



# EMPLOYMENT TRIBUNALS

Claimant: Ms F Khan

Respondent: MacIntyre Care Limited

Heard at: Cambridge Employment Tribunal

On: 2 November 2018

Before: Employment Judge Michell (sitting alone)

## Appearances

For the claimant: In person

For the respondent: Mr Whysall, Solicitor

## JUDGMENT

The claim is dismissed on the basis that the claimant has no reasonable prospect of success against the respondent in respect of the matters alleged, in the light of the operation of Regulations 4(1) and 4(2) of TUPE.

## REASONS

### Background

- (1) The claimant was employed by the respondent from 29 June 2015 until 1 September 2017, when she and about 40 other co-workers transferred by operation of the TUPE Regulations 2006 to her present employer, the WKCIC group, trading as CCCG (“CCCG”).

## The claims

- (2) By a claim presented on 30 April 2018, and after compliance with the early conciliation procedures, the claimant brought a claim of discrimination and arrears of pay against her former employer, the respondent.
- (3) The complaint is of arrears of pay dating back to about June 2016, when she was allegedly not paid her full salary. On her case, those matters remain unresolved.
- (4) She also complains of discrimination on grounds of race, sex, religion or belief, age and /or disability in respect of various alleged acts or omissions occurring in March to August 2017.
- (5) The claimant has not named CCCG as a party to this claim. Nor has she sought to amend the claim to rely on post-TUPE transfer acts by either the respondent or CCCG.
- (6) By a second claim, also presented on 30 April 2018, the claimant brought a claim of discrimination -relying on the same array of protected characteristics- and arrears of pay against CCCG. That claim is to be heard in London Central Employment Tribunal, (case number: 2202621/2018, hereafter 'the second claim'). I have seen the pleadings in the second claim. The second claim relies solely on events post-TUPE transfer, beginning on 4 September 2018. The ET1 in the second claim does not mention the respondent. In its ET3, CCCG accepts the claimant was TUPE transferred to it on 1 September 2018.
- (7) The claimant tells me that the second claim has already been before the London Central Employment Tribunal for a preliminary hearing, (before an employment judge whom she declined to name), at which apparently CCCG unsuccessfully argued that some or all of the allegations ought to be struck out for lack of reasonable prospect of success. She tells me that neither the ET1 nor the ET3 have been amended in the second claim, albeit she has provided some further and better particulars, (which I have not seen). She says the second claim is listed for a seven day full merits hearing in March 2019.

## The Hearing

- (8) This hearing was convened to consider the issues in the Employment Tribunal's letter dated 31 July 2018, namely,
  - 8.1 whether the current respondent is the correct respondent and whether parties should be added / removed from the pleadings;

- 8.2 whether the Employment Tribunal has jurisdiction to hear the claimant's claim.
- (9) I heard from the respondent's solicitor, Mr Whysall. The claimant represented herself, and did so with professionalism and clarity, for which I was grateful. She indicated at my enquiry that no specific reasonable adjustments needed to be made to accommodate her, and she was given time prior to the commencement of the hearing to read through the various documents produced by the respondent. She was also provided with a hard copy of the short bundle which had been sent to her in soft copy form some time ago, and was also given a copy of the TUPE Regulations for her perusal. I did my best to make sure she understood the issues for resolution today, which she appeared to do.
- (10) The parties agreed the proper name for the respondent was, MacIntyre Care Limited, rather than 'MacIntyre' which is simply its trading name.

#### Submissions

- (11) Mr Whysall relied on the undisputed fact of the TUPE transfer of the claimant, and the effect of Regulation 4(1) and 4(2), as transferring liability for the matters about which the claimant complains from the respondent to CCCG. He did not address me on time issues because, as I indicated to him, this would be unnecessary as regards the respondent if his submissions regarding TUPE were correct. Different considerations may also apply in relation to time issues if CCCG, rather than the respondent, were debating them.
- (12) The claimant explained to me that she wanted all matters dealt with together. She asserted that the respondent had continued to misconduct itself in relation to her post TUPE transfer, (though this does not feature in any pleaded case of hers). She said that all facts should be heard before a decision on the effect of TUPE was made. She explained that she had simply sued the persons she felt were responsible, (ie the respondent), and had not appreciated what is now said to be the effect of TUPE.

#### Analysis

- (13) It seems to me quite clear that by operation of TUPE, any liability for the matters about which the claimant complains has transferred by operation of Regulation 4(1) and 4(2). They provide as follows:
- 13.1 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 transfer or assigned to an organised grouping of resources or employees that are subject to the relevant transfer, which

will otherwise be terminated by the transfer, but such contract shall have effect after the transfer as if originally made between the person still employed and the transferee;

- 13.2 Without prejudice to paragraph (1), but subject to paragraph (6), and Regulations 8 and 15(9), on completion of the relevant transfer
- (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract should be transferred by operation of this regulation of the transferee; and
  - (b) any act or omission before the transfer is completed of or in relation to the transfer or 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.
- (14) As a result, the transferor is relieved of its obligations without the need for the employee's consent. See by way of example, Berg and Dusscheis v Besselsen [1990] ICR 396, which articulates this principle. Hence, the claimant can still sue CCCG as if the original liability had been CCCG's.
- (15) It therefore seems to me that the appropriate respondent to the matters about which she complains in this claim is CCCG, and not the respondent. Ought the claim to be dismissed? I think so. An alternative might be to replace the respondent with CCCG. The claimant has not applied for CCCG to be joined. CCCG is (as far as I know) therefore not on notice of today's hearing. In any event, I consider dismissal of the claim is apt and sensible for these reasons:
- 15.1 It is plainly not appropriate for the two claims to be proceeding at the broadly the same time in different tribunals.
  - 15.2 The claimant already has a claim, ie the second claim, at a more advanced stage against CCCG.
  - 15.3 That claim is in London, which the claimant tells me is a far more convenient location for her.
  - 15.4 The claimant is at liberty to apply to London Central Employment Tribunal to amend the second claim to (e.g.) introduce the various factual allegations contained in this claim against the respondent, identifying (with the assistance of this judgment) CCCG as the proper respondent in the light of the operation of TUPE, which (she says) she had not previously understood.
  - 15.5 Although I cannot predict what the outcome of any such application would be, and though I express no more than a provisional view, it seems there may be different arguments concerning time and any debate as to "conduct extending over a period", for the purposes of section 123 of the

Equality Act 2010, in particular given the further post-TUPE allegations the claimant makes against CCG. These may assist her in (belatedly) arguing that some, or all, of the complaints in this case may not in fact be out of time when joined to the second claim.

- 15.6 If any such application succeeded, it looks to me, (again from a provisional perspective, having seen only very limited paperwork in relation to the second claim), as if the presently listed full merits hearing in March 2019 may be able to accommodate the factual contentions in the present claim. That, however, is obviously a matter for the judge hearing the matter.
- (16) I also made an order by consent, which is separately attached.

Employment Judge Michell

12 November 2018

Sent to the parties on:

11 February 2019

For the Tribunal:

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