EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr J Santos		(1) Exclusive Contract Services Limited
		(2) Cleanbrite Commercial & Retail Cleaning Limited

HELD AT: London South ON: 07 November 2019

Before: Employment Judge Freer

Appearances
For the Claimant: In person
For the First Respondent: Mr Ellison, Advocate
For the Second Respondent: Mr Singer, Counsel

REASONS FOR JUDGMENT FROM A PRELIMINARY HEARING

1. These are the written reasons for a judgment promulgated on 06 January 2020 that, upon both Respondents accepting that the Claimant's unfair dismissal claim is well-founded and the single issue on liability being whether or not the Claimant was assigned to the relevant organised grouping of employees that was subject to a transfer from the First Respondent to the Second Respondent, the Claimant's contract of employment was transferred from the First Respondent to the Second Respondent by way of a transfer of undertakings taking effect on 03 February 2019.

2. Oral reasons were provided at the hearing and these written reasons are produced at the request of the Second Respondent.

3. The Claimant gave evidence on his own behalf.

4. The Respondents gave evidence through Ms Lisa Hylton, Human Resources and Training Director for the First Respondent and Ms Kate Lawrence, Corporate Services Director for the Second Respondent.

5. The Tribunal was presented with a bundle of documents comprising 104 pages.

Facts, law and associated conclusions

6. The Claimant claims unfair dismissal, wrongful dismissal and annual leave pay.

7. It was conceded by both Respondents that the Claimant was dismissed and that the dismissal was unfair.

8. There is no dispute over the applicability of the Transfer of Undertakings (Protection of Employment) Regulations 2006 and the main regulation under review is Regulation 4 which states:

   "(1) . . . 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which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

   (2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), 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. The single issue on liability is whether the Claimant was assigned to the organised grouping of employees on a service provision change from the First Respondent to the Second Respondent.

10. The Claimant commenced his employment with the First Respondent on 01 June 2016 after being transferred by his previous employer. His continuous employment started on 09 February 2012.

11. The Claimant was employed as a Manager and based solely at the First Respondent's Sainsbury's site. In his position as Manager the Claimant was responsible on average for around seven employees. That contract was lost by the First Respondent and was gained by the Second Respondent on a TUPE transfer that occurred on 03 February 2019. It is not in dispute that this amounted to a TUPE transfer.

12. The Claimant was contracted to work for seven hours a day, six days a week: a 42 hour week. The Claimant also signed an opt out of the Working Time Regulations and regularly worked in excess of the 48-hour limit. It is not in dispute that the Claimant's role was a position with some responsibility. His basic hours were two shifts per day of 05.00am to 10.00 am and then 8:30pm to 10:30pm.

13. The Claimant fell ill in or around April 2018 in serious and regrettable circumstances. It is not in dispute that the Claimant was off work from 16 April 2018 and did not return to work prior to the transfer taking place on 03 February 2019.

14. The Claimant appears to have had a single welfare meeting with the First Respondent on 25 July 2018 but for the majority of the time contact between the First Respondent and the Claimant was minimal. The Claimant was paid Statutory Sick Pay almost immediately and converted zero pay from around 01 November 2018. The Claimant submitted fitness for work certificates for the majority, if not all, of the period.

15. On the occasion of the transfer, the Second Respondent did not accept that the Claimant was transferred because he was on long-term sickness with no evidence of a likely return date.

16. Employer liability information was provided to the Second Respondent and gave information on the Claimant's medical position and the Tribunal was referred to that in the bundle from pages 49 to 76.

17. An Occupational Health report was obtained and that is at page 101 of the bundle. The consultation was undertaken by Dr Rajeev Srivastava and took place on 01 February 2019, immediately before the transfer.

18. In that report there are a number of observations made that go to the issue before this Tribunal. At page 102, for example, the report states: "I would recommend a GP/specialist report if more detailed information on clinical condition or future prognosis is required".

19. The report also states: "I consider the employee is unfit to undertake the substantive work role". The Tribunal concludes that this is a reference to the Claimant's then current condition rather than a diagnosis of the permanent position, particularly given the recommendation for a specialist medical report if more detail is require for future prognosis. Also at page 103: "Therefore after medical assessment today I consider that he is currently unfit for work and there were no adjustments currently possible to assist a return".

20. The report confirms under the heading "Is the employee likely to render reliable service in the future?": "It is currently uncertain whether the employee will be able to provide a reliable service" and under the heading "What are the timescales for recovery and resumption to work?": "Timescales for recovery and return to work is currently uncertain".

21. Under the heading "Is the employee permanently unfit for current role? If so would redeployment to an alternative role be recommended? Of not fit for alternative role, would assessment for ill health retirement be recommended if a pension scheme is available to the employee?" the report states: "He would not be considered permanently unfit for current role at present".

22. These are the main salient facts.

23. The Tribunal has been referred to a number of authorities. In the Tribunal's view the principal authority is **BT Managed Services Ltd -v- Edwards** UKEAT/241/14. That is an authority most recent time and also refers to a number of other authorities cited by the parties in submissions.

24. The Tribunal has read that decision with some care and at paragraph 60 of the judgment, His Honour Judge Serota refers to the case of **Fairhurst Ward Abbotts Ltd -v- Botes Building Ltd** [2004] ICR 919, CA. He confirms that it is a service provision case and that the Court of Appeal approved a two-stage test to determine whether an employee is assigned to the organised grouping: "First, was the employee employed in the part transferred immediately before the service provision change; and, but for temporary absence, could he have been required to work as part of the relevant organised grouping?".

25. It is also confirmed in that paragraph that the **Fairhurst** case is: "a further example of the TUPE provisions that did not derive from the Acquired Rights Directive being construed in the same manner as the rest of the Regulations". That can be cross-referred to paragraph 50 of the **Edwards** decision which confirms (should confirmation be required) that the purpose of the Directive and the Regulations is to safeguard/protect employment.

26. With regard to the burden of proof on this matter, the Tribunal refers to paragraph 46 of **Edwards** which states: "The burden of proof that TUPE applies is on the party who asserts that it did". This point does not appear controversial and the Tribunal accepts it to be correct. Mr Ellison for the First Respondent relies upon the case of **Sage -v- North Somerset Council** UKEAT/0336/13 at paragraph 42 where he argues that if a party is relying on an exception to a general rule then it is for the party relying upon it to establish the exception applied. The Tribunal prefers the Second Respondent's argument that the same type of issue was before the EAT in **Edwards** and there is no dispute arising in that case over the burden of proof application.

27. The Tribunal's conclusion lies in the final paragraphs of **Edwards**, in particular paragraph 68: "This case is quite unlike any other that I have seen related to the service provision change, because the Claimant's connection with the grouping subject to the transfer was a very limited administrative connection that was not based on the present or future participation in economic activity. I reject the suggestion that the universal criterion in all cases to determine the question of whether the employee (not in work at the time of the service provision change) is assigned to a particular group is to be found in the answer to the question to which grouping he could be required to work if able to do so. This criterion is

useful in cases where an employee is able to return to work at the time of the service provision change or is likely to be able to do so in the foreseeable future, assuming employee has not been transferred to other work. The principle has no resonance or applicability in a case such as the present where the employee in question is *permanently* unable to return to work and can have no further involvement in the economic activity performed by the grouping, the performance of which is its purpose".

28. In the Tribunal's conclusion it is clear from the evidence that the Claimant was not permanently incapable of undertaking his current role. That was expressly stated in the occupational health report and that is the best evidence available on the issue.

29. The position, as set out in the report, was 'uncertain'. The diagnosis that the Claimant was unfit to undertake his substantive work role was simply one made and relevant only to the time of examination. Further specialist input would be necessary to get a detailed view on future prognosis.

30. As stated in **Edwards**, the **Fairhurst** criteria is 'useful' where an employee is able to return to work or would likely to be able to do so in the foreseeable future. The Tribunal cannot say in the circumstance of this case that the **Fairhurst** criteria has 'no resonance or applicability', because in this case the First Respondent has proved that the Claimant was not permanently incapable of work.

31. It is worth quoting directly from the **Fairhurst** decisions with regard to individual assignment. The Employment Appeal Tribunal refers to where the employer could have required the Claimant to work: "had he not been excused from attendance. The same test would apply to an employee who was on holiday, on study leave or on maternity leave". At the Court of Appeal LJ Mummery held: "The appeal tribunal remitted . . . the question whether [the Claimant] was employed to work in . . . his contractual place of work and could have been required to work there immediately before the transfer of that part, had he not been excused from attendance by reason of sickness. In my judgment, that was the correct course to take". LJ Pill held: "His contractual assignment was to that part and the proper inference is that he would have been working there apart from his sickness".

32. The Tribunal concludes that these decisions do not place emphasis on the absence being "temporary" to the extent only short-term absences were anticipated. The Tribunal concludes that the **Fairhurst** criteria should apply in the Claimant's case and the circumstances are sufficient to pass the two-stage test.

33. It is the Tribunal's conclusion that if 'uncertainty' over current prognosis was of itself sufficient to avoid assignment in the circumstances, it would seriously reduce the intended protection afforded to employees by the TUPE regulations, particularly where there has been limited enquiry of medical experts on the Claimant's condition. For example, there has been less evidence of the

Claimant's medical circumstances in this case than one might reasonably expect to see in a capability dismissal case.

34. The Tribunal also concludes that the relationship between the Claimant and the First Respondent was not 'purely or mainly administrative'. The Claimant did not have "a very limited administrative connection that was not based on the present or future participation in economic activity" as was the case in **Edwards**.

35. The Claimant's connection with the First Respondent was not such that he was to have no involvement in participating in the economic activity under the contract, particularly in the future. In **Edwards**, for example, the employee was kept on the books simply to allow him to receive permanent health insurance payments. Here the Claimant was off work through sickness. His unfitness to work was not permanent, but uncertain. There was contact between the Claimant and the First Respondent, such that might be considered appropriate with an employee off work with an obviously long-term illness. There was a welfare meeting and the Claimant provided fitness for work certificates. The circumstances are not, for example, anywhere near the same as those considered in **Edwards**.

36. Having regard to all the circumstances, including the purpose of the Regulations; taking fully into account the reference to timescales of recovery and reliability at the time of the Occupational Health examination being 'uncertain'; the Occupational Health recommendation for a specialist report on future prognosis; the relationship between the Claimant and the First Respondent not being 'purely or mainly administrative', particularly as anticipated in **Edwards**; the Claimant being employed in the part transferred immediately before the service provision change; and 'but for' the nature of his absence could have been required to work as part of the relevant organised grouping, it is the Tribunal's overall conclusion that the First Respondent has shown the Claimant was assigned to the part transferred and the Claimant was transferred to the Second Respondent.

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Employment Judge Freer
Date: 19 February 2020