



## EMPLOYMENT TRIBUNALS

Claimant

**Ms K Mohamed**

v

Respondents

- 1. First Choice Facilities Services Limited**
- 2. Active Cleaning Ltd**

**Heard at: CVP**

**On:**

**3, 4 December 2020**

**Before: Employment Judge Davies**

### **Appearances:**

**For the Claimant:**

**Mr A Suleiman (Claimant's son)**

**For the Respondents:**

**1. Mr Searle (counsel)**

**2. Mr A Ross (director)**

**Interpreter:**

**Mr M Noor**

**JUDGMENT** on the preliminary issue having been given to the parties on 3 December 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

### **Introduction and Issues**

1. Ms Mohamed brings claims of automatically unfair dismissal because of a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), and for a redundancy payment and notice pay. We agreed at the start of the hearing that I would start by deciding the preliminary issue whether there was a relevant transfer under TUPE or not. These are the reasons for my finding that there was not.
2. At the CVP hearing the claimant was represented by her son, Mr Suleiman, and was assisted by a Somalian interpreter, Mr Noor, appointed by the Tribunal. Mr Searle (counsel) represented the First Respondent and Mr Ross (director) represented the Second Respondent. I was provided with an agreed file of documents. I heard evidence from Mr Ross and from Mr Styles of the First Respondent.
3. The Respondents agreed that, following the decision of the Court of Appeal in *Hunter v McCarrick* [2013] ICR 235, there cannot have been a service provision change as defined in TUPE Regulation 3(1)(b) because the client in the two relevant cleaning contracts changed. The issue for me was therefore whether there was a business transfer as defined in TUPE Regulation 3(1)(a).

## Findings of Fact

4. This case concerns Ms Mohamed. She is a cleaner earning national minimum wage and she arrived at work one day to find someone else doing her job. Although there are complex legal arguments in this case it is important to remember that at the heart of the case is Ms Mohamed and her claim. I am pleased to know that Ms Mohamed is back working for the Second Respondent.
5. Ms Mohamed worked as a cleaning operative a Ventana House in Sheffield, a commercial office building let to commercial tenants. Before January 2020 its owners had a contract with Bellrock Ltd (“Bellrock”) for facilities management services. Bellrock in turn had a contract with Active Cleaning Ltd (“Active”), the Second Respondent, to provide cleaning services. Active is a company based in Leeds that provides contract cleaning services for a substantial number of clients. On the Ventana House contract it had five cleaning operatives including Ms Mohamed. In fact, they had transferred into Active under TUPE on a previous occasion. The service they provided, which I have been concerned with, was cleaning the common areas of Ventana House. They provided 50 hours’ cleaning services per week, using equipment owned by Active, which was hired to the client, Bellrock, under the contract. Mr Ross tells me that is a standard way of operating in the industry.
6. In January 2020 Ventana House was sold to NPV Sheffield Ltd (“NPV”), an offshore pension investment fund. NPV appointed a new facilities management company, APAM Ltd (“APAM”). APAM have a nationwide contract with the First Respondent, First Choice Facilities Management Ltd (“First Choice”), for contract cleaning services. First Choice is another company with a substantial number of commercial cleaning contracts. Very shortly before the sale of the building was completed APAM copied First Choice into emails suggesting that First Choice would be the new cleaner at Ventana House. The sale was completed on 17 January 2020.
7. On 18 and 19 January 2020, Ms Mohamed went to work, found someone else doing it, and tried to do her job anyway. On Saturday 18 January 2020 Bellrock had sent an email to Active telling them to remove their staff from Ventana House immediately, and giving Active 30 days’ notice to terminate their contract with Bellrock. Active received or open the email on the Monday and told its employees that day. There is no criticism of Mr Ross and his company in that. They did not know what was going on before 20 January 2020.
8. A dispute arose about whether TUPE applied. Ms Mohamed and her colleagues stopped working at Ventana House and that was really because First Choice was saying that TUPE did not apply and they were not transferred to it. Active subsequently recovered its equipment from Ventana House.
9. First Choice already had a contract with APAM to provide cleaning services in the neighbouring building to Ventana House. When they found out about the sale of the building First Choice’s Area Manager visited Ventana House and determined a cleaning specification. A formal contract or tender was put in after the event. It provided for 64 hours’ cleaning services per week in the common parts. First Choice had three cleaning operatives working next door and it used the same people to cover the Ventana House contract. They used the equipment from next door too. That equipment was worth about £3,500.
10. Those are the basic facts. I was not given more detailed evidence than that.

## Legal principles

11. Regulation 3 of TUPE provides, so far as material, as follows:

### 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.

...

(6) A relevant transfer -

- (a) may be effected by a series of two or more transactions; and
- (b) may take place whether or not any property is transferred to the transferee by the transferor.

...

12. As noted above, in *Hunter v McCarrick* [2013] ICR 235 the Court of Appeal held that there cannot be a service provision change within Regulation 3(1)(b) if the client changes. Everybody agrees that this means there can be no service provision change in this case because before January 2020 the client in the cleaning contract was Bellrock (or possibly the owner of Ventana House through Bellrock) and after January 2020 it was APAM (or possibly NPV through APAM).
13. However, the principle in the *Hunter* case only concerns service provision changes. The Court of Appeal expressly left open the question whether there could still be a business transfer within Regulation 3(1)(a) if the client changed. At the very end of their judgment the Court indicated that they did not know of any authority on the point. They identified a possible argument, but they pointed out that the identity of the client might be an intrinsic part of the identity of the undertaking.
14. That leaves me to decide whether on the facts of this case and applying well-established legal principles there was a business transfer within Regulation 3(1)(a).
15. Regulation 3(1)(a) is based on the Acquired Rights Directive (Council Directive 2001/23/EC). That is a piece of European legislation and it is designed to protect employees.
16. The principles set out in the case of *Cheesman v R Brewer Contracts Ltd* [2001] IRLR 144 still apply (although of course they were established at a time when there was not the separate "service provision change" category of transfers). As to whether there is an undertaking, the EAT held:

- 16.1 There must be a stable economic entity, an organised grouping of persons and assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective.
- 16.2 In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible. In certain sectors including cleaning the assets are often reduced to their most basic and the activity is essentially based on manpower.
- 16.3 An organised grouping 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.
- 16.4 An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operational resources available to it.

17. As to whether there has been a transfer, the EAT held:

- 17.1 The decisive criterion is whether the entity in question retains its identity, as indicated, among other things, by the fact that its operation is actually continued or resumed.
- 17.2 In a labour-intensive sector an entity is capable of maintaining its identity after it has been transferred where the new employer does not merely pursue the activity in question but also takes over a major part of the employees specially assigned by his predecessors to that task. That follows from the fact that in certain labour-intensive sectors a group of workers engaged in the joint activity on a permanent basis may constitute an economic entity.
- 17.3 The Tribunal must consider all the factors characterising the transaction in question. The relevant factors include: the type of undertaking, whether or not its tangible assets are transferred, the value of its intangible assets at the time of transfer, whether or not the majority of its employees are taken over by the new company, whether or not its customers are transferred, the degree of similarity between the activities carried on before and after the transfer, and the period, if any, in which they are suspended.
- 17.4 Account must be taken of the type of undertaking or business in issue, and the degree of importance to be attached to the different factors will vary according to the activity carried on.
- 17.5 Where an economic entity is able to function without any significant tangible or intangible assets, the maintenance of its identity following the transaction being examined cannot logically depend on the transfer of such assets.
- 17.6 Even where assets are owned and are required to run the undertaking, the fact that they do not pass does not rule out a transfer.
- 17.7 Where maintenance work is carried out by a cleaning firm and then next by the owner of the premises concerned, that mere fact does not justify the conclusion that there has been a transfer.
- 17.8 More broadly, the mere fact that the service provided by the old and new undertaking providing a contracted-out service or the old and new contract-holder are similar does not justify the conclusion that there has been a transfer of an economic entity between predecessor and successor.

- 17.9 The absence of any contractual link between transferor and transferee may be evidence that there has been no relevant transfer but it is certainly not conclusive as there is no need for any such direct contractual relationship.
- 17.10 When no employees are transferred, the reasons why that is the case can be relevant as to whether or not there was a transfer.
- 17.11 The fact that the work is performed continuously with no interruption or change in the manner of performance is a normal feature of transfers of undertakings but there is no particular importance to be attached to a gap between the end of the work by one sub-contractor and the start by the successor.
- 17.12 More generally, the aim of the Directive is to ensure continuity of employment relationships within the economic entity irrespective of any change of ownership the Courts will readily adopt a purposive construction to counter avoidance.

### **Application of the law to the facts**

18. Applying those principles to the facts set out above, I find that there was an undertaking. Mr Searle did not seriously dispute that. There was a stable economic entity, which was the organised group of cleaning operatives providing the cleaning services at Ventana House under the contract with Bellrock.
19. That brings me to the question whether there was a transfer. That is very finely-balanced in this case. The purpose of the Directive and TUPE Regulation 3(1)(a) is to protect employees, but that does not mean that every situation the Regulations would apply. I assess the relevant factors and come back to the fundamental question whether there is the transfer of an entity that retains its identity.
20. Here, no assets transferred. No staff transferred, but in some ways I attach limited weight to that because in reality they did not transfer because First Choice and others said there was no transfer. All that moved in fact was the contract. It did not “move” in quite the same way as it moves in the typical transfer situation, because both parties to the contract changed. There was a group of operatives providing cleaning services at Ventana House pursuant to a contract. Now, the building is owned by someone else, they (or rather their facilities management provider) have entered a different contract with different people. There is no contractual link between Active and First Choice. There is no common link between the contracts no matter how far up the chain you go. That points to the entity not retaining its identity after the transfer.
21. There was no gap between the contracts. Essentially the same work was carried out, with an immaterial variation in the number of hours. But it was carried out by the operatives who were already working next door and who were now covering two buildings. They used the equipment from next door. There were some economies of scale in that way of doing things. That too points to the entity not retaining its identity afterwards.
22. Bringing all the threads together, on balance I find that there was no transfer. There was not a transfer of a part of an undertaking or business to another person where there was the transfer of an economic entity that retained its identity. The complete change in contractual arrangements following a change in ownership of the building, and the extension of the work done by First Choice in the next door building pursuant

to their existing contract with APAM point to that conclusion. The importance of protecting employees, and the other factors that point towards a transfer, do not lead me to a different conclusion.

**Employment Judge Davies  
4 December 2020**