



EMPLOYMENT TRIBUNALS

Claimant: Mr A Penrose

Respondents: (1) Affinity Water
(2) P N Daly Ltd

Heard by CVP On:18 May 2022

Before: Employment Judge Manley

Representation

Claimant: In person
Respondents: (1) No appearance
(2) Mr Williams, solicitor

PRELIMINARY HEARING JUDGMENT

- 1 There was no transfer of the claimant's employment under TUPE 2006 from the second respondent to the first respondent on or around 30 April 2020.
- 2 The claimant did not have two years' service with the second respondent and cannot bring a claim of unfair dismissal arising from the termination of his employment.
- 3 The claim is dismissed.

REASONS

Introduction and issues

- 1 This claim was listed for a preliminary hearing to determine whether there had been a transfer of the claimant's employment from the second to the first respondent.
- 2 The claimant presented a claim form on 16 June 2020, naming the first respondent. He ticked the box for unfair dismissal but said he was still employed and gave no dates for the start or end of his employment. The grounds were that "*TUPE process was not adhered to*".
- 3 The first respondent presented a response which stated that the

claimant was not employed by it but that he was employed by the second respondent. It denied there was a TUPE transfer.

- 4 The claimant was asked if he wanted to join the second respondent to the proceedings and it was later joined. The second respondent also denied that there was a TUPE transfer. It stated that they employed the claimant until the end of a contract to install water meters with the first respondent. There was then a redundancy situation and the claimant was made redundant. It pointed out that the claimant had less than 2 years' service.
- 5 The claimant was sent a letter by an employment judge pointing out that he could not claim unfair dismissal arising from a transfer unless he had two years service. The claimant was of the view that there had been a breach of TUPE and the matter was listed for an open preliminary hearing to determine whether there had been a transfer of his employment under TUPE 2006.
- 6 That preliminary hearing took place in January 2022 with the second respondent applying for a strike out of the claim because of the lack of service. The judge declined to strike the claim out as he felt further information was needed about what work, if any, had continued on meter installations, after redundancies were made. Orders were made.

The hearing

- 7 At the commencement of the hearing, I outlined what documents had been sent and checked what others had. There was no attendance by the first respondent nor had the tribunal received any further information from it since the response was presented.
- 8 There was a bundle prepared by the second respondent. There was also a witness statement from Mr Brennan, the Operations Director of the second respondent. The claimant had not understood that he might need to provide a witness statement. The claimant had sent several documents to the tribunal but had not seen the bundle prepared by the respondent. I stated we would have a break so he could be sent the bundle, although it contained documents the claimant had seen before.
- 9 After the introductions, I discussed the nature of the hearing with the claimant. Although it had been listed to determine whether there had been a transfer under the TUPE regulations, I reminded the claimant that there appeared to be no claim he could bring, even if there had been a transfer. I said I was prepared to come to a conclusion on that question if he still believed I should but there appeared to be no other disputed matter to be determined. After the break, the claimant said he wanted a determination on the TUPE issue.
- 10 I heard from Mr Brennan. The claimant took no issue with Mr Brennan's statement and put to him that the second respondent

had been put to some cost making people redundant and Mr Brennan agreed. I asked Mr Brennan what he knew about arrangements at the end of the contract. The claimant gave evidence about his understanding of work continuing on meter installation. I took a break to consider the evidence and gave oral judgment. The claimant requested written reasons.

Facts

- 11 The second respondent had a two year contract with the first respondent for installing water meters. It ran from 1 May 2018 to 30 April 2020. The ending of the contract did, of course, coincide with the pandemic and the introduction of lockdown restrictions. The second respondent had decided not to renew the contract. It wrote to affected employees on 26 March 2020, somewhat coincidentally as those employees were being furloughed, to inform them that their employment would be transferred to the first respondent.
- 12 The first respondent then informed the second respondent that it intended to cease water meter installation. Mr Brennan's evidence was that he was told there would be a concentration on other ways of encouraging water saving and meter installation would cease. This led to the second respondent writing to the affected employees on 31 March 2020 saying there would be no transfer but a redundancy situation arose. A consultation meeting about redundancy was held with the claimant on 17 April 2020.
- 13 Further information came to the second respondent that some meter installation might be continuing and they wrote again on 30 April 2020 to affected employees to say it understood there was to be a TUPE transfer. The first respondent wrote to the claimant stating that meter installation had ceased and that his employment had not transferred to it.
- 14 The redundancy consultation proceeded and the claimant was dismissed by letter of 26 June 2020 with payment in lieu of notice to 3 July 2020.
- 15 I heard oral evidence to the effect that water meter installation did take place at some point in 2020. The claimant's evidence was that he believed it re-commenced in September 2020. There are documents which show a new contract being awarded to Network Plus about a year later and a post of Facebook saying that 25,000 meters had been installed in 2020-2021 saying 12 months work had been achieved in 6 months. On the face of it, it seems some meter installation commenced in the autumn by a new contractor. The claimant's evidence was that he was aware, because he had worked for the first respondent before, that there was a 10 year contract between the first respondent and Ofwat to deliver a high volume of installed meters.

The law and submissions

16 The relevant legislation is the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006). In this case, Regulation 3 (1) (b) applies, that is the service provision change sections:-

“(ii) 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; 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”

17 Paragraph 3 (3) TPUE 2006 requires there to be *“an organized grouping of employees which has as its purpose the carrying out of the activities on behalf of the client”* and that *“the client intends that the activities will, following the service provision change, be carried out by the transferee....”*

18 In this case, both the alleged transferor and the transferee, dispute that the work was to carry on.

19 The second respondent’s case is that it was told the work was to cease. It accepted that and made its employees redundant. The claimant firmly believes work continued, although it was later in the year and may have been carried out by Network Plus rather than the first respondent.

Conclusions

20 I do not find that the service provision changes under TUPE 2006 applied here. There are some difficulties that arise from the evidence. Apart from a response, I have nothing further from the first respondent. The period on question is also when the UK was in its first lockdown and many employees, including the claimant, were on furlough.

21 I accept that the claimant was in an organized grouping of employees carrying out the meter installation when the contract came to an end. But there is no evidence of a new contract being awarded for many months and no clear evidence that meter installation continued. I do not find that the first respondent intended the activities would be carried out either by itself or another contractor. The second respondent remained the claimant’s employer and carried out a redundancy process about which no complaint is made. There was no TUPE transfer from the second respondent to the first respondent.

22 Furthermore, this claim can go no further because the claimant did not have the necessary two years’ employment. Even if there had been a transfer of his employment, that would end the claimant’s

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claim. Whilst the claimant has raised concerns about colleagues who were made redundant at the same time, the tribunal can only deal with this matter. The claim is dismissed.

Employment Judge Manley

Date 18 May 2022

JUDGMENT SENT TO THE PARTIES ON

10 June 2022

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FOR THE TRIBUNAL OFFICE