



EMPLOYMENT TRIBUNALS

Claimant

Respondent

v

Daphne Inniss

(1)Health Care Resourcing
Group t/a Allied Health Services
(2)SIPPI Homecare Ltd

Heard at: Watford
Before: Employment Judge Anderson

On: 14 and 15 June 2021

Appearances

For the Claimant: Ms Step-Marsden (counsel)

For the First Respondent: Ms Barnard

For the Second Respondent: Mr Dakka

JUDGMENT

1. The Claimant's employment transferred from the First Respondent to the Second Respondent on 11 January 2019. The transfer was a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006, following a service provision change.
2. The First Respondent is discharged from these proceedings.

REASONS

3. Mrs Innis, the Claimant, brings a claim against the First Respondent (R1) and the Second Respondent (R2) for unfair dismissal, unpaid wages, notice and holiday pay, and age discrimination. The Claimant was employed by R1 as a carer until its contract with London Borough of Brent ended on 10 January 2019. The contract for the supply of care to the two service users with whom the Claimant worked was awarded to R2. R1 says this was a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (the TUPE regulations) as it was a service provision change. R2 says it was not. The Claimant remains neutral on this point.

4. It is necessary for the tribunal to make a judgment on whether there was a relevant transfer as part of a service provision change in order to determine which of the respondents is the proper respondent to each of the Claimant's claims.
5. The preliminary issues to be decided today were defined in the order of EJ Quill dated 1 December 2012 at paragraph 2:
 2. *The preliminary issues are:*
 - 2.1 *Was there a relevant transfer within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006 from the First Respondent to the Second Respondent?*
 - 2.2 *If so, did the Claimant's employment transfer from the First Respondent to the Second Respondent?*
 - 2.3 *For each of the complaints, if the Claimant were to be successful: (a) would the Claimant potentially have a remedy against the First Respondent? (b) would the Claimant potentially have a remedy against the Second Respondent?*
 - 2.4 *Should either the First Respondent or the Second Respondent be removed as a respondent to the proceedings.*
6. A further preliminary issue was raised by R2 at the outset of the hearing and determined immediately. Allied Health Services Ltd was taken over by Health Care Resourcing Group Ltd in November 2018. Mr Dakka questioned whether R1 was correctly referenced. The parties agreed that the name of R1 should be amended to Health Care Resourcing Group Ltd t/a Allied Health Services.
7. Once oral judgment was given R1 applied to be discharged from the proceedings and I granted that application.

The Law

Regulation 3 of TUPE provides, in so far as is relevant:

"3. A relevant transfer

(1) These Regulations apply to ...

(b) a service provision change, that is a situation in which ...

(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 ... and in which the conditions set out in para (3) are satisfied. ...

(2A) References in para (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 para (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;
- (b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use

Evidence

- 8. I received a bundle of documents prepared by R1 and agreed by the Claimant and R2's representative. This included 79 paginated documents. I received a witness statement each from the Claimant, Ms Barnard and Mr Dakka. Included at the back of the bundle but unpaginated was a letter from R2's then representative with an ET3 and response. Mr Dakka said he had not received the bundle. This was because he had recently parted company with his legal representative, to whom the bundle had been sent. This was emailed to him, and time was allowed for him to read it. I also received a position statement from the Claimant.
- 9. Ms Barnard and Mr Dakka gave evidence at the hearing. Ms Step-Marsden told the tribunal that the Claimant was neutral as to the outcome of the preliminary hearing and would not take part in it.

Submissions

- 10. Ms Barnard, for R1, said that where it could ascertain that the work of their employees could be matched to particular new providers then those transfers were transfers under TUPE. Of seven providers all but two accepted this without challenge. Those that were unable to transfer as there was no clear transferee in respect of the work those employees had been doing, were found alternative employment within Health Care Resourcing Group. She said that although R2 denied that TUPE applied it had not supplied reasons for this. Whether the contracts R1 and R2 held with London Borough of Brent (Brent) were offered as spot purchases or otherwise, a point made by Mr Dakka, was not relevant to whether TUPE regulations applied. R1 had a contract with Brent made up of a number of spot purchases. It was not the role of Brent or the CQC to determine whether or not TUPE Regulations applied.
- 11. Mr Dakka, for R2, said that R2 had taken on contracts offered by Brent as spot purchases and he understood this to be a temporary measure until a tendering process took place. The contracts came to R2 individually between 6 December 2018 and 10 January 2019. He said that Brent had advised that TUPE did not apply in these circumstances and that CQC rules were such that it could not.

Findings of Fact

12. R1 is a nationwide company providing care to service users in their own homes. R2 also provides care to service users in their own homes on a smaller scale in north west London.
13. R1 held contracts to provide care to service users in their homes in the London Borough of Brent. Brent had a statutory duty to ensure that services were provided to those service users and contracted some of that work to R1. At the time the contracts were ended on 10 January 2019, R1 was supplying services to 150 service users and had 118 staff in its Wembley branch which supplied the services in Brent.
14. The relevant activity for the purposes of Regulation 3(1)(b), the activity carried out by R1, the original contractor, was the provision of care services to service users in Brent in their own homes. There was no evidence of a dispute between the parties over the nature of the activity.
15. The client for the purposes of Regulation 3(1)(b) is the London Borough of Brent.
16. Following the issue by the Care Quality Commission of a section 6 notice in November 2018, Brent gave notice to R1 on 29 November 2018 that it was ending its contracts with R1. It did not give an end date at that time but the contracts ended on 10 January 2019.
17. Brent advertised the work carried out by R1 for it to other service providers and allocated it to seven service providers who expressed interest, one of which was R2. The allocation was on a postcode and capacity basis. There is some discrepancy in the documents and the account given by Ms Barnard on behalf of R1 as to whether there were six or seven providers and I make no finding on that.
18. The way in which this work was advertised by Brent was confirmed by Brent to R2 as follows:
We would generally send email to all our provider outlining the details of the package and the provider who contact us first and meets the requirements of the packages will generally be awarded the package. In this instance we had to manage the capacity of the market due to the amount of packages Allied had and the new packages that were coming through. Therefore we awarded packages to providers that had capacity and could meet the needs of the client.
19. R2 was engaged to provide services to two service users from 6 December 2018. They were awarded the contracts to supply services to a further 19 service users, previously handled by R1, between 6 December to 10 January 2019.
20. R1 decided that TUPE did not apply to the transfer of their services to the seven providers and commenced a redundancy consultation process on 10 January 2019.

21. At the consultation meeting R1 discovered that some of their employees were in a position where all of the service users for whom they cared were moving to one provider. This included the claimant who cared for two service users who were both transferring to R2.
22. R1 subsequently decided that TUPE did apply and wrote to the seven providers to advise of this.
23. R1 contacted R2 on 10 January to say that TUPE applied to a number of its employees whose work was transferring mainly or wholly to R2. R2 responded on 11 January that TUPE did not apply.
24. R1's contracts with Brent ended on 10 January 2019.
25. R1 wrote again to R2 on 14 January setting out the list of employees who were mainly or wholly assigned to the service provision to service users now the responsibility of R2, that these employees transferred under TUPE.
26. Despite discussion between R2 and the Claimant, the Claimant did not accept an employment contract with R2 and did not work for either Respondent after 10 January 2021.

Decision

27. In order to determine whether there has been a service provision change under TUPE regulations I need to consider whether the conditions set out at Regulation 3 of the TUPE regulations have been met and I find as follows:
28. This was a situation in which activities ceased to be carried out by a contractor (R1) on a client's (Brent's) behalf and are now carried out instead by a number of subsequent contractors.
29. I am satisfied that there was an organised grouping of employees (R1's Wembley branch) which had as its principal purpose the provision of care to service users in their homes on behalf of the client, London Borough of Brent.
30. Where contracts are fragmented, as in this case, it is necessary to consider at the point of consideration as to whether activities carried out by a subsequent contractor after the relevant day (here 10 January 2019) are fundamentally or essentially the same as those carried out by the original contractor (Reg 3(2A)), if the fragmentation of the activity among new providers has a bearing on that decision.
31. Here the service provided to 150 service users, previously supplied by R1 through an organised grouping of employees (the Wembley branch) was transferred to seven different providers. Six of those providers took on provision of services to 21 or less service users, one took on 92. R2 took on 21 of those service users according to its capacity. The services provided by R1 were organised on a borough basis and not organised on a postcode

basis, as was the case post transfer. Not all of the employees transferred. Ms Barnard said this was a minority but was not able to provide numbers.

32. I am satisfied that there was fragmentation after transfer of the activities carried out by R1 until 10 January 2019, among seven providers and this transfer was organised on a postcode basis but, (i) as it was possible for R1 to identify employees who were wholly or mainly assigned to the care of service users now taken on by R2, and (ii) the services performed by R2 (the provision of care to service users in their home) are the same as the service performed by R1, the activities are fundamentally the same as that carried out by R1.
33. I do not find that the duration of the contracts awarded to R2 or the fact that they can be terminated at short notice means that Brent intended them to be in connection with a single event or of short duration.
34. I find that the TUPE regulations apply in this case and the Claimant's contract of employment with R1 transferred to R2 under TUPE after 10 January 2019.
35. As a consequence of this decision, I find that the Claimant has a potential remedy for her claims only against R2.

Employment Judge Anderson

Date: 15 June 2021

Sent to the parties on: 8 July 2021

S. Bhudia

For the Tribunal Office

Note

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.