Appeal No. UKEAT/0219/17/DA
UKEAT/0220/17/DA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 17-18 January 2018
Judgment handed down on 21 February 2018

Before

THE HONOURABLE MR JUSTICE SUPPERSTONE

(SITTING ALONE)

UKEAT/0219/17/DA

LONDON CARE LTD	APPELLANT
MS J HENRY AND OTHERS	RESPONDENTS

UKEAT/0220/17/DA

CAREWATCH CARE SERVICES LTD	APPELLANT
MS J HENRY AND OTHERS	RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For London Care Ltd	MR CHARLES CROW (of Counsel)
For Carewatch Care Services Ltd	MR COLIN EDWARD (of Counsel) Instructed by: Law at Work Ltd Kintyre House 205 West George Street Glasgow G2 2LW
For the Unison Claimants	MR STUART BRITTENDEN (of Counsel) Instructed by: Unison Legal Services Unison Centre 130 Euston Road London NW1 2AY
For Sevacare (UK) Ltd	MR JULIAN MILFORD (of Counsel) Instructed by: Gateley PLC Solicitors One Eleven Edmund Street Birmingham B3 2HJ

SUMMARY

TRANSFER OF UNDERTAKINGS - Transfer

The Employment Tribunal found that there was a service provision change from the First Respondent to one or more of the Second to Eighth Respondents for the purposes of Regulation 3(1)(b) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006**.

The Employment Appeal Tribunal allowed an appeal by the Second and Fifth Respondents on the basis that the Employment Judge had not properly considered the issues of (1) fragmentation, and (2) whether the relevant activities had been carried out pre-transfer by an organised grouping of employees which had as its principal purpose the carrying out of the activities concerned on behalf of the client. Further the Employment Judge's reasons were defective in various respects.

Case remitted to the Employment Tribunal, before a differently constituted Tribunal.

THE HONONOURABLE MR JUSTICE SUPPERSTONE

Introduction

1. In these conjoined appeals London Care Limited ("London Care") and Carewatch Care Services Ltd ("Carewatch") (the Fifth and Second Respondents below respectively) appeal against the Judgment of an Employment Tribunal (Employment Judge Lewzey, sitting alone) ("EJ"), sent to the parties on 12 July 2017, following a Preliminary Hearing held at London Central on 19-21 June 2017, that there was a service provision change from Sevacare (UK) Ltd ("Sevacare") to one or more of the Second to Eighth Respondents before the Employment Tribunal on or around 25 July 2016 for the purposes of Regulation 3(1)(b) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE").

2. The EJ concluded that there had been a **TUPE** transfer when Sevacare ended its contract with the London Borough of Haringey ("the Council") to provide care for Borough residents to whom it had a statutory obligation to provide care and London Care and Carewatch (and other care providers) took over.

3. In the proceedings below the 17 Claimants (now the First Respondents), who are all members of Unison, were employed by Sevacare as Homecare Support Assistants ("HSAs") providing care to adults in their homes.

4. For convenience I shall refer to the First Appellant as London Care; the Second Appellant as Carewatch; the First Respondents as the Claimants; and the Second Respondent as Sevacare.

The Relevant Statutory Provisions

5. Regulation 3 of **TUPE** provides, in so far as is relevant:

> **"3. *A relevant transfer***
>
> **(1) These Regulations apply to …**
>
> > **(b) a service provision change, that is a situation in which …**
> >
> > > **(ii) activities cease to be carried out by a contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by another person ("a subsequent contractor") on the client's behalf …**
>
> **and in which the conditions set out in paragraph (3) are satisfied.**
>
> **…**
>
> **(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.**
>
> **(3) The conditions referred to in paragraph (1)(b) are that -**
>
> > **(a) immediately before the service provision change -**
> >
> > > **(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;**
> >
> > > **(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and**
> >
> > **(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use."**

6. Regulation 4, provides so far as is relevant:

> **"4. *Effect of relevant transfer on contracts of employment***
>
> **(1) Except where objection is made under paragraph (7), 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 be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.**
>
> **(2) 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 that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee."**

The Material Facts

7. The material facts are set out at paragraphs 23 to 51 of the Judgment. They include the following:

> **"23. Sevacare was a provider of Residential Care Services for the London Borough of Haringey ("Haringey" or "the Council") from 2004. Originally it provided services on block contract basis with the Fifth Respondent ("London Care"). Haringey changed the position in or around 2012 to allow more providers to become approved providers, although Sevacare was to remain the major provider. In February 2012 Haringey decided to enter into a framework contract with further providers selected on to the framework. Sevacare was selected and continued with its existing work. Sevacare entered into a contract with the Council … under which it continued to provide services until the contract ended in July 2016.**
>
> **24. Mr Stapleberg's evidence was that in June 2016 Sevacare was contracted to deliver packages of care to 168 service users. Service users have variously been described as such, and as clients in the evidence. They are the individuals to whom care is provided.**
>
> **25. An individual in need of care was assessed by the Council. If the Council was willing to fund that care the individual in need of care was assessed and an individual service delivery agreement prepared … The Care Manager from Sevacare visited the client and drew up a care plan. Sevacare created a series of appointment slots and identified which carers had availability to fit those slots, although some care packages did not have a permanent carer assigned (which Sevacare aimed to avoid). Sevacare organised the clients within Haringey into four districts, namely, East 1, East 2, West and Central. Consistency in the carer attending the call slots was desirable in order that a relationship of trust could be built up between the carer and the client. Cover for a dedicated carer would be provided when that carer was unwell or on annual leave.**
>
> **26. The care to the clients or service users was delivered by the care workers who were employed on zero hours contracts. They were asked to take delivery of specified care for a service user, allocated to those services users, and placed on the rota maintained by Sevacare. Workers were allocated to particular service users in order to ensure continuity of care, a relationship of trust, and efficiency of care delivery. Mr Stapleberg's evidence was that the average length of a care package in Haringey was 3.5 years up to mid-2015, reducing to nine months thereafter due to changes in commissioning and, more specifically, that clients had to have more critical needs in order to warrant Council funded care.**
>
> **27. Sevacare adopted a regionalised approach so that wherever possible carers worked within one zone and were allocated clients within that zone. The evidence was that the aim of such practices was to minimise travelling time for the convenience both to the service users and the carers. Sevacare's work in Haringey was almost exclusively made up of servicing the clients funded by the Council, although there were a small number of private clients who engaged Sevacare on a private basis. Sevacare did not allocate business outside Haringey Borough to the Haringey team of carers unless there were exceptional circumstances. In the eight month period prior to the transfer, non-Council work in the form of private work was between 6 and 9% of the total … In addition, Sevacare had three packages in Islington. Work outside the Borough totalled 87 hours over the 2015/2016 tax year …**
>
> **…**
>
> **31. By a letter dated 14 June 2016 from Ravi Bains, Chief Executive Officer of Sevacare, served on the Council as follows …:**
>
> > **"I write to notify the Council of our intention to terminate all the services we deliver in London Borough of Haringey …**
> >
> > **Our last day of service will be Friday 15 July 2016."**
>
> **…**
>
> **33. On 21 June 2016 the Council notified the service users of the termination of service by Sevacare …**

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39. On 7 July 2016 the Council reduced the number of proposed transferees to four major providers, Premier Carewaiting, London Care, Kaamil Education and Carewatch, each of whom is a Respondent to these claims. Sujesh Sundarraj of the Council emailed the potential providers on 7 July 2016 … saying that allocation of packages would be based on capacity and post codes …

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Some small packages of care were allocated outside the four main providers. This included a single live-in package for PF transferred to Diligent Care Services Ltd, the Fourth Respondent.

40. Mr Rees's evidence on behalf of London Care was that the Borough was "carved up" on the basis of geography, with each provider being given contiguous parts of the Borough. …

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44. Mr Fox of UNISON attached to his witness statement a spreadsheet setting out in respect of each claimant the service users/their packages to which they were allocated, the number of hours worked for each service user in the four week period prior to the transfer, which service provider assumed responsibility with effect from 25 July 2016, and the hours of care provided by each Claimant to each service user post transfer. …

45. On 8 July 2016 … the Council sent Sevacare a list of allocations including only the four main providers and Diligent. An exercise was undertaken by Sevacare on or around 10 July to identify which carers were allocated to which clients according to the template rotas that had been prepared for a six week period prior to the exercise. In some cases all of the carers' work went to the same provider but in other cases there was a split between one or more providers. Where that was the case, Sevacare looked at whether any of the four main providers were getting more than 50% of the hours worked by their member of staff and, if so, allocated the carer to the new provider.

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47. Prior to the transfer UNISON was involved in discussions with the Council to rationalise the transfer of the work. Sevacare accepts that the Claimants are likely to be in a better position than Sevacare to know the exact details concerning which residents' packages of care eventually transferred to which provider. Accordingly, Sevacare accepts the calculations in Mr Fox's spreadsheet.

48. On the evidence of Mr Fox's spreadsheet and the evidence of the individual Claimants save as referred to below the position of the Claimants following the transfer on 25 July 2016 was as follows: [the details are then set out]."

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The Appeal

8. In essence Mr Charles Crow for London Care and Mr Colin Edward for Carewatch advance four grounds of appeal:

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(i) The EJ should have found that the relevant activity was so fragmented as to preclude any finding of a service provision change ("SPC") (**Ground 1**).

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(ii) The EJ erred in concluding that the activities were carried out pre-transfer by an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of the client (**Ground 2**).

(iii) The EJ erred in concluding that each Claimant was assigned to such an organised grouping (**Ground 3**).

(iv) The EJ's reasons were defective in various respects, in particular in relation to fragmentation, organised grouping and assignment (**Ground 4**).

I shall consider each ground in turn.

Submissions of the parties and discussion

Ground 1: fragmentation

9. All counsel are agreed that the identification of the relevant activity for the purposes of Regulation 3(1)(b) is critical. As HHJ Peter Clark stated in the guidelines he set out in **Enterprise Management Services Ltd v Connect-Up Ltd** [2012] IRLR 190 at paragraph 8:

> **"(2) The expression 'activities' is not defined in the Regulations. Thus the first task for the employment tribunal is to identify the relevant activities carried out by the original contractor: see *Kimberley*, paragraph 28 …"**

10. Counsel did not agree what the EJ decided was the relevant activity.

11. At paragraphs 57 to 60 and 68 the EJ set out the competing submissions as to the identity of the relevant activity:

> **"57. Mr Brittenden, for the Claimants, contends that the relevant activity should be defined as the provision of adult homecare to individual service users, or clients, pursuant to spot contracts, in accordance with individual service delivery agreements known as Care Plans.**
>
> **58. Mr Milford, for Sevacare, contends that the activity in question consists of a provision of a package of care to a number of service users within the Borough. He argues that the activity was carried out prior to the transfer by Sevacare for the Council and exactly the same activity was carried out by each of the other Respondents on behalf of the Council after the transfer. He argues that the package of care for certain individuals is a relevant activity for these purposes notwithstanding that it does not represent the whole of Sevacare's activities in the Borough.**

> **59. Ms Kemmett, [who then appeared] on behalf of Carewatch, submits that the activity was the provision of the Adult Social Care Services but that the identity of the client on whose behalf of [sic] the services were carried out is not immediately apparent.**
>
> **60. Mr Crow, for London Care submits that the determination of the identity of the clients for the purposes of Regulation 3(1)(b)(ii) must precede a determination of whether the conditions of Regulation 3(1)(b) and 3(3A)(1) are met. He addresses the three possibilities of the Council as client, the individual service user as a client, and both the Council and individual service users as client in combination. He argues that if the definition of activities is in general terms the provision of adult home care to individual service users, it is uncontroversial.**
>
> **…**
>
> **68. Ms Kemmett's submission is that there were four commissioning clients on whose behalf activities were carried out, and, in the alternative, the individual service users were the clients. The four groups relied upon by Ms Kemmett are referred to in Mr Stapleberg's evidence. They are the Council, private clients, a small amount of work done for the clinical commissioning group, and work done for other local authorities. …"**

12. The EJ's decision on this point is to be found at paragraphs 68 and 70. At paragraph 68 she says:

> **"68. … In the present case, the number of private clients is minimal, as are the number from the clinical commissioning groups and other local authorities. In the context of this case I am entirely satisfied that the client is the Council. The relevant activity is the provision of Adult Homecare to individual service users in accordance with the care plans."**

At paragraph 70 the EJ states:

> **"70. The relevant activity in this case was the provision of a package of care to a number of service users and that activity remains the same both before and after the transfer. Sevacare provided the care to the service users prior to the transfer and a number of the Respondents carried out that activity after the transfer. …"**

13. It is clear that the EJ rejected Mr Brittenden's primary submission that "each care package is a separate content and stand alone activity" (paragraph 82). What is not clear is what the EJ did accept. Mr Milford submits she accepted Sevacare's contention that the relevant activity was not the whole service Sevacare provided for the Council, but rather that a package of care provided to a number of service users itself constituted an "activity" for the purposes of Regulation 3(1)(b). In support of this submission Mr Milford refers to the wording of his contention as recorded at paragraph 58, which is mirrored in the finding of the EJ at paragraph 70. There is force in this submission. On the other hand, as Mr Crow points out, the

EJ found at paragraph 68 that the activity should be defined as "the provision of Adult Homecare to individual service users in accordance with the care plans". That conclusion in paragraph 68 follows immediately after the Judge stating that she is "entirely satisfied that the client is the Council". Mr Edward observes that when the EJ turns to consider fragmentation she says (at paragraph 80) that "The issue is whether the activities have divided up to the extent that it can be said that the original service contract has been fragmented". That suggests that the pre-transfer activity related to the contract with the Council as a whole.

14. In support of his submission that the relevant activity was not the whole service Sevacare provided for the Council Mr Milford refers to the judgment of Simler J (President) in **Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust** [2016] ICR 607 where she says at para 18 that "the fact that the service that is subject to a service provision change can comprise 'activities' connotes that the relevant activities in a particular case may be a subset of the whole of the activities carried out by the transferor". That is correct. However I find it difficult to read paragraphs 68 and 70 of the decision as amounting to a finding that packages of care provided to a number of service users were, in the present case, a subset of the whole of the activities Sevacare provided for the Council.

15. I tend to the view that the EJ did find that the relevant activity was the whole service Sevacare provided for the Council. However it is most unsatisfactory that there should be a real issue as to what the EJ did decide on this important matter.

16. The importance of identifying correctly the relevant activity carried out by the original contractor is made clear by the next submission made by Mr Milford. He submits that the EJ, having concluded that a package of care given to a set of individuals can be a relevant activity,

notwithstanding that it did not represent the whole of Sevacare's activities in the Borough, was logically bound to conclude that the activity in question retained its identity in the hands of the incoming contractor. If the work transferring to each contractor was itself an "activity", the activity remained exactly the same after 25 July 2016. However, if the EJ in fact decided that the relevant activity was the whole service Sevacare provided for the Council, plainly that would not be logically so.

17. Despite finding (as I tend to think the EJ did, see paragraph 15 above) that the relevant activity was the whole service Sevacare provided for the Council, the EJ determined that "the activities are fundamentally the same post-transfer" (paragraph 80). It was only after having reached that conclusion (see paragraphs 70, 74 and 80) that the EJ turned to consider fragmentation.

18. Mr Milford and Mr Brittenden accept that fragmentation is an issue that should have been considered at the point the EJ considered whether the activities carried on by the subsequent contractor after the relevant date are fundamentally or essentially the same as those carried on by the original contractor.

19. In fact the EJ considered fragmentation when considering the issue of organised grouping (see paragraphs 71 to 93 at paragraphs 80-83). The EJ states that it is that issue that involves a consideration of fragmentation (paragraph 72). That is not correct. However, subsequently (at paragraph 80) the EJ does acknowledge that the issue as to whether the activities have divided up to the extent that it can be said that the original service contract has been fragmented is the second step in the **Enterprise** test to determine whether or not the activities are fundamentally the same post transfer. Mr Brittenden submits that being so the EJ

A has merely committed a "defect of form" in that the section in the decision dealing with fragmentation should have been positioned in an earlier part of the Judgment when the EJ was dealing with the issue as to whether there had been a fundamental change post transfer. I do not accept the error is as limited as Mr Brittenden suggests.

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20. In **Arch Initiatives** Simler J stated (at paragraph 21):

> **"21. … it is commonplace for contract awarding bodies to split a service into different components or functions when re-tendering, each of which is assigned to a different incoming contractor. Whether or not the service provision change provisions in fact apply in any of these circumstances will depend on the application of the particular conditions within the service provision change regime to the facts of the particular case. A split or change in activities is plainly a relevant consideration in assessing whether the activities cease in relation to the outgoing contractor and whether fundamentally the same activities are carried on by the incoming contractor for the same client, but at the end of the day in each case the question is one of fact and degree."**

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21. Dealing with the issue of fragmentation (at paragraphs 80 to 83) the EJ recorded that the re-allocation of service users was based on postcodes, but she rejected the contention that there was fragmentation resulting in no service provision change. As I have noted Mr Milford, supported by Mr Brittenden, submits that the EJ having defined the activity in the way they say she did, her conclusion that the activity remained essentially the same after transfer followed as a matter of logic (see paragraph 16 above). However the EJ's finding was that the activity which transferred was "the provision of Adult Homecare to individual service users in accordance with care plans" (paragraph 68). That being so the EJ should have considered whether there was fragmentation of the activity amongst the new providers. There is no evidence that one contractor took on the majority of the work; and in relation to a number of employees it is difficult to establish where the employment should transfer given that various service users went to different contractors. Whilst the Sevacare work generally was organised on a regional basis, post-termination the Council-funded work was divided on the basis of both capacity and postcode. It does not appear from the Judgment that proper consideration was

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given to these various factors when the EJ considered fragmentation which, as is agreed, should have been at the stage when she determined whether or not the relevant activities carried out by the original contractor were fundamentally the same post-transfer.

Grounds 2-5

22. In the light of the conclusions that I have reached with regard to the first ground of appeal I can deal with the remaining grounds shortly.

Ground 2: organised grouping of employees

23. In **Argyll Coastal Services Ltd v Stirling** (UKEATS/0012/11) Lady Smith said (at paragraph 18):

> **"18. … It seems to me that the phrase 'organised grouping of employees' connotes a number of employees which is less than the whole of the transferor's entire workforce, deliberately organised for the purpose of carrying out the activities required by the particular client contract and who work together as a team. …"**

In **Rynda (UK) Ltd v Rhijnsburger** [2015] IRLR 394 Jackson LJ (at paragraph 44), summarising the principles to be applied when considering whether there has been a service provision change said:

> **"44. … The fourth step is to consider whether company B organised that employee or those employees into a 'grouping' for the principal purpose of carrying out the listed activities."**

24. No criticism is made of the EJ's self-direction in this respect. However her conclusion on this issue is expressed at paragraph 93 as follows:

> **"93. Having considered the evidence and submissions I am satisfied that in these cases there was an organised grouping because the principal purpose of the activity was delivering care to service users for whom the Council was responsible."**

25. Mr Brittenden submits that the conclusion that there was an organised grouping can only sensibly be understood when set against the earlier findings of fact (at paragraphs 26 to 27), and the self-direction in law. However as Mr Edward, rightly in my view, observes the EJ confined her consideration (at paragraph 93, and earlier at paragraph 90) to the purpose of such a grouping, without first considering whether any grouping existed and, if so, whether it had intentionally been formed.

26. Mr Edward makes the additional point that if the EJ did find, as Mr Milford supported by Mr Brittenden suggest she did, that there was an organised group of employees for each package of care, there is no evidence or finding that there was a conscious or deliberate grouping of employees into a grouping to perform Council work.

Ground 3: assignment

27. In the absence of a finding of deliberate organisation of a grouping (or, on Mr Milford's and Mr Brittenden's case, a number of groupings) of employees to service the Council's work the issue of assignment does not require further consideration.

28. I will however make two points: (1) when considering whether there was an organised grouping of employees the question is whether "before the change there existed an organised grouping of employees whose principal purpose was the carrying out of the activities for the client" (**Arch** at paragraph 22). It follows that the assignment must be to an organised grouping of employees that exists before the change. (2) I do consider, having regard to the relevant passages in the Judgment as a whole, that the EJ did, and was entitled to, prefer the evidence of Mr Fox to Ms Wambulu and made a finding to that effect (see paragraphs 48, 83 and 99).

Ground 4: reasons

29. I have identified in relation to the issues of fragmentation (Ground 1), and organised grouping of employees (Ground 2), inadequate reasoning in the decision.

Conclusion

30. For the reasons I have given this appeal succeeds.

Disposal

31. I am not in a position to substitute my own findings. The case will therefore have to be remitted to the Tribunal. The EJ, I am told, has retired. Mr Brittenden suggests that she could still be asked if she would deal with the matter. However, having regard to all the circumstances including the deficiencies in the Judgment, I consider that the case should go before a differently constituted Tribunal.