Case Number: 3333553/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Daniel Selcraig	**v**	(1) Peterborough United Football Club; (2) Idverde Limited; (3) Sportsturf Maintenance Limited

Heard at: Cambridge **On**: 2 and 3 December 2019

Before: Employment Judge Tynan

Appearances

For the Claimant:	In person
For the First Respondent:	Ms Ibrahim, Counsel
For the Second Respondent:	Mr Perry, Counsel
For the Third Respondent:	Mr Moreton, Solicitor

JUDGMENT on PRELIMINARY HEARING

The Tribunal strikes out the claim in so far as it is brought against the second Respondent on the grounds that it has no reasonable prospect of success.

RESERVED REASONS

1. By a claim form presented to the Employment Tribunals on 29 September 2018, the Claimant brings claims against the Respondents for unfair dismissal, age discrimination and for a redundancy payment. The basis of his unfair dismissal complaints are broadly indicated in Section 8.1 of form ET1 in which the Claimant refers to,

> *"failure to TUPE transfer me from my old contractor Sportsturf to Idverde or Peterborough United after the contract was cancelled by the football club. I feel I have a legal right to have been transferred as part of a simple service provision change."*

2. The age discrimination complaint relates solely to the first Respondent.

3. It is not in dispute that there was a 'relevant transfer', as defined by Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), as between the second and third Respondents on or around 1 September 2018 when the second Respondent took over responsibility for the maintenance of the pitch at the first Respondent's football ground at London Road in Peterborough, together with its training grounds. The London Road pitch had been maintained by the third Respondent since 2007. There was some uncertainty on the part of the first Respondent whether the Claimant was claiming that his employment had transferred from the third Respondent to it as part of a two stage change of service provider, namely because he was contending that the first Respondent had briefly taken on responsibility for the maintenance of the pitch at the beginning of the 2018 / 2019 football season. Whilst this is alluded to at Section 8.1 of the Claimant's form ET1, no evidence to that effect emerged in the course of the Preliminary Hearing and the Claimant confirmed in his submissions that on the strength of the evidence that had been given at the Preliminary Hearing he accepted there had been a change of service provider directly from the third Respondent to the second Respondent such that he could not pursue a TUPE based claim against the first Respondent.

4. As between the Claimant and the second and third Respondents, the question I have to determine is whether the Claimant was assigned to the organised grouping of resources or employees that were subject to the relevant transfer, such that his employment transferred (or should have transferred) on or around 1 September 2018 from the third Respondent to the second Respondent.

5. The Claimant submitted an 18 page statement for the Preliminary Hearing. It addresses many of the issues in the proceedings and is not limited to the preliminary issue that I have to determine. He gave evidence at Tribunal as did Mr Robert Symns, Mr Steve Tingley and Mr Steven Moore respectively on behalf of the first, second and third Respondents.

6. In coming to a judgment on the preliminary issue, I have re-read all of their witness statements and my detailed notes of the evidence they gave at Tribunal. The Respondents' representatives had each prepared written submissions to which they spoke. I have re-read their submissions and have had careful regard to these even though I do not rehearse their submissions in this Judgment.

7. There was a joint agreed bundle of documents running to some 275 pages.

Preliminary Matter

8. At the outset of the hearing, I identified that I had worked with the third Respondent's representative Mr Moreton perhaps four years ago when I was a partner in the firm of Maclay Murray & Spens LLP. I was based in the firm's London office, whereas Mr Moreton worked in the firm's Scottish offices. We had participated in weekly departmental calls and I was privy to discussions regarding promotions and salary reviews across the whole department. I was not involved in Mr Moreton's appraisals or in managing him, though it is entirely possible that we may have exchanged views on legal issues from time to time in the course of our weekly departmental calls or during training sessions which were held by video conference across the offices. None of the parties raised any concerns in relation to me hearing the matter, but in any event, I am satisfied that the relatively limited nature of my interactions with Mr Moreton were such that there is no real risk of an appearance of bias.

Findings of Fact

9. The Claimant was employed by the third Respondent as a Head Groundsman. He commenced employment on 13 April 2016 and throughout his employment worked at Peterborough United Football Club (the "Club"). It seems that he was never issued with a contract of employment or a written statement of particulars of employment. As I set out later below, the contractual arrangements between an employer and an employee are not determinative of the issue of assignment under TUPE, though will ordinarily form part of the overall factual matrix.

10. I further note that there was also no formal contract in place between the Club and the third Respondent regarding the maintenance of the pitch at London Road. An email from Mr Symns dated 27 April 2007 provides a very high-level overview of the maintenance services that were to be provided by the third Respondent. It also confirms that the third Respondent agreed to continue to employ the then groundsman employed by the Club. The email is silent as to whether the groundsman was to be assigned exclusively to London Road or might work at other football or sports grounds maintained by the third Respondent. Likewise, the email does not address whether and, if so, in what circumstances the groundsman might be removed from working at London Road, whether at the first Respondent's instigation or to suit the needs of the third Respondent. I accept Mr Moore's evidence that the issue was never discussed. Given that the condition of the pitch at London Road might be thought a critical element in the Club's success, it is perhaps surprising that the contractual arrangements for the maintenance of the pitch merited such little attention.

11. I also accept Mr Moore's evidence (which in any event does not seem to have been challenged by the first or second Respondents) that its contract with the Club was terminated without notice. Although I was puzzled as to

why Mr Moore had written on 20 July 2018 that the Claimant *"comes under TUPE"* if the contract was said to have been terminated some weeks later without notice, having had the benefit of hearing Mr Moore's evidence at Tribunal, it is clear that legal and HR issues are not his forte. Whatever his reasons for referring to TUPE on 20 July 2018, I am content that it was not because he then understood that the third Respondent's contract to maintain the pitch at London Road was at imminent risk of being terminated such that there might be a relevant transfer under TUPE. In the course of his evidence, Mr Moore referred a number of times to a meeting on 31 August 2018 at which the Club's Chairman, Mr Fry, had expressed how upset he was that the third Respondent's contract was being brought to an end. I find that the Club terminated the contract without prior warning and that Mr Moore was genuinely surprised and upset to find that his company was effectively locked out of London Road on or around 29 August 2018. I can well understand why he viewed that as an ignominious end to an 11 year working relationship with the Club and why, having introduced the second Respondent to the first Respondent, he thought Mr Tingley may have acted dishonourably in the matter. The proximity in time between the Claimant's exclusion from London Road in June 2018 and the change in service provider inevitably gives rise to questions as to whether the timing of the Claimant's exclusion was coincidental or evidences an attempt by the first Respondent to circumvent TUPE. However, I accept Mr Symns' evidence that the second Respondent was not brought on board simply in order to avoid having the Claimant back at the ground. Instead, its decision to appoint the second Respondent coincided with Mr Moore having been unwell and having indicated that he was contemplating retiring. And, Mr Moore having introduced the Club to the second Respondent, the second Respondent had evidently established its credentials by successfully laying the Club's new pitch at London Road.

12. In deciding whether or not the Claimant was part of the organised grouping of resources or employees for the purposes of TUPE, I approach the correspondence after 29 August 2018 with a degree of caution. From that date, the parties were potentially in dispute as to whether or not the Claimant would transfer from the third Respondent to the second Respondent under TUPE. I am mindful that the correspondence between them after that date was to an extent self-serving in terms of the preliminary issue that I have to determine.

13. One of the difficulties in this case is that Mr Moore was evidently saying different things to the Claimant and to the Club. I can understand his predicament. He thought well of the Claimant and, in any event, was mindful throughout that the third Respondent had certain obligations to the Claimant as his employer. On the other hand, there was a commercial client to keep happy. Their respective interest could not be reconciled. In an email to the second Respondent's Chairman on 4 September 2018 (page 206 of the hearing bundle), Mr Moore maintained that the Claimant had merely been suspended at the request of the Club and placed on

'garden leave'. He claimed that the Club's Stadium Manager, Dawn Brittain had banned the Claimant from the ground but that if this ban was,

> *"found to be unfair or inaccurate, we would then have asked for his reinstatement. We were in this process when without notice Sportsturf were dismissed from their long term, full time contract."*

14. I find that this does not accurately reflect the position prior 29 August 2018. Instead I find that there was no expectation on Mr Moore's part that the Claimant would return to London Road, but instead that he had accepted some weeks earlier that the Claimant would not be returning to the ground, even if he thought that the Club, and Ms Brittain in particular, had acted unjustly in requesting the Claimant's removal. Over the summer months of June, July and August 2018, the issue that Mr Moore was grappling with was not how to secure the Claimant's return to London Road, it was what the third Respondent was supposed to do with the Claimant, in particular whether it could realistically continue to employ him, in circumstances where he had been permanently excluded from its contract with the Club. The available documentary evidence from summer 2018 supports this conclusion. For example, on 29 May 2018, Mr Symns sent a very short letter to Mr Moore stating,

> *"I therefore agree* [Mr Selcraig] *should not return to the stadium for season 18 / 19 in the interests of both parties".*

Mr Symns' intentions and expectations could not have been clearer and, as I shall return to, he reiterated the first Respondent's position on 20 July 2018 when, at Mr Moore's instigation, he wrote,

> *"Unfortunately, we are still of the opinion that Daniel should be removed permanently from his position and* [no] *longer work at the Club or on your behalf. Could you please arrange a permanent replacement as a matter of the upmost urgency?"*
>
> (page 158 of the hearing bundle)

15. It was not, of course, ultimately a matter for the Club to determine whether or not the Claimant was assigned to the organised grouping of resources or employees that were subject to the relevant transfer. This is something Mr Symns accepted in his evidence. Be that as it may, Mr Moore accepted in the course of his evidence at Tribunal that the first Respondent had the right *"to bar"* the third Respondent's staff from the contract *"if there was a problem"*. He went on to say,

> *"I didn't agree to it, but that was what he [Mr Symn] decided to do. I don't think it's the way to behave".*

16. Mr Moore may have thought that the Club was behaving badly in the matter, but I find that he ultimately acquiesced in their decision even if he did not agree with it. His evidence at Tribunal was that,

"It looked like he wouldn't go back"

and

"I would have dismissed him earlier if he hadn't raised grievances".

17. Mr Moore also accepted that following receipt of an email from Ms Brittain on 20 July 2018 in which she had stated that the Claimant was *"not to come back on site"*, (page 156 of the hearing bundle), he had not responded to say that any decision should await the outcome of any internal investigation process.

18. In her cross examination of Mr Moore, Ms Ibrahim suggested on behalf of the first Respondent that the process followed by the second Respondent in relation to the Claimant was essentially a sham, in that the evidence suggests that Mr Moore was working closely with the Claimant to create a paper trail that might support the Claimant's dismissal on the grounds of 'some other substantial reason', namely an irretrievable breakdown in the working relationship with the client. Whilst Ms Ibrahim's line of questioning was entirely legitimate, I am mindful not to intrude into the substantive issue of the fairness or otherwise of the dismissal, which will be a question for the Judge at the Full Merits Hearing. In terms of the preliminary issue I have to determine I think it is sufficient that I record here that in the course of this exchange Mr Moore's evidence was,

"I felt there was no chance he would be reinstated".

19. That is not the only evidence that Mr Moore accepted that the Claimant would not be returning to London Road. As I say, he procured Mr Symns' letter of 20 July 2018 and at a meeting some weeks earlier with the Claimant on 18 June 2018, the minutes of which are at page 119 of the hearing bundle, Mr Moore informed the Claimant,

"The CEO [Mr Symns] *made it quite clear they would not allow Daniel to return to their ground and the entry locks had been altered so that he could not gain access".*

20. In the circumstances the Claimant was mistaken in his recollection when he said at Tribunal that it had never been put to him that he would not be going back to London Road.

21. On 20 July 2018, Mr Moore emailed Ms Brittain and wrote,

"He knows he is not returning".

22. Mr Moore emailed Ms Brittain again on 9 August 2018, when he wrote,

"Daniel has pointed out that it is abusive and very insensitive seeing he was removed from site on 9 June 2018…"

This comment is relevant in so far as it evidences that Mr Moore relayed his understanding that the Claimant also believed he had been *"removed"* rather than simply suspended pending a negotiated return.

23. Putting aside that Mr Moore had procured Mr Symns' letter of 20 July 2018, there was apparently no further correspondence between Mr Moore and the Club following its letter of 20 July 2018. In my judgment that evidences that both parties then regarded the matter as closed even if Mr Moore subsequently sought to re-open the matter in early September following the third Respondent's loss of its contract with the Club. Mr Symns' evidence, which I accept, is that as far as he was concerned the letter of 20 July 2018 was the end of the matter.

24. Finally, there is further support for this conclusion in so far as Mr Tingley was told, as I find, by Mr Moore on 18 April 2018 on a visit to the Club, that the Claimant would no longer be at the Club when the second Respondent laid the new pitch that summer.

Law and Conclusions

25. Regulation 4(1) of TUPE provides:

> (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 organised 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.

26. Regulation 4(3) of TUPE further clarifies that:

> (3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

27. In their various submissions, the representatives referred me to two decisions of the Employment Appeal Tribunal in

Robert Sage Limited (t/a Prestige Nursing Care Limited) v O'Connell and Others [2014] IRLR 428; and

Jakowlew v Nestor Prime Care Services Limited (t/a Saga Care) and Another [2015] IRLR 813.

28. In Robert Sage, Mrs Truman one of the Respondents to the appeal, was determined not to have been assigned to the grouping of employees,

subject to the transfer. Whereas in Jakowlew, Mrs Jakowlew was assigned and did transfer. The parties' submissions were focused on whether the facts in this case brought it within the ambit of Robert Sage or Jakowlew.

29. In Robert Sage the Employment Appeal Tribunal confirmed that whilst the terms of the contract under which an employee is employed at the material time, are relevant in determining whether he or she is assigned to a part of the business transferred, the question is primarily to be answered by deciding where the employee would be required to work immediately before the transfer, (see paragraph 52 of Mrs Justice Slade's DBE's Judgment).

30. Robert Sage was distinguished on its facts in Jakowlew. At paragraph 23 of his Judgment in Jakowlew his Honour Judge Richardson said,

> *"What is the position where, as here, a third party instructs an employer to remove an employee from working upon particular activities? Does it follow that the employee immediately ceases to be assigned to the organised grouping of employees carrying out those activities irrespective of the employer's stance? I do not think it does. I do not think that the unilateral instruction of a third party in itself has that affect. It is the employer, or those whom the employer has authorised, to decide what grouping of workers an employee is assigned."*

31. In my judgment, given my findings above, this case falls within the ambit of the Judgment in Robert Sage. Mr Moore may have thought that the first Respondent's decision that the Claimant should be removed from the contract was harsh and unjust, but he acquiesced in that decision. Indeed, he procured a letter from the first Respondent on 20 July 2018 that made clear the Claimant would not be permitted to return to work at the Club and, having done so, unsurprisingly he did not challenge that decision, that is until early September after he learned that the third Respondent had lost its contract with the first Respondent. As His Honour Judge Richardson made clear in Jakowlew, it is the employer who decides to what grouping of workers an employee is assigned. Mr Moore may have been grappling with what to do with the Claimant, a situation that was complicated by his grievances, but in my judgment, by no later than 20 July 2018, he had removed the Claimant from the group of workers who looked after the pitch at London Road even if he believed, or had been advised, that he could not put in place permanent alternative arrangements. Whether or not Mr Moore had resolved to dismiss the Claimant, the Claimant was no longer assigned to the organised grouping of resources or employees because the third Respondent would no longer have required him to work within that group if his absence had not been excused at that time. In spite of the position taken by Mr Moore after 29 August 2018, immediately prior to the relevant transfer Mr Moore was not protesting the first Respondent's instruction in relation to the Claimant or seeking to change its viewpoint. As he said at Tribunal,

"I felt there was no chance he would be reinstated".

32. Given that immediately before the transfer the Claimant was not assigned to the organised grouping of resources or employees that was subject to a relevant transfer, it follows that the Claimant's contract of employment did not have affect after the transfer as if originally made between himself and the second Respondent, and further that the third Respondent's rights, powers, duties and liabilities under or in connection with his contract of employment did not transfer by virtue of Regulation 4 of TUPE to the second Respondent.

33. In these circumstances the claim against the second Respondent has no reasonable prospect of success and I shall therefore strike it out under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

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Employment Judge Tynan

Date: …20/01/2020…….

Sent to the parties on: 31/01/2020

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For the Tribunal Office