



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mrs MC Lica

**(1) Mrs M Dudhee trading as St
Mary's Rest Home for the Elderly**

(2) London Borough of Sutton

HELD AT: London South

ON: 20 January 2020

EMPLOYMENT JUDGE Truscott QC

Appearances

For Claimant: in person

For First Respondent: No appearance or representation

For second respondent Mr N Cameron

Judgment

1. The claimant is entitled to £2356 as unpaid wages for August 2018 and this is the sum awarded against the first respondent.
2. The claimant is entitled to £2090.61 as unpaid wages for September 2018 and this is the sum awarded against the first respondent.
3. The claimant is entitled to £657.72 as unpaid holiday pay and this is the sum awarded against the first respondent.

4. The claimant is entitled to £313.20 in respect of the failure to give notice of one week and this is the sum awarded against the first respondent.
5. The claimant is entitled to £1250 as a redundancy payment and this is the sum awarded against the first respondent.
6. The second respondent (the Local Authority) is dismissed from proceedings.

REASONS

1. The claimant makes claims in respect of wages not paid and other entitlements. The claimant was ordered by 3 September 2019 to set out in simple terms the amounts alleged not to have been paid and identify any other claims. She has done so and these are the sums awarded by the Tribunal.

The position of the second respondent (Local Authority)

2. The Local Authority had a power to meet the care and support needs of adults which appeared urgent (s.19 Care Act 2014). The Care and support statutory guidance issued under the 2014 Act indicates that this power is very wide.

3. Mrs Marietta Dudhee, the first respondent, operated residential accommodation for elderly adults known variously as St Mary's Rest Home for the Elderly and St Mary's Lodge Care Home. Mrs Dudhee was a provider of care to adults.

4. Mrs Dudhee's provided care as an individual. Under the Care and Support (Business Failure) Regulations 2015, there is a business failure of a provider who is an individual only if that individual is (a) adjudged bankrupt or (b) makes a voluntary arrangement (Reg 2((3)). Mrs Dudhee was not a business failure within the meaning of the 2015 Regs.

5. Part 1 chapter 5 of the statutory guidance chapter deals with provider failure and other service interruptions. In cases where there is a service interruption not being a business failure, the relevant part of the guidance is paras. 5.25-5.33.

6. Para 5.29 of the guidance makes clear that in service interruption cases, the provider retains primary responsibility for the provision of care and support. The Local Authority's involvement was and can only have ever been secondary. In essence, the Local Authority is able to decide how to support the provider (in this case, Mrs Dudhee) whether she agrees or not and provide that support.

7. In a service interruption case, the Local Authority's power does not extend beyond providing support to the provider. The Local Authority cannot take ownership of a provider's business or require the ownership of a business to be passed to the Local Authority of any third party.

8. Following a whistleblowing disclosure, the Local Authority took a close interest in Mrs Dudhee's care provision. It became clear to the Local Authority that vulnerable adults in Mrs Dudhee's care had urgent care needs that Mrs Dudhee was unable to meet or was in jeopardy. Accordingly, the Local Authority had power under s.19(3) of the 2014 Act to take steps. The Local Authority exercised which its power s.19(3) and took certain steps including staging an urgent crises intervention.

9. The crises intervention lasted 7 days from 28 September to 4 October 2018. It included the Local Authority deploying its own staff to St Mary's, providing some on-the-ground management direction and providing a non-binding guarantee to Mrs Dudhee's remaining workers that they would be paid for the period of the intervention to prevent any further loss of staff to ensure the residents' safety.

10. The basic aim of the crises intervention was to move the 12 St Mary's residents to alternative accommodation and to ensure that care and support needs were met whilst the moves were organised and made. This was appropriate and considered necessary in the circumstances to ensure the safety of Mrs Dudhee's St Mary's Lodge residents.

11. The Local Authority did not consider that it needed to employ Mrs Dudhee's St Mary's staff. To avoid the situation at St Mary's worsening, the Local Authority needed St Mary's staff to continue working whilst the relocation of the St Mary's residents was organised. To facilitate this and given that the Local Authority had no intention of employing any member of the St Mary's staff, the Local Authority signposted staff who wanted to keep working to an Headstart Employment (an employment agency).

12. At no time was there any contractual relationship between the Local Authority and the claimant.

TUPE

13. Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") a transfer of employment can arise in 2 situations: (i) a business transfer under Reg 3(1)(a); or (ii) a service provision change under Reg 3(1)(b).

14. Mrs Dudhee continued as the legal owner of her care home business. No part of her business undertaking was transferred to the Local Authority. There was no transfer of any assets (tangible or intangible), contracts, staff, property or Mrs Dudhee's residents.

15. The Local Authority did not have the power under s19(3) of the 2014 Act to take or transfer the whole or any part of Mrs Dudhee's undertaking under TUPE.

16. Mrs Dudhee remained responsible for the care provision at St Mary's. The Local Authority exercised its choice to help Mrs Dudhee. There was no

actual change of employer responsible for running St Mary's and it cannot be said that there was indicative or a de facto transfer of the whole or any part of Mrs Dudhee's business. (Statutory guidance para 5.29)

17. When considering whether or not an undertaking has been transferred, all of the relevant circumstances should be taken into account (**Spijkers v Gebroeders Benedik Abbatoir CV and another** [1986] 2 CMLR 296). All of the relevant factors and circumstances in this case point away from there having been a transfer.

18. The circumstances of the service interruption to Mrs Dudhee's care provision and the crisis intervention were extremely unusual, if not unique. Mrs Dudhee remained legally responsible for the care provision; the Local Authority only had the statutory power to provide secondary support to Mrs Dudhee's legal responsibilities.

19. The Local Authority could not legally take over responsibility for carrying on Mrs Dudhee's business. A transfer occurs at the point a transferee takes over the responsibility for carrying on business. There cannot, therefore, have been a transfer. (Para 20 of **Commercial Motors (Wales) Ltd v Howley** UKEAT/0491/11 citing **North Wales Training and Enterprise Council Ltd (t/a Celtec) v Astley and others** [2006] UKHL 29).

20. There was no service provision change under TUPE Reg 3(1)(b). For there to be a transfer by way of a service provision change, the conditions set out in Reg 3 (3) must all be satisfied.

21. The condition in Reg 3 (3) (ii) provides that "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". This was a short term task.

22. In any event, there was no stable economic entity in existence. European Court authority states that an undertaking must be a 'stable' economic entity. In **Rygaard v Stro Molle Akustik A/S: C-48/94, [1996] IRLR 51**, the Court of Justice had to consider the position of successive building contractors. The main contractor agreed that work which contractor 'A' had been subcontracted to do would be completed by contractor 'B'. Contractor B refunded contractor A the cost of the materials supplied and took on responsibility for two of contractor A's apprentices. When one was subsequently dismissed by contractor B (contractor A having become bankrupt in the interim), the question arose as to whether the Danish equivalent of the 1981 Regulations applied. The ECJ considered that there was no transfer within art 1(1) of the directive where work started by one party was taken over for completion by another. In order to transfer, the ECJ were of the view that the undertaking had to be 'a stable economic entity'.

23. There was no transfer of the employment of the claimant to the Local Authority. Accordingly, the second respondent is dismissed from these proceedings.

Employment Judge Truscott QC

Date 20 January 2020