



# **EMPLOYMENT TRIBUNALS**

**Claimant: Stephen Bryce P C Coaches of Lincoln Ltd**

**Respondent: T C Mini Coaches Ltd**

## **Record of an Attended Hearing at the Employment Tribunal**

**Heard at: Lincoln**

**Heard on: 13 & 14 December 2023**

**Before: Employment Judge Hutchinson**

**Members: Mr A Blomefield**

**Mr C Tansley**

**Appearances:**

**Claimant: Mr Webb, Counsel**

**Respondents: Miss Niaz-Dickenson, Counsel**

# **JUDGMENT**

The unanimous Judgment of the Tribunal is:

1. The Respondent has failed to notify to the Claimant the employee liability information contrary to regulation 11 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

2. The Tribunal makes an award and the Respondent will pay to the Claimant **the sum of £7,500.00 as compensation.**
3. The Tribunal also declares that any changes made to the terms and conditions by the Respondent during the consultation period were unlawful as the only reason for those alleged enhancements was the impending change of service provision and they are therefore null and void pursuant to regulation 12 of TUPE.

## **REASONS**

### **Background to this Claim**

1. The Claimant presented its claim to the Tribunal on 24 May 2023. It is a bus and coach operator based in Lincoln with additional depots at Louth, Grimsby and Horncastle employing around 150 full-time employees. The Claimant operates a wide range of work including a Call Connect contract of behalf of Lincolnshire County Council.
2. The Respondent is a mini coach operator based in Market Rasen who prior to 27 March 2023 also operated a Call Connect contract on behalf of Lincolnshire County Council that required around 15 drivers.
3. The Claimant was successful when it successfully tendered for several local bus contracts under the Call Connect band and one of the companies who operated these contracts were the Respondent.
4. The transfer took place on 27 March 2023.
5. It was not in dispute that TUPE applied to the group of employees following the change in service provider.
6. Under regulation 11 of the TUPE regulations the Respondent was obliged to provide the required employee liability information to the Claimant.
7. At the commencement of the hearing the Respondent's Counsel accepted that they had failed to provide the required information. It is the Respondent's case that the Respondent was also responsible for providing inaccurate and/or misleading information.
8. It was also the Claimant's case that the Respondent having failed in its tender had wrongly and without any commercial rational or notification to the Claimant purported to grant a pay rise to the group of transferring employees during the consultation period.

9. This has resulted in the Claimant seeking a declaration that the pay rise is void under the provisions of regulation 12 of the TUPE regulations.
10. Apart from the two declarations sought the Claimant was also seeking an award of compensation under regulation 12 of TUPE.

### **Evidence**

11. The Tribunal heard evidence from the following witnesses.

11.1. For the Claimant:

- Phillip Shirley, the Claimants Operations Manager.
- Stephen Bryce, the Claimants Managing Director, and Qualified Transport Manager.
- Peter Charles Smith the Owner and Founder of the Claimants.
- Andrew James Rae the Claimants Transport Manager.

11.2. For the Respondent the Tribunal heard from:

- Janice Pask, former employee of the Respondent.
- Anthony Silk, Call Connect Driver.
- Tina Warren, Director and owner of the Respondent.

12. Where there was a conflict of evidence the Tribunal preferred the evidence of the Claimants witnesses. Their evidence was consistent, not only with each other, but with the written documentation provided. That could not be said for the evidence of Tina Warren whose evidence, particularly relating to the alleged pay rise given to the drivers who were to be transferred to the Claimant, was not credible.

### **The Facts**

13. The Claimant is a bus and coach operator based in Lincoln established in 1978 with additional depots at Louth, Grimsby and Horncastle employing around 150 drivers known as FTE's. The Claimant operates a wide range of work including a Call Connect contract on behalf of Lincolnshire County Council.
14. The Respondent is a mini coach operator based in Market Rasen who, prior to 27 March 2023, also operated a Call Connect contract on behalf of Lincolnshire County Council that required around 15 FTE's.
15. Tina Warren is the Director of the Respondent Company which is small family run coach and bus hire business. She has worked for the Company for 20 years and they had operated various Call Connect contracts for the last 16 years with Lincolnshire

County Council.

16. The contract in this case concerned the provision of a bus to use on a service which provides on demand services to the rural county of Lincolnshire. The Respondent had 15 employees engaged in this contract.
17. Both the Claimant and the Respondent tendered for the new contract and on 6 February 2023 the Claimant was notified by Lincolnshire County Council that it had successfully secured several local bus contracts operated under the Call Connect brand.
18. These contracts had been operated by two companies namely the Respondent and F Hunt Coach Hire Limited.
19. Those two companies were also notified on the same date that they had been unsuccessful in retaining these contracts.
20. The Claimant believed that the TUPE regulations would apply to this contract and they contacted the outgoing contractors and asked them to provide the employee liability information.
21. On 15 February 2023 Mr Shirley tried to call Miss Warren but without success and sent an email to her which is at page 49 of the bundle. The email requested the Respondent to provide copies of the contract of employment, shift patterns and other relevant information such as hourly rate, annual leave and local agreements.
22. The Respondent did not reply to this request.
23. On 18 February 2023 the Respondent sent an email to its drivers which is at page 50. The email confirmed that TUPE would apply and their employment would transfer to the Claimant. It ended by saying:

*“The last day in our employment is Saturday 25 March, you go to them under our terms and conditions they can’t make you do anything different; they can ask but you can refuse, they cannot change what you are doing.*

*We will be giving you a pay rise before you go as we are going to do this in April anyway, hoping it doesn’t take you too long to adjust to your employer. ....”*
24. On the 21 February Mr Shirley wrote again to the Respondent requesting initial documentation required for the current drivers on the Call Connect contracts. The email is at pages 52-53.
25. It can be seen from the messages at page 51a that Miss Warren was in discussion with one of her employees. She was asked about the pay rise mentioned in the aforementioned email of 18 February. Miss Warren’s response was:

*“It all depends how much PC pee me off and they are not doing a very good job so far! – the sky’s the limit!”*

26. In the final message at 27 February 2023 Miss Warren says:

*“Hi just in case PC asks you, your money has been increased £12.00 per hour due to the cost of living”.*

27. Mr Shirley did receive a response from Miss Warren to his email of 21 February. It confirmed that she intended to pass on the necessary information and explained that she was having Cancer appointments but that she would supply the necessary information as soon as possible.

28. Mr Shirley acknowledged this email and said that he appreciated the circumstances.

29. In the meantime employees of the Respondent started to contact the Claimant to ask them if they knew what was going on as they had not heard anything from the Respondent. One of these was an employee called Gill Garrell who visited the Claimant’s Lincoln depot on 24 February 2023. She had a discussion with Mr Shirley and told him of her intention to transfer over. Upon checking her documentation, it became apparent that her CAT D entitlement on her driving licence had expired in September 2022 which meant she had been driving illegally for at least five months. She was told that she would need to obtain the correct driving licences before she could be allowed to drive a vehicle for the claimant.

30. A former employee of the Claimant who Mr Smith believed was in the affected group of employees was Tony Silk who was working for the Respondent as a minibus driver on one of the contracts the Claimant had been awarded. Mr Smith’s partner and also a Director of the Company, Susan Trainer reached out to him and asked him if he intended to transfer. Mr Silk said that he did and he was invited to Mr Smith and Miss Trainer’s house on 24 February 2023.

31. At the meeting Tony Silk confirmed that his rate of pay was £10.00 per hour and that the Respondent had told Tony that if they retained the contracts then they would look at giving the affected employees a pay rise although nothing had been confirmed at that stage.

32. As a result of this, and the lack of information they had been able to obtain the Claimant called an open evening on Tuesday 28 February 2023 at which 15 drivers attended and confirmed their intention to transfer to the Claimant’s employment on 27 March.

33. When talking to the affected employees at the open evening they all confirmed their current hourly rate of pay was £10.00 per hour and it was confirmed to them that this would increase from 1 April 2023 inline with the increase in National Minimum Wage.

34. In the meantime on 24 February 2023 Tina Warren had written to Phil Shirley (page 56) saying that the drivers were all now on £12.00 per hour. At that time all the drivers were being paid at the rate of £10.00 per hour.

35. On 1 March 2023 Mr Shirley responded to the email from Miss Warren confirming

that during the Claimants discussions with the drivers they had each confirmed that their current rate of pay was £10.00 per hour not £12.00 per hour as indicated in the email of 24 February. He asked for copies of correspondence about the intention to increase the hourly rate. The email is at page 59.

36. Miss Warren's response was as follows, also at page 59:

*"Good Morning Phil.*

*Rates of pay I have given you, even if I decided to put the rate of pay up the day before the transfer, you are liable for all terms and conditions before transfer date. ...."*

37. Miss Warren then agreed to meet Mr Smith and Mr Bryce at the companies Louth depot and promised to bring the contracts of employment and other information relating to the affected employees.

38. The meeting was short. Tina Warren handed over a pile of contracts and when asked for clarity on the rates of pay responded:

*"Well you obviously do not know how TUPE works then".*

39. When the documentation was considered there was no mention of a pay rise and when they asked Miss Warren if she had written to the drivers confirming a pay rise she replied "No".

40. The transfer took place on Monday 27 March 2023.

41. In total 15 employees transferred over and 7 of them maintained there was never a pay rise and signed new contracts of employment with the Claimant. The other 8 employees were adamant that there was a pay rise and in the following days notified the Claimant that they were working "under protest".

42. Those drivers have now issue proceedings in the Employment Tribunal claiming non-payment of wages.

## **The Law**

43. The relevant regulations of TUPE are regulations 11 and 12.

44. Regulation 11 provides:

*"(1) The transferor shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a relevant transfer;*

*(a) In writing; or*

*(b) By making it available to him in a readily accessible form.*

*(2) In this regulation and in 12 "employee liability information" means;*

*(a) The identity and age of the employee,*

*(b) Those particulars of employment that an employer is obliged to give to an employee pursuant to section 1 of the 1996 Act;*

*(c) Information of any;*

*(i) Disciplinary procedure taken against an employee*

*(ii) Grievance procedure taken by an employee*

*within the previous 2 years in circumstances where a code of practice is issued under part IV of The Trade Union and Labour Relations Act 1992 where it relates exclusively or primarily to the resolution of disputes applies.*

*(d) Information of any Court or Tribunal case....*

*(e) Information of any collective agreement which will have effect after the transfer in its application in relation to the employee pursuant to regulation 5(a).*

*(6) Any notification under this regulation shall be given not less than 28 days before the relevant transfer or, if special circumstances make this not reasonably practicable as soon as reasonably practicable thereafter.”*

45. Regulation 12 provides:

*“(3) Where an employment tribunal finds a complaint under paragraph (1) well-founded, the tribunal—*

*(a) shall make a declaration to that effect; and*

*(b) may make an award of compensation to be paid by the transferor to the transferee.*

*(4) The amount of the compensation shall be such as the tribunal considers just and equitable*

*in all the circumstances, subject to paragraph (5), having particular regard to—*

*(a) any loss sustained by the transferee which is attributable to the matters complained of; and*

*(b) the terms of any contract between the transferor and the transferee relating to the transfer under which the transferor may be liable to pay any sum to the transferee in respect of a failure to notify the transferee of employee liability information.*

*(5) Subject to paragraph (6), the amount of compensation awarded under paragraph (3) shall be not less than £500 per employee in respect of whom the transferor has failed to comply with a provision of regulation 11, unless the tribunal considers it just and equitable, in all the circumstances, to award a lesser sum.*

*(6) In ascertaining the loss referred to in paragraph (4)(a) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to any damages recoverable under the common law of England and Wales, Northern Ireland or Scotland, as applicable.*

## **Our Conclusions**

46. We are satisfied that the Respondent has not complied with regulation 11 by its email to the Claimant on 24 February 2023. The email does not comply with regulation 11 in that it fails to provide details of:

- The employees age.
- Details of disciplinary and grievance procedure within the last two years.
- Particulars of employment pursuant to section 1 including pension, holiday and sick pay entitlement.

47. Although the Respondent provided the Claimant with copies of the contract of employment on 7 March 2023 the information such as the age of the transferees is not included. In any event the contracts were provided 20 days before the transfer which is in breach of regulation 11(6).

48. The Respondent also did not provide the Claimant with any details of the alleged pay rise merely informing the Respondent the hourly rate was £12.00 per hour but not explaining that this hourly rate was subject to a recent alleged pay rise.

49. No special reason has been advanced as to why compliance could not have been achieved prior to the deadline.

50. The Tribunal is satisfied that there was no valid pay rise to £12.00 per hour. Although some of the staff may have been notified there was no agreement in writing with the staff of the terms of any pay rise and when they attended the meeting of 28 February 2023 only one employee, Mr Silk was aware of the pay rise.

51. The Tribunal is satisfied that whilst 8 of the transferees subsequently stated there was a pay rise 7 of them stated there was not and signed new contracts with the Claimant.

52. We are satisfied that there was not a pay rise before the transfer but even if it was it is clear from the evidence that any pay rise awarded the sole or principal reason for it was the transfer.

53. Under regulation 4(4) of TUPE any purported variation of a contract of employment is void if the sole or principal reason for the variation was the transfer.

54. Miss Warren was clearly mistakenly under the impression that she could make an award of a pay rise to her employees prior to the transfer and that the Respondents were liable for that increase in pay. She was wrong.

55. In this case there had been no pay rise for the Respondents drivers in October 2022



and there was only a vague promise of a pay rise if she did not lose the contract in February 2023.

56. The message that was contained at page 51a between Tina Warren and one of her drivers clearly shows that any pay rise would be in retaliation for her losing the contract when she says:

*"It all depends how much PC pee me off and they are not doing a very good job so far! sky's the limit!"*

57. We are satisfied that the Claimant is entitled to a declaration that pursuant to regulation 12 of TUPE that the Respondent did not comply with regulation 11 of TUPE.

58. We also declare that the Respondent had not increased the wages of its employees prior to the transfer and even if it had done so during the consultation period it was unlawful as the only reason for the alleged enhancements was the impending change of service provision and they are therefore null and void pursuant to regulation 12.

59. The Tribunal considered what was the appropriate award. In this case there were 15 employees and under regulation 12 the minimum is £500 per employee unless there are exceptional circumstances.

60. In the schedule of loss the Claimant claims losses relating to the hourly rates they are having to pay to the former employees of the Respondent. By making our declaration we are satisfied that they are not going to suffer any losses at all. There are no circumstances in this case why we should not make the award of £500 per employee and therefore the Respondents will pay to the Claimant the sum of £7,500.

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Employment Judge Hutchinson

Date: 24 January 2024

JUDGMENT SENT TO THE PARTIES ON

....31 January 2024.....

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FOR THE TRIBUNAL OFFICE

**Note**

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.

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