EMPLOYMENT TRIBUNALS

Claimants:	**Mr C Eames (C1)**
	Mr W Masters (C2)
Respondents:	**N V Transport Ltd (R1)**
	PMP-Forward Ltd (In administration) (R2)
Heard at:	**Southampton On: 1/4/2019**
Before:	**Employment Judge Wright**
Representation:	
Claimants:	**Mr Cain of Counsel**
First Respondent:	**Mr P Stevens - Solicitor**

RESERVED JUDGMENT

It is the judgment of the Tribunal that there was no TUPE transfer from R1 to R2 on 1/4/2018. The claimants' claims succeed against R1. The sums awarded are £21,235.43 of which £10,179.50 is the prescribed element to C1 (loss of wages to the date of assessment between 1/4/2018 and 1/4/2019) and £9,948.93 of which £2,565.50 is the prescribed element to C2 (loss of wages to the date of assessment between 1/4/2018 and 1/4/2019).

REASONS

1. By order of EJ Harper the claims of Mr C Eames (1402558/2018) and Mr W Masters (1402559/2018) v MMD (Shipping Services) Ltd and the claims of Mr C Eames (1402620/2018) and Mr W Masters (1402621/2018) v NV Transport Ltd and PMP-Forward Ltd were consolidated on 17/7/2018.

2. The names of the parties are abbreviated as follows:

   First claimant Mr C Eames – C1

Second claimant Mr W Masters – C2

First respondent NV Transport Ltd – NV

Second respondent PMP-Forward Ltd (In Administration) – PMP

Former respondent MMD (Shipping Services) Ltd - MMD

3. By letter dated 24/9/2018 the Tribunal informed the parties that PMP was in administration and the proceedings against it were stayed. At the commencement of this hearing, it was confirmed that no permission had been sought of the Administrator and therefore, the claim against PMP remained stayed. No application was made in respect of the stay.

4. MMD was originally a respondent to the claim. At the hearing, it was represented by Mr Potterton of Counsel. Upon discussion, it was clear that the claimants no longer had any claim to advance against MMD. By agreement MMD was dismissed as a respondent.

5. The claim therefore proceeded against NV.

6. The employment history of the claimants is as follows. They were both employed as shunters. C1's employment commenced on 1/12/1994 and C2's on 25/2/2005. There were previous transfers under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), but they are not relevant for the issues to be determined in these claims. In 2016 the claimants transferred to NV.

7. The claimants advance two alternative arguments. Firstly, they claim that on 1/4/2018 their employment transferred under TUPE from NV to PMP. They claim they were dismissed on 1/4/2018 and as such claim unfair dismissal and a breach of Regulation 13 TUPE.

8. In the alternative, if the Tribunal finds there was no TUPE transfer, then they claim unfair dismissal against NV. They also claim notice and holiday pay, wrongful dismissal and redundancy pay.

9. The Tribunal heard evidence from both claimants and from Mr Laurence Ward, a director of PMP called by the claimants. For the respondent, the Tribunal heard from Mr Steven Zwinkels the MD and from Mr Bryan Cottington who had acted as a consultant or contractor for PMP for a short period in April 2018 (about the time of the purported transfer).

10. In short, C2 says he was told in January 2018 that NV had lost its contract with MMD and that PMP were taking over. C1 was absent due to ill-health at this time. There is a dispute as to whether or not he was informed of the situation; that dispute is only relevant if there is a finding there was a TUPE transfer and the breach of Regulation 13 of TUPE comes into play. C1 however became aware of the situation and both claimants were concerned about their futures and wanted to know what was happening.

11. NV wrote to both claimants on 26/3/2018 advising them that its contract with MMD was ending on 31/3/2018 and said it was its view their employment would transfer under TUPE to PMP.

12. C1 wrote to PMP on 27/3/2018 stating he had received a letter from NV and he sought clarification as he had understood he would be made redundant by NV. Mr Ward responded that he had informed MMD approximately two months earlier, that PMP would not be taking any staff over.

13. C2 also wrote to PMP and received a similar reply.

14. The claimants claim they were therefore redundant as of 1/4/2018.

15. Mr Ward of PMP said that he had discussions with MMD in late-2017. He was concerned that if MMD terminated its contract with NV, that very little of the contract would be left for PMP to operate for MMD.

16. Mr Ward send emails to Mr Pennery at MMD raising questions such as querying the rent for use of the yard and requested copies of the load sheets (in order to estimate volumes of work).

17. Bearing in mind Mr Ward was giving evidence on behalf of the claimants; he said that nothing formally had been agreed between PMP and MMD. Indeed, the Tribunal was taken to a Port User Licence (pages 66-85); however the Licence had not been signed (page 81) and there was no evidence it had ever been entered into. This is in contrast to the signed Distribution Services Agreement dated 23/9/2016 between MMD and NV (pages 46-65).

18. Mr Ward said that he was unable to obtain information from MMD as to anticipated volumes of work and he did no more than to rent some extra trailers and put a member of staff on site. He said this was 'as a favour' to MMD in order not to sour any future working relationship. He engaged Mr Cottington; but he said that it quickly became apparent that despite MMD referring to PMP as its 'preferred contractor', the vast majority (apart from delivering a few pallets in early April 2018) of the work was retained by NV.

19. Mr Zwinkels for NV said MMD informed him it was going to terminate its contract with NV and that MMD's preferred contractor would be PMP. He said that MMD did not inform its customers it was terminating its contract with NV and they were concerned to hear this. Mr Zwinkels said:

> '…several customers subsequently decide to remain using our transport services.
>
> Since the agreement with NV has been terminated, we have still provided haulage services to customers collecting from Flathouse Quay [Portsmouth], just as we had done before entering into the agreement…'

20. Mr Cottington (called by NV) gave evidence that he was engaged by Mr Ward to help set up the distribution operation for PMP from MMD's premises at Flathouse

Quay. He said PMP hired two trailers which they parked at MMD's premises. Mr Cottington said he remained on site for about eight days.

The Law

21. TUPE - Regulation 3 defines a relevant transfer as:

> **(1) These Regulations apply to—**
>
> **(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;**
>
> **(b) a service provision change, that is a situation in which—**
>
> **(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");**
>
> **(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; or**
>
> **(iii) activities cease to be carried out by a contractor or a subsequent 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 the client on his own behalf, and in which the conditions set out in paragraph (3) are satisfied.**
>
> **(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.**
>
> **(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.

(4) Subject to paragraph (1), these Regulations apply to—

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;

(b) a transfer or service provision change howsoever effected notwithstanding—

(i) that the transfer of an undertaking, business or part of an undertaking or business is governed or effected by the law of a country or territory outside the United Kingdom or that the service provision change is governed or effected by the law of a country or territory outside Great Britain;

(ii) that the employment of persons employed in the undertaking, business or part transferred or, in the case of a service provision change, persons employed in the organised grouping of employees, is governed by any such law;

(c) a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.

(5) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer.

(6) A relevant transfer—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.

(7) Where, in consequence (whether directly or indirectly) of the transfer of an undertaking, business or part of an undertaking or business which was situated immediately before the transfer in the United Kingdom, a ship within the meaning of the Merchant Shipping Act 1995(1) registered in the United Kingdom ceases to be so registered, these Regulations shall not affect the right conferred by section 29 of that Act (right of seamen to be discharged when ship ceases to be registered in the United Kingdom) on a seaman employed in the ship.

Submissions

22. A direction was made for the parties to provide written submission within 14-days at the conclusion of the hearing, which along with the Easter break, accounts for the slight delay in this judgment being promulgated.

23. NV contends there was a transfer under TUPE from it to PMP under Regulation 3(b)(ii). It says the service provision was to be the provider of all transport services which were required by MMD. It says it was never all the haulage work undertaken from MMD's premises at Flathouse Quay as much of that work was transported by other hauliers who contracted directly with the customer rather than MMD.

24. NV says the provider of all the transport services direct to MMD was what MMD called their 'preferred haulier', who had the right to park trailers at MMD's premises and was obliged to have employees based at MMD's premises.

25. NV say this was evidenced by Mr Cottington being engaged by NV at MMD's premises and set out his evidence (that the work MMD required which was part-loads or pallets was not the type of work which PMP had expertise as they were primarily a container transport operator).

26. NV also referred to Mr Zwinkels' evidence and Mr Zwinkels' saying he was told by MMD that PMP was to become its 'preferred haulier'.

27. NV referred to the fact that when the transfer of staff was first raised on 18/1/2018, Mr Ward did not deny there would be a transfer (page 92). It referred to Mr Ward saying 'nothing was changing' yet there were the steps PMP took in respect of the provision of staff and trailers.

28. If it was found there was no TUPE transfer, then NV accepted liability for the statutory redundancy payment to the claimants. NV also accepts liability for notice pay, subject to the claimants' duty to mitigate their losses.

29. NV contends that the dismissal was not unfair as it genuinely believed the claimants had transferred to PMP under TUPE. It states that the dismissals were fair under s. 98 (4) of the Employment Rights Act 1996 (ERA).

30. In the alternative, if the dismissals are found to be unfair, then it contends that the claimants should not receive any compensation as they will receive a statutory redundancy payment which equates to a basic award and they both obtained new employment before the expiry of their notice periods. NV also relies upon Polkey v A E Dayton Services Limited (1987) IRLR 503.

31. For the claimants, it was submitted that PMP said it did not have a contract with MMD and that in effect, NV had cut MMD out, by directly taking on the customers MMD had and for which NV had provided the services on behalf of MMD.

32. The claimants submit that based upon the evidence heard and on the balance of probabilities, there was no transfer from NV to PMP and therefore, NV was responsible for making them redundant if as a result of the loss of the MMD contract, it no longer had a need for shunters.

33. The claimants say it was accepted the intention was for PMP to become the preferred haulier for MMD, however the Port Licence was never agreed by either party.

34. The claimants referenced Mr Zwinkels saying in cross-examination PMP taking over the MMD contract was 'subject to contract'. It was noted there was no written documentation between MMD and PMP to evidence that PMP would definitely be taking over the contract. Ms Hiron (Legal Department Manager of MMD who did not give evidence in person) had said there was no signed agreement. It was pointed out that Ms Hiron's evidence was that NV had approached all of MMD's customers directly and had cut MMD out (and that the proposed volumes had therefore decreased to such an extent that it was not viable for PMP to take over the contract and the subject matter of the contract had effectively disappeared) was corroborated by Mr Ward in his evidence and cross-examination.

35. In respect of the rent for the yard, it was submitted that Mr Ward had said that although he had entered into negotiations, it was too high and there the negotiations ended. Any discussions were on the basis of what might happen, rather than what would happen.

36. The claimants conclude that the actuality of the situation agrees with its conclusion there was no TUPE transfer. There was a significant reduction in the amount of work MMD had, which led to PMP being unable to agree any terms or contract with MMD. Both PMP and MMD accused NV of approaching the importers directly and taking over the work. The claimants' referred to Mr Zwinkels' evidence that he had attended the Fruit Logistica Exhibition and informed MMD's customers the contract between them was ending and it was intended that PMP would take over. Mr Zwinkels said MMD had not informed its customers and they were concerned. Mr Zwinkels said several customers continued to use NV's services directly, rather than remain with MMD and thereby use PMP.

37. In respect of the staff on site and the trailers PMP hired, it was submitted this was no more than Mr Ward said; a favour to MMD and that PMP continued, as it had previously done, to provide ad hoc services to MMD.

38. To conclude, on the balance of probabilities, the claimants' submitted NV knowing PMP did not require shunters and despite not being aware of or having seen any written documentation between MMD and PMP, had assumed TUPE applied; however a transfer had not taken place. The Tribunal was invited to find there was no transfer.

Conclusions

39. The Tribunal agrees with the claimants' submission that NV assumed a transfer was going to take place, once it had notice from MMD that the contract was going to be terminated. As Mr Ward said, NV 'jumped the gun'. There was also a suggestion that NV took the view that a transfer would take place in order to 'off-load' the claimants.

40. NV refers to Regulation 3(b)(ii) - activities ceasing to be carried out by a contractor on MMD's behalf and are then carried on by (in this case) PMP on MMD's behalf. All of the evidence, including that of NV, was that when PMP ceased to carry out the activities on MMD's account, they themselves took over those activities. There was therefore no activities (other than a few pallets during the first week of April which then ceased and cannot therefore under TUPE amount to 'an activity') to transfer between NV and PMP.

41. There was no Distribution Services Agreement between MMD and PMP (or any other contractor for that matter as NV had directly taken on the work of MMD's customers). There were some preparatory steps taken by PMP in the anticipation that some 'activities' of MMD were coming their way and there were some negotiations. The fact of the matter is that however much MMD wanted PMP to become its preferred haulier and wanted to rent out its yard, etc., to PMP, by the time the contract with NV had come to an end, there were no activities to transfer (other than the few run-off activities in the first week in April).

42. What had happened in reality was that having been given over three months' notice by MMD, NV systematically (there is no suggestion there was anything underhand in this) took over for itself MMD's customers. It may well have been that NV undermined to MMD's customers the capabilities of MMD's preferred haulier going forward and that helped it to convince the customers to engage NV directly once the contract with MMD ended.

43. If PMP are removed from the picture, MMD gave notice to NV. NV approached MMD's customers directly with a view to securing the work after its contract ended. NV was effective such that come the end of March 2018, so little was left of MMD's customer base, that there were no 'activities' to transfer. What activities MMD had had, had been poached by NV.

44. Where did that leave the claimants? PMP had said all along that it did not need shunters as it did not operate in that way. NV said that all of its other staff objected to going to work for PMP, apart from the two claimants. Pausing there, Mr Zwinkels' said he sent to Mr Ward a list of 'all the employees affected by the transfer' on 18/1/2018 (page 86) and he had a group meeting on 14/2/2018. Mr Petworth (an employee of NV) said in an email dated 21/2/2019 (page 149) that

in addition to himself, five other members of staff attended (including C2 but excluding C1 who was absent at that time). If there had been 'activities' which transferred from NV, how did PMP operate without the five staff who were operating the activities (in addition to the two claimants) and without taking any additional staff on (save for Mr Cottington)? If activities transferred, why did PMP not take on additional staff – possibly even accept the claimants who if they were not drivers, were experienced shunters? PMP did not do so as there were no activities to transfer to it from NV and it therefore did not need to take on extra staff.

45. If the work/activities which NV contends was transferred to PMP, from where did the work materialise to keep engaged the remaining five staff who 'refused' to transfer to PMP? It could be that NV had been very busy obtaining new contracts for when the MMD contract ended. Or it could be and it is found to be more likely, that NV had been transferring the contracts from MMD, with a view to its remaining staff servicing those activities.

46. NV accepts that if there was no transfer, it is liable for the claimants' redundancies. NV says the dismissal was fair by reason of redundancy. NV has not explained how the claimants were redundant in accordance with section 139 Employment Rights Act 1996 (ERA). Upon what basis does it say the claimants' roles were redundant? What had changed to result in a redundancy situation? All the parties however accept that the reason for termination (absent a TUPE transfer) is redundancy. It is not therefore in accordance with the overriding objective and it is not possible in the absence of hearing further evidence, to make any other finding that the principle reason for dismissal was redundancy in accordance with section 98(2)(c) ERA. Furthermore, both claimants seek compensation by way of remedy.

47. NV contends the dismissal was fair as it was for redundancy. Notwithstanding the previous comment, the dismissal was unfair for the purpose of s. 98(4) ERA. Taking into account the size and administrative resources of NV (as at 14/8/2018 it had 53 staff), there was no evidence of any redundancy process followed in terms of consultation. Mr Zwinkels said he offered both claimants a job in Chichester, but other than informing them they were to transfer to NV, no other process or procedure has been followed. All NV did was to write to both claimants on 26/3/2018 (pages 108-109) to say their employment had transferred to PMP.

48. There is no evidence of NV showing any 'fair play' to the claimants or even properly engaging with them – see C2's increasingly panicked text messages (pages 94-98). Accepting that NV 'genuinely' thought the claimants would transfer to PMP, they were not properly informed as to the consequences of NV losing its contract with MMD or indeed of any other consequences.

49. The lack of information and therefore the unreasonableness of the dismissal impacted the claimants' ability to secure alternative employment. C2 started alternative employment on 1/5/2018 on a similar salary; he was aged 39. C1 secured alternative employment on 29/5/2018, however on a salary which is £9,103 lower than he earned at NV; he was aged 42 at the time of dismissal. Had both claimants been properly informed and consulted in respect of the

redundancy, on the balance of probabilities, they would have secured alternative work sooner and so there would not have been a gap in their earnings, i.e. they would have had time to apply for and accept an alternative positon, as soon as their employment with NV terminated. C1 may well have found a more remunerative role and not have accepted a lower paying role; rather than remain out of work.

50. In conclusion, both claimants were unfairly dismissed contrary to s.94 ERA.

51. Turning then to the schedules of loss. Both claimants were paid £685.00 per week gross and £592.27 per week net. C1 had 23 years' service and was aged 42 at the time of dismissal. C2 had 13 years' service and was aged 39.

52. For C1, the following is awarded:

Basic award/statutory redundancy award £10,024.50

53. Prescribed element (loss of wages to the date of assessment between 1/4/2018 and 1/4/2019)

Notwithstanding what was said about the reason for dismissal being redundancy above and notwithstanding the fact that NV had in effect taken over the contract it was performing for MMD, it is accepted that there would have been changes to the claimants' employment and that redundancy may well have resulted. Had C1 had more notice or time, he may have secured a role paying at a similar level to his previous role and he has had the opportunity to do so since then. C1 did not give evidence in respect of his job search or his future prospects. Doing the best it can in these circumstances (predicting what may have happened in the past had NV acted reasonably) and again following the overriding objective, the Tribunal is prepared to award C1 the two months' of notice pay he is entitled to and the difference between the salary at NV and his new employer, for the remainder of the notice period (3.5 weeks) and then for a further two months.

£2566.50 x 2 months = £5,133
£592.27 (less £177.27 net difference per week between C1's salary at NV and in his new role) x 3.5 = £1,452.50
£2566.50 (less £769.5 net difference per month between C1's salary at NV and in his new role) x 2 = £3,594

£10,179.50

54. Loss of statutory industrial rights £500.00

55. Payment in lieu of accrued but untaken holiday at termination, C1 claims for seven days less two days the figure as per the schedule of loss

£531.43

56. Total for C1 £21,235.43

57. For C2, the following is awarded:

    Basic award/statutory redundancy award £6,357.00

58. Prescribed element (loss of wages to date of assessment between 1/4/2018 and 1/4/2019)

    One months' loss of net salary £2560.50

59. Loss of statutory industrial rights £500.00

60. Payment in lieu of accrued but untaken holiday at termination, C1 claims for seven days less two days the figure as per the schedule of loss

    £531.43

61. Total for C2 £9,948.93

62. If any of those calculations are challenged, the parties are invited to agree alternative figures, failing which, an application for reconsideration can be made to be dealt with on paper. The period of time within which such an application may be made is extended to 28 days under Rule 71 of the ET Rules, in order to afford the parties time to reach agreement in the first instance.

Employment Judge Wright

Date: 21 May 2019