



EMPLOYMENT TRIBUNALS

Claimant
Mr M Abatan

Respondent
v NBCUniversal International Limited

OPEN PRELIMINARY HEARING

Heard at: Central London Employment Tribunal **On:** 5 November 2019

Before: Employment Judge Brown

Appearances

For the Claimant: In person
For the Respondents: Ms C Thomas, Counsel

JUDGMENT

The Claimant's claim is struck out because it has no reasonable prospects of success.

REASONS

This Hearing

1. By a claim form presented on 11 June 2019, the Claimant brought complaints of unfair dismissal and race discrimination against the Respondent. In his claim form, he said that he had been employed by the Respondent from 6 April 2011 to 28 February 2019. He made complaints about the Respondent's treatment of him in the period leading up to a planned TUPE transfer.
2. The Respondent defended the claim. In its ET3 Response, it stated that the Claimant's employment had transferred from it to Tata Consultancy Services ("TCS") on 1 March 2019. It said that, in accordance with *Reg 4(2) TUPE Regulations 2006*, all the Respondent's liabilities in connection with the Claimant had transferred to TCS on that date, so that the Tribunal did not have jurisdiction to hear the Claimant's claims against the Respondent. It further said that the Claimant had settled all his claims against TCS when he entered into a settlement agreement with it following the transfer.

3. On 16 October 2019 the Respondent wrote to the Claimant and the Tribunal, applying for the Claimant's claim to be struck out on the grounds that it had no reasonable prospects of success.
4. On 22 October 2019 the Tribunal wrote to the parties, saying that a Preliminary Hearing listed for 5 November 2019 would decide whether to strike out the claim because it had no reasonable prospects of success. On 30 October 2019 the Tribunal confirmed that the Preliminary Hearing would be a public hearing.
5. The parties attended the Hearing today.

The Parties' Contentions

6. The Respondent contended that, pursuant to *r 4(2) TUPE Regs 2006*, on the completion of a relevant transfer, all the transferor's rights, powers, duties and liabilities under or in connection with the relevant employee's are transferred to the transferee. It contended that, thereafter, anything done by the transferor is deemed as done by the transferee instead. It relied on *Allan v Stirling District Council* [1995] IRLR 301, Court of Session, as authority for the proposition that there is no joint and several liability in the transferor and transferee after the transfer, so claims can only be brought against the transferee.
7. The Claimant agreed that his employment had transferred to TCS on 1 March 2019. He said, however, that he signed a compromise agreement with TCS which expressly permitted him to continue to pursue a grievance against the Respondent. He said that he was complaining about what the Respondent had done and that the Respondent had used the TUPE transfer as a way of avoiding liability. He said that *reg 18 TUPE Regs 2006* prohibited the exclusion of rights under the *TUPE Regulations* by way of compromise agreements.

The Law

8. By *Reg 4(2) TUPE Regulations 2006*,
“.. on the completion of a relevant transfer—
(a) all the transferor's 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 organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.”
9. In *Allan v Stirling District Council* [1995] IRLR 301 held that the word 'transferred' in *reg 5(2) TUPE Regs 1981* (now *reg 4(2) TUPE 2006*) was unambiguous, so that, on completion of a relevant transfer, all the transferor's liabilities under, or in connection with, the contract of employment of any employee of the transferor “shall be transferred ... to the transferee”. The Court of Session held that the word “transferred” necessarily denotes that all the transferor's liabilities, whether accrued or continuing, pass to the transferee and the transferor is no longer subject to any of them. It said that the word “transfer” cannot bear any other

meaning than a taking away from one and a handing over to another so that, on a transfer, liabilities arising from the contract of employment pass to the transferee.

10. The *Acquired Rights Directive 2001/23/EC* gave EU member states the option of incorporation of joint and several liability in respect of obligations which, apart from such provision, would fall exclusively on the transferee (art 3(1)). The 2006 Regulations provided for joint and several liability in only two areas:

- 10.1. *Liability under Reg 15* for failure to inform and consult appropriate employee representatives under *Reg 13 (TUPE SI 2006/246 Reg 15(9))*.

- 10.2. Liability for personal injury in cases where a transferor employer is not obliged to carry employer's insurance under the *Employer's Liability (Compulsory Insurance) Act 1969* (and the transferee is thereby unable to take advantage of the employer's insurance cover by virtue of the decision in *Bernadone v Pall Mall Services Group* [2000] IRLR 487). Under *Reg 17(2)*, the transferor and transferee are held jointly and severally liable in respect of personal injury liability arising from the employee's employment with the transferor.

11. In *Fox Cross Claimants v Glasgow City Council; GMB Claimants v Same* [2013] ICR 954, the EAT considered equal pay and sex discrimination claims. It held that Glasgow City Council should be removed as a party to the proceedings because the Claimants has been TUPE transferred from Glasgow City Council to another employer. The EAT said that the effect of *regulation 4(2)(b) Transfer of Undertakings (Protection of Employment) Regulations 2006* was that any acts or omissions by the council which might found a claim had been assigned to the transferee, and there was no scope for the council to have retained any residual liability in respect of the transferred contracts; and that, therefore, there was no prospect of the Council being liable for any of the claims

12. An Employment Judge has power to strike out a claim on the ground that it has no reasonable prospect of success under *Employment Tribunal Rules of Procedure 2013, Rule 37(1)*. The power to strike out a claim on the ground that it has no reasonable prospect of success may be exercised only in rare circumstances, *Teeside Public Transport Company Limited (T/a Travel Dundee) v Riley* [2012] CSIH 46, at 30 and *Balls v Downham Market High School & College* [2011] IRLR 217 EAT. In that case Lady Smith said:

"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the word 'no' because it shows that the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in submissions and deciding whether their written or oral recensions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospect".

13. A case should not be struck out on the grounds of having no reasonable prospect of success where there are relevant issues of fact to be determined, *A v B* [2011] EWCA Civ 1378, *North Glamorgan NHS Trust v Ezsias*, [2007] ICR 1126 ; *Tayside Public Transport Co Ltd (t/a Travel Dundee) v Reilly* [2012] CSIH 46.

Decision

14. In this case, it was not in dispute that the Claimant's employment had transferred from the Respondent to TCS on 1 March 2019. He brought his claim to the Tribunal on 11 June 2019.
15. By virtue of *regulation 4(2)(b) Transfer of Undertakings (Protection of Employment) Regulations 2006* any acts by the Respondent which might found a claim were assigned to TCS on 1 March 2019.
16. According to *Fox Cross Claimants v Glasgow City Council; GMB Claimants v Same* [2013] ICR 954, EAT, and *Allan v Stirling District Council* [1995] IRLR 301, there is no scope for the Respondent to have retained any residual liability in respect of the Claimant's employment. All the Respondent's liabilities in respect of the Claimant's employment passed to TCS pursuant to the TUPE transfer and the Respondent was no longer subject to them.
17. Under the *TUPE Regs 2006*, a transferor can be jointly and severally liable with a transferee in respect of claims for failure to inform and consult appropriate employee representatives under *Reg 13* and for personal injury where the transferor employer is not obliged to carry employer's insurance.
18. The Claimant has not brought those types of claim.
19. Liability for the claims which the Claimant has brought against the Respondent transferred to TCS on 1 March 2019. The Claimant has not brought a claim against TCS. It is not in dispute that he signed a compromise agreement with TCS, settling his claims against it. I decided that the terms of a compromise agreement signed between the Claimant and TCS could not alter the effect of the *TUPE Regulations*.
20. There was no prospect of the Respondent being liable for the Claimant's claims.
21. I therefore struck out the Claimant's claims.

Dated:

Employment Judge Brown
5th Nov 2019

SENT TO THE PARTIES ON
06/11/2019

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FOR THE TRIBUNAL OFFICE