



EMPLOYMENT TRIBUNALS

Claimant		Respondent
Ms F Ajala	v	1. Herts Young Homeless Group
		2. John Robinson
		3. Visionary Accountants

PRELIMINARY HEARING

Heard at: Watford

On: 21 May 2018

Before: Employment Judge Jack

Appearances:

For the Claimant:	In Person
For the Respondents:	Mr T McArdle, Solicitor

JUDGMENT

On the preliminary issues ordered to be tried by order of the 11 of December 2017:-

1. There was no relevant transfer between the first and the third respondent.
2. The complaints of direct race discrimination are in time.
3. The claimant was an employee from 2008 onwards.
4. The third respondent's application for costs is refused.
5. The third respondent is dismissed from the action.

REASONS

The issues

1. By order dated the 11 December 2017 made by Employment Judge Henry, three preliminary issues were listed for determination. These were:-
 - 1.1 Whether there was a relevant transfer between the first and the third Respondents;
 - 1.2 Whether the claimant's complaints of discrimination on the protective characteristic of race have been presented to the tribunal within the requisite period of three months starting with the date of the act complained of or whether conduct extending over a period is to be treated as done at the end of that period which date is then within time and if not, whether it has been presented in such other period as the tribunal thinks just and equitable;
 - 1.3 Whether the claimant was a claimant was an employer, worker or self-employed for the period 2008 to December 2014.
2. Both the second and third issues have been resolved by agreement. As regards to the second issue, the last incident of detriment for the purposes of direct race discrimination is agreed to be the dismissal of the claimant herself. The claim for direct race discrimination is in time (the claimant has withdrawn her claim for indirect race discrimination).
3. As regards to the third issue, the respondents accept the claimant was an employee from 2008 when she started working for the first respondent onwards.
4. As regards to the first issue, I heard evidence from the claimant from Mrs Elliott, the Chief Executive Officer of the first respondent and from Mr. Wallace, a partner in the third respondent. Extracts from three cases were sited to me; Rynda (UK) v Rhijnsburger, Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and Kimberley Group Housing Limited v Hambley [2008] IRLR 682.

The law

5. The law is to be found in the Transfer of Undertakings Protection of Employment Regulations.
6. Regulation 3, so far as relevant provides:-
 - (1) "These regulations apply to:-
 - (a) A transfer of an undertaking, business or part of an undertaking or business situation immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity

- (b) A service provision change, that is a situation in which:-
- (i) activity ceased to be carried out by a person (“a client”) on his own behalf and are carried out instead by another person on the client’s behalf (“a contractor”) ... and in which the condition set out in paragraph 3 are satisfied
- (2) In this regulation “economic entity” means an organized grouping of resources which has the objective of pursuing an economic activity whether or not that activity is central or ancillary.
- (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 changed:-
 - (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.
 - (b) The activities concerned do not consist wholly or mainly of the supply of goods for the client’s use.”

The facts

7. The claimant was born on the 13 July 1964. In January 2008 she was placed with the first respondent by an employment agency and she continued to work there until the date of her dismissal.
8. In August 2008 Peter Spragge joined the first respondent as a Finance Officer. He subsequently worked with the claimant in the accounting part of the first respondent.
9. On the 1 January 2015 the claimant was placed on a permanent contract. The job description, which was produced for her, said that her main duties and responsibilities were:-
 - Managing processing the employee payroll including payments to pension scheme, childcare scheme;
 - Work with HR to maintain and potentially improve staff benefits through financially costing proposals as and when made;
 - Process and manage the accounting records of the company to professional standards in accordance with statutory requirements;

- Process and manage the preparation of accurate and timely monthly accounts for senior management team and budget holders;
 - Process and manage the preparation of accurate and timely management accounts and balance sheets as required by the Board;
 - Manage the role of Finance Assistant to ensure basic accounting data processed in a timely and orderly manner;
 - Preparation of the annual file for auditors of the company and to answer any questions stemming from the audit;
 - Ensure robust accounting and financial controls are in place at all times to safeguard the company's assets;
 - Participate in the preparation of annual monthly budgets and statutory accounts with the Company Secretary;
 - Assist with the preparation of department detailed budgets to support bids for grants for the Company Secretary;
 - Assist the Company Secretary in the preparation of returns to the Charity Commission, HMRC etcetera;
 - Undertake improvements to accounting financial and administrative systems as they may seem appropriate;
 - To undertake any other reasonable duties as maybe required and consistent with the normal level of responsibility of the post;
 - To attend and contribute to the monthly Finance Committee Meetings to further and safeguard the development of the charity;
 - Ensure all annual appraisals are completed and actioned in accordance with the required time deadlines;
 - To work alongside volunteers as appropriate;
 - To report any health and safety issues to the relevant manager
 - To identify the personal training needs in agreement with the line manager and attend training as appropriate;
 - Attend supervision team meetings and other meetings as appropriate;
 - Be responsible for recording and providing paperwork in accordance with agreed procedures and HYH Policies;
 - To ensure HYH's Policies and Procedures are adhered to at all times.
10. In the second of half of 2016 the need for savings became apparent as a result of the potential loss of funding from the County Council. At a board meeting of the 27 September 2016, there was a discussion about outsourcing the finance role or part of it.
11. On the 8 March 2017, Mrs Elliott, the Chief Executive Officer, wrote to the claimant putting her at risk of redundancy and an 'at risk' meeting was held.
12. By a letter of the 19 April 2017, which its common ground was only given to the claimant on the 25 April 2017, she was informed that her finance role was to be out-sourced. Mr. Spragge, however, was kept on in his functions and is still there.
13. On the 28 April 2017 there was a contract entered between the first respondent and the third respondent. This provided for a one off service for payroll set-up and then it said as regards ongoing services:-

“Bookkeeping to be carried out by existing in house bookkeepers.”

Management accounts:-

- Monthly management accounts produced to agreed format to include profit and loss, balance sheet and cashflow reports;
- Production of agreed monthly KPIs and metrics;
- Ongoing measurement against agreed budget where required;
- Monthly reporting highlighting key areas of concern, main variances and performance improvement strategies;
- Discussion of reports arising with key stakeholders;

Payroll processing:-

- Handover date not yet agreed;
- And then it gave details of the Payroll;
- And then then there was a software licence”

14. The amount of time which it was anticipated the third respondent would spend on these tasks was fifteen hours a month, in contrast to the work done by the claimant, which was thirty-seven hours a week.
15. The functions listed in bullet points in paragraph 9 above continued to be carried on as follows. The first two bullet points were done by Debbie Wood, the first respondent’s Director of Business. The third bullet point was shared between Mr Spragge and the third respondent. The fourth and fifth bullet points were done by the third respondent. The sixth bullet point was done by Ms Wood, the seventh and twelfth were shared by Mr Spragge, Mrs Elliott and Ms Wood. The eighth to eleventh were done by Mrs Elliott. The remaining bullet points had all been done personally by the claimant, so these were not transferred to anyone.
16. On the 4 June 2017 the claimant’s employment ended.

Conclusion

17. The claimant’s case is that she was a one-person accounting department and that the third respondent had taken over the fundamental activities of her job.
18. In my judgment she fails on both limbs of her case. The accounting function at the first respondent was conducted by two people: the claimant and Mr. Spragge. Although each specialised in different aspects of the work, they comprised a team covering most of the accounting functions.
19. The two constituted together the economic entity for the purposes of regulation 3(2) and regulation 3(3) of TUPE. Even if the whole of the claimant’s function was transferred to the third respondent (and they were not) there would still not have been a transfer of an economic entity. Even if I were wrong about that, and it was appropriate to look at the claimant on her own, I would still disagree that the work done by the third respondent was fundamentally the same as that of the

claimant. There were very great differences between what the claimant was doing and the limited roles carried out by the third respondent as well as the time spent by the claimant and the third respondent respectively.

20. The claimant tried to finesse this problem by saying that her accounting functions were the fundamental part of her job but that is not what regulation 3(2A) says. What needs to occur for there to be a TUPE transfer is that the activities, taken as a whole, are fundamentally the same. The large differences between the work done by the claimant and the work done by the third respondent, in my judgment mean that the activities undertaken by the third respondent were not fundamentally the same as those of the claimant. Accordingly, there was no TUPE transfer.

Costs

21. Following the giving of the judgment following on from that Mr. McArdle sought to recover costs on behalf of the third respondent.
22. Rule 76 of the Tribunals Rules of Procedure provides so far as relevant that a tribunal “may make a costs order and shall consider whether to do so where it considers that:-
 - (a) A party ... has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing or the proceedings or part or the way that the proceedings or part are being conducted or;
 - (b) Any claim or response had no reasonable prospect of success ...”
23. In my judgment the claimant has not acted unreasonably in the bringing of these proceedings and she certainly has not acted vexatiously, abusively or disruptively. Nor can I say that the TUPE application had no reasonable prospect of success. It was a weak claim but it was one which needed to be tried.
24. I also bear in mind that Employment Judge Henry ordered that three preliminary issues be determined. The claimant has won on two of those and lost on the remaining issue. In those circumstances, even if I held that she had acted with no reasonable prospect of success, nonetheless, in the exercise of my discretion, I would have refused to make an order in favour of the third respondent.

CASE MANAGEMENT SUMMARY

Listing the hearing

1. After all the matters set out below had been discussed, we agreed that the hearing in this claim would be completed within a three days. It has been listed

at Watford Employment Tribunal, Radius House, 51 Clarendon Road, Watford WD17 1HP to start at 10am or so soon thereafter as possible on the 15/16/17 October 2018. The parties are to attend by 9.30 am.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. Amended response/Further information

1.1 The respondent is ordered to present a draft amended response so as to arrive with the tribunal and the claimant on or before **4 June 2018**. The amended response will set out the respondent's factual assertions in connection with the claim as now understood.

2. Disclosure of documents

2.1 The parties are ordered to give mutual disclosure of documents relevant to the issues by list and copy documents so as to arrive on or before **18 June 2018**. This includes, from the claimant, documents relevant to all aspects of any remedy sought.

2.2 Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment.

2.3 This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.

2.4 The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

3. Statement of remedy/schedule of loss

3.1 The claimant is ordered to provide to the respondent and to the Tribunal, so as to arrive on or before **4 June 2018**, a properly itemised statement of the remedy sought (also called a schedule of loss).

3.2 The claimant is ordered to include information relevant to the receipt of any state benefits.

4. Bundle of documents

- 4.1 It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.
- 4.2 The first respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before **3 September 2018**.
- 4.3 The respondent is ordered to bring sufficient copies (at least five/three) to the Tribunal for use at the hearing, by 9.30 am on the morning of the hearing.

5. Witness statements

- 5.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
- 5.2 The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
- 5.3 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
- 5.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
- 5.5 It is ordered that witness statements are exchanged so as to arrive on or before **5 October 2018**.

CONSEQUENCES OF NON-COMPLIANCE

- 1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
- 2. The tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.
- 3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Jack

24 May 2018

Sent to the parties on:

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For the Tribunal:

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