



# EMPLOYMENT TRIBUNALS

**Claimant:** Julie Miles

**Respondent 1:** Absolutely Leisure Limited (Resp1)  
**Respondent 2:** Redwood Leisure (Resp2)

**Heard at:** Watford by video

**On:** 8 April 2021

**Before:** Employment Judge Allen sitting alone

## PRELIMINARY HEARING

**Appearances:**

**For the Claimant:** Miss Julie Miles - unrepresented

**For Respondent 1:** Mr John Brotherton, Solicitor

**For Respondent 2:** Mr Michael Charles Reddan - unrepresented

**COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals**

*“This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in a bundle of 110 pages, the contents of which I have recorded. The order made is described at the end of these reasons.”*

## JUDGMENT

1. As regards the claim against Resp2 no preliminary issues were raised today. In the circumstances the claim against Resp2 will proceed to final hearing.
2. The application of Resp1 to strike out the claim against under Rule 37(1) Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) on the grounds it had no or little reasonable prospect of success is not well founded and is rejected. The claim brought by Ms Miles will proceed to final hearing.

## REASONS

### Open Preliminary Hearing

3. An Open Preliminary Hearing (OPH) to consider the application by Resp1 to strike out the claim under Rule 37(1) Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the Rules) on the grounds it had no or little reasonable prospect of success.

### The Claim

4. In an ET1 Claim form submitted on 5 October 2018 the claimant claims a redundancy payment on the basis of redundancy arising out of her objection to TUPE transfer and the fact the transferee had no need of an Operations Manager (her post with the transferor before transfer).
5. At section 8.2 in the free text section, she asserts:
  - *'Was employed as an Operations Manager prior to a TUPE transfer from Absolutely Leisure to Redwood Leisure on 1 March 2018.'*
  - *'Was told at the time that there was no role for an Operations Manager at Redwood Leisure but that had to TUPE transfer anyway. Did this under protest and wrote objecting to this at the time....'*
  - *'Believe(s) was made redundant at the time of the transfer by either Absolutely Leisure or Redwood Leisure. Ha(s) carried out some work at Redwood Leisure, to mitigate losses, but it was not in role as Operations Manager.'*

### Findings

6. The claimant was employed by Resp1 between February 2001 and February 2018. A period of 17 years.
7. In December 2016 Resp1 promoted the claimant to Operations Manager.
8. The claimant was a member of staff assigned to the catering and events services (part of Resp1's business).
9. In 2017 Resp1 decided to transfer its catering and events services to Resp2.
  - 9.1. On 14 November 2017 Resp1 held a consultation with the claimant and other staff setting out the reasons for its decision and outlining the redundancy versus TUPE transfer situation. Staff were invited to raise counter proposals. Confirmed in letter of 16 November 2017. This meeting was recorded and then transcribed.
  - 9.2. On 21 November 2017 Resp1 held a 2<sup>nd</sup> consultation meeting with the claimant and other staff to enable them to bring forward any counter proposals. Confirmed in a letter of 9 December 2017. This meeting was recorded and transcribed.
  - 9.3. 15 January 2018 Resp1 held a 3<sup>rd</sup> consultation meeting; this meeting was recorded and transcribed, confirming that:

- 9.3.1. the transfer would take place on 1 March 2018.
- 9.3.2. Resp1 would take no steps to terminate the claimant's contract.
- 9.4. On the same day Resp1 confirmed the discussions of that meeting in a letter and made it clear that a refusal to be transferred was a resignation without entitlement to redundancy payment.
- 9.5. 5 February 2018 Resp1 held a 4<sup>th</sup> consultation meeting with the claimant confirming that her contract would be transferred to Resp2. Confirmed in a letter of 8 February 2018.
10. Resp2 was a small company run by Mr Michael Reddan who performed the role of Operations Manager himself; consequently, he had no need of another.
11. The claimant asserts she raised objection to her transfer in writing on 14 November after the first consultation meeting. She believes it was sent from her works email account to which she no longer has access. She also asserted that she raised her objection during the consultation meeting. The consultation meetings were recorded and transcribed. The transcript records only Resp1's address to the staff (made by Mr Brind). Resp2 states in his response to Ms Miles' claim he was fully aware of the claimant's objections at the time of transfer. Whilst Resp1 denies that she objected and her letter of objection has not been produced she did give evidence today that she consulted her union about her concerns. Resp1 has produced copies of email correspondence with the union which focuses on the adequacy of the consultation process and whether the union should have been involved. This is consistent with her account and tends towards her assertions today that she objected to her transfer.
12. The business was transferred on 1 March 2018. This is the date the claimant asserts was her final date of employment with Resp1.
13. Resp1 purported to transfer the claimant to the transferee and confirmed this in writing. It is not disputed by the claimant or Resp2 that she worked for him on a casual basis. Neither the claimant nor Resp2 are represented and whilst Resp2 confirmed records of his employment of the claimant exist they have not been provided for today's hearing.
14. The work the claimant performed during those shifts was not that of an Operations Manager.
15. As late as 13 September 2018 (supported by email exchange) the claimant and Resp2 were in communication about arranging shifts, consequently I conclude notwithstanding that she had worked no shifts for some time at that point both she and Resp2 considered she was still employed by him.

The Law

The Transfer of Undertakings (Protection of Employment) Regulations 2006  
**(TUPE)**

16. Regulation 4 - Effect of relevant transfer on contracts of employment

(1) **Except where objection is made under paragraph (7)**, a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) .....

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, **or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1)**, including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(4) - (6)

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer.

(10) - (11)

17. *Capita Health Solutions v BBC [2008] UKEAT 0034-07-0105 (1 May 2008)*  
- Whether or not contract of employment transferred in circumstances where the employee objected but worked for the transferee on secondment for six weeks post transfer. On a proper consideration of the whole facts and circumstances, the employee's objection was not such as to prevent

transfer; It was, in reality, an agreement to work for the transferee for a short period.

### Conclusion

18. None of the parties challenged that this was a relevant transfer for the purposes of the TUPE regulations. For the purposes of today's hearing I am satisfied there is a transfer of undertaking and hence a relevant transfer to which TUPE applies.
19. Who may be liable in respect of the claimant's claims?
  - 19.1. The claimant was employed by the transferor immediately before the transfer;
  - 19.2. The claimant was assigned as Operations Manager (other than on a temporary basis) to the organised grouping of resources or employees that is subject to the transfer and had been since 2016;
  - 19.3. Would the claimant's contract of employment be terminated otherwise than by the transfer? No.
  - 19.4. Did the claimant inform the transferor or the transferee that she objected to becoming employed by the transferee as required by Regulation 4(7)? As set out at paragraph 12 above the claimant did raise objections to being transferred. As set out above neither the response to claim nor the written submissions for today's hearing submitted by Resp1 make any mention of the claimant's written objections to being transferred in fact it is specifically denied that she did.
  - 19.5. Under Regulation 4(7) this would suggest the transfer terminates the claimant's contract with the transferor.
20. Submissions by Resp1 that the claimant's position mirrors that described in *Capita Health Solutions v BBC [2008] UKEAT 0034-07-0105 (1 May 2008)* above and Reg 4(7) does not apply.

I am grateful to Mr Brotherton who on behalf of Resp1 brought this case to my attention. He argued that this case is authority for concluding that a transfer can properly take place notwithstanding the claimant's objection which would normally serve to terminate the claimant's contract at the date of transfer under Reg4(7). Notwithstanding that Resp1 denies that any such objection was made.
21. I do not agree with Mr Brotherton's interpretation of this case and its impact upon Ms Miles' claim. In my opinion Ms Miles' position can be distinguished from that of the claimant in the Capita Health case. The claimant in that case raised an objection to the transfer but she then agreed to work for the transferee on secondment for a short period post transfer to assist in the handover of staff. It was held that on a proper consideration of the whole

facts and circumstances, the employee's objection was not such as to prevent transfer; It was, in reality, an agreement to work for the transferee for a short period.

22. The pertinent question therefore is did Ms Miles make a supplementary agreement to transfer in limited circumstances? No evidence was produced to me today either orally or in document form to show Ms Miles made a supplementary agreement. I conclude that Ms Miles didn't make one.
  
23. I cannot say that Ms Miles claim has no prospect of success given that Resp1 may have transferred her in the face of her objection to work for Resp2. That Resp2 had no need of an Operations Manager; the work she performed for Resp2 was not that of an Operations Manager but rather that of casual staff in the transferred entity.

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**Employment Judge Allen**

Date: .....16/05/2021.

Judgment sent to the parties on

.....18/05/2021.....

.....THY.....

For the Tribunal office