# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **Mrs R M Rodewald** | **v** | **Ofm Support Limited** |

**Heard at**: Watford **On**: 20 March 2019

**Before:** Employment Judge R Lewis

**Appearances**

**For the Claimant:** Ms M Jones, Counsel
**For the Respondent:** Mr N Bidnell-Edwards, Counsel

## JUDGMENT

1. The claimant's contract of employment did not transfer to the respondent.

2. The claimant's claims for unfair dismissal, wrongful dismissal (breach of contract) and for holiday pay are dismissed.

3. Any claims brought under the provisions of TUPE 2006 are dismissed on withdrawal.

4. The respondent's application for a costs order is refused.

## REASONS

1. This was the hearing for a claim presented on 19 September 2017. There was originally a separate first respondent, Enterprise Support Services UK Limited, against whom the claimant withdrew the claim by e-mail from her solicitor on 18 March 2019, Judgment signed by Employment Judge Bedeau on 19 March.

2. The claimant's claims arose out of termination of her employment following a TUPE transfer from Enterprise to Ofm. Following withdrawal against Enterprise, the first issue for me to decide was whether the claimant's employment had indeed transferred to Ofm.

3. The parties had agreed a bundle of some 120 pages, and Mr Bidnell-Edwards prepared a concise skeleton argument, to which he annexed the Judgment of the EAT in BT Managed Services Limited -v- Edwards, UKEAT, 241/14, Judgment given 2 September 2015.

4. The claimant gave brief evidence. On behalf of the respondent there was brief evidence from Ms Winifred Feasby, former HR advisor and Mr Robert Lyford, senior account manager. I was given unsigned copies of two statements on behalf of Enterprise, which I read but which were of relatively little assistance.

5. The factual background can be simply stated, and I find as follows. The claimant, who was born in 1955, was originally employed by the facilities company Initial on 11 June 2007, in what must have been a supervisory role.

> "I was employed as a Supervising Cleaner and was responsible to work under a cleaning contract based at Thames Valley Police, where my role involved hoovering, dusting, washing floors, cleaning toilets and sinks and emptying bins with assistance"

6. The claimant suffered an accident at home on 24 December 2011.

7. On 21 or 22 January 2014, she went off work for surgery to her left shoulder, from which she never returned. All absences have been properly certificated, and referred to shoulder pain and later depression.

8. She gave honest evidence of her hopes of recovery, which were dashed, despite two operations.

9. Initial's contract with TVP specified the level of staffing to be maintained, and in due course Mr Lyford made arrangements for the claimant's role to be permanently covered, so that the contractual staff complement was maintained.

10. On 1 November 2015, the cleaning contract was transferred from Initial to Enterprise. The claimant had, by then, been off work for about 22 months.

11. It was common ground and was pleaded by Enterprise that there was a TUPE transfer of the claimant to Enterprise (I reject and attach no weight whatsoever to an e-mail from Mr Cant in which he tried to resile from that position (98) on 26 April 2017.)

12. Ms Yates was an HR business partner at Enterprise. In due course she made arrangements to meet the claimant for welfare purposes. The bundle contained a note in particular of a meeting on 5 July 2016, which the claimant in evidence accepted was accurate, and in which Ms Yates noted the following:

> "The claimant said she was not better and has very little movement in her shoulder which made it very difficult for her to do anything. She also said she is left handed and even struggles to write …… she wants to come back to work but felt she was not well enough and her shoulder gives her a lot of pain when she moves it. She knows she could not go back to work because everything needs two hands and arms …. "I do not know as I

> cannot use a computer or write with my left hand, I don't know [what other duties] I could do". (60)

13. Ms Yates on Enterprise's behalf, referred the claimant for a medical assessment. The medical questionnaire, apparently completed by the claimant's GP, recorded that she was, in September 2016, "not able to return to this job", and that the only duties that she might otherwise do would be those which would not include, "use of her affected arm or heavy lifting" (68).

14. Ms Yates had another welfare meeting with the claimant on 12 October 2016 (70), at which Ms Yates raised the issue of medical retirement, and the claimant is recorded as stating that she was "shocked but not surprised" to be asked about retirement (70).

15. The claimant was signed off for 3 months from 3 November 2016 with a diagnosis of shoulder pain and for 3 months on 3 January 2017 with a diagnosis of shoulder pain and depression (72-73).

16. Approximately in March 2017 (but probably earlier), the TVP contract was re-tendered, and then awarded to Ofm, the present respondent. Nearly 80 employees transferred without issue. Mr Lyford was one of them. The date of the transfer was 2 May.

17. The bundle contained correspondence in which the claimant was sent standard letters informing her of the progress of the transfer. Her details were included in the ELI information sent by Enterprise to Ofm (85) and she was described as "long term sick". Around 20 April, Ms Feasby asked Enterprise for further details about the claimant (93). On 3 May, after the transfer had taken place, she wrote again to Ms Yates (104) with some queries, including the following:

> "It has been brought to my attention that Mary Rodewald who you have included on the ELI as a long term sick colleague has not worked a single shift in the period that Enterprise has retained the contract. Therefore, we do not believe that she is eligible to transfer under the Tupe regulations."

18. Ms Yates replied the following day (105) confirming that Enterprise had had welfare meetings with the claimant "so therefore she has the right to transfer under Tupe law".

19. On an unknown date after then, and in an undocumented conversation, Ms Feasby telephoned the claimant to tell her that Ofm took the view that she had not transferred to it, and that her rights and liabilities were against Enterprise. On 8 June, her present solicitors sent letters to both companies indicating a threat of Employment Tribunal proceedings "for numerous claims". The letter stated, "Our client advises that your human resources department told our client that she was dismissed". Having seen Ms Feasby give evidence, I accept that she was cautious not to use the word dismissed, but to tell her that she had not been accepted by Ofm. In any event, this claim arose out of the decision not to accept the claimant into Ofm's employment.

20. TUPE 2006 provides at regulation 3, that a transfer takes place where there is a transfer of "an organised grouping of resources which has the objective of pursuing an economic activity." Regulation 4 provides so far as material that "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 are subject to the relevant transfer"

21. Mr Bidnell-Edwards concisely submitted that the position was as summarised at paragraphs 66-69 of the BTMS authority. The issue in that case referred to an employee who had been on long term sick leave for over 5 years, but who had been retained as an employee so as to continue PHI benefits. The EAT agreed with the Employment Tribunal that the employee in that case had not been assigned to the entity which transferred. I quote paragraph 66 to 68 in full as follows, emphasis added:

> "I derived the following from the authorities. In order for an employee to be assigned to a particular grouping, within the meaning of Regulation 4(3) of **TUPE**, something more than a mere administrative or historical connection is required. The question of whether or not an individual is "assigned" to the organised grouping of resources or employees that is subject to the relevant transfer, will generally require some level of participation or, in the case of temporary absence, an expectation of future participation in carrying-out the relevant activities on behalf of the client, which was the principal purpose of the organised grouping. Whether an employee is assigned to a particular grouping is a question of fact that must be determined by taking into account all relevant circumstances, none of which individually can be determinative; in particular, in the case of an employee being absent through ill-health at the date of the service provision change where he might be required to work when able to do so. Mere administrative connection of an employee to the grouping subject to the service provision change in the absence of some participation in the carrying-out of the economic activity in question, although a factor to be taken into account, cannot be determinative of whether or not for **TUPE** purposes the employee was assigned to the grouping at the time of the service provision change. It is not necessary to determine where the employee was assigned at the time of the service provision change if he was not assigned to the organised grouping engaged in the relevant activity and subject to the service provision change.
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> 67. I reject the submission that the ECJ in **Botzen** recognised that employees who might be permanently unable to work might still be assigned to the entity subject to the service provision change. Permanent inability should be distinguished from temporary inability. I am not able to accept the submission that the Employment Tribunal is bound to consider to what other entities Mr Edwards was assigned if not to the DNO. The identity of an organised grouping *et cetera* subject to service provision change is partly defined by the work it carries out; so, almost by definition a person who plays no part in the performance of that work cannot be a member of the group and thus is not "assigned" to the grouping.
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> **Discussion and Conclusions**
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> 68. This case is quite unlike any other that I have seen related to a service provision change, because the Claimant's connection with the grouping subject to the transfer was a very limited administrative connection that was not based on the present or future participation in economic

> activity. I reject the suggestion that the universal criterion in all cases is to determine the question of whether an employee (not in work at the time of the service provision change) is assigned to a particular grouping is to be found in the answer to the question to which grouping he could be required to work if able to do so. This criterion is useful in cases where an employee is able to return to work at the time of the service provision change or is likely to be able to do so in the foreseeable future, assuming the employee has not been transferred to other work. The principle has no resonance or applicability in a case such as the present where the employee in question is *permanently* unable to return to work and has and can have no further involvement in the economic activity performed by the grouping and the performance of which is its purpose. There is a clear link, as I have already observed, between the identification of the organised grouping and the question of who is assigned to that grouping. If the grouping is to be defined by reference to performance of a particular economic activity, the absence of any participation in that activity will almost, by definition, exclude persons in the position of the Claimant."

22. I find that at time of transfer the claimant had been on medically certificated absence for 39 months, including the whole 17 months during which Enterprise had had the contract. The respondent had no reason to believe that there was any prospect of her return either to her usual job, or to any alternative duties. The primary source of its information was the candour and honesty of the claimant herself each time she was asked.

23. She had not participated in the economic activity for the last 21 months of Initial's contract, or for the entirety of Enterprise's contract. Ms Yates is not to be criticised for maintaining welfare contact, nor do I accept Mr Bidnell-Edwards criticism of Enterprise for failing to dismiss the claimant (no matter how convenient that would have been to this respondent). I find that the facts before me fit four square with those of BTMS.

24. Faced with these facts, Ms Jones made a number of submissions, all of which I reject. I agree with Mr Bidnell-Edwards in principle that the correct approach to whether there was a transfer is the tribunal's interpretation, irrespective of what Ms Feasby thought at the time. I accept that the claimant was included in Enterprise's ELI, and I agree that Enterprise could have dismissed the claimant earlier but do not criticise them for failing to do so. Whilst I note that the medical certificates were for 3 months each, I do not in the total circumstances accept that that shows lack of permanence. I do not criticise the respondent for failing to reject the claimant at an earlier stage. It does not follow that they left it too late, such that liability transferred to it.

25. At the time of the transfer, the claimant had not been economically participating in the activity for a very long time. There was no prospect of her doing so. I accept that the BTMS authority is binding on me and I find that she did not transfer to the respondent.

26. After I had given judgment on the above point, the claimant requested written reasons. After a short adjournment, the claimant through counsel, withdrew any claim under Tupe.

27. Mr Bidnell-Edwards applied for costs. His first brief point was that the claim never had any prospect of success in light of the EAT Judgment in particular, and the claimant's health absence. I was wary of that application, because it is a common place that cases look different after they have been heard from when they are contemplated. I was concerned about applying the wisdom of hindsight. I was also concerned that there were matters of fact and degree set out in BTMS, which the Tribunal had to consider, such as the permanence of an absence. I did not ask Ms Jones to reply to that application.

28. Mr Bidnell-Edward's second strand was more troubling. He told me that on the day before this hearing the two representatives had agreed a "drop hands" deal from which the claimant had then resiled. He applied for the costs incurred by the respondent in consequence, which were the difference between an abated fee agreed by his client when the case was thought to have been withdrawn, and the actual full fee incurred when the case proceeded. I adjourned to let Ms Jones take instructions. The material point was that the claimant had agreed to a drop hands deal and then reflected further on the matter and changed her mind, deciding that after such a long delay she wished to have judicial determination. I invited Ms Jones to tell the tribunal whether there had been any money recovery from the first respondent, as that might be relevant. She replied, having taken instructions, that the settlement was confidential and that she was not even permitted to state whether there had been any recovery.

29. I was shown none of the e-mail trail which had recorded these matters. It seemed to me that first that the claimant, seen objectively, had conducted the case unreasonably in instructing her solicitors to agree a settlement and then changing her mind a few hours later. For all its informality, the Tribunal is a structured disciplined process, and a public service working under considerable pressure. However, considering whether it was in the interest of justice to make an award, and as a matter of discretion I find that the application for costs fails. I must balance the interests of the parties and the Tribunal system, and of those members of the public awaiting to be heard. I cannot say that it is in the interests of justice that a member of the public, after a delay of nearly 2 years, decides 24 hours before a listed hearing that she wishes to have a judicial determination of her case.

30. I record having told the parties, however, that if it were the case that there had been a substantial money recovery in settlement from Enterprise, leaving a drop hands deal desirable because the claimant had part extinguished any recovery against this respondent, that would have had a significant impact on my consideration. There was, however, no evidence to that effect.

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Employment Judge R Lewis

Date: ……11.04.19……..

Sent to the parties on: ..12.04.19.....

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For the Tribunal Office