



EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT

V

RESPONDENT

Ms L Tuitt

(1) London Borough of
Richmond Upon Thames
(2) Broadland Guarding
Services Ltd

Heard at: London South
Employment Tribunal

On:

10 and 11 February 2020

Before: Employment Judge Hyams-Parish

Representation:

For the Claimant:

In person

For the First Respondent:

Mr M Lee (Counsel)

For the Second Respondent:

Mr R Hickford (Solicitor)

JUDGMENT

The claim of automatic unfair dismissal brought against the First Respondent fails and is dismissed.

All claims against the Second Respondent are dismissed.

REASONS

Claim(s)

1. By a claim form presented to the Tribunal on 25 July 2018, the Claimant brings a claim of automatic unfair dismissal. She says that the dismissal was automatically unfair because the sole or principle reason for her dismissal was her transfer to the employment of the First Respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the TUPE Regulations).

2. The Claimant was very clear, both at the preliminary hearing in this case (on 16 January 2019) and at this hearing, that her claim is for automatic unfair dismissal only - and not ordinary unfair dismissal. On the basis of it being agreed that liability for any automatic unfair dismissal would fall upon the First Respondent only, and that there was no claim for ordinary unfair dismissal, the Second Respondent applied at the outset of the hearing to be released and removed as a party to these proceedings. This application was canvassed with the Claimant and the First Respondent, both of whom did not object to all claims being dismissed against the Second Respondent by consent, and them being removed as a party to these proceedings.

Legal issues

3. It was agreed at the outset of this case that the issues were very narrow and limited to the following:
 - (a) Was there a relevant transfer within the meaning of regulation 3 of the TUPE Regulations?
 - (b) if the answer is yes, was the TUPE transfer the sole or principal reason for dismissal?
4. The First Respondent defends the case brought by the Claimant by saying:
 - (a) There cannot be a TUPE transfer because the activities carried on by the First Respondent after the transfer date were fundamentally different;
 - (b) As at 1 July 2018 the First Respondent intended the activities to be carried out for a short term duration only, until March 2019, when the First Respondent anticipated that the CCTV services would be merged with the London Borough of Wandsworth ("LBW").

Evidence

5. The Tribunal heard evidence from the Claimant and two witnesses for the Respondent:
 - (a) Keith Free, Careline and CCTV Manager
 - (b) Pauline Ollett, HR Business Partner
6. The Tribunal was referred to documents in a hearing bundle extending to 379 pages.
7. Before the hearing started, the Tribunal gave itself an hour to read the witness statements and certain documents in the hearing bundle referred to in the witness statements.
8. During the hearing, Mr Free was cross examined by the Claimant but Ms

Ollett was not asked any questions.

9. The Tribunal gave the parties its decision at the conclusion of the hearing, with oral reasons. These written reasons have been prepared and sent to the parties at the request of the Claimant, which was made at the hearing.

Practical and preliminary matters

10. Two preliminary matters were dealt with at the outset of the hearing.
11. The first related to the joining of LBW to these proceedings. This issue had been determined by Employment Judge Martin at the preliminary hearing in January 2018 and had been appealed to the Employment Appeal Tribunal by the Claimant. That appeal did not proceed past the sift.
12. The issue was explored with the parties during this hearing and Counsel for the First Respondent said that he could not see why LBW should be added as a party and added that if the Claimant won her claim, the First Respondent would not attempt to deflect blame or liability on to LBW but that the First Respondent would pay any compensation ordered by the Tribunal. Leaving liability aside, the only relevance of the First Respondent's combined services agreement with LBW was because the First Respondent's secondary defence was that there was not a TUPE transfer because the activities would only be carried out for a short term duration, until the merger of the services with LBW in March 2019. The Tribunal's attention was drawn to documents in the bundle which showed that the decision to merge the CCTV services with LBW was made in June 2018 and intended to come into effect in March 2019. The Claimant was therefore asked what value there would be in adding LBW in light of what had been said and she could not give a good reason.
13. The second issue that arose before and during the hearing was regarding witnesses. The Claimant said that she wanted the First Respondent to call witnesses who were performing what is referred to in more detail below as the "Careline service". The Claimant was informed that the First Respondent was at liberty to call such witnesses as they chose and they could not be compelled by the Tribunal to call particular witnesses at the behest of another party. The Claimant was informed that there was no possession in a witness and that she could approach such employees of the First Respondent as she wanted. It became clear that the Claimant did not know who she wanted to call and did not know the identity of such witnesses or have their contact details.
14. The Claimant was informed that the CCTV and Careline Manager, Mr Free, would be giving evidence during these proceedings and that he could be cross examined on the role performed by the Careline staff. The Tribunal commented that whilst witness orders could be made, there would need to be good reason for doing so and that the Claimant would need to be clear who such witnesses were. She was informed that the Tribunal could not simply require the First Respondent to produce any two members of its staff.

The Tribunal commented that in all likelihood the case would have to be postponed for weeks, if not months, because it was too late for witnesses to be served with an order and for them to attend this hearing.

15. The Claimant was given time to consider what had been discussed and to decide whether she wanted to pursue this issue and make an application, which the First Respondent could then respond to. Having given the Claimant ten minutes to consult with the friend who had accompanied her, she confirmed that she did not wish to make an application but wanted it recorded that she had asked. The Tribunal confirmed that it would be noted in any written reasons but that if she wanted to make an application she should do so. No application was made.
16. When another friend of the Claimant attended in the afternoon of the first day to assist the Claimant in presenting her case, the matter came up again and there was another opportunity to make an application, the Tribunal having made all the same comments as above, but there was no application from the Claimant. The Tribunal did comment that it could make an order of its own volition but the circumstances in which the Tribunal should do so are very rare, and there needed to be very good reasons to take such a step.

Findings of fact

17. The following findings of fact were reached by the Tribunal, on the balance of probabilities, having considered the evidence given by witnesses during the hearing, and any documents referred to. Only findings of fact relevant to the issues necessary for the Tribunal to determine have been made. It has therefore not been necessary to determine each and every fact in dispute where it is not relevant to the issues between the parties.
18. Until her dismissal, the Claimant was employed by the Second Respondent as a CCTV Operator. Until 30 June 2018 the Second Respondent had provided CCTV operators to the First Respondent to work in their CCTV control room between the hours of 6pm to 6am. The Second Respondent had been providing that service since 2005, and from 2008 in exactly the same way as it had on 30 June 2018.
19. The Claimant was supplied by the Second Respondent to the First Respondent in addition to another member of staff. The Claimant worked a shift of four days on, four days off. Her job, and that of the other CCTV operator provided by the Second Respondent was to operate and monitor surveillance cameras situated around the borough in order to safeguard the public, prevent and detect crime. CCTV footage was used by police to solve crimes and no doubt also used as evidence to prosecute offenders. She would respond to safety related calls from the Police, Clubs, Pubs, Venues and various shops on the high street.
20. The Tribunal was also able to get a good picture of what the Claimant did from the logs which were completed by CCTV operatives which recorded what they did during their shift. From looking at those logs, it was clear that

there was a great deal of what was referred to during the hearing as “proactive monitoring”; this meant looking at each camera, checking that it was functioning correctly and monitoring what was going on in the area where the particular camera was located. The logs show the camera numbers of each and every camera inspected and viewed.

21. The Claimant proactively monitored 12 screens from the control room where she was based and which is shared with staff working principally for the Careline operation provided by the First Respondent. The Tribunal heard evidence from the Careline and CCTV Manager, Mr Keith Free, who said this in evidence about Careline:

The Careline activity is by far the main activity as it is a life critical service providing emergency response to the most vulnerable in our borough. Careline is delivered by staff responding to alarms triggered by service users which are routed through the call answering system. The alarm brings up the user's address, personal and medical details, next of kin, responder's details and any other relevant information. Based on the information provided by the service user, through the speaker in the alarm in their home, and the details on the system, the operators make decisions and judgement calls regarding the appropriate response to the alarm that has been triggered. This can vary from providing re-assurance to calling the emergency services. These calls can be very time-consuming as it is often necessary to make several related calls, to family, responders, social workers etc. whilst keeping the service user informed and supported. Additionally, the Careline staff respond to all out of hours calls for council services from 1700 hours to 0900, which includes calls for social workers, emergency response, alarms on council properties and a wide variety of other demands, including calls about noise nuisance, littering or “fly-tipping” and dustbins not being emptied. Between 2200 and 0600 a single member of the Careline staff covers all of the above. That was the case both before and after 1 July 2018.

22. On 28 May 2018, the Second Respondent elected to serve notice on the First Respondent to end its contract. There were a couple of reasons for this: the first was the pending merger with LBW and no doubt the potential impact on the contract in any event; and the second was the fact that one CCTV operative left the Second Respondent's employment and there had been difficulties recruiting a replacement, which left management having to step in in order to fulfill their obligations under the contract. The notice period was relatively short, just over a month, and the contract ended on 30 June 2018.
23. Upon the expiry of the contract, the First Respondent decided to divert the funding that had historically paid for the services of the Second Respondent and this meant that from 1 July 2018 the First Respondent chose not to employ full time CCTV operatives to provide the same service that the Second Respondent had done between 6pm-6am.
24. The Tribunal finds that this fundamentally changed the whole character of the service provided by the Second Respondent. Without the full time operatives provided by the Second Respondent, any monitoring of the

CCTV cameras was left to the Careline staff. They were already overloaded with Careline duties and therefore the extent to which they were physically able to perform CCTV monitoring was minimal. Mr Free said in evidence that their Careline duties took up 95% of their time. It is clear from the email at page 218 of the bundle that they weren't providing the service because Mr Free was receiving complaints about it. They were forced to provide only reactive support service as when needed. We heard that as Careline staff were on calls all of the time, they could not simply go over to the CCTV desk even if the the phones were ringing. Calls went unanswered. The Tribunal accepts that with only one member of staff on Careline in the evenings, the monitoring service provided by the First Respondent was minimal. Whatever the rights or wrongs of the decision taken by the First Respondent, the demand on budgets are such that the money for the service disappeared to pay for something else. The Tribunal does not accept that there was any deliberate action on the First Respondent's part to do this or not fund the service to avoid TUPE applying.

Relevant law

25. The law in this area and the definition of a 'relevant transfer' is set out in the TUPE Regulations 2006, as amended in 2014. Regulation 3 provides the definition of a 'relevant transfer' for the purpose of the regulations.

(1) These Regulations apply to—

(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;

(b) a service provision change, that is a situation in which—

(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");

(ii) activities cease to be carried out by a 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 another person ("a subsequent contractor") on the client's behalf; or

(iii) activities cease 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 (3) are satisfied.

2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

(3) The conditions referred to in paragraph (1)(b) are that—

(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.

26. This area of law has been the subject of lots of litigation on the interpretation of the TUPE Regulations and the Tribunal's attention was drawn to a number of cases by Counsel for the First Respondent which the Tribunal has considered in reaching its decision.

Closing submissions

27. The Tribunal considered carefully the submissions made by the parties before reaching its decision.

Conclusions, analysis and associated findings of fact

28. Returning to the issues in the case: was there a relevant transfer? In answering this question, the Tribunal considered the First Respondent's primary argument that the activities after the transfer date were fundamentally different.
29. At a high level, the First Respondent was continuing to provide a CCTV monitoring service, but this was the extent of any similarity. It was a fundamentally different service given that the First Respondent no longer engaged a company to provide CCTV operatives and for all the reasons made clear in the above findings of fact. Not only did the amount of monitoring significantly reduce but the type of monitoring changed considerably. Cameras were not checked and there was no routine surveillance of areas in which the cameras were situated. Calls from the police and public remained unanswered as this was no longer a service that the First Respondent could routinely provide. Proactive support, which played such a large part of the Claimant's role, had disappeared over night. The above picture is supported by the logs and there is a stark difference in the activities logged pre and post 30 June 2018.
30. Given the Tribunal's finding on the First Respondent's primary point, the Tribunal did not need to turn to the secondary point as it would have been an artificial exercise to then go on to decide whether it was a task of short duration.
31. As there was no TUPE transfer, the sole or principal reason for the Claimant's dismissal was not a TUPE transfer and therefore the claim of

automatic unfair dismissal must fail.

32. At the conclusion of the hearing, the First Respondent made an application for costs on the ground that the Claimant had rejected an offer to settle the claim which was equivalent to the maximum that the Claimant could receive by the Tribunal, if successful. The Tribunal was shown correspondence that the First Respondent said put the Claimant on notice of its intention to make an application. Based on the Tribunal's reading of the emails, it could not conclude that the Claimant had been properly put on notice of the application. Bearing in mind that the Claimant is a litigant in person, she may not have understood the implications of what was written and therefore, the Tribunal could well understand the Claimant feeling that she was effectively being told formally for the first time, at the end of the hearing, that a cost application was to be made.
33. The Tribunal considered that the Claimant needed a reasonable time to give her response and therefore the First Respondent was asked to put the application in writing. The Claimant was ordered to respond to such application, if made, within 7 days, saying why such an order should not be made. The Claimant was further ordered to say whether she wanted the application dealt with on the papers or at a hearing and she was asked to include in her response information about her current financial circumstances and ability to pay.

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Employment Judge Hyams-Parish
11 February 2020

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