EMPLOYMENT TRIBUNALS

Claimant: **Mrs N Dhesi**

Respondent: **Alacra Inc**

Heard at: **London Central** **On: 22 January 2020**

Before: **Employment Judge Emery**

Representation:
Claimant: In person
Respondent: Ms D Gilbert (counsel)

PRELIMINARY HEARING JUDGMENT

The Judgment of the Tribunal is:

1. There was a TUPE transfer on 10 December 2018 on the sale of 'Hiperos' to Coupa.

2. The claimant has reasonable prospects of showing she was an affected employee.

3. It was not reasonably practicable for the claimant to bring her claim within the time limit, and the claim was brought within a reasonable period thereafter.

REASONS

The Issues

1. Judgment was given at the Preliminary Hearing. The issues to be determined set out in the Order dated 20 December 2019, were refined after discussion and agreement with the parties, as follows:

    a. Was there a TUPE transfer as a result of the sale of 'Hiperos' to Coupa? At the outset of the hearing the respondent conceded that there was a TUPE transfer on 10 December 2018.

b. Was this TUPE claim brought within time?

c. If the claim was submitted out of time, was it reasonably practicable to submit it within the time-limit, or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

d. Has the claimant reasonable grounds for showing that she was affected employee? The Order stated that the tribunal's function at this hearing was to determine if there were reasonable prospects of the claimant showing she was an affected employee within the meaning of s.13(1). The respondent initially objected, Ms Gilbert stating that it was not ready to deal with this point. Evidence was set out in the respondent's statements on this point, as set out below. We heard significant evidence on this issue and I made findings of fact, set out below.

The Evidence

2. I heard evidence from the claimant. Witness statements were provided by respondent witnesses who are based in the US and not present at the hearing, Ms Janet Tarendash and Mr Kelvin Dickenson. The claimant did not object to these statements being allowed as evidence, but she did not accept the truthfulness of all matters raised in the statements. I read their statements and considered their contents, as set out below. The claimant submitted a statement of Ms Mona MacKay who worked for the respondent and who worked with the claimant. Again, I read her statement and considered its contents, as set out below.

The Facts

3. The claimant was employed by the respondent, one of a number of Group companies under the Opus Global umbrella, which also included 'Hiperos'. The claimant's evidence was that she worked across the Opus Global entities, in particular Alacra and Hiperos, along with colleagues who did likewise.

4. The respondent's initial case was that there was little or no cross-over between Alacra products and Hiperos products, and that Alacra staff worked on Alacra products and Hiperos staff worked on Hiperos products. The respondent's evidence was that the claimant is not on Hiperos' payroll, as 116 employees were. She was on Alacra payroll, comprising 58 employees and worked on Alacra products.

5. Mr Dickenson's statement accepts that all staff were trained on both products, and the intention was that there would be cross-over but in practice this did not happen, and he denies that the claimant undertook any work on Hiperos products - her "primary objective was to work for and be involved with the business of Alacra" (paragraph 12 statement). Ms Tarendash's statement states that the claimants' time sheets do not show work on Hiperos after November 2017, meaning she either did not work on Hiperos after this date, or she failed to record work as she was meant to.

6. The respondent now accepts that the claimant did undertake work on Hiperos products, it says as maternity leave cover for a colleague (NW) who returned to work in October 2017. The claimant accepts that the majority of her working time was on Alacra products, and that her work on Hiperos products was initially to cover NW's maternity leave, but she did not accept that her work on Hiperos ended in October 2017, because NW subsequently had medical treatment for a serious condition and, says the claimant, she remained 'co-managing' the Hiperos project with NW until her departure firstly on leave in March 2018 and then her maternity leave commencing 3 April 2018.

7. Ms Tarendash's position is that the claimant exaggerated her timesheet entries generally, including in relation to her work on the Hiperos projects. For example NW challenged whether the claimant was on the attendee list for two telephone meetings on Hiperos that the claimant had submitted timesheets for. NW was clear the claimant had not been invited onto these calls, but no conclusion was reached at the time as to whether she had attended on these calls. By February 2018 the claimant's position was that on Hiperos related projects "I haven't had to get involved much especially as the configuration is going on" (page 86). The claimant's evidence was the 'configuration' necessarily meant she would not be involved at this stage; her expectation was that her involvement would increase at the end of this process.

8. At a meeting with her line manager in February 2018, the claimant accepted her time-recording was down in part because, it was accepted at the time, she was not feeling her best because of her pregnancy. It was agreed that she would continue with "account handover activities" with NW and another (page 87). At this point she continued to undertake some work on Hiperos, and there was a further issue raised by NW as to the claimant's hours on this project. The claimant's position was that she remained 'facilitating' the project, her involvement would depend on the order of the process; for example during the configuration stage there would be far less Project Manager involvement. Her involvement in part also depended on NWs health.

9. The claimant has adduced LinkedIn text messages from former colleagues within the Respondent and Coupa who recall with varying degrees her work on Hiperos, including as Project Manager (page 44). Ms MacKay's statement states that she worked with the claimant and other Project Managers "…based on both Alacra and Hiperos clients".

10. The claimant's position is that she was working on Hiperos projects up to her maternity leave although she was handing over projects including Hiperos projects before her maternity leave started, and she expected to work on Hiperos projects on her return from maternity leave. She says that a lot of her time was unbillable, and hence it was not recorded on her timesheets. It was put to her that her involvement on Hiperos was contingent on NWs leave and her "needing support", and that when NW was back "there was no need for you". The claimant's position was that she was "co-managing" the project and that continued after NWs return to work and until the commencement of her maternity leave.

11. On 10 December 2018, Hiperos was acquired by Coupa software. On the same date, communication about this sale was sent to all staff. The claimant was on maternity leave, and she had no email access to the respondent's email system. She was not therefore made aware of the sale, a point the respondent now accepts. Employees who the claimant worked with transferred to work for Coupa, including employees with whom she worked on Hiperos-related activities.

12. The claimant accepts that the majority of her working time related to clients using Alacra products, her case is that she was nevertheless affected by the sale as the loss of Hiperos "significantly reduced the scope" of her role (para 16 page 63).

13. I heard no evidence on whether the respondent seeks to rely on a defence on the issue of a failure to consult with her on the TUPE transfer, an issue which will be explored at the full hearing of this claim.

Submissions

14. The claimant pointed out that the respondent has denied TUPE all along, and only now is admitting it.

15. Ms Gilbert argued that the facts do not support the argument that the claimant 'may be' affected by the transfer. In fact there is compelling evidence that she was not – the timesheets showed zero hours on Hiperos related products; the evidence showed that the claimant was covering for NW and this was scaled back once she returned, and the amount of work she was undertaking was challenged at the time. In comparison the statements and documents on behalf of the claimant were general. The Hiperos work for which the claimant had submitted timesheets were challenged. The respondent says that it was inherently unlikely that the work would have been assigned to the claimant from NW, as this would have been disability discrimination. In fact NW was the assigned Project Manager on the Hiperos contracts, and the claimant did not stay on these contracts for over two months on NW's return to work.

The Law

16. TUPE Reg 13: Duty to inform and consult representatives

    (1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

    (2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

        a. the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it

b. the legal, economic and social implications of the transfer for any affected employees;
c. the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and
d. if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

…

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

17. TUPE Reg 15: Failure to inform or consult

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground
a. in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;
b. in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
c. in the case of failure relating to representatives of a trade union, by the trade union; and
d. in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—
a. that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and
b. that he took all such steps towards its performance as were reasonably practicable in those circumstances.

…

(10) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which an order under paragraph (7) or (8) relates and that

…

(12) An employment tribunal shall not consider a complaint under paragraph (1) or (10) unless it is presented to the tribunal before the end of the period of three months beginning with
a. in respect of a complaint under paragraph (1), the date on which the relevant transfer is completed…

or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of three months.

18. The BEIS guidance, 'Employment rights on the transfer of an undertaking' (BEIS guidance) includes as affected employees those who are not being transferred to the transferee but whose jobs may be affected by the transfer.

19. I noted the decision of *I Lab Facilities Ltd v Metcalfe and others UKEAT/0224/12* in which the EAT stated that:

> "A proposed transfer may well affect such employees if they do some work in or for the undertaking (or part) whose transfer is proposed ... But that is different from saying that they are affected simply because the transfer has left the remaining part of the undertaking less viable."

20. I also noted the case of *Machine Tool Industry Research Association v Simpson [1988] IRLR 212*, in which the claimant was unaware someone had been employed to take on her role after her redundancy. The Court of Appeal considered the following test was appropriate to consider 'whether it was reasonably practicable for the claimant to present her claim in time, and that the burden of proof rested on the employee:

    a. It had to be reasonable for the employee not to have been aware of the factual basis on which they could have brought a claim during the three-month limitation period. It could not be reasonably practicable to expect a claimant to bring a case based on facts of which they were ignorant.
    b. The claimant must establish that the knowledge had been reasonably gained and had been crucial or fundamental in changing their position from believing that they did not have grounds for a claim, to reasonably and genuinely believing that they did.
    c. The acquisition of this knowledge had to be crucial to the decision to bring the claim in any event.

Conclusions on the evidence and the law

21. The dispute therefore between the parties is the extent, if at all, the claimant was working on Hiperos products before her maternity leave and whether this meant she "may be" an affected person – i.e. an employee who remains employed by the transferor but whose work would be affected by the transfer (Reg13(1)).

22. I concluded that the claimant was working as a 'Project Leader' on Hiperos projects until shortly before her maternity leave; the majority of this work was as cover for NW, and this cover continued when NW was back at work. There was a lack of clarity in the evidence as to precisely why the claimant was undertaking this work, but documents suggest that Ms Tarendash was aware that the claimant was undertaking work on Hiperos projects, reference being to handing this work over to NW in February 2019, i.e. shortly before the claimant's maternity leave. I also accepted the claimant's evidence that the Hiperos projects she was working on were in 'commissioning' phase, meaning there was little fee-earning time to record during this period. I concluded that project leaders remain project leaders

even when their work on that project is in abeyance – for example during commissioning.

23. It is true to say that the amount of work towards the start of the claimant's maternity leave was diminishing, on both Alacra and Hiperos projects; this was - as the documents show - in part because of the claimant's pregnancy having an effect on her ability to work and in part because she was handing over to colleagues including NW because of maternity leave. However, she remained engaged on Hiperos projects until shortly before her maternity leave.

24. I therefore concluded that at the point of her maternity leave, there was at least a reasonable prospect of the claimant showing she was an employee who may be affected by the transfer.

25. I next considered the issue of whether the TUPE-related claim was brought in time and, if not, within such further period as I consider reasonable, if it was not reasonably practicable for the complaint to be presented before the end of the 3 month period.

26. Time started to run from the date of the transfer, 10 December 2018 (Reg 15(12)(a)), meaning the primary limitation period ran out on 9 March 2019. As the respondent accepted at the outset of the hearing, the claimant was unaware of the transfer on 10 December 2018 as she was on maternity leave and had no access to work emails. In fact she did not become aware of the transfer until 14 March 2019. While the respondent's initial position was that the claimant could have become aware of the transfer via the press, she did not in fact become aware, and I concluded that this was in the circumstances this was a reasonable lack of knowledge. I concluded that it was not reasonably practicable for her to bring a claim relating to the TUPE transfer within 3 months of the transfer when she was - reasonably - unaware of the fact of the transfer during the whole of this 3 month period.

27. Was the claim brought within such a period thereafter as I considered reasonable? The claimant was told on 14 March 2019 of the transfer, and on this date she was also put at risk of redundancy. She was told on 1 April that her role was being made redundant. The clamant contacted ACAS on 4 April 2019, naming her employer as 'Opus Global'. The respondent engaged in the ACAS process and did not correct the name of the employer. This conciliation process ran to 4 May 2019. There was then a one day conciliation process with the correct employer, on 24 May 2019. The claim was issued 16 June 2019.

28. I concluded that the claim was issued within a reasonable period after the original limitation period expired. The claimant had received no information about the TUPE issue from her employer, and it was the respondent's position that she did not need this information as she was not an affected employee. The claimant was clearly and understandably concerned about her role being at risk, and her contact with ACAS was primarily concerned about her redundancy. She contacted ACAS at the soonest opportunity after her dismissal. There was then confusion over the correct name of her employer, before the claim was issued. I concluded that the one month conciliation period paused the limitation clock, albeit against the wrong employer. The claimant needed to seek advice on all

the issues she considered were involved in her dismissal, of which the TUPE issue was only one, in circumstances where the employer was denying the claimant was an affected employee. I concluded that it would reasonably take time to explore this issue, to take advice, that this would take some weeks given the complexity of the issues involved. I therefore concluded that the claim was issued within a reasonable period after the limitation period had expired.

29. This claim remains listed for a final hearing, and Orders made at the Preliminary Hearing dated 13 November 2019 remain in force.

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Employment Judge Emery
Dated: 25 February 2020

JUDGMENT SENT TO THE PARTIES ON

06/03/2020……

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FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS