



# EMPLOYMENT TRIBUNALS

**Claimant:** Ms Lesley Jones

**Respondents:** (1) Blackpill Ltd  
(2) Angela Limited

**Heard at:** Cardiff Employment Tribunal (by video link) On: 28 & 29 July 2022

**Before:** Employment Judge E Macdonald

## **Representation**

Claimant: Mr Hall (Union representative)

First Respondent: Mr Jones (director)

Second Respondent: Mr Maratos (consultant)

# REASONS

## **Background**

1. The decision in this matter was given orally to the parties on 29 July 2022, with Judgment sent to the parties on 16 August 2022. On 19 August 2022 the Claimant's representative wrote to the Tribunal to request written reasons.
2. The issue for determination at the Preliminary Hearing heard on 28 & 29 July 2022 was whether (and, if so, when) a "service provision change" ("**SPC**") within the meaning of Regulation 3 Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE**") had occurred between the First and Second Respondents. At the hearing, it was determined that there had not been an SPC, and hence no "relevant transfer" within the meaning of Regulation 2 TUPE.
3. These reasons explain that decision.

## **Issues**

4. The hearing was conducted on Cloud Video Platform with all attendees joining by video link.
5. Oral evidence was heard from Ms Jones (the Claimant); Mr Jones (of the First Respondent); and Mrs Evans (of the Second Respondent).
6. I was also assisted by oral submissions made by Mr Hall, on behalf of the Claimant; Mr Jones on behalf of the First Respondent; and Mr Maratos on behalf of the Second Respondent. I express my gratitude for that assistance.
7. The First Respondent operated a shop at 110 Mumbles Road, Blackpill, Swansea

SA3 5A, and also a Post Office branch which was situated within that shop. It was common ground that the Claimant was employed by the First Respondent up to her resignation on 14 May 2021, albeit that the parties disagreed on the precise scope of her work.

8. The First Respondent's business, including the Post Office, was sold to the Second Respondent with the transfer due to take place in May 2021. The First Respondent's position was that the transfer date had been agreed to be 15 May 2021.
9. The Claimant said that an SPC (and hence a "relevant transfer" within the meaning of Regulation 2 TUPE) had taken place on 11 May 2021 when the management of the Post Office branch, which formed at least part of her work at the First Respondent's business, was transferred from the First to the Second Respondent.
10. The Second Respondent denied that there had been an SPC, or indeed a relevant transfer, on 11 May 2021.
11. The First Respondent said that the responsibility for the Post Office was to be transferred at 1pm on 15 May 2021.
12. At the start of the hearing, some time was spent clarifying the issues in dispute. The Issues had been considered at a Case Management Preliminary Hearing on 9 February 2022, and at that hearing the Issues had been summarised as:
  - a. Did activities cease to be carried out by the First Respondent?
  - b. On what date (transfer date?)
  - c. Were activities carried out by the Second Respondent from the transfer date?
  - d. If so, were any such activities fundamentally or essentially the same as the activities carried out by the First Respondent?
  - e. Accordingly, was there a Service Provision Change?
13. However, a further issue was identified at the outset of the hearing, namely the application of Regulation 3(3) TUPE which requires the Tribunal to consider whether immediately before the SPC there was an "organised grouping of employees . . . which had as its principal purpose the carrying out of the activities concerned on behalf of the client." I return to the precise wording of the statutory test below.
14. Regulation 3 TUPE also requires the Tribunal to consider whether the activities pre- and post-transfer were essentially the same. However, the parties helpfully found common ground on this point, and agreed that:
  - a. The parties agreed that there had been an "audit" which had taken place at the Post Office branch managed by the First Respondent on 11 May 2021, and it was agreed by all parties that, at or around the end of this audit, the activities carried out by the First Respondent [on behalf of the Post Office] ceased to be carried out by the First Respondent on behalf of the Post Office and were instead carried out by the Second Respondent on behalf of the Post Office.
  - b. The parties agreed that the activities in question were "fundamentally the same" pre- and post-transfer.
15. In the light of this clarification from the parties, the sole question became the applicability (or otherwise) of Regulation 3(3)(a)(i) TUPE, namely whether "immediately before the service provision change" there was "an organised grouping of employees situated in Great Britain which [had] as its principal purpose the carrying out of the activities concerned on behalf of the client."
16. The Claimant's case was that she and her son Kieran formed such an "organised grouping".

## The applicable law

17. The effect and purpose of TUPE includes, in very broad terms, the protection of the rights of employees upon the sale of a business. Regulation 3 TUPE provides insofar as is material as follows:

3.— A relevant transfer

(1) These Regulations apply to—

[. . .]

(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 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,

and in which the conditions set out in paragraph (3) are satisfied.

(2) In this regulation “economic entity” means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.

(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.

[. . .]

(6) A relevant transfer—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor.

18. Tribunals should adopt a “straightforward and commonsense application of the relevant statutory words to the individual circumstances”: *Metropolitan Resources Ltd v Churchhill Dulwich Ltd (in liquidation) and anor* UKEAT/0286/08

19. The approach elaborated in *Kimberly Group Housing Ltd v Hambley and ors* UKEAT/0488/07 requires the Tribunal to:

- a. Identify the service which the transferor was providing to the client, and identify the relevant activity or activities which the staff perform in order to provide that service
- b. Consider whether those activities are caught by Reg 3(1)(b)(ii) TUPE – i.e. activities that cease to be carried out by one contractor and are instead carried out by a subsequent contractor on the client's behalf
- c. Identify the employee / employees who ordinarily carried out the activities

- d. Consider whether, immediately before the ceasing of activities on the client's behalf, those employees were an organised grouping of employees that had as its principal purpose the carrying out of activities concerned on behalf of the client
20. An "organised grouping" must be organised by reference to the requirements of the client and be identifiable as members of that client's team: *Eddie Stobart Ltd v Moreman and ors* [2012] IRLR 356
  21. Further guidance was provided by HHJ Eady QC in *Tees Esk & Wear Valleys NHS Foundation Trust v (1) Harland and ors (2) Danshell Healthcare Ltd and ors* UAEAT/0173/16/DM:
    - a. There is a 4-stage test as identified by the CA in *Rynda UK Ltd v Rhijnsburger* [2015] IRLR 394
    - b. The application of the statutory provisions is one of fact, and requires a straightforward adherence to the wording of the regulations: para 20
    - c. As to the 'principal purpose' of an 'organise grouping' test – this is clarified in *Eddie Stobart Ltd [2012] IRLR 356 EAT* as set out at para 22 of *Tees Esk*
    - d. *Tees Esk* emphasises that the 'carrying out of those activities should be the (principal) purpose of an organised grouping . . . that necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question
    - e. The paradigm is where the employees are organised as the 'client A' team
    - f. The broad purpose of TUPE is to protect the interest of employees by ensuring that in the specified circumstances they 'go with the work'
  22. In *Tees Esk*, HHJ Eady QC explained at paragraph 23 that:
    - a. In order for an organised grouping to exist the employer must have deliberately put the employees together into a team in order to carry out work for the client
    - b. The fact that an employee was working on the transferring activities immediately pre-transfer is not on its own sufficient to show assignment
    - c. The question is the situation immediately before the SPC
    - d. As to grouping, the focus must be on the mind of the employer, and on its intention in organising the group
  23. There are, in effect, two questions here:
    - a. The first is the question of the "organised grouping", which requires the Tribunal to consider the intention of the employer
    - b. The second is the question of the purpose of any such grouping, which requires me to scrutinise the purpose of the grouping itself
  24. It is not simply the carrying out of the activities which means that the existence of the organised grouping meets the relevant condition; rather, the carrying out of the activities has to be the principal purpose of the grouping. If the grouping in fact carries out other work, that might well point to its organisation being for a purpose other than the activities relevant to the SPC: *Tees Esk*.
  25. Regulation 3(3)(a)(i) does not ask what was the transferor's intention, although this will be relevant to determining whether or not there was an organised grouping and *may* suggest its purpose. Rather, Regulation 3(3)(a)(i) asks what was the principal purpose of the organised grouping of employees: *Tees Esk* at paragraph 45.

### **Material facts**

26. My findings of fact have been made on consideration of the documentary and oral evidence in the round and applying the evidential standard of the balance of probability.
27. In the months leading up to the transfer (that is, in the months before May 2021), there were three members of staff working in the Post Office: Ms Jones (the Claimant), her son Kieran ("**Kieran**"), and Mr Jones.
28. Mr Jones was, unfortunately, unable to do much work because he had become unwell. Ms Jones' son, Kieran, was working in the shop, and Ms Jones was training him to become a clerk. He was, by the point of transfer, both trained and authorised to undertake Post Office business.
29. Ms Jones explained the service which the First Respondent provided to the Post Office as follows:

"[it was] a post office – we opened the counter, served customers from anything in the morning to late at night, doing banking, mail – it was a very busy post office – we had to have extra royal mail vans to collect the mail – all sorts of cash deposits, withdrawals, business customers with business accounts, leaflets – everything a post office can do."
30. Ms Jones further explained the activities which the First Respondent undertook to provide that service as being

". . . opening, making sure that the safe was secure in the morning and night, making sure I had balanced the till, all stock was ordered, cash, coin, preparing for any business customers' needs, looking at the emails coming back from cash office to make sure we didn't have too much cash in the safe because had some very busy banking customers, ordering new leaflets, making sure all leaflets were up to date, and of course complying with the new COVID restrictions"
31. I accept this as a description both of the services provided, and of the activities which were undertaken by the First Respondent to provide that service.
32. Ms Jones had no written contract of employment. Mr Jones operated another Post Office branch at the DVLA offices in Swansea, to which he and Ms Jones would go on a Thursday and Friday. By the point of the transfer, the DVLA branch had been closed.
33. Immediately prior to 11 May 2021, Ms Jones and her son were the two remaining employees working in the premises at 110 Mumbles Road. Mr Jones' evidence was that the Claimant was not employed solely as a post office clerk, but was employed to work in the post office and behind the retail counter, as was her son. Between them they decided the shift pattern that they would work, because Mr Jones was not able to spend a long time on site due to health issues. His contribution was, he said, "very limited". He said that Ms Jones and Kieran "worked together in whatever part they needed to do as and when it happened . . . they would organise between themselves." That was consistent with Ms Jones evidence: she in oral testimony stated that about 40% of her time was spent on non-post-office-related activities; her son Kieran would be in the shop, and would run the shop, but on a Friday he would run the Post Office, and indeed every other Saturday. He would also help out in the Post Office "from time to time."
34. Mr Jones lacked any particular intention as to the organisation of Ms Jones and her son, Kieran. He had not organised them in any particular way. They were employed to deal with the Post Office and/or the shop generally, with no concrete division of labour contemplated by Mr Jones.

35. There was a dispute between the parties as to the relative amounts of work involved in the Post Office as against the shop. Mr Jones considered that the workload would be a 65% / 35% split in favour of the shop. Mrs Evans thought that the split was 75% / 25% in favour of retail, with the total business having a turnover in excess of £300,000 and the Post Office element representing c. £17,000. Her view was that the work in the premises was shared interchangeably, with Ms Jones and Kieran serving customers in either the Post Office or the [retail] shop according to need.
36. Ms Jones explained that the division of time (or labour) was

“. . . just an arrangement. If a customer came in we had to serve them. I just worked and did what I needed to do. Kieran could have gone behind the counter and dealt with the Post Office stuff.”
37. The relative division of labour was, therefore, not agreed between the parties. The Claimant thought that her work predominantly related to the Post Office, but this was disputed by the First and Second Respondents. There was no direct evidence on this point beyond the Claimant’s oral testimony.
38. The parties did agree that the retail side of the business was (by a substantial margin) the more financially significant element. That of course does not determine by itself the volume of work involved.
39. I find that, in employing Ms Jones and her son Kieran, the intention of Mr Jones on behalf of the First Respondent was simply to employ staff to serve the needs of the business. Those needs included the need to operate a Post Office service, but Mr Jones’ view, which I accept, is that the Post Office service was no more important than the retail side of the business.
40. The division of labour was simply one which came about. It was not allocated or determined by Mr Jones, but was left in the hands of Ms Jones and her son Kieran. That labour would, of course, have reflected the needs of the business.
41. Both Ms Jones and her son Kieran had access to “Horizon”, which was the information technology system used within the Post Office.
42. There was not sufficient evidence to satisfy me, on the balance of probabilities, that Ms Jones’ time was primarily or mainly devoted to Post Office work.

### **Decision**

43. As required by Paragraph 23 of *Tees Esk*, I first consider whether the grouping was deliberately put together by the employer into a team in order to carry out work for the client.
44. The Claimant’s case, as articulated by her representative, was that she and her son formed an “organised grouping”.
45. When I consider the question of the grouping, the focus must be on the mind of the employer. I find that Mr Jones lacked the requisite intention. There was no organised grouping: rather, Ms Jones and her son were simply employed in the business to meet the needs of the business.
46. If I had found otherwise, I would have gone on to consider the question of “principal purpose”. I would have found that the putative grouping (Ms Jones and her son Kieran) did *not* have as its principal purpose the carrying out of the activities concerned on behalf of the Post Office.
47. I would have arrived at that conclusion having regard in particular to Ms Jones’ evidence that she was not employed specifically as a Post Office clerk, but was

employed to work both in the Post Office and behind the retail counter, as was her son. The retail side of the business was more financially significant, and although that does not determine the issue by itself it is a relevant factor. As Ms Jones explained in her oral evidence, the Post Office brought in customers to spend in the shop.

48. Nor was there sufficient evidence to satisfy me, on the balance of probabilities, that Ms Jones spent the majority of her time working in the Post Office. I were to have been satisfied that Ms Jones spent 60% of her time in the Post Office, I would then have accepted Mr Maratos' submission that, taking Ms Jones and Kieran together, the total time spent on the Post Office work would necessarily have been lower than 50%. But, as stated above, I simply do not have evidence which would satisfy me, on the balance of probabilities, that Ms Jones spent such a fraction of her time working in the Post Office.
49. The fact that both Ms Jones and her son Kieran had access to "Horizon" did not (as Ms Jones' representative submitted) mean that they were an "organised grouping" for the purposes of Regulation 3 TUPE. Rather, it was a necessary incident of work which they were required from time to time to do.
50. Further, the shift pattern was decided between Ms Jones and her son. They worked together according to the needs of the business and organised their work between themselves.
51. I would therefore have concluded in any event that the principal purpose of the grouping was not the carrying out of the activities concerned for the Post Office, but rather the effective running of the business considered as a whole. The test in Regulation 3(3)(a)(i) TUPE was not met, and hence no SPC within the meaning of TUPE. By the same token, there was no "relevant transfer" within the meaning of Regulation 2 TUPE.

Employment Judge **E Macdonald**

Date: **29 September 2022**

JUDGMENT SENT TO THE PARTIES ON 4 October 2022

FOR THE TRIBUNAL OFFICE Mr N Roche

#### Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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