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## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103338/2020

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Held via Cloud Video Platform (CVP) on 8 March 2021

Employment Judge Murphy

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**Michael Brady**

**Claimant  
Represented by  
R Lawson  
Solicitor**

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**Pegasus Couriers Scotland Ltd**

**Respondent  
Represented by  
D Whyte  
Regional Operations  
Manager of the  
Respondent**

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## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The part of the Response quoted below is struck out pursuant to Rule 37 of the Employment Tribunals Rules of Procedure 2013 on the grounds that it has no reasonable prospects of success.

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*“Claimant accepted a redundancy payment from previous employment (May 2019). As such the Transfer of Undertakings (Protection of Employment) Regulations do not apply”*

## REASONS

### Background

2. The Claimant brings claims of unfair and wrongful dismissal. The Respondent entered an ET3 response on or about 13 July 2020. That response was brief and set out only two grounds on which the claim was said to be resisted:
- 5 a. On time bar grounds (Ground A); and
- b. On the ground that “[the] Claimant accepted a Redundancy payment from previous employment (May 2019). As such the Transfer of Undertakings (Protection of Employment Regulations do not apply.” (Ground B)
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3. On 22 December 2020, The Claimant’s representative lodged an application to strike out the response on the basis that neither ground of resistance stood any reasonable prospect of success.
4. A final hearing had previously been fixed for 13 and 14 January 2021. On the Claimant’s application it was converted to a PH to determine Mr Lawson’s application. The Claimant sought a late postponement on 13 January 2021 to seek legal advice on Mr Lawson’s communication dated 22 December 2020. The postponement was granted, and the hearing today was fixed to determine the application in that communication.
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5. At today’s hearing the Claimant withdrew the time bar argument in the ET3. The Claimant also made two separate applications to amend the ET3. These were considered and determined at the hearing as set out in the Case Management Order and Case Management Note below.
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6. With regard to the application to strike out Ground B, the Claimant was given the opportunity to make representations generally and, in particular to provide more detail of his argument as to why it was said that the receipt of a redundancy payment thwarted the operation of the Transfer of
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Undertakings (Protection of Employment) Regulations 2006 (“TUPE”). The Claimant was unable to give any detail of the legal basis for this assertion.

5 7. No evidence was heard, and the Claimant’s application was considered based on legal argument only.

8. It was undisputed that the claimant was previously employed by SGM Distribution Limited. Mr Lawson submitted that company entered liquidation on 16 May 2019. The Respondent, he said, took over SGM’s business and the claimant’s employment continued without interruption.  
10 The only basis upon which it was said by the Respondent in the ET3 that TUPE did not apply was that the Claimant received a redundancy payment. Mr Lawson pointed out that Section 214 of the Employment Rights Act 1996 (“ERA”) makes provision for continuity of employment being broken if an employee receives a redundancy payment only for the  
15 purposes of calculating entitlement to a redundancy payment. The receipt of a redundancy payment, he submitted, has no impact on the Claimant’s continuity of employment for the purposes of determining his entitlement to pursue a claim of unfair dismissal. The TUPE Regulations and section 218(2) of the Employment Rights Act 1996 Act provide for continuity of  
20 employment to be preserved in the event of a transfer of an undertaking.

### Relevant Law

9. The way in which TUPE applies to the sale of an insolvent business or part thereof is set out in Regs 8 and 9. Where the transferor is subject to bankruptcy or analogous insolvency proceedings instituted with a view to  
25 the liquidation of the assets under the supervision of an insolvency practitioner, Regs 4 and 7 of TUPE are disapplied. In such cases, employees are not accorded the protection of the automatic transfer principle (Reg 8(7)).

10. On the other hand, insolvency proceedings which have been opened “not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner” engage different provisions (Regulation 8(2) to 8(6)). Here, broadly, the automatic transfer principle remains intact, but liability is not transferred from the transferor to the transferee for sums payable under relevant statutory schemes (Reg 8(5)). Liability for these sums (which include statutory redundancy payments) sits with the Secretary of State instead of being inherited by the transferee. The principle of the transfer of employment is not, however, interfered with in cases falling under Regulation 8(2) to 8(6). It is, therefore, possible in such cases for certain payments to be made to staff by the Secretary of State but for TUPE to apply as modified in the manner described.

11. Section 214 of ERA provides that the making of a redundancy payment will break a period of continuity but only for the purposes of the application of section 155 or 162(1) of that Act, concerned with the qualifying service for a redundancy payment and the calculation of the amount of such a payment only. These provisions do not have a bearing on continuity of service for the purposes of the right not to be unfairly dismissed.

## 20 **Discussion and Decision**

12. Neither party was in a position to lead evidence or make submissions on whether Reg 8(7) or Reg 8(2)-(6) applied in this case at today’s hearing. The purpose of the hearing was limited to considering whether the Respondent’s Ground B, as framed, stood no reasonable prospect of success and, as such, should be struck out.

13. The tribunal accepted Mr Lawson’s arguments in that regard. There were circumstances where a Claimant could have received a redundancy payment from his former employer or the Secretary of State in an insolvency situation but could still benefit from the automatic transfer

principle under Regulation 4 of TUPE. This scenario would be compatible, for example, with a case where the relevant insolvency proceedings fell within Reg 8(6). Proving that the Claimant had received a statutory redundancy payment would not establish that the Claimant did not transfer under TUPE and that he therefore lacked the requisite service to bring a complaint of unfair dismissal.

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14. The automatic transfer of employment under TUPE may or may not have applied, but the Claimant's receipt of a redundancy payment would not be determinative of that issue nor even bare upon it significantly. On that basis Ground B was struck out.

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15. Had that been the end of the matter, the effect would have been as though no response had been submitted, as set out in Rule 21. However, the Respondent sought leave to amend the ET3 which was granted as set out in the Case Management Order of today's date.

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**Employment Judge:**  
**Date of Judgment:**  
**Date sent to parties:**

**Lesley Murphy**  
**08 March 2021**  
**16 March 2021**

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