



EMPLOYMENT TRIBUNALS

Claimant: Mr Ian Read

Respondent: (1) Adventure Risk Management Services Limited
(2) Tourism Quality Services Limited

Heard at: via CVP

On: 22 – 23 March 2021

Before: Employment Judge Webb

Representation

Claimant: Mr T Pochron
First Respondent: Mr L Varnam
Second Respondent: Mr A George

JUDGMENT having been sent to the parties on 23 March 2021 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

1. The Claimant, Mr Read, was employed by the Second Respondent Tourism Quality Services Limited (TQS) as a Senior Inspector from 1996. TQS was contracted with the Health and Safety Executive (HSE) to provide inspections and report functions in relation to providing licenses for adventure activities. He claims that he was transferred to the First Respondent, Adventure Risk Management Service Limited (ARMS) on 1 April 2020 following its successful tender with the HSE. He claims that the transfer was a relevant transfer under Regulation 3(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regulations).
2. The Second Respondent agrees there was a relevant transfer. The First Respondent denies that a relevant transfer took place.

Claims and Issues

3. The Claimant has bought a claim against the First Respondent, or in the alternative the Second Respondent, for unfair dismissal.

4. The Claimant has also submitted a claim in the alternative against the Second Respondent for unpaid wages, in the event there has not been a relevant transfer under the TUPE Regulations.
5. The Claimant has also brought a claim against both respondents for a failure to inform and consult under the TUPE Regulations.
6. The issues to be decided in this preliminary hearing were identified in the Order of Employment Judge Harfield on 19 November 2020 and confirmed at the start of the hearing as follows:
 - (a) Is TUPE applicable to the case, because there was either a business transfer or service provision change?
 - (b) Was there, on 31 March 2020, a transfer from the Second Respondent to the First Respondent of an undertaking or part of an undertaking or business situated immediately before the transfer in the United Kingdom?
 - (c) If so, did that transfer involve the transfer of an economic entity?
 - (d) If so, did that economic entity retain its identity before and after the transfer
 - (e) Did activities cease to be carried out by the Second Respondent on HSE's behalf on 31 March 2020?
 - (f) If so, were fundamentally the same activities carried out by the First Respondent on the HSE's behalf after 31 March 2020?
 - (g) If so, was there, prior to 31 March 2020, an organized grouping of employees situated in the Great Britain which had as its principle purpose the carrying out of the activities concerned on behalf of the HSE?
 - (h) If so, did the HSE intend that fundamentally the same activities, would after 31 March 2020, be carried out by the First Respondent other than in connection with a single specific event or task of short-term duration?

The Hearing

7. The Claimant was represented by Mr T Pochron and gave evidence. The First Respondent was represented by Mr L Varnam, who called evidence from Mr T Morton, a director of ARMS. The Second Respondent was represented by Mr A George, he called Sir B Boothby, a director of TQS, and Mr J Walsh-Heron, managing director and Chief Executive of TQS.
8. In making my decision I also considered the documents from an agreed 630-page bundle of documents which the parties introduced in evidence. The First Respondent also provided a written opening statement, and the Second Respondent provided a Skeleton Argument.

Findings of Fact

9. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point. References to page numbers are to the agreed bundle of documents.

10. The Adventure Activity Licensing Authority (AALA) was set up to licence outdoor activities involving children following the Lyme Bay canoeing tragedy. TQS was originally designated the AALA. In 2007 the HSE became the AALA and TQS were contracted to provide services to them including inspections and the production of reports. These reports and inspections are required by virtue of Regulations 6(2) and (3) of the Adventure Activities Licensing Regulations 2004/1309 (the 2004 Regulations):

“6.— Consideration of applications for licences

(1) The licensing authority may grant or refuse a licence but, without prejudice to its discretion to refuse a licence on other grounds, the authority shall not grant a licence unless—

(a) it is satisfied that the applicant has—

(i) made a suitable and sufficient assessment of the risks to the safety of the young persons and other persons who will be engaged in the adventure activities in respect of which the application is made or whose safety may be affected thereby;

(ii) identified the control measures he needs to take in consequence of that assessment to ensure, so far as is reasonably practicable, the safety of those persons;

(iii) made the arrangements referred to in regulation 9(1)(a) and (b);

(iv) appointed competent persons to advise him on safety matters or has competence in such matters himself; and

(b) the required fee has been paid.

(2) The licensing authority shall, before reaching a decision as to whether or not it will grant a licence, first consider a report made to the authority by a person authorised by it for that purpose pursuant to regulation 12.

(3) The report referred to in paragraph (2) shall be made only following an inspection by the person making the report and, subject to regulation 7(2), carried out after the application for the licence has been received.

(4) The inspection referred to in paragraph (3) shall be of any such places, equipment and documents as the person making the inspection thinks necessary for the purpose of enabling the licensing authority to satisfy itself on the matters referred to in paragraph (1).”

11. Without a report, carried out after an inspection, the HSE is unable to lawfully issue a licence.

12. TQS conducted the inspections and reporting via five Senior Inspectors who would undertake inspections and produce reports setting out whether a licence should be granted. All applications for a licence, including

renewal applications, were subjected to a site visit. Each Senior Inspector was responsible for a specific geographic area. Senior Inspectors could undertake spot checks of premises and pre-emptive inspections in the 12 months before expiry of a licence with a view such an inspection could be used to inform a renewal application report. Senior Inspectors could also use a number of freelance inspectors to complete site visits and provide reports, on their behalf. Senior Inspectors could claim expenses for travelling to the various sites for inspections.

13. In his evidence before me, Sir Boothby explained that TQS was not for profit and funded by way of a grant from the HSE that would cover the costs of running the organisation. These costs were reported to the HSE on a regular basis. Since 2007 any fees received for licences, although money due to the HSE as the AALA, were processed and retained by TQS and any shortfall in operating costs were then met by HSE by way of the grant. Mr Morton's evidence was that TQS were provided with a retainer and were able to keep fees payable for licences. I prefer Sir Boothby's evidence in respect of this as he was involved with the financial running of TQS. The details of the services provided by TQS can be found in their contract documentation and in particular are set out at pages 112-117 of the bundle.
14. In August 2019 the HSE retendered for an inspection service and the First Respondent, ARMS, was the successful bidder. The details of services that were to be provided by the successful bidder can be found in Schedule A of the tender documentation at pages 190-202 of the bundle.
15. The terms of the tender reflected that the administration of the licensing service was to be taken in-house by HSE and ARMS was to provide inspections and reports. Rather than use the same funding model as TQS, HSE wanted the winning bidder to provide a fixed cost for each inspection. In their tender document it was made clear that that site visits would only be required for new applicants for a licence (5.18 at page 196 of the bundle), with spot checks only being possible with written permission of HSE (7.1 at page 198 of the bundle). Site visits for renewal applications were only to be carried out after considering all the information available to the inspectors (5.19 at page 196).
16. Mr Morton's evidence was that his view and the view of HSE was that inspections under the 2004 Regulations did not require a site visit. Under the new arrangements ARMS would carry out a desktop review of renewal applications, with those inspections being charged to the HSE at a lower cost than inspections with site visits. I accept his evidence that this is his view and that of the HSE as the retender document was drafted on those terms and the contract awarded on that basis and that will be the way in which ARMS will operate.
17. However, I have found that it is not within the powers of the HSE to prevent site visits for renewal applications. Regulation 6(4) of the 2004 Regulations makes clear that any inspection shall be of any such places, equipment or documents as the person carrying out the inspection shall consider necessary. I find the tender documents make clear renewal site visits, rather than being not carried out at all, are to be carried out at the

discretion of the person carrying out the inspection. All the witnesses agreed that the 2004 Regulations and the underlying Act of Parliament had not changed. I therefore find that this was also the position while TQS held the contract.

18. Under the new arrangements with ARMS, inspectors will be self-employed. Each inspector will carry out fewer inspections with the inspections being split between 20 inspectors instead of five. Spot check visits are only carried out with the permission of the HSE and renewal site visits would not always be carried out. Reports and recommendations for granting licences and potential conditions will be provided to the HSE.
19. The First Respondent said the Claimant had agreed the service had fundamentally changed because site visits were no longer going to be compulsory for renewal applications. I accept that this is Mr Read's view because of his feeling that site visits at renewal are important to the system of licencing. However, I have found that site visits have always been discretionary rather than compulsory under the 2004 Regulations and that his view is held on a misunderstanding of those regulations.
20. During the retendering process all parties treated the process as being subject to TUPE regulations. As part of the retendering process, the HSE agreed to be responsible for any TUPE costs. Mr Morton's evidence was that at the beginning he was unsure and that felt it could go either way and I accept that evidence, however the process did continue on the basis the TUPE applied following legal advice. It was only on receipt of the ET3 in this matter that it became clear that the First Respondent did not accept that a transfer under the TUPE Regulations had taken place.
21. TQS ceased providing services to the HSE at the end of their contract on 31 March 2020, and ARMS began providing services on 1st April 2020. On 27 April 2020 Mr Read received what was described as a redundancy payment from ARMS and was informed he was no longer employed.

Law

22. The TUPE Regulations only apply to a relevant transfer as described by Regulation 3 which, as far as is relevant to the issues before me, states as follows:
 - “3(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.”*

23. All the parties agreed that the question of whether there had been a service provision change under Regulation 3(1)(b) is a matter of fact and degree for me to decide on the evidence.

24. For the Claimant, Mr Pochron argued that the activities being carried out by TQS and ARMS were fundamentally the same. During the retendering process all parties had agreed that the TUPE Regulations would apply. The HSE were bringing the administration in house but leaving the inspectorate function to be carried out by ARMS. That inspection function still needs to be carried out and could not be fundamentally different as the 2004 Regulations have not changed; the inspectorate service was the same as it ever was.

25. For the Second Respondent, Mr George also argued that a relevant transfer had taken place for the same reasons that the Claimant had set out. He argued in the alternative a transfer of an economic entity had taken place under Regulation 3(1)(a), the fact TQS had in effect been split in two did not prevent a business transfer for the purposes of the regulations.

26. Mr Varnam for the First Respondent argued that the activities carried out by ARMS are fundamentally different to those carried out by TQS. He

argued in particular that the change in status of those undertaking the inspection, from employed to freelancers, that their role in terms of being able to organise spot checks or undertake advance inspections was considerably more limited. He emphasised the difference between carrying out a site visit for every application, around 80-120 visits per year for each inspector, which was the working practice of TQS, and the inspectors for ARMS who would undertake site visits for new applicants only, around 13% of total inspections.

27. In relation to Regulation 3(1)(a), Mr Varnam argued that the workforce and management had changed and that TQS continued to exist as an entity after the transfer. He referred me to **Cheeseman v R Brewer Contracts Ltd [2001] IRLR 144** and asked that I consider the multifactorial approach, and that the intentions of the parties are, at the highest, just another factor to be considered.
28. If I were to find a transfer had taken place, Mr Varnam argued, in the alternative, that any transfer was for the short-term task of carrying out the redundancy process, and not for the long-term activities of ARMS.

Conclusions

29. I have considered the facts as I have set out above and the submissions of the parties in reaching my conclusions on the issues before me.
30. *“Did activities cease to be provided by TQS on behalf of the HSE 31st March 2020?”* I conclude the answer to that question is plainly yes. TQS were no longer contracted by the HSE after that date.
31. *“If so, were fundamentally the same activities carried out by ARMS on behalf after 31st March 2020?”* In paragraph 6 of his opening note, Mr Varman described the relevant activities as the carrying out of inspections on behalf of the HSE. I conclude this is a fair description of the activities that are being carried out. The HSE in their position as AALA are required by law to consider reports that have been drafted following an inspection. It is the report writing and inspections that the HSE retendered for. While there are differences in the way ARMS will be carrying out the inspections, I conclude that the differences in the way the inspections are to be undertaken do not fundamentally alter the activities being carried out.
32. *“If so, was there, prior to 31 March 2020, an organized grouping of employees situated in Great Britain which had as its principle purpose the carrying out of the activities concerned on behalf of the HSE?”* It is accepted by the First Respondent that there was an organised group carrying on that activity in Great Britain and I conclude that there was such a group.
33. *“If so, did the HSE intend that fundamentally the activities would after 31 March 202 be carried out by the First Respondent other than in connection with a single specific event or task of short-term duration?”* I conclude that the HSE did intend that the activities of carrying out inspections on behalf of the HSE was to be undertaken by ARMS other than in connection with a single event. The requirement to consider reports following applications

for a licence is a continuing one as is the requirement for inspections, that is clear from the statutory background and the tender documents.

34. *“Is TUPE applicable to the case, because there was either a business transfer or service provision change?”* In light the above I conclude that TUPE is applicable to this case because there was a service provision change on 1 April 2020.

Employment Judge Webb

Date: 12 April 2021

REASONS SENT TO THE PARTIES ON 22 April 2021

.....
FOR THE TRIBUNAL OFFICE