EMPLOYMENT TRIBUNALS

Claimants **Mr A McAuley and Ms C Wilson**

v

Respondent **Brighton and Hove City Council**

Heard at: **London South Employment Tribunal**

On: **9 July 2018**
10-11 July 2018 (in Chambers)

Before: **EJ Webster**

Appearances

For the Claimants: Ms L Price (Counsel)

For the Respondent: Ms L Mankau (Counsel)

JUDGMENT

1. The Claimants' claims for unlawful deductions from wages are not upheld.

The Hearing and evidence

2. I was provided with 4 witness statements (2 by the claimants and 2 for the respondent), a bundle of documents, a joint bundle of authorities and written skeleton arguments by both parties. I read all the witness statements and read the authorities that I was taken or referred to by counsel. I only considered those documents in the bundle that I was referred to by witness statements which were very few. Counsel confirmed that they did not expect me to read anything else.

3. I heard from the two claimants who confirmed their witness statements and were asked brief supplementary questions and briefly cross-examined.

4. I did not hear from the respondent witnesses as the claimant's representative stated that she accepted their evidence.

5. The Parties only attended and made submissions on the first day. I considered the matter in chambers thereafter. It was agreed that I should reserve the Judgment and send out my written reasons as opposed to delivering them orally.

Issues

6. Following a preliminary hearing in March 2018 where it was found that there had been a relevant transfer for the purposes of the TUPE legislation, EJ Bryant and the parties had agreed the issues to be determined at today's hearing. These were as follows.

7. Is clause 46 of the Claimants' contract of employment is a valid term which is enforceable against the respondent?

   That clause is as follows:

   *"**Service Transfer** - In the event that out of school hours After School Club care at Downs Primary School ceases to be carried out by the Transferor and is carried out instead by the Transferee you will be entitled to:*

   ***A Service Transfer Bonus**: A bonus equating to the sum of 1 x your gross hourly pay x the average hours worked by you per month x each complete year of your continuous employment (subject to the deduction of any tax or other statutory deductions the Transferee may be obliged by law to deduct). The average hours worked by you per month shall be calculated by reference to the last 3 complete months worked by you prior to the Service Transfer bonus becoming payable.*

   In the event of a Service Transfer and the consequential automatic transfer of your employment by operation of TUPE from the Transferor to the Transferee, you shall be entitled to payment of a Service Transfer Bonus upon the earlier of:
   a. 3 months following the date of the Service Transfer, should you remain employed by the Transferee at that time; or
   b. The termination of your employment by the Transferee in circumstances other than where it terminates pursuant to:
      (i) Your resignation; or
      (ii) Where the Transferee is entitled to terminate your employment summarily without notice or payment in lieu of notice or gross misconduct.
   The Service Transfer Bonus shall be payable by the Transferee at the time you become entitled to the Service Transfer Bonus"

8. Does the effect of a relevant transfer, which took place on 7 April 2017 in accordance with the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), require that, in accordance with Regulations 4(1) and

(2) of TUPE, all the terms and acts or omissions of the Claimants' contracts of employment are enforceable against the transferee/Respondent or only those terms and acts or omission which would have been enforceable against the transferor?

Facts and Background

9. The facts were largely agreed by the parties.

10. Downs Junior School ("the School") is a state junior school in Brighton. Until April 2017 the breakfast and after school clubs run for the purposes of the children who attend the School, were run by a third party provider, Class of Their Own Ltd ('COTO'). Ms Wilson was the Supervisor of the clubs and Mr McAuley the assistant supervisor. The School decided to move provision of those clubs in house. The change occurred on 8 April 2017 and EJ Bryant held at a preliminary hearing on 2 March that this change amounted to a relevant transfer for the purposes of the TUPE Regulations.

11. The respondent accepts that the claimants were employed by them from this date onwards.

12. Contained in the Claimants' contracts with COTO was Clause 46 which is set out in full above. That clause ostensibly entitles them to a bonus if a transfer takes place ("Service Transfer Bonus" 'STB'). The clause was added to their contracts in 2013 and both claimants accepted the variation or addition to their contract. It was agreed that at the time this clause was added no transfer or potential transfer was being considered by any party including COTO.

13. At a meeting on 8 March 2016 Mr Franceschi (the School's headteacher) and the School's business manager Ms Rice had a meeting with COTO. Their intention was to service notice to terminate the contract to bring the clubs in house. At that meeting the directors of COTO confirmed that this would result in a TUPE transfer and alerted the School to the presence of clause 46. They told the School that clause 46 would create liabilities to the transferring staff of approximately £35,000 to £40,000 on bonuses.

14. As a result of that information notice to terminate the contract was not given until October 2016 whilst the School and the respondent sought legal advice regarding Clause 46.

15. After the school had served notice to terminate its arrangement with COTO but before the transfer took place, the respondent and COTO consulted with the claimants and other staff who would be affected by the transfer. In the course of those consultations the School confirmed that it would not be paying the STB.

16. The claimant's employment transferred to the respondent by way of a relevant transfer in April 2017.

17. The claimants believe that they are entitled to the bonus and that failure to pay them amounts to an unlawful deduction from their wages. Their individual bonuses amount to:

Ms Wilson - £4,743.57
Mr McAuley - £3,704.64

Those figures are agreed between the parties.

18. Ms Wilson stated in evidence that the bonus payment was a factor in her continuing to be employed after the transfer to the school. She cited that moving the service to the school had created more work for her and concerns about whether the new employer would be as good as her old one, but had refrained from looking for alternative work at least partly because of the bonus.

19. Mr McAuley was less clear. He stated that the bonus was important to him but that realistically he would not have left his job had the bonus clause not existed. Nonetheless he confirmed that the possibility of the bonus was important to him.

20. I have no reason not to believe the claimants' accounts of their current positions and accept their evidence.

21. Both claimants continue to be employed by the respondent at the School.

Submissions

22. The claimants' case was relatively simple. They stated that the clause was a binding clause in their contract that they had given consideration for by remaining employed and, in the case of Ms Wilson, by not looking for alternative employment or treating the contract as terminated at the point of transfer.

23. The addition of the clause or 'variation' was not related to the transfer and therefore not prevented from transferring under TUPE (regulation 4(4)). They say the clause had been added before any transfer was contemplated and certainly before this particular transfer was contemplated.

24. They stated that the obligation for payment clearly transferred under Regulation 4(1) and/or Regulation 4(2). The fact that the obligation fell on a hypothetical Transferee as opposed to COTO/the Transferor was not a barrier on the basis that the liability would have transferred in any event when the transfer took place.

25. The respondent's submissions were more extensive and covered 4 key points which were headed as follows:

    (i) The obligation to pay the bonus was not a liability that passed to the respondent because:
        a) The clause was void and unenforceable under contract law because it contravenes the doctrine of privity.
        b) Regulation 4(2) transfers to the transferee the liabilities of the transferor only. As the obligation to pay the STB did not fall upon the transferor, it was not a liability that transferred to the transferee;
    (ii) In the alternative the addition of the STB was a variation of contract the sole or principal reason for which was the transfer, within the meaning of Regulation 4(4) of the TUPE Regulations. There was no ETO reason for

the variation within the meaning of Regulation 4(5) of the TUPE Regulations and accordingly, the provision relied upon is void and therefore unenforceable;

(iii) In the further alternative, the Service Transfer Bonus clause is void on public policy grounds and therefore unenforceable. A clause of this nature as the effect of: (i) stifling effective and competitive enterprise; and (ii) preventing effective public procurement; and/or

(iv) In the further alternative, the claimants gave no consideration for the inclusion of the STB clause and it is therefore unenforceable.

26. Although I heard submissions on the third point (para 22(iii) above) it was agreed with the parties that I would not determine that point unless it proved necessary to do so. As I have concluded that the Respondent is correct in its other arguments I do not need to deal with this matter.

The law and conclusions

Contract Law

27. What has to be considered is whether A (COTO) can make a binding promise to B (the claimants) that they will be paid by C (a transferee and in this case the respondent) at some future date when C is not party to the contract and is not aware of the contract at the time. If there is no effective contractual obligation that is capable of transfer then there would be nothing that could transfer under TUPE. I therefore need to consider the matter under the common law and ask whether the clause creates any enforceable obligation and if so who could it be enforced against?

28. It seems to me that prior to the transfer taking place in one regard the position is quite clear. A's promise by A to B that upon some event occurring B will be made a payment by C does not give rise to any contract at all between B and C. None of the essential elements of a contract are present between the claimants and the respondent (offer, acceptance consideration and certainty). In the present case the identity of C was, at the time of the agreement, entirely unknown as although the School is suggested as a possible transferee in the contract, it also states that it could be another provider on the premises so there was no certainty. I therefore do not believe that it could be enforced between B and C as C was not a party to the contract at the time it was entered into.

29. There was some discussion as to whether the effect of TUPE was to 'perfect' the contract. I took this to mean that the effect of TUPE would mean that the Transferee was, at the time of the transfer, identifiable, and that by agreeing to the Transfer, the Transferee also knew about clause 46 and therefore the obligation would crystallise at the point of transfer.

30. There is, in my view, some force in this argument. At the date of the transfer the claimants knew who the transferee would be and the respondent was fully aware of the clause and still agreed to take the contract. The respondent willingly took on the contract and therefore become a valid party to the contract by agreeing to the transfer. The conditional elements of clause 46 would fall away - it would all be clear at the time of the transfer and therefore a valid clause and enforceable.

31. However I do not believe that this acquired knowledge, present at the time of the transfer can, at common law, retrospectively 'correct' a clause that when entered into, lacked the essential elements of a contract between, in this case, the claimants and the respondent.

32. The more difficult question is whether there was any obligation imposed upon COTO? As I read the agreement COTO (A in my analogy above) will never have to pay the STB because the only way that the STB becomes payable is if COTO is no longer the employer by virtue of the TUPE Regulations which will transfer the claimants' employment to the respondent. Even if the clause was silent on whether payment was to be made by the Transferee, the fact that it is conditional on a transfer of the employee's contract under TUPE means that even without the specific mention of the Transferee in the clause, this clause never 'bites' COTO.

33. I asked respondent's counsel if the case would have made it to tribunal if it had not made it clear that the payment was to be made by the Transferee to which she said no. She conceded that it would transfer under TUPE were the clause not to specifically state that payment is made by the Transferee. I disagree. The fact is that COTO is never going to have to pay this money because it is only triggered once they are no longer a party to the contract because of TUPE. However, in the present case that is an academic question as the contract clearly states that it is the transferee who will pay the bonus.

34. The difficult question is whether when A promises B that C will pay something that gives rise to any obligation on A to do anything at all. In some circumstances it might be possible to say that it is an implied term of the agreement between A and B that if C does not pay A will do so. However, the implication of such a term could only be justified by business efficacy/necessity. I see no basis for any such implication here.

35. That leads me to the conclusion that there was nothing in Clause 46 which created any legal obligation whatsoever on COTO either to make payment itself or to ensure that the payment was made at the time of a transfer.

Regulations 4(1) and 4(2) TUPE and Article 3 Council Directive 2001/23/EC

36. **Article 3**

1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing at the date of a transfer shall, by reason of such transfer, be transferred to the transferee.

TUPE - Regulation 4 – Effect of relevant transfer on contracts of employment

1. 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 organized grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such

contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

2. Without prejudice to paragraph (1) but subject to paragraph (6) and regulations 8 and 15(9) on completion of a relevant transfer –

(a) All the transferors' rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) *Any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organized grouping of resources of employees, shall be deemed to have been an act or omission of or in relation to the transferee.*

37. There is no satisfactory conclusion to this case. Either I conclude that the clause can transfer in which case COTO has succeeded in ensuring that its position as provider is more competitive than any third party wishing to take on the service by effectively inserting a penalty clause into the employment contracts OR the conclusion is that the claimants cannot be paid a relatively large amount of money which they had reasonably expected. Neither, it seems to me is right particularly when COTO is put to none of the inconvenience and cost that the parties have been put to clarify the situation.

38. However having carefully considered the statute, case law and the arguments put before me I find that the clause cannot transfer under Regulations 4(1) or 4(2) and therefore the claimants' claims for unlawful deductions are not upheld.

39. The Regulations are clear in stating that it is only the liabilities and duties <u>of the Transferor</u> that can transfer. In this situation it is clear that the STB is exclusively conditional on there being a transfer. The transfer itself means that the clause would never be the Transferor's liability or duty.

40. The liability cannot transfer because it is not an obligation on the Transferor at the relevant time - because it is only actionable once there is a transfer. At which point the contract is the Transferee's responsibility but without that clause.

41. The actual wording of the clause also makes it clear that the liability rests with the Transferee. However, even without that sentence I believe that the liability never lies with the Transferor. The fact that the liability can only be triggered if there is a transfer is what prevents it from ever being the responsibility of the Transferor. Even if the clause stated that a bonus would be payable once a transfer took place and was silent as to who the payment would be made by – the effect of TUPE would be that the Transferor is not liable to the employees as the contract will have transferred to the Transferee.

42. I consider that the effect of reg 4 (2)(a) is that unless the transferor is subject to an obligation than there is nothing capable of being an obligation transferring to the Transferee.

43. I have gone on to consider whether the deeming provisions of Reg 4 affect that conclusion. Reg 4(1) provides that the contract of employment shall take effect after the transfer as if made between the employee and the transferee. Reg 4(2)(b) deems the acts or omissions of the Transferor to have been done by the

Transferee. I do not think that these provisions affect my conclusion. As set out above TUPE exists to preserve rights and not to create them. It must be interpreted with that in mind. I consider that those deeming provisions cannot be used to create an obligation retrospectively.

44. I have considered the case law that counsel took me to. In particular I have born in mind that the TUPE legislation is meant to protect employee's rights not those of the employer. I have also considered the fact that the employee can rely upon a positive variation if it so chooses. However this is not analogous to this situation and does not, in my view, assist.

45. It is not within my gift to put a gloss on the wording of the statute so as to read it, even when applying the purposive approach to Article 3 of the Directive, that anything other than the Transferor's obligations can transfer. TUPE cannot be used to improve an employee's position.

    In Wilson v St Helens Borough Council/British Fuels Ltd v Baxendale [1998] IRLR 713, paragraph 71, Lord Slynn says,
    "*In my opinion the overriding emphasis in the European Court's judgments is that the existing rights of employees are to be safeguarded if there is a transfer. That means no more and no less than that the employee can look to the transferee to perform those obligations which the employed could have enforced against the transferor."*

46. The claimants in this case could not at any point either because of the wording of the clause or the fact that the liability is only triggered by a transfer, enforce the clause against COTO. They should therefore not be put in a position that is better than the one they were in before the transfer.

47. I accept that LJ Mummery the case of Power v Regent Security Services Ltd (CA) [2008] ICR states:

    "The aim was to safeguard the acquired rights of employees on the transfer of an undertaking. Safeguarding the acquired rights of employers was not the aim. Allowing a transferee employer to rely on the Regulations in order to prevent a transferred employee from taking the benefit of a varied term agreed by the employer by reason of the transfer is not required either by the aim of, or by the provisions of, the Directive and the Regulations."

48. However Power can be distinguished from the current case. There the Transferee was seeking to rely on TUPE to defeat an express agreement it had reached directly with Mr Power because of the transfer. The Court of Appeal was safeguarding an employee's right to choose to rely on more enhanced terms after a transfer where they had been expressly agreed with the Transferee. In this case the respondent or School had made no such express agreement with the claimants. In fact they made it clear that they did not accept Clause 46 in the contract at the time of the transfer.

49. At its highest, it seems to be that Regulation 4(2) would allow the transfer of the theoretical right to a bonus from the next Transferee at the time of another

transfer. However the theoretical right is what transfers – the liability never bites a Transferor.

50. It is surprising that no other employers have tried to insert such clauses in their contracts, particularly in the current widespread use of outsourcing. The result of this finding is unsatisfactory in that I believe it could enable other similar clauses to be used to mislead employees that they will get a future entitlement in the full knowledge that a) that amount or benefit will never be payable by either employer under the contract and b) both Transferors and Transferees could use this to their advantage to try to obtain continuity of workforce with false promises that will not be enforceable on either with the employees ultimately suffering.

51. **Regulation 4(4) TUPE**
"*Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1) is void if the sole or principal reason for the variation is the transfer.*"

52. For completeness, I have also considered whether Regulation 4(4) would prevent a transfer. I find that it would not.

53. It is clear that the variation i.e. the introduction of Clause 46 occurred a long time before the transfer between COTO and the respondent was even contemplated. It therefore cannot be said to be related to this particular transfer. No Economic, Technical or Organisational reason is relied upon by either party. The argument here was purely whether the introduction of this clause was related to the transfer or not.

54. The respondent argued that the variation to include Clause 46 was inherently related to a transfer because it was only triggered by a transfer. The case of Spaceright Europe Ltd v Baillavoine [2012] IRLR 11 makes it clear that the transfer does not have to have crystallised to be the transfer referred to in this clause but the possibility of a transfer can be sufficient. In that case the facts are such that a chief executive is dismissed by liquidators so that the sale of the business as a going concern is more attractive. It was found to be related to the transfer. That case can be distinguished on its facts. There the reference to a possible transfer was clearly in relation to a situation where the liquidators had already set about trying to sell the business and a transfer was imminent or at least anticipated. Here, to my knowledge, there was no transfer being contemplated when COTO varied the claimants' contracts to include Clause 46. It is obvious that the clause envisages a transfer at some point but I think it would be stretching it to say that any clause which in some way referred to rights obligations around an entirely theoretical TUPE transfer can or should be defeated by this clause.

55. For example if a contract imposed enhanced periods of consultation prior to any theoretical TUPE transfer or specific contractual methods for that consultation, I do not think that this could or should be defeated by Regulation 4(4). Regulation 4(4) is there to prevent changes which occur because of or are related to a 'real' transfer such as a transferor giving employees a large pay rise just before a transfer in the knowledge that they will not be paying them. Or alternatively,

cutting employees' rights to ensure that the outsourcing deal is more attractive to potential transferees.

Consideration

56. For completeness, I shall address the issue of consideration here as a lack of consideration could invalidate the clause as well. The respondent argued that as COTO neither gave nor received any benefit it could not be binding and in any event the claimants had not given proper consideration either.

57. I find that the claimants did give consideration. They continued to be employed, they chose not to resign and they remained employed during a time of relative uncertainty. Although this consideration was not given at the time that the clause was entered into, that is the case with numerous clauses in an employment contract. Many employees will not take advantage of, say, enhanced maternity leave (the claimant's example), or paid sick pay allowances, but they are nonetheless binding clauses in the contract. Whilst Mr McAuley states that he may well have remained employed regardless of this clause, that does not mean that his continuing employment cannot amount to consideration. As stated above many clauses in employment contracts are never relied upon or 'by employees but their presence, whilst not a 'make or break' factor in their continuing employment, no doubt influence a decision to remain employed and still amount to a valid clause that they are entitled to rely upon. Mr McAuley did state that the possibility of the bonus was important to him.

58. I also think it is clear that COTO were construed with a benefit by making this promise. They were providing an element of financial security and certainty to their staff should a transfer take place that could (and apparently did) mean that they had a relatively stable workforce. Ms Price used perhaps a bit of creative license to suggest that having the possibility of a more stable workforce at the time of a potential transfer even if you were the transferor, was a legitimate benefit for an employer. It is possible that a transfer may not actually take place but rumours about the possibility could be unsettling and lead to people leaving. COTO, as stated above say in their letters regarding this topic that they wanted to provide increased security for their staff. I believe that this is sufficient to show that they were conferred a benefit by including this clause in the contract and that there was consideration.

Conclusion

59. For the reasons I have set out above I find that there has been no unlawful deduction from wages. Clause 46 contained no obligation capable of transferring to the Respondent.

60. Whilst the issue of public policy is stayed I did hear some submissions in relation to this point and would make the following observations. It appears, on the face of it, that the introduction of Clause 46 was a cynical attempt by COTO to ensure that provision of the clubs was more financially viable or profitable for them than any other provider. From the documents I have seen it appears that they have referred to it on other occasions where schools have attempted to take services back in house or find other providers. Their intention has been to dissuade

competitors by effectively imposing a financial penalty via a contract with employees.

61. However I was not provided, in the course of the hearing, with any hard law that specifically bans such contractual terms. It seems to me that if such a practice is prohibited this clause would be void and therefore not transfer as per the respondent's submissions. However commercial arrangements between parties in an outsourcing agreement could also, it seems to me, prevent amendments such as the addition of Clause 46 which either in theory or reality, create obligations on either party that were not part of the original deal. However in the light of my other conclusions I do not need to decide this matter.

Employment Judge Webster
15 July 2018