



EMPLOYMENT TRIBUNALS

Claimant: Matthew Barnes

Respondent: Shop@theShip Limited

Heard at: Bristol Employment Tribunal

On: 15 & 16 June 2022

Before: Employment Judge Gibb

Representation

Claimant: In person

Respondent: Madeline Fife (Director of the Respondent)

JUDGMENT having been sent to the parties on 28 June 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a judgment dated 16.06.22, the tribunal found that the Claimant had been automatically unfairly dismissed by the Respondent following a service provision change pursuant to the provision of the Transfer of Undertakings (Protection of Employment) Regulations 1996 (“TUPE”) and awarded him £4866.36. The Respondent has now requested written reasons for that decision.

Claims & Issues

2. On 17.10.21, the Claimant issued proceedings for unfair dismissal against the Respondent. The Respondent denied that the Claimant had been unfairly dismissed and denied that there had been any circumstances giving rise to a transfer under TUPE. It was the Respondent’s case that there was no service provision change, that the Claimant did not constitute an “organised grouping of employees” and that TUPE did not apply.
3. There was no list of issues prepared in advance of this hearing and although the Respondent had had historical legal advice and assistance, neither party was represented. At the outset, the parties agreed the list of issues that were to be decided by me at the hearing. The issues were as follows:

- i. Whether there was a relevant transfer when the Post Office terminated its contract with Cyril Barnes and commenced a new contract with the Respondent. It was agreed that if there was no such transfer the Claimant's claim fell away.
 - ii. If there was a relevant transfer, was it an automatic unfair dismissal? The ET3 did not argue in the alternative that there was an economic, technical or organizational reason. The Respondent rested its case solely on the argument that there was no relevant transfer.
4. Whilst the Respondent was not represented at the hearing, it had retained solicitors to draft the ET3 and also to draft a skeleton argument which it produced for the hearing. That skeleton further sought to argue that this might be a public sector transfer and that it was therefore not covered by the provisions of TUPE. That point had not been pleaded previously in the ET3 or otherwise raised before the day of the hearing and was not fully argued in the skeleton or before the court.

Procedure, Documents & Evidence

5. On behalf of the Claimant, the tribunal heard evidence from the Claimant, Matthew Barnes, his father Cyril Barnes, the Claimant's wife Sarah Guilfoyle and Mark Baker who is the branch secretary of the Postmasters Branch of the Communication Workers Union. For the Respondent, evidence was given by Madeleine Fife (a director of the Respondent). She was accompanied at the hearing by Jill Reeves, her co-director, who did not give evidence. All of the witnesses who gave evidence provided written witness statements which the tribunal read in advance and which stood as their evidence in chief. In addition, there was a bundle of documents running to 140 pages. I explained to the parties that whilst I had read the witness statements and any documents in the bundle referred to in the statements, if I was not taken to a document then I would not have read it.
6. The Claimant explained that he suffered from chronic fatigue syndrome, might need additional breaks and may take a bit longer to give his response. The tribunal made it clear that these reasonable adjustments would be made during the course of the hearing. On day two, for the purpose of providing closing submissions, I agreed that the Claimant could write out the submissions he wished to make and that his wife Ms Guilfoyle could read those out for him. The Respondent did not object to this approach.

Findings of Fact

Nature of the Contractual Arrangements

7. In March 2004 Cyril Barnes, took over the Post Office contract to run the Newnham Post Office. This contract was with the Post Office Limited ("the Post Office"). On 05.03.04, the Claimant commenced employment with his father Cyril Barnes to work at the Newnham Post Office. The contract set out that the Claimant's duties were to provide general assistance to the sub postmaster as discussed from time to time and his salary was to be £8.50 an hour for 22 hours of work per week, although he didn't work a fixed pattern.

8. The Post Office counter was operated from a shop space which also housed a newsagents which was run by Cyril Barnes' wife and the Claimant's mother.
9. Under Cyril Barnes' contract with the Post Office, the contractual payment was structured by way of core tier payments being a fixed monthly sum as well sums calculated on transactional pay in accordance with the remuneration booklet.

Activities Carried Out By The Claimant for Cyril Barnes

10. At the outset, Cyril Barnes left the Claimant in day-to-day control of the Post Office counter alongside other more experienced members of staff who had TUPE'd across when he took over the contract. The Claimant was in charge of running the Newnham Post Office and took ultimate responsibility for the administrative tasks required.
11. It was argued by the Respondent that the Claimant spent time assisting on both counters. However, having listened to the evidence of both the Claimant and Cyril Barnes I am satisfied that whilst the Claimant would assist his mother in her newsagency business which ran alongside, that he was not paid to do so and did so in order to help out as and when, and prioritised his position behind the Post Office counter. Given that he worked part time, I cannot see that such activity affected the work he carried out for Cyril Barnes.
12. Throughout, there was a large secure steel counter with bulletproof glass known as the 'Fortress' and customers of the Post Office were served from this counter. In the period immediately prior to the termination of the contract with Cyril Barnes, the Newnham Post Office sold stamps, checked postage for parcels and letters, provided cash withdrawals, made bill payments and benefit payments, sold car tax, provided business banking and cheque deposits, sold phonecards and postal orders. The opening hours were determined by the Post Office and were 9-5.30, Monday to Friday and 9-1 on a Saturday. It was closed on Sundays and Bank Holidays.
13. Pre-pandemic they had also offered a pre-order currency service but this had been withdrawn by the Post Office during the pandemic and had not returned. Passport services and insurance had also ceased by this time.

Discussion Regarding the Transfer of the Old Contract and the New Contract

14. In around September 2019, Cyril Barnes spoke to Madeline Fife about taking over the Post Office contract when he retired. At the time he suggested to her that the Claimant's employment would transfer with the contract under TUPE.
15. On 10.02.20, the Post Office and the Respondent signed a new contract, with a delayed start date.
16. On 17.03.21, there was a meeting between the Claimant, Ms Guilfoyle, Ms Fife and Ms Reeves at which the Claimant informed the Respondent that he wished to transfer with the contract and to work for the Respondent.
17. On 12.05.21, Cyril Barnes wrote to the Respondent to confirm that the Claimant wished to transfer his employment and that TUPE would apply to the transfer.

18. On 01.06.21, the Respondent's solicitors wrote to Cyril Barnes and set out that the Respondent did not accept that the transfer of the Post Office contract constituted a service provision change, that TUPE did not apply and that the Claimant's employment would not transfer.
19. On 28.06.21, the Post Office terminated its contract with Cyril Barnes. On 29.06.21, the Post Office formally commenced the new contract to run the Newnham Post Office with the Respondent.
20. By letter dated 26.07.21, the Claimant raised a formal grievance with the Respondent regarding the lack of notification regarding his employment and that he considered his employment had transferred pursuant to the provisions of TUPE.
21. By an email dated 03.08.21, the Respondent rejected the grievance.

Activities Carried Out by the Respondent

22. The Post Office counter under the new contract with the Respondent is run as a 'bolt on' to the existing business which is a shop operated from the old pub premises. The Post Office provided entirely new equipment and the till point was not a separate counter as it had been previously but sat alongside the shop tills and the lottery till on a melamine counter with weighing scales.
23. The Respondent currently provides the following services under the new contract: selling stamps, checking postage for parcels, providing cash withdrawals, making bill payments, selling car tax, providing business banking and cheque deposits, selling phone cards and postal orders. Under the new contract, the Post Office has not reintroduced currency services and they don't offer passport services or insurance. However, the range of stamps offered is less than it was under the old contract.
24. Under the new contract between the Respondent and the Post Office, it is only paid commission based upon what it sells.
25. Both parties agreed that the client remained the Post Office.

The Law

Service Provision Change

26. Neither party argued that this was a business transfer and both parties proceeded on the basis of a service provision change.
27. Regulation 2 of TUPE defines a "relevant transfer" as a transfer or a service provision change. In this case, the Claimant argued that there had been a service provision change ("SPC"). Specifically, he said that there had been a SPC on a change of contractor. That is defined in regulation 3(1)(b)(ii) as being where:

"(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.”

12. To be a SPC the following conditions set out in reg.3(3) must apply:

“(3) The conditions referred to in paragraph (1)(b) are that— (a) immediately before the service provision change—

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

(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.”

28. In *Kimberley Group Housing Ltd v Hambley and Ors [2008] IRLR 682*, the EAT identified the first question for a tribunal dealing with reg.3(1)(b) as being to identify the relevant activities. Reg.3(2A) says that the activities must be “fundamentally the same” as those carried out by the person who ceased to carry them out.

29. In *Salvation Army Trustee Company v Coventry Cyrenians Limited [2017] IRLR 410* the EAT summarised the principles in deciding whether activities are “fundamentally the same”:

“The words in regulation 3(1)(b) including the word ‘activities’ are to be given their ordinary everyday meaning...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 the 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 service provision change provisions.”

30. His Honour Judge Peter Clark provided a useful summary of the authorities in *Enterprise Management Services Ltd v Connect-Up Ltd and ors 2012 IRLR 190*, EAT, in which he gave guidance to tribunals on this issue. He suggested that:

1. *An employment tribunal’s first task is to identify the activities performed by the in-house employees (in an outsourcing situation) or the original contractor (in a retendering or insourcing situation).*

2. *The tribunal should then consider the question of whether these activities are fundamentally the same as those carried out by the new contractor (outsourcing or retendering) or in-house employees (insourcing). Cases may arise where the activities have become so fragmented that they fall outside the SPC regime.*

3. *If the activities have remained fundamentally the same, the tribunal should ask itself whether, immediately before the transfer, there was an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client.*
4. *Following this, a tribunal should consider whether the exceptions in Reg 3(3)(b) and (c) apply: namely, whether the client intends that the transferee, post-SPC, will carry out the activities in connection with a single specific event or task of short-term duration; and whether the contract is wholly or mainly for the supply of goods for the client's use*
5. *Finally, if the tribunal is satisfied that a transfer by way of an SPC has taken place, it should consider whether each individual claimant is assigned to the organised grouping of employees.*

Public Sector Transfer

31. Regulation 3(5) of TUPE makes it clear that an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer. In the skeleton argument, the Respondent made no positive submissions that this case fell within public sector transfers. The Respondent also referred to the Cabinet Office Statement of Practice relating to staff transfers in the public sector and noted:

"...it is unclear... whether it would apply to the Post Office and specifically of the alleged service provision change we are faced with here. Please also note this is a policy statement and not binding in law."

Organised Grouping of Employees

32. In *Amaryllis Ltd v McLeod and ors* EAT 0273/15 Mrs Justice Slade made it clear that an 'organised grouping of employees' being the phrase used in Regulation 3(3)(a)(i) is not synonymous with a 'grouping'. The organised grouping within the potential transferor's business must be shown to have had as its principal purpose the carrying out of the relevant activities for the particular client. Regulation 2(1) sets out that 'references to "organised grouping of employees" shall include a single employee'.

Discussion & Conclusions

Public Sector Transfer

33. I have considered the case law put forward in support of the argument that this case might fall to be considered as a public sector transfer and that TUPE would not apply. It is quite clear that the principal set out in the case of *Henke v Gemeinde Schierke and anor* 1997 ICR 746, ECJ is of narrow ambit and should only apply in a small number of exceptional cases. Regulation 3(4)(a) further states that the Regulations do apply to public and private undertakings engaged in economic activities whether or not they are operating for gain. Having considered the case law I do not believe that this case falls within the

administrative function exclusion. No evidence was put forward by the Respondent to support such analysis.

34. In my view, the real question is not whether this is a public sector transfer but whether it involves an economic entity since if there is an economic entity the TUPE Regulations apply regardless. I consider that it is unarguable that the contract offered by the Post Office to operate its services in specified locations is an economic entity and in the circumstances, the administrative function exclusion set out in Regulation 3(5) does not apply.

Fundamentally the same Activities?

35. I have set out my findings in relation to the activities carried by Cyril Barnes under the former contract and those carried out by the Respondent under the new contract. The Respondent submitted that the services provided were different. I do not agree. As is clear from my findings set out above, a comparison of the services offered shortly before the contract with Cyril Barnes was terminated and those now offered by the Respondent shows that the activities are almost identical, with the exception of the range of stamps offered. The parties were largely in agreement on this point when giving evidence.

36. In its submissions, the Respondent relied upon the following as evidence that the activities were not fundamentally the same: the new contractual fee structure with the Post Office; that the contract was operated by a limited company; the physical layout of the premises; that the services were no longer run from behind a fortress and different / extended operating hours.

37. Having considered all the Respondent's arguments and carrying out the comparison that I am required to make as between the activities pre and post the purported transfer, I find that the differences highlighted by the Respondent do not relate to the activities themselves but rather to the manner in which the contract with the Post Office was structured and / or the manner in which the activities were offered to the public by the business in question. I do not consider that the style of till, position of the counter or opening hours changes this conclusion. The fundamental activities were the provision of the identified services offered by the Post Office to members of the public operated in a manner akin to a franchise. Having made findings regarding those activities, I find that they remained fundamentally the same immediately before the potential transfer and immediately afterwards.

Was there immediately before the transfer, an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client?

38. The Respondent relied upon Cera Freight (UK) Ltd v Seawell Ltd [2013] CSIH59 XA118/12 to submit that the Claimant did not constitute an organised grouping of employees. The Respondent contended that the Claimant assisted with both businesses and did not solely carry out work for the Post Office.

39. It was argued by the Respondent that the Claimant assisted his mother and running the newsagent side of the business and spent time assisting both counters. It was the Claimant's case that whilst he would assist his mother in her newsagency business, that he was not paid to do so, did so in order to help

out as and when and prioritised his position behind the Post Office counter. The Respondent was not able to put forward any evidence in relation to this point and I prefer the Claimant's evidence.

40. Given that he worked part time, such activity did not affect the work he was contracted to do for Cyril Barnes. Having heard the Claimant's evidence and the evidence of Cyril Barnes, I am satisfied that the Claimant worked exclusively for his father during his contracted 22 hours a week. I accept his clear evidence that any help he provided to his mother's newsagent business was *ad hoc* and did not impact upon his primary duty to operate the Newnham Post Office services. I find that the Claimant worked 22 hours a week exclusively for his father.
41. Following on from that, I find that the Claimant was engaged for the sole purpose of running the Post Office counter and that this by its very nature was a positive decision by Cyril Barnes to employ him and assign him to that role. As at 2004, there were other employees who were also employed to do so, but by the time the contract was terminated, only the Claimant remained employed and that was his sole employment. In this case, therefore, the Claimant constituted an "organised grouping of employees" employed to run the Newnham Post Office (and is more akin to the employment position in the case *Rynda (UK) Ltd v Rhijnsburger 2015 ICR 1300, CA [2015] ICR 1300* than *Ceva Freight (supra)* cited by the Respondent). The activities involved are set out above and were carried out by the Claimant solely for Cyril Barnes under the Post Office contract.

Conclusion on SPC

42. I have found that the activities carried out by the Claimant immediately before the transfer were fundamentally the same as those now carried out by the Respondent under the new Post Office contract. I have also determined that although a single employee, the Claimant constituted an organised grouping which had as its principal purpose, the carrying out of those activities on behalf of the client, the Post Office. Neither party argued that either of the exceptions in Regulation 3(3)(b) or (c) applied and I therefore find that transfer by way of a service provision change took place when the contract transferred to the Respondent.
43. Having found that there was a service provision change, I must also go on to consider whether or not the Claimant was assigned to an organised grouping of employees. Cyril Barnes held the contract for the provision of Post Office services to Newnham and the Claimant was employed to carry out these identified activities at the moment the Post Office terminated the contract. I find that the Claimant was assigned to the organized grouping of employees for this purpose immediately before the transfer.

Automatically unfair dismissal

44. I must then go on to consider whether the sole or principle reason for the Claimant's dismissal was the transfer. In considering this question, I have looked at all the facts including the timing and the reason for the dismissal. The Respondent has throughout stated that TUPE did not apply to this contract and refused to employ the Claimant. The Respondent failed prior to

commencement of the new contract to establish what activities the Claimant had carried out prior to the transfer and did not carry out thorough enquiries regarding the extent to which the Claimant assisted his mother in the newsagents.

45. As a result of the Respondent's approach

46., it did not at any time seek to argue that there was an economic, technical or organization reason which might otherwise justify not continuing the Claimant's employment post transfer. In light of these factors, I do not consider there is any alternative other than to find that the principal reason for his dismissal was the transfer and it is automatically unfair.

Continuous Employment

47. Having heard the evidence, I am quite satisfied that the Claimant commenced employment for Cyril Barnes in accordance with his written contract on the 05.03.04. The Respondent put to the Claimant that he had not worked continuously and that a criminal conviction that meant that he had not worked in the Post Office between 2007 and 2012. The Respondent argued that an absence of payslips in the bundle supported this conclusion. It was also put to the Claimant that the employer's name on the single payslip in the bundle, namely the Newham Post Office Stores, was actually his mother's business and that he'd been paid by his mother, not Cyril Barnes. The Respondent went on to argue that the employer PAYE reference on the claimants P60 was incorrect. These suggestions were denied by the Claimant and Cyril Barnes.

48. I should note that the issue of continuous employment was not raised until the morning of trial during cross-examination. Had it been raised earlier, then the Claimant says he would have had the opportunity to disclose the relevant payslips and provide further financial evidence regarding trading names of the relevant businesses and PAYE references. There is significant force in that argument, particularly when the Respondent had the benefit of specialist legal advice and drafting during the preparation for trial. I therefore make my findings based upon the written and oral evidence before the tribunal and the documents in the bundle.

49. Cyril Barnes gave clear evidence that the Claimant had run the Newnham Post Office for him since 2004. Both the Claimant and Cyril Barnes were clear that the Claimant had worked at the Post Office continually from March 2004 and that this was his primary employment. Cyril Barnes stated that the PAYE reference number was his and that the reference to Newham Post Office Stores on the payslip must have been an administrative error. He confirmed that he had employed the Claimant throughout and that he had not been paid by his mother's newsagent business. I accept this evidence and on the balance of probabilities, I find that the Claimant was employed continuously by Cyril Barnes from 05.03.04 to 28.06.21.

Mitigation of Loss

50. The Claimant gave evidence that he had found a new job by 19.07.21, on a self-employed basis working for a Christopher Saunders and that he worked for 18 hours a week at £10 per hour. On 01.09.21, he started working 15 hours

a week at the Dean Heritage Centre at £9 per hour. At this point he dropped down to 3 hours a week for Mr Saunders. This means that initially he was earning £180 a week and then from 01.09.21, this reduced to £165. He works these slightly reduced hours because he has caring responsibilities for his wife and small daughter. The Respondent did not challenge this evidence or these figures.

Remedy

51. Based upon the Claimant's age, the fact that he had 17 years' continuous service and calculating his gross weekly pay at £202.40 I have calculated his basic award as 19 qualifying weeks x gross pay of £202.40 which equals £3845.60.

52. In relation to his compensatory award, which is related to losses post-dating the termination of his employment, he found a new job in 3 weeks. Given that he was working part time on a modest wage, I would have expected him to have found new employment within a month. I will therefore award him 3 weeks' net earnings ($3 \times £200.19 = £600.57$) and one week of the difference between his previous earnings and current earnings ($£200.19 - £180.00 = £20.19$), which gives a total of £620.76.

53. Given his long length of service, I award £400 for loss of statutory rights.

54. Therefore, the total of the compensation due is £4866.36.

Employment Judge Gibb
Date: 19 July 2022

REASONS SENT TO THE PARTIES ON
22 July 2022 by Miss J Hopes

FOR THE TRIBUNAL OFFICE