



EMPLOYMENT TRIBUNALS

Claimant

Mr R Napper

v

Respondents

(1) Herongrange Limited (In Compulsory Liquidation)
(2) Herongrange Security and Systems Limited
(3) Brit Sec Limited

Heard at: Huntingdon (by CVP)

On: 15 June 2021

Before: Employment Judge Ord

Appearances

For the Claimant:

Ms S Crawshay-Williams (Counsel)

For the First Respondent:

No attendance and not represented.

For the Second & Third Respondents:

Mr D Kane (Managing Director)

JUDGMENT ON PRELIMINARY ISSUE

1. The claimant's employment transferred to the Second Respondent pursuant to an Asset Purchase Agreement signed and dated the 1 December 2019 between the First and Second Respondents to which the Transfer of Undertakings Regulations applied. The claimant was part of an organised grouping of employees whose employment transferred under that agreement.

REASONS

1. This matter came before me today following directions issued by me on 19 May 2021 to determine the following questions:
 - (i) Was there a relevant transfer between the First Respondent and either the Second or Third Respondent, and if so which; and
 - (ii) Was the claimant part of an organised grouping of employees whose employment transferred to the Second or Third Respondent, and if so to which?

2. The claimant submitted a witness statement which was before me today, gave evidence and was cross examined. The respondents called no evidence but submitted unsigned statements from Mr Adkins the Director of the First Respondent and Mr Withers a Director of the Second Respondent. Those statements have been given the appropriate weight. Both sides made closing remarks.
3. The claimant's evidence was largely unchallenged and I accept it. In particular he gave unchallenged evidence as follows:
 - 3.1 His employment began on 21 December 2009 with the First Respondent.
 - 3.2 Throughout the period he was employed as a Control Supervisor.
 - 3.3 Of the three supervisors they worked together on a rota or shift system, the others were Christine Ryle and Zina Ayres.
 - 3.4 They each supervised two or three controllers and collectively there was a system of monitoring cameras for clients of the First Respondent whose premises were covered by CCTV operated by the First Respondent.
 - 3.5 There was no separation of clients or duties between each shift or each supervisor. The work done was for all relevant clients of the First Respondent at the time.
 - 3.6 On 22 November 2019 the claimant began a period of sickness absence.
 - 3.7 On 29 November 2019 the claimant received an email from a then Director of the First Respondent Mr Pell. That email told him that as a result of the First Respondent losing major contracts and suffering financial difficulties "ownership of the company has transferred to Brit Sec who are now our parent company" and that "Your workload, job and responsibilities do not change".
 - 3.8 On 18 December 2019 the claimant received an email from Carlie Baxter of the First Respondent who was then a Director of that company. That email forwarded at the request of Lauren Wallace Head of HR for the Third Respondent, Miss Wallace, it was said, would be "responsible for setting up new TUPE contracts and will be in contact with each of you to discuss moving forward".
 - 3.9 On the following day the claimant received an email from Steve Adkins Director of the first Respondent that advised the claimant that because of one of the First Respondent's largest clients going into Administration he was "forced to reduce the workforce" and this included the claimant. The claimant's employment was terminated on notice which he was not required to work. The

termination date was not specified. The claimant was told the respondent could not pay the claimant's wages until the new year.

I note at this point that Mr Ivor Adkins whose statement has been produced to me is registered at Companies House as the sole Director of the First Respondent and that his full name is Ivor Steven Adkins and thus I can only assume that Steve Adkins and Ivor Adkins are one and the same person.

- 3.10 On 21 December 2019 the claimant questioned why he had been selected for redundancy when there were three supervisors, stating that he believed his dismissal was due to his medical condition and asking why the three supervisors had not been interviewed for the two remaining posts.

I note that at the time there was in place a reasonable adjustment for the claimant to work only night shifts and on a fixed pattern of work. He questioned why those who had kept their jobs had been paid but he had not.

- 3.11 No reply to that email was ever received.

4. Unbeknown to the claimant the First and Second Respondents had entered into an Agreement described as an "Asset Purchase Agreement" on 1 December 2019. The respondents' evidence about this Agreement was limited in the extreme and in part both unhelpful and contradictory. Mr Adkins said he "decided to retain part of the business to continue on a smaller scale providing in-house designed products and camera systems" to which end he said he retained three employees including the claimant.
5. Thereafter the First Respondent's financial position was such that he had to let the three employees go. Mr Withers says the Agreement listed the staff transferring which did not include the claimant because Mr Adkins was retaining them to take on work on a smaller scale.
6. The Agreement however has a number of relevant clauses, first the transferring "goodwill" includes "the exclusive right for the purchaser to carry on the business under the business name". The business name is defined as Herongrange or any name including Herongrange or any colourable imitation of it. Second, the agreement transferred all the assets of the First Respondent to the Second Respondent, there were no excluded assets as set out in Schedule 2 Part 2 of the Agreement which in fact lists all assets transferring to the Second Respondent down to kettles in the kitchens. It is not clear what assets or equipment Mr Adkins would be using to continue his work on a reduced scale. Third the transferring employees are listed, the two other controllers transferred but the claimant's name is not on the list. No evidence was given by the respondents to indicate the basis upon which the work of the two controllers who were transferring was relevant to the transferring business when the work of the claimant was not.

7. Next, the Agreement confirms that the Transfer Regulations apply to it and it was not suggested by the respondents in evidence that the Regulations did not apply.
8. The claimant is referred to in Clause 5 of the Agreement which repeats the application of the Transfer Regulations and states in 5.1.1 that:

“All contracts of employment with the employees shall automatically transfer to the purchaser ... save in the case of ... [the claimant] ... who shall formally object to the automatic transfer of his employment under TUPE.”
9. No such objection was raised by the claimant and no evidence has been advanced by the respondents to suggest that he did object.
10. Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 [TUPE] SI2006/246 a relevant transfer is the transfer of a business or part of an undertaking or business situated immediately before transfer in the United Kingdom to another person where there is transfer of an economic entity which retains its identity.
11. In this case the business of the First Respondent (save allegedly for some small activity retained by the First Respondent which was not detailed in the Agreement between the First and Second Respondent and which I do not accept on the evidence before me ever existed) transferred in full to the second respondent.
12. No assets or equipment were been retained by the first respondent and no evidence has been advanced of any activity whatsoever post-Agreement having been carried out by it.
13. The whole activity was within the United Kingdom and both the First and Second Respondent are registered United Kingdom companies.
14. The transferred business retained its identity. The Agreement specifically ensures that the business will continue under the Herongrange name which is part of the transferring goodwill.
15. For those reasons there was clearly a relevant transfer to the Second Respondent under Regulation 4 of the whole of the business of the first respondent. All employees part of an organised grouping of employees subject to the transfer, transfer to the transferee and their contracts of employment have effect as if originally made between the employee and transferee.
16. The exception is where there is an objection by an employee under Regulation 7. The claimant did not object to the transfer and the reference in the Agreement that he “shall object” is without any foundation whatsoever. I consider it to be no more than a device to attempt to exclude the claimant from the ambit of the transfer.

17. There was an organised grouping of employees which included the supervisors and others monitoring cameras for the First Respondent. It has not been suggested to me that any of the other employees who were allegedly not transferring were engaged in this activity. There were three control supervisors of which the claimant was one. His unchallenged evidence was that they operated on shifts all carrying out the same duties for the same clients. There was no separation of duties or distinguishing differences in their roles. The respondent has offered no explanation at all as to why the claimant was outside that organised grouping of employees (and indeed the reference to him requiring to object to the transfer suggests that he otherwise would be) and I find that he was part of that grouping.
18. The claimant was part of that organised grouping of employees whose employment transferred to the second respondent. He did not object to the transfer, the indication of that suggestion in Clause 5.1.1 of the Agreement appears to me to be nothing more than a device to remove the claimant from the group of transferring employees for what reason or purpose I do not know.
19. The suggestion that he was to continue to work for the First Respondent in their reduced activities is without any evidential foundation whatsoever.
20. For those reasons the claimant's employment transferred to the Second Respondent under the Transfer Regulations which applied to the Agreement made on 1 December 2019 between the First Respondent as transferor and the Second Respondent as transferee. The Transfer Regulations applied to that Agreement and the claimant was part of the organised grouping of employees who transferred to the Second Respondent, he did not object to the transfer.

Employment Judge Ord

Date: 17 June 2021

Sent to the parties on: 13 July 21

For the Tribunal Office