



EMPLOYMENT TRIBUNALS

Claimant: Mr V Chun

Respondent: The Dapper Clinic Limited

Heard via Cloud Video Platform (London Central) On: 21 March 2023

Before: Employment Judge Davidson

Representation

Claimant: Mr B Holland

Respondent: Mr N Jarvis, director

JUDGMENT

The claimant's claim for unlawful deductions from wages succeeds. The respondent is ordered to pay the claimant the sum of £7,720 in respect of unpaid wages.

REASONS

Issues

1. This is a claim for non-payment of wages in September 2021 and between January 2022 and January 2023. It is accepted that the claimant performed the work and is entitled to be paid. The claimant maintains that he is an employee and should be paid as such. The respondent's position is that the claimant is a freelancer and will be paid on submission of an invoice
2. The issue of the claimant's status turns on:
 - a. whether his employment transferred under TUPE to the respondent;
 - b. if not, whether he satisfies the definition of employee;
 - c. if not, whether he satisfies the definition of worker.
3. The claimant's representative sought to amend the claim following delivery of the Judgment to include a claim for notice pay as the claimant had been dismissed after the ET1 had been submitted. I refused to allow the

amendment given that the case had concluded and the respondent was not on notice that any amendment application would be made.

Facts

4. The facts were largely agreed and can be summarised as follows.
5. The claimant worked for a company called Genco Male Emporium Limited as a senior stylist at a hair salon at 9 Devonshire Road, Chiswick, part-time, each Sunday. His employment started in 2011 and he was paid via PAYE.
6. Mr Jarvis was a shareholder in Genco Male Emporium Limited and, in December 2021, he purchased the remainder of the shares in that company. In March 2022, he found out that the company had significant debts and he took steps to close the company in order to avoid trading while insolvent.
7. Mr Jarvis transferred the chairs and the Genco brand name to the respondent. The respondent was an existing company run by Mr Jarvis which had a branch in Richmond also under the Genco brand name.
8. The claimant's employment with Genco Male Emporium Limited was not terminated and he continued to work at the salon every Sunday, as he had done previously.
9. In June 2022, the business moved from its premises to new premises on the same street at 16 Devonshire Road and retained the same trading name. There are Whatsapp messages from Mr Jarvis dated 29 May 2022 to those working in the salon, making arrangements for the transfer to the new premises in early June 2022. He states that he will be sending emails and text messages to all clients to let them know about the move.
10. The respondent's position is that the old business was a barber shop and the new premises is a male grooming salon. It is not suggested that there were any changes to the claimant's work.
11. Most of the stylists worked on a freelance arrangement, which is common in the industry. They were all offered the opportunity to move to the new company and the new premises. Some moved and others went elsewhere.
12. The claimant continued to attend each Sunday, working from the new premises from June 2022 onwards.
13. The claimant realised after some months that he had not been paid. When he queried this, he was told to submit an invoice as the respondent only operated using freelancers and was not set up with a PAYE payroll.

14. The claimant refused to submit an invoice, maintaining that he was an employee and he wanted to continue to be an employee. The respondent refused to pay him other than on presentation of an invoice.

Procedural background

15. The claim was lodged on 29 January 2023 alleging that deductions had been made from the claimant's wages since January 2022 and the deductions were ongoing. The response was filed on 21 February 2023. The respondent accepted that the claimant had worked the hours he was claiming and had not been paid. However, the respondent's position was that he was a freelance worker and should submit an invoice in order to be paid.
16. The Notice of Hearing was sent on 13 February 2023, listing the case for a two hour hearing before a Judge sitting alone, via CVP. The Notice of Hearing included a paragraph informing the parties it was their responsibility to ensure that any relevant witnesses attend the hearing and that they bring sufficient copies of any relevant documents.
17. There was no order for disclosure of documents, preparation of a bundle or exchange of witness statements. The claimant produced a 40 page bundle for the use of the tribunal.
18. In March 2023, the tribunal asked the claimant if he wished to add or substitute Genco Male Emporium Limited as a respondent. The claimant confirmed that he did not wish to do so.
19. The case proceeded against the respondent only.

Law

20. The relevant law is found in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (as amended) (TUPE).
21. Regulation 3(1)(a) of TUPE provides that a relevant transfer is '*a transfer 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*'.
22. It is necessary to distinguish between the transfer of a collection of assets that amounts to an economic entity and a collection of assets that does not.
23. There can be a TUPE transfer even if the employees working in the economic entity are not informed that there has been a transfer (*Secretary of State for Trade and Industry v Cook [1997] IRLR 150*).

24. The economic entity must retain its identity after the transfer (going concern test). In determining whether there is a going concern, the tribunal must consider a number of factors including:
- a. whether the business's tangible assets (such as buildings and movable property) are transferred;
 - b. the value of the transferor's intangible assets at the time of the transfer;
 - c. whether goodwill has been transferred;
 - d. whether the majority of the employees are taken over;
 - e. whether the customers are transferred;
 - f. the degree of similarity between the activities carried on before and after the transfer;
 - g. the period, if any, for which the activities carried on before and after the transfer are suspended or disrupted;
 - h. the use of the employees by the transferee.
25. If there is a TUPE transfer, the employees of the transferor transfer automatically to the transferee on their existing terms and conditions of employment. Any liabilities to the employee of the transferor are transferred to the transferee.

Determination of the Issues

26. I find that there was a TUPE transfer of the male grooming business in Chiswick from Genco Male Grooming Limited to the respondent.
27. In reaching this conclusion, I have taken the following factors into account.
28. The respondent took over the business prior to the move to new premises and so, at the time of the transfer, the business continued at the same premises as before.
29. If I am wrong about this and the transfer was at the time of the move to the new premises, assets such as the chairs and brand name were transferred.
30. Goodwill was transferred. It is clear that the marketing efforts were aimed at the same clients. There was no information before me regarding how many of the clients transferred but it was clearly the intention that the clients should continue to use the salon.
31. The new salon was in the same street, with the same branding and some of the personnel who worked there before continued to work there. All the personnel were offered the opportunity to work there.
32. The activities before and after the transfer were sufficiently similar to amount to the same activity. Even if the new salon offered additional services, this does not, in my view, mean that there is a different entity.

33. Although not every factor indicates that there was a transfer, I find that there are sufficient factors which point to there being a transfer of a going concern that TUPE applies.
34. This means that the claimant's employment transferred automatically to the respondent on his existing terms and conditions. In addition, any amounts due to him from the transferor are payable by the transferee.
35. The respondent did not challenge the amounts claimed by the claimant. I therefore award the sum of £7720 in respect of arrears of pay.

Employment Judge Davidson
Date 21 March 2023

JUDGMENT SENT TO THE PARTIES ON
22/03/2023

FOR EMPLOYMENT TRIBUNALS

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

CVP hearing

This has been a remote which has been consented to by the parties. The form of remote hearing was Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. There were some connection problems at the start of the hearing but these were resolved and the hearing proceeded using CVP.