EMPLOYMENT TRIBUNALS

Claimants:	v	**Respondents:**
1.Juliet Henry		1.Servacare (UK) Ltd
2. Mabel Asare		2.Carewatch Care Services Ltd
3. Clovia Bennett		3. Kaamil Education Ltd
4. Patricia Francis		4. Diligent Care Services Ltd
5. Eulalee Harris		5. London Care Ltd
6. Frederica James-Blair		6. Premier Carewaiting Ltd
7. Felicia Kwame-Osei		7. Satellite Consortium Ltd
8. Sarah Nakato		8. Flexserve Resource Ltd
9. Gloria Noel		
10. Helen Ogunsanya		
11. Althea Palmer		
12. Charmaine Powell		
13. Gwendolyn Smith		
14. Christine Smith		
15. Rashid Wamala		
16. Florence Wambulu		
17. Cherrylyn Williams-Lee-Chin		
In addition, 27 claimants in Claim 2		

Heard at: London Central Employment Tribunal

On: 14, 15, 16 and in Chambers on 17 January 2019

Before: Employment Judge JL Wade

Appearances:
For the Claimants: Mr S Brittenden, Counsel
For the First Respondent: Mr J Milford, Counsel
For the Second Respondent: Mr C Edward, Counsel
For the Fifth Respondent: Mr C Crow, Counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that there was no transfer of undertaking from the first to the second to eighth respondents

REASONS

1. On 12 July 2017 a differently constituted panel in this Tribunal found that there had been a transfer of undertaking between Sevacare Ltd, the first respondent, and one or more of the second to eighth respondents. The second and fifth respondents appealed the decision and the EAT remitted to this Tribunal the issue of whether there had been a transfer of undertaking between the first respondent and them.

2. The ET judgment as it affects the third, fourth and sixth respondents has not been appealed and so they were transferees and remain respondents in these proceedings (although at present they are not allowed to participate as their responses were struck out).

3. A judgment (attached) dismissing various claims on withdrawal was made at the start of this hearing and Mr Scuplak attended for the eighth respondent with a watching brief only as no claimant had claims against it in this "round" of the litigation. There are other claims in the system which are stayed pending the outcome of this set of claims which comprise the claims under case number 1302183/16 only. These are case numbers 1303297/16, 13032829/16, 1302830/16 and these findings do not directly affect them although it is hoped that further litigation on this preliminary issue will not be required because the parties will accept these findings in relation to all claimants.

4. Only five claimants are affected by the issue in this preliminary hearing and they are those who allegedly transferred from the first to the second or fifth respondent. They are:

1. Juliet Henry
2. Mabel Asare
12. Charmaine Powell
14. Christine Smith and
16. Florence Wambulu

The relevant law

5. I have to decide if there were service provision changes as defined by TUPE such that parts of Sevacare's business transferred to the second and fifth respondents with the consequences for those respondents as set out in TUPE regulation 4(2).

The TUPE regulations 2006

6. The relevant passages of Regulation 3 of TUPE provide:

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."

7. The relevant passages of Regulation 4 provide:

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.

Case law

8. I was taken to the leading cases *Churchill Dulwich Ltd (in liquidation) v Metropolitan Resources Ltd* [2009] IRLR 700 at [27]-[30], *Kimberley Group Housing Ltd v Hambley* [2008] IRLR 682 at [27]-[35], *Enterprise Management Services Ltd v Connect-Up Ltd* [2012] IRLR 190 at [8], *Rynda (UK) v Rhijnsburger* [2015] ICR 1300 CA at [44] and *Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust* [2016] IRLR 406.

Enterprise sets out the steps a Tribunal should take in making its decision and *Arch*, the most recent EAT decision, and one made by the President, confirms that:

a. The Regulations have their ordinary straightforward meaning and the application of the law to an individual case is one of fact and degree.
b. A split or change in activities is a relevant consideration but there are no hard and fast rules as to when an activity becomes so fragmented that it ceases to be fundamentally the same post transfer.
c. Activities which transfer need not be all of the activities carried out by the outgoing contractor and there need not be only one transferee
d. The ways in which activities may be orgnaised are infinitely variable. For example, there can be divisions in the activity along quantitative, functional or geographic lines.

9. At the time all involved believed there was a TUPE transfer and the process ran according to that belief. Then the second to eighth respondents changed their minds, which was frustrating for the claimants but there is no rule of law by which they were estopped from doing so.

The evidence

10. For the claimants I heard from Ms Henry, Ms Asare, Ms Smith and Ms Wambulu. Ms Powell provided a witness statement but did not attend. I also heard from Mr S Fox, UNISON Joint Branch Secretary.

11. For the first respondent I heard from Mr D Stapelberg, Managing Director and Ms C Thakrar, Care Services Director.

12. I read the documents in the bundles to which I was referred.

The facts

13. I have based these findings upon the summary provided by the employment appeal tribunal but added to them as appropriate following the evidence which I heard at this hearing.

13.1 Sevacare was a provider of care services for the London Borough of Haringey from 2004. After 2012 it did not have an exclusive contract and other providers worked in the borough as well. The contract ended suddenly in July 2016.

13.2 At the time the contract came to an end Sevacare was contracted to deliver packages of care to 168 service users. It ran the operation through a Registered Manager who was overall responsible for the delivery of care and a deputy manager. Haringey was divided into four areas, each of which had and area coordinator and team leaders who worked out in the field. Nearly all the work that Sevacare did in Haringey was council commissioned and funded, but around 10% was private work. Sometimes a council- funded service user would want to privately top up the service they received because there were strict constraints on what the council was prepared

to fund and sometimes, rarely I think, but I do not know, a service user was fully private.

13.3 An individual in need of care at home was assessed by the council and if it was willing provide care an individual service delivery agreement/ purchase order was prepared. When this was directed to Sevacare it sent out a team leader to the service user's home to prepare a care plan. When complete this had a rota attached showing the carers who would be attending the service user and continuity of care was necessary in order to satisfy the service delivery standards of the Care Quality Commission. When the main carer was not available, for example due to holiday, Sevacare would send a substitute to cover their work. 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, the fact that clients had to have more critical needs in order to warrant council-funded care.

13.4 The carers were employees on zero hours contracts. They all worked for a number of service users because the council rarely provided domiciliary care for a full day and therefore in order to get a day's work they had to move around different homes. Carers tended to work in a narrow geographical area, which meant that travel between jobs was kept to a minimum, which suited everyone, but there was no hard and fast rule. It was, however, rare for them to work outside Haringey.

13.5 Common to many organisations providing domiciliary care services, carers were not allowed to liaise with each other about the needs of the service users they were working with and all contact was with their area coordinator in the office. This meant that they were not working together in teams to provide care for individual or groups of service users and their only working relationship was with the central Sevacare organisational hub.

13.6 Following concern expressed by the Care Quality Commission and negative press reports in the summer of 2016, Sevacare decided to withdraw from the borough as a matter of urgency. They gave notice to the council in June 2016, following which the council notified the service users. In July the council developed a plan to transfer the service users to four major providers, the second, third, fifth and sixth respondents, and it emailed them saying that allocation of care services for the 168 service users would be based on capacity in the new organization and postcodes. A few small packages of care were allocated amongst eight other providers.

13.7 The negotiations all took place on the understanding that Sevacare staff were transferring across to the new providers as part of a TUPE transfer and the claimants would move with their service users who were being divided up amongst the different providers. In that event, the new providers would have capacity because they had the same staff as before.

13.8 One of the claimants' witnesses, Mr Fox of Unison, prepared a table which, until the submissions stage of this hearing, was not contested. It showed how the work of the five claimants engaged in this hearing was divided in the four weeks before transfer as follows:

a. Ms Asare: of the work she did for her (only) three service users 90.48% went to Carewatch (the second respondent);

b. Ms Henry: of her three service users 100% to Carewatch
c. Ms Powell: of her five service users 88.12% to London Care (the fifth respondent)
d. Ms C Smith: of her 17 service users 77.54% to Carewatch
e. Ms F Wambulu: of her 28 service users 69.58% to Carewatch

Obviously, this meant that the rest of their time was spent working for other providers.

13.9 This information can be interpreted in a number of different ways, but the key point is that the split was by service user, usually located in a geographical pattern, and although Mr Fox carried out an analysis of the impact upon the individual carers, their skills, availability, geographical location, et cetera did not figure in that process.

13.10 In their submissions the second and fifth respondents highlighted evidence which had emerged during the hearing which suggested that the majority of Ms Asare's service users were partially or fully privately funded and so the work was not being done for Haringey. The same applied to a service user, for whom Ms Henry worked 30.67% of her time. None of the witnesses were questioned about this.

Conclusions

14. I regret to say that the claimants and the first respondent have tried to give a meaning to the facts which is not ordinary or straightforward in order to argue that the TUPE regulations apply.

15. In summary, the claimants worked for Sevacare in its operation in Haringey and that was the service provision. After the transfer, they carried on providing the same services to service users who needed them, many or most of whom were the same as before, and their day-to-day working lives did not change much or at all, which at first blush made me think that there must have been a service provision change. However, the problem is that tracing the path their employment took post transfer is like trying to disentangle a bowl of spaghetti because it was the service users who transferred in an organised way, largely by postcode, to four main and eight other providers, not the employees.

16. The claimants had to follow their individual service users, who were distributed widely amongst the companies which took over Sevacare's work and this led to most of them working for a number of different providers so that it is not possible to say that they continued to work as before. Whilst these claimants mainly (and in one case entirely) worked for the second or fifth respondent this was coincidental and not a symptom of the transfer of an orgnaised grouping; I have no idea what the wider picture was in relation to the work of employees who are not part of these proceedings after July 2016.

17. I now go through a step by step process as outlined by HHJ Clark in *Enterprise.*

The client

18. Thankfully this question was no longer in dispute and LB Haringey is agreed to be the client.

The activity

19. What activity was carried out on the client's behalf which was legally capable of transferring? The fifth respondent argues that the activity in question was "the provision of care to the Haringey-funded service users".

20. The claimants and the first respondent argue that the activity was "the provision of a package of care to a number of service users for whom care was provided by Haringey".

21. The fifth respondent's formulation is the most natural following the facts and the wording in the regulations and I struggled to understand why the first respondent was formulating the activity in an obscure alternative way. The reason was that this was the only formulation which could survive the changes which took place at transfer. At the time of the transfer, however, there was no logical reason for creating sub-sets of activity defined by groups of service users.

22. There was a loose geographical subdivision of the work into four areas, but this was for administrative purposes and there was no difference in the activity as a whole (see *Seawell v Ceva 2012]* IRLR 802, paragraphs 24 and 30) so there was neither a geographical not a functional distinction in the activity.

23. I agree with Mr Crow when he says in his submissions that the claimants'/ first respondent's definition of activity: "would lead to a finding of 168 (or more) separate "activities"…. This takes the case, way beyond the subdivision in *Arch*: to put it into the *Arch* context, it is the equivalent of suggesting that each intervention provided to a beneficiary amounts to a distinguishable subset of the second function (delivery of interventions)." It has to be remembered that no service user was attended by just one claimant, so there was no neat division even into 168 parcels of care.

The activity must remain fundamentally the same before and after transfer

24. Fragmentation has to be considered at this point as according to regulation 3(2A) I have to decide if the activities are fundamentally the same before and after the transfer.

25. The EAT commented at paragraph 16:

> "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."

I have to ensure consistency of reasoning throughout this judgement and each definition must be logically connected to the previous one. Since I find that the activity before transfer was the whole service and that it was fragmented beyond recognition afterwards with the 168 services users, I have to find that the activity was not the same before and after. Each new contractor inherited a whole service user but a fraction of each claimant's work; it was the case that some new contractors inherited a greater fraction than others, but it was still a fraction in all but Ms Henry's case. In her case the exception proved the rule that the norm was overwhelmingly a fragmented picture.

Organised grouping

26. The only sensible "organised grouping" immediately before the transfer on the facts was the whole of Sevacare's operation in Haringey, although it could be argued that the four regions in Haringey were each organised groupings. Put simply, following the ordinary meaning of the Regulations, this was how the claimant's work was organised. They were not organised according to service user and although continuity of care was highly desirable, this continuity was the responsibility of Sevacare and not down to an "organised grouping" arrangement between the carer and the service user. If the claimants were asked "who do you work for?" I am sure they would say "Sevacare" and not "Mrs X, Y and Z".

27. By contrast, the claimants' and the first respondent's preferred "organised grouping" has been defined with reference to the situation which the claimants found themselves in *after* the transfer, an ex post facto rationalisation of the situation which pertained before. The claimants and the first respondent can only make their arguments work by tracing back from the situation after transfer, when they were working for a set number of service users as defined by their rotas, and saying that they always worked in that organised grouping. This is not the right way to give plain meaning to the regulations. As I have already said, the fact that continuity of care was highly desirable in order to satisfy CQC standards is not enough to say that both before and after transfer the activity was organized by service-user.

28. Case-law says that the organized grouping has to be organised and formed deliberately. There is no evidence that immediately before the transfer the carers were organised into groups around the individual service users, or groups of service users. Indeed, they were told that they could not liaise together to form a team around that service user, but must always communicate with the coordinator in the office who had the power, and no doubt did, send them to whichever service user the organisation most required them to care for. CQC required continuity of care, but more than anything else the council required them, them being Sevacare, to ensure that a staff member turned up to deliver the hours contracted for.

29. I think that the fact that Sevacare did do some private work is not significant in that it was only 10% of the whole and well within a de minimis range as it is clear to me that the Sevacare's existence in the borough was down to the fact that they were contracted by Haringey to provide care to those to whom Haringey was statutorily responsible.

Assignment

30. The Honourable Mr Justice Supperstone in the EAT commented on assignment:

> "I will ….. 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.

I conclude that it was not possible to assign the claimants to the organised grouping which existed before the transfer because it no longer existed either as a whole or as a defined sub-set, defined by function, geography etc.

Overall conclusions

31. I appreciate that the claimants may be "victims" of the system of working in which they are not split into functional or geographical teams but instead were required as individuals follow the service user. They do not work in a not a traditional team and effectively who worked alone as "spokes in a wheel" where the hub was Sevacare. Of course, I must however apply the law as I understand it.

32. This means that currently the claimants and respondents for the substantive hearing in case 1302183/2016 are as set out below:

Claimants		**Respondents**
1.Juliet Henry		1. Sevacare Ltd
2. Mabel Asare		1. Sevacare Ltd
3. Clovia Bennett		1. Sevacare Ltd
4. Patricia Francis		1. Sevacare Ltd
5. Eulalee Harris		1. Sevacare Ltd 3. Kaamil Education Ltd
6. Frederica James-Blair		1. Sevacare Ltd 6. Premier Carewaiting Ltd
7. Felicia Kwame-Osei		1. Sevacare Ltd 6. Premier Carewaiting Ltd
8. Sarah Nakato		1. Sevacare Ltd
9. Gloria Noel		1. Sevacare Ltd 3. Kaamil Education Ltd
10. Helen Ogunsanya		1. Sevacare Ltd 3. Kaamil Education Ltd
11. Althea Palmer		1. Sevacare Ltd 3. Kaamil Education Ltd
12. Charmaine Powell		1. Sevacare Ltd
13. Gwendolyn Smith		1. Sevacare Ltd 4. Diligent Care Services Ltd
14. Christine Smith		1. Sevacare Ltd
15. Rashid Wamala		1. Sevacare Ltd 3. Kaamil Education Ltd
16. Florence Wambulu		1. Sevacare Ltd

17. Cherrylyn Williams-Lee-Chin		1. Sevacare Ltd 3. Kaamil Education Ltd

33. I am happy to list a case management preliminary hearing if this will assist but I invite the parties to endeavor to agree directions between themselves first. The parties are ordered to report back on the progress of their discussions by 15 March.

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Employment Judge Wade

6 February 2019

Sent to the parties on:

6 February 2019

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For the Tribunal: