



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Claudia Tabares

**Respondents:** (1) Bugbusters UK Ltd  
(2) Crystal Services PLC

**Heard at:** East London Hearing Centre

**On:** 29<sup>th</sup> July 2021

**Before:** Employment Judge Peter Wilkinson

## Representation

**Claimant:** Finnian Clarke of United Voices of the World

**1<sup>st</sup> Respondent:** Sophie Harkins of Holly Blue Employment Law

**2<sup>nd</sup> Respondent:** Mr Toby Jerman, Managing Director

**JUDGMENT** having been sent to the parties on 2 August and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

## REASONS

1. The Claimant was employed by the 2<sup>nd</sup> Respondent from 20 June 2016 to 28<sup>th</sup> September 2020 as a cleaner. Her principal place of work was the offices of Equus Software (Equus) pursuant to a contract between the 2<sup>nd</sup> Respondent and Equus. That contract was terminated by Equus on 28<sup>th</sup> September 2020. The contract to provide cleaning services to Equus was taken over by the 1<sup>st</sup> Respondent on 30<sup>th</sup> September. The Claimant has brought the following claims:

- 1.1. A claim of unfair dismissal under Part X of the Employment Rights Act 1996; and
- 1.2. Unpaid notice pay;
- 1.3. A claim for 21 days accrued but untaken annual leave under Regulation 30 of the Working Time Regulations 1998 or under

Part II of the Employment Rights Act 1996; and

- 1.4. A claim for compensation pursuant to r15 TUPE for failure to inform or consult contrary to r13 TUPE.

## The Issues

2. The issues in the case were not in dispute and were as follows:

### Transfer

- 2.1. Whether the Claimant had transferred from the employment of the 2<sup>nd</sup> Respondent to that of the 1<sup>st</sup> Respondent, pursuant to r4 TUPE.
  - 2.1.1. It was agreed that there had been a transfer of a service provision, in that the contract to clean the offices for Equus had been transferred from the 2<sup>nd</sup> Respondent to the 1<sup>st</sup> Respondent, in accordance with regulation 3.(1)(b)(ii), Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).
  - 2.1.2. It was agreed, or at least conceded, that the provisions of r3. (3) TUPE were satisfied, the Claimant having been allocated to the Equus contract and being the only person allocated to that contract.
  - 2.1.3. The first contentious issue was whether there had been an effective transfer of the Claimant from the employment of the 2<sup>nd</sup> Respondent to that of the 1<sup>st</sup> Respondent.
    - 2.1.3.1. The position of the Claimant and of the 2<sup>nd</sup> Respondent was that there had been an effective transfer from transferor to transferee.
    - 2.1.3.2. The position of the 2<sup>nd</sup> Respondent was that there had been no such transfer because, in the course of a telephone conversation between Jose Matador and the Claimant, the Claimant objected to the transfer, so that, pursuant to r4. (7), r4.(1) and (2) did not operate to transfer the relevant employment to the transferee.

### Change in working conditions

- 2.1.4. In the event that the Tribunal finds that there was an objection, per r4.(7), was the Claimant in any event entitled to treat the contract as having been terminated by the 1<sup>st</sup> Respondent by way of dismissal, by reason of the fact that the transfer would involve a substantial change in working conditions, to the detriment of the Claimant?

### Unfair dismissal

- 2.2. Whether the Claimant had been dismissed, and if so, whether by the 1<sup>st</sup> Respondent or by the 2<sup>nd</sup> Respondent.

### Fairness

- 2.3. In the event that the Tribunal finds that the Claimant has been dismissed, was that dismissal unfair?

2.3.1. If the Tribunal finds that the transfer was the sole or principal reason for the dismissal, the Claimant shall be treated for the purposes of Part X of the Employment Rights Act 1996 as unfairly dismissed.

2.3.2. If the Tribunal finds that the dismissal was for some economic, technical or organisational reason entailing in the workforce, then r7(2) applies and the reason for dismissal is treated as redundancy. In that event, the Tribunal must consider whether the dismissal by reason of redundancy was fair, applying the test in s98(4) ERA 1996.

2.3.3. If the Tribunal finds that the dismissal was for some other reason, then again, the Tribunal must consider the issue of fairness, applying the test in s98(4) ERA 1996.

2.3.3.1. If the dismissal was unfair should any compensatory award be reduced to reflect any possibility that, had the Respondent acted fairly, the Claimant could or would have been dismissed in any event? and/or

2.3.3.2. Whether any basic award and/or compensatory award should be reduced under sections 122(2) and/or 123(6) of the Employment Rights Act 1996 because of any conduct by the Claimant.

### **Relevant legal principles:**

#### TUPE

3. The Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) apply to a service provision change, as defined by r3.(1)(b)(ii) where:

*“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”*

Such a service provision change is thus a ‘relevant transfer’ for the purposes of TUPE.

4. Regulation 4.(1) TUPE provides that:

*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.*

5. Therefore, unless the employee objects to the transfer, the employee of the transferor (in this case Crystal Services), automatically becomes an employee of the transferee (here, Bugbusters) with all her employment rights and length of service intact and under the same contractual provisions.

6. Regulation 4.(9) provides:

(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.

**7. Regulation 7 provides that dismissal by reason of the transfer is to be treated as unfair:**

7.—(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is—

(a) the transfer itself; or

(b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

**8. The question of whether any dismissal was for an economic, technical or organisational reason is dealt with as an issue below.**

**9. Regulation 13 provides for the provision of information to employees by their employer:**

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

...

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

...

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).

10. Regulation 15 provides for remedies in the event of a breach of regulation 13, provision of information:

**Factual issues and disputes**

Transfer

11. As set out above, it is agreed that there was a service provision change for the purposes of r3 TUPE when the Equus cleaning contract was taken over by the 1<sup>st</sup> Respondent on 30<sup>th</sup> September 2020.
12. It is the Claimant's case that she transferred to the employment of the 1<sup>st</sup> Respondent pursuant to the provisions of r4(1) TUPE on 30<sup>th</sup> September.
13. It is the 1<sup>st</sup> Respondent's case that her employment did not transfer because, in a telephone call on 1<sup>st</sup> October 2020 between the Claimant and Matdor, she objected and that there was thus no transfer, pursuant to the provisions of r4(7) TUPE.
14. The Claimant's alternative case is that, insofar as she raised objections in the telephone call on 1<sup>st</sup> October, those were objections to being told her working hours would be reduced from 2 hours per week to one hour per week, halving her income.
15. The Tribunal heard differing accounts of what was said on that telephone call. The content of that call is central to determination of the legal status of the Claimant. It is thus necessary to consider the competing accounts of the conversation and to make relevant findings of fact.
- 15.1. The Claimant gave evidence in her witness statement in the following terms:

On 1 October, Jose, the manager of Bespoke, called me. The call last around 5 minutes. He said he was calling from Bespoke (he never gave the name "Bugbusters").

He informed me that they were the ones who had the Equusoft contract now, that it was only for 1 hour from Monday to Friday and that he could not give me more hours, neither there nor in another contract (see **Bundle 92**).

I told him that they should respect my contract and that my transfer should be with the same conditions. He said no, that it was only 1 hour that he was offering me and nothing else.

I asked them to please give me the same 2 hours of my contract even if it was in another place and again he refused saying that he had nothing else to offer me.

We ended the conversation with me telling him that I was waiting for them to change their decision and offer me the same conditions in which I had been transferred. I also asked him what would happen to me and his answer was that Crystal was the one who had to place me somewhere else. I was totally unaware of my employment rights and I told him that I would call Crystal, which is what I did.

At no time did I refuse to work or transfer. I told him several times in the conversation that I didn't care if it was in another workplace.

- 15.2. Ms Tabares had been in her employment servicing the Equus account for some 4 years and wanted to continue. She filed a witness statement setting out her account of the telephone call on 1st October. She was clear in her account of the telephone call and clear in her evidence. She came to court and affirmed. She subjected herself to cross examination. She did not change her account.
- 15.3. From the Respondent, The Tribunal has the evidence of Ms Lewandoska, who now accepts that she was not a party to the telephone call of 1<sup>st</sup> October. There is no evidence from Mr Matador, who was the other party to the call with the Claimant. He has not filed a witness statement. He has not come to tribunal to give evidence. He has not been cross examined.
- 15.4. Ms Lewandoska gave the following account in her witness statement:

“The Claimant was telephoned on the 1<sup>st</sup> October 2020 and informed that Bespoke had been awarded the contract and that her employment would transfer across under the TUPE regulations. She was informed that the contract requirements had been changed and that instead of 2 hours per day the contract would only be for 1 hour per day. The Claimant immediately stated that she did not want to transfer across and that she wanted to remain with the 2<sup>nd</sup> Respondent and to receive redundancy if her job was no longer available to her from them. The Claimant was clear that she considered she had been treated unfairly by the 2<sup>nd</sup> Respondent, she spoke about receiving an email informing her that she would be employed directly by the client Equus and she stated that she was not prepared to let their behaviour go and advised of an appointment that she had arranged with her trade union representative.

The Claimant was not told that she could not transfer and that only one hour was available and nothing else. Had she transferred we would have looked to give her work with another client in order to secure the remaining hours to her contractual entitlement. No such discussions took place however as she stated very quickly and very assertively that she wanted to stay with her current employer the 2<sup>nd</sup> Respondent and that she did not want to transfer to our employment. I informed the 2<sup>nd</sup> Respondent via email that the Claimant did not want to transfer, this is shown at page 94 and further correspondence is shown at page 97.”

- 15.5. It is remarkable that there is nothing in that account to identify who called the Claimant and who was informed that she “*did not want to transfer*”. The impression is given that the writer had personal knowledge of the phone call. The expression “she stated very quickly and very assertively that she wanted to stay with her current employer” gives the very clear impression that the writer was on the call. In cross examination, Ms Lewandowska accepted that she was not.
- 15.6. Ms Lewandowska went on in her statement to say the following:
- “I called the Claimant on the 6<sup>th</sup> October 2020 to ask her why she was saying these things as it was not true and the Claimant informed me that her union representative had been confused and her complaint of non-contact was in regard to the 2<sup>nd</sup> Respondent and not Bespoke”
- 15.7. Ms Lewandowska acknowledged in Cross examination that this was flatly untrue. She was not a party to any telephone call with the Claimant at any time. Her witness statement made no mention whatsoever of Jose Matador. She accepted in cross examination that the Claimant was correct in saying that the telephone call was between the Claimant and Jose Matador. She described this as a “typo”.
- 15.8. Ms Lewandowska told the Tribunal that Jose Matador had not been called as a witness because she, Ms Lewandowska, did not wish him to be under stress. Mr Matador is Ms Lewandowska’s manager.
- 15.9. The Tribunal is thus obliged to consider whose evidence to believe. The evidence of a party who has at best second hand knowledge of a conversation to which she was not a party, in a language she does not speak, and who seemed to me to have provided misleading and inaccurate evidence, or the evidence of a party to the conversation, who has been entirely consistent and who has attended Court to give evidence and be cross examined.
- 15.10. This Tribunal has not the slightest hesitation in accepting the evidence of the Claimant, as set out above.
- 15.11. Accordingly, The Tribunal finds as a fact that the Claimant did not object to the transfer in the telephone conversation on 1<sup>st</sup> October 2020, although she did insist on her contractual terms being preserved.
- 15.12. The result of that finding is that the Claimant’s employment did transfer to the 1<sup>st</sup> Respondent on 30<sup>th</sup> September 2020, pursuant to r4(1) TUPE

### Dismissal

16. The first respondent’s pleaded reason for the termination of the employment contract was that there was never a transfer and therefore that there has been

no dismissal. Clearly, that pleading cannot survive the finding of fact in respect of the telephone call.

17. It is the first respondent's alternative position that the dismissal was for an economic, technical or organisational reason, relating to the reduction in service requirements by Equus reducing from 2 hours per day to 1.5 hours per day.
18. The Tribunal is simply unable to accept that this is the reason for the dismissal. The 1<sup>st</sup> Respondent has 250 employees engaged on various contracts. According to Ms Lewandowska, on the same phone call on 1<sup>st</sup> October, Mr Matador was able to offer Ms Tabares "direct employment", not under a TUPE transfer. Apparently 2 hours a day was possible, just not under a TUPE transfer, which would have preserved the Claimant's existing employment terms and rights. It simply cannot be the case that economic, technical or organisational reasons prevented a transfer to a 2 hour contract under TUPE, when a contract for 2 hours could be provided outside TUPE.
19. The Tribunal thus finds as a fact that the sole or principal reason for the dismissal was the transfer itself and that the 1<sup>st</sup> Respondent was simply unwilling to honour the Claimant's existing employment terms.
20. Accordingly, the Tribunal finds that the Claimant was dismissed and that, pursuant to r7(1) TUPE, that dismissal was unfair.

#### Failure to notify

21. The 1<sup>st</sup> Respondent acknowledged that there had been a failure to notify the Claimant of the matters set out in r13(2) to (7) TUPE.
22. Ms Lewandowska agreed in her oral evidence that as head of HR for the 1<sup>st</sup> Respondent, she should have written to or at least emailed the Claimant, setting out her rights and the details of the transfer and that she was, with hindsight, wrong to rely on what was said to have been conveyed on the phone on 1<sup>st</sup> October without following it up in writing to ensure that the Claimant had the information she needed and with which she should have been provided.
23. There was self evidently a duty to consult on measures affecting the Claimant, given the proposed change in hours. It was accepted that that was not done, save for telling her on the phone that she would only be working one hour per day, not two as previously.
24. Despite that admission however, the 1<sup>st</sup> Respondent appears to contend that the failure to notify the Claimant in accordance with r13 resulted from compliance being not reasonably practicable due to special circumstances.
25. Ms Lewandowska, in her witness statement, says the following:

"Given the circumstances of the contract award being on the 28<sup>th</sup> September 2020 and notification of the Claimant's eligibility to transfer being on the 29<sup>th</sup> September 2020 there was no time to enable any



form of consultation pre or post transfer for either Respondent as the circumstances given rise to the termination and contract award were very much dictated by the client Equus Software and for both parties, was without notice. It was simply not reasonably practicable for either Respondent to carry out any obligation to inform and for us to consult. I do believe however that we carried out what was practicable in the circumstances and that we could do no better”

26. As noted above, in her oral evidence, Ms Lewandowska agreed that she could have informed the Claimant of her rights under the transfer by email and that she should have done so. It was in any case the 1<sup>st</sup> Respondent's express case that no discussions about TUPE transfer rights took place because they considered that the Claimant had objected to the transfer in the telephone call with Jose Matador on 1<sup>st</sup> October. The Tribunal's findings in respect of that telephone call are set out above.
27. I am reminded by Mr Clarke, appearing for the Claimant, of the authorities in respect of the 'special circumstances' defence. In particular, the proposition that the defence is to be narrowly construed and that circumstances are only 'special' if they are 'exceptional or out of the ordinary', per *Clarks of Hove Ltd v Bakers Union* [1978] ICR 1076. Also that loss of business at short notice was neither exceptional nor extraordinary, per *Guardian Facilities and another* ET No. 2330014/08.
28. In being cross examined by Mr Jerman for the 2<sup>nd</sup> Respondent, Ms Lewandowska agreed that in the contract cleaning business in which both respondents operate, it was in fact completely routine to lose a client's business or to gain one at very short notice, as happened here. She accepted that these circumstances were not extraordinary.
29. In any event, r13(9) provides that there remains a duty on the employer to "take all such steps towards performing that duty as are reasonably practicable". Ms Lewandowska in her evidence accepted that there were steps which could and should have been taken to relay the information required to the Claimant which were not taken. She accepted that there was no consultation on the change in working conditions which were imposed. What she said about that was "under TUPE, we have the right to reduce the hours". She contended that informing the Claimant that her hours had been reduced in the telephone call on 1<sup>st</sup> October was therefore sufficient consultation.
30. Further, as the Claimant pointed out, her start on the contract could have been delayed. The 1<sup>st</sup> Respondent avers to a workforce of 250 part time employees. Providing short term cover for the contract would clearly have allowed time for consultation if that was genuinely required.
31. In the circumstances, the Tribunal finds that the 1<sup>st</sup> Respondent has failed to consult or inform in a manner compliant with r13 TUPE.
32. The Tribunal having found that there was a valid transfer of employment, the 1<sup>st</sup> Respondent is liable for the failure to consult and inform.
33. The Tribunal considered the complete failure of the 1<sup>st</sup> Respondent to inform or consult the Claimant in respect of her rights under the transfer and the

proposed changes to her working hours as being a serious failure, meriting an award of 13 weeks pat, pursuant to r16 TUPE.

Holiday pay

34. Given the finding in respect of dismissal made above, the Tribunal having heard unchallenged evidence from the Claimant and in the same terms from the 2<sup>nd</sup> Respondent, the Tribunal found that the Claimant was due 15 days holiday pay at £17.44 per day.

**Employment Judge Peter Wilkinson**  
**Date: 21<sup>st</sup> December 2021**