



EMPLOYMENT TRIBUNALS

Claimant: Mrs Teresa Machin

Respondent: (1) Aspens Services Limited
(2) Governing Body of St Catherine's C of E Primary School
(3) Worcestershire County Council

Heard at: Birmingham Employment Tribunal via CVP

On: 27 July 2020

Before: Employment Judge Mark Butler

Representation

Claimant: Mr W Horwood (Counsel)

First respondent: Miss M Wood (in-house HR consultant)

Second and third respondent: Miss T Hand (Counsel)

JUDGMENT (OPEN PRELIMINARY HEARING)

The judgment of the tribunal of the Preliminary Issue is that:

1. At the material time there was not a relevant transfer, a service provision change, within the meaning of Regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 from the first respondent to the second and/or third respondent.
2. Respondent 2 and 3 are dismissed from these proceedings.
3. Oral reasons were handed down at the hearing. The representative of the first respondent requested written reasons following the handing down of that judgment. These are those written reasons as requested.

Background

4. The claimant complains that she has been unfairly dismissed, wrongfully dismissed and is owed outstanding holiday pay by either the first or second and/or third respondent. These claims were brought by a claim form that was presented on 15 November 2019.

5. This matter came before the tribunal today to determine whether the claimant's employment transferred from the first respondent to the second and/or third respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (hereinafter referred to as 'TUPE').
6. It was explained to me by Mr Horwood that the claimant was adopting a neutral stance in this case and was not submitting a positive case in respect of who the correct respondent is. The claimant simply wanted to know against whom she should progress her case.
7. The first respondent's position was that there was a relevant transfer and that the claimant's employment transferred to the second and/or third respondent who are liable for the claims.
8. The second and third respondent's position was that there was no relevant transfer, the claimant was never their employee, and all liability, if any, rests with the first respondent.
9. In assisting me with this hearing today I was provided with a bundle which ran to some 349 pages. I heard evidence from three individuals. I heard evidence from the claimant, from Ms Cunningham who is the Regional Operations Manager of the first respondent, and from Ms Power who is the Headteacher of the second respondent.
10. I was further assisted by having received a skeleton argument from Ms Wood (albeit very late in the day) for the first respondent and from Ms Hand for the second and third respondent.
11. The issue that I have to determine at this Preliminary Hearing is the preliminary issue set out below.

Issues

12. This case comes before me in a publicly held preliminary hearing, albeit using the tribunal's Cloud Video Platform ('CVP'), to determine the preliminary question as directed by Employment Judge Battsby at a Case Management Preliminary Hearing held on 10 March 2020:

"Was there a transfer of the claimant's employment from the first respondent to the second and/or third respondent in about July 2019 by virtue of the TUPE Regs. 2006 and, if so, on what date?"

13. In order that I may determine the preliminary issue it is necessary for me to consider the following questions:
 - a. Were the activities before and after the relevant transfer fundamentally or essentially the same?
 - b. Did the activity cease to be carried out by the contractor and were they instead carried out by the client on its own behalf?
 - c. Immediately before such change was there an organised grouping of employees that had its principal purpose of carrying out activities on behalf of the client?

d. Did the client intend to carry out the same activity?

Law

14. Relevant to this hearing was Regulation 3 of the TUPE Regulations. More specifically, Regulation 3(1)(b)(iii), which provides that one type of service provision change to which these Regulation apply is where:

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

15. I also reminded myself of the remaining parts of Regulation 3 of the TUPE Regulations, which provides:

(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.

(4) Subject to paragraph (1), these Regulations apply to—

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;

(b) a transfer or service provision change howsoever effected notwithstanding—

(i) that the transfer of an undertaking, business or part of an undertaking or business is governed or effected by the law of a country or territory outside the United Kingdom or that the service provision change is governed or effected by the law of a country or territory outside Great Britain;

(ii) that the employment of persons employed in the undertaking, business or part transferred or, in the case of a service provision change, persons employed in the organised grouping of employees, is governed by any such law;

(c) a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.

16. In closing submissions by Ms Wood I was referred to the cases of **CT Plus (Yorkshire) CIC v Black & Or's (Transfer of Undertakings: Service Provision Change) [2016] UKEAT0035_16_0308**, **Costain Ltd v Armitage & Another EAT/0048/14**, **Amaryllis Ltd (formerly of Montrose Road, Chelmsford, Essex) v McLeod and others** and **Barlow v Allen t/a Associated Cleaning Services ET/2407598/09** (although I do note that this is an Employment Tribunal decision).
17. Whereas Ms Hand in her closing submissions referred me to the case of **OCS Group UK Ltd v Jones and another UKEAT/0038/09**.
18. When considering whether the activities before and after a service provision change are fundamentally or essentially the same, I reminded myself that great care has to be taken with this exercise, as too narrow a construction of the activities in question can act to frustrate the protections contained within the TUPE Regulations.

Findings of Fact

I make the following findings of fact, on the balance of probability based on all the matters I have seen, heard, and read. In doing so, I do not repeat all the evidence, even where it is disputed, but confine my findings to those necessary to determine the issues in this case.

19. The first respondent had a contract to provide services to the second and/or third respondent as the client. This contract started on the 01 April 2016 and came to end on 19 July 2019.
20. The activity which was undertaken by the first respondent as part of the contract to provide services was an activity of providing a full canteen service to the client and to account for monies received for paid meals.
21. In providing a full canteen service, the first respondent would prepare, produce and distribute both hot and cold meals at set times during the day. Food was prepared and produced on site in kitchen facilities, which was made available to the first respondent by the second respondent.
22. During the time when the first respondent was providing the canteen service, on average, there would be between 5-7 children out of 130 who would have a cold sandwich. This equated to around 5.4% of the meals that were distributed. The remainder were hot meals. Therefore, a

significant proportion of the meals prepared by the first respondent were hot meals.

23. The first respondent, as part of the activity that they were contracted to do, would maintain a system of identifying which children paid for their meals, take payment accordingly and undertake general accounting practices in relation to payments received.
24. Following a dispute concerning the payment of a monetary surplus, which the first respondent had indicated that they were no longer going to pay to the second a/or third respondent, the second respondent gave notice to the first respondent in a meeting on 05 April 2020 that they were seeking to terminate the contract. The first and second respondent reached agreement that the contract would come to an end at the end of the summer term. This termination of the contract was confirmed in a letter dated 08 May 2019 (see page 136 of the bundle).
25. During May 2019, the second respondent put out the tender, with a view to securing a contract with new caterers. This was a genuine tendering process, which failed to secure a new contractor for the reasons outlined in Ms Power's unchallenged evidence at paragraphs 23-25 of her witness statement. The tender documents can be seen at pages 140-192 of the bundle, with the advert for the catering contract at pages 132-135 of the bundle.
26. Following a failure to identify a suitable tender for the catering contract, the first respondent considered insourcing the work. However, this was not pursued. There was also discussion between the first and second respondent with a view to extending the contract in circumstances where no new catering contract had been awarded. However, this was not pursued following the first respondent advising the second respondent that such an extension would attract an additional cost of £107.69.
27. The contract between the first and second/third respondent came to end on 19 July 2019.
28. Following termination of the contract with the first respondent the school engaged a sandwich provider to prepare sandwiches off site, take payment off site and deliver the sandwiches to the second respondent. The second respondent was responsible for distributing the sandwiches to the correct child. Neither of the second or third respondent would produce food themselves, nor would they be responsible for taking payment (see p.276 and p.279 of the bundle).
29. There were events that took place at the school where food was provided. This took the form of 'Messy Church' (see p.277 and p.282 of the bundle) and bingo with fish and chips (see page 282). However, the food for both of these nights were not prepared by either the second and/or third respondent. The food for Messy Church was produced by volunteers and the fish and chips were provided through a favourable arrangement with a local fish and chip shop.
30. Catering for the second and/or third respondent continues to be provided by an external sandwich provider.

Conclusions

31. Having made my findings of fact based upon the evidence relevant to the issues I am to determine, I have considered the written and oral submissions that have been made to me by the representatives.
32. This hearing is essentially about whether there was a relevant transfer between the first respondent and the second and/or third respondent as defined by Regulation 3 of the TUPE regulations.
33. In this case, based on the findings of fact that I have made, it is evident that immediately before 19 July 2019 the first respondent was engaged in providing to the second and/or third respondent a full canteen service whilst accounting for monies received for paid meals. Whereas after that date, no such activity was continued by the second and/or third respondent. The role fulfilled by the second and/or third respondent following 19 July 2019 was simply as distributor of cold foods that had been prepared off site and for which payment and accounting for monies received for paid meals also took place off site. There was no transfer of activities, pursuant to Regulation 3 of the TUPE Regulations, from the first respondent to the second and/or third respondent.
34. This was not an arrangement set up to avoid the TUPE Regulations either.
35. I am led to conclude that at the material time there was not a relevant transfer of an activity carried out by a contractor on behalf of their client and are instead carried out instead by the client, namely the second and/or third respondent. The conditions referred to in Regulation 3 of the TUPE Regulations have not been met.
36. As such, respondent 2 and respondent 3 are dismissed from these proceedings.

Signed by: Employment Judge Mark Butler

Signed on: 08 September 2020

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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