EMPLOYMENT TRIBUNALS

PRELIMINARY HEARING JUDGMENT

BETWEEN

CLAIMANTS		**RESPONDENTS**
MR M FORD (1) **MR N OWEN (2)** **MR D HANKEY (3)**	**v**	**SUEZ INDUSTRIAL WATER LIMITED (1)** **AIRBUS OPERATIONS LIMITED (2)**

HELD AT: BURY ST EDMUNDS (BY VIDEO) **ON: 15 & 16 MAY 2023**

EMPLOYMENT JUDGE EMERY

REPRESENTATION:

For the claimants:	Mr M Mensah (counsel)
For respondent 1:	Mr R Hignett (counsel)
For respondent 2:	Mr T Cross (counsel)

PRELIMINARY HEARING JUDGMENT

The Tribunal declares there was a relevant service provision change which transferred the claimants' employment from the 1st respondent to the 2nd respondent on 31 October 2020 by virtue of TUPE Regulation 3(1)(b)(ii).

The 1st respondent is dismissed from the proceedings.

REASONS

The Issues

1. The claimants were employed by the 1st respondent, who had a contract with the 2nd respondent to operate and provide maintenance services (the maintenance contract) at a chemical effluent treatment plant servicing the 2nd respondent's West Bromwich vehicle plants. On the expiry of its contract with the 1st respondent, the 2nd respondent decided to take the service in-house. It contends that when it did so the way it ran the operation and maintenance services fundamentally changed, meaning that TUPE did not apply.

2. The claimants and the 1st respondent contend that the claimant's employment automatically transferred to the 2nd respondent on the expiry of the maintenance contract on 30 October 2020, the 2nd respondents position prior to this date was that it had no intention of employing the claimants. The 1st respondent did not dismiss the claimants, it did not transfer them to another site and it did not make them redundant. The claimants turned up to work on 31 October 2020, they were not allowed entry.

3. The claimants allege against both respondents that they were unfairly dismissed, they seek a redundancy payment and notice pay and other payments.

4. The claimants dispute the 2nd respondent's characterisation of their roles, arguing the way the plant operates and the maintenance works required remains the same pre and post-transfer.

5. The factual and legal issues to be determined are:

    a. what were the activities undertaken by the claimants while employed by the 1st respondent
    b. were they fundamentally the same as those undertaken from 31 October 2020 onwards by the 2nd respondent

Witnesses and tribunal procedure

6. I heard evidence from Mr Owen for the claimants. For the 1st respondent I heard evidence from Ms Claire McLintock, Head of HR. For the 2nd respondent I heard evidence from Mr T Griggs Head of Industrial Maintenance.

7. The hearing was conducted remotely on the CVP platform. We arranged regular breaks. The evidence and questions were presented effectively and without difficulties for all participants.

8. I spent the 1st two hours of the hearing reading the witness statements and the documents referred to in the statements.

9. This judgment does not recite all of the evidence I heard, instead it confines its findings to the facts relevant to the issues in this case. This judgment incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The relevant facts

10. The parties accept that the activities undertaken at the treatment plant – its operation and maintenance – remain the same pre- and post-transfer. The claimants and 1st respondent say that this is all that needs to be answered for their argument to succeed.

11. The difference between the parties is the way in which the maintenance is undertaken pre- and post-transfer. The maintenance contract splits maintenance into activities 1-5, based on speciality. The 2nd respondent contends that the claimants undertook limited and non-specialist maintenance activities, activities 1 – 2, its own operatives undertook activities 3 – 5. From 31 October 2020 the 2nd respondent's operatives now undertake a *"fully integrated"* service, undertaking the plant operation and all of maintenance activities 1 – 5.

12. The contract activities are described in some detail in the maintenance contract, the maintenance activities are summarised as follows:

    a. Level 1 – simple actions, lubrication, and inspections
    b. Level 2 – adjustments and replacements of simple components
    c. Level 3 – complex adjustments, replacements or subassemblies requiring procedures, support equipment, qualified personnel
    d. Level 4 – complex operations implying knowledge of procedures, control of specific technologies, specialist equipment and tools
    e. Level 5 – reconstruction and renovation.

13. The maintenance contract also states: "*Note: level 3, 4, and 5 maintenance activities are not part of the core subcontracted activity but support may be requested [from the claimants] on an 'ad hoc' basis".*

14. Mr Owen's evidence is that in practice activities 1-5 were indivisible between the claimants and 2nd respondent's operatives. He accepted that he and his colleagues are not mechanical engineers, the 2nd respondents maintenance engineers were. But, to fix (say) a faulty pump required the claimants and 2nd respondent's engineers to work together *"… we identified what needed removing and fixing, how [the 2nd respondent's engineers] should go about it, because they did not know how their plant worked. So when there was a fault, we had to find it, work out how to fix it and then call in maintenance and say 'replace this'".*

15. The 2nd respondent's characterise this as 'ad-hoc' support work for maintenance activities 3-5, as specified in the contract (127). Mr Owen's evidence was that the issue was often complex to resolve, *"a fault may be very hard to identify as we cannot see what pump/pipe needs fixing. You have to go on our knowledge of how the plant works. So it's a complicated task trying to work out what was wrong. We tended to work together with [the 2nd*

respondent's] engineer - we spent a lot of time together trying to resolve these issues."

16. Mr Owen denied that work was demarcated between the claimants and 2nd respondent's employees, with for example the claimants only undertaking work on non-hazardous systems. He said his team had permits to work with hazardous chemicals including sulphuric and caustic acids, confined space permits to allow them to work in tanks, his team would draw up method statements and risk assessments for maintenance projects involving the claimants and 2nd respondent employees.

17. Mr Owen described an interchangeable role with the 2nd respondent's engineers when undertaking particular tasks. For example he described a process whereby the claimants would empty tanks, the 2nd respondent's engineers would replace parts, and the claimants would make the tanks safe and refill. He accepted that the responsibility for the isolation process rested with the 2nd respondent, but that the claimants undertook the process *"the 2nd respondent did not know how to do it. Their person in charge was not trained in chemical procedures – he was a chef. They did not have any specialised chemical personnel, so they would often rely on our expertise on what to do and how to do it."*

18. Mr Owen denied that the claimants did not undertake tank drops, or that their role was only to observe and assist. He described tank drops *"it's a big job, you do it as part of a team",* he described working with the 2nd respondent and another subcontractor on tank drops, *"The expertise was shared between us all … we would be involved in setting up and advising what to do – it's a team effort"*.

19. The same with line breaks: the 2nd respondent characterises these as level 3-4 maintenance undertaken by the 2nd respondent. Mr Owen argued the 2nd respondent engineers' role was to unbolt the pipe and put in a replacement section *"… we would tell them which pipe to fix and we would divert the chemicals to another part of the system … the physical unbolting would be [the 2nd respondent's] maintenance team".*

20. Mr Griggs accepted in his evidence that the claimants *"would find where the fault is. They have knowledge of how the plant works";* but complex diagnostic work was a level 3-4 level maintenance activity not undertaken by the claimants, their role was basic fault finding and initial diagnostics, *"… they did not rebuild pumps".* Mr Griggs accepted that the claimants may have assisted the 2nd respondent's employees with complex diagnostic issues, he accepted there was a *"collaborative approach"* between the claimants and 2nd respondent engineers, they often *"worked in concert"* when undertaking maintenance activities.

21. Mr Griggs position is that prior to October 2202 75% of the claimants time was spent on operating the plant and 25% on levels 1 – 2 maintenance. He said that now the 2nd respondent's engineers undertake all the work done pre-transfer, *"… the only difference is economies of scale as levels 1 and 2 maintenance can be combined with 3 - 5".*

22. The 2nd respondent disputes that the claimants were involved in level 3 activities. Mr Owen described one level 3 activity, replacing carbon and sand filters. This involved his team adding penetrant to separate water and chemicals, switching the plant off, draining the system; 3rd party contractors would build a scaffold, the 2nd respondent engineers would disconnect and replace the filters, the claimants would refill the filters and restart the plants. He described the engineers maintenance activity of removing and replacing filters as a *"10 minute job, our role was 2 days".*

23. Mr Owen accepted that he and his team did not do maintenance and service of pumps, motors, and valves, or electrical work or software upgrades. He argued that some of this was contracted to other contractors. He argued that since his dismissal some of the roles his team undertook has been passed to different contractors.

24. Ms McLintock accepted in her evidence that the 2nd respondent was saying the *"skills and competencies of the role were different after transfer"* (245), that the 2nd respondent was saying mechanical and electrical competencies were required in its operators. Her view is that the claimants were undertaking activities in levels 1 – 3 pre transfer, that the 2nd respondent carried out levels 4 and 5 activities pre and post transfer. Her view was that the essence of the operations remained the same, that the claimants never undertook skilled mechanical and electrical work, but that the expertise of the claimants *"… is fundamental for the maintenance activities. A fundamental activity was operation of the plant. This has transferred and required to be done. The maintenance hangs off the operational part. The fundamental aspect is operation of the plant. This still is in place .. someone still has to operate the plant and do levels 1 – 3 maintenance…".*

25. Mr Griggs argument is that the maintenance activities are now being undertaken by less people; *"We had to reduce the cost of the maintenance operation … to facilitate safe maintenance, we had to have a more inventive way of delivering the service".* There is now a 7 person team who operate, maintain, service and repair the plant.

Closing arguments

26. The parties provided skeletons and written closing arguments. All gave oral closing arguments. Where relevant these are addressed below.

The law

27. TUPE SI 2006/246 reg 3(1)(b)

A relevant transfer

3.—(1) These Regulations apply to—

(a) …

(b) a service provision change, that is a situation in which—

…

(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.

28. Case law

a. *Churchill Dulwich Ltd (in liq) v Metropolitan Resources Ltd [2009] IRLR 700, [2009] ICR 1380:* The fact post transfer of additional duties being undertaken does not negate a transfer *"… unless the addition is of such substance that the activity then being carried on is no longer essentially the same as that carried on by the predecessor… to negate the existence of a transfer under reg. 3(1)(b). It is for the tribunal in each case to assess, on the facts, taking into account any material differences, whether the alleged transferee is performing essentially the same activity as that of the alleged transferor…".*

b. *OCS Group UK Limited v Jones UKEAT/0038/09, [2009] All ER (D) 138 (Sep):* Regulation 3(1)(b) did not apply where the activities following the service provision changeover were 'substantially' different; a restaurant service within a factory was replaced by dry goods kiosks selling pre-prepared sandwiches and salads. Reg 3(1)(b) did not apply because the activities after the changeover were 'wholly different' from the previous contractor's activities

c. *Hamshaw v Nottinghamshire Healthcare NHS Trust UKEAT/0037/11:* there cannot be a relevant transfer under TUPE where the services provided to a client are not fundamentally or essentially the same as they

were before the change of provider; in circumstances where a care home was closed and residents re-housed into their own homes and received assistance with daily tasks, this was not essentially the same activity as the care provided in care homes.

d. *Enterprise Management Services Ltd v Connect-up Ltd [2012] IRLR 190, EAT*: where there are some similarities between the activities pre-and post-transfer, where there are also significant differences such that activities carried out before the transfer which constituted 15% of the work were no longer undertaken post-transfer, TUPE did not apply.

e. *Johnson Controls v UK Atomic Energy Authority UKEAT/0041/12:* where booking taxis was no longer a centralised service but undertaken by several different staff members as part of their role, the services after the change were essentially different from those carried out before the change.

f. *The Salvation Army Trustee Company v Coventry Cyrenians Limited [2017] IRLR 410:* An employment tribunal's approach to the categorisation and identification of the 'activities' concerned and the comparison between activities carried out prior to and subsequent to the change of providers must be neither too generalised nor too pedantic. The word 'activities' in reg 3(1)(b) of TUPE was to be given its ordinary, everyday meaning, and in the context of reg 3(2A), 'activities' must be defined in a common-sense and pragmatic way; the definition should be holistic having regard to the evidence in the round, avoiding too narrow a focus. A pedantic and excessively detailed definition of 'activities' would risk defeating the purpose of the SPC provisions. The EAT accepted that a tribunal's findings that the provision of services to the homeless remained fundamentally the same notwithstanding the number of accommodation sites were reduced from 10 to 2, the services were provided to a different age group, the length of stay was 112 days rather than 12 months

g. *Anglo Beef Processors UK v Longland UKEATS/0025/15:* post-transfer a different method was to be used to classify carcasses from a part manual and part computerised assessment to a fully computerised assessment. The EAT accepted the Tribunal was entitled to find that the activity being transferred was the classifying of carcasses, whether manually or electronically, that the activities undertaken pre and post transfer were fundamentally the same.

Conclusions on the evidence and law

29. The question for me to address is whether the claimants' roles remain fundamentally the same from 31 October 2020. The way the activities are being carried out is less relevant, I accepted Mr Mensah's point that the key focus is whether the activities continue.

30. The 2nd respondent's key argument is that maintenance activities are being undertaken by different personnel who can undertake all of maintenance

operations 1 – 5, that the activities of the plant personnel have therefore changed. The claimants and 1st respondent accept *per Churchill*, that additional activities are being undertaken, that level 4 and 5 maintenance activities have been added onto what was the claimant's role. But, they argue, this does not change the fact that the same activities are still being carried out or that the fundamental nature of the activities remain unchanged. They may be undertaken in a different organisational way, but the activities remain the same, there has been fundamentally no change in the operation of the plant. Mr Griggs accepted in his evidence that the activities previously undertaken by the claimants remain largely unchanged.

31. I accepted that the activities being undertaken by the claimants remained activities undertaken by the 2nd respondent in the same way from 31 October 2020. I accept that these activities are now organised differently, being undertaken by staff who have mechanical engineering experience, and who also undertake specialist maintenance as they did pre-transfer. But the activities remain the same: the operation of the plant remains the same, the way maintenance is carried out remains the same, with the same tasks being required, the same safety systems.

32. I accept also that the claimants had involvement in activities 3 – 5, including undertaking some of the maintenance, assisting the mechanical engineer undertaking maintenance, preparing the site for the specialist maintenance, acting as safety lookout. I accepted Mr Owen's characterisation of the claimants and 2nd respondent's employees acting as a team to undertake these activities. The activities undertaken by the claimants are all essential to activities 3-5, and they remain activities still being carried out post-transfer.

33. I did not accept the 2nd respondent's argument that because the current team undertakes activities 3-5 and the workforce has been reorganised, the activities are fundamentally different. Even if Mr Cross is right with his analogy that the claimants were an 'engineers mate' in certain activities, the fact is that someone is still acting as 'mate': someone needs to fault-find, isolate and drain tanks, act as safety lookout, even if the act of replacing the (say) pump is a role for a skilled mechanical engineer. I did not accept Mr Cross's argument that the interchangeability of the role with staff new undertaking all of the operational maintenance means that the activities have fundamentally changed.

34. Noting the law requires me to take a straightforward and common-sense approach, I concluded that the activities being undertaken were substantially the same post-transfer as by the claimants, an organised grouping of employees, immediately before transfer, the automatic transfer principle therefore applies.

35. Because the claimants automatically transferred to the 2nd respondent on 30 October 2022 they remained employees of the 2nd respondent on 31 October 2022 when they were barred from entering the plant. The 1st respondent was not their employer at this date, and the 1st respondent is therefore dismissed as a party to the claim.

EMPLOYMENT JUDGE EMERY

Dated: 9 August 2023

Judgment sent to the parties
On
16 August 2023

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For the staff of the Tribunal office

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