



EMPLOYMENT TRIBUNALS

Claimant: Ms F Rostron

Respondent: (R1) Disability Derbyshire Coalition for
Inclusive Living Limited
(R2) Paypacket Limited

Heard at: Nottingham

On: Monday 3, Tuesday 4 and Wednesday 5 February 2020

Before: Employment Judge M Butler (sitting alone)

Representatives

Claimant: Mr M Rudd of Counsel

Respondent: Mr D Maxwell of Counsel

RESERVED JUDGMENT

The judgment of the Employment Tribunal Judge is that the Claimant's employment did not transfer to the Respondent from Disability Derbyshire Coalition for Inclusive Living Limited pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006, as amended.

REASONS

The claim

1. By a claim form submitted on 13 August 2018, the Claimant was one of a number of Claimants who brought claims against a number of Respondents arising out of the financial failure of Disability Derbyshire Coalition for Inclusive Living Limited (DDCIL) in around March 2018. The Claimant had worked for DDCIL from 19 September 2011 and, at the time her employment ceased, she was Senior Direct Payments and Support Planning Adviser. Briefly, the claim is that, as a result of DDCIL's financial failure, its business was transferred to the Respondent and, in particular, the Claimant's duties were taken over by the Respondent such that the TUPE Regulations applied. Accordingly, the Claimant alleged she had been automatically unfairly dismissed by reason of the transfer and claimed a redundancy payment, notice pay, holiday pay and outstanding wages. She also included a claim for payments in respect of time off in lieu. The Respondent denies there was a TUPE transfer or that it has any legal obligations to the Claimant.

The issues

2. The issue is a relatively straightforward one. It is whether the events which occurred from around November 2017 and then extended beyond March 2018 constituted a service provision change in accordance with the TUPE Regulations.

The law

3. Regulation 3 of TUPE provides at 3(1)(b)(iii) that a service provision change is a situation in which “activities ceased to be carried out by a contractor or a subsequent 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 the client on his own behalf and in which the conditions set out in paragraph (iii) are satisfied.

4. Regulation 3(iii) lists those conditions as -

(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

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client’s use.

5. I have considered the decision in **Metropolitan Resources Limited v Churchill Dulwich Limited and Others** [2009] ICR 1380 which acknowledges that in determining whether there has been a service provision change Tribunals will “inevitably be faced... with arguments that the activities carried by the alleged transferee are not identical to the activities carried on by the alleged transferor...”. It also provides that “a common sense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided... The Tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it”.

6. I have also considered the decision of the EAT in **Swanbridge Hire and Sales Limited v Butler** [2013] UK EAT/0056/13/BA which effectively held that there will not be a service provision change where the client intends the activities will be carried out in connection with a single specific event or task of short term duration.

The evidence

7. There was an agreed bundle of documents consisting of 598 pages and references to page numbers in this judgment are to page numbers in the bundle.

8. I heard oral evidence from the Claimant and for the Respondent from Ms Camille Pace, Service Manager within Adult Care and Mr Collin Selbie, Group Manager (Contracts and Compliance) within Adult Care. All of the witnesses provided witness statements, gave oral evidence and were cross-examined.

The factual background

9. It was not in dispute between the parties that the Respondent awarded a grant to DDCIL of £235,000 per annum in return for DDCIL providing services to the Respondent's vulnerable clients under a service level agreement (page 241). Early in 2018, the Respondent became aware that DDCIL was in financial difficulty and failed to provide evidence of its solvency to the Respondent when requested to do so. The Claimant became fully aware that DDCIL could not pay its debts in March 2018 and that company was locked out of its premises by the landlord when it failed to renew its lease in April 2018.

10. The Claimant said that in around November 2017 the Respondent set up a team of six Community Social Workers under the leadership of Ms Pace which began to undertake some of the duties of DDCIL resulting in a lack of referrals to it from the Respondent. The Respondent would refer clients to DDCIL for the purposes of giving assistance on employing personal assistants, employment law, sourcing particular services as needed and to assist clients in managing their payments so as not to over spend or under spend and to make representations to the Respondent if the payments were insufficient to meet the client's needs.

11. It is the Respondent's argument that the team set up in November 2017 comprised 6 members engaged on 2 year fixed term contracts whose principal focus was to migrate clients from a direct payment scheme to a prepaid account scheme. This had the benefit of reducing the burden on the clients of producing bank statements to the Respondent every month and meant the Respondent could monitor the clients' spending more effectively.

12. Referring to paragraph 23 of the witness statement of Ms Pace, the Claimant gave evidence that she was involved in many of the activities set out in the bullet points. She was clear in her evidence as to which of the activities she carried out, with which she was involved very little or which she rarely undertook. However, under cross-examination, it was clear that the Claimant was not involved in these activities to the extent her evidence suggested.

13. In particular, the Claimant said she was involved in creating support plans working as a team with the Respondent. In fact, under cross-examination, she accepted that the creation of support and care plans was a statutory function of the Respondent. Referred to page 99, she accepted that she did not have access to the care and support plans completed by the Respondent through its social and community workers and which was maintained on the Respondent's Mosaic electronic system. Whilst the Claimant said she had a similar form she would fill in, Ms Pace's evidence was that such documents created by third parties were uploaded to the system and might be taken into account in

assessing a client and making a decision on the level of funding required.

14. The Claimant also said she was involved in brokerage services which involved sourcing services clients needed. She would also be involved in effectively challenging the amount of a client's payment by the Respondent if it was considered it was inadequate to fund the level of service a client required. Ms Pace gave evidence that she herself used the Respondent's own brokerage services team and was personally unaware that the Claimant provided this service.

15. The Claimant confirmed that it was the Respondent who decided whether there was a need for a direct payment to a client. She did not assess or authorise payments and was not involved in the decision.

16. The Claimant's evidence was that she and others at DDCIL were involved in assessments, support plans, budget and the brokerage of services. I found the reality to be somewhat different and the Claimant did ultimately agree that she was not directly involved in fulfilling the Respondent's statutory duty under the Care Act 2014.

17. In relation to Ms Pace's team taking over the work of DDCIL from November 2017, I found absolutely no evidence to support this. The Claimant stated that referrals from the Respondent began to decline after the setting up of the prepaid accounts team. Ms Pace confirmed that other third parties were used from around January 2018 onwards for such referrals due to the trustees of DDCIL apparently being unable to provide the financial reassurance required by the Respondent. The Claimant was taken through a long list of e-mails of which Ms Pace was often a party showing the very significant endeavours she made to source alternative third party providers to assist clients who were, in common parlance, left in the lurch by the ultimate failure of DDCIL. The Claimant could offer no evidence to argue that this was a situation forced on the Respondent through circumstances beyond its control. I did not find the Claimant's evidence to be in any way dishonest. However, I did find much of it to be unintentionally misleading and based on assumptions which could not be supported by any evidence at all.

18. In contrast, the evidence of Ms Pace was given in a concise, straightforward manner, without any hint of prevarication and entirely supported by documentary evidence. In particular, she explained that the Respondent, effectively following its own protocol, would not become engaged in employment matters or the recruitment of personal assistants for its clients. The essential reason for this was to give clients some ownership of their own affairs, distinct from the Respondent, and this was an area in which referrals were made to DDCIL.

19. Ms Pace confirmed there had been no reduction in the number of referrals made to DDCIL up to the time it got into financial difficulties. In fact, she said there was actually a waiting list of referrals for people who wanted advice on employing others. The team created in November 2017 was at no time engaged in employment related support. She accepted that some Social Workers might help with filling in forms as did the Claimant, but clients with difficulties regarding the employment of personal assistants would be referred to DDCIL and Social Workers would not help with HMRC documents.

When DDCIL collapsed, Ms Pace said duties fell to the Respondent under the Care Act and this included the functions carried out by DDCIL. In March 2018, the Respondent began to identify other providers and the tender process took rather longer than was anticipated.

20. Ms Pace's team had to deal with issues involving shortfalls of money when DDCIL failed. They needed to ensure that clients had the necessary funds to pay their personal assistants. The additional work they carried out was mainly identifying what DDCIL were helping clients with and, in this regard, they had to deal with very many phone calls and items of correspondence. The function of the team did not overlap with the functions of DDCIL.

21. Mr Selbie's evidence was largely in relation to the demise of DDCIL and its relationship with the Respondent. He confirmed that the Respondent at no time intended to bring the kind of support DDCIL offered to clients in-house. It was always seen as a completely independent activity.

22. I have recorded my concerns about the Claimant's evidence. In contrast, I found the evidence of Ms Pace and, where relevant Mr Selbie, to be entirely credible and convincing. Accordingly, where there was a dispute in relation to the facts, I preferred the evidence of the Respondent's witnesses.

Findings of fact

23. In relation to the issues, I find the following facts:-

(i) the Respondent made a grant of £235,000 per annum to DDCIL to provide services for and on behalf of vulnerable clients within the Respondent's jurisdiction;

(ii) the Respondent had a statutory duty to these clients under the Care Act 2014. It alone assessed the needs and requirements of its clients and made decisions as to the financial payments to be made to those clients. Neither DDCIL nor the Claimant was involved in the decision making process regarding these payments. It did assist clients in filling in forms and could make representations to the Respondent if the level of payment was considered to be inadequate. It did offer brokerage services, as did the Respondent, but the level of such services was not supported with any direct evidence.

(iii) the team set up by Ms Pace in November 2017 was staffed by temporary employees on fixed term contracts with the objective of migrating clients from direct payment to prepaid accounts thereby reducing the administrative burdens placed on both clients and the Respondent. When DDCIL failed, that team was engaged in a level of firefighting when faced with queries from clients concerned about paying the salaries of personal assistants and other employment matters and recruitment which were previously undertaken by DDCIL. The work of the team did not involve carrying out duties previously undertaken by DDCIL. It consisted of assisting clients by referring them to third party organisations which could undertake them. Neither in the short term nor the long term did the Respondent undertake duties previously carried out by DDCIL.

Submissions

24. For the Respondent, Mr Maxwell referred to his skeleton argument and in essence argued that for the purposes of Regulation 3 of TUPE the activities carried out by DDCIL did not cease and then be carried out by the Respondent. There was no significant overlap between the Respondent's statutory obligations under the Care Act 2014 which it retained from 2015 onwards and what DDCIL actually did. The Respondent's statutory duty was to make an assessment and a decision on funding whereas the Claimant assisted in filling in forms which was quite separate and distinct from the Respondent's obligations. To succeed, the Claimant must show there had been a movement of the service provided by DDCIL in-house to the Respondent. This did not happen in this case. Ms Pace was adamant that the relevant work did not move in-house to the Respondent. The Respondent had never intended to carry out those activities itself and had been very clear it would not do so. It was irrelevant that it could have done.

25. For the Claimant, Mr Rudd said that the relevant activities were obliged to be carried out by the Respondent when DDCIL ceased trading. The Claimant's case was that once DDCIL failed the Respondent carried out those activities by awarding spot contracts to third parties. The direct payments team under the leadership of Ms Pace took over the activities carried out by DDCIL and the Respondent simply chose to outsource them.

Conclusions

26. The findings of fact in this case effectively speak for themselves. I find there is no evidence to support the Claimant's contention that the direct payments team set up in November 2017 ever engaged in work undertaken by DDCIL or the Claimant between then and the failure of DDCIL. Moreover, it did not undertake those duties after the failure of DDCIL.

27. The Respondent has a statutory duty under the Care Act 2014 to assess and make payments to vulnerable members of its society. It did this by outsourcing certain functions to third parties including DDCIL. That organisation, a registered charity limited by guarantee, provided direct payment support services to the Respondent's clients to whom funds were paid so that they could manage their own care. The Respondent deliberately avoided being involved in recruitment and employment of personal assistants for clients. It did this to give those clients some ownership of their own affairs. At no time was it ever engaged in recruitment or employment issues. I find no merit in the argument that there was a service provision change when, after the failure of DDCIL, the Respondent took the service it had provided back in-house and managed it through the auspices of spot contracts with other third party providers. This was an emergency situation in which the Respondent was faced with a significant number of urgent matters to be dealt with on behalf of its vulnerable clients. The evidence in the bundle is clear that it made very significant efforts to arrange support, not with its own employees, but with other independent third parties.

28. For the purposes of Regulation 3 I find that there was no intention on the part of the Respondent that the activities previously carried out by DDCIL were to be carried out by the Respondent. Even if it were the case that there was such an intention, it would have been in connection with a single specific event, namely, the financial failure of DDCIL

Further, it would have been intended to be of short term duration and, although a new supplier of the services was not in place until July 2019, this has to be viewed in the context of the administration of tenders by local authorities and county councils. To put it lightly, there is much red tape to be cut in organising a tender.

29. In the event, I find there was no service provision change in this case for the purposes of Regulation 3 of TUPE. I have considered the oral and written evidence of the parties in detail. I have taken account of the conflicting views as to what actually happened as presented by the Claimant and the Respondent. It is clear to me, that although unintentionally so, the Claimant's evidence is inaccurate and in part based on conjecture and assumption. The reality of the situation, I find, is that the Respondent's version of events is far more credible than that of the Claimant. It is supported by documentary evidence particularly in regard to the efforts made to source services for its clients after the demise of DDCIL. In this regard, the Respondent can be grateful for the very clear, concise and convincing evidence of Ms Pace.

30. In this case, there were also two further issues to be resolved by the Tribunal. The first relates to time limits and whether the Claimant's claim was presented in time. The second relates to the Claimant's application to amend her claim to include a claim for reimbursement of course fees. It was agreed by the parties at the commencement of this Hearing that these matters would fall away if I found there was no service provision change. Since that is what I have done, there is no need to consider those matters further.

Employment Judge M Butler

Date 7 February 2020

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.