EMPLOYMENT TRIBUNALS

Claimant: Mr C Gilchrist

Respondent: (1) Aspyre Training and Communication Services Ltd
(2) Wales Council for Deaf People

Heard at: Cardiff **On:** 24 January 2020

Before: Employment Judge Moore

Representation
Claimant: Mr G Pollitt, Counsel
Respondent: Mr A George, Solicitor

RESERVED JUDGMENT

1. The claim against the first respondent is dismissed.

2. There was a relevant transfer of an undertaking or business from the first respondent to the second respondent in accordance with Regulation 3 (1) (a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

REASONS

Background and Introduction

1. The ET1 was presented on 20 December 2018. The claimant brought claims of ordinary unfair dismissal, automatic unfair dismissal by reason of TUPE, failure to consult (Regulation 13 TUPE), redundancy pay, wrongful dismissal, holiday pay, arrears of pay and breach of contract (pension contributions). The claim was originally brought against Aspyre Training & Communication Services Ltd ("R1") and Wales Council for Deaf People ("R2"). There was a preliminary hearing listed on 18 April 2019 to determine whether there had been a TUPE transfer from R1 to R2. This was adjourned on application of both parties as new disclosure had come to light and there was insufficient time allocated.

2. R1 was dissolved on 23 July 2019. Accordingly there can be no valid claim against R1. This had not been brought to the Tribunal's attention prior to this hearing. I have therefore dismissed the claim against the first respondent under Rule 27 of the Employment Tribunal Rules of Procedure as the Tribunal has no jurisdiction to consider the claim and / or it has no reasonable prospect of success.

The issues

3. The issue in this preliminary hearing was whether there had been a TUPE transfer from R1 to R2.

4. There was an agreed bundle of 153 pages. I heard evidence from the claimant and Ms L McGrath and Mr Rees-Evans for the Respondent.

Findings of fact

5. R1 was a limited company offering interpretation, communication and training services to organisation and individuals needing communication support.

6. R2 is a charity providing services to individuals with hearing loss and difficulties in Wales.

7. The claimant commenced employment with R2 on 1 September 2015 on a fixed term contract until 31 March 2016 as a lipreading project coordinator. This was a specific role funded by a grant from the Welsh Government. His contract was extended to the end of August 2016. He was employed on 21 hours / 3 days per week.

8. The claimant asserted that R2 was an "umbrella association of organisations" and that R1 was one of them. In their response to the claim, R2 denied that R1 was affiliated or part of R2. This was not a sustainable position to have taken but this was attributable to a lack of understanding on the part of R2 rather than any attempt to deliberately mislead the Tribunal in this regard. Ms McGrath fully accepted the claimant transferred to R1 from R2 in 2016 when cross examined.

9. R1 was incorporated in March 2016. R1 had been set up as a trading arm of R2 who would provide services namely training and interpretation services with the profits transferred back to R2. R1 rented premises from R2 and used their office and computer equipment. The only employees of R1 were the claimant and a Ms L McNamara. The only assets held by R1 were the company name and the two employees. R2 obtained all of the grants and funding. They would then engage R1 to deliver the contracts. The only evidence before me as to why R1 was set up was a reference to tax reasons.

10. On 1 September 2016 the claimant commenced in a new role as Training Manager for R1. He was provided with a contract of employment. On the front cover it stated his employer was R1. It had clearly been cut and pasted from

R2's contract. In the preamble it stated R2 was the employer. This was a drafting error. R1 was the claimant's employer from 1 September 2016 as specified on the front page of the contract. It stated that his previous period of service with R2 would be recognised as continuous service. Ms McGrath was unable to explain how this had come about other than they had used a HR consultant to prepare the contract. The contract was for 21 hours 3 days per week with an annual salary of £12,151.80 pa.

11. The claimant also continued to work for R2 2 days per week. R1 invoiced R2 for the claimant's services from October 2017 – June 2018 (the last invoice for w/c 4 June 2018). On the invoice it stated **"For WCDP Tuppe'd (sic) staff John Gilchrist".**

12. R1's business did work in the following four areas:

- BSL Interpreting Agency
- Meeting room hire management
- Lipreading and deaf awareness courses
- BSL courses

Nature of work undertaken by claimant for R1

13. The claimant's role was predominantly selling, devising and delivering lip reading, deaf awareness, sensory loss awareness and basic sign language courses to organisations in Wales. He was responsible for setting up lip reading courses run from R2's offices in Pontypridd including preparation, designing course content and materials, promoting classes and recruiting students to attend. The classes ran for two hours per week for 10 weeks. There also was preparation time to set up and tidy up afterwards. The claimant accepted this was the largest part of what he did.

14. The claimant was not able to deliver BSL interpreting work or run BSL accredited courses as he was not qualified to BSL Level 3. These courses were run by subcontracted qualified teachers. He did not deal with the meeting room hire management.

15. The claimant delivered the following courses during his employment with R1:

- October 2017- 10-week lip reading course (community)
- November 2017- 10-week essential sign language course taught to BT staff in Cardiff
- January 2017 10-week lip reading course (community)
- Jan / Feb 2018 - 10-week essential sign language course taught to Tesco staff
- February 2018 Sensory Loss Awareness – half day – Welsh Ambulance Service
- March 2018 – Essential Sign 20-week course taught to Ikea (4 hours per week x 10 weeks).

16. The last training delivered by the claimant ended in June 2018 (Ikea training).

17. Ms McNamara was part time whose main role was to oversee the work of the interpretation agency, handling bookings for interpreters. The claimant helped to promote the interpretation agency which provided BSL to English / English to BSL interpretation services, lip speakers, Speech to text reporters and note takers. He occasionally helped take bookings if Ms McNamara was off sick or on holiday.

18. The claimant also undertook other duties from time to time such as representing people at meetings with social services, helped with fundraising and represented both respondents at meetings with third sector and Welsh Government. He was involved in marketing services such as designing promotional materials, stationary, leaflets and writing press releases and articles. He also provided advocacy support services for people with hearing loss. I find that these were activities largely conducted during the two days per week he worked for the respondent.

19. The claimant represented R1 and R2 at meetings with various health boards and the Welsh government.

20. Whilst I have no doubt the claimant was engaged in these activities there was no evidence as to how much time he spent on them. Furthermore the claimant accepted that all of these activities ceased when the respondent closed save for the lip-reading course which I return to below.

21. The claimant was asked what he did between June and 3 August 2018 when he went off sick. The claimant told the Tribunal that he finished completing the course certificates for Ikea, was liaising with union representatives to try and sell courses and supported people locally. Given that he was working 21 hours per week completing certificates for a course cannot have taken very much time and there was no evidence from the claimant as to business development appointments, emails, logs of calls etc.

22. Three other courses were delivered by other trainers. Two of which the claimant accepted he was not qualified to teach (Level 1 BSL). The third was a lip-reading class from October 2018.

<u>Lip reading class – Santander grant</u>

23. Santander had provided a grant to R2 of £4,000 in 2017 to conduct charitable activities for elderly persons with hearing loss in the local area. The claimant had already run two courses. It was common ground that R2 ran a 10-week lip reading course between 19 October 2018 – 14 December 2018. The claimant relies on this as evidence that work he was assigned to transferred to the respondent.

24. The respondent asserted they engaged a self-employed tutor (Ms Garnett) to deliver this course as the claimant was off sick and they had to spend the grant money by the end of the year or lose the finding. They relied on an

email from Santander dated 5 September 2018 but this did not reference any deadline. I find there was a time limit on the spending of the grant as the claimant is minuted as having said so in minutes of a staff meeting on 26 June 2018. Minutes of a meeting held by R2 on 5 September 2018 record concern that the money needed to be spent before year end as the claimant was off sick with no information about his likely return date it was decided to make arrangements to engage the self employed tutor to run the courses.

25. This was work that the claimant could and would normally have undertaken but for his dismissal. However this was the only work that the claimant could have undertaken. No other work formerly undertaken by the claimant transferred to the respondent. It ceased on the transfer.

Closure of R1

26. R2 had engaged a business consultant to advise them regarding their relationship with R1 and concerns over the finances of R1. R2 had provided a loan to R1 which was not being repaid. On 24 August 2018 the Chairman of R2, Mr Rees-Evans instructed Ms McGrath to send an email to R1 directors. There had been a previous meeting where R1 directors had agreed to work with R2 to wind up R1. It was a condition of R2's assistance that R1 would agree to wind themselves up and no new directors to be appointed nor were any staff to be involved in meetings.

27. On 6 September 2018 there was a meeting of the board of directors for R1. Ms McGrath was also in attendance. The relevant minutes of that meeting are as follows:

28. Ms McGrath stated that **"WCDP were taking back the services that had originally been transferred**". In reality this consisted of the interpreting agency business only. The directors agreed to wind the company up. The claimant was discussed. He was the only remaining employee as Ms McNamara had resigned in August and left the company. The claimant was reported as having been on leave during early August and then called in sick on 22 August 2018 but no fit note had been received. It was recorded that there was no outstanding contracts or future bookings to deliver training to enable the claimant to be TUPE transferred to R2. There was no mention of the lip-reading course that had been agreed would run only the day before and that a self-employed tutor would be engaged to run that course. It was agreed to write to the claimant and advise his employment would be terminated and he would be made redundant.

29. On 10 September 2018 Ms McGrath wrote to the claimant on behalf of R1 directors to advise that the directors had voted to wind up the company due to its technical insolvency. The claimant was informed his employment was terminated, with employment ending on 24 September 2018. He was informed no redundancy payment would be made due to technical insolvency.

30. It transpired that a sick note the claimant had sent on 7 August 2018 dated 3 August 2018 (signing him off sick for one month) had got lost in the post.

The Law

31. Regulation 3 of TUPE sets out the definition of a relevant transfer. This can be either a business transfer, service provision change or both. It provides:

3 A relevant transfer

(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.

(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.

[(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.

Economic Entity

32. It is first of all necessary to consider whether there is a sufficiently identifiable economic entity. The guidance in **Spijkers v Gebroeders Benedik Abbatoir CV and Alfred Benedik en Zonen BV, C-24/85 [1986] ECR 1119 CJEU** provides for consideration of the following:

(1) the type of undertaking or business concerned;

(2) whether assets, tangible or intangible, are transferred;

(3) whether employees are taken over;

(4) whether customers are transferred;

(5) the degree of similarity between the activities carried on before and after the transfer and the period, if any, for which those activities are suspended.

33. These are all single factors in the overall assessment that must be made and they cannot, therefore, be considered in isolation.

34. The question to be determined as to whether there is an undertaking is whether there is a stable economic entity sufficiently structured and autonomous but does not necessarily have to have significant assets tangible or intangible. Assets can be based on manpower. An organised group 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. An activity in itself is not an entity; the identify of an entity emerges from other factors such as its workforce, management staff, the way the work is organised, operating methods and where appropriate operational resources. **(Cheesman v R Brewer Contracts Ltd [2001] IRLR 145)**.

35. The next question to determine is whether there has been a relevant transfer of the entity.

Business Transfer

36. As to whether there is a relevant transfer the entity in question must retain its identity. It is necessary to consider all of the factors characterizing the transaction (each is a single factor and none is to be considered in isolation). Matters falling for consideration are the type of undertaking, whether or not tangible assets transferred, the value of intangible assets at the time of the transfer, whether or not the majority of employees are taken over by the new company, whether or not customers transfer, the degree of similarity between the activities carried on before and after and any suspended period. Where no employees are transferred the reasons why can be relevant. The fact that work is performed continuously with no interruption or change in the manner or performance is a normal feature of transfers. **(Cheesman).**

Service provision change

37. Clear guidance providing a step by step approach can be found from His Honour Judge Peter Clarke's summary of the authorities in, **Enterprise Management Services Ltd. v Connect Up Ltd. and Others 2002 IRLR 190, EAT**:

38. The employment tribunal's first task is to identify the activities performed by the in-house employee, (in and outsourcing situation), or the original contractor, (in a retendering or insourcing situation).

39. The tribunal then has to consider the question whether these activities are fundamentally the same as those carried out by the new contractor, (outsourcing or retendering), or in-house employees, (insourcing). There are, and will be cases where the activities have become so fragmented that they fall outside the service provision regime.

40. If the activities have remained fundamentally the same, the tribunal will then ask itself whether, before the transfer, there was an organised grouping of employees which had as its principle purpose the carrying out of the activities on behalf of the client.

41. Following this, the tribunal should then consider whether the exceptions in Regulations 3(3)(b) and (c) apply: namely, whether the client intends that the transferee post the service provision changes and will carry out the activities in connection with a single specific event, or task of short term duration and whether the contract is wholly or mainly for the supply of goods for the client's use.

42. Finally, if the tribunal is satisfied that a transfer by way of a service provision change has taken place, it should consider whether each individual claimant is assigned to the organised grouping of employees.

<u>Submissions – Claimant</u>

43. Counsel for the Claimant's primary contention was there had been a business transfer (not a service provision change). The only "assets" were the claimant and Ms McNamara. R2 "cherry picked" who transferred, the claimant was expensive and quiet work wise, this was the primary consideration rather than looking at what he actually did. The business of R1 was to deliver contracts and the employees performed that delivery.

44. The claimant was not simply delivering training but had a multi factorial role. R2 had deliberately excluded the claimant as did not want him to transfer and had deliberately not sought any further training work after the transfer as they knew the claimant was bringing a claim. R2's position that there was "no more training" is too simplistic and more a question of whether there was an ETO.

<u>Submissions – Respondent</u>

45. The respondent's skeleton argument had anticipated the claimant was relying on an SPC. The respondent submitted that the claimant did not qualify as an organized group of employees as factually the claimant's work in terms of him carrying out awareness training has not transferred to R2. This was the function to which the claimant was predominantly assigned and that has not transferred. In respect of the other work undertaken by R1 the claimant was not predominantly assigned to lip reading work. It accepted lip reading work

transferred. In the alternative the respondent relied upon Regulation (3) (2) as it being a single specific event or task of short-term duration and **Liddell's Coaches v Cook & ors UKEATS/0025/12**.

46. The claimant was not assigned to the other work indicated in his claim. He did not attend meetings for R1 and even if he did there are no meetings to attend for R1 as it no longer exists.

47. The respondent conceded there was a TUPE transfer in 2016 but submits this is irrelevant to the 2018 question. If there was a business transfer the Spijkers test applied.

Conclusions

48. In order for there to have been a relevant transfer of an undertaking or part of an undertaking under Regulation 3 (1) (a) (as per the claimant's primary submission) there must have been a transfer an economic entity which retained its identity.

49. In my judgment there was a relevant and sufficiently identifiable economic entity. The type of undertaking or business concerned was the provision of training and interpretation services. The only assets were the employees who provided a vehicle for the delivery of the services offered by R1. R1 was set up, structured and organised to deliver these services. Employees can amount to an economic entity in service-based businesses. For these reasons I find there was a business transfer within the meaning of Regulation 3 (1) (a) rather than a service provision change.

50. The next question is whether there was a relevant transfer of this entity.

51. It was common ground that the interpretation services and meeting room hire transferred to R2. R2 accepted that Ms McNamara, who was assigned to the interpretation agency would have transferred but for her resignation prior to transfer. These activities continued post transfer.

52. In respect of the part of the undertaking that delivered training the economic entity did retain its identify post transfer as there was active ongoing lip-reading awareness training due to be delivered after the transfer between 19 October 2018 – 14 December 2018. This was the same activity as carried on before and after the transfer. The claimant was assigned to this part of the undertaking. He could have delivered this course. The fact that he was off sick was irrelevant to the question of whether there was a transfer. What was also irrelevant in my judgment was that there were no other training courses after this date. This is conflating the question of whether there was a transfer with whether there was an ETO reason for the claimant's dismissal. I accept Mr Pollitt's submission that these were matters for discussion after the transfer had taken place.

53. There was no evidence in my judgment that the respondent deliberately chose not to deliver any other training after the lip-reading course ended to avoid employing the claimant. It was clear there was no “pipeline” of potential work and there had been very limited delivery (6 courses in a one-year period see paragraph 15 above), undertaken by the claimant.

54. I did not accept that the claimant was engaged in a multi factorial role. The activities outlined at paragraphs 17, 18 and 19 were either performed for R2 and those activities came to an end in June 2018 or by the time of the transfer had ceased all together.

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Employment Judge Moore

Date 5 March 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 5 March 2020

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FOR EMPLOYMENT TRIBUNALS