



EMPLOYMENT TRIBUNALS

Claimant: (1) W ADAMS (2) K THORNTON (3) D MATHEWS (4) D BRAY (5) K TAYLDER

Respondent: (1) PROFILE SECURITY SERVICES LIMITED, (2) PORT OF TYNE AUTHORITY (3) EVENTCOVER PRODUCTIONS LIMITED (4) TYNE TEES SECURITY LIMITED

Heard at: Newcastle On: 29 July 2018

Before: Employment Judge O'Dempsey

Appearances

**For the claimant: Mr Lott (1)-(2) (Solicitor) and Mr Brien (3)- (5) (Counsel),
For the respondent: Mr Emmerson (1) (Counsel), Mr Rochester (2) (Solicitor),
Mr Webster (3) (Counsel), Mr Robson (4) (Solicitor).**

JUDGMENT

The Claimants' claims against the Third Respondent are dismissed.

REASONS

I gave the parties short oral reasons on the day of the hearing. These written reasons expand on those given orally.

Background to this hearing

1. On 25 February 2019 there was a private preliminary hearing before judge Martin. This set a hearing date for the final hearing and also determined that there could be a preliminary hearing to determine whether the second and or third respondent should remain as party to these proceedings.

2. Whether such a hearing was to take place depended on the parties cooperating with each other to achieve the overriding objective. The second respondent indicated that it did not wish to have a preliminary hearing on this issue, and the third respondent indicated that it did.

3. The third respondent made no effort to define the issues for that hearing and none of the other parties, save the first respondent, gave a list of issues for this hearing.

4. On the morning of the hearing, therefore some time was taken to try to define the issues I could determine. There appeared, for example, to be confusion as to whether there was

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an application to strike out the claim against the third respondent on the basis that the claim stood no reasonable prospect of success. No such application had been made, and in any event the suggestion stood, itself, no reasonable prospect of success as it was manifest that on any of the issues involved, evidence would need to be considered.

5. On the day therefore the parties appeared to agree that it was possible for two issues to be determined by me. On further consideration however it was apparent that in reality only one issue could be determined, namely whether the second respondent intended, that the activities carried out post putative service provision change, were to be in connection with a specific task.

6. The fourth respondent, whose solicitor was instructed very late, as I understand it, also indicated a wish to have the same point determined in relation to it. However for reasons set out below, this did not prove possible, proportionate or fair to the other parties (a fact which only emerged after a slightly unusual course in England and Wales had been adopted by the consent of the parties).

7. I should also add that the Claimants have provided a list of issues which ranged over all of the matters for the final hearing, but this was not produced for the purposes of today's hearing.

The issue

8. The question I had to determine in relation to the third respondent therefore was "Did the second respondent intend that the activities would, following any putative service provision change, be carried out by the transferee (for these purposes the third respondent) other than in connection with a single specific event or task of the short term duration?"

9. The parties had drawn up a list of agreed facts which simply record the correspondence. This had not been done prior to the hearing, and it may have assisted all parties if a real attempt had been made to secure agreement on these matters at an earlier stage.

Background facts

10. By way of background, but without making findings of fact binding on the tribunal hearing the merits of this case, on 1 August 2015 the first respondent took over the security services at Morston Quay Howdon and McNulty sites for the second respondent. This was under the terms of a contract for a fixed term of three years due to end on 1 August 2018.

11. On 10 July 2018 the second respondent emailed the first respondent informing them that they were undertaking a review of their third-party security needs.

12. On 23 July 2018 the representatives of the first and second respondents met and discussed the future requirements in respect of all three sites.

13. On 26 and 27 July 2018 there was an email exchange between the first and second respondents. This set out their positions in relation to a potential extension of the contract between the first and second respondent. I do make findings of fact in relation to the exchanges, below.

14. On 27th July the first respondent wrote to the claimants and warned them of possible redundancies. On the same day the second respondent contacted the third respondent by telephone and email to enquire whether the third respondent could provide security services on an interim basis until 1 September 2018 for the sites at Howdon and at Morston Quay.

15. On 30 July 2018 the second respondent emailed the third respondent setting out its requirements for temporary security provision at the Morston Quay and Howdon sites

together with a supply services contract.

16. On the same day the second respondent issued an invitation to tender for the provision of security services at Stephenson Enterprise Park (Morston Quay). The first and fourth respondents were invited to tender.

17. Also on the same day the first respondent held consultation meetings with the claimants. It sent letters to all claimants setting out its position regarding the transfer of undertakings regulations.

18. On 1 August 2018 the third respondent started providing security services at the Morston Quay and Howdon sites for the second respondent.

19. Between two and 9 August 2018 there was an exchange of emails between the first and the fourth respondent in relation to the question of the transfer of undertakings regulations.

20. On 6 August 2018 the first respondent wrote to the claimant.

21. On 8 August 2018 the first respondent emailed the second respondent to confirm that it would not be submitting a tender for the security services at Morston Quay/Stephenson Enterprise Park.

22. On 31 August 2018 the third respondent ceased providing security services at Morston Quay and Howdon sites for the second respondent.

The hearing

23. As noted above, I was originally presented with two potential issues to be determined at this hearing. The third respondent had identified the question under regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and also a question under regulation 3(3) (a) (ii).

24. Having heard submissions on the question of whether it was feasible to hear evidence and reach conclusions on both of these issues, I determined that it was not. The issues arising under the first of these questions overlap substantially with the other matters that the tribunal will have to determine at a full hearing. However I did think that it was possible to determine the question of whether the client in this case intended that the activities would, following any putative service provision change, be carried out by the transferee in connection with a task of short term duration.

25. Accordingly the sole issue on which I heard evidence was that question of whether the client (the second respondent) intended, if all the other elements of a service provision change were satisfied, that the activities would be carried out by the transferee in connection with a task of short term duration.

The law

26. The scope of the issues being as narrowly defined, the only relevant legal provision is regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 which provides:

“3 A relevant transfer

[2.921]

(1) These Regulations apply to—

...

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

...

(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

...

and in which the conditions set out in paragraph (3) are satisfied.

...

"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..."

26.1. Even if the other conditions for a service provision change were satisfied, if immediately before the service provision change the second respondent did not intend that the activities would, following the service provision change, be carried out by the transferee other than in connection with a task for short term duration, there will be no transfer (under the service provision change provisions). No party argued that there was, in relation to the third respondent, any other type of transfer.

The evidence

27. I heard evidence from Mr Taylor of the third respondent, and Mr Hannigan of the first respondent.

27.1. Although the fourth respondent had not prepared any witness statement, over the luncheon adjournment an email containing the evidence that its witness wishes to give was sent and received (29 July 2019).

27.2. The parties agreed that this could stand as the evidence in chief of Mr Yellowly. Accordingly, although it involved a short adjournment so that is the third and the second respondent could take instructions, the inclusion of this evidence did not hold up proceedings unduly. However that consent clearly had been given when the lawyers had not fully read the document (for understandable reasons: there had not been sufficient time).

27.3. It emerged that objection was being taken to his evidence, after the email he had provided was read by the other parties. Although he had been sworn in, he had not been asked any questions, and it was apparent to me that it was not possible for the fourth respondent's application to be dismissed from proceedings to be heard, despite the co-operative efforts of the parties to make as much progress as possible given their attendance at today's hearing.

27.4. I therefore released Mr Yellowly from his oath, without objection by any party, and his evidence was therefore not tested in cross examination. I accordingly, for this purpose give it very little weight.

28. As to the other witnesses, all of parties made clear that (whilst they were not challenging certain aspects of the witness statements that were handed in) they reserved their position to the full hearing on those matters.

29. They did wish to challenge the matters relating to the question of whether there was an intention on the part of the client that the activities be carried out by the transferee in connection with a task of short term duration.

Submissions

30. The claimants maintained a neutral position on this issue and made no submissions. The other respondents made submission. I deal with the submissions made indicating that the third respondent should remain a party. I took into account all submissions made to me.

31. Mr Emerson for the first respondent urged me to draw an inference from the fact that no one had been called by the client (the second respondent) to deal with the second respondent's intention. He said that I should draw an adverse conclusion from this fact, namely that (contrary to the second respondent's submission), the second respondent did not have an intention that the activities be carried out by the transferee in connection with a task of short term duration.

32. He referred me to **Panos Eliades v Lennox Lewis** [2005] EWHC 488 paragraph 61 of which appears to be relevant. I have read that passage. It seems to me that in that case there was a great deal of evidence contextualising the failure to call witness in question. It is clear to me that the judge was considering the failure to call the witness in the context of other adverse evidence against the party failing to call them. By contrast this case does not appear to me to contain that type of evidence.

33. Rather what I need to do is to consider all of the evidence and reach a conclusion about the second respondent's intentions at the time of the service provision change (assuming all the other elements are satisfied). Of course it is open to me to draw an adverse inference from the failure of the second respondent to call a witness to deal with its intention, but I also have to draw inferences from the other evidence, including the documentary evidence showing the intentions of the parties and conferring on them the natural and ordinary meaning that is to be given to words used.

Findings of fact on the issue

34. In that regard on 27 July 2018 11:51 AM the second respondent wrote to the third respondent stating "we require some third-party cover for approximately four weeks". Mr Emmerson cross examined Mr Taylor on the fact that it said "approximately", suggesting that this indicated that it was vague. Of course in one sense it was, but I read this email as indicating that from the outset the intention of the second respondent was, at this point, to have temporary cover. It was also something which, generally, Mr Taylor's company specialised in. He accepted that his contracts could be rolling ones, and could cover up to a year, but his evidence was to the effect that in the main they are of short duration. My finding of fact that the second respondent intended at the time of the service provision change intend that the activities be carried out by the third respondent in connection with a task of short term duration is based on this and all the other findings of fact set out below.

35. At 1615 on the same day the I find that the second respondent wrote confirming that it wanted to employ the third respondent's services as third party security on two of their off-site locations.

36. Although it is clear that there was no concluded contract at this stage, the second respondent said this "contract will run from 1700 on 1 August 2018 and terminate on 1 September 2018 unless extended by further discussion and availability. Please could you contact Heather Coleman who is included in this email to discuss contracts et cetera."

37. I find that this email sets out the default position of the second respondent: unless a further discussion resulted in a different agreement the contract would cease on 1 September. I accept also that Mr Taylor for the third respondent did not want a longer contract. However it is not his intention that is relevant to this question and I do not rely

on it for my conclusions.

38. In addition I find that there were emails at 1357 to the same effect ("this would only be an interim measure until 1 September 2018"). On 30 July 2018 at 1646 Heather Coltman wrote to Felicity Chater at the third respondent stating "I have been liaising with Ben Ewart to make the necessary arrangements for the temporary provision of security services to our Howden and Stephenson Enterprise Park sites."

39. Finally there was a draft contract which was not signed but which also referred to "temporary provision of security services".

40. Mr Taylor of the third respondent was cross-examined on these documents and gave an account of what his intention was. As I have noted, the evidence does not take matters much beyond the documentary evidence. It is however consistent with the conclusion that the second respondent's intention was for activities in connection with a task of short term duration.

41. On the evidence which is available to me, I have to reach the decision on the balance of probabilities. Doing the best I can I conclude that the intention of the second respondent at the time of the service provision change was that the activities to be carried out by the transferee following the putative service provision change were to be carried out in connection with a task of short term duration, namely the short term provision of security services. I make no finding about whether, after the point immediately before that service provision change, the second respondent's intention changed, but that has no significance for the position of the third respondent (whatever its implications for the position of the fourth respondent may be).

42. The most likely explanation is that the second respondent wanted the third respondent to carry out short-term contract security work. I am not persuaded that the words in the email dated 1615 on 27 July 2018 "unless extended by further discussion and availability" indicate an intention that the work be carried out other than in connection with a task of short term duration.

43. In those circumstances the third respondent should not be a party to these proceedings and the proceedings against the third respondent are dismissed.

44. After giving this judgment I had asked the parties to agree a new timetable for the merits hearing in this matter. I have set out the result of the case management discussions in a separate document.

Employment Judge O'Dempsey

Date 7 August 2019