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EMPLOYMENT TRIBUNALS

Claimants: **Mr K Dutton-Topping & Others**

Respondent: **East of England Ambulance Service NHS Trust**

Heard at: **East London Hearing Centre**

On: **31 October, 1 & 2 November 2018**

Before: **Employment Judge M Warren**

Representation

Claimants: Mr K Dutton-Topping

Respondent: Ms O'Halloran (Counsel)

JUDGMENT

1. The claims of Mr K Dutton-Topping and Mrs C Barnes fail and are dismissed.

2. The remaining Claimants are to within 14 days of this judgment with reasons being sent to the parties, to confirm to the Tribunal whether or not they withdraw their claims or show cause in writing why their claims should not be struck out on the grounds that they have no reasonable prospects of success.

REASONS

Background

1 The Claimants worked for a company called the Private Ambulance Service Limited, which ceased trading on 29 September and went into administration on 2 October

2017. Mr Dutton-Topping issued proceedings on behalf of himself and 12 others, claiming that their employment had transferred to the Respondent, that they had been unfairly dismissed and were owed notice pay, holiday pay and unpaid wages. The claims are resisted. The Respondent denies that the Claimants were transferred to its employment pursuant to the Transfer of Undertaking Regulations.

2 The matter was case managed at a preliminary hearing before Employment Judge Russell on 30 April 2018. There is a connected case which is not consolidated with this one. I do not need to complicate this decision by making any further reference to the other case.

3 Employment Judge Russell identified Mr Dutton-Topping and Mrs Barnes as lead Claimants and it is their claims that come before me today. Apart from Mr Dan Mace, all claims of unfair dismissal have been struck out by virtue of an unless order made by Employment Judge Russell, which required all Claimants who intended to pursue claims of unfair dismissal to so inform the Tribunal by 14 May 2018. As none of the remaining Claimants had the required two years' service, such information was only provided in respect of Mr Mace, on 2 May 2018. His claim is not before me today.

4 In discussions during the hearing, we clarified that Mr Dutton-Topping and Mrs Barnes had misunderstood the wording of their contracts and thought that they were entitled to 12 weeks' notice, but now accept they are only entitled to one week's notice for each complete years' service, as their contracts provide for the statutory minimum notice periods only. They have already been paid by the Insolvency Service that and their accrued due and untaken holiday pay to the date of termination of their employment. They thought that they were entitled to further holiday pay which would have accrued during the purported 12 weeks' notice period I have just referred to. Their claim for an uplift for breach of the ACAS procedure is on the basis that the Respondents did not engage in early conciliation. They now understand that the uplift provisions relate to breaches of the codes of practice relating to disciplinary and grievance procedures. This aspect of their claim is therefore no longer pursued. The Claimants agreed that they were paid to the end of the month for September 2017, but they say they continued working for a few more days 1, 2 and 3 October, before they were "stood down".

The Issues

5 This is a case where it is alleged the Transfer of Undertakings Regulations apply by virtue of a service provision change, not the transfer of an economic entity. The Claimants say that they were engaged by the Private Ambulance Service, (PAS) to work on one specific contract we will call the Beds and Herts contract, that contract was transferred to the Respondent and therefore, their employment was transferred too.

6 The Respondent says the Claimants' employment was not transferred because not all the activities carried out for the clients, (a conglomerative of Care Commission Groups or CCGs) were taken over by it. It says that the Claimants were not organised into a group for the purpose of carrying out the activities contracted for with the clients and that the activities carried out for the clients were taken over a by a number of organisations, (a situation sometimes referred to as "fragmentation").

Evidence

7 For the Claimants, I had witness statements before me for Mr James Barnes, Mrs Caroline Barnes and Mr Kenneth Dutton-Topping. For the Respondents, I had witness statements from Ms McEwan and from Mr Moore. The Respondents have prepared a cast list, a chronology and the list of issues. Ms O'Halloran prepared a skeleton argument which I had before me today before hearing closing submissions.

8 On day two, Mr Dutton-Topping produced four lever arch files containing documents relating to complaints received on the Beds and Herts contract, which he said he had dealt with. Those files were not seen by me, but they were reviewed by Ms O'Halloran. Mr Dutton-Topping claimed to have informed the Respondent's solicitors of the existence of these files, although he had not been able to produce evidence of that overnight as I had requested. Ms O'Halloran reviewed the documents and I permitted her to further cross-examine Mr Dutton-Topping on the contents, as well as on the contents of some further documents he produced on day two, those which I added to the bundle at pages 298 – 340. On those latter documents, I simply observe that in respect of the document at 319, a letter from Mr James Barnes to Mrs Barnes appointing her Call Centre Manager, that ought to have been in the bundle, for I can see from an email of April 2018 that it was provided to the Respondent's solicitors by Mrs Barnes.

The Law

9 The relevant provision in the Transfer of Undertaking (Protection of Employment) Regulations 2006 is Regulation 3, which in relation to a service provision change, provides as follows:

> *"(1) These regulations apply to –*
>
> *……*
>
> *(b) a service provision change, that is a situation in which –*
>
> *(i) …*
>
> *(ii) activities ceased 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 paragrah (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 …

(6) A relevant transfer –

(a) May be effected by a series of two or more transactions…"

10 For there to be a Service Provision Change in this case, the following must therefore be established:

10.1 The same client was served before and after the transfer;

10.2 Fundamentally the same activity was carried out before and after the transfer;

10.3 The activity must have ceased by the outgoing contractor;

10.4 The activity must be carried on by the new, incoming contractor;

10.5 There must be an organised group of employees whose principal purpose was carrying out the activity, and

10.6 The client must intend that the new, incoming contractor will carry on the same activity.

11 Section 3 (2A) was inserted in January 2014 to codify the earlier case law and therefore, the pre January 2014 cases I refer to below remain of assistance.

12 In Enterprise Management Services Ltd v Connect-up Ltd UKEAT/0462/10/CEA HHJ Clark noted that some cases may arise where the division of services amongst a number of different contractors, (known as "fragmentation") means that the case falls outside the Service Provision Change regime. At paragraph 14 of that case, HHJ Clark found that the Employment Judge was entitled to find, as a matter of fact and degree, that there were significant differences in activities, before and after the transfer, in that some 15 percent of the work which was done before the alleged transfer were not done afterwards, which meant that the activities were not essentially or fundamentally the same.

13 In Johnson Controls Ltd v Campbell and another UKEAT/0041/12/JOJ, the

Employment Tribunal's decision was to hold that there was not a service provision change when a client centralised its outsourced taxi booking service, henceforth booking its taxis through the services of its secretarial staff; the function, no longer centralised, was found to be a different activity. In that case, Mr Justice Langstaff commented:

> *[6] We would add that the identification of "activity" is critical in many cases. The case before us is an example of that. An activity may be more than the sum of the tasks that are performed in respect of that activity, but a tribunal must be careful to ensure that it does not take so narrow a view of that which "activity" consists of, in the case before it, as to forget that the context in which it decides "activity" is the context in which it is ever likely that employees' continued employment will be affected. If for instance the activity performed by a given employee is after a service provision change to be performed by two or three employees in the transferee or, in a 3(1)(b)(iii) situation, by the client itself, then it may well be that the approach of the tribunal should recognise that the same activity may well be carried on, though it is performed now by three people rather than by the one person who earlier performed it. These questions are, however, fundamentally questions of fact and degree.*
>
> *…*
>
> *18…… We accept that identifying what an activity is involves an holistic assessment by the tribunal. The tribunal is trusted to make that assessment. Its evaluation will be alert to possibilities of manipulation, but it is not simply to be decided by enumerating tasks and identifying whether the majority of those tasks quantitatively is the same as the majority was prior to the putative transfer"*

14 The current President of the EAT, Mrs Justice Simler, explained in Arch Initiatives v Greater Manchester West Mental Health Foundation Trust EAT/0267/15/RN that there was nothing in TUPE that prevented an SPC occurring where the pre-transfer activities are split up after the transfer. There is no requirement that all the activities are transferred, a sub-set may be transferred. There remains the requirement that for TUPE to apply and for employees to transfer, they must have been assigned to that sub-set; their principle purpose must be the carrying out of those activities. Whether the activities are fundamentally the same is a question of fact and degree, that activities have been split is relevant to that question.

15 In Salvation Army Trustee Co v Bahi & Others UKEAT/0120/16/RN, HHJ Richardson held that the words in reg. 3(1)(b) are to be given their ordinary, everyday meaning and that, "the activities" must be defined in a commonsense and pragmatic way; they should not be defined at such a level of generality that they do not really describe the specific activities at all but on the other hand, they should be defined holistically, having regard to the evidence in the round, avoiding too narrow a focus. Too pedantic and detailed a definition of "activities" runs the risk of defeating the purpose of the SPC provisions. In Bahi, the provision of services to the homeless on behalf of a local authority had been by way of 22 contracts, at accommodation in 10 different locations. The contracts were merged to a single provider, the Salvation Army, who provided the service in 2 large blocks of accommodation, introduced a single point of referral, provided the service to over 25's rather than over 18's for a shorter duration and support workers were

available for more hours each day. The tribunal's finding that the fundamental activity was the provision of accommodation and support workers and that the activities under the new contract were fundamentally the same, was upheld.

The Facts

16 The Respondent, as the name suggests, provides a publicly funded Ambulance Service in the East of England. The Private Ambulance Service, (PAS) was, as the name suggests, a private company that provided an ambulance service. A number of Care Commissioning Groups, or CCGs, in Bedfordshire and Hertfordshire combined forces to commission non-emergency patients' transport services. This is referred to as the Beds and Herts contract. The company which had this contract terminated it and in March 2017, PAS took the contract over.

17 In September 2017, in addition to the Beds and Herts contract, PAS also had the following work:

17.1 A number of contracts, (service level agreements) with a number of NHS Ambulance Trusts, (including as it happens, the Respondent) to provide staff and vehicles.

17.2 A contract with London North West NHS Trust to provide non-emergency transport for patients, and

17.3 A contract to provide non-emergency transport for the Royal Brompton Hospital.

18 The Beds and Herts contract represented about 35 to 40 percent of the work of PAS. It was an unusual contract in that it entails taking telephone calls directly from patients, rather than from NHS staff, in order to make the transport arrangements.

19 PAS had premises in Basildon, Essex. At these 2 storey premises, the first floor was a call centre employing 15 people managed by Mrs Barnes. 12 of those people would work on the Beds and Herts contract, receiving calls from patients who were empowered to make direct contact in order to arrange their transport. The other 3 would be engaged on work to do with the London North West contract; transport arrangements in that area were made by the NHS staff and GP surgeries by email or fax. Mrs Barnes managed the call centre as well as performing occasional duties as company secretary.

20 The ground floor of the premises was a control centre, in which teams dispatched ambulances and crews on all PAS contracts, including Beds and Herts.

21 PAS ceased trading on 29 September 2017 and went into administration on 2 October 2017. An announcement was made to PAS staff, the text of which is in the bundle at page 230A. It includes

> *"Our commissioners are taking steps to ensure that the employment of staff within the service will be transferred to another service provider based on the current contracts on which they are engaged."*

The author of that is Mr James Barnes.

22 The CCG conglomerate contacted the Respondent and asked it to step in and help with regards to the Beds and Herts contract. On 30 September 2017, they entered into a contract whereby the Respondent was to provide emergency cover, with a view to negotiating in due course a contract whereby the Respondent would take over the Beds and Herts contract. This document is in the bundle at page 110 and there are a few clauses from it I will quote:

> *"2. PAS is in or is at risk of entering into, liquidation and the CCGs have asked EEAST to provide emergency rescue cover for the services as are more particularly set out in schedule 2 to this letter (emergency cover). From the date of this letter (commencement date) and subsequently the CCGs wish to enter into a contract with EEAST for the delivery of services being substantially to the specification of the services (full contract).*
>
> *3. The CCGs have agreed to pay the EEAST its costs actually incurred in providing the emergency cover from the commencement date until a contract for the delivery of the services is agreed or this agreement is otherwise terminated (interim period)*
>
> *4. The parties therefore agree that EEAST shall provide the emergency cover for the interim period..."*

A little later, the contract deals with the intention to negotiate, Clause 9 stating:

> "*the parties agree to negotiate in good faith with a view to executing the full contract on or before 13 October 2017"*

And at clause 11 it states:

> "*the CCG has agreed to (a) procure that the employee liability information (as defined in the Transfer of Undertakings (Protection of Employment) Regulations 2006) relating to any employee is likely to transfer to EEAST pursuant to the commencement and delivery of the services under the full contract will be provided to EEAST as soon as reasonably practicable following the commencement date."*

23 Schedule 2 of the agreement, which is meant to contain details of the emergency work to be undertaken, does not contain those details. I was told in evidence that the emergency cover to be provided was set out in a letter of intent and it is surprising that important document was not in the bundle.

24 On 30 September 2017, somebody in authority at the commissioning CCG, a Ms Margson, sent an email to Mr James Barnes setting out the wording of a communication to be sent to the staff electronically. This reads:

> *"The Clinical Commissioning Groups for Bedfordshire, Luton and Hertfordshire, the East of England Ambulance Service NHS Trust and Unison have been*

working together to agree how the service can be continued over the coming days and weeks and we have agreed that East of England Ambulance Service will provide the service on caretaker arrangements.

Firstly, the important thing is that we need you more than ever – we have patients across the area who rely on the service you provide and we therefore very much want you to continue coming to work and delivering those services for which of course you would be paid for.

We are jointly working on a plan to continue the service for the next two weeks before we agree more robust plans to take the service forward over the coming months and into the future."

25 The Respondents communicated with its own staff on the same day. I was referred to an email from Ms McEwan to a number of individuals dated 30 September, in which she refers in the opening sentence to having signed a letter of intent with Bedfordshire and Hertfordshire to take over emergency cover and to have a full contract in place by 13 October. Also in this email, she notes that in discussions it had been indicated that TUPE will not apply.

26 The Respondent has a call centre based in Norwich and they decided to deal with the calls from Bedfordshire and Hertfordshire patients from that call centre. Patients in the Beds and Herts contract area calling for transport after the 1 October would hear a recorded message, the text of which is set out at page 121:

"Welcome to the East of England Ambulance Service NHS Trust. Private Ambulance Service has gone into administration and we have been asked to support the patient transport service for the next few days and weeks. As a result we are currently only able to book patients who are attending hospital for cancer treatment or dialysis and for discharges from hospitals. We are sorry that we cannot book outpatients appointments at this time. Please contact the hospital or care setting where you are due to have your appointment."

27 Ms Margson emailed Mr Malcolm Barnes regarding PAS' vehicles, (page 126) on 1 October to say that these vehicles are on lease and the leasing companies had agreed to release the vehicles to the Respondent with immediate effect.

28 On 3 October, Ms Margson emailed Mr James Barnes, (page 123). I say 3 October because that is the date I am told is the date on this document; I cannot actually read it because of the poor and small quality of the print. I am not sure that it make sense that it is 3 October, but that is what I am told is the date. It reads:

"I can confirm that we have now made a decision in relation to the call centre from tomorrow.

We will not require continuity of the PAS call centre for the CCGs contract tomorrow am.

We are mobilising an EEAST call centre during the afternoon which they will be

ready in a skeleton form for tomorrow am…

Staff who worked on the CCG contracts should arrive for work tomorrow morning as planned. EEAST will then make transport available for the call centre staff to be transferred back each day until a more formal arrangement is confirmed."

29 The Respondent did not collect PAS staff and did not provide them with work.

30 The Respondent took over the contract with Beds and Herts in part, three months later, on 8 January 2018.

31 The emergency work, ("emergency cover") undertaken by the Respondent during the period between 2 October 2017 and 8 January 2018 was transport for renal oncology, chemotherapy and radiotherapy patients and those being discharged from hospital. What they did not do, which was in the Beds and Herts contract, was provide transport between hospitals**,** or transport for diagnostic testing, or for high dependency technician transfers, or for outpatients and its services were not 24/7. The Beds and Herts contract was to provide 240,000 journeys a year. The emergency cover provided between 2 October 2017 and 8 January 2018 was about 60% of that in terms of journey numbers. Ms McEwan explained that renal patients require six journeys a week, so in terms of patient numbers, the percentage would have been much less than that. As an aside, it is surprising that Ms McEwan would have to guess at these percentages in answer to questions from me. One would have thought this was evidence solicitors for the Respondent would have ensured was in her witness statement after appropriate research, as evidence-in-chief. I have no doubt though, the evidence was genuine and reasonably accurate.

32 The hospitals and CCGs affected brought in other providers to cover the non-emergency work. Three were named in evidence: Human Touch, UK Specialist Ambulance Service and Met Medical. No one before me has any first hand specific knowledge of these matters and no one here is with the CCGs or the hospitals involved. The lack of more precise information in the evidence on this crucial point was surprising. In some cases, taxies were arranged by the hospitals or patients had to use their own transport.

33 After the Respondent took over the contract in January 2018, after re-negotiating its terms, the journeys they undertook were 75,000 a year less than the 240,000 in the original contract. A proportion of the work previously done by PAS is now done by other providers, some being those I have just named. This is again based on evidence from Ms McEwan in answer to questions from me when I put her on the spot and ought to have been in her evidence-in-chief.

34 Mr Dutton-Topping was employed from June 2016 as a credit control manager. After PAS took over the Beds and Herts contract, they inherited an operation that had not been going well and which generated a high volume of complaints. I find that on balance, probably Mr Dutton-Topping took on the role of complaints manager to deal specifically with those complaints and that somebody else took over his role of credit control.

Conclusions

35 The client is the consortium of Care Commissioning Groups for the Beds and Herts contract.

36 The activities carried out by PAS for the client were 240,000 journeys a year transporting patients. Those journeys included transport for renal, oncology, chemotherapy, radiotherapy, diagnostic testing, high dependency technical transfers, for outpatients appointments, for transport between hospitals and for those being discharged from hospital. The service provided was 24 hours a day, 7 days a week. The key question is, were the activities carried out by the Respondent fundamentally the same, ignoring any minor differences? They are fundamentally the same, in that they entailed the transportation of patients to and from and between hospital, but they are fundamentally different in that the work undertaken was only the emergency cover: transport for renal, oncology, chemotherapy and radiotherapy patients and those being discharged from hospital. As we have seen, that did not include 40% of the work which was 24/7 cover and transport between hospitals, for diagnostic testing, for high dependency technician transfers and significantly, for outpatients appointments.

37 The activities had been spread out over a number of providers. I do not have evidence on how many or who precisely, but at least three others I have been able to name and there were probably more. Only 60% of the work, the emergency cover, was carried on by the Respondent, the remaining 40 % had been fragmented to other service providers.

38 Mr Dutton-Topping was employed at the time of the transfer to work exclusively on the Beds and Herts contract dealing with complaints, but he was not assigned to work principally on the emergency cover. Mrs Barnes was not assigned to the Beds & Herts contract, (let alone the emergency cover aspect) because 3 out of the 15 staff she managed were not working on the Beds & Herts contract and she had other, albeit minimal, duties as a company secretary. As they were not assigned to the activities that were transferred, the emergency cover, the employment does not transfer.

39 I could not make a conclusive finding about the other 12 or 15 staff at the call centre because I would need to hear evidence as to whether each individual worked on the Beds & Herts contract only, day to day, or whether they might have one day to another, worked either on this contract or another. If they did work on the Beds & Herts contract, for their employment to have been transferred, they will have to show that they were assigned to the emergency cover and I doubt that to be the case.

40 I might say that I can entirely understand why the Claimants might have thought that the Transfer of Undertaking Regulations did apply, given some of the communications I have quoted above and the impression they may have been given in the early stages, particularly by the CCG. However, the test before me is whether in fact what actually happened was a transfer of fundamentally the same activities and an assigned group of employees; that is not what in fact happened in respect of these 2 lead Claimants.

41 These two lead Claimants claims fail and are dismissed. The remaining Claimants should review their position and consider whether in light of my findings, they should withdraw. They have 14 days from when this decision is posted to them.

Thereafter, I may strike them out on the grounds that they have no reasonable prospect of success, unless within those 14 days they have shown cause in writing why I should not do so.

Employment Judge M Warren

Date : 22 January 2019