



EMPLOYMENT TRIBUNALS

Claimants: 1. Ms V Cunningham
2. Mr M Cunningham
3. Mr B Webb

Respondent: Care Preference Limited

Heard at: Leeds (by video) **On:** 29 July 2024

Before: Employment Judge T Knowles

Representation

Claimants: In person

Respondent: Mr N James, Chief Executive Officer

RESERVED JUDGMENT

The Claimants' claims for payments in lieu of accrued but untaken holiday leave upon termination of employment are not well founded and fail.

RESERVED REASONS

Issues

1. The issue for me to determined today is whether or not the Claimants are entitled to a payment in lieu of accrued but untaken holiday leave upon termination of employment.
2. The Respondent accepts that the Claimants left their employment on 1 October 2023 and at that time had accrued but untaken leave.
3. However, the Respondent contends that on 1 October 2023 the Claimants employment transferred to their former client along with their holiday entitlement under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").
4. The key issue in this matter is therefore was there a relevant transfer under TUPE. If there was, the claims for holiday pay would fail. If there is, then the claims for holiday pay would succeed and remedy could be calculated.

Evidence

5. This matter was heard by video using HMCTS's cloud video platform. No technical issues were encountered with the service today.

6. I heard evidence from the First and Third Claimants who affirmed. The Second Claimant did not give evidence as he had nothing to add to the evidence given by the other Claimants. None of the Claimants produced a written witness statement.

7. The Respondent's Chief Executive Officer gave sworn evidence and produced a written witness statement.

8. The Respondent produced a bundle of documents, consisting of 22 appendices amounting to 82 pages of documents. Page numbers are referred to in this Reserved Judgment in the format appendix number : page number. E.g. A9:2 would be a reference to page 2 in appendix 9.

9. This matter was allocated 2 hours hearing time, most of which was used listening to the parties. I had insufficient time within that allocation to consider and deliver my Judgment and explained to the parties that my Judgment and Reasons were therefore reserved to be sent to them in writing.

Findings of fact

10. I made the following findings of fact on the balance of probabilities. This is a summary of the facts relevant to my determination on the issues only. I do not set out in full the evidence which I heard or read, only the key points which explain the determination I made.

11. The Claimants were each employed by the Respondent to provide care to a vulnerable individual who was the Respondent's client.

12. They worked as personal care assistants, and in the case of the Third Claimant, were trained to provide Tracheostomy and ventilator support. The client required 24/7 care, from two people through the day and one through the night. This was full care provision, with manual handling, toileting, showering and bathing etc, together with support at home, cleaning and cooking etc, and health support including medication, PEG feeding, ventilator, trachea, suctioning and oxygen support.

13. The Respondent's client opted to end his contract with them and instead to directly employ the Claimants to continue to provide his care. There was debate between witnesses as to who made that decision. That is not an issue for me. There are emails from the First Claimant informing the Respondent of the decision which appear to relate it mainly to her own financial situation, i.e. that she could receive more wages through being directly engaged by the client. It also appeared that towards the end of the contract with the Respondent, there were staffing shortages, the First Claimant explains that these were due to wage levels, which were impacting the length number of the shifts those involved in the client's care provision needed to cover.

14. The Respondent reluctantly agreed to this taking place, even though they may have made contractual representations about whether or not this was permissible. They reluctantly agreed to ensure a smooth transition involving continuation of care.

15. On 30 September 2023 the Claimants ceased to be employed by the Respondent and were instead employed directly by the Respondent's client beginning work for him on 1 October 2023.

16. There were at that time 7 people involved to certain degrees in providing care to the client. These were the 3 Claimant's and 4 other people employed by the Respondent. 2

of the Respondent's other employees were managers who only provided cover for absences on an ad hoc basis in addition to their other duties.

17. From 1 October 2023, the client directly employed the 3 Claimants and in time engaged a further 3 employees to ensure that his care needs were covered.

18. The Claimants received their P45s. The Third Claimant also received, following discussions on 30 August 2023 (A19), an email (A1:29) which explained that his employment with the Respondent is "*coming to an end on 30 September 2023*".

19. In the months that lead up to then, there were several discussions regarding the transfer of the arrangements.

20. None of those discussions involved directly addressing the application or impact of TUPE. It appears the Claimants were unaware of the potential application and impact of TUPE. The Respondent mentioned it first on 24 October 2023, when sending employee liability information (accrued holiday entitlement) to their former client (A1:33). The Respondent say that they were always discussing transfer to their client's employment with the Claimants in the build up to the change in arrangements, albeit there is no specific reference to TUPE until afterwards.

Submissions

21. The Respondent submits that their former client is the Claimants' new employer and that they have no liability for accrued but untaken holidays because their new employer must honour those entitlements by way of granting them leave.

22. The Claimants submit that their employment with the Respondent ended and they began a new contract as new starters for the client. There was no transfer and nobody mention TUPE to them until the Tribunal proceedings were issued.

The Law

23. TUPE provides the following in relation to a relevant transfer and the effect of a relevant transfer:

A relevant transfer

3.— (1) *These Regulations apply to—*

...

(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.

...

(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.*

Effect of relevant transfer on contracts of employment

- 4.— (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.*

24. Guidance as to my task today can be found in ***Enterprise Management Services Ltd v Connect-Up Ltd and ors 2012 IRLR 190, EAT***, to the effect that:

an employment tribunal's first task is to identify the activities performed by the in-house employees (in an outsourcing situation) or the original contractor (in a retendering or insourcing situation)

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 have become so fragmented that they fall outside the SPC regime

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

following this, a tribunal should consider whether the exceptions in Reg 3(3)(b) and (c) apply: namely, whether the client intends that the transferee, post-SPC, 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

finally, if the tribunal is satisfied that a transfer by way of an SPC has taken place, it should consider whether each individual claimant is assigned to the organised grouping of employees.

Conclusions

25. The Respondent was the original contractor for providing care services to the client.
26. The activities performed under the contract by the Respondent are fundamentally the same as those procured by the client from the Claimants.
27. No differences have been explained to me in the care provided before or after 30 September 2023.
28. The Claimants and the Respondent were easily able to identify the group of personal care assistants assigned to the care activities by the Respondent. Both parties agree who was performing the care activity on 30 September 2023. That group of the Respondent's employees (in particular the 5 who were engaged as personal care assistants only as opposed to the managers who provided ad hoc support in addition to other duties) had as their principle purpose the care activity provided to one client.
29. None of the exceptions in Regulation 3(3)(a)(ii) or 3(3)(b) are relevant in this case.
30. I am satisfied that a relevant transfer by way of a service provision change has taken place.
31. The Claimants were assigned to the organised grouping of employees which had as their principle purpose providing care activity for the client.
32. In circumstances where there has been a relevant transfer, Regulation 4(1) prevents there being any termination of employment.
33. A claim for a payment in lieu of accrued but untaken holiday pay is only possible where there has been a termination of employment however the termination is overridden by Regulation 4(1).
34. This means that the Claimants' claims for a payment in lieu of accrued but untaken holiday leave are not well founded and fail.
35. The Respondent's liability to provide leave to the Claimants has transferred to the new employer.

Employment Judge T Knowles

29 July 2024