

**Case No. 1304496/2018**

# **EMPLOYMENT TRIBUNALS**

**BETWEEN**

**Mr G Watson**

**AND The Vine Trust Walsall (1)**

**Symonds (UK) Limited (2)**

**Claimant**

**Respondents**

**HELD AT Birmingham**

**ON**

**11 February 2019**

**EMPLOYMENT JUDGE Self**

## **Representation**

**For the Claimant: In Person**

**For the First Respondent: Miss T Vittorio - Consultant**

**For the Second Respondent: Mr P Morris - Counsel**

## **JUDGMENT**

The Claimant was not assigned to the organised grouping of Vine employees working on the Cardiff IKEA contract and accordingly did not transfer to Symonds on 1 September 2018. Accordingly, the Claim against Symonds (the Second Respondent) is dismissed.

This matter will be listed for two days and a date will be sent out to the parties, in the near future, with standard directions attached.

## **RESERVED WRITTEN REASONS**

1. The Claimant lodged his Claim at the Tribunal on 1 October 2018 against two Respondents The Vine Trust Walsall (hereafter Vine) and Symonds UK Limited (hereafter Symonds). In that Claim he asserted that he was unfairly dismissed and was owed holiday pay, notice pay and a redundancy payment.

2. Vine in their Response denied the Claims, asserting that the Claimant's employment transferred pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) as amended to Symonds on 31 August 2018. In Symonds' Response they denied that any such transfer had taken place.
3. This Open Preliminary Hearing (PH) was listed following an initial PH in January and EJ Hindmarch in that Order recorded certain preliminary matters to be determined at paragraphs 2 and 3 of the Case Management Summary which I will summarise below.
4. The Claimant was an employee of Vine. That organisation had a contract to provide shopping tools management and trolley services to IKEA in Cardiff and that ended on or around 1 September 2018 when it was awarded to Symonds. Vine states that the Claimant's contract should have transferred across to Symonds in the same way as other employees did but Symonds asserts that the Claimant was not assigned to the transferring activities.
5. It is recorded in the EJ Hindmarch order that:
  - a) There is no dispute that the Claimant was an employee of Vine at the date of the relevant transfer.
  - b) There is no dispute that the activities / services provided to the Cardiff IKEA by Vine ceased and were transferred to Symonds under Regulation 3(1)(b)(ii) of TUPE on 31 August 2018.
  - c) There is no dispute that there was an organised group of employees whose principal purpose was to carry out the activities concerned with the service provision under Regulation 3 (a)(i), but the issue for this preliminary hearing is to determine whether the Claimant was assigned to that organised grouping of employees.
6. In order to consider that matter I have heard oral evidence from the Claimant, and I have also heard oral evidence from Kevin Davis CEO of Vine and Sarah Smith, an HR Manager for Symonds. All witnesses provided witness statements. I also considered oral submissions from all parties and had a bundle of some 197 pages which was agreed. The representative for Vine also provided written submissions.
7. Vine is a community development trust that provides services and facilities to help improve communities. One area of that work included the arrangement of apprenticeships for young people. Some of the services it delivers are in partnership with other businesses.
8. One of those other businesses was IKEA and services were provided to them by Vine managed via a subsidiary of Vine called P390 Limited. The services delivered were car park management services which included organising the

shopping trolleys in and around stores and car parks. Providing apprenticeships in such work met the service needs of IKEA and the social objectives of Vine.

9. The Claimant was recruited and started work on 17 September 2008 to manage the IKEA contract nationwide and his job title was Head of P390 i.e. head of the subsidiary that provided services to IKEA. I have seen his contract that states on the first page (177) that it is dated 11 March 2013 but was actually only signed by the Claimant and Mr Davis in April 2018. I note that was only some 6 months before the matters that give rise to the Claim and accept that it was relevant to the role the Claimant was engaged to do at the time relevant to the issues in this case. The Job Description is similarly dated, and the view is the same for that document.
10. Mr Davis asserted in his witness statement that the Claimant started off as a Deputy Head of Vine's social enterprise activity which included the P390 role but as time went on, he relinquished the wider role and was responsible for managing the IKEA sites in line with the national framework and service agreements. The Claimant records that P390 Limited came into being in 2015 and that his role concerned managing all trading activity with IKEA and that it was at that point that he ceased any social enterprise activity for any other role.
11. The Claimant's job description which is dated April 2018 states that the Claimant's work area is Walsall in the West Midlands with travel around the UK and explains that the project seeks to assist young people establish themselves in the world of work with a view to them sustaining that into the future. There is a long list of responsibilities to be carried out by the Claimant in his P390 role spread between Management, Commercial General and Supervision and Support. I will return to those in due course.
12. Mr Davis explained that in addition to the Cardiff site which is the subject of this application the Claimant also had responsibility for Birmingham, Nottingham and Dublin until they were not renewed in September 2017. There were unsuccessful attempts to secure contracts with IKEA at other sites.
13. In January 2017 the Claimant explained that IKEA decided to withdraw the use of voluntary / unpaid work from its UK Operations. This impacted upon the Cardiff model as the contract had been resourced by such workers on managed work experience placements and the supervisors were there to mentor and support the volunteers whilst ensuring that the job they were engaged to do got done and the hours requirement was met.
14. From January 2017 additional paid staff and a group of 6 apprentices worked together to ensure the hours contracted for were delivered and that amendment was set out in an amending letter to the framework agreement.
15. In September 2017 Vine lost all of the IKEA sites save for Cardiff. Mr Davis accepted in his statement that the Claimant's role had changed from a senior strategic role over a number of sites to managing just one site. I was told that by the end of 2017 the overhead of employing the Claimant was charged to

the Cardiff site and that by September 2017 there was insufficient work to sustain the Claimant on a full-time basis, but the Claimant was retained.

16. Mr Davis' rationale for that was the Cardiff site was due to end in 2018 and the Claimant would be responsible for bidding for the retender and had that been retained it was hoped that could provide a spring board for more IKEA stores which would allow the Claimant to do a full job again. It appears to me that was, if true, at best, a triumph of hope over expectation but that was what the Claimant was engaged to do and is an important factor in this case because it shows that the Claimant's role remained far wider than simply what he ended up doing which only occupied him for part of his working week.
17. In March 2018 the Claimant and others engaged by P390 Limited were transferred back to Vine. A decision was taken to liquidate P390 Limited as it had been making a loss for some time once the IKEA income had dried up. P390 as a project and an idea remained but the corporate entity was wound up.
18. In April / May 2018 the Claimant was asked to support the Chief Executive in developing a project by helping to draft a business plan etc with another commercial partner. The Claimant estimated that he worked 12 days on this project between April and July 2018 which equated to 5 % of his working year. That calculation is 5% of a full-time working year but would of course equate to far more of the Claimant's time actually spent doing work. To put it into context the Claimant only spent 25 days a year actually in Cardiff although it is accepted that he put in further work to Cardiff remotely.
19. On 1 June there was email correspondence between the Claimant and Lisa Stephens from IKEA and she asked the Claimant what company the employees and apprentices were contracted to. The Claimant explained that as at that date all worked for Vine and explained that P390 Limited had been wound up. The Claimant said:

***“There are no other individuals who work solely on IKEA contracts in our organisation. I work part-time to manage this contract, but I also work on other projects”.***

20. The Claimant stated that he was concerned by the questioning as they were the type of questions asked when there was a TUPE transfer on the horizon. On 8/9 June there was further correspondence where a suggested meeting was posited and that Oliver Roberts (Lead supervisor at Cardiff IKEA) was finishing working on the figures. Towards the end of July negotiations were ongoing between IKEA and Symonds to quote for the contract and it was given to them.
21. The Claimant wrote to Tina Haydock of Vine in relation to Employee Liability Information and asked:

***“Can you confirm whether in your discussions with Citation that you still require me to be on the TUPE list?”***

The Response came back of 27 July that Vine did want him on that list.

22. There was then email correspondence between the Claimant and Miss Smith from Symonds HR and a list of staff was provided on 2 August (64-70). There were 9 staff on that list including the Claimant. All staff lived in the vicinity of the store in Wales apart from the Claimant.
23. There is an email from the Claimant to Citation where he sets out that he has included himself on the TUPE list **as “after discussion with our Chief Executive and operations manager it has been pointed out that I have been employed to manage all IKEA contracts and since September 2017 this has been the only IKEA contract we have operated. Recently I have been spending time working on another project but on average I have worked the majority of my time on this contract”**.
24. On 3 August a meeting was proposed by Miss Smith with those who would be transferring. On 14 August Miss Smith raised a query with Ms Haydock from Vine as to why the Claimant was on the TUPE list which had been requested because they were **“unsure at this time as to the duties associated with this role are not wholly or mainly attributable to the Ikea Cardiff contract”**.
25. On 15 August Ms Haydock replied **“Gary (sic) role is solely to run Ikea P390 service for Ikea, he had no other duties or responsibilities other than the Ikea services, he is the manager overseeing solely this service provision and has no other regular duties elsewhere within the organisation.”**
26. On 16 August Ms Smith wrote back to Ms Haydock in the following terms:  
**“I do not accept that the service provision transfer at the IKEA Cardiff site for Vine to Symonds will affect the transfer of the Head of P390 role. This role is a strategic role relating to the whole of the IKEA service. It is not assigned to the work transferring at the Cardiff site and even if .... The Cardiff site is the only site that does not result in the head of P390 role transferring.”**
- The other 8 employees were accepted. Mr Davis accepts in his statement that at the date of the transfer Vine did not have a suitable role for the Claimant.
27. On 20 August Ms Haydock (Head of Operations) asserted that the Claimant should transfer as he:  
**“spends 100% of his time on the service contract with IKEA as the head of P390 maintaining the operational and strategic services provided as part of the service”**
- A job description was attached, and it was made clear that the Claimant did not undertake any other work apart from the contract.
28. On 23 August Sarah Smith emailed Lisa Stephens the Cardiff Store Services manager enquiring as to who she liaised with re normal day to day business and activities and she confirmed that it was only Oliver Roberts who she dealt with.

29. On 30 August the Claimant wrote to Ms Smith setting out why he believed that he was an integral part of the grouping of employees concerned with the service provision change. That afternoon Mr McTaggart a solicitor raised some questions of the Claimant which he replied to on 31 August however the information therein did not persuade Symonds that the Claimant should transfer.
30. On 6 September Ms Smith responded more substantively and explained that the Claimant was not accepted because his place of work was the transferor's head office and when there were a number of contracts the costs were shared between them all. At this stage all his cost was allocated to Cardiff but that was a function of the fact it was the only contract and did not mean, in my view, he was assigned to it. In addition, it was believed that he only ever spent 1-2 days a month in the store. Vine confirmed on 10 September that they believed that he should have transferred, and that the Claimant's contract terminated on 1 September with them.

### 31. The Law

Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 as amended state that:

***(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 ... 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***

***(3) The conditions referred to in 1 (b) are that***

***(a) immediately before the service provision change***

***(i) there is an organised grouping of workers situated in Great Britain which has as its principal purpose the carrying out of activities concerned on behalf of the client.***

Regulation 4 states

***"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 transferred***

32. The start point for legal analysis in respect of cases such as these is the case of ***Botzen (1986) 2 CMLR 50*** in which paragraph 15 states:

***"An employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned in order to carry out his duties".***

33. I was also taken to an EAT decision – ***Williams v Advance Cleaning Services Limited, Engineering and Railway Solutions Limited (In Liquidation) (2005) EAT 0838/05***. That case considered whether or not Mr Williams was employed in or assigned to that part of the undertaking that was transferred from ERS to ACS.
34. Within that case at para. 11 reference is made to cases where the appellate courts have declined to attempt to provide a formula for deciding whether an employee was assigned to the part of the undertaking transferred.
35. At paragraph 13 of Williams it is reiterated that the answer to the question of assignment is a question of fact. The facts of Williams do have some passing similarities to this case. Mr Williams was originally engaged to be a project leader on an engineering design contract. That contract concluded and the Claimant was asked to take responsibility for the Train Care Division for which there were three separate contracts. One contract was particularly difficult and took up much of his time, but he remained based some distance from it. That contract was put out for tender and Mr Williams company did not get it. He was not offered employment with the transferee and brought claims. The transferee, as here, did not accept that he was assigned to that part of the contract.
36. The Tribunal concluded that more than half of Mr Williams time was spent on the transferred contract and it was the largest element of work done by him in the months leading up to the loss of the contract. It found that although he attended at the contract on a relatively frequent basis his workplace remained where it originally was some distance away. Day to day responsibility was carried out by two subordinates and Mr Williams had an overview of their activities.
37. The Tribunal concluded that whilst Mr Williams spent a large part of his time working on the main contract, he continued to be a project manager in the employ of the transferor and that he never became an integral part of that main contract but remained attached to the transferor as a whole and was available to undertake work for them.
38. Obviously, one has to look at the facts in each individual circumstance, but I do consider that the approach taken in the Williams case does shine a light upon what the true position is in the instant case. The message that comes from the Williams case is that the distinction between spending substantial time on a contract and being assigned to it. The latter does not necessarily follow from the former although it does have relevance as one of the factors in the case.
39. I was also asked to consider a further EAT decision ***London Borough of Hillingdon v Gormanley (2014) EAT 0169/14***. The summary of that case suggests that the Tribunal had erred in that case by failing to consider the organisational structure of the putative transferor and the role of the Claimants including their contractual obligations within it.

40. The Hillingdon case makes it clear that there is a need to consider the way in which an organisation is structured and the Claimant's role within it to determine the question in that and in this case re assignment (Hillingdon – para 36.
41. At Para 37 the Judgment goes on:
- “An important source of information on an employee's role in the organisation is likely to be their contract of employment. The job description or statement of duties is likely to inform a decision as to whether their duties are confined to certain activities or whether they include more general duties..... There is an importance of considering what duties the Claimant could have been called upon to perform under the contracts as well as what they were actually performing at a particular moment in time.”***
42. Having listened to the evidence and considering the closing submissions of the parties (which I will not repeat in this judgment) I do not consider that the Claimant was assigned to the organised grouping of employees at the Cardiff IKEA.
43. It is clear that there was a clearly defined grouping who lived locally and undertook their work on a daily basis at the Cardiff IKEA and they were transferred over to Symonds. I accept the evidence within the e-mail of Lisa Stephens at para 28 above that to all intents and purposes on a daily basis she dealt with Oliver.
44. I fully understand why Vine were so keen for the Claimant to transfer over. In essence, they were paying him a full-time wage for what was very much a part time role. Had he remained in their organisation there was quite simply no role for him to do at all and as a charitable organisation I can understand why there would be little appetite to pay the Claimant a redundancy payment and any other termination sums he would have been due.
45. The Claimant's contract and job description which although asserted to be out of date were only signed in April 2018, proximate to the matters under discussion give absolutely no indication of an assignment to the Cardiff IKEA. The Claimant's role was a strategic and managerial role on a very wide-ranging basis.
46. The Claimant's Job Title is said to be Head of P390 (177) and even though P390 ceased to exist as a separate corporate entity this name did not seem to change. The Claimant's employer shows as Vine. There was a right for the charity to ask the Claimant to undertake additional or other duties to assist Vine on a short-term basis and his normal place of work was shown as being Vine's address with a requirement that he could be asked to work in other UK locations. The Claimant indicated in evidence that he also regularly worked from home.
47. The Job Description is also dated April 2018 (182-183). There are a substantial number of bullet points which demonstrate the breadth of the Claimant's contracted role. There is no specific mention therein of any

specific duties which are specific to the Cardiff IKEA although a number of them would encompass the need for some work in relation to that store. The clear scope of the Claimant's duties is substantially wider than matters in Cardiff and focus upon his participation at Executive Board level and the strategic and operational management of all of the P390 activity with an emphasis upon developing services with IKEA.

48. From a commercial perspective the Claimant was to represent Vine to heads of service within IKEA and was to market new sites and to work with the Executive Board to develop new projects. Clearly the Cardiff IKEA was within his remit and he was, inter alia, responsible for ensuring that the framework agreement was implemented in Cardiff as well as other sites.
49. In summary the Claimant's job description clearly encompassed managerial responsibilities in relation to Cardiff IKEA but at all material times his role also encompassed those same responsibilities with other stores and also a far wider remit to drive forward the Vine business with IKEA so as to provide other opportunities. In my view at his level and taking into account the job description those strategic responsibilities were the more important ones.
50. In contrast I have the Job Description of Oliver Roberts who was the P390 Lead Supervisor based in IKEA Cardiff and his specification is clearly specifically linked to day to day operations at the IKEA Cardiff store.
51. The simple fact is that the Claimant's job description and contractual obligations did not change. It remained as wide and encompassing throughout. The only thing that changed was that the stores that he had direct responsibility for shrunk to only the Cardiff store and dealing with that appears to me to be a very part-time job. There would have been no question of the Claimant being assigned to the Cardiff part of the undertaking when he was managing a portfolio of several stores and he was seeking to expand and develop the links with IKEA further. The question is whether or not the diminution in what the Claimant did which meant that all he had to do was deal with Cardiff assigns him to that part of the undertaking.
52. I do not accept that it does. His general role remained the same and whilst perhaps not undertaking the developmental parts of his role at that time as stated by Mr Davis above it was hoped that if Cardiff stayed then that could be a springboard for more IKEA stores to be signed up via the work of the Claimant in the future. That was his core job.
53. At the time of the transfer the Claimant's role as described in the Job Description had shrunk so as to encompass the need to work for a short time per week and a relatively small percentage of his contracted hours. He was given another project to look at as well to fill some of his time but even then, there was only work that filled a fraction of his contracted hours. He only attended the Cardiff site around twice a month and it is clear that the day to day management of the Cardiff operation was conducted by Oliver Roberts. Whilst I accept that the majority of the Claimant's working time was spent at the material time working on Cardiff as it was the only thing he had left he was never assigned to that part of the operation it was simply happenstance that

by September that was the only working project left. The Claimant was still left with what his job was specified to be under the Job Description.

54. This case is similar to that of Mr Williams above in that he happened to be working on one part of the contract when the service provision change took place, but his basic wider contract and duties remained the same thereby meaning that he was factually not assigned.
55. I am fortified in my conclusion that it does not appear to me that the Claimant himself initially believed that he was assigned to the contract. He explained originally (see para. 19 above) at a point where the whole assignment issue and its importance was not fully countenanced that he worked part-time on the contract and also worked on other contracts as well. I believe that is a true expression of the Claimant's view of himself and that subsequently during the TUPE process and in these proceedings, he has moulded matters so as to portray his role in a light as favourable as possible to him being assigned to the Cardiff operation. For reasons that are beneficial to Vine Mr Davis has also been supportive of crafting a situation which in my view simply does not reflect the actuality of the situation. At para 21 above the Claimant asks Ms Haydock from Vine whether Vine requires him to be on the TUPE list. This does not seem reflective of a man that himself is firmly convinced that he should be.
56. I find as a fact that the Claimant was not assigned to this specific contract but was working on it as part of his wider organisational role. The fact that many elements of that wider role were not being undertaken at the material time does not equate to the Claimant being assigned as required by the Regulations. The amount of time spent is not, on the facts of this case, determinative.
57. Accordingly, the Claimant should not have transferred automatically and the claims against Symonds should stand dismissed. This claim will proceed against Vine only and should be a comparatively straightforward case now this issue has been resolved. I will list it for 2 days and standard directions will be sent out.

**Employment Judge Self**

20.03.2019