

Case Numbers: 3335380/2018, 3300069/2019, 1306116/2018
3300429/2019, 2200092/2019, 3300285/2019, 3335090/2018
3335396/2018, 3300338/2019, 3300337/2019, 3335556/2018
3335603/2018, 2200270/2019 and 3310968/2019



EMPLOYMENT TRIBUNALS

Claimants

1. Mr E Bellot
2. Mr M Corcoran
3. Mr W Corcoran
4. Mr Shaw
5. Mr D Owen
6. Mr S Thompson
7. Mr W Chandler
8. Mr D Dyer
9. Mr D Lloyd

v

Respondents

- (R1) Ace Waste Haulage Limited
(R2) X-Bert Haulage Limited
(R3) Secretary of State

PRELIMINARY HEARING

Heard at: Watford

On: 18-20 November 2019

Before: Employment Judge **Palmer**

Appearances:

For the Claimant:

1. Mrs Bellot
2. In person
3. In person
4. In person
5. C Owen, Representative
6. Ms T Grant, Solicitor
7. In person
8. In person
9. Mr S Eckett

For the Respondents:

- R1 – Not present, not represented
R2 - Mr Blackwood, Counsel
R3 – Mr Soni, Representative

RESERVED JUDGMENT

1. There was no transfer of the business or part of the business of the first respondent to the second respondent under Regulation 3(1)(a) of TUPE.

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2. There was no service provision change from the first to the second respondent under Regulation 3(1)(b) of TUPE.

Reasons

The claims and issues

1. There are nine claimants all of whom were made redundant from the First Respondent (Ace) (R1) on 31 July 2018. R1 is now insolvent, the liquidators having been appointed on 11 October 2018 (128). X-Bert Haulage Ltd (R2) is a continuing business. The claimants are all claiming redundancy payments from the Secretary of State (R3) with some also claiming notice and holiday pay.
2. This Preliminary hearing is only concerned with the issue of whether or not there was a relevant transfer of the business or part of the business of the first respondent to the second respondent within the Regulation 3(1) of TUPE and also whether there was a service provision change within the meaning of Regulation 3(1)(b) of TUPE. This issue was set out by Regional Employment Judge Byrne at the Preliminary Hearing on 21 June 2019. If there was no transfer, the redundancy payments will be made by the Secretary of State. All other claims are stayed.
3. The claimants and the Second Respondent (R2) argued that there had been no transfer either in whole or part, so that the Secretary of State (R3) was liable for the redundancy payments.
4. The third Respondent, the Secretary of State, argues that there was a transfer under Regulation 3(1)(a) Transfer of Undertaking (Protection of Employment) Regulations 2006 (TUPE). He did not pursue his argument that there was a service provision change.
5. The issues are:
 - 5.1 Whether there was a stable economic entity,
 - 5.2 Whether there was a transfer of that entity,
 - 5.3 Whether the economic entity retained its identity.

The evidence

6. There were two lever arch files of documents but only a few of these were relevant. The parties identified the relevant documents and I read those to which I was referred but not the remainder of the bundle. Relevant page numbers are in brackets.

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7. There were witness statements from the following claimants, the contents of which were accepted by the respondents except the Secretary of State did not accept statements that there had not been a transfer. R2 did not accept the quantum claimed by the claimants.
 - 7.1 Mr Bellot, who gave supplementary evidence
 - 7.2 Mr M Corcoran
 - 7.3 Mr Lloyd
 - 7.4 Mr Shaw
 - 7.5 Mr Thomson
 - 7.6 Mr Dyer
 - 7.7 Mr Owen
 - 7.8 Mr W Corcoran
 - 7.9 Mr Chandler
8. Mr Glynn, Director of R2, gave evidence for the second respondent.
9. The third respondent did not call any witnesses.
10. The respondents and some of the represented claimants, including Mr Lloyd, Mr Bellot and Mr Thomson, provided written submissions. The other claimants were given the opportunity to give evidence and/or provide written or oral submissions but did not want to do so.

The facts

11. There was no dispute that all the claimants were made redundant on 31 July 2018. They were given notice on 27 July (282). There was no consultation with employees, though this is not a critical factor. The employees were all given a P45. About 30-32 employees were made redundant. The exact number was not known. 15 of these applied to R3 for redundancy pay. Of the ten original claimants, seven employees moved to work for R2. R1 and R2 worked at Neasden Goods Yard. There was also a skip hire company, Simpson Eco Skips Ltd, which worked at the same yard with R1 but the parties agree it was of little relevance to the question of whether there was a transfer.
12. ReSolve were appointed as Joint Liquidators of Ace (R1) on 11 October 2018 (129-130). The Liquidators' letter to the claimants said that their service was terminated on 31 July and redundancy (and other) pay would be paid by the Redundancy Payments Service (RPS) (96).

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13. Form RP14 (information from Insolvency Practitioner) (127-128) stated that there were 30 employees and that they did not anticipate there was likely to be a transfer.

The claimants' circumstances

14. There was no dispute that the claimants who were subsequently employed by R2 took the initiative individually to ask R2, who worked in the same yard, if there was a job available. Most commenced work with R2 on 1 August 2018. Mr Thomson started work with R2 on 21 September 2018. Mr Chandler and Mr Lloyd were not employed by R2. The employees who moved to R2 all had a probation period of about 3 months and different terms and conditions than they had at R1. In the main, they worked for different customers to R1.
15. **Mr M Corcoran** was a skip driver who worked for R1 from 3 April 2006. He started work for R2 on 1 August. On Form RP19 Mr Corcoran said that he had enquired about the job with R2 and that although the job was the same, his pay, hours, holiday entitlement were not. He was not using the same machinery or dealing with any or all of the same customers (162).
16. **Mr Bellot** was a skip driver (192) who worked for R1 from 20 July 2003 until 31 July 2018. He was employed as a skip driver by R2 on 1 August 2018. His job was not the same and he drove a different vehicle (158).
17. **Mr Lloyd** used to work for Simpsons Transport as a Yard Operative but transferred to R1 on 19 July 2003. He drove a 360 degree excavator vehicle and sorted out the metals that arrived into the depot. He has not worked since his redundancy.
18. **Mr Shaw** was an HGV driver who had worked for R1 from 20 July 2011. He started with R2 on 1 August. His role was the same but he was not dealing with the same customers and his terms and conditions had changed (178).
19. **Mr Thomson** worked for R1 from the date his previous company went into liquidation in 2008, when he was transferred under TUPE. He was employed as a haulage driver. After being made redundant he applied for a number of jobs and then enquired at R2 and was offered a job there which started on 21 September 2018. He said the job was the same but with different machinery and different customers.
20. **Mr Dyer** worked for R1 from 31 June 2011 as a lorry driver. He removed rubbish to land fill sites. He started working for R2 on 1 August.
21. **Mr Owen** started working for R1 on 1 June 2009 as a HGV driver. He applied for a job with R2 when he heard a rumour that R1 was in financial trouble. He started working for R2 on 1 August 2018.

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22. **Mr W Corcoran** was an HGV driver and worked for R1 from 19 June 2006 until 31 July 2018. When he received notice of redundancy he started looking for work with other skip companies and was offered work with R2, where he started on 1 August 2018. He said his job remained the same but with different machinery and customers (165, 225).
23. **Mr Chandler** worked for Leisure Notice Ltd, as an office administrator (then weighbridge operator), from April 2005 until the company was taken over by R1. After being made redundant Mr Chandler became a self-employed skip driver working for himself (206).
24. There was no discussion between R1 and R2 about the redundant employees working for R2. Redundant employees, who ended up working for R2 (about thirteen out of thirty of the redundant employees), made their own individual approach to R2 seeking work. There was no collective approach, only individual. At the time R2 was expanding and as it was difficult to find good drivers, all those who approached them for work were taken on. Initially, they helped with the removal of waste for R1, but this was only for about two months.

Ace (R1)

25. Ace Waste Haulage Limited (R1) operated a haulage business which employed HGV/skip drivers to deliver and collect skips and would also tip the waste, which would then be sorted, some being recycled. It was not a skip hire business itself. R1 worked with Simpson Eco Skips Ltd, a skip hire business which also traded from R1's address, Neasden Goods Yard.
26. On 14 August 2018 there was a report from the Environment Agency setting out non-compliance matters (46-50). There were pictures of waste piles which were almost as high as the roof in places. The report stated that the combustible waste was not stored in compliance with fire prevention guidelines and that the company must take immediate action to rectify any non-compliance and prevent repetition. The action required was to remove combustible waste from the site or utilise the space inside the site to store the combustible wastes in line with the maximum pile sizes. R1 also had to document the procedures to be used to prevent any future failings in waste stockpiling.
27. R1 did not have the money to remove the waste which is why the agreement was reached that R2 carry out the waste removal in exchange for trucks and other equipment belonging to R1. It was a one-off agreement.

X-Bert (R2)

28. R2 was a waste recycling business. It provided skips to builders, collected the full skips and disposed of the waste. It employed over 100 employees and at the time of the redundancies was expanding its business. Their business was largely based in the West End where there are stricter emission controls limiting the type of truck that could enter central London.

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Simpson Eco Skips Ltd

29. Simpson ECO Skips Ltd was a skip hire business located at Neasden Goods Yard. It had about 300 skips out on hire as at 23 July 2018.

Agreements between R1 and R2 and Simpsons and R2

30. R1 approached R2 asking if R2 would clear their yard of waste as they did not have the money. Mr Glynn said it would cost about £350,000 and R1 asked R2 if they would clear the yard in exchange for R1's plant and assets, estimated to be worth the same value. This meant no money was paid.
31. I accept Mr Glynn's evidence that he did this as he thought there may be some profit in it and it was not done to acquire the business. He said that he would not touch the business as it had a poor reputation particularly after a fatality and the Environmental report. In an email of 12 July 2018 Mr Glynn said that R2 agreed to clear the site of all waste at Neasden Goods yard for R1. In return, Ace agreed to pay them with their assets and phone numbers. The assets included skip lorries, tippers, excavators etc (8-9).
32. On 23 July 2018 R1 and R2 entered into an agreement for R2 to purchase a number of its assets, including twelve skip lorries, excavators and loading shovels (38-39). In consideration for that, R2 agreed to remove approximately 3,000 tonnes of controlled waste from the R1's premises. There was no other sale or other acquisition of the business, goodwill or any contracts.
33. The agreement said:
- ‘The parties acknowledge and agree that this agreement does not constitute a sale and purchase of the goodwill of the Seller's business and that it relates only to the sale and purchase of the Assets and that no employees are affected by this agreement’.
34. Attached were schedules setting out the value of the waste clearance, details of the equipment including eight trucks and other assets.
35. There was a second agreement made on 23 July 2018 between R2 and Simpson Eco Skips Ltd, that R2 would collect the skips currently out on hire and Simpson Eco Skips Ltd would transfer the skips, its customer records and telephone numbers to the Second Respondent (36-37). The transaction did not include any sale or other acquisition of the business, goodwill or any contracts. The agreement said that it did not constitute a sale and purchase of the goodwill of the Simpson's business and that it related only to the transfer of the Assets and that no employees were affected by this agreement.
36. The agreement was signed by Jack Lloyd for Simpsons and Mr Glynn for X-Bert.
37. This was also a one-off agreement which would not be continued after the agreement had been implemented.

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38. R2's business was primarily in the West End and the trucks they bought from R1 were not suitable for Central London because of their emissions. R2 did use them locally until they could be replaced.
39. I accept Mr Glynn's evidence that he did not want to acquire the goodwill or name of R2 as he considered they had a poor reputation and so it would damage R2's reputation. He picked up only about five of R1's local customers as R2 mainly serviced West End construction firms.

Transfer of business

40. R3 argued that in fact R1 was a skip hire and waste disposal organisation which was exactly the same as the work done by R2. This was based on R1's letterhead which referred to both (282) and some google searches.
41. I find that, based on the evidence from Mr Glynn, R1 was not a skip hire business so it was not exactly the same as R2's. Skip hire was done by Simpson. Some phone lines were transferred but not customer records, goodwill, other contracts, books, records.
42. R1's lease had run out at about this time, so there was no lease to transfer.
43. Although R2 did pick up some business from the closure of R1, this was to be expected as they were in the neighbouring yard. This could not be measured by R2 as it coincided with the closure of another competing business. It was not a situation whereby R2 took over all or most of R1's business, which was not, in any event, a viable going concern by July 2018.

Liquidation

44. R1 formally became insolvent on 11 October 2018. It was a Creditors Voluntary Liquidation. Form RP14 (127) said that there were about 30 employees. To the questions 'Has there been, or do you anticipate that there is likely to be, a transfer, the liquidator said 'No'.
45. On 18 October 2018 the liquidator (Resolve) wrote to the employees confirming that their service was terminated on 31 July 2018 and that outstanding payments including redundancy pay would be paid by the Redundancy Payments Service (96).

The law

46. Regulation 3(1)(a) of TUPE regulations 2006 provides:

“A relevant transfer

3.—(1) These Regulations apply to—

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(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

(2) In this regulation “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.”

47. The relevant authority, as agreed by the parties, is *Cheesman and others v R. Brewer Contracts Ltd (2001) IRLR 144*.
48. The following principles apply as to whether there is an undertaking:
- (i) As to whether there is an undertaking, there needs to be found a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective;
 - (ii) In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible;
 - (iii) An organised grouping of wage-earners who are specifically and permanently assigned to a common task may in the absence of other factors of production, amount to an economic entity;
 - (iv) An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it;
49. As for whether there has been a transfer the following principles apply:-
- (i) As to whether there is any relevant sense a transfer, the decisive criterion for establishing the existence of a transfer is whether the entity in question retains its identity, as indicated, inter alia, by the fact that its operation is actually continued or resumed;
 - (ii) In a labour intensive sector it is to be recognised that an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity.
 - (iii) In considering whether the conditions for existence of a transfer are met it is necessary to consider all the factors characterising the transaction in

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question but each is a single factor and none is to be considered in isolation. However, whilst no authority so holds, it may, presumably, not be an error of law to consider "the decisive criterion" in (i) above in isolation; that, surely, is an aspect of its being "decisive", although, as one sees from the "inter alia" in (i) above, "the decisive criterion" is not itself said to depend on a single factor;

- (iv) Amongst the matters thus falling for consideration are the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended;
- (v) In determining whether or not there has been a transfer, account has to be taken, inter alia, of the type of undertaking or business in issue, and the degree of importance to be attached to the several criteria will necessarily vary according to the activity carried on.
- (vi) Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets.
- (vii) Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not preclude a transfer.
- (viii) Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer.
- (ix) More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor.
- (x) The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship.
- (xi) When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.
- (xii) The fact that the work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a

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gap between the end of the work by one sub-contractor and the start by the successor.

50. The question of whether or not there was a stable economic entity is separate from whether or not there was a relevant transfer. It is important to know what the relevant entity is before deciding whether it has been transferred.
51. In deciding whether there has been a transfer of an undertaking, the critical question is whether the undertaking retains its identity which is carried on by the transferee. The transfer of an undertaking must involve the transfer of a 'stable economic entity' though an activity, in itself, does not constitute an entity.
52. All factual circumstances must be considered which include: the type of undertaking, whether tangible assets are transferred and their value, whether the majority of employees are taken on by the transferee, whether customers are transferred, the degree of similarity between the activities of the transferor and transferee. The mere fact that a similar activity is carried on before and after does not mean there is a transfer of an undertaking.

Submissions

R2 submissions

53. R2 provided written submissions and they were similar to the claimants'. In brief R2 argued that there was not a transfer of an undertaking, there being no economic entity that retained its identity. There was no evidence that the workers transferred had or could constitute an economic entity within R1;
54. It was not enough to demonstrate that R1 transferred its assets to R2 and thereafter employed individuals who approached R2 for work;
55. When R1 was disposed of, it was not a going concern as it contradicts the asset disposal agreement and the Liquidators report. The tangible assets were disposed of on 23 July 2018 and the employees made redundant on 31 July 2018. There was no transfer to R2 of other necessary 'going concern' matters, such as books, records, debts, liabilities, goodwill;
56. If the employees had first gone to the Job Centre and been advised there were vacancies at R2, it would be clear that there was obviously not a TUPE transfer.

R3 submissions

57. R3 provided written submissions arguing that there was a transfer of an undertaking or part of an undertaking from R1 to R2 on or around 31 July 2018. The business was a going concern, its operation being continued by the transferee with the same or similar activities;
58. The sale agreement confirms the purchase of assets in exchange for removal of waste;

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59. R2 now carries out skip hire and waste haulage from the Neasden Goods Yard and uses the trading names of Ace Waste Skip and Simpson Skip Hire
60. Employees of R1 were offered jobs with R2, the majority of whom said they were doing the same work and some saying they dealt with the same customers.
61. Mr Thomson argued that there was no transfer, that he was not consulted about any transfer, did not have continuous service with R2, his duties were significantly different, he had a probationary period and no job security.
62. Mr Eckert, for Mr Lloyd, argued that R1 and R2 had different business models as R2 provided skip hire services unlike R1. No goodwill passed and there was no transfer of staff because there was a series of individual approaches to R2.

Conclusions

63. I find that there was no transfer of an undertaking from the first to second respondent. This is for the following reasons.
64. First, I do not accept that there was a stable economic entity, that retained its identity. An activity, such as truck driving and waste removal and sorting waste, is not an entity in itself. There was not an organised grouping of employees who moved from R1 to R2 and retained its identity when they moved.
65. Out of 30-32 employees made redundant, about thirteen went to work for R2. All of them took it on themselves, as individuals, to ask R2 if they had a job for them. Of the ten claimants before the tribunal, seven found employment with R2 commencing on 1 August and one found employment which started on 21 September. Two were never employed by R2.
66. There was no discussion between R1 and R2 about redundant employees moving to R2 nor did R2 seek out R1 employees.
67. The work carried out by R1 and R2 was similar in some respects in that it covered the removal, sorting and disposal of waste with skips but it was also different as R1 was not a skip hire company and they had different customers. R2's activity was mainly in the West End, whereas R1 had a local customer base.
68. R1 was not a going concern as at July 2018, or earlier. For example, they could not find the money to move the waste nor continue their business, which led to the agreement with R2.
69. Even if there was a stable economic entity, I do not accept that it transferred from R1 to R2.

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70. The agreements concluded on 23 July 2018 were one-off asset purchase agreements. The agreement between R1 and R2 was limited to the clearance of R1's waste in exchange for trucks and other equipment. It was a one-off commercial agreement to deal with the problem of Ace removing waste which was subject to an environmental order. In effect R2 was clearing up the mess left by R1 in a way that was satisfactory for all parties.
71. Further the agreements were concluded on 23 July which was before the date when R3 considered the TUPE transfer occurred, ie on 31 July.
72. The employees did not move from R1 to R2 as a group. They did similar work at R2, but mainly with different equipment and with different customers. They worked alongside 100 other employees at R2.
73. There was no transfer from R1 to R2 of matters showing there was a 'going concern' such as goodwill, customers, books, records.
74. R2 did not acquire R1 as a going concern which was an identifiable entity. It picked up some work because of R1's insolvency, which would have happened in any event being a neighbouring business. The fact that about thirteen employees moved to R2 one by one, not as a unit or group, and had probationary periods and different terms and conditions, supports R2 and the claimants' contention that there was no transfer of any undertaking.
75. I find that there was no transfer of undertaking.

Employment Judge C Palmer

Date: 02/12/2019

Sent to the parties on:

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For the Tribunal:

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