



EMPLOYMENT TRIBUNALS

BETWEEN

Claimants

and

Respondent

**(1) Mr A McAuley
(2) Ms C Wilson**

Brighton and Hove City Council

HELD AT: London South

ON: 2 March 2018

BEFORE: Employment Judge K Bryant

Appearances:

For the Claimant: Ms L Price (Counsel)

For the Respondent: Ms L Mankau (Counsel)

JUDGMENT AND REASONS ON PRELIMINARY ISSUES

1. The tribunal notes that there were originally three respondents to this claim but the cases against the first two, Class of Their Own Limited ('COTO') and the Governors of Downs Junior School ('the School'), have already been dismissed on withdrawal by the Claimants.
2. At the start of this Preliminary Hearing ('PH') the parties agreed that each Claimant brings a single claim for unauthorised deduction from wages which is based, they say, on a clause in their respective contracts of employment which entitles them to what is referred to as a Service Transfer Bonus. In essence, they say that this clause entitles them to a bonus payment calculated in accordance with a contractual formula in the event that their employment transferred from COTO to the Respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').
3. The Respondent accepts that both Claimants became employed by it in April

2017 having been employed up to that time by COTO. It also accepts that if there was a relevant transfer within the meaning of TUPE then (a) it was the transferee in relation to that transfer and (b) it is the appropriate respondent to these claims. However, it does not accept that there was a relevant transfer or, even if there was, that it is liable to pay a Service Transfer Bonus to either Claimant.

4. This PH was listed to deal with the following preliminary issues:
 - 4.1 Whether there was a relevant transfer within the meaning of TUPE from COTO to the Respondent in April 2017.
 - 4.2 If so, whether the employment of the Claimants transferred from COTO to the Respondent as a result of that relevant transfer.
5. As it transpired, the Respondent conceded during the course of the PH that if the first of the above preliminary issues was decided in the Claimants' favour then the second would not be in issue, ie it accepts that if there was a relevant transfer then the employment of both Claimants transferred from COTO to the Respondent as a result of that transfer. That left one live issue to be determined by the tribunal at this PH, ie whether there was a relevant transfer.
6. The tribunal notes that, although the Respondent has accepted that it is the Claimants' employer and was the transferee if there was a relevant transfer, the facts of these cases concern activities being undertaken at the School and the following discussion will in large part refer to the Respondent and the School interchangeably.
7. The tribunal was provided with an agreed bundle of documents. The tribunal also heard evidence from both Claimants on their own behalf and from Mr Giovanni Franceschi, the headteacher of the School, on behalf of the Respondent. Each witness gave evidence by reference to a written witness statement.
8. In light of all the evidence heard and read, the tribunal makes the following findings of fact:
 - 8.1 The School is a state junior school in Brighton. Mr Franceschi is its headteacher. There is also a state infant school on the other side of the road from the School. The School (and the neighbouring infant school) are within the Respondent's area of responsibility.
 - 8.2 COTO is a company that operates breakfast, after school and holiday clubs for children, including in the Brighton area. Up to April 2017 it operated such clubs on the School's premises for pupils of the School and of the neighbouring infant school.
 - 8.3 As their names suggest, the breakfast club is open before the start of the school day and includes provision of breakfast, the after school club is open after the end of the school day and the holiday club operates during the school holidays.
 - 8.4 When operated by COTO the clubs were based in the School's canteen. The activities at the clubs involved free play and cooking. COTO provided toys and also some cooking equipment. The

- equipment was stored in two sheds on School premises, one metal and one wooden.
- 8.5 As noted above, pupils from the School and the neighbouring infant school were eligible to take part in the clubs. In addition, a very few former pupils, in particular two former pupils with Downs' Syndrome, and siblings of current pupils were also allowed to participate in the breakfast and after school clubs. The holiday club was open more widely to pupils of other schools in the area.
 - 8.6 The total number of children attending the clubs varied but was between about 44 and 60.
 - 8.7 Ms Wilson was at all material times up to April 2017 the Supervisor of the clubs and Mr McAuley was the Assistant Supervisor. There were also between 5 and 10 other staff working in the clubs, the number on each day depending on the number of children attending the clubs.
 - 8.8 Some of the staff working in the clubs also had separate contracts of employment with the Respondent to work in the School during the day. Both Claimants had such contracts, working as Teaching Assistants.
 - 8.9 When the clubs were run by COTO, most of the administration associated with their operation was done by COTO. Parents tended to book on a termly basis and they paid COTO direct.
 - 8.10 There was also a separate club operated on the School's premises by a separate external company. That club provided more active things for those attending, essentially sports or related activities. That club, which will be referred to below as 'the active club' was run by different staff from those operating the breakfast, after school and holiday clubs for COTO.
 - 8.11 In January 2017 the active club was taken over by the School. The active club is still independent of the other clubs operating at the School; for example, it still has a separate register and separate staff and save on one day in 2018 as discussed further below there is no overlap between the activities of the active club on the one hand and the other clubs on the other.
 - 8.12 In about March 2016 it came to the Claimants' attention that there was a possibility that the School may want to run all of the clubs, including those operated at that time by COTO. There were then various discussions between COTO and the School and also with COTO's employees operating the clubs at the School.
 - 8.13 It was the understanding of both COTO and the School throughout the period from March 2016 to April 2017 that TUPE would apply if the School took over the operation of the clubs and both COTO and the School consistently told the staff as much. The staff elected employee representatives for the purposes of consultation as required by TUPE and the consultation and information provision requirements of TUPE were followed by COTO and the School.
 - 8.14 The School took over the operation of the breakfast, after school and holiday clubs in April 2017. COTO ran the holiday club during the Easter school holiday and then the School took over on the first day of the summer term. All agree that the change was seamless and there was no period of suspension of the clubs' activities.
 - 8.15 COTO took away all of its equipment, ie the toys and cooking

equipment, save for the metal shed. It is not clear what was the fate of the wooden shed, ie whether it was in such a state of disrepair that it was of no further use (as Ms Wilson has suggested) or whether COTO took it away for use elsewhere. In any event, the School provided a new wooden shed together with toys and cooking equipment. The metal and wooden sheds were thereafter used for storage as they had been before and also further storage was made available in the School's canteen itself.

- 8.16 Ms Wilson took on more of the administration needed to run the clubs from April 2017 onwards and to enable her to do so her hours as a Teaching Assistant were slightly reduced and her hours working in the clubs slightly increased. She was also given access to an office. Apart from that, and a change in job title for the two Claimants (to Manager and Deputy Manager from Supervisor and Assistant Supervisor), the operation of the clubs remained the same as it had been before April 2017.
 - 8.17 Of the 13 or so staff employed by COTO to operate the clubs immediately before the April 2017 change, all became employed by the Respondent immediately after the change. The School has also brought in additional staff, perhaps one or two at the time of the change and a few more since. Of the 13 employed at the time of the change a few of them have since left.
 - 8.18 The clubs have been open the same hours since the change, they operate in exactly the same place, the children do the same things, the clubs are open to the same children and are attended by much the same children. The School has offered more free places in the clubs than when they were operated by COTO but it seems that only a few of these have been taken up.
 - 8.19 Parents book places in the clubs in much the same way, albeit with the School rather than COTO, and they pay the School for those places. The clubs make a profit, as they had done for COTO in the period up to April 2017.
 - 8.20 The School has, and had as at April 2017, an aspiration to have some degree of crossover between the clubs previously operated by COTO and the active club. This would not involve any sort of merger, but rather children would attend part of a session with the active club and then the rest with one of the other clubs. However, to date that has only happened on one day in the February 2018 half term, ie some 10 months after the change of operation of the clubs from COTO to the School.
9. Once the evidence had been completed each party made closing submissions. Both parties provided the tribunal with detailed and helpful written submissions which were supplemented by brief oral submissions. It is unnecessary here to repeat those submissions but the main points raised will be discussed further below.
 10. The tribunal has reminded itself of the relevant statutory provisions, including in particular regulation 3 of TUPE:

3 A relevant transfer

- (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.*
- (2A) *References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.*
- (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.

...

(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.

...'

11. Both parties addressed the issue on the basis of both regulation 3(1)(a) and 3(1)(b) of TUPE; the tribunal will first discuss whether there was a transfer under regulation 3(1)(a) before considering, if necessary, the question of whether there was a service provision change within the meaning of regulation 3(1)(b).
12. During the course of submissions the Respondent conceded, sensibly in the tribunal's view, that the operation of the clubs at the School amounted, and continues to amount, to an economic entity for the purpose of regulation 3(1)(a) of TUPE.
13. The remaining question under regulation 3(1)(a) is, then, whether the economic entity, ie the clubs, retained its identity following the change from COTO to being operated by the School.
14. The parties agree that there is no single decisive factor and that the tribunal should consider all relevant circumstances when answering this question, albeit the weight to be put on each such factor will vary from case to case depending on the type of business under consideration.
15. The Respondent has referred the tribunal to the case of *Francisco Hernandez Vidal SA v Gomez Perez* ([1999] IRLR 132) in which the following guidance was given by the ECJ:

'29 In order to determine whether the conditions for the transfer of an entity are met, it is necessary to consider all the facts characterising the transaction in question, including in particular the type of undertaking or business, whether or not its tangible assets, such as buildings and movable property, are transferred, the value of its intangible assets at the time of the transfer, whether or not the majority of its employees are taken over by the new employer, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, for which those activities were suspended. However, all those circumstances are

merely single factors in the overall assessment which must be made and cannot therefore be considered in isolation (see, in particular, Spijkers and Süzen [1997] IRLR 255, paragraphs 13 and 14 respectively).

...
31

As pointed out in paragraph 29 of this judgment, the national court, in assessing the facts characterising the transaction in question, must take into account among other things the type of undertaking or business concerned. It follows that the degree of importance to be attached to each criterion for determining whether or not there has been a transfer within the meaning of the Directive will necessarily vary according to the activity carried on, or indeed the production or operating methods employed in the relevant undertaking, business or part of a business. Where in particular an economic entity is able, in certain sectors, to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction affecting it cannot, logically, depend on the transfer of such assets (Süzen [1997] IRLR 255, cited above, paragraph 18).'

16. The Respondent also referred the tribunal to the well known domestic authority of *Cheesman v R Brewer Contracts Limited* ([2001] IRLR 144) in which the EAT gave the guidance based on a number of cases, including *Vidal*, as follows:

'11 As for whether there has been a transfer:

(i) *As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed – Vidal [1999] IRLR 132 paragraph 22 and the case there cited; Spijkers v Gebroeders Benedik Abattoir CV [1986] ECR 1119 ECJ; Schmidt v Spar-und Leihkasse [1994] IRLR 302 ECJ paragraph 17; Sánchez Hidalgo [1999] IRLR 136 paragraph 21; Allen [2000] IRLR 119 paragraph 23.*

(ii) *In a labour-intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity – Sánchez Hidalgo [1999] IRLR 136 paragraph 32.*

(iii) *In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in question but each is a single factor and none is to be considered in isolation – Vidal [1999] IRLR 132 paragraph 29; Sánchez Hidalgo [1999] IRLR 136 paragraph 29; Allen [2000] IRLR 119 paragraph 26. However, whilst no*

authority so holds, it may, presumably, not be an error of law to consider 'the decisive criterion' in (i) above in isolation; that, surely, is an aspect of its being 'decisive', although, as one sees from the 'inter alia' in (i) above, 'the decisive criterion' is not itself said to depend on a single factor.

- (iv) *Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended – Sánchez Hidalgo [1999] IRLR 136 paragraph 29; Allen [2000] IRLR 119 paragraph 26.*
- (v) *In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on – Vidal [1999] IRLR 132 paragraph 31; Sánchez Hidalgo [1999] IRLR 136 paragraph 31; Allen [2000] IRLR 119 paragraph 28.*
- (vi) *Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets – Vidal [1999] IRLR 132 paragraph 31; Sánchez Hidalgo [1999] IRLR 136 paragraph 31; Allen [2000] IRLR 119 paragraph 28.*
- (vii) *Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer – Allen [2000] IRLR 119 paragraph 30.*
- (viii) *Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer – Vidal [1999] IRLR 132 paragraph 35.*
- (ix) *More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor – Sánchez Hidalgo [1999] IRLR 136 paragraph 30.*
- (x) *The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship: Sánchez Hidalgo [1999] IRLR 136 paragraphs 22 and 23.*
- (xi) *When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer – ECM [1999] IRLR 559 p.561.*
- (xii) *The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal*

feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one subcontractor and the start by the successor – Allen [2000] IRLR 119 paragraphs 32–33.’

17. Taking into account the above guidance, the tribunal turns to the particular facts of this case.
 - 17.1 The tribunal notes that only limited physical assets were passed from COTO to the School, ie the metal shed. The toys and cooking equipment used before the change were taken away by COTO and replaced by the School.
 - 17.2 However, intangible assets associated with the economic entity, such as good will, relationships with the pupils and parents and so on, did pass from COTO to the School.
 - 17.3 Further, all staff employed at the material time moved from COTO’s employment to employment by the Respondent. The fact that the School added further staff to work in the clubs does not, in the tribunal’s judgment, detract from this.
 - 17.4 More or less all ‘customers’, ie children and parents, stayed the same when the clubs moved from operation by COTO to the School.
 - 17.5 The activities undertaken in the clubs and the hours during which they were undertaken were identical before and after the change.
 - 17.6 The change from COTO to the School was seamless and there was no period of suspension of activity; COTO ceased one day and the School took over the following day.
18. The Respondent says that the operation of the clubs before and after the change from COTO to the School was significantly different in that COTO is a private company whereas the Respondent is a public authority, the senior management above the Claimants is now different, the Respondent pays the staff working in the clubs at a higher hourly rate and the School intended, and still intends, to have crossover between the clubs and the active club. However, in the tribunal’s judgment none of those matters affects the answer to the statutory question in any material way.
19. Taking all relevant circumstances into account the tribunal has no hesitation in finding that the economic entity in question did retain its identity within the meaning of regulation 3(1)(a) of TUPE when it ceased to be operated by COTO and started to be operated by the Respondent / the School. There was a relevant transfer within the meaning of TUPE in April 2017 when the operation of the clubs transferred from COTO to the Respondent / the School.
20. In light of the above finding it is unnecessary to consider the parties’ arguments on the question of service provision change within the meaning of regulation 3(1)(b) of TUPE.
21. As noted above, the Respondent has already conceded that if there was a relevant transfer within the meaning of TUPE then the Claimants’ employment transferred from COTO to the Respondent pursuant to that transfer.

Case Numbers: 2302230/2017 and 2302231/2017

22. Having given the above judgment and reasons orally to the parties at the PH, the tribunal proceeded to make case management orders for the further progress of this case. Those orders are set out in a separate document.

Employment Judge K Bryant

6 March 2018
