



EMPLOYMENT TRIBUNALS

First Claimant: Mrs L Lindley
Second Claimant: Miss J Coutts
First Respondent: Serco Limited
Second Respondent: Southend-on-Sea Borough Council

COSTS JUDGMENT

The First Respondent's application for an order that the Second Respondent pay all or part of the First Respondent's costs pursuant to rules 76(1)(a) and 76(1)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 is refused.

REASONS

Relevant background

1. By a claim form presented on 2 October 2020, the First Claimant asserted that the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) applied on termination of a contract between the First Respondent and the Second Respondent for the "*provision of caseworkers for remote processing of benefits*" (the **Contract**). The First Claimant's position was that this amounted to a service provision change under regulation 3(1)(b) of TUPE and that her employment should have transferred on termination of the Contract from the First Respondent to the Second Respondent as a result.
2. The Second Claimant also asserted that TUPE applied on termination of the Contract and pursued claims on the same basis as the First Claimant.
3. The First Respondent defended both claims, its position being that TUPE applied on termination of the Contract and that the employment of both the First Claimant and the Second Claimant transferred to the Second Respondent on 2 July 2020.
4. The Second Respondent also defended both claims, its position being that TUPE did not apply on termination of the Contract. Further, if TUPE did apply,

its position was that the First Claimant and the Second Claimant were not assigned to the Contract at the date of the transfer such that their employment would not, in any event, have transferred from the First Respondent to the Second Respondent.

5. A public preliminary hearing took place via CVP on 12 March 2021, to determine whether or not there had been a relevant transfer under TUPE, which continued and was concluded on 15 June 2021, with Judgment reserved. All parties were represented at this preliminary hearing and evidence took the form of witness statements, oral witness evidence and an agreed bundle of documents. Written submissions were provided on behalf of all parties, which were supplemented with oral submissions at the close of the preliminary hearing.
6. Following a full day of deliberations in Chambers, by its Judgment dated 13 July 2021, the Tribunal determined that:
 - a. pursuant to regulation 3(1)(b) of TUPE, on 2 July 2020 there was a relevant transfer of an undertaking from the First Respondent to the Second Respondent; and
 - b. the First Claimant and the Second Claimant were assigned to the organised grouping of resources subject to that relevant transfer. The contracts of employment of the First Claimant and the Second Claimant therefore had the effect, after the transfer, as if originally made with the Second Respondent.
7. The matter was listed for a private preliminary hearing for case management purposes and the claims proceeded, further to this preliminary issue having been determined, although were withdrawn by the First Claimant and the Second Claimant prior to the final hearing.

Costs application

8. Following determination of the preliminary issue, by email dated 10 August 2021, the First Respondent made an application for a costs order against the Second Respondent "*for all the costs it has incurred in relation to the relevant transfer issue and in respect of those costs it has incurred in defending its position on this point at tribunal*", pursuant to rules 76(1)(a) and 76(1)(b) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the **Tribunal Rules**). Its position is that the Second Respondent's denial that there had been a relevant transfer was unreasonable and / or had no reasonable prospect of success.
9. The First Respondent submits that the Second Respondent acted unreasonably in all the circumstances of the case because "*(a) the Council was well aware that TUPE applied and that Serco's employees were due to be transferred to the Council upon Serco's termination of the Contract (in-sourced), and (b) the Council, knowingly and deliberately, took steps to avoid that happening by taking working in-house*". In its written representations, it

refers to the First Respondent's knowledge on the "*inevitable application of TUPE*", referring to the Tribunal's finding that the Second Respondent understood the First Respondent's position on TUPE by 28 April 2020 and that the First Respondent's position on TUPE, as set out in correspondence to the Second Respondent, was clear and unambiguous.

10. It further submits that the implication of the Tribunal's findings is that "*the Council's communications to Serco at the time were knowingly untrue and were a consequence of its efforts to avoid the application of TUPE. The Council maintained that untruth in these proceedings by its continued denial that there was a relevant transfer and, in particular, that it had not taken work in-house*".
11. The Second Respondent provided its response, including written representations, to the Tribunal on 20 August 2021, objecting to the First Respondent's application for a costs order.
12. Further written representations in support of the application and in response to the Second Respondent's representations were submitted to the Tribunal by the First Respondent on 17 September 2023.
13. The parties were informed by the Tribunal that, having noted that an appeal to the Employment Appeal Tribunal had been lodged by the Second Respondent in respect of part of the Tribunal's findings at the preliminary hearing, determination of the costs application would be postponed until conclusion of the appeal.
14. By letter dated 21 September 2022, the Employment Appeal Tribunal informed the parties that the Second Respondent's appeal had no reasonable prospect of success and would not, therefore, proceed by way of an appeal.
15. On 15 May 2023, the claims of the First Claimant and the Second Claimant were withdrawn on their behalf, following which the First Respondent requested that its costs application now be determined.
16. On 16 May 2023, the Second Respondent requested that the application be considered on the papers alone.
17. The parties were notified that a Chambers hearing would take place on 25 September 2023, at which the costs application would be determined, by letter dated 21 July 2023.

The Law

18. The power to award costs is contained in the Tribunal Rules. The definition of costs appears in rule 74(1) and includes fees, charges, disbursements or expenses incurred by or on behalf of the receiving party.
19. Rule 75(1) provides that a costs order includes an order that a party makes a payment to another party "*in respect of the costs that the receiving party has incurred while legally represented*".

20. The circumstances in which a costs order may be made are set out in rule 76. The relevant provision here is rule 76(1) which provides as follows:

“A Tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that

(a) A party (or that party’s representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or

(b) any claim or response had no reasonable prospect of success.”

21. The procedure by which the costs application should be considered is set out in rule 77 and the amount which the Tribunal may award is governed by rule 78. In summary rule 78 empowers a Tribunal to make an order in respect of a specified amount not exceeding £20,000, or alternatively to order the paying party to pay the whole or specified part of the costs with the amount to be determined following a detailed assessment.

22. Rule 84 concerns ability to pay and reads as follows:

“In deciding whether to make a costs, preparation time or wasted costs order and if so in what amount, the Tribunal may have regard to the paying party’s (or where a wasted costs order is made the representative’s) ability to pay.”

23. It follows from these rules as to costs that the Tribunal must go through a three-stage procedure (see paragraph 25 of Haydar v Pennine Acute NHS Trust UKEAT 0141/17/BA). The first stage is to decide whether the power to award costs has arisen, whether by way of unreasonable conduct or otherwise under rule 76; if so, the second stage is to decide whether to make an award, and if so the third stage is to decide how much to award. Ability to pay may be taken into account at the second and/or third stage.

24. I have considered the relevant case law on the costs powers (and their predecessors in the 2004 Rules of Procedure) including confirmation that the award of costs is the exception rather than the rule in Employment Tribunal proceedings; that was acknowledged in Gee v Shell UK Limited [2003] IRLR 82, as reiterated by the Court of Appeal in Yerrakalva v Barnsley Metropolitan Council and nor 2012 ICR 420, CA.

25. I have also had in mind the fundamental principle that the purpose of an award of costs is to compensate the party in whose favour the order is made, and not to punish the paying party (Lodwick v Southwark London Borough Council 2004 ICR 884).

26. As per the Court of Appeal guidance in Yerrakalva v Barnsley Metropolitan Council and nor 2012 ICR 420, CA:

“The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been

unreasonable conduct by the claimant in bringing and conducting the case, and in doing so to identify the conduct, what was unreasonable about it and what effects it had.”

27. Other authorities brought to my attention have been considered, namely Daleside Nursing Home Limited v Mathew UKEAT/0519/08, HCA International Ltd v May-Bheemul and Arrowsmith v Nottingham Trent University [2012 ICR 159] as referred to be the First Respondent and Salinas v Bar Stearns International Holdings Inc and Another [2005] ICR 1117 and ET Marer Limited v Robertson [1974] ICR 72 as referred to by the Second Respondent.

Decision

28. I must first consider, has the power to award costs arisen, whether by way or unreasonable conduct or otherwise under rule 76. Was the conduct of the Second Respondent, in defending this claim, unreasonable? Did the Second Respondent's response have no reasonable prospect of success?
29. Firstly, I am reminded that it is not for me to determine whether or not the Second Respondent's position, in maintaining that TUPE did not apply during the period up to and including 2 July 2020 when the Contract ended, was unreasonable.
30. It is for me to determine whether or not the Second Respondent's conduct once proceedings were issued on 2 October 2020 and thereafter, in its continued defence of the claims up to and including the final hearing, was unreasonable.
31. My decision is that it was not.
32. This was a preliminary issue, which required findings of fact to be made in respect of each of the following:
- a. What were the activities performed by the First Respondent under the Contract?
 - b. Were the activities carried on by the Second Respondent after termination of the Contract fundamentally the same?
 - c. Immediately before the transfer was there an organised grouping of First Respondent employees that had, as its principal purpose, the carrying out of the activities on behalf of the Second Respondent?
 - d. Was each of the Claimants assigned to the organised grouping of employees?
33. In respect of each of these issues, relevant to determining whether or not there had been a relevant transfer under TUPE, there were facts in dispute. The Second Respondent therefore had an arguable defence and in defending the proceedings cannot be said to have been unreasonable.

34. By way of example, the Second Respondent's position was that there had been a "*significant and substantial reduction in processing work*", which was a key factual matter to determine, relevant to (amongst other things) whether or not post-termination activities were fundamentally the same as pre-transfer activities. Making a finding of fact required an analysis of the work being undertaken, the impact of different factors (such as the introduction of Universal Credit and the introduction of automation) on workloads and consideration of data produced and the extent to which this substantiated the Second Respondent's position. There was some volume of evidence and information to assess and interpret and the position was not definitive.
35. I acknowledge that my finding was that there was not a significant and substantial reduction in processing work in the period from May 2020 onwards and also that I found that the Second Respondent increased the amount of processing work being undertaken in-house. However, had my assessment of the evidence resulted in me making a finding that there had been a significant and substantial reduction in processing work and that processing work undertaken by employees of the First Respondent had not been taken in-house, my decision on the application of TUPE may have been different. As such, in the context of their being factual matters in dispute, there was an arguable defence on the part of the Second Respondent.
36. Further, had I accepted the Second Respondent's position in terms of the "relevant activity" under the Contract, the findings of fact that I made may have resulted in a different decision, since the consequence of adopting the Second Respondent's definition of relevant activity would have significantly narrowed the scope of such activity.
37. I acknowledge that, had the Second Respondent been in no doubt that TUPE applied on termination of the Contract, but proceeded to defend the claims rather than conceding this preliminary point, that might (and depending on all the circumstances most likely would) amount to unreasonable conduct. However, taking into account the evidence before me and my findings of fact, it cannot be said that the application of TUPE was something about which the Second Respondent was in no doubt.
38. Nor can it be said that the Second Respondent knowingly relied on an untruth during proceedings. I do not agree that the Second Respondent had, as the First Respondent puts it "*knowledge on the inevitable application of TUPE*". Whilst the First Respondent may have set out its position in clear and unambiguous terms, that does not equate to the Second Respondent having agreed with the First Respondent. Indeed, as I noted within my decision, even "*in circumstances where both the alleged transferee and the alleged transferor agree about the application of TUPE, that is in no way a conclusive indication of the legal position*". Also, whilst I may have made findings in respect of the extent to which workloads had reduced and the bringing in-house of work, that was not a finding that the Second Respondent had relied on an untruth.

39. Instead, my findings are clear in that there was an ongoing dispute between the parties about the application of TUPE, a matter that I believe rightly required determination at a preliminary hearing.
40. When looking at the whole picture, I do not find the Second Respondent's continued defence of its position to have been unreasonable, not least since the alternative for the Second Respondent would have been to concede that TUPE applied without that preliminary issue being determined in circumstances where that outcome was not an inevitable one.
41. In addition to the above and of particular weight in reaching my decision is the nature of the claim and the issue being determined.
42. The identification of a "relevant transfer" for the purposes of TUPE has long been a confusing and difficult matter in employment law. This may have been somewhat helped by the introduction of service provision changes in the 2006 legislation, but although regulation 3(1)(b) may have been intended to simplify matters, there has been a substantial body of case law arising as a result of its introduction.
43. The question as to whether or not TUPE applies to a contract termination is often one that is difficult to determine and one that regularly has to be considered and determined at a preliminary stage. The listing of the issue as a preliminary matter enables this difficult determination to be made prior to the full liability hearing.
44. In this particular case, deciding the preliminary issue and the application of TUPE required a 2-day hearing at which numerous documents were reviewed and considered and witness evidence was heard. Detailed legal submissions were provided and taken into account. A full day in chambers was spent considering the evidence and reaching a decision on the preliminary issue. Had it been clear at the outset, or during the preliminary hearing, that the Second Respondent's defence was such that it had no reasonable prospect of success, I could have exercised my discretion to strike out that response under rule 37 of the Tribunal Rules. The fact that I did not do so supports my decision in respect of this costs application.
45. On considering the factors put forward by the First Respondent in support of its application and the considerations set out in this Judgment, I am satisfied that these do not make this claim an exceptional one in which a cost order should be awarded. The Second Respondent was not unreasonable in its conduct of its defence, nor was its defence one that had no reasonable prospect of success. The power to award costs has therefore not arisen, whether by way of unreasonable conduct or otherwise under rule 76.

JUDGMENT SENT TO THE PARTIES ON
29 September 2023

FOR THE TRIBUNAL OFFICE

Notes

1. 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.
2. Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.