



EMPLOYMENT TRIBUNALS

Claimant: Mr R Cuga
Mr D Peters

Respondent: Topwood Ltd (1)
Delivery Solutions (Delsol) Ltd (2)

Heard by: CVP link **On:** 25th November 2021

Before: Employment Judge A Frazer

Representation:

Claimant:
Ms Zablocka
(representative
and translator)

Respondent 1:
Mr L Bronze
(Counsel)

Respondent 2:
Ms J Whiteley
(Solicitor)

JUDGMENT

1. Mr Cuga's claim against the First Respondent and Mr Peters' claim against the First and Second Respondent under Regulation 4(9) of the TUPE Regulations 2006 are dismissed under Rule 37 of the Employment Tribunal Rules of Procedure 2013.
2. Mr Cuga's claim against the First Respondent and Mr Peters' claim against the First and Second Respondent under Regulation 13 TUPE Regulations 2006 shall proceed to a final hearing.

REASONS

1. This is a claim brought by Mr Peters and Mr Cuga for essentially a failure to consult by Topwood (R1) and Delsol Ltd (R2). The claim brought by Mr Cuga on 20th October was for unfair dismissal, redundancy, notice and other payments. The Claimants were employed as warehouse operatives by Topwood, the First Respondent, at its site in Wrexham.
2. The First Respondent made a decision to terminate its contract with its client, Treadstone and informed the Claimants there would be a change to a new employer.
3. In the claim form it says that the Claimants raised objection to the change of work location as it would result in a substantial worsening of their conditions. A meeting took place between Mr Phillips Managing Director of the Second Respondent and the Claimants on 15th July. He is alleged to have said 'leave it with me I'll sort this out'. The meeting was 15 minutes long. They say they asked Tom Gilruth of the First Respondent to sit with them to discuss it further but he didn't do so.
4. Additional to the claim Mr Peters has added that he did speak to Mr Phillips of R2 on the phone subsequently and that there was a refusal to pay travel expenses so Mr Peters communicated to him his objection to the transfer. Mr Cuga has withdrawn his claim against R2.
5. In the case management order of EJ Ryan dated 1st April 2021 at paragraph 7 there is a helpful summary of the position as was confirmed by the claimants as to the essential and undisputed facts in this case. These are as follows:
 - Both claimants were Warehouse Operatives employed by R1, following several TUPE transfers, working for R1's client Treadstone Ltd, and they worked based in Wrexham and near their respective homes.
 - The claimants' contracts of employment with R1 did not include any contractual provision relating to expenses of travelling from home to work; it was not an issue as they both lived close-by.
 - On several dates in June and July 2020, both orally and in writing, R1 confirmed an intended and then definite transfer of the Treadstone contract to R2 with confirmation of the TUPE implications for the claimants; they also met representatives of R2 to discuss their request for expenses in attending work.
 - R2's operations are based at Sandycroft, approximately 17 miles/28 Kms from Wrexham. Both claimant's sought agreement with R2 that it would recompense them for their respective expenses that would be incurred in travelling from their home addresses to Sandycroft; they say they received assurances that R2 would "look into it" but then say that nothing transpired. R2 did not agree to pay travel to work expenses from 1st September 2020.
 - The TUPE transfer between R1 to R2 was effected on 1st September 2020. The claimants' last day of employment by R1 was 31st August 2020.

The claimants objected to the transfer and did not take up employment with R2. They no longer work for R1. They have not sought subsequently to work for R2.

6. It was clarified by EJ Ryan whether a request for payment of expenses would fall under Regulation 4(9) or Regulation 13 (paragraph 8) and Ms Zablocka then confirmed that it was the latter. R1 did not consult with either claimant and R2 did not consult with Mr Peters.
7. Again, today I confirmed with Ms Zablocka that the essence of the complaint was a failure to consult over travel expenses. She agreed that it was a failure to consult but over the wider issue of worsening conditions brought about by the Claimant's need to travel. She added that in particular Mr Peters did not have a driving licence and that the Claimants were on £9 an hour.

The Law

8. ET Rule 37 provides that a Tribunal has the power to strike out a claim or a response where there are 'no reasonable prospects of success'. ET Rule 39 provides that the Tribunal has power to order the claimant to pay a deposit to proceed with his or her claim where there are 'little reasonable prospect of success'.
9. Under the TUPE Regulations 2006 Regulation 4(7) serves to terminate a contract of employment where an employee objects. The effect of this is the immediate termination. There is no redundancy situation created by this.
10. Under Regulation 4(9) there is a dismissal where a relevant transfer 'would involve a substantial change in working conditions to the material detriment of a person whose contract of employment would be transferred.'
11. The claim is not brought under the specific wording of 4(9) insofar as the transfer itself operated to dismiss the claimants. The claim is brought as a failure to consult or a request for expenses or assistance with travelling to the new site. This cannot amount to a 'substantial change in working conditions to the material detriment of a person'. While it could be said there may be a detriment by a failure to consult there cannot be a substantial change in working conditions brought about by this.
12. Having regard to Regulation 13 on the facts that I have heard and seen the claimants were informed of the change of location. The issue is whether the claimants were informed about the '*measures that the employer envisages he will take in relation to any affected employees, or if he envisages that he will take no measures, that fact.*' The claimants say that they were not advised that they would receive any upgrade to their contracts of employment. The respondent was going to give them information about the expenses but both claimants agree that Mr Phillips provided this information before they were due to be transferred as this is why they resigned.

13. I have considered Regulation 13(6). This obliges an employer who envisages that he will take measures in relation to an affected employee to consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.
14. The claimants had a mobility clause in their contract but this would be subject to being exercised reasonably.
15. The essence of the complaint is that there was insufficient consultation regarding the issue of how the claimants may be assisted to transfer regarding travel assistance. They requested this in the form of expenses. They say that Tom Gilruth didn't speak to them and Mr Phillips didn't come back to them about it but instead just left it that they would transfer on their existing terms and conditions. They say that the consultation was in effect neither engaging nor meaningful.
16. Neither 'measures' nor 'envisages' are defined in Regulation 13(2)(c) of the TUPE Regulations 2006. However there is an argument that it would include a change of workplace location with all of the upheaval that entailed.
17. There was some discussion between R2 and the claimants but little or no discussion as between R1 and the claimants. The challenge is that R2 did reply but did not give reasons for why he was refusing assistance so the issue is whether there was sufficient consultation in accordance with Regulation 13(2)(c).
18. It is a matter of argument as to whether there was an obligation to consult in relation to measures taken about the workplace and a matter of fact about the nature and extent of any consultation and whether this was sufficient.
19. It cannot be said therefore that the claim under Regulation 13 has little reasonable prospect or no reasonable prospects of success.
20. Therefore I allow the claims to go through but only under Regulation 13.
21. Any claims under Regulation 4(9) are struck out as having no reasonable prospects of success.

Employment Judge A Frazer
Dated: 10th March 2022

JUDGMENT REASONS SENT TO THE PARTIES ON 21 March 2022

FOR THE SECRETARY OF EMPLOYMENT
TRIBUNALS Mr N Roche