



EMPLOYMENT TRIBUNALS

BETWEEN

claimant

respondent

AND

- 1) MRS T. BLACKFORD
- 2) MS L. STEVENSON
- 3) MS A. CORNELIUS

- 1) SPL RETAIL LIMITED
- 2) VNS GROUP LIMITED

JUDGMENT OF THE EMPLOYMENT TRIBUNAL ON “TUPE” TRANSFER ISSUE WITH WRITTEN REASONS

HELD AT: Birmingham

ON: 21-24 July & 1 September 2020

EMPLOYMENT JUDGE Algazy QC

Representation

For the claimants: In Person

For the First respondent: Mr. Zain Malik - Solicitor

For the Second respondent: In Person

J U D G M E N T

1. The Judgment of the Tribunal is that there was no transfer of the employment of the claimants from the first respondent to the second respondent, whether on or around 20 July 2019 or at any material time.
2. The second respondent is dismissed from the proceedings accordingly.

W R I T T E N R E A S O N S

1. BACKGROUND TO PRODUCTION OF WRITTEN REASONS

- 1.1 I preface these reasons in the particular circumstances of this case by the observations in this paragraph.
- 1.2 Oral reasons for this judgment were given on 1 September 2020.
- 1.3 Following judgment and a short adjournment, the respondent accepted that the claimants had each been unfairly dismissed and indicated a willingness to settle the claims by consent in accordance with the claims as set out in the respective schedules of loss of each claimant. The claimants were content to agree to that outcome.

- 1.4 Following a further adjournment the first respondent settled the claimant's 3 claims by reference to a draft prepared by the First respondent's representative which was emailed to the parties and the Tribunal. A separate judgment by consent was issued accordingly.
- 1.5 The submission to judgment by the first respondent in the sums agreed was made without qualification or reservation.
- 1.6 The first respondent requested written reasons for this judgment at the end of the Hearing. According to the first respondent, this is for what is understood to be reasons of internal review by the first respondent's representatives, Peninsula Group Limited. It was explained by the first respondent's representative that this was not in any way to seek to go behind the judgment entered by consent.
- 1.7 These observations also underscore the fact that the written reasons are provided in substantially the same format, then drafted with the brevity appropriate to oral reasons, as given on 1 September 2020. Accordingly, these reasons have not undergone the further refinement ordinarily undertaken to perfect written reasons before being handed down. Should any occasion arise when fuller and perfected reasons might be required, though such occasion is presently unforeseen, these written reasons may be augmented as necessary.

2. INTRODUCTION TO THE TUPE ISSUE

- 2.1. The claimants were all employed, in various roles, to work at the post office known as West Heath Post Office at 27, 29 - 31 Alvechurch Road, Birmingham, West Midlands, B31 3JW (the "main PO" till around 20 July 2019) for lengthy periods of time ranging from 7 ½ to 32 years.

- 2.2. Those Employments came to an end by 20 July 2019 at the latest. The first respondent was a corporate vehicle for the main PO, run by Mr. Tarlochan Singh Chata ("TC") since some point in 2014. The three claimants became employees of the first respondent pursuant to a TUPE (Transfer of Undertakings (Protection of Employment) Regulations 2006) transfer – see TC's witness statement at paragraph 3.
- 2.3. The second respondent is the corporate vehicle run, with others by, Vikas Phougat. ("VP").
- 2.4. Following a staged purchase of R1's businesses that were run from 29 to 31 Alverton Road ("the premises"), a dispute had arisen as to whether the claimants were to transfer to R2 pursuant to the relevant provisions of TUPE relating to a business transfer under Reg 3(1)(a) TUPE. A secondary argument in respect of Service Provision Change was abandoned during closing submissions and is not considered further here.
- 2.5. The claimants raise claims for redundancy/unfair dismissal and certain sums outstanding on termination of employment. Some sums in relation to pay are now conceded by R1. The precise consequences of a finding, one way or the other, of the existence of a TUPE Transfer require further consideration with the relevant parties. Albeit that some limited consideration has been given to that matter at the previous hearing, I am of the view that this should be examined in greater detail following the handing down of this judgment on the TUPE issue.
- 2.6. The claimants represented themselves. The first respondent was represented by Mr Z.Malik - solicitor. The second respondent was in person

2.7. The claimants gave evidence on their own behalf and called no other witnesses.

The respondents called TC and VP.

2.8. The respondent provided a bundle of documents. Numbers in square brackets in these Reasons refer to the bundle. A few further documents were admitted during the Hearing as referred to below.

2.9. The Tribunal is used to dealing with unrepresented parties. Litigants in person often appear on both sides and the appellate courts have addressed the consequent difficulties on a number of occasions. One such decision is **Mensah v. East Hertfordshire NHS Trust [1998] IRLR 531**. Consistent with the guidance of the Court of Appeal in that case, and the limits there identified, the Tribunal sought to assist the parties that were litigants in person, with the Tribunal process.

3. **THE ISSUES**

3.1. As indicated, the determination of the TUPE issue is central to identifying and deciding the consequential issues and it is to that matter that I now turn.

3.2. There is a further and preliminary issue raised by R1 in relation to a protected conversation under s111A ERA.

4. **THE FACTS**

- 4.1. On the evidence presented to the Tribunal, I found the following facts and such additional facts as are contained in the conclusions section set out below.
- 4.2. The salient facts are relatively brief and revolve principally around events in May to July 2018. Though some historical background is relevant as appears below.

CREDIT AND CREDIBILITY

- 4.3. Wherever matters are within the direct knowledge of the claimants, I take the narrative of events principally from their accounts. I have no hesitation in accepting their evidence as honest and straightforwardly given.
- 4.4. I formed a different view of TC as a witness and found him to be a less reliable historian. Insofar as his evidence clashes with that of the claimants, and subject to any S111A issue, I have no hesitation in preferring the evidence of the claimant to that of TC.
- 4.5. With regard to VP, I formed a more nuanced view of his evidence as it evolved and emerged. On balance, I also preferred his account of events where there was conflict with TC. I regarded the attempts to attack VP's credit by suggesting that he was racially motivated by his recruitment efforts at [227] as unhelpful and irrelevant.

THE BUSINESS PREMISES

- 4.6. The premises were divided into a convenience store and a main PO. The 2 businesses operated under different Landlords. The sale of R1's business to R2 took place in stages. The convenience store changed hands in 2017 (October 2017 according to Teresa Blackford at paragraph 2 of her witness statement ("w/s")). It seems that 2 convenience store employees TUPE transferred to the convenience store - see TC w/s paragraph 6.
- 4.7. A document introduced by R2 as "R2A" showed that, in respect of the Post Office part of the business (at No 27), VP had been accepted by the PO authorities to run the PO, importantly as a "Main PO", on 19 February 2018. This was specifically subject to conditions which included obtaining a "valid property interest" at 27 Alvechurch Road. This did not proceed at the time.
- 4.8. The original discussions and arrangements between the Respondents as to the purchase of both businesses having not materialised. A new approach was taken.
- 4.9. Around April 2018, arrangements and agreements had been reduced to writing in accordance with a document prepared by the solicitors for R1 and is in the bundle at 157-175 and is dated 20 April 2018.
- 4.10. R2 relies in particular on the provisions of paragraph 17 as indicating the state of mind of the parties at that time:

[166]

"17 EMPLOYEES

The Seller warrants to the Buyer that there are no Employees employed by the Seller at the Business carried on at the Property and the provisions of the Transfer Regulations shall not apply.”

- 4.11. Once the original entire purchase plan had floundered, R2 made a different approach to the PO authorities to run a smaller and slimmed down "Combi Counter" in a local and not a main PO framework.
- 4.12. I accept that a meeting took place on or about 13 May 2019, contrary to TC's denial of such a meeting, having occurred, between VP and TC. I further accept that discussions took place between TC and VP, whether at that meeting or otherwise in which TC assured VP that R2 had no responsibility for the Cs employments and that appropriate arrangements would be made in their regard by TC.
- 4.13. That state of affairs entirely accords with the version of events advanced by the claimants and whose evidence I have no hesitation in accepting. See eg Annette Cornelius at §4-8. I make it plain that I arrive at my conclusions about the conversations between TS and VP wholly independently of the C's conversations with TC and insofar as I am required to, at any stage, disregard the C's conversations with TC pursuant to S111A, I do so and put them out of my mind. It is my understanding however, that the reliance on S111A by R1 only applies to the issue of ordinary unfair dismissal and no other issues.
- 4.14. R1's PO operation closed on 31 May 2019. R2s PO combi counter was installed on 20 July 2019.
- 4.15. Some time was taken up in evidence with VP's willingness or otherwise to engage with the efforts made by R1 regarding the alleged TUPE Transfer. Some of that criticism appeared justified, albeit that VP gave some explanations about particular family difficulties at the time.

However, it does not seem to me to impact in any meaningful way on the question of whether a TUPE transfer took place at the material time.

- 4.16. I regard the evidence of TC as to his efforts to engage with the claimants in respect of what he was claiming was a TUPE Transfer to be consistent with what he may have believed, or wished to believe, but not determinative of the question of whether there was TUPE transfer as matter of law on the facts as I find them.
- 4.17. It is not necessary at this stage to set out the detail in respect of each claimant's working history/ vacation between May and 20 July which can be dealt with in the next phase of the hearing. Save to note that each C arrived at R2's business on 20 July 2019 only to be told by VP that there were no jobs for them.

“LOCAL” AND “MAIN” PPST OFFICES

- 4.18. On this topic. VP took the Tribunal to what seemed, at first blush, to be somewhat thin evidence about the distinctions between the 2 types of PO. VP was pressed by the Tribunal to demonstrate the evidence to support his case for distinguishing between the 2 types of establishment. To his credit, VP persevered and did so by reference to 2 documents at R2A and R2B. VP took the tribunal to a detailed sample of line entries showing the differences in the types of services offered by a main and a local PO as well the different fees payable. I do not list them here for the sake of brevity in theses summary reasons but they were important and significant on my findings. I highlighted them as the witness took the Tribunal through them. They involved services relating to Passport services, money handling and “local schemes” as well as significantly reduced capacity for dealing with Foreign Exchange and currency. In the local model operated by R2, this was not kept on the premises routinely but previously ordered online and merely collected by a

customer. These instances serve as just some examples of the distinctions.

- 4.19. This was augmented by oral testimony from VP as to the day to day business operations of a local PO as opposed to a main PO. Matters such as opening hours and the dual role of staff operating the convenience store and the PO functions as opposed to dedicated PO staff operating fixed hours. That evidence was given in an initially halting manner but VP became increasingly confident as he managed to get his points across. That testimony was not diminished by cross examination on the topic and reference to extracts about the operation (Exhibit R1A) taken from the internet and put to VP.
- 4.20. During closing submissions, I had offered the parties a specific opportunity to consider and address the Tribunal on a line of Authority dealing with differences in activities, notably **OCS Group UK Ltd v Jones and another [2009] WL 2848113** and **Mathieson and anor v United News Shops Ltd EAT 554/94**.
- 4.21. The relevant commentary in the IDS handbook on the topic was also considered. Mr Malik for R1 accepted that there were, at least, these 3 distinctions to be made between the activities of the 2 types of branch:

MAIN

LOCAL

Dedicated Counter

Combi Counter

Shorter hours – typically 9- 5.30

Open during
Convenience store
hours - up to 8pm

Broader range of services

More limited range of
services

5. THE LAW

5.1 I reminded myself of the relevant provisions of the TUPE regulations and only touch on the law briefly in these summary reasons. There was no disagreement as to the correct approach to be followed.

5.2 TUPE applies to a "relevant transfer". For our purposes this covers the following event:

A transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity that retains its identity.

Otherwise known as a business or "standard transfer"- Reg 3(1)(a)
TUPE.

5.3 I had regard to the well known case of **Cheesman and ors v R Brewer Contracts Ltd 2001 IRLR 144, EAT**. And I was taken to a number of authorities by R1, Notably:

- **Spijkers v Gebroeders Benedik Abattoir CV and Alfred Benedik en Zonen Case 24/85 1 – 5- [1986]ECR 1119.**
- **Wood v Caledon Social Club Ltd & London Colney Parish Council [2010] UKEAT/0528/09/CEA 6 – 9.**
- **Rynda (UK) Ltd v Rhijnsburger (CA) [2015] ICR 1300 10 – 20**

- **Inex Home Improvements Ltd v Hodgkins and others**
[2016] ICR 71 21 – 39

5.4 The following guidance from **Spijkers** assists in the correct approach for Tribunals to take :

- The decisive criterion for establishing the existence of a transfer within the meaning of the Directive is whether the entity in question retains its identity.
- It is necessary to consider whether, having regard to all the facts characterising the transaction, the business was disposed of as a going concern.
- This will be apparent from the fact that its operation is actually being continued or has been taken over by the new employer with the same economic or similar activity.
- In order to decide whether such retention of identity has occurred, it is necessary to take account of all the factual circumstances of the transaction in question, including:
 - the type of business or undertaking;
 - the transfer or otherwise of tangible assets such as buildings and stocks;
 - the value of intangible assets at the date of transfer

- whether the majority of the staff are taken over by the new employer;
- the transfer or otherwise of customers;
- the degree of similarity of activities before and after the transfer; and
- the duration of any interruption in these activities.

5.5 As above indicated, the ET drew the parties' attention to the **OCS/Mathieson** cases and commentary thereon.

6. CONCLUSIONS

- 6.1 Little evidence was led as to some of the criteria identified in **Spijkers**. Be that as it may, I am able to reach a conclusion on the basis identified below in any event.
- 6.2 The degree of business interruption was not significant according to the submissions of R1 on the facts - see case **of Inex**. I am not entirely persuaded that the cessation of activities and recommencement is not of importance on the specific facts of this case when one considers the specific circumstances of the termination of R1's business and the commencement of R2' as above described.
- 6.3 However even if that matter is resolved in R1s favour, It seems to me that the insuperable difficulty facing the first respondent on the facts as I have found them , is the question of similarity of activities. I do not accept that a particular PO necessarily carries out the same activity, or similarly sufficient activities for TUPE purposes, as any other PO.

6.4 I consider, drawing on the following paragraphs in **OCS**, that it is the task of the Tribunal to carry out the function there identified:

“17 The respondents argue that “activities” may well be narrower than a general service being provided such as food, cleaning or catering. We were taken to a decision under the earlier TUPE regulations involving continuity of businesses, Mathieson & Another v United News Shops Ltd EAT/554/94, an unreported decision from the Scottish EAT where the issue related to a change of activities at a hospital shop where the Tribunal found that the degree of similarity between the activities carried on before and after the alleged transfer was:

“... in our opinion minimal having defined the range of goods that was being sold under the two regimes.”

That certainly lends support to the fact that activities may demand a more detailed look at what is actually being carried on by the organised grouping of employees under the old and new contractors.

18 Judge Burke’s approach was set out in paragraph 30 of his decision when he said this:

“The statutory words require the Employment Tribunal to concentrate upon the relevant activities; and tribunals will inevitably be faced, as in this case, with arguments that the activities carried on by the alleged transferee are not identical to the activities carried on by the alleged transferor because there are detailed differences between what the former does and what the latter did or in the manner in which the former performs and the latter performed the relevant tasks. However it cannot, in my judgment, have been the intention of the introduction of the new concept of service provision change that that concept should not apply because of some minor difference or differences between the nature of the tasks carried on after what is said to have been

a service provision change as compared with before it or in the way in which they are performed as compared with the nature or mode of performance of those tasks in the hands of the alleged transferor. A commonsense and pragmatic approach is required to enable a case in which problems of this nature arise to be appropriately decided, as was adopted by the Tribunal in the present case. The Tribunal needs to ask itself whether the activities carried on by the alleged transferee are fundamentally or essentially the same as those carried out by the alleged transferor. The answer to that question will be one of fact and degree, to be assessed by the Tribunal on the evidence in the individual case before it.”

6.5 For the reasons identified above, I find that the activities of the Local branch PO carried out by R2 as opposed to that of the Main PO , previously run by R1 not to attract the application of 3(1) a of the 2006 TUPE regulations.

6.6 I will now hear from the parties on the next steps.

Oral reasons were given on 4 August 2020 and the parties were, and are, reminded of Rule 62(3), Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 regarding written reasons not being produced unless requested in accordance with Rule 62 (3).

The parties are reminded that written reasons will be posted on the appropriate government website at

<https://www.gov.uk/employment-tribunal-decisions>

Employment Judge Algazy QC
14 September 2020