



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4108834/2018

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Held in Glasgow on 29 and 30 October 2018

Employment Judge: Lucy Wiseman

10 **Ms S Abraham**

**Claimant
In Person**

15 **NP Homecare LLP**

**Respondent
Represented by:
**Ms S Mechan -
Solicitor****

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

20 The tribunal decided to dismiss the claim of unfair dismissal because the claimant does not have the necessary qualifying service to bring a complaint of unfair dismissal.

REASONS

25 1. The claimant presented a claim to the Employment Tribunal on the 14 June 2018 alleging she had been unfairly dismissed by the respondent.

30 2. The respondent entered a response admitting it had dismissed the claimant, but denying the dismissal was unfair. The respondent asserted the claimant did not have the necessary period of qualifying service to bring a complaint of unfair dismissal.

35 3. A preliminary hearing took place on the 30 August 2018. The claimant clarified her position was that she had previously worked for Community Care Choice and transferred to the respondent's employment when the care package of a particular client transferred to the respondent.

E.T. Z4 (WR)

4. The Employment Judge decided a preliminary hearing should be arranged to determine if the claimant has the necessary period of qualifying service to proceed with a claim for unfair dismissal. The determination of that issue will require a decision whether there was a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations.
5. I heard evidence from the claimant and Ms Tina Ravenscroft; and from Ms Joanne Hamilton, Director of Community Care Choice. I was also referred to a number of documents produced by the respondent (the claimant's documents were relevant to the issue of dismissal). I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

6. The respondent is a limited liability partnership owned and managed by Mr Patrick Lewis. The respondent provides home care and support services.
7. The claimant commenced employment with Community Care Choice in 2015 as a Support Worker. The claimant worked 16 hours per week.
8. Community Care Choice (CC) employ approximately 160 employees and provide care and support to 300 clients.
9. CC is a recognised provider of these services for Glasgow City Council and South Lanarkshire Council, and works within the Framework Tender.
10. CC endeavours to match its employees with clients, but this is dependent on training and the care/support required. There are no teams of employees dedicated to the care of particular clients or groups of clients.
11. CC was requested by Glasgow City Council to take on the care package for a particular individual (JB). JB required 24 hour care and support and this was provided by up to ten individuals over the course of each week.

12. CC struggled to get sufficient staff who lived within, or close to, the area in which JB lived. This presented difficulties in fulfilling the contract to provide care and support for JB.
- 5 13. The claimant provided care and support initially for 2/3 clients including JB. The claimant built up a good relationship with the client and her mother and, from approximately December 2016, the claimant worked only with JB.
- 10 14. Ms Hamilton, Director of CC, entered into discussions with Ms Lorna Mackinnon, Social worker with Glasgow City Council to advise her of the fact CC could not fulfil the contract to provide care and support to JB.
- 15 15. Ms Mackinnon, in an email dated 28 March 2017 (page 57) confirmed CC had officially given notice that they planned to stop providing care for JB on 21 April 2017.
16. Ms Mackinnon attended at JB's home to inform JB's mother of the situation. Ms Kirsty Anderson, an employee of the respondent was also present.
- 20 17. JB's mother informed the claimant what had happened, and told the claimant she was very keen for the claimant and Ms Tina Ravenscroft to continue to care for JB. The claimant also wanted to do this because she had built up a good relationship with JB and her mother.
- 25 18. The claimant subsequently met with Ms Kirsty Anderson at JB's house. There was an informal chat regarding working with the respondent, which concluded with Ms Anderson inviting the claimant to attend the office to complete the forms to enable disclosure checks to be carried out.
- 30 19. The claimant and Ms Ravenscroft attended the respondent's office, completed the disclosure forms and were given an application form to complete. They both took the application form away and it was only completed

and collected by the respondent in July. The claimant's application form was produced at pages 21 - 35 and Ms Ravenscroft's at pages 1 – 16.

- 5 20. Ms Hamilton had "a fair idea" the claimant would stay with JB wherever the care package moved.
- 10 21. The claimant sent a text message (page 49, 50 and 51) to CC asking how they would like her notice as she would be leaving. The claimant was asked to put it in writing and state her last day of work. The claimant did this and confirmed her last shift would be the (Thursday) 20 April.
22. CC stopped providing care for JB on the 21 April 2017.
- 15 23. Cordia provided care and support for JB over the weekend of the 22 and 23 April 2017.
- 20 24. The respondent started to provide care and support for JB on the 24 April 2017. The claimant (and Ms Ravenscroft) started work with the respondent, providing care and support for JB, on the 24 April 2017.
- 25 25. The claimant continued to work 16 hours per week, providing care and support to JB. The claimant continued to work a pattern of one weekend on and one weekend off.
26. Ms Yvonne Rennie is employed by CC. Ms Rennie worked, on occasion, with the claimant and provided care and support to JB. Ms Rennie attended at the offices of the respondent with the claimant, but decided not to go ahead with her application. Ms Rennie continued to work with CC.
- 30 27. CC has sufficient work to continue to have employed the claimant and Ms Ravenscroft.
28. The claimant's employment with the respondent ended on the 19 April 2018.

Claimant's submissions

29. Ms Abraham very candidly admitted she had not known about relevant transfers in terms of the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). She had been informed by ACAS that she may be able to argue there had been a TUPE transfer and, if successful, this would mean she had continuous service (and therefore sufficient service to proceed with the claim of unfair dismissal).
30. Ms Abraham's position was that she had not applied for a job with the respondent. JB's mother had wanted her to go with JB to continue her care and the claimant had been agreeable to this.
31. Ms Anderson had seemed very pleased she was going with JB, and any meetings with Ms Anderson had been quick and informal. The claimant took issue with the fact she had not completed an application form for the job in advance and had not had to attend an interview. The only formality had been completing the disclosure forms, but once they had come through, she simply started with the respondent. She worked the same hours, doing the same job.
32. The claimant was critical of the fact that the date she signed the application form had been changed by the respondent (Ms Anderson) to 24 April 2017, yet her contract of employment (page 58) stated her employment commenced on the 20 April 2017.

Respondent's submissions

33. Ms Mechan submitted that in this case Glasgow City Council was the client and JB the service user. CC took on the care package for JB in October 2016. CC was unable to fulfil the contract and discussions to move the contract started in February.
34. The claimant and Ms Rennie attended a meeting with Ms Anderson, but Ms Rennie decided not to move to work with the respondent. The fact CC had work available was supported by Ms Tina Ravenscroft who confirmed she had no concerns in that regard. Ms Mechan invited the tribunal to find the claimant

equally would have known she could have stayed in the employment of CC. The claimant moved to the employment of the respondent because she wanted to continue to care for JB.

5 35. Ms Mechan submitted the claimant's evidence regarding leaving CC was unreliable. The claimant maintained she had not resigned from this employment. The claimant, when shown the text messages, stated she did not recall having sent them. It was only when Ms Hamilton produced her phone that the claimant accepted she had sent the messages. The text
10 messages confirm the claimant resigned on the 10 April, effective 20 April.

36. Ms Mechan invited the tribunal to have regard to the fact the claimant completed an application form and forms for disclosure checks to be carried out. The issue of a relevant transfer only arose because the claimant needs
15 two years' service to claim unfair dismissal.

37. Ms Mechan referred the tribunal to regulation 3(1)(b) TUPE Regulations which deals with a service provision change. Ms Mechan submitted the service by the client – Glasgow City Council – did not cease. The Framework Agreement
20 between Glasgow City Council and CC did not cease. Further, there was no organised grouping of employees to carry out JB's care. This was the crucial issue for CC because they could not get sufficient people to carry out JB's care package.

25 38. Ms Mechan referred to the sample roster produced at page 46 which demonstrated that at least 10 different people were scheduled to provide care for JB. The claimant did not know many of those on the roster: people came and went as required. There was also evidence that Ms Rennie and Ms Ravenscroft provided care for other people. Ms Mechan invited the tribunal to
30 accept the claimant had not been assigned to an organised grouping.

39. A further question to be asked by the tribunal was whether the claimant was employed immediately before the transfer? This question had to be answered in the negative because the claimant's last shift with CC was on the 20 April. The claimant had not been employed on the 21st, 22nd or 23rd April.

40. Ms Mechan referred to the cases of **Carewatch Care Services Ltd v Henry**
UKEAT/0219/17; Costain Ltd v Armitage UKEAT/0048/14; Eddie Stobart
Ltd v Moreman and others UKEAT/0223/11 and Ceva Freight (UK) Ltd v
5 **Seawell Ltd 2013 CSIH 59.**

41. Ms Mechan submitted there was no relevant transfer and, if there was, there
was no organised grouping of employees and in any event, the claimant had
not been employed immediately prior to the transfer. Ms Mechan invited the
10 tribunal to find the claimant does not have qualifying service to bring a claim
of unfair dismissal and to dismiss the claim.

Discussion and Decision

42. I had regard firstly to the terms of regulation 3(1) of the TUPE Regulations
2006 which provides that the Regulations apply to:-

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“(b) a service provision change, that is a situation in which –

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*(i) activities cease to be carried out by a person (a client) on his own
behalf and are carried out instead by another person on the client’s behalf (a
contractor);*

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*(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.

43. Regulation 3(3) provides that conditions are that:-

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“(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*
- (iii) *the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.*

10 44. I considered the circumstances of this case potentially fell within regulation 3(1)(b)(ii) because the activities (care and support for JB) ceased to be carried out by a contractor (CC) on behalf of Glasgow City Council, and instead were carried out by a subsequent contractor, the respondent.

15 45. I must identify the activity which the contractor has “ceased” to carry out. Ms Mechan submitted the activities provided by CC to Glasgow City Council were provided under a Framework Agreement. The activity was to provide care and support to a whole range of service users of which JB was one. Ms Mechan submitted that contracts “come and go” within the Framework Agreement without the whole service provision being disrupted or ceasing.

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46. I considered whether the activity was as suggested by Ms Mechan, or whether the activity was to provide care and support to JB. I concluded the “activity” was the provision of care and support to service users.

25 47. I, having decided the activity in question was the care and support provided to service users, accepted Ms Mechan’s submission that that activity did not cease. The situation was one where there was fragmentation of the activities (**Carewatch Care Services Ltd v Henry above**). I acknowledged this may not prevent a relevant transfer, but careful consideration has to be given to the issue of how the employees of CC were organised to carry out those activities.

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48. Regulation 3(3)(a) above provides that immediately prior to a service provision change there must be an organised grouping of employees, which

has as its principal purpose the carrying out of the activities concerned on behalf of the client. I noted the intention of this condition is, in general, to cover cases where the transferor (in this case CC) has in place a team of employees to carry out the service activities, and that team is essentially dedicated to carrying out the activities that are to transfer.

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49. I considered the whole workforce of CC was the only identifiable grouping of employees which had as its principal purpose the carrying out of all activities concerned on behalf of Glasgow City Council. I further considered that in relation to the care and support of JB, there was no evidence to suggest there was an organised grouping of employees dedicated to carrying out this care and support package. This conclusion was supported by the evidence of Ms Hamilton to the effect employees are not divided into dedicated teams, but rather they are allocated work on the basis of their training, the nature of care and support required, their availability and ease of travel. This evidence was supported by the fact the roster for one week of JB's care and support was made up of at least ten employees some of whom were known to the claimant but most were not. Furthermore, there was no suggestion that anyone other than the claimant worked all of their hours with JB. The evidence suggested employees worked across a number of service users.

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50. I, having had regard to this evidence, concluded there was no organised grouping of employees which had as its principal purpose the carrying out of the care package of JB. I acknowledged the claimant worked solely with JB, but she, herself, could not constitute an organised grouping of employees in circumstances where care and support for JB was provided by up to 10 people.

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51. I did go on to consider (if I am wrong in the above conclusion) whether the claimant was employed immediately before the transfer (regulation 4). There was no dispute regarding the fact the claimant's last shift for CC was Thursday 20 April.

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52. CC ceased to carry out JB's care package on Friday the 21 April. The care package was provided by Cordia over the weekend of the 22 and 23 April,

before the respondent started on the 24 April. The claimant started work with the respondent on the 24 April. I noted the term “immediately before” means at the moment of transfer. The above chronology demonstrates there was a period of at least 48 hours between CC ceasing care for JB, and the respondent taking it on. The claimant was not employed “immediately before the transfer” because her resignation from CC took effect on the 20 April.

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53. I decided there was no transfer (service provision change) when CC stopped carrying out care and support for JB on the 21 April, and the respondent started providing care and support for JB on the 24 April. I further decided that even if there was a transfer (service provision change), the claimant was not employed immediately before the transfer in terms of regulation 4.

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54. I found as a matter of fact (as set out above) that the claimant resigned from her employment with CC and commenced new employment with the respondent. I accepted the claimant’s concerns that there had not been a formal interview process, and that the application forms were not collected by the respondent until some months after she had started work. However, the informal discussions between the claimant and Ms Anderson were of a nature such as to indicate (i) JB’s mother wanted the claimant and Ms Ravenscroft to continue to care for JB; (ii) the claimant and Ms Ravenscroft were prepared to do this; (iii) it suited the respondent to take on two employees who were familiar with JB’s care and support needs; (iv) disclosure checks were carried out by the respondent and (v) the claimant and Ms Ravenscroft resigned their employment with CC and started work with the respondent.

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55. I was entirely satisfied the claimant knew she was leaving the employment of CC. The text message from the claimant to CC asked how they would like her notice. The claimant followed this up by confirming the date of her last shift. The claimant may not have used the term “resignation” but the effect of her texts and her actions were clear: she was leaving the employment of CC.

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56. I have decided the claimant left the employment of CC on the 20 April 2017. She commenced employment with the respondent on the 24 April 2017.

There was no relevant TUPE transfer. The claimant's employment with the respondent terminated on the 19 April 2018. The claimant does not have the necessary length of service to proceed with a claim of unfair dismissal. I decided, accordingly, to dismiss the claim.

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10 **Employment Judge: Lucy Wiseman**
Date of Judgment: 29 November 2018
Entered in register : 30 November 2018
and copied to parties