Case Nos: 3320784/2021
3322391/2021

EMPLOYMENT TRIBUNALS

First Claimant: Mr Danny Howard
Second Claimant: Mr John Jackson

First Respondent: Hallmark Connections Limited
Second Respondent: First Choice Mini-Bus Service Limited

Heard at: Watford (In person) On: 3-5 July 2023
4 September 2023

Before: Employment Judge Bansal (sitting alone)
Members – Mrs A Brosnan & Mrs C Baggs

Representation

Claimants: In person
First Respondent: Mr R Beaton (Counsel)
Second Respondent: Mrs Evan Jarvis (Solicitor)

JUDGMENT having been given orally at the conclusion of the hearing, these reasons are provided following a request made by the respondent for written reasons in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

REASONS

Background

1. The Claimants were employed by the First Respondent, a company that provides passenger transport services, as minibus drivers. Both claims arise from the acquisition of a contract to supply transport services for an American school, commonly known as TASIS. The First Respondent had secured the contract to supply services as a sub-contractor of Kura, also known as Coach Hire until it re-tendered and acquired by the Second Respondent on 1 August 2021. Both claimants worked on that contract which required them to pick children up from their homes and taking them to school at the start of the day and taking them home on two trips at the end of the school day. They took their buses home with them started and finished the day at home.

2. The First Claimant was employed from 22 April 2024 until 31 July 2021. He presented his Claim Form on 25 September 2021. The Second Claimant was

employed from 12 November 1995 to 31 July 2021, and he presented his Claim Form on 20 October 2021. Both Claimants brought complaints of;

(ii) Unfair dismissal/redundancy by First Respondent or
(iii) Automatic unfair dismissal/redundancy under Tupe Reg 7 by the Second Respondent;
(ii) Breach of Tupe Regulations 15 and 13, duty to inform and consult;
(iii) Wrongful dismissal

3. The First Respondent defence is that both Claimants did transfer and so all claims against them should be dismissed. Also, it is argued that they did inform and consult under the Tupe Regs 15. In the alternative, the respondent argues the Claimants were redundant having lost the contract and this was a potentially fair reason for dismissal they acted fairly and reasonably and if, which is denied the claimants were procedurally unfairly dismissed, they would have been dismissed in any event and therefore seek a reduction in any award of compensation.

4. The Second Respondent argues that the Claimants were not part of the organised group of employees that were subject to the proposed TUPE transfer due to undertaking other work for the First Respondent. The respondent also argues that that they offered employment to the First Claimant on 12 October 2021 and he did not respond. They also argue that if the Tribunal find the First Claimant's dismissal was procedurally unfair, they argue for a reduction in compensation on the basis that he would have been dismissed in any event, relying on the principle in Polkey v AE Dayton services Ltd (1987) ICR 142.

List of Issues

5. At a Preliminary Hearing held on 4th October 2022, EJ Mensah agreed a list of issues with the parties which are repeated below.

1 Was there a service provision change pursuant to Reg 3(1)(b) Tupe.

2. If so, did the Claimants form part of an organised grouping of employees situated in Great Britain which has as their principal purpose the carrying out of the relevant activities on behalf of the client. (Reg 3(3)(a)(i) Tupe)

3. If so, did the Claimants employment automatically transfer from the First Respondent to the Second Respondent on 1 August 2021 pursuant to Reg 4(1) Tupe.

4. If so, was the sole or principal reason for the dismissal the transfer itself.

5. If so, did the Second Respondent establish an ETO reason for the dismissal?

6. If so, did the Second Respondent act reasonably in these circumstances in treating that reason as sufficient to justify dismissal?

7 If the Claimants employment did not automatically transfer to the Second Respondent did the First respondent have a potentially fair reason to dismiss the Claimant. (s98 ERA 1996)

8 Was the First Respondent responsible in treating any potentially for reason as the reason for the Claimant's dismissal (s98(4) ERA 1996)

9 Did the First Respondent follow a fair and reasonable procedure in respect of the Claimant's dismissal? (s98 ERA 1996)

10 If not, do the principles in the case of Polkey apply?

11 What notice pay are the Claimants entitled to?

12 What redundancy pay are the Claimants entitled to ?

7 Failure to consult in breach of Reg 15 Tupe 2006

1. Was the Claimant an "affected employee" as defined in Reg 13(1) Tupe, if so
2. Has the First respondent complied with their duties to consult under reg 13 & 14 Tupe 2006, namely;
   (i) Was an appropriate employee rep identified/elected? If yes,
   (ii) Was that rep provided with the information required under Reg 13(2)?
   (iii) If not, was the Claimant provided with that information individually?
   (iv) Was the information provided in good time before the transfer date to enable meaningful consultation.?

Hearing

8. The Tribunal was provided with a bundle of documents which was a joint bundle of some 543 pages, with a supplementary bundle from the Second Respondent. In addition, the First Claimant produced a short bundle of 6 pages containing correspondence which he said had been removed from the agreed bundle which he wanted the Tribunal to be consider. This bundle was agreed to be added to the joint bundle.

9. The Claimants were litigants in person and not represented. The First Respondent was represented by Mr Beaton of Counsel and the Second Respondent by Mrs Evans-Jarvis, solicitor. The Tribunal heard oral evidence from the Claimants; Mr A Creba on behalf of First Respondent: and Michelle Duff for the Second Respondent. The Tribunal was provided with witness statements for Mr Daniel Judson and Mr Mick Wallbank by the First respondent and a witness statement of Mr Mark J Davies of TASIS on behalf of the Second Respondent. Mr Davies' statement was accepted and not challenged by the First Respondent.

Findings of Facts

10. Based on the evidence heard and documentation read, the Tribunal made the findings of facts as set out

11. Coach Hire (also known as Kura) was the transport supplier for TASIS (an American school) for 3 academic years from 2018-2019, 2019- 2020 and 2020 - 2021. Prior to that there were other companies who offered the same service for the last 17 years, with the First Claimant Mr Howard transferring each time. TASIS had 15 routes for their school runs, of which Kura operated 5. The TASIS contract was a school bus contract whereby the transport provider would collect children from their homes and take them to the school in Thorpe. Kura contracted external suppliers (ie, a third party supplier) to complete the home to school bus routes. The contract was solely for the school service. The contract was to complete 3 services a day (morning service school drop-off, starting at approximately 7.30am and then at 15.30 and 17.20 departures from school Monday - Thursday and a morning service and 15.30 service on Fridays). The drivers were responsible for taking the attendance of pupils as they boarded the bus and driving the route. Drivers typically started work from their homes at about 6:30 am and finished work when they returned home at the end of the day about 18:30.

First Respondent - Mr D Howard

12. The First Claimant (Mr Howard) continuous service of employment was from 21 April 2004. He was employed as a minibus driver to transport pupils who attended the TASIS school. The Tribunal was not provided with an up-to-date contract of employment for Mr Howard. There was a previous contract with the main page missing, this contract was issued by a previous employer, Tellings Golden Miller ('TGM'), which was signed by Mr Howard on 26 August 2008. The heading of this contract described Mr Howard as "TASIS term-time driver Non PCV driver'. In evidence, he explained that he was paid 60 hours per week, which was evidenced in his pay slips. He confirmed that his principal purpose was to undertake work on the TASIS contract, which amounted to 25-30 hours of his working week during term time. He was licensed to drive passenger-carrying vehicles, carrying up to a total of 16 fee-paying passengers.

13. Mr Howard asserted that he was full time employee – he was paid 60 hours per week, which was evidenced in his pay slips. Mr Howard confirmed in his evidence that his principal role and purpose was to undertake work on the TASIS contract, which he confirmed amounted to 25-30 hours of his working week during term time. This was confirmed by Mr Andy Creba (MD of Hallmark).

14. Mr Howard confirmed that,

    a. he started and finished his duties from home and took the bus home;
    b. outside of his driving hours, he was responsible for ensuring the buses were booked in for regular servicing, route planning and route driver training.
    c. During the summer school holiday period his driving was limited to transporting the TASIS pupils to and from the airport and on school trips.
    d. During the non-driving hours of his day he would do other work, for example, running errands for his manager such as going to the cash and carry, banking, and ad-hoc tasks.
    e. After 2019 he would, in conjunction with Mr Jackson, perform some revenue protection duties on another contract that Hallmark held.

f. His other work was always arranged outside his main/principal work that of the TASIS contract. Whatever he did was finished in time for him to work on his TASIS role.
g. During the school holidays, he would stay at home and be called in to do the work, if required. He did not have any other separate contract.

15. During furlough, he received 80% of his pay.

Second Claimant - Mr J Jackson

16. The Second Claimant, (Mr Jackson) commenced employment as a PCV driver on 12 November 1995. His employment was the subject of various TUPE transfers. We were provided with a signed contract of employment issued by TGM Group Ltd on 22 November 2013. The contract stated that he was a PCV driver, term-time only, and his hours per week term-time only were 55 hours per week. In evidence Mr Jackson confirmed that he regularly worked 60 hours per week but was only paid for 55 hours. He further stated that several years before 2017 he had been driving on the TASIS contract. He drove on the morning and afternoon school runs, starting work at 6am and finishing at 6pm. The driving hours amounted to 30 hours per week. In the hours he was not driving he did other duties, namely as a bus inspector checking tickets and revenue on other buses within the First Respondent's group.

17. His principal work was on the TASIS contract. The other work (i.e checking tickets and revenue) that he did was organized around the timings of his TASIS runs.

18. He held a PCV licence, which allowed him to drive minibuses and heavy goods vehicles, although he did not wish to drive the latter as he preferred not to drive larger vehicles

The Tender process

19. In March 2021 the TASIS contract came up for re-tender. The First Respondent did tender for the contract but was not successful. The Second Respondent was successful with its tender. The start date of this contract was 1 August 2021. The service for this contract was no different to that provided by the First Respondent save that the Second Respondent was contracted to run all 15 TASIS routes.

20. On 4 May 2021, the First Respondent received a letter from the Second Respondent on their headed note paper. The letter stated as follows:-

'Dear Hallmark,
I am writing to inform you that we have been awarded the contract at TASIS which is currently run by your company. The transfer of this contract is expected to take effect on or around July 2021. We believe that TUPE Regs 2006 may apply to the transfer of the above contract. Therefore we are requesting information regarding any employees who are wholly assigned to the contract at TASIS so we may evaluate if TUPE would apply in this circumstance.'

21. On 19th May 2021, the First Respondent sent to the Second Respondent the requested employee information. It was a one page document. This letter was not produced in the bundle. However it was accepted by the parties a document containing the employee information was provided. Following receiving this document, the Second Respondent by letter dated 20 May 2021 contended that it did not believe that TUPE applied to 4 employees, which included the Claimants. They did not believe that the Claimants were wholly or mainly assigned to the contract on the basis that their working hours were outside the contract offers and not term-time only. It further stated that, in their view, while there is a service provision change, the Claimants were not wholly assigned within the relevant definition of TUPE and did not transfer. The letter continued to say *'while we appreciate that the duty to inform and consult fall solely with Hallmark, we would like to enter into discussions with the transferring employees or their elected representatives with regard to these proposed measures…'*

22. In reply, the First Respondent by letter from Mr Creba which was not dated maintained that the Claimants are 'an organised group of employees' and that the transfer of service on 1 August 2021 would amount to an service provision change and therefore TUPE would apply.

23. By letter dated 4 June 2021, the Second Respondent confirmed that it would like the opportunity to consult with the employees on 7 June 2021 at 9.30 am, to discuss their potential rights if they moved over.

24. The Second Respondent then held consultation meetings with the Claimants on 7 June 2021.

25. In parallel to this correspondence, by letters dated 10 June 2021 from the First Respondent to both Claimants, the Respondent set out its position, maintaining that TUPE did apply to their employment and that their terms of employment should transfer to the Second Respondent on 1 August 2021. They were asked to attend a meeting on Friday 11 June 2021 at 1pm.

25. By letter dated 1 July 2021, the First Respondent sent an update letter to all potentially affected employees (who were the claimants, Penny Turnbull, Dave Elliott). This gave an update on their discussions with the Second Respondent and maintained that their employment should transfer to the Second Respondent. On 11 July 2021, the First Respondent held a further consultation meeting with, the Second Claimant. The First Claimant had a separate meeting on 26 July 2021. Both Claimant were told that their employment should transfer to the Second Respondent.

26. Further correspondence was exchanged between the Respondents with both maintaining their respective positions.

27. During this process, the First Claimant raised a grievance with the First Respondent concerning the process and lack of communication. A meeting was held with him on 7 July 2021, following which his grievance was not upheld.

28. Given the entrenched position of both Respondents there was then a meeting held on 28 July 2021 involving Peninsula Services, the advisers of the Second Respondent. We understand Mr Creba attended this meeting on behalf of the Second Respondent. Their position remained that the employees (i.e the Claimants, Penny Turnbull and Dave Elliott) did not form part of an organised grouping and accordingly that they will not accept any attempt to transfer their employment to them. They maintained that all these 4 employees, were undertaking work on other contracts for other clients and in other locations throughout the year, and that their position was final.

29. Despite, maintaining that the Claimants were not part of an organised grouping whose sole purpose was to provide the TASIS contract, the Second Respondent did offer both Claimants the position of School Bus Driver, at £11per hour; and at 30 hours per week. The offer of employment did not provide for continuity of service.

30. The First Respondent did not find alternative work for the Claimants. Mr Creda asserted he had verbally offered work to the Claimants on a permanent basis however this was denied by the Claimants, who both said the alternative work offered was only in June and July 2021. We preferred the Claimants evidence on this point and do not accept Mr Creda's evidence that alternative work was offered. Had this offer of employment been made given the dispute between the parties and the importance of documented discusisons, we would have expected some documentary evidence to support this claim by Mr Creda,

31. Due to the impasse between the both the Respondents, the Claimants' employment with the First Respondent ceased effective from 31 July 2021.

32. By letter dated 30 July 2021 sent to both Claimants, the First Respondent confirmed the termination of their employment in which it stated *'We understand that this is an difficult time for you and are sorry that we have been unable to agree the transfer with First Choice Bus as you will be aware, that even if TUPE did not apply, there would be no alternative work available with Hallmark Connections Ltd'.*

<u>The Law</u>

33. The legal provisions are contained in the Transfer of Undertakings (Protection of Employment) Regulations 2006, referred to as TUPE.

Regulation 2(1) defines "assigned" as meaning "assigned other than on a temporary basis".

The definition of a relevant transfer in Regulation 3;

(1) These Regulations apply to … (b) a service provision change, that is a situation in which …
(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 … and in which the conditions set out in para (3) are satisfied. …

References in para (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.
The conditions referred to in para (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;

(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use

34. The Tribunal was referred to a number of case authorities which were considered in our deliberations namely;
    (i) Jinks v LB Havering UKEAT/0157/14
    (ii) Eddie Stobart v Moreman [2012] IRLR 356 EAT
    (iii) Argyll Coastal Services v Sterling UKEATS/0012/11
    (iv) Costain Ltd v Armitage UKEAT 10048/14
    (v) Horizon Security services Ltd v Edazend & PCS Group UK 35EAT/00714JOJ

35. The Tribunal took note of the approach to be taken as explained by His Honour Judge Peter Clark's in ***Enterprise Management Services Limited v ConnectUp Limited & Others*** to the effect that:

    (1) An Employment Tribunal's first task is to identify the activities performed by (the in-house employees in an outsourcing situation) or by the original contractor in a retendering or insourcing situation.

    (2) The Tribunal should then consider the question of whether these activities are fundamentally the same as those carried out by the new contractor outsourcing or retendering or in-house employees insourcing. Cases may arise where the activities had become so fragmented that they fall outside the service provision change regime.

    (3) If the activities have remained fundamentally the same, the Tribunal should ask itself whether, before the transfer, there was an organised grouping of employees which had as its principal purpose the carrying out of the activities on behalf of the client.

    (4) Following this, a Tribunal should consider whether the exceptions in regulation 3 apply, namely whether the client intends that the transferee post service provision change will carry out the activities in connection with a single specific event or task of short-term duration and whether the contract

is wholly or mainly for the supply of goods for the client's use.

(5) Finally, if the Tribunal is satisfied that a transfer by way of a service provision change has taken place it should consider whether each individual claimant is assigned to the organised grouping of employees.

36. Other particularly relevant points the Tribunal noted from the case law are that the grouping must be deliberately organised for the purpose of carrying out the relevant activities, the authority for which is the **Argyle Coastal Services v Sterling case**.

37. Even if employees are working 100% of their time on the relevant activities, that will not be enough, by itself, to conclude that they form an organised grouping of employees: **Costain v Armitage**.

38. The grouping should have existed prior to the loss of the contract. In *Eddie Stobart Limited v Moreman*. Mr Justice Underhill, President of the EAT wrote in that case: "*Whereas it is perfectly possible to see how a part of an undertaking may first become a separate entity only at the moment of transfer, it is the essence of a service provision change that the organised grouping should have existed prior to the loss of the contract."*

Decision and reasons

39. The Tribunal recognised what an awful situation the Claimants were put through due to no fault of their own. As a consequence of their employment being terminated they were left with no job and no redundancy pay. The Tribunal accepted that it is possible that both Respondents acted in good faith in their belief. However, one of them must have been wrong in their belief.

40. That said, the Tribunal was required to apply the applicable law to the facts. The questions the Tribunal was required to determine were, was there;
(i) a Tupe transfer; and if so,
(ii) were the Claimants assigned to the organised group which transferred to the Second Respondent.

41. The Tribunal heard submissions from both representatives which were taken into account. The Tribunal approached the claims by asking the following questions;

Was there an economic entity

42. In order for there to have been a relevant transfer of an undertaking or even a part of an undertaking under Regs 3 (1) (a) there must have been a transfer of an economic entity which retained its entity. There is no dispute on this point. On the facts, the Tribunal concluded that there was a relevant economic entity - i.e the provision of a transport service.

What were the activities performed by the First Respondent under the TASIS contract

43. The relevant activity for the purposes of Reg 3(1)(b), the activity carried out by the First Respondent was the provision of a transport service – daily school bus contract transporting children from home to school and return during term time. There is no dispute between the Respondents over the nature of the activity.

Were the activities carried out by Second Respondent after the transfer fundamentally the same.

44. The Tribunal was not provided with a copy of the Contact between The second Respondent and TASIS. Notwithstanding this, the Tribunal found that the activities carried out by the Second Respondent after the termination of the contract with the First Respondent were fundamentally the same as the activities previously performed by the First Respondent. This was not disputed by the Second Respondent in their response to the claims, although Mrs Evans Jarvis at this hearing sought to challenge this on the basis that the First Respondent did not have the contract to transfer, on the basis that the First Respondent was a sub-contractor of Coach Hire (Kura).

45. The Tribunal rejected this argument. The fact is that the contact went back to TASIS and that the Second Respondent was successful in the tender process with them doing the same contact although they now operate 15 routes which included the 5 routes previously serviced by Hallmark.

46. Further, the Tribunal noted, that as a matter of fact, that on 20 May 2021, the Second Respondent accepted there was a relevant service provision change in their le wrote to the First Respondent stating that *"there is a relevant provision change"* but disputed that the Claimants were " assigned within the relevant definitions of TUPE and do not transfer". The Tribunal was therefore satisfied that there was a relevant Service Provision Change.

Immediately before the transfer was there an organized grouping of employees from the First Respondent that had, as its principal purpose the carrying out of the activities on behalf of Kura- namely working on the TASIS contract

47. In deciding on this issue, in particular, the Tribunal carefully considered the case of ***Costain v Armitage UKEAT/0048/14***. On the facts, the Tribunal concluded that there was an organised grouping of employees from the First Respondent and that the identifiable group were the 5 drivers whose principal work was on the TASIS contract, which included both Claimants.

Was each of the two Claimants assigned to the organized grouping of employees?

48. The Tribunal found that both Claimants were assigned to the organized grouping of employees with the principal purpose of carrying out driving for the TASIS contract. The Tribunal come to this conclusion based on the following facts;
    a. they both were contracted to and were assigned to the TASIS contract,

which was their principal work; and

b. the other work, they did, if and when was in addition to their main work to the TASIS contract, and did not interfere with their driving work.

Consequences of the non-transfer

49. The Tribunal unanimously concluded that the TUPE regulations did apply in this case. For the reasons stated there was a relevant TUPE transfer situation as of 1 August 2021 and that the Claimant's employment should have transferred to First Choice under Regs 4.

50. The Second Respondent did not put forward any unconnected reason for the termination of the Claimant's employment. Neither was an ETO reason advanced in their defence. Mrs Evans Jarvis accepted that if the Tribunal found for the Claimants, then their dismissal was automatically unfair.

51. Accordingly, the Tribunal found that the real reason for the dismissal of the Claimants was the transfer itself. In relation to this claim, the First Respondent was discharged from these proceedings. Accordingly, the Claimants remedy is against the Second Respondent.

Failure to inform and consult – Regs 15 & 13 TUPE Regs

52. On the facts, the Tribunal did not find that the claims under this head have been made out by the Claimants and are therefore dismissed.

53. Accordingly, the Tribunal unanimously found the Claimants claim for automatic unfair dismissal against the Second Respondent was well founded and succeed.

54. The Judge apologises for the delay in sending these written reasons. This delay has not been intentional but due to an oversight with the administration process.

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Employment Judge Bansal
Date 28 March 2024

JUDGMENT & REASONS SENT TO THE PARTIES ON
28 March 2024
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FOR THE TRIBUNAL OFFICE