



EMPLOYMENT TRIBUNALS RECONSIDERATION

Claimant: Ms K Shuttleworth

First Respondent (R1): NHS West Yorkshire Integrated Care Board

Second Respondent (R2): The Leeds Teaching Hospitals NHS Trust (the subject of a reconsideration of an application to join R2 as second respondent and amend the claim, R2 being labelled as such for convenience and not because until determination it is or is not joined as the second respondent and an amendment of the claim has or has not been made)

Heard at Leeds by CVP

ON: 4 June 2025

BEFORE: Employment Judge Shulman

REPRESENTATION:

Claimant: Mr C Kennedy, Counsel
R1: Ms Crawshay-Williams, Counsel
R2: Mr A Sugarman, Counsel

JUDGMENT ON RECONSIDERATION

On a reconsideration pursuant to Rule 68(1) of the Employment Tribunal Procedural Rules 2024 (Rules) and Rule 68(2) of the Rules:

1. The Judgment made on 17 December 2024 is confirmed.
2. A case management hearing by CVP shall be heard on **13 August 2025 at 10.00am** to regulate matters for and fix the final hearing which shall be listed for two hours.

REASONS FOR RECONSIDERATION

1. Reconsideration

- 1.1. As the parties are aware I have decided that there are parts of my decision dated 17 December 2024 (decision) that do merit a reconsideration, and these are set out in my further directions which I will revisit in this decision as necessary.
- 1.2. The parties suggested at the outset of the reconsideration hearing that the principal questions for me to consider should be whether R2 should be added as a party and whether the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) claims should be admitted. Effectively each of these (principal questions) are encompassed in the relevant parts of the decision. I will deal with the principal questions as part of the paragraphs of the decision, which may or may not merit reconsideration as per the further directions.
- 1.3. By Rule 68(1) of the Rules the Tribunal may reconsider any Judgment where it is necessary in the interests of justice. By Rule 68(2) of the Rules the Judgment may be confirmed varied or revoked. In the case of **Outasight VB Limited v Brown UKEAT/0253/14/2A** (Outasight) HHJ Eady QC decided that the wording “necessary in the interests of justice” allows Employment Tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially “which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation (or in this case parties) and the public interest requirement that there should so far as possible, be finality of litigation.”

2. Matters Relevant to the Principal Questions

- 2.1. The Tribunal may add any person as a party by way of substitution or otherwise if it appears that there are issues between that person and any of the existing parties falling within the jurisdiction of the Tribunal which it is in the interests of justice to have determined in the proceedings.
- 2.2. The law relating to whether to amend which is referred to below is also set out at paragraph 3.1 of the decision. I also have regard to paragraphs 11 to 17 of Mr Sugarman’s skeleton argument (skeleton). Paragraph 17 also deals with amendment in relation to the adding of a party.

3. Parts of the Decision Specified in the Further Directions Taking Into Account the Principal Questions Adopting the Same Lettering and Numbering as in the Further Directions

- 3.1. P5.5 Reference P(v) where it last appears – TUPE overview – what the claimant appears to be saying is that long enough before a relevant transfer to enable the employer of any affected employees to consult

appropriate representatives of any affected employees the employer shall take certain steps (see Regulation 13(2) TUPE) in the manner of information. Regulation 13(6) TUPE requires consultation, although it is not clear as to whether the claimant alleges more than failure to inform and not breach of the duty of consultation. In terms of the amendment to introduce a TUPE claim or claims, the claim or claims are new. Further it should be asked when did the right to claim arise, if at all? P33 of the amended grounds of claim marked 16 September 2024 (AGOC) recites that the TUPE transfer had been due to take place on 31 March 2024 and the claimant was aware that her colleagues had been told of their position and post transfer in December 2023 and January 2024. The claimant had had a short meeting with R1 on 29 May 2024. At some time during the consultations, which times are unclear, the claimant was on annual leave. That could only have been for a short period and not during the whole period between December 2023 and 29 May 2024 (see P33 and P34 AGOC). We do know that some consultation was to commence on 7 May 2024 and that there was a meeting on 4 June 2024, but it is unclear as to whether that was with the claimant. Similarly, there was no feedback on 14 June 2024, but it is unclear if that related to the claimant. If the starting gun for a claim is three months from the date of transfer (Regulation 15(12) TUPE) then that would run from 1 July 2024 and the proposed amendment in the form of AGOC was filed on 16 September 2024. Therefore, the TUPE aspect of the claim as per the further directions is ostensibly in time. It seems from this that we seem to be looking at an alleged breach of Regulation 13(2) TUPE and by Regulation 15(1) TUPE for such an alleged breach a complaint may be presented to an Employment Tribunal for failure to elect representatives by any employees who are affected employees. Alternatively, this could be in relation to any other failure relating to employee representatives, relating to trade union representatives by the trade union or in any other case by employees who are affected employees or if indeed any of these are the case. It is unclear as to whom or what is the detail of the alleged failure. Depending on the answer to these questions the claimant may or may not have the right under Regulation 15(1) TUPE. On the amended pleading or AGOC the locus of the claimant to pursue that alleged right is unclear.

- 3.2. P5.6 Reference to failure to comply with TUPE on line 4 of P38 AGOC – this is part of the amended pleading although the amended pleading is unclear as to the detail of how R1 and/R2 have failed to comply and how the claimant claims a right under Regulation 15(1) TUPE. The amended pleading says that the claimant was not informed (P39(v) second AGOC) but not the basis of the right to claim (see point 3.1 above).
- 3.3. P6.1 Ref P(v) of AGOC where it last appears – failed obligations. It is not known how R1 and/or R2 have failed in their obligations and the statement that the claimant was informed of the fact of transfer and the date does not been clear next to P33 and P34 AGOC because those paragraphs do not specify what the claimant was told.
- 3.4. P6.2 Ref to the last P of AGOC where it last appears – Regulation 4(2) TUPE. This is a reference to Regulation 4(2) TUPE whereby all the transferor's liabilities under or in connection with a person employed's contract of employment shall be transferred to the transferee. That is

subject to an employee who informs the transferor that he objects to becoming employed by the transferee (Regulation 4(7) TUPE). This is silent in this case. Let us pre-suppose that the claimant has not objected so her right to powers, duties and liabilities pass. Therefore, by operation of law, in the absence of an objection, the claimant's right to powers and liabilities did pass. That does not necessarily mean that the claimant has a right of action under Regulation 13(2) TUPE, because the locus of the claimant to the rights under Regulation 13(2) TUPE are unclear and there may be no right of action even if Regulation 4(2) TUPE applies.

- 3.5. P6.3 Whether or not the Employment Tribunal should join R2 as a party. That is a principal question. Having regard to Outasight the Tribunal has a broad discretion having regard to the interests of the claimant but also the interests of other parties and to the question of finality of litigation. Just because a transfer may have taken place does that mean that R2 necessarily should become a party in the litigation? For that to happen one has to balance the interests of the parties. Mr Sugarman argues on the question of the amendment, not the issue of joinder, on hardship (see Mr Sugarman's skeleton at paragraphs 36 and 37. I see very little difference on the question of hardship between joinder and general amendment. If the claimant loses R2 as a party she will still have R2 in place. If R2 is joined R2 will have to join live proceedings with the expense it brings and the research required going back to November 2022, having little or no knowledge of what went before.
- 3.6. P6.4 May there be a transfer of an undertaking and if so can R2 object? It looks like on 1 July 2024 there was a relevant transfer within the meaning of Regulation 3(1)(a) TUPE, which means there was a transfer of the undertaking from R1 to R2. This does not necessarily mean that the claimant has a right of action against R1 and/or R2 under Regulation 13(2) TUPE as has been said. Unlike the position within an employee, a transferee, in this case R2, cannot object to the transfer of an undertaking. In the decision (paragraph 6.4) the reference to R2 objecting did not purport to be a statutory objection but was an objection in practice to the consent of transfer, which cannot affect what happened under Regulation 3(1)(a) TUPE which occurs by operation of law.
- 3.7. P6.5 Can R2 object to the allegation of a breach by it of the TUPE information and consultation provisions? R2 takes the point that AGOC does not pursue a breach of the consultation provisions. The relevant provisions relating to information and consultation (if applicable) are in Regulations 13(2), 13(4) and 13(6), if applicable. Because of the TUPE transfer R2 would still have the opportunity to defend itself but the locus of the claimant would still require to be considered.
- 3.8. P6.6 Inactivity by the claimant. We know the transfer took place on 1 July 2024. Nothing happened between 1 July 2024 and the preliminary hearing on 27 August 2024 when R2 was incorrectly named. The claimant still took until 16 September 2024 to amend her claim (two and a half months) and then it took the claimant until 13 December 2024 (another three months) to amend to name the correct title of R2. That is five and a half months delay in total. That is a long period when a party is represented. But I also have to take into account that R2 put in its draft grounds of resistance on 14 October 2024, so arguably the delay was

three and a half months. However, we have no explanation, even for that delay of three and a half months.

- 3.9. P6.7 Why did the claimant name the incorrect R2? There was no explanation as to this. The fact of naming the incorrect R2 appears to have been a mistake. There will have come a time when the claimant obviously became aware of what was the real name of her new employer, but she fails to explain in any pleading why it that was or what the circumstances of her finding out were. Throughout the period the claimant was represented as I have said and for a period R1 and/or R2 were waiting for the claimant to put matters right.
- 3.10. P6.8 Compliance with early conciliation in relation to R2. Subsequent to the hearing on 17 December 2024 I understand that the claimant did in fact disclose that it had complied with the early conciliation provisions, although I am unaware in whose name the certificate is, because I was not shown a copy at the reconsideration hearing. Either way in this case I find that early conciliation compliance will not be a deciding factor when considering what is and what is not in the interests of justice and/or necessary in the interests of justice.
- 3.11. P6.9 Time. Although the Tribunal has rehearsed the time it took for the claimant to amend her claim so as to ensure she was pursuing the correct R2, in relation to statutory time limits for TUPE the claimant was in time.
- 3.12. P6.10 Does paragraph (v), of AGOC when it last appears give rise to claims under Regulation 13 and 13A TUPE? This is dealt with at paragraph 3.1 above. In the absence of the matters specified in Regulations 15(1)(a)(b) and (c) TUPE the claimant does have a right to complain for failure under Regulations 13 and 13A TUPE, under Regulation 15(1)(d) TUPE but this is only a right and the issues in paragraph 3.1 above still have to be dealt with.
- 3.13. P6.11 Where does the claim lie? The claim most likely lies pursuant to Regulation 13, subject to 3.1 above. The right to make a complaint is dealt with under paragraph 3.12.
- 3.14. P6.12 – P v a)b)c) AGOC where paragraph v) (last appears) – bearing in mind the timings referred to in clause 3.1 there is nothing clear in the amended grounds of claim which assists in the claimant's assertion that she was not informed of the reasons for transfer, the legal economic and social implications of the transfer and measures (or lack thereof) that the transfer envisages will be taken.
- 3.15. P6.13 Were representatives consulted? There is nothing in the amended grounds of claim or AGOC which suggest that there were representatives or that if there were that they were or were not consulted. R2 says that the amended grounds of claim or AGOC do not make a claim about lack of consultation, as we have said.
- 3.16. P6.14 Time, merits, drafting of AGOC and hardship – the issue of time does not relate to whether or not the TUPE claim is out of time, save for whether that is affected by the extra time the claimant took to get to the correct R2, which is referred to at paragraph 3.8. As to the merits on the face of AGOC it is not clear whether the claimant has a right pursuant to Regulation 13(2) TUPE and accordingly whether there is a breach by

either R1 and/or R2. The drafting of AGOC could be clearer as regards the numbering and lettering from paragraph 37 onwards but the drafting is not going to have a meaningful impact on whether the amendment of AGOC should or should not be allowed in the interests of justice. As to the question of hardship this is dealt with in paragraph 3.5.

- 3.17. P6.15 The claimant's rights under Regulation 4 TUPE. Regulation 4 TUPE does transfer the claimant's contract to R1 and/or R2 (if applicable) but that of itself does not necessarily mean that R1 and/or R2 are in breach of Regulation 13(2) TUPE.
- 3.18. P6.16 The transfer of Regulation 4 rights – see paragraph 3.17.
- 3.19. P6.17 Regulations 13 and 13A TUPE. It is at this point where it is unclear from AGOC that there is a breach of Regulation 13(2) and/or Regulation 13A TUPE, so that the provision of Regulation 14 TUPE does not engage until it is clear that there is a breach.
- 3.20. P7.3 Ref P21 of AGOC Despite the suggestion that claimant was not claiming a breach of the consultation provisions pursuant to Regulation 13(6) TUPE AGOC reveals that there may have been consultation as long ago as 9 November 2023. This was around proposed restructure, that the claimant would move over and what were the transformational functions that would move over. In P27 AGOC the claimant appears to have been consulted about TUPE across to a Band 7 role as assistant project manager on 8 February 2024. Further consultation was planned to require the transfer to be deferred from 31 March 2024. On 29 May 2024 at a short meeting the claimant's job description was discussed. The fact that there was some consultation may be why the claimant has not claimed lack of consultation at P v) AGOC when it last appears.
- 3.21. P7.7 P38 AGOC Failure to comply with TUPE – the relevant part of P38 which are on the last line and in green just make the bland statement that R1/R2 “have failed to comply with the TUPE Regulations”. The pleading does not say how and this could be the claimant's problem as she has not spelt out in detail R1 and/or R2's alleged breach.
- 3.22. P7.11 Ref last P before P40 of AGOC referring to TUPE only. The claimant uses Regulation 4 TUPE and pre-supposes that this throws up liability, but then there will be no liability unless Regulation 13(2) TUPE engages. If Regulation 13(2) TUPE does not engage there will be no liability.

4. Determination of the Reconsideration

(After listening to the factual and legal submissions made by and on behalf of the respective parties):

- 4.1. I have gone into detail as to the matters which were outlined for reconsideration in paragraphs 3.1 to 3.22 above. They provide the background for the principal questions, and I am not proposing in the determination to revisit that detail unless it is clearly relevant to the answers to the principal questions. The first question is whether the TUPE claims as set out in AGOC and specified in the further directions should be admitted. In other words, should those parts of AGOC set out in paragraph 4 of the further directions be allowed?

- 4.1.1. The law deciding on whether to amend is as mentioned in paragraph 2.2 above and set out at paragraph 3.1 of the decision and supplemented by paragraphs 11 to 17 of the skeleton.
- 4.1.2. In particular the leading case of **Selkent Bus Company Limited v Moore [1996] ICR 836 EAT** (Selkent) sets out the factors relevant to deciding whether to amend:
- The nature of the amendment – those which amount to the correction of clerical typing errors, the addition of factual details to existing allegations and the additional substitution of other labels for facts already pleaded to, and – the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal has to decide whether the amendment sought is one of the minor matters or a substantial alteration pleading a new course of action.
 - The applicability of time limits.
 - The timing and manner of the application – an application should not be refused solely because there has been a delay in making it as amendments may be made at any stage of the proceedings – delay in making the application is however a discretionary factor – it is relevant to consider why the application was not made earlier and why it is now being made.
- 4.1.3. In **Abercrombie and ors v AGA Rangemaster Limited [2014] ICR 209** paragraph 48 (Abercrombie) Underhill LJ placed emphasis “on the extent to which the new pleading is likely to involve substantially different areas of enquiry than the old; the greater the difference between the factual and legal issues raised by the new claim ... the less likely it will be permitted.”
- 4.1.4. In **Vaughan v Modality Partnership [2021] IRLR 97** (Vaughan) HHJ Tayler at paragraph 21 posed the question “what the real practical consequences of will be allowing or refusing the amendment. If the application to amend is refused how severe will be the consequence, in terms of the prospect of success of the claim or defence; if permitted what will be the practical problems in responding. This requires a focus on reality rather than assumptions.”
- 4.2. Whether the respondent should be added as party – in so far as the second principal question is concerned the same considerations apply when the amendment is to add a party says Mr Sugarman in the skeleton. He goes on to say, and I agree, that the balance of hardship to a new party who may be added to a claim it might otherwise have to defend is a legitimate factor for the Tribunal to take into account and he refers to the case of **Trimbell and or v North Lanarkshire Council and or EATS 0048/12** when a tribunal upheld by the Employment Appeal Tribunal a refusal to add a TUPE party. In that case a new transferee was seven years after the TUPE transfer.
- 4.3. In paragraphs 3.1 to 3.22 I have examined those parts of the decision which are referred to in the further directions so careful consideration can

be given to the reconsideration of the decision. In other words whether it is necessary in the interests of justice to confirm, vary or revoke the relevant parts of the decision. For this I have a broad discretion to determine whether and what type of reconsideration it is appropriate to make in relation to the taking into account of the principles in Outasight. Though it is a reconsideration of the principal questions it is mainly whether the amendments and the further directions or whether the amendments referred to in the further directions by the addition of R2 as a party should or should not be admitted.

- 4.4. I am in no doubt that the TUPE claims are entirely new factual obligations which change the basis of the claimant's claims. They are a substantial alteration pleading a new cause of action.
- 4.5. On the other hand having considered whether the claim is out of time despite the meandering from and after 16 September 2024 the claims are not out of time.
- 4.6. Having said that there was a delay and there was also one in setting the correct R2 though I can take those delays into account. There was never any explanation for these.
- 4.7. Having regard to Abercrombie it is my view that AGOC in so far as it relates to TUPE involves a substantially different pleading than the original claim.
- 4.8. So far as Vaughan is concerned this case involves hardship. The question of hardship is set out elsewhere, but it is worth repeating that R2 was not involved in the transfer itself and it would have to work from scratch on the pre-TUPE aspects of the case. Alternatively, the claimant will have all the facts that she needs at her disposal.
- 4.9. For all these reasons and having reconsidered the decision it is clear to me that in principle my decision was correct.
- 4.10. Having so decided that it is necessary and indeed appropriate in the interests of justice for R2 not to be added as a party.
- 4.11. In all the circumstances in reconsidering the decision under Rule 68 of the Rules the original decision is confirmed. That means the TUPE amendments are refused and I do not allow R2 to be joined as a party. Case management will be required as in the Judgment above.

Approved by Employment Judge Shulman

Date: 1 July 2025

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