

Case No: 2500065/2019  
2500253/2019  
2501043/2019  
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2500285/2019



# EMPLOYMENT TRIBUNALS

**Claimant:** (1) Mr K Carter (2) Mr D Hopper (3) Mr S Littlemore (4) Mr W B Long (5) Mr T Todd

**Respondent:** (1) Steadfast Security Solutions Limited (2) Alpha Security

**Heard at:** Manorview, Newcastle-upon-Tyne      **On:** 4 September 2019

**Before:** Employment Judge A.M.S. Green

## Representation

**Claimant:** Mr F Ferguson – Sunderland Welfare Rights

**Respondent:** Mr H Menon - Counsel

# Reasons

1. On 4 September 2019, I issued a judgment with oral reasons. I have been asked to provide written reasons for my judgment.
2. This was a public preliminary hearing to determine 5 issues that are common to each of the claimant's claims. In summary, each of the claimants were employed by the first respondent as security officers at Sunderland Football Club (the "Club"). The Club stopped using the services of the first respondent on or around 7 December 2018 after a tendering process had taken place, in which the first respondent was unsuccessful. The second respondent claims that it was asked by the Club to escort the security staff off the site on 7 December 2018 and was asked to provide emergency cover at the Club. The first respondent claims that the claimants were transferred to the second respondent under a Service Provision Change pursuant to Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") regulation 3. The second respondent denies that there was a Service Provision Change.
3. At a private preliminary hearing on 12 June 2019, Judge Arullendran identified the following issues that fell to be determined:

- a. Have activities by a contractor ceased which are instead carried out by a subsequent contractor on the same client's behalf?
  - b. Are the activities fundamentally or essentially the same as the change as before?
  - c. Was there immediately before the change an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client?
  - d. Where the claimants employed by the transferor immediately before the transfer?
  - e. Where the claimants assigned to the organised grouping of resources or for the subject to the transfer?
4. The Second Respondent did not attend the hearing and was not represented. I made enquiries as to their whereabouts. I was satisfied that they had been notified of the hearing and the change of venue to Manor View House and I proceeded with the hearing in their absence. I believed that it was in the interests of justice to do so and commensurate with the overriding objective.
5. There was a joint hearing bundle. I heard evidence from Mr Mike McGann, the first respondent's Business Development Manager and the first claimant. Both men adopted their witness statements. Mr Ferguson tendered written submissions. Both representatives made oral submissions.
6. In reaching my decision, I have considered the oral and documentary evidence, the submissions and my record of proceedings. The fact that I have not referred to every document produced in the evidence bundle should not be taken to mean that I have not considered it.
7. The claimants and the first respondent both claim that there was a Service Provision Change and they must establish this on a balance of probabilities.
8. Having considered the evidence, I make the following findings of fact:
- a. On 18 April 2016, the first respondent was contracted to provide security services to the Club. These services were previously provided by a different Service provider called Axis. However, Axis ceased to provide those services on a re-tendering exercise and the new contract was awarded to the first respondent. All of the claimants except Mr Todd were transferred from Axis to the first Respondent under TUPE.
  - b. The contract became operational on 16 May 2016. All the claimants worked at the Club's premises.
  - c. On 26 July 2018, Paul Harbord, the first respondent's Security and Group Associate Director, met Tony Davison, the Club's new managing director. He told Mr Harbord that he wanted to cut costs and he was looking at the provision of security services.

- d. On 18 September 2018, the Club invited the first respondent to re-tender for the security contract. It duly responded to the invitation to tender which it submitted to the Club.
- e. The Club did not award the new contract to the first respondent. Instead it awarded the new contract to the second respondent. The Club notified the first respondent of this on 16 October 2018. The contract between the Club and the first respondent required 3 months' notice of termination.
- f. On 22 October 2018, Mr McGann wrote to Mr Davison asking when the Club would issue its 3-month termination notice so that the first respondent could start the TUPE process. Later that day the first respondent wrote to the affected employees, including the claimants, to notify them of the contract award to the second respondent.
- g. Mr McGann heard rumours that the Club were having second thoughts about awarding the contract to the Second Respondent. This was around 16 November 2018. He approached the Club again to discuss re-tendering for the contract, but he never received a response.
- h. On 3 December 2018, the third claimant e-mailed the first respondent telling it that the second respondent had initiated a meeting with the claimants on 30 November 2018 and asked them to provide them with their contracts of employment. They told the claimants that they would "take over" on 16 January 2019. The third claimant asked the first respondent to provide him with a copy of his contract of employment.
- i. Mr Harbord wrote to the Club on 5 December 2018 to ask for formal notice of termination of the contract as none had been provided thus far. This information was required so that the first Respondent could Start the TUPE process.
- j. There was an exchange of correspondence between the first respondent and the Club regarding whether notice of termination had been issued. The gist of this was that the Club thought that it had issued its notice at the meeting on 8 October 2018. The Club insisted that first respondent to vacate the site on the January 2019.
- k. On 6 December 2018, Mr Harbord asked the Club to provide him with contact details at the second respondent so that we could progress TUPE matters. On the same day, a Junior Director at the first respondent inadvertently copied the Club into an inappropriate e-mail.
- l. As a result of the inappropriate email, the Club's Finance Director wrote to the First Respondent on 7 December 2018 to terminate the security contract with immediate effect because it had lost trust and confidence in the first respondent.
- m. The security staff working at the Club's premises were required to vacate the site and return their keys, fobs and other Club property. The first

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claimant, who was supposed to be working a night shift at the Club was told not to go into work.

- n. On 10 December 2018, Jackie Horner, the first respondent's personnel officer, wrote to the claimants and other affected employees confirming the loss of the contract and the transfer to the second respondent.
  - o. The first respondent instructed its solicitor to write to the second respondent to confirm the TUPE arrangements, the re-assignment of the contract and provide employee liability information. The solicitor acted on his instructions on 20 December 2018.
  - p. Later the same day, the first respondent wrote to the affected employees, including the claimants, notifying them that TUPE applied with effect from 7 December 2018 and their employment had transferred to the second respondent.
  - q. The second respondent did not reply to the Solicitor's letter. The Solicitor wrote again on 7 January 2019.
  - r. The first respondent wanted to mitigate hardship suffered by the claimants in the meantime and attempted to offer shifts elsewhere after 7 December 2018.
  - s. Eleven employees provided security services at the Club's premises including the claimants. Two members of that group, Mr Gallagher and Mr Cleary were kept on by the second respondent after 7 December 2018.
  - t. The first respondent provided the second respondent with details of all 11 employees as part of its employee liability information.
  - u. In his evidence, the first claimant said he knew about the award of the contract to the second respondent. He said that he did not want to transfer but did not formally object to the proposed transfer. He did not expect to be transferred because he understood that the second respondent was going to cut security cover at the Club. He accepted that the first respondent had told him that he was no longer employed by them and he should take his grievance up with the second respondent.
  - v. The first claimant worked at Seaham, another site where the first respondent provided services, between 7 December and 21 December 2018 as all of the staff had been taken off the Club's site on 7 December 2018.
  - w. The first claimant accepted that he received a letter notifying him that part of the business in which he worked at the Club was transferred to the second respondent on 7 December 2018 and that his employment would be transferred under TUPE. He knew this because the first respondent had written to him.
9. Regulation 3 of TUPE defines a relevant transfer. For a Service Provision Change where there was then a re-tendering exercise, as alleged in this case, the activities

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must cease to be carried out by a contractor on a client's behalf and are carried out instead by another person on the client's behalf. The activities must be fundamentally the same by the subsequent contractor.

10. Applying the law to the facts I find as follows:

- a. The provision of security services provided by the first respondent for the Club at their premises in Sunderland ceased on 7 December 2018. They were taken over by the second respondent. There is nothing to suggest that the second respondent provided fundamentally different services or that they were of short duration.
- b. The activities being performed by the second respondent are fundamentally or essentially the same as those provided before (i.e. manned security services) at the same premises.
- c. Immediately before the change, 11 of the first respondent's employees were assigned to provide security services for the Club at their premises in Sunderland. This was their principal purpose.
- d. All of the claimants were employed by the first respondent on 7 December 2018 (i. e. the transfer date). The claimants were assigned to the organised grouping of resources forming the subject of the transfer.

There was a Service Provision Change between the first and the second respondents.

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Employment Judge A.M.S. Green

Date 1 October 2019

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.