



# EMPLOYMENT TRIBUNALS

**Claimants:** Mrs Helen Davis and Miss Charmaine Hanlon

**Respondents:** Kare Plus National Ltd (1)  
Southwest Healthcare Ltd (in liquidation) (2)

## REASONS

**for the Judgment delivered orally and promulgated on 21 October 2019  
following a request from the First Respondent**

1. The Claimants, Mrs Davis and Miss Hanlon pursued complaints of unlawful deductions from wages, accrued but unpaid holiday pay and Damages for unpaid notice against the First Respondent ("Kare Plus"). They claim that their employment had been transferred from the Second Respondent ("Southwest") to Kare Plus under the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE"). They also claim that they had resigned because Kare Plus had not paid them their wages which constituted a fundamental breach of contract entitling them to claim constructive unfair dismissal.
2. Southwest which traded as Kare Plus Bournemouth appointed liquidators on 17 December 2018 because it was insolvent. It is not disputed that its business was transferred to Kare Plus on or around 12 November 2018 but Kare Plus submits that its takeover of the business was not a relevant transfer within the terms of TUPE.
3. At the commencement of the hearing the Claimants informed the Tribunal they were not pursuing claims of constructive dismissal under s.95(1)(c) Employment Rights Act 1996 ("the Act") because they did not have sufficient continuity of service to pursue such a claim. However they had been advised they had grounds to pursue a claim that they had been dismissed by Kare Plus for asserting a statutory right contrary to s.104 of the Act. The Tribunal agreed to accept this amendment to the claims of unfair dismissal because they relied on the same circumstances and facts already pleaded, on which evidence had been prepared by both parties for this hearing. Therefore, considered in the round, there was no substantial prejudice to the Respondents if the Tribunal adjudicated on the amended claim.
4. There was an Agreed Bundle of Documents (Exhibit R1). The Claimants gave their evidence-in-chief by written statement: Exhibit C1 (Mrs Davis) and Exhibit C2 (Miss Hanlon). The Tribunal also received evidence from Mr Stringer, an Operational Director with the Respondent at the relevant time, who gave his evidence-in-chief by way of written statement: Exhibit R2. The relevant facts are not subject to substantial dispute. Mr John helpfully confirmed that Kare Plus accepted that the particularised sums claimed by the Claimants had been correctly calculated by them but that Kare Plus did not accept liability to pay any of those sums to the Claimants. The Tribunal made the following findings of fact.

5. Kare Plus and its associated companies operate a franchise business through a network of franchisees throughout the UK which provide domestic care services to clients / patients, and supply agency staff to nursing and residential care homes. The provision of domestic care services are either publicly or self-funded. The supply of agency staff is undertaken through contracts between Kare Plus and various providers with Kare Plus sub-contracting the recruitment and provision of agency staff in defined areas to its franchisees. The provision of domestic care services is regulated by the CQC. The supply of agency staff is not regulated.
6. The Tribunal was informed that it is essential for Kare Plus to take over any franchisee's business which falls into serious financial difficulty which might involve its closure. This is to ensure the proper administration of the domestic care business operated by any such franchisee and continuing compliance with the CQC's regulatory requirements. Any failure by Kare Plus to take such a step would have a potentially significant adverse impact on the integrity of all of Kare Plus' regulated business.
7. Such a situation can require Kare Plus to run the franchise business until its closure, or it may choose to continue itself or until the registration of a new franchisee which would then takeover domestic care and staff recruitment services. Kare Plus has a standard Deed of Release to deal with such situations. Such a Deed was executed between the relevant stakeholders to deal with Southwest's situation in November 2018. This Deed states at clause 3.3 as follows:

*"With effect from the Release Date, the Franchisor shall be free to take over the control and operation of the Business or otherwise operate in the Territory on such terms that it considers fit (which will include the right to grant a license to third parties to operate in the Territory)."*

It further states at clause 4.4:

*"The parties agree that, on the Franchisor or Kare Plus National taking over operation in the Territory, this will constitute a relevant transfer for the purposes of TUPE and, accordingly, that it will not operate so as to terminate the contracts of employment of the Employees. Such contracts shall be transferred to the Franchisor or Kare Plus National pursuant to TUPE with effect from the Release Date."*

8. The Claimants had both been recruited relatively recently to Southwest's employment. By November 2018 they were the only employees supporting the administration of Southwest's business and were each involved in working in both areas of Southwest's business Mrs Davis had been employed by Southwest as Deputy Manager from 27 April 2018 and Miss Hanlon as its Recruitment Consultant from 6 June 2018. These were both full-time jobs which involved them working in, and for, all areas of Southwest's business. This included provision of domestic care services and recruitment of agency staff. The provision of domestic care services made up the largest part of Southwest's business. Mrs Davis had overall management responsibilities for both parts of the business. She had also taken over the responsibilities and duties of Southwest's Registered Manager who had left its business shortly after Mrs Davis' arrival and had not been replaced. Miss Hanlon's job involved arranging shifts, and other administrative tasks, for the provision of domestic care services and training for staff in both areas of the business amongst other duties.
9. By 12 November 2018, for reasons which did not have to be examined by the Tribunal, Southwest was in substantial financial difficulty. It was envisaged that this

would lead to its liquidation. Kare Plus took over Southwest's business in accordance with the terms of a Deed of Release on 12 November. On that day Mr Stringer attended on the Claimants in their office. He informed him that Southwest's franchise had been terminated and that Kare Plus had taken over Southwest's business. He confirmed that their employment had transferred to Kare Plus and that it would be responsible for all payment of salary, benefits and expenses going forward but that Southwest would be liable for any unpaid monies due to the Claimants up to that date.

10. After this meeting with Mr Stringer the Claimants continued carrying out their usual duties and those further duties which Mr Stringer had assigned to them. Mr Stringer held a further meeting with the Claimants on 20 November to discuss future plans and how Kare Plus intended to grow the business from the Bournemouth office. At this meeting he told the Claimants that Kare Plus did not intend to continue providing domestic care services but would be continuing the recruitment business operated by Southwest. He also instructed Mrs Davis to give due written notice to current clients / patients and the CQC of the expiry of current domestic care contracts.
11. On 21 November Mr Stringer emailed the payroll department of Kare Plus to confirm that the Claimants had been transferred by TUPE to its employment with effect from 12 November 2018. He also wrote to the Claimants by email on 22 November to confirm the actions which had been agreed between the Claimants and him at their meeting on 20 November. Shortly after this Mrs Davis, acting on Mr Stringer's instructions, gave 14 days written notice of termination of Southwest's domestic care services contracts on 5 December 2018 to the patients and the CQC.
12. The correspondence from Kare Plus to the Claimants confirmed that they had been welcomed to the Kare Plus team. They were provided with forms to join its pension scheme. They were able to submit expenses for payment and arrange for payment of the staff contracted to provide domestic care services. However, on 27 November they each received a letter in the same terms from Kare Plus attaching a new contract of employment. This letter informed them that TUPE did not apply to them and that their employment with Kare Plus would not be continuous for that reason. The contract attached to this email was in substantially the same terms as their existing contract with Southwest but had some significant changes which caused them concern and was very confusing for them. They had received no previous notice of this development and no explanation of why Kare Plus had taken this step and was refusing to pay them wages for work which they had carried out at Mr Stringer's direction.
13. They received this letter by email at 3 pm. It informed them that they had to respond to the offer of the new contract by no later than 4 pm on the following day. When Mrs Davis raised enquiries about their situation with Mr Stringer he informed her that if the Claimants did not accept the new contracts offered to them then they would be out of a job.
14. The Claimants raised a grievance as to their position before the expiry of the deadline on 28 November. They had an oral acknowledgement of receipt of that grievance but no further response. They were due to be paid on 30 November. They received no payment of the wages due to them for the work they had carried out from 12 November onwards on that date. Furthermore, they did not receive any substantive responses to their enquiries as to this position. They continued to provide on-call services throughout the following weekend during which they submitted a further grievance in respect of their unpaid wages. They continued to work in the week commencing 3 December. They submitted their resignations on 4

December which confirmed they would cease work on 5 December.

15. Mr Stringer informed the Tribunal that as at 12 November Kare Plus had been advised that Southwest's employees were protected by TUPE and that their employment would transfer across to Kare Plus by operation of TUPE. Mr Stringer informed the Claimants that this was the case at his meeting with them on 12 November. At some point the advice given to Kare Plus changed. They were advised that TUPE did not apply to the Claimants' employment. Mr Stringer explained that although Kare Plus decided to close down the domestic care services provided by Southwest it intended to continue the agency business from Southwest's Bournemouth location. It considered that there were good prospects for substantial growth in that business. He also confirmed that, notwithstanding the change in advice as to TUPE, Kare Plus wanted the Claimants to continue working in this business. It offered each of them a new contract for that reason.
16. Mr Stringer also explained that the advice received by Kare Plus was that they had not taken over any part of Southwest's business and that TUPE did not apply for that reason. He was advised that this was because Kare Plus had been acting purely as an agent to ensure that the domestic care franchise had been terminated properly. In its oral judgment the Tribunal made it clear to the parties that it could see no merit in that explanation. It also notes that Mr John did not make any submission to the Tribunal in those terms.

### **Submissions**

17. Mr John submitted there had been no transfer of undertaking by operation of TUPE. Kare Plus had only become involved in running the business because of its obligations under CQC Regulations and the requirement to ensure that the domestic care contracts were terminated in accordance with those Regulations. This is a situation that falls within Regulation 3(3)(a)(ii) because Kare Plus were running down the domestic care services contract they had taken over and were only doing so for a short duration – those contracts were terminated by 14 days' notice expiring on 5 December 2018. This was not a transfer of undertaking within the terms of TUPE. Therefore, Kare Plus cannot be liable for the financial claims made by the Claimants – this liability remains with Southwest.
18. The Claimants submit that Kare Plus took over Southwest's business in its entirety, and that its offer of new contracts of employment to the Claimants confirms that it intended to continue, and grow, Southwest's agency business. The Claimants had been told by Mr Stringer that their employment had transferred to Kare Plus. He had confirmed that it would pay their wages going forward. Kare Plus' subsequent actions demonstrated chaotic management, breached their contracts of employment, placed them under undue pressure and left them with no alternative but to resign.

### **Conclusions**

19. The Claimants had been employed to work in all aspects of Southwest's business. Kare Plus took over all the business when it became clear that Southwest was insolvent. Kare Plus did so to ensure compliance with regulatory requirements in respect of the domestic care services operated by Southwest. It faced a number of choices as to that part of the business but intended to continue the provision of recruitment of agency staff going forward and considered this part of the business was financially viable and presented prospects of growth.
20. The Deed of Release executed by the parties to the franchise arrangement confirms

that Kare Plus fully understood the legal consequences of doing so as far as the employment position of Southwest's employees was concerned. Southwest was an organised grouping of resources which had the objective of pursuing identifiable economic activity. It had a stable structure and established businesses operated within that structure as part of a nationwide franchise arrangement. Therefore, the Claimants were at the time that Kare Plus took over the business from Southwest on 12 November 2018 employed in an economic entity which retained its identity after Kare Plus had taken over the business and this was a transfer undertaking within the terms of Regulation 3(1)(a) of TUPE as the relevant Deed of Release acknowledged.

21. The Claimants' contracts of employment with Southwest transferred to Kare Plus by operation of TUPE on 12 November 2018. Mr Stringer confirmed this was the case when he met with the Claimants at their office on 12 November 2018. He also confirmed that from that date they would be paid by Kare Plus for their continuing work in the business. It is a remarkable feature of this case that Kare Plus contest the Claimants' claims for unpaid wages from 12 November to their date of resignation notwithstanding that it cannot be disputed that it had reneged on that contractual entitlement to which it was contractually committed.
22. The Claimants' contracts of employment with Southwest transferred to Kare Plus by operation of TUPE. A few days later Kare Plus attempted to impose a unilateral change to their contracts. It did so without undertaking any consultation with the Claimants and in breach of the Claimants' contractual entitlement to four weeks' notice of the termination of their current contracts with Southwest.
23. It would have been possible for Kare Plus to consult with the Claimants as to potential changes to their contracts of employment which it sought to meet the requirements of the ongoing business which it had decided to continue in the Bournemouth area. It is possible that there may have been economic, technical or organisational reasons as defined within the TUPE Regulations for dismissal of the Claimants if they had not been prepared to agree to the proposed changes to their contracts of employment but their existing contracts of employment would have required Kare Plus to have given them due notice of termination of their employment in those circumstances.
24. Therefore the Claimants' claims for unlawful deduction of wages, accrued holiday pay and damages for wrongful dismissal and, in the case of Mrs Davis, expenses, against Kare Plus succeed for these reasons. The Tribunal has made awards to the Claimants for those successful claims in the sums agreed by the parties as set out in its Judgment.
25. The Claimants also claim automatically unfair dismissal under s.104(1)(b) of the Act. The Claimants have to prove that they asserted a statutory right in good faith and that their assertion of it was the reason, or principal reason, for their dismissal if their claims are to succeed. There are obvious difficulties for them in doing so where they have resigned for what they considered to have been a fundamental breach of their contracts of employment by Kare Plus, that is, Kare Plus' failure to pay them wages on 30 November 2018 and Kare Plus' breach of the implied term of trust and confidence in their contracts of employment.
26. However, s.104 of the Act does not protect an employee who suffers an unlawful deduction of wages. This is because the protection provided by this section of the Act only applies if an employee has been dismissed because he or she has made an assertion of such an unlawful deduction. Furthermore any such assertion must be made prior to a dismissal. Mr John is also correct in his submission that an

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assertion of a statutory right needs to be in relation to the breach not for the breach itself. It is clear from the undisputed evidence placed before the Tribunal that the Claimants fall far short of establishing they were dismissed for asserting a statutory right. They resigned for a number of reasons which included Kare Plus' failure to pay wages due to them but, as already stated, that falls far short of the Claimants asserting a statutory right within the terms of the Act.

27. Mr John was also correct to accept that, on the evidence before the Tribunal, the Claimants would have had strong grounds for pursuing a claim for constructive dismissal if they had sufficient continuous service to have done so. The amended claim is an understandable, if unsustainable, attempt to relabel that claim to meet the requirements of s.104 of the Act. It does not do so and the claims of automatically unfair dismissal for asserting a statutory right are dismissed.

Employment Judge Craft

Date: 15 January 2020

Reasons sent to parties:16 January 2020

FOR THE TRIBUNAL OFFICE