mr Beeney the second respondent is that the claimant had resigned his employment at the end of the week, namely Friday, 2 February 2018, and was away for a week, but rejoined the following Monday, 12 February 2018. I have seen an email from Air Management Solutions Limited confirming that the claimant was employed by them with effect from 5 February 2018 but left of his own accord on 9 February 2018. The claimant himself has adduced photocopies of a number of bank statements, and on one of these he had previously made the following manuscript note: "David always irregularly paid me. I was only gone a week (seven days) and I started on the 12<sup>th</sup> after he promised to pay what's owed. The reason I went was because he wasn't sticking to paying the weekly wage."
6. Considering all of this evidence in the round, I find on the balance of probabilities that the claimant had notified the first respondent that he was resigning his employment during January 2018 (as confirmed in the email of 10 January 2018) and that he left his employment at the end of the normal working week, namely Friday, 2 February 2018. He left the alternative employment on 9 February 2018, and rejoined the respondent the following week on 12 February 2018, as suggested by his own earlier contemporaneous note. I therefore find that his employment with the first respondent terminated on 2 February 2019, and commenced again with effect from 12 February 2018.
7. The claimant then worked on with the first respondent until it ceased trading with effect from 16 September 2019, and he was summarily dismissed by reason of redundancy as at that date. At that time he earned £399.00 per week. He was not paid for his last week of employment, nor was he paid for the week in hand which had earlier worked. He was also

- not paid for some agreed overtime working which had been agreed by Mr Elliott in the sum of £200.00, and he was owed in excess of £500.00 in expenses and petrol, which the claimant limits to £500.00. At the time of termination of his employment he had six days of accrued but unpaid holiday pay.
8. Mr Elliott had informed the second respondent during the beginning of September 2019 that he was about to cease trading. The second respondent therefore had some notice of his impending dismissal for redundancy when the first respondent ceased trading on 16 September 2019, whereas the claimant had received no such notice. In any event the second respondent was concerned about his impending unemployment, and decided to set up his own business as an air-conditioning engineer. On 6 September 2019 he registered for VAT purposes with HMRC in his own right, namely Mr Austen Beeney trading as Austen Air Conditioning. He then paid the first respondent £20,000 for its list of customers. He paid this sum to the first respondent in instalments over the course of the next five months.
  9. The second respondent had been driving a company van in the first respondent's company livery. In fact this van was owned by the second respondent because he had taken ownership of it in lieu of unpaid wages approximately a year before. The running costs of that van were paid by the first respondent prior to the date when it ceased trading. With effect from 16 September 2019 when the second respondent commenced his own business, he removed the first respondent's company livery and was required to pay the insurance and running expenses of the van himself in the name of his new business.
  10. The second respondent had the tools of his trade in that van, but they were his own tools and they were not the property of the first respondent.
  11. There were no other employees of the first respondent's business apart from the second respondent and the claimant.
  12. There were no maintenance contracts which customers had signed in favour of the first respondent and accordingly none were assigned to the second respondent.
  13. The second respondent did not purchase any outstanding debts nor have the benefit of any unpaid invoices. All sums which had been invoiced by the first respondent were still due to the first respondent, and the second respondent did not assume those book debts or enjoy the benefit of them.
  14. The second respondent did not purchase any uniforms, stationery or other aspects of the first respondent's company livery.
  15. The only thing which the second respondent purchased was the list of customers, so that he could email them following the cessation of the first respondent's business in the hope of persuading them to engage him in his new business. There was however no guarantee of this, and all existing customers were entitled to choose to give their future business to competing third parties.
  16. Having established the above facts, I now apply the law.
  17. The provisions relating to statutory continuity of employment are contained in the Employment Rights Act 1996 ("the Act"). Section 212(1) of the Act provides that any week during the whole or part of which an employee's relations with his or her employer are governed by a contract of employment counts in computing the employee's period of employment. Section 210(4) of the Act confirms that (subject to exceptions which do not apply in this case) a week that does not count in computing the length of an employee's period of continuous employment breaks continuity. Section 235(1) of the Act defines a week for these purposes as being a week ending with Saturday.
  18. Section 155 of the Act provides that an employee does not have any right to a redundancy payment unless he has been continuously employed for a period of not less than two years ending with the relevant date.
  19. With regard to the prospective transfer, the relevant regulations are the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations").
  20. Regulation 3(1) provides that the 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.

21. Regulation 3(2) provides that "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.
22. Regulation 4(2) provides that: Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), 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; 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 the organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.
23. Regulation 4(3) provides that: Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1)...
24. I have considered the following cases, namely: ECM (Vehicle Delivery Service) Ltd v Cox and others [1999] ICR 1162; Spijkers v Gebroeders Benedik Abattoir CV 24/85 [1986] 2 CMLR 296; and Cheesman v R Brewer Contracts Ltd [2001] IRLR 144 EAT.
25. Potential TUPE Transfer
26. A business transfer pursuant to the wording of Regulation 3(1)(a) requires four key elements, namely that there is (i) a transfer to another person; (ii) that there is an identified economic entity that transfers; (iii) that the economic entity is situated in the UK immediately before the transfer; and (iv) that the economic entity retains its identity after the transfer.
27. In Spijkers the Court made it clear that it is important to consider the following matters: (a) the type of undertaking or business concern; (b) whether assets, tangible or intangible, are transferred; (c) whether employees are taken over; (d) whether customers are transferred; and (e) 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 single factors in an overall assessment which should not be considered in isolation. In addition, the facts characterising the transaction in question should be considered to determine whether the undertaking has continued and retained its identity in different hands (ECM (Vehicle Delivery Service) Ltd).
28. In Cheesman, the EAT set out principles which can be distilled as to whether there is an undertaking, and principles which can be distilled as to whether there has been a transfer. However, these lists are not exhaustive and the test to be applied in considering whether there was a transfer is broad, multifactorial, and fact sensitive. Nonetheless the guidance provided by the EAT in Cheesman with regard to the question of identifying an "economic entity" is as follows:
29. (i) There needs to be a stable economic entity, which is an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity that pursues a specific objective. There will not be such an entity if its activities are limited to performing one specific works contract. It has been held that the reference to "one specific works contract" is to be restricted to a contract for building works; (ii) in order to be such an undertaking, it must be sufficiently structured and autonomous but will not necessarily have significant tangible or intangible assets; (iii) in certain sectors such as cleaning and surveillance the assets are often reduced to their most basic and the activity essentially based on manpower; (iv) an organised grouping of wage-earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity; and (v) an activity is not of itself an entity; the identity of an entity emerges from other factors, such as its workforce, management of staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it."
30. In my judgment there was no stable or identifiable economic entity which was transferred from the first respondent to the second respondent. There was no organised grouping of persons or of assets which passed from the first respondent to the second respondent. The

- second respondent purchased a list of customers, but no more. He was then able to approach them to ask if they wished to instruct him in his new business but there was no guarantee that they would do so. The second respondent did not purchase, or have transferred to him, any of the following tangible or intangible assets: (i) goodwill or any trading name; (ii) other employees; (iii) existing maintenance contracts or other guaranteed customer relationships; (iv) book debts or the benefit of other unpaid invoices; (v) vehicles; (vi) tools; (vii) stationery or livery. I find that there was no transfer to another person of any identified economic entity which retained its identity after the transfer.
31. Accordingly, I find that the claimant's accrued employment rights did not transfer to the second respondent on or about 16 September 2019. The claimant's claims are therefore dismissed as against the second respondent, who in turn is dismissed as a respondent from these proceedings.
32. Continuity of Employment:
33. For the reasons explained above, I find that the claimant resigned his employment with effect from Friday, 2 February 2018 and that he was not an employee of the first respondent from that date. He was then persuaded to rejoin the first respondent, and commenced employment with the first respondent again with effect from Monday, 12 February 2018. That means that he was not employed by the first respondent from Saturday, 3 February 2018, and was not employed by the first respondent during the week ending Saturday, 10 February 2018. Applying sections 210(4) and 235(1) of the Act, there was a break in the claimant's period of continuous employment at that time.
34. Entitlement to Statutory Redundancy Payment
35. The claimant had not been employed for two years as at the effective date of termination of the second period of continuous employment in September 2018. Applying section 155 of the Act, the claimant is not entitled to a statutory redundancy payment.
36. Remaining Monetary Claims
37. The claimant succeeds in his remaining claims as against the first respondent, namely one week's pay in the sum of £399.00 for breach of contract in respect of his lost one week's statutory notice period; for unpaid wages for two weeks in the sum of £798.00; for unpaid overtime in the sum of £200.00; for unpaid expenses in the sum of £500.00; and for accrued but unpaid holiday pay for six days in the sum of £478.80.

Employment Judge N J Roper

Dated: 7 December 2020

Judgment sent to Parties: 6 January 2021

FOR THE TRIBUNAL OFFICE