



EMPLOYMENT TRIBUNALS

Claimants:
Mr P Reed (1)
Mrs E Burnip (2)
Ms S Eglon (3)
Mr F Reid (4)

Respondents:
Deborah Jude as Deputy for Property and Affairs for
Stephen Martin (1)
YS Services Limited t/a Embracing Care (2)

Heard at: Newcastle CFCTC **On:** 11, 12 and 13 July 2022

Before: Employment Judge Loy (sitting alone)

Representation

Claimants:
(1) In person
(2) Mr A Burnip (husband)
(3) & (4) Miss Abladey (Counsel)

Respondents:
(1) Mr J Munro, Solicitor and Senior Litigation
Consultant, Peninsula
(2) Mr B Hendley, Croner

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1. There was a service provision change within the meaning of Regulation 3(1)(b)(ii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006.
2. All of the claims brought by claimants (1) to (4) against the first respondent are dismissed.

3. All of the claims brought by claimants (1) to (4) against the second respondent for a Statutory Redundancy Payment are well-founded and succeed.
4. All other claims brought by claimants (1) to (4) against the second respondent were presented outside the prescribed statutory time limits and are all dismissed.

REASONS

The Hearing

Representation and evidence

1. The first claimant (Mr P Reed) represented himself. The second claimant (Mrs Burnip) was represented by her husband. The third claimant (Ms Eglon) and the fourth claimant (Mr Reid) were represented by Miss Abladey of Counsel. All of the claimants gave evidence and none called any further witnesses.
2. The first respondent (Deborah Jude) was represented by Mr Munro, Solicitor and consultant who called Ms Carol Varley and Ms Deborah Jude as witnesses. The second respondent (YS Services Ltd t/a (and referred to in these reasons as) Embracing Care) was represented by Mr Hendley, consultant, who called Ms Yvonne Shillock to give evidence.
3. The evidence-in-chief or on behalf of the parties was given by way of written statements, which had been exchanged between them. I also had before me a file of agreed documents comprising some 393 pages. The numbers shown in parenthesis in these reasons refer to page numbers in that file.

Consideration and findings of fact

4. This was a matter where the facts were not materially in dispute. The issues between the parties were essentially the legal effect of those facts, namely whether a transfer of an undertaking ("TUPE transfer") took place between the first and second respondents. The determination of that issue would identify which respondent if either of them was responsible for termination payments and/or unfair dismissal compensation that might be due following the departure of all four claimants from their employment.
5. Both the first and second respondents were responsible for providing care services to Mr Steven Martin, referred to throughout as "SM". The second respondent succeeded the first respondent as the provider of that care on 16/17 December 2020. SM is quadriplegic and suffers from spastic cerebral palsy. He also suffers microcephaly, severe learning difficulties, visual problems, and epilepsy, with almost no verbal communication, all of which resulted from birth complications.
6. Due to SM's medical situation he has a Deputy appointed by the Court of Protection. At the time relevant to these proceedings, the Deputy for SM's property and financial affairs was Deborah Jude, solicitor. SM is totally dependant on carers for day-to-day living activity and supported by a 24 hour support package funded throughout the period relevant to these proceedings by Continuing Health Care (CHC) an operating unit of Durham County Council

(DCC). There was no change in the clinical needs of SM before and after the change of care provider. What lay between the parties was:

- a. whether or not the “client” remained the same before and after the change of care provider and, if so,
 - b. whether or not the difference in the way in which the care was provided before and after the change of provider was a “service provision change” for the purposes of the definition of a relevant transfer under TUPE.
7. Before the change of provider, SM was cared for at the home of his foster carers who lived in Chopwell, Tyne and Wear. Deborah Jude, as Deputy for SM, carried out the role of arranging for the provision of care services to SM. In law the actions of Deborah Jude as Deputy for SM are treated as the actions of SM himself. Deborah Jude (R1) initially delegated the care of SM to a care services organisation, JS Parker Limited (JSP). Ms Carol Varley was the relevant manager for SM’s care at JSP. All those engaged by JSP on SM’s care were in fact employed directly by SM not by JSP.
 8. The 24 hour care package provided by the first respondent was resourced in the following way. There were a total of seven care workers (five permanent contract holders and two bank contract holders) engaged by JSP to provide (subject to some de minimis ad hoc work for JSP) care wholly and exclusively to SM. SM therefore had his own team of dedicated carers who had limited, if any, responsibility for any other service users at JSP. In summary, SM had his own team of seven carers which he directly employed via his Deputy R1, but who were subject to the management and supervision of JSP as a professional care services organisation.
 9. The position after the second respondent took over responsibility for providing SM care was different. Deborah Jude, as Deputy, consented to the change in the care provision for SM. SM had previously had his own new build bungalow purchased by his previous Deputy and it had been envisaged that SM would live in that bungalow on his own with just his carers after he left his foster home. As time went on, DCC no longer considered this accommodation to be in SM’s best clinical best interests mainly due to the lack of socialisation opportunities that living alone with just his carers would provide for SM.
 10. During the course of 2020, Embracing Care (the trading name of R2) put forward a proposal to take over the care services for SM. SM would move to St Godric’s in Newton Hall, Durham, a complex of three detached bungalows located adjacent to each other and owned by Bernica Housing, a provider of affordable homes. Typically each of the bungalows is home to three or four residents with a team of supported living carers provided by employees of Embracing Care, a professional care services provider.
 11. In terms of the claimants, at JSP, Paul Reed, Emma Burnip, Sandra Eglon and Frances Reid were part of a grouping of seven carers solely looking after the needs of SM.
 12. During the course of 2020, Deborah Jude (R1), along with the care funder, DCC, decided to move SM from JSP’s care to the care of Embracing Care, where SM would live with two other residents.

13. The process of managing the affected staff was somewhat chaotic.
14. On 19 November 2020, Yvonne Shillock received an email from Deborah Jude to discuss the future arrangements in respect of SM's care. As Deputy, Deborah Jude was involved in a "best interests" meeting during 2020 in which the decision to switch care provision was taken. At that stage, neither Deborah Jude, JSP or Embracing Care considered that TUPE would apply to the change of service provider. On that basis, Ms Shillock replied that the current carers for SM at JSP were more than welcome to apply for work at Embracing Care but Embracing Care could not guarantee a job, the specific available hours or that they would be responsible for caring for SM at St Godric's (206).
15. On 23 November 2020, Laurel Daniels (an associate at Womble Bond Dickinson and working colleague of Deborah Jude) raised for the first time with Ms Shillock (or indeed anybody) that TUPE applied to the change of provision. Ms Shillock responded to that email in her own email of 24 November 2020 in which she explained that TUPE conditions and staff transfers had not been mentioned as part of the package for SM's care going forward. Ms Shillock said that if TUPE applied it "may determine his placement". She explained in evidence that she meant that if the staff were to transfer it might make the costings and the care package being agreed between Embracing Care and Durham County unviable. Nevertheless, she asked for details of pay rates, sick pay information, pensions, holiday and other terms and conditions along with the last months' rota to be sent to her from JSP (205).
16. On 24 November 2020, Ms Amanda Turnbull from Embracing Care wrote to DCC (208-209). Ms Turnbull explained that JSP had raised the issue of TUPE with her and the potential transfer of seven JSP staff. Ms Turnbull explained that Embracing Care would not be able to take SM to St Godric's if TUPE applied.
17. There was to be a short period transitional provision from existing to replacement carers but it was agreed by all parties that this was not determinative of any material issue in these proceedings. Ms Shillock gave evidence, which we accepted, that a transition period of this nature was common practice in the assisted living sector (207).
18. On 9 December 2020, Ms Jude sent an email to Carol Varley of JSP (214). That email appeared to be premised on the basis that TUPE did not apply, since Ms Jude was contemplating redundancy consultation and postponing the termination date of the SM carers for a short period to enable that consultation to take place.
19. On 11 December 2020, Carol Varley at JSP convened an at risk meeting (217-221). At this meeting SM's carers were for the first time told about the changes. As had been known to Deborah Jude for some time, SM's foster carers had decided to sell their house in Chopwell and this had advanced the timescale of change of care provision. That sale was to be finalised with the premises needing to be vacated before Friday 18 December 2020. The JSP carers (including all of the claimants) were told that the DCC had decided to transfer the service provision to Embracing Care and that SM would be

moving to a group home with two other residents and support was to be provided after that by Embracing Care.

20. JSP had not been involved in any of those discussions. The effect of the changes would be that JSP would no longer be responsible for any of the care provision to SM. Carol Varley of JSP explained that as a consequence JSP had to consider redundancies. It was common ground that although JSP were conducting this meeting, the seven carers (including all of the claimants) were employed not by JSP but by SM through Deborah Jude in her capacity as Court of Protection appointed Deputy. This is material to the present dispute as it is not the outgoing provider of care (JSP) that employed SM's carers prior to the change of provision. At all material times, the carers were legally employed directly by SM. In any event, the "at risk" meeting on 11 December 2020 was again premised on the assumption that the carers would become redundant.
21. On 16 December 2020 (224 to 225), JSP wrote to the SM carers to the effect that TUPE applied to the change of provider one consequence of which would be that the employment of SM's carers (including the claimants) would automatically transfer to Embracing Care as and when the change of provision took effect. JSP provided the SM's carers with the name and address of SM's new placement at St Godric's and identified Embracing Care Ltd Limited (sic) as the SM's carers' new employer.
22. On 16 December 2020, Emma Burnip (C2), in response to JSP's letter by email of 16 December 2020 raised her concerns about whether or not she wished to be employed by Embracing Care.
23. Later on 16 December 2020, Frances Reid (C4) also wrote to JSP expressing his concerns about transferring employment to Embracing Care.
24. On 16 December 2020 (237 to 238), JSP wrote to Ms Shillock at Embracing Care stating that in JSP's view TUPE applied to the change of service provision with the effect that the legal rights and obligations under TUPE (including Regulation 13 duty to inform and consult representatives) would apply.
25. On 17 December 2020 (245), Ms Shillock responded explaining that no additional staff would be needed at St Godric's since it was a shared house rather than dedicated individual care in SM's home.
26. On 17 December 2020, (243 to 245) JSP replied in turn to Embracing Care saying that they were proposing to transfer the SM carer employees to Embracing Care on 17 December 2020. On the same date, Embracing Care were sent contracts of employment and documents in purported compliance with TUPE (246 to 270). Yvonne Shillock on behalf of Embracing Care responded (272) setting out the view that TUPE did not apply to this situation.
27. On 17 December 2020 (278), JSP informed Emma Burnip (R2) that since JSP considered the matter to be covered by TUPE, Mrs Burnip would need to follow the rota originally provided by JSP, but now to be performed under the auspices of Embracing Care, until advised differently by Embracing Care (278).

28. On 18 December 2020, a JSP staff meeting took place (273 to 275) at which Deborah Jude's change of position on the applicability of TUPE was brought to the attention of SM's carers. Essentially, this explained that there would be no redundancies in the hands of JSP/SM because TUPE applied with the effect of transferring their contracts of employment across to Embracing Care. Thereafter the responsibility for SM's carers' employment (including that of the claimants) would be with Embracing Care not JSP or SM.
29. On 18 December 2020, JSP confirmed that Ms Eglon (R3) would be paid for 18 and 19 December 2020 but was not sure who would be paying those wages.
30. On 18 December 2020, JSP confirmed to Paul Reed (C1) that his employer while he was working at JSP had been SM personally and not JSP (282).
31. On 18 December 2020, Ms Eglon reminded Carol Varley at JSP that staff had been told that morning that they were no longer employed by JSP (288).
32. On 28 December 2020, Ms Eglon emailed to say that she had not turned up for the transition shifts because she was unwell and asked if she was required to work further shifts on 28, 30 December or 9 January 2021. This email was sent to Amanda Turnbull at Embracing Care who replied to say that TUPE did not apply and that the one week transition agreed by Carol Varley at JSP had ended on 18 December 2020 earlier than planned.
33. On 8 January 2021, Deborah Jude told Mrs Burnip that Embracing Care was now her employer (293). On the same day Deborah Jude also so advised Ms Eglon (294).
34. On 11 January 2021, Amanda Turnbull of Embracing Care received an email from Ms Eglon who conveyed to Ms Turnbull Deborah Jude's position that Ms Eglon was not entitled to redundancy payments from her (or JSP) because a transfer of Ms Eglon's employment to Embracing Care had taken place.
35. On 5 January 2020, Emma Burnip wrote to Deborah Jude to point out that Deborah Jude had known about the new arrangements since May 2020 and that her employer according to her contract was with SM.
36. On 15 January 2021, JSP offered Ms Eglon a new role which was later rescinded on 15 February 2021 (299/203 and 306).
37. On 23 February 2021, JSP wrote a reference for Sandra Eglon which set out that Ms Eglon's employment terminated on 16 December 2020 but that Ms Eglon remained currently employed as a bank support worker with JSP (308).
38. On 1 March 2021, Ms Eglon wrote to Ms Shillock at Embracing Care saying that redundancy consultation should have taken place (315 to 316). Ms Shillock responded on 10 March 2021 to the effect that there had been no TUPE transfer.
39. On 22 March 2021 and on 21 May 2021, JSP gave a reference for Paul Reed (318/319). Those letters both stated that Mr Reed's employment ended on 17 December 2021.
40. There was a dispute about holiday pay between the claimants and Deborah Jude/JSP regarding unpaid accrued holiday pay. That matter was resolved

between JSP and the claimants, but it took some time. Ms Varley explained, and I accepted, that the only reason that there had been a delay to the issue of the P45 by Deborah Jude was because JSP were resolving the holiday pay issues and not because there was any continuation of employment between 16 December 2020 and 1 March 2021 (309, 312, 378 and 381). P45s were issued to all of the claimants on 1 March 2021 and dated on that same date.

41. Ms Varley gave evidence about the way in which SM's care was provided by JSP and Ms Shillock gave evidence about the way SM's care is provided by Embracing Care. The key points are as follows.
42. The legal date upon which the care transferred from JSP to Embracing Care was 17 December 2020. The physical move to St Godric's took place on 16 December 2020.
43. At JSP, the care was provided exclusively for SM by the SM carers at his foster home and they were employed directly by SM albeit that the care services were contracted to JSP. At Embracing Care, SM was one of four residents who shared one bungalow. This was described by Ms Shillock as shared care and supported living.
44. Ratios of staff to SM at JSP were one to one or two to one in situations where JSP was transporting SM. There were seven carers in total at JSP caring for SM only. At Embracing Care only one additional member of staff needed to be recruited to Embracing Care's pre-existing staffing resources because the provision of shared care involved economies of scale which did not require one to one care – the model was essentially one of shared care rather than individual bespoke care. Accordingly, the staff already employed by Embracing Care at the St Godric's bungalow to which SM was transferred took on the additional responsibility of caring for SM as well as for the pre-existing residents at the bungalow. Ms Shillock explained that no one needed to be moved out as a resident since DCC were already paying for a "void" placement at the relevant bungalow which money was not being effectively used prior to SM moving to Embracing Care at St Godric's.
45. At JSP, the total number of weekly hours for the care was 230 spread out amongst SM's carers. At Embracing Care the total was 96 hours. This involved a financial saving to DCC. The weekly cost of the care provided at JSP to SM was £3,900 whereas at St Godric's it was £2,700.
46. At JSP there was a "sleep-in" night care which was undertaken on a rota by one of SM's carers. A carer was needed to be in attendance 24 hours a day but there was no need in terms of the service provision at JSP for the carer appointed for nights to be awake all night. In contrast, Embracing Care recruited a "waking night" worker just for SM. At all times, the funding for the provision of the care was being provided by CHC/DCC.
47. It was common ground that SM's care needs remained the same before and after the transfer, but what was between the parties is whether the client remains the same and whether the difference in the way in which the service was provided meant that TUPE did not apply.
48. JSP received conflicting advice initially that TUPE did not apply and subsequently that it did. Embracing Care's advice throughout appears to be

that TUPE did not apply to this change of provision. It was also common ground that the care contract before the transfer was with SM delegated to JSP whereas after the change of provider the contract was directly between Embracing Care and DCC with SM not directly involved in terms of the legal parties to the contractual arrangements.

49. At JSP, SM's socialisation was achieved through attending a college a number of days per week. At St Godric's, SM was taken to a day centre and also had socialisation with the other users in his bungalow on a daily basis.
50. At JSP the ratios of staff to SM were two to one on days and one to one on nights. At St Godric's two to one care was only provided for SM when attending to his personal care (toileting, shaving etc), normally it was one to one on day time and one to one on nights.
51. In accordance with the contractual arrangements, when JSP was providing the care, DCC paid Deborah Jude/SM who then in turn paid JSP. DCC paid Embracing Care directly after the change of care provision.
52. Put simply, at JSP there was one to one dedicated care for SM whereas at Embracing Care the model was shared care and supported living and SM was one of four residents to sharing the home without any personal dedicated care other than when personal needs were being attended to.
53. SM relocated to St Godric's on 16 December 2020 and legal responsibility for SM's care ceased on that date and was assumed by Embracing Care on 17 December 2020.
54. In the event, Embracing Care refused to employ any of the claimants under TUPE terms or at all and Deborah Jude refused to accept that she was responsible for any termination costs on the basis that she had been advised and considered that TUPE applied so as to transfer the contracts of employment of all SM's carers (including the contracts of employment of all of the claimants) to Embracing Care with the effect that they had not been dismissed by SM. It is that impasse which has led to these proceedings.

Time limits and the date of presentation of the claim forms

55. When matters reached the litigation phase there was a significant delay in the presentation of claims after the cessation on 16 December 2020 of responsibility for SM's care provision by SM/JSP and the assumption of responsibility for that care by Embracing Care .

Statutory Redundancy Payments

56. It was common ground that the claims by all four claimants for a statutory redundancy payment were brought within the prescribed period of six months from the effective date of termination against both respondents.

Unpaid notice and unfair dismissal

57. Taking each of the claimants in turn, the position is as follows.

First claimant, Paul Reed as against the First Respondent Deborah Jude

Day A – EC notification - 14 March 2021

Day B – EC certificate – 15 March 2021

Claim form presented – 31 March 2021

58. Mr Reed identifies his termination date as 10 December 2020. On that basis the initial three month time limit to present a claim for unpaid notice pay and unfair dismissal expired on 9 March 2021. That is some 22 days before Day A with the effect that the claimant's claim was already out of time before he notified ACAS.
59. I find that Mr Reed's termination date was in fact 16 December 2020. That has the effect that his claim was presented against the first respondent within the three month period as extended by early conciliation. 15 April 2021 was the be last date for the claim form to be presented based on a termination date of 16 December 2020. The claims for unfair dismissal and unpaid notice, if properly presented against the First Respondent, are in time.

Second respondent – as against the Second Respondent Embracing Care

Day A – EC notification – 22 December 2020

Day B – EC certificate – 05 January 2021

Claim form presented – 31 March 2021

60. This claim was brought out of time against the second respondent even if the later date of 16 December 2020 is taken as the termination date. If the termination date was 10 December, the final date to present a claim was 25 March 2021 whereas the claim form was not presented until 31 March 2021. If the termination date is 16 December 2020, the final date to present a claim expired on 29 March 2021. In both cases, the claim form was presented against the second respondent out of time.

Second claimant, Emma Burnip as against the First Respondent Deborah Jude

Effective date of termination - 16 December 2020

Day A – 08 February 2021

Day B – 22 March 2021

61. The final for Ms Burnip to present her claim form against the first respondent was 27 April 2021 and the claim form was presented in time on 19 April 2021.

Second respondent as against the Second Respondent Embracing Care

Day A – 20 April 2021

Day B – 20 April 2021

62. The three months' time limit from the effective date of termination expired on 16 March 2021, prior to Day A. The claimant's claim was therefore already out of time before Day A with the effect that the primary time limit of three months is not extended by the EC period and the claim form against the second respondent is therefore out of time.

Third claimant, Sandra Eglon as against the First Respondent Deborah Jude

Effective date of termination 16 December 2020.

Day A – 12 March 2021.

Day B – 25 March 2021.

63. In these circumstances, the last day to present a claim in time against the first respondent was 25 April 2021 and the claim form was presented on 22 April 2021 with the effect that all claims against the first respondent by Ms Eglon are brought in time.

Second respondent as against the Second Respondent Embracing Care

The effective date of termination - 16 December 2020.

Day A – 19 March 2021.

Day B – 25 March 2021.

64. Claim form presented on 22 April 2021.

65. In the circumstances, the primary three months' time limit expired on 15 March 2021, prior to Day. The primary time limit of three months was not extended and none of the claims are in time against the second respondent.

Fourth claimant, Frances Reid as against the First Respondent Deborah Jude

Effective termination 16 December 2020.

Day A – 12 March 2021.

Day B – 17 March 2021.

Claim form 22 April 2021.

In these circumstances, the final day for the claim form to be presented was 17 April 2021 with the effect that all claims against the first respondent are out of time.

Second respondent, as against the Second Respondent Embracing Care

Effective date of termination 16 December 2020.

Day A – 19 March 2021.

Day B – 25 March 2021.

66. The last day for presenting a claim in time was 15 March 2021 with the effect that the claim form presented on 22 April 2021 was out of time before Day A. The effect is that all claims against the second respondent are out of time.

Reasonable practicability

67. It was accepted by counsel for the third and fourth claimants that it was reasonably practicable for the claims to have been brought in time if the effective date of termination was 16 December 2020.

68. Neither the first or second claimant sought to contend that it was not reasonably practicable for their claims to have been brought in time.

The relevant law

A relevant transfer

69. The principal UK statutory provisions relevant to transfers of undertakings and the employment protection regime applicable to such transfers are found in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”) and are as follows:

3 (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.

(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.”

70. The case law in relation to a service provision change within the meaning of Regulation 3(1)(b) of TUPE in relation to which, as set out above, there can be three types of change is as follows.

71. Guidance on the approach to be adopted by an Employment Tribunal can be drawn from the decision in and Enterprise Management Services Ltd v Connect-Up Ltd [2012] IRLR 190, EAT in which the following principles were identified:

4.1. “The prospective SPC in this case arises under Regulation 3(1)(b)(ii), that is where “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”) or an SPC under Regulation (3)(1)(b)(ii), that is where “activities” cease to be carried on by a contractor ... on a client’s ... behalf and are carried on instead by a subsequent contractor.”

4.2. “The expression ‘activities’ is not defined in TUPE. Thus the first task for the Employment Tribunal is to identify the relevant activities carried out the client or original contractor”.

4.3. “The next (critical) question for present purposes is whether the activities carried on by the contractor or subsequent contractor after the relevant date ... are fundamentally the same as those carried on by the original contractor or client. Minor differences may properly be disregarded. This is essentially a question of fact and degree for the Employment Tribunal.”

4.4. “Cases may arise...where the division of services after the relevant date, known as fragmentation, amongst a number of different contractors means that the case falls outside of the SPC regime”.

4.5. “Again even where the activities remain essentially the same before and after the putative transfer date as performed by the client, original and subsequent contractor, an SPC will only take place if the following conditions are satisfied:

(i) There is an organised grouping of employees 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 transferee, post-SPC, will not carry out the activities in connection with a single event of short-term duration;

(iii) The activities are not wholly or mainly the supply of goods (rather than services) for the client’s use”.

4.6. “Finally, by Reg 4(1) of TUPE, the Employment Tribunal must decide whether each claimant was assigned to the organised grouping of employees”.

72. More recently, in Rynda (UK) Ltd v Rhijsburger [2015] EWCA Civ 75 it was stated that a four-stage test emerges from the case law when consideration is being given to whether there has been a service provision change as follows:

“The first stage of this exercise is to identify the service which company B was providing to the clients. The next step is to list the activities which the staff of company B performed in order to provide that service. The third step is to identify the employee or employees of company B who ordinarily carried out those activities. The fourth step is to consider whether company B organised that employee or those employees into a “grouping” for the principal purpose of carrying out the listed activities.”

Time Limits

73. The law in relation to the time limit to present a claim for unfair dismissal is set out below. That time limit is in essentially the same terms for unauthorised deduction claims and notice pay claims. The claim in relation to a redundancy payment is the same except the period of three months in section 111(2)(a) is extended to six months from the effective date of termination to present a claim.
74. The time limit in respect of a complaint of unfair dismissal is set out in section 111 Employment Rights Act 1996 (ERA). It is in the following terms:
- “111 Complaints to [employment tribunal].**
- (1) A complaint may be presented to an [employment tribunal] against an employer by any person that he was unfairly dismissed by the employer.
- (2) [Subject to the following provisions of this section], an [employment tribunal] shall not consider a complaint under this section unless it is presented to the tribunal—
- (a) before the end of the period of three months beginning with the effective date of termination, or
- (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.”
75. Accordingly, a claim must be presented within three months from the effective date of termination unless it was not reasonably practicable to do so. Reasonably practicable has been held to mean “reasonably feasible”. Only if it was not reasonably practicable to present the claim within the initial period of three months does a Tribunal then consider whether the claim was presented within such further period as the Tribunal considers reasonable.
76. Section 207B of the ERA provides for an extension of that time limit to facilitate early conciliation before the institution of proceedings:
- [1] This section applies where this Act provides for it to apply for the purposes of a provision of this Act” (a “relevant provision”). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.
- [2] In this section – (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunal’s Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.
- [3] In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

[4] If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

[5] Where an Employment Tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

77. When considering the test of whether it is reasonably practicable to submit a claim within time, “reasonably practicable” does not mean reasonable (which would be too favourable to employees), and does not mean physically possible (which would be too favourable to employers) but means something like “reasonably feasible” as in the case of Palmer v Saunders and Southend-on-Sea Borough Council [1984] IRLR 119.

78. The burden of proof is on the claimant to show that it was not reasonably practicable for her to have submitted the claim within the applicable limitation period: Porter v Bandridge Ltd [1978] IRLR 271.

79. A claimant who knows of his or her rights to bring a complaint of unfair dismissal is under an obligation to seek information and advice about how to enforce that right: Wall’s Meat Co. Ltd v Khan [1979] ICR 52.

Definition of dismissal

80. The definition of dismissal for the purposes of the claims in this matter is set out section 95 of the ERA 1996. It provides as follows:

95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . . , only if)—

(a) the contract under which he is employed is terminated by the employer (whether with or without notice),

[(b) he is employed under a limited-term contract and that contract terminates by virtue of the limiting event without being renewed under the same contract, or]

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.

Definition of redundancy

81. All four claimants contended that their dismissals, whether by the first or second respondent, were by reason of redundancy. Neither respondent contested that contention. I therefore proceeded on that basis.

Application of the facts and the law to determine the issues

82. The provision of TUPE that is potentially relevant to the change of provider in this case is Regulation 3(1)(b). It is possible to look at the set of facts presented to the Tribunal as an example under the first category of service

provision change, namely outsourcing the activities carried on by the client to a contractor or under the second category of service provision change where activities ceased to be carried out by a contractor on a client's behalf and are carried out instead by a subsequent contractor on the client's behalf – a situation commonly referred as second generation contracting. I remind myself of the change introduced into the regulations on 31 January 2014 with the addition of Regulation 3(2)A to reflect the established case law particularly in Metropolitan Resources Ltd v Churchill [2009] ICR 1380. The activities in question must be “fundamentally the same”.

83. In assessing whether there has been in this case a service provision change I apply the guidance in the decision in Enterprise Management Services Ltd that are relevant to the facts of the case before me, and also bringing into account the four-stage test set out in Rynda (UK) Ltd.
84. My first task, therefore, is to identify the relevant activities carried out by the client/original contractor. The activities carried out by JSP are set out in detail above. In summary, they involve the provision of the personal care to SM whose needs, it was common ground, remained the same throughout matters relevant to these proceedings. By the first respondent, the services were provided by way of care in SM's foster home, on a one to one basis, the ratio of two to one during the day and one to one on sleeping nights. That team was solely dedicated to the care of SM in his “own home”. The care involved personal care during the day and personal care during the night including preparation of all food and drink and attendance to his personal needs.
85. The next question is of fundamental importance. It is whether the activities carried on by Embracing Care are fundamentally or essentially the same as those carried on by JSP; minor differences should be disregarded. In Metropolitan Resources Ltd it was made clear that a Tribunal should take a common sense and pragmatic approach concentrating upon relevant activities rather than upon detailed differences between what is done by the transferor or transferee or upon the manner in which each respectively performs or performed the relevant tasks. The question becomes whether the activities carried out by both respondents were essentially the same.
86. Noting the facts and decision in the case of OCS Group, I am not satisfied that the changes to the ratios or number of service users in the same premises for less cost amounts to the activities of the two respondents not being fundamentally the same. Both respondents, fundamentally and essentially, provided personal care services to SM whose needs did not change. The principal difference before and after the change of provider and the number of carers who were required to attend to the needs of SM, that care was shared amongst four service users and the consequent cost savings that entailed. Whilst I understand that this produced economies of scale, I do not find it sufficient in order to say that these activities are performed fundamentally differently that because they are done more cost effectively and in a group setting rather than on an individual basis. For these reasons, I am satisfied that the activities carried on by the two respondents in this case are fundamentally the same.
87. It is then necessary to consider whether the conditions contained in Regulation 3(3) of TUPE are satisfied. I am satisfied that JSP's method of for

providing SM's care amounted to an organised grouping of employees in Great Britain which had as its principal purpose the carrying out of the activities concerned. It was common ground that there was a dedicated service team solely focusing on the needs of SM. That team appears to have grown over time. This was a conscious decision by JSP to provide a dedicated team for the care of SM and that decision reflected the fact that SM remained the employer of those providing his care under the management and supervision of JSP. The conditions in Regulation 3(a)(ii) do not apply to this case.

88. One of the principal submissions of the second respondent was that Regulation 3(1)(b)(ii) of TUPE is predicated on the activities being carried out before and after the transfer on the same "client's behalf". Much reliance was placed on what the second respondent regarded as a change in the client from SM himself to DCC. There is no requirement under Regulation 3(1)(b)(ii) of TUPE that the client must be a common contracting party before and after a service provision change for there to be a TUPE transfer. The requirement is for the activities to be carried out on the same *client's behalf*.
89. I was not directed to the terms of the contract between the second respondent and DCC. However, it was clear that the beneficiary to the care services to be provided under that contract was SM and only SM. I am satisfied therefore that there is sufficient commonality between the client on whose behalf Deborah Jude was acting when she procured the services of JSP and the client on whose behalf Embracing Clare were contracted by DCC to provide what we have found to be fundamentally the same activities. The same conclusion can also be arrived at by treating DCC as the "client" since they remained the funder of the services at all times.
90. That being so, and stepping back and considering all of the evidence before me in the round, I am satisfied, on balance of probabilities, that the situation in this case does constitute a service provision change as defined in Regulation 3(1)(b)(ii) of TUPE.
91. In these circumstances, the claimants were each dismissed by the second respondent upon the second respondent's refusal to engage them under TUPE. That dismissal was by conduct. I have found that the date of the transfer was 16 December 2020 when SM moved to St Godric's and I also find that this was the date of termination of each of the four claimant's contracts of employment. The only factor pointing to a later date was the date of the P45s. The only reason for that delay was that the first respondent was resolving claims by the claimants for unpaid holiday pay which claims were successfully resolved. Having found that there was no dismissal by the first respondent it follows that the date of issue of the P45s by the first respondent are immaterial. It also follows from my finding that there was no dismissal by the first respondent that all claims against the first respondent must fail.
92. I find that the claims by all four claimants for unpaid notice and unfair dismissal are out of time against the second respondent. That leaves the remaining claim for statutory redundancy payments against the second respondent all of which it was common ground had been made in time. It was also common ground that each of the claimant's dismissals were by reason of redundancy.

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In those circumstances the claims for a statutory redundancy payment by all four claimants against the second respondent are well-founded and succeed.

93. In the circumstances, the claimants are all entitled to a statutory redundancy payment against the second respondent in a sum to be agreed between the parties. Given the apparent agreement between the parties as to the claimants' ages, lengths of service and gross pay it is to be hoped that the question of remedy can be resolved between the parties. Otherwise, the claimants will need to apply for there to be a remedies hearing.

Employment Judge Loy

Date: 3 January 2023

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