EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109113/2021 (V)

Held on 4 October 2021

Employment Judge N M Hosie

Mr I Mackenzie	**Claimant** **In Person**
Angard Staffing Solutions	**Respondent** **Represented by** **Ms N Moscardini,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

1. there was no relevant transfer, in terms of the Transfer of Undertakings (Protection of Employment) Regulations 2006, to the respondent;

2. the claimant's application to amend is refused;

3. the claim has no reasonable prospect of success and is struck out, in terms of Rule 37 (1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

REASONS

E.T. Z4 (WR)

Introduction

1. The claimant brought a claim for unpaid wages and holiday pay. His claim was predicated on there having been a relevant transfer from Royal Mail to the respondent under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"). The claim was denied in its entirety by the respondent. The respondent's solicitor maintained that there had not been a TUPE transfer to the respondent.

2. This case came before me by way of a preliminary hearing to consider an application by the respondent's solicitor to strike-out the claim as having "no reasonable prospect of success", in terms of Rule 37(1)(a) in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules of Procedure"); or alternatively that the claimant should be ordered to pay a deposit as a condition of continuing with his claim, in terms of Rule 39, on the ground that it has "little reasonable prospect of success".

The facts

3. It was not necessary for me to hear any evidence at the hearing as the relevant facts were either agreed or not disputed. A joint bundle of documentary productions was lodged. This contained a chronology of the claimant's employment with Royal Mail and then the respondent which the claimant had submitted by way of "better and further particulars" (P25-30). I was satisfied that, by and large, the chronology was accurate.

Respondent's submissions

4. I heard submissions first from the respondent's solicitor.

5. She referred first to a Note which Employment Judge Hendry had issued following a case management preliminary hearing on 22 June (P.37). In that Note, he expressed reservations as to whether or not there had been a TUPE transfer and directed the claimant to provide "better and further particulars of his statutory claims". These particulars along with the respondent's response were included in the joint bundle (P.25 and P.33).

6. The respondent's solicitor submitted there was not a "Service Provision Change" ("a SPC"), as the claimant maintained, as the conditions in Regulation 3(3) had not been satisfied.

7. The claimant was engaged by Royal Mail as a temporary casual worker to carry out the additional work over the Christmas period. His "Christmas casual offer letter" was one of the documentary productions (P.55). His employment with the respondent started on 25 January 2021. A copy of his terms and conditions of employment was one of the documentary productions (P.44). Christmas casual workers are a bank of workers providing assistance during peak periods of time for Royal Mail.

8. The respondent's solicitor submitted that this was not a SPC, *"as the grouping of employees doesn't satisfy Regulation 3(3)".* She submitted that, *"it did not satisfy the definition of an SPC as the activities of Christmas casual work ended after Christmas, so these activities did not carry over to the respondent".*

9. She submitted that the claimant did not allege previously that he was doing exactly the same work for the respondent as he had been doing with Royal Mail. In any event, Royal Mail continued to sort mail, as the claimant had

been doing, and the SPC provision did not apply as the sorting work he did had not ceased.

Claimant's submissions

10. The claimant submitted that it was "*arbitrary to say that Christmas ended on 24 January*" when he started to work for the respondent. He submitted that, "*Christmas isn't a legally defined period*" and, in any event, whether or not it was "Christmas work" was irrelevant, as *"Christmas casuals"* were, *"surplus workers".*

11. The claimant further submitted that *"Christmas casuals"* were not the same as regular full-time Royal Mail employees as they are in effect, *"surplus labour"*; they do not receive sick pay, minimum hours or training and do not have the same terms and conditions. He submitted that that makes them *"severable from the rest of the workforce".* Casuals also reported to different managers and were only recruited for night duties and for sorting.

12. The respondent is a subsidiary of Royal Mail. The claimant had a contract with Royal Mail for 12 weeks which ended on 24 January and he submitted that his employment then transferred to the respondent. He submitted that, "*the activity transferred is the staff bank of casual workers.*"

13. He submitted that the "grouping" was the, *"Royal Mail Christmas casual workforce".* He further submitted that, "*Christmas being a specific thing doesn't really mean anything. It's still just peak time bank work being transferred over*".

Claimant's application to amend

14. By e-mail on 12 September 2021 at 11:56 the claimant applied "*to add Royal Mail as a respondent*". In support of his application, he referred to the alleged failure to consult as detailed at paras. B3 and B4 on page 7 of his better and further particulars (P.31).

15. He accepted that Judge Hendry had discussed the possibility of adding Royal Mail as a respondent at the case management preliminary hearing on 22 June (it was not in his Note (P.37) but it was discussed). When asked why it had taken him so long to apply, the claimant said that he, *"hadn't been aware of how TUPE worked"* and it was only when he was considering TUPE for the preliminary hearing that he realised that Royal Mail had to consult with him. He said that he had *"misinterpreted the Regulations".*

Respondent's response

16. The respondent's solicitor advised that the application to amend was opposed. The claimant had been made aware on 22 June at the case management preliminary hearing of the possibility of bringing in Royal Mail as a respondent but he had delayed too long. In support of her submissions, she referred to ***Selkent Bus Co. Ltd v. Moore*** [1996] ICR 836. She also submitted that, *"to grant the application would not be consistent with the overriding objective"* in the Rules of Procedure.

17. Further, and in any event, she submitted that as TUPE did not apply there was no obligation on Royal Mail to consult.

Discussion and decision

18. The issue for the Tribunal in the present case was whether there had been a relevant transfer in terms of TUPE, because of a "Service Provision Change" ("a SPC").

19. The extension of the definition of a "relevant transfer" to cover a SPC was introduced by TUPE in 2006. So far as the present case was concerned, the following provisions are relevant:-

"***3A Relevant Transfer***

(1) These Regulations apply to –

(a) ……..

(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 been previously 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 (iii) are satisfied.

(2) ……...

(3) The conditions referred to in paragraph (1)(b) are that –

(a) *immediately before the service provision changed –*

(i) there is an organised grouping of employees situated in Great Britain which has its principal purpose that carrying out of the activities concerned on behalf of the clients;

(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.*"

20. As Regulation 3 is a creation of domestic law, rather than being EU derived, the *"multi-factorial"* approach to whether there has been a TUPE transfer, which continues to apply in a standard TUPE transfer, does not apply to a SPC. This was confirmed by Judge Burke QC in ***Metropolitan Resources Ltd v. Churchill Dulwich Ltd & Ors*** [2009] ICR 1380. In his view, the circumstances in which a SPC is established are "*comprehensively and clearly set out in reg.3(1)(b) itself and reg.3(3):- The introduction of reg.(3)(1)(b) enables a transfer to be established in any of these three situations if the activities previously carried out by the client or contractor have ceased to be so carried out and, instead, are carried out by a contractor or a new contractor or by the client……..*

If there was immediately before the change relied upon, an organised grouping of employees which had as its principal purposes the carrying out of the activities in question the client intends that those activities will be carried out by the alleged transferee, other than in connection with a single specific event or a task of short-term duration, and the activities do not consist totally or mainly of the supply of goods for the client's use, and if those activities cease to be carried out by the alleged transferor and are carried out instead by the alleged transferee, a relevant transfer exists. In contrast to the words to define transfer in the 1981 Regulations the new provisions appear to be straightforward; and their application to earn an individual case is, in my judgment, essentially one of fact…….there is no need for a judicially prescribed multi-factorial approach……..

29. In a case where regulation 3(1)(b) is relied upon, the Employment Tribunal should ask itself simply whether on the facts, one of the three situations in reg.3(1)(b) existed and whether conditions set out in regulation 3(3) are satisfied."

Relevant activities

21. Following the guidance of the EAT in ***Kimberley Group Housing Ltd v. Hambley & Ors*** [2008] ICR 1030, the first issue which I considered was "relevant activities". Reg.3(2)(a) provides that the activities being carried out by another person must be "*fundamentally the same"* as the activities carried out the person who has ceased to carry them out; the greater focus of the case law has been on the question of whether these activities remain the same in the hands of the new contractor.

22. When considering this issue, I was again mindful that in ***Metropolitan Resources*** Judge Burke QC emphasised that when comparing the activities of the alleged transferor and transferee, detailed differences will be inevitable and it could not have been intended that "*new concept"* of a SPC should not apply because of "*some minor difference*". In his view, "*a common sense and pragmatic approach is required.*"

23. Also in "***Salvation Army Trustee Company v. Bahi & Ors*** [2016]WL05484859, HH Judge David Richardson in the EAT, expressed the same view: "*the activities must be defined in a common sense and pragmatic way…….on the one hand, they should not be defined at such a level of generality that they do not really describe the specific activities at all……on the other hand, their definition should be holistic, having regard to the evidence in the round, avoiding too narrow a focus in deciding what the activities were…… a pedantic and excessively detailed definition of 'activities' would risk defeating the purpose of the SPC provisions*".

24. Further, in ***Johnson controls Ltd v. Campbell & another*** UKEAT/0041/12/JOJ, the Honourable Mr Justice Langstaff (President) said that, "*identifying what an activity involves is an holistic assessment by the Tribunal. The Tribunal is trusted to make that assessment. It's evaluation will be alert to possibilities of manipulation, but it is not simply to be decided by numerating tasks in identifying whether the majority of those tasks quantitively is the same as the majority one prior to the putative transfer.*"

Present case

25. What then of the present case? While the claimant continued to do sorting work when he took up employment with the respondent, Royal Mail had not ceased completely to carry out the same activities. However, the test is whether the activities remain "*fundamentally or essentially the same*". Albeit with some hesitation, I decided that they were. The Department for Business Innovation & Skills Guide January 2014 ("the BIS Guide) recognises that Reg.3(1)(b) is capable of applying where service contract is split up in this way.

Organised grouping

26. However, the Regulations only apply to some changes in service provisions. They only apply to those which involve, "*an organised grouping of employees which has as it principal purpose the carrying out of the activities on behalf of the client.*"

27. The BIS Guide states that this requirement, "*is intended to confine the Regulations' coverage to cases where the old service provider (i.e. the transferor) has in place a team of employees to carry out the service activities, and that team is essentially dedicated to carrying out activities that are to transfer on behalf of the client (though they do not need to work exclusively, on these activities, but carrying them out for the client does need to be their*

principle purpose). It would therefore exclude cases where there was no identifiable grouping of employees or where it just happens in practice that a group of employees works mostly for a particular client. This is because it would be unclear which employees should transfer in the event of a change of contractor, if there was no such grouping. For example, if a contractor was engaged by a client to provide, say, a courier service, but the collections and deliveries were carried out each day by various different couriers on ad-hoc basis, rather than by an identifiable team of employees, there would be no service provision change and the Regulations would not apply.

It should be noted that a "grouping of employees" can constitute just one person as may happen when the cleaning of a small business premises is undertaken by a single person employed by a contractor."

28. It is also clear from the case law that it is necessary to consider whether a grouping existed, and if so, whether it had been intentionally formed. In ***Edie Stobart Ltd v. Moreman & Ors*** the EAT held that the organisation of the grouping must be more than merely circumstantial. The employees must have been organised intentionally. The Employment Judge had held that merely because the employees spent all or most of their time on tasks related to the particular contract did not mean there was an "organised grouping". At the EAT, Mr Justice Underhill agreed. He said that the statutory language, "*necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question.*" He distinguished between a group and an "*organised grouping*". Pointing out that a group of employees, "*may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client.*" Thus, this decision limits the reach of the service protection. It would appear to limit a SPC to employees who can be said to have been organised so as to form part of a dedicated client team. Mr Justice Underhill also said that, "*there is no rule that in actual meaning of the language of their Regulations must be stretched in order to achieve transfer in as many situations as possible*".

29. The Court of Session approved and applied that analysis in ***Ceva Freight (UK) Ltd v. Seawell Ltd*** [2013] SC 596.

30. So far as the present case is concerned, I am not persuaded that there was an "*intentional grouping*". There was no evidence to suggest a conscious organisation into a grouping. There was a *"group"* of Christmas casual workers, but not an *"organised grouping".*

31. I arrived at the view, therefore, that the submissions by the respondent's solicitor in this regard were well founded. As there was not an "*organised grouping*", there was no TUPE to the respondent.

32. Accordingly, the claim predicated as it is on there having been a TUPE transfer, has "*no reasonable prospect of success".* It is struck out, therefore, in terms of Rule 37(1)(a) in Schedule 1 of the Rules of Procedure.

Application to amend

33. As, in my Judgment, there was no TUPE transfer, there was no obligation on Royal Mail to consult. This means that even if I were to allow the amendment, the claim against Royal Mail would have no reasonable prospect of success and would require to be struck out.

34. However, for the sake of completeness, I wish to record that, having regard to the guidance in ***Selkent***, I would have refused the application, in any event. The claimant delayed submitting the application for a number of months for no apparent reason. He had been alerted to the possibility of adding Royal Mail by Employment Judge Hendry at the case management preliminary hearing on 22 June. It was clear that the claimant is an articulate, intelligent person, well able to carry out the necessary investigations and submit an application to amend and yet it was not until 12 September that he made the application. There was no apparent impediment to him doing so much earlier.

Further, were I to allow the amendment, this would involve further delay and expense for the respondent as the claim would require to be intimated to Royal Mail, they would require to be afforded an opportunity of submitting a response and there would be further hearings.

35. I was satisfied, therefore, that the balance of prejudice favoured the respondent. I was also of the view that to grant the application would not be in accordance with the "overriding objective" in the Rules of Procedure or in the interests of justice.

36. For all these reasons, therefore, the claimant's application to amend is refused.

Employment Judge **N Hosie**

Date of Judgement **29 October 2021**

Date sent to parties **29 October 2021**