



EMPLOYMENT TRIBUNALS

Claimant: Ms Z Kirby

Respondents: Beats Learning Limited (1)
In Toto Ed Limited (2)

Heard at: London South (by CVP)

On: 8 September 2023

Before: Employment Judge Emery

REPRESENTATION:

Claimant: Ms I Egan (counsel)

Respondent 1: No appearance

Respondent 2: Mr P Maratos (solicitor)

JUDGMENT

The Tribunal declares:

1. The claimant transferred from the 1st to the 2nd respondent on 1 October 2022 by virtue of Regulation 4 TUPE Regulations 2006
2. There was a failure by the 1st and 2nd respondents to inform or consult the claimant, contrary to Regulations 13 & 15 TUPE 2006.

REASONS

The Issues

By agreement and because of issues of time, the Hearing considered issues 1, 2, 3, 11, and 16, set out below. Judgment was given on these issues at the Hearing.

TUPE Transfer

1. Was there a TUPE transfer between the 1st and 2nd Respondent's on the 01/10/22.
2. If there was a TUPE transfer on the 01/10/22 did the Claimant's employment transfer or did the Claimant's employment remain with the 1st Respondent. The Respondent will say that the Claimant's employment did not transfer on the 01/10/22.
3. Did the Claimant believe that her position had been made redundant rather than the Claimant's employment transferring.

Employment Status

4. Has there been a resignation, dismissal or has the employment agreement concluded by other reasons. If so when?
5. If the employment transfer, did the employment continue beyond 04/01/23 when the Claimant began full time employment which ended on 26/05/23.

Wrongful Dismissal/Notice pay/Breach of Contract

6. Has the Claimant been wrongfully dismissed, if so on what date?
7. Has there been a failure to mitigate losses.
8. Should recoupment regulations apply.
9. Should there be a reduction applying the *Polkey* Principle.
10. Should there be a reduction for blameworthy conduct / contributory fault.

Unlawful Deductions from Wages and Holiday Pay

11. Is the 1st or 2nd Respondent liable for any unpaid wages, if so for what period of time.
12. Are the wages 'properly payable' in light of new full-time employment being obtained running alongside full time suspension.
13. Should recoupment regulations apply.
14. Is the Claimant entitled to holiday pay from the 1st and / or 2nd Respondent. If so how much.

ACAS uplift

15. Has there been a failure by either side to follow the ACAS code. If so should there be an uplift or down lift on any award.

TUPE Failure to Inform and Consult - Reg 13 to 15 TUPE 2006

16. Has there been a failure by R1 and / or R2 to inform and consult. If so what should the award be and how should it be apportioned between the parties.

Witnesses and evidence

17. We heard evidence from the claimant and Ms. Stacey Green for the 2nd respondent. The 1st respondent has not submitted a defence and did not attend the hearing. It commenced a voluntary liquidation process on 30 January 2023. Ms. Green is the 2nd respondent's HR and Compliance Manager, prior to the transfer she was the 1st respondent's Compliance Manager.
18. The parties agreed that the TUPE-related issues should be addressed first. In the event, this issue took most of the day to resolve; directions were made for a further hearing, addressed separately.
19. The hearing bundle was prepared with pagination numbers recommencing for each paper file (A1, B etc). Sitting remotely, I was provided with an electronic bundle, and I have used the electronic pagination number when citing documents in the judgment.
20. This judgment does not recite all the evidence we heard, instead it is confined to the findings to the evidence relevant to the issues for this hearing. The judgment incorporates quotes from the Judge's notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions.

The evidence

21. The claimant was employed as by the 1st respondent as a Headteacher at two school sites in Peterborough and Cambridge. 'The School' specialises in performing arts for young people with physical disabilities and mental health challenges.
22. The claimant was suspended from work on 22 August 2022 following allegations made by a teacher against her of sexual harassment. The claimant attended an investigation meeting with her Trade Union representative, she was then invited to a disciplinary hearing, the disciplinary invite letter made further allegations of misconduct contrary to the 1st respondent's Code of Conduct. Her representative raised issues about the allegations and the process followed to that date. In her statement the claimant describes that by 28 September 2022 the disciplinary process had reached an "*impasse*", as after this point she remained suspended, and no disciplinary meeting was scheduled.

23. Alongside this, the 1st respondent was in the process of transferring the Schools to the 2nd respondent. Mr. Simon Gunton is the CEO and sole shareholder and Director of the 1st and 2nd respondents.
24. The claimant was informed by phone call on 6 September 2022 by Ms. Green and in a letter the same day that her employment was to transfer to the 2nd respondent on 1 October 2022 pursuant to the TUPE Regs on the same terms and conditions, that the 2nd respondent looked forward to *her "becoming an employee"* of the 2nd respondent. She was told there would be consultation meetings w/c 12 September 2022 and she was asked to *"share a date and time"* that would be convenient. The claimant did not respond, and she was not invited to join any consultation meetings thereafter.
25. Ms. Green's evidence was that the 2nd respondent received no employee liability information in relation to the claimant, that she *"must have chosen to object"* to the transfer, that she *"continued to be employed"* by the 1st respondent after the transfer (paragraphs 2, 16 & 17 statement).
26. It was put to the claimant that she *"did not agree"* to the transfer, that she did not suggest a *"convenient"* date to attend a consultation meeting. The claimant's evidence was that she had *"no issue"* with the transfer, that she believed she would be automatically transferred, she was not invited to a consultation meeting and did not feel the need to proactively seek one; her view was that *"silence means agreement"* to the transfer.
27. Ms. Green's evidence at the hearing was that Citation, the 1st respondent's HR advisers, advised the 1st respondent not to proceed with the claimant's TUPE transfer because of ongoing negotiations between the claimant's rep and the 1st respondent, that Citation also advised the 1st respondent not to proceed with the TUPE consultation meeting for the same reason. Her evidence was that the claimant's name was not on the employer liability information given to the 2nd respondent *"due to the disciplinary investigation and I was told not to do this ... Advice was given not to go through with the TUPE consultation with [the claimant] from 7 September 2022"*.
28. In communications on the disciplinary process, on 28 September 2022 Mr. Gunton confirmed to the claimant's union rep that the claimant's name would be added to the 2nd respondent's website.
29. The transfer of the School from the 1st to the 2nd respondent took place on 1 October 2022. The claimant was not transferred. Teachers and other staff employed at both sites transferred, bar the claimant and one other staff member. The claimant contends that the School operates from the same sites in essentially the same way after transfer.

30. The 2nd respondent's position is that the claimant continued to be employed and paid by the 1st respondent; it has produced wage slips saying she has been paid in January, February and March 2023 (236-8). The claimant challenges this, saying she had not been paid from end October 2022. She provided her bank statements as evidence of a failure to pay her to the date of hearing (246-274).
31. The claimant's union rep wrote several emails and called Ms. Green from 5 December 2022 onwards (e.g. 115, 117) saying the claimant had not been paid, Ms. Green couldn't say why there was no response by the 2nd respondent. Ms. Green's evidence was that the wages slips and payment may have been generated by the 1st respondent's administrators, she had no knowledge of this.
32. I concluded that, despite the wages slips showing payment, the claimant received no salary from the respondents from 1 December 2022 onwards.

Closing arguments

33. The parties agree that there was a Regulation 3 relevant transfer of the School, that the claimant was a part of this economic entity immediately before the transfer. The only issue between the parties in respect of this element of the claim is whether the claimant automatically transferred under Regulation 4, or whether she objected under Regulation 4(7).
34. Ms Egan argued that the claimant was told she would transfer. There is no evidence that the claimant objected to the transfer, which must be communicated, silence clearly means the transfer was not objected to. The without prejudice argument is not pleaded or in witness evidence; clearly without prejudice discussions do not communicate an objection.
35. Mr Maratos argued that the TUPE process stopped, that there was 'in total' a clear and unambiguous objection to the transfer. The first sign of this is the company 'putting a stop' to the process. The email saying she was being added to the website was not an email relating to the transfer. At this time there were discussions. *"If there is a failure it's a failure of R1. And this is not a liability of R2. It's a failure of R1 if there is one, and they are separate legal entities."* If it is accepted that wage slips were received by the claimant, this shows the claimant gave a clear and unambiguous objection to the transfer.
36. Mr Maratos initially argued that if there was a failure to consult, this had *"nothing to do with R2 as could not consult prior to transfer"*. He argued that this *"is not R2's liability; it's R1's duty..."*. On discussion of Regulation 15 and the EAT judgment in *Todd v Strain*, Mr Maratos accepted that the transferor and transferee are jointly and severally liable if there is a relevant TUPE consultation breach by one of them.

The Law

37. Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246)

Reg 3 A relevant transfer

(1) These Regulations apply to

- (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;

...

(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.

Reg 4 Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

- (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

- (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

...

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

...

Reg 13 Duty to inform and consult representatives

(1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of

(a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;

(b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

Reg 15 Failure to inform or consult

(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground

(a) ...

(b) ...

(c) ...

(d) in any other case, by any of his employees who are affected employees.

- (2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show
- (a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and
 - (b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.
- ...
- (6) In relation to any complaint under paragraph (1), a failure on the part of a person controlling (directly or indirectly) the employer to provide information to the employer shall not constitute special circumstances rendering it not reasonably practicable for the employer to comply with such a requirement.
- (7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.
- (8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may
- (a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or
 - (b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.
- (9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).

38. *Todd v Strain [2011] EAT IRLR 11*: Regulation 15(9) means that the claimant can bring a claim against either transferor or transferee: the tribunal has no power to apportion liability between the transferor and transferee if there has been a failure to consult.

Conclusions

39. I accept the claimant's case that she did not object to the proposed TUPE transfer of her employment to the 2nd respondent. Ms Green was unable to point to an objection in any form. In fact, the 2nd respondent's evidence has changed – from asserting the claimant must have objected to the transfer, to the 1st respondent receiving HR advice to cease the consultation and TUPE process.
40. I accept, as fact, that the 1st and 2nd respondent – in particular Mr. Simon Gunton and his close management team – knew that the claimant had not objected to the transfer. Yet, this was the 2nd respondent's witness evidence at this hearing.

41. The failure to consult was in fact, according to Ms Green, based on HR advice. If so, the advice was clearly wrongly given. The claimant was an employee of the transferring entity who had been told she would transfer. Reliance on advice given is not a permissible reason to fail to consult the claimant. The claimant was excluded from whatever consultation process there was (on which we heard no evidence). It was not the claimant to arrange a consultation meeting, and the 2nd respondent's argument that her failure to do so somehow amounts to an objection to the transfer is misconceived. The failure to consult with the claimant was contrary to Regulation 15.
42. As a finding of fact, in the absence of communication from either respondent, and remaining suspended, the claimant assumed her employment transferred on 1 October 2022. She did not consider she had been made redundant, as the 2nd respondent alleges. It was only when she was not paid in early November 2022 that she became aware she had not been transferred to the 2nd respondent.
43. I concluded that as the claimant was an employee of the transferring economic entity, and as she did not object to her transfer, her employment transferred under the provisions of Regulation 3 to the 2nd respondent on 1 October 2022.
44. There was a clear and obvious and mystifying failure to consult with the claimant, both pre and post transfer. Under the provision of Regulation 15 the 2nd respondent is jointly and severally liable for any failures, whether attributable to the 1st or 2nd respondent.
45. I also found that the claimant was not paid from 1 November 2022, contrary to the payslip evidence produced by the 2nd respondent. I stated in my oral judgment, and reiterate here, that I am concerned at the provenance of the payslips in the bundle. Ms Green suggested they may have originated from the liquidator. I address this issue in a separate Order.

Employment Judge Emery
17 October 2023

Note

Reasons for the judgment were given orally at the hearing. Written reasons will not be provided unless a party asked for them at the hearing or a party makes a written request within 14 days of the sending of this written record of the decision.

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