



EMPLOYMENT TRIBUNALS

Preliminary Hearing

Claimant: Mrs G Ali
Respondent (1): Roseberry Healthcare Management Ltd
Respondent (2): Winnie Care (Brantwood Hall) Limited (dissolved)
Heard at: Leeds **On:** 20 February 2017
Before: Employment Judge Maidment

Representation

Claimant: Ms R Clayton, Solicitor
Respondent (1): Mr J Frederick, Consultant
Respondent (2): Mr S Roberts, Counsel

JUDGMENT

1. There was no relevant transfer of the Claimant's employment from the Second to the First Respondent on 5 August 2015 or otherwise pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006. At the date of the Claimant's dismissal she was employed by the Second Respondent.
2. As a result of a foregoing the Claimant's complaints against the First Respondent must fail and are hereby dismissed.
3. The Claimant's continuing proceedings against the Second Respondent are hereby stayed until 20 May 2017 and by such date the Claimant shall update the Tribunal regarding any action taken by her to restore the Second Respondent to the Register of Companies.

REASONS

1. The issues

- 1.1. This Preliminary Hearing had been arranged to determine whether at the time of the Claimant's dismissal from her employment in February 2016 she was employed by either the First or the Second Respondent. The Claimant maintained that prior to 5 August 2015 she had been employed by the Second Respondent but that her employment transferred pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") to the First Respondent on that date pursuant to Regulation 3(1)(b)(i) – that there was a service provision change. The Claimant at no stage relied on there being a relevant transfer pursuant to Regulation 1(a) on the transfer of an economic entity which retains its identity.
- 1.2. The Tribunal had not from earlier correspondence expected the Second Respondent to be represented at this hearing. Mr Roberts informed the Tribunal that whilst he had been instructed to appear by those representing the Second Respondent, the Second Respondent was in fact a dissolved company such dissolution having been recorded at Companies House as effective from 11 February 2017. The Claimant and the First Respondent accepted that this was the accurate position.
- 1.3. Mr Roberts wished in particular to bring to the Tribunal's attention that whilst the Second Respondent had submitted its notice of appearance stating that it had not been the Claimant's employer at the material time of her dismissal, on the face of documentation including that before the Tribunal, this appeared to be in error. The Second Respondent, if it existed so to speak, would accept that it was the Claimant's employer at the relevant time.
- 1.4. The Tribunal confirmed that despite the unusual circumstances it would allow Mr Roberts to participate in the hearing albeit beyond setting out the Second Respondent's position, as he already had, he proposed to take no part in proceedings. No evidence for instance was being called on behalf of the Second Respondent.

2. The evidence

- 2.1. The Tribunal before the commencement of the hearing spent some time reading into the written witness statements provided to it and relevant documentation contained within an agreed bundle numbering some 260 pages.
- 2.2. On commencing the live hearing the Tribunal clarified the issues with the parties and then proceeded to hear evidence on the basis that it was unnecessary for each witness to read his/her statement out but in circumstances where the Tribunal had already read the statements each witness was able to simply confirm the accuracy of his/her statement and then be open to be cross-examined on it. The Tribunal heard Firstly from Mr Ron McNamara, chairman of the First Respondent and then from the Claimant herself.
- 2.3. Having considered all the relevant evidence the Tribunal makes the findings of facts as follows.

3. The facts

- 3.1. The Second Respondent owned and operated a care home for the elderly based in Wakefield. The Claimant was employed by the Second Respondent as a care assistant from 1 January 2012 and worked at the Brantwood Hall care home until her employment was terminated summarily purportedly on the grounds of her misconduct on 24 February 2016.
- 3.2. On 5 August 2015 the Second Respondent entered into administration with administrators appointed by the Second Respondent's landlord, Healthcare Property Holdings Limited. The aim of the administration was to allow the nursing home business to continue to trade whilst its viability was assessed and ideally a purchaser found allowing the lease of the care home to be assigned to whoever took over the business. At this point in time the future of the care home operated at Brantwood Hall was precarious. It had been identified as failing by the Care and Quality Commissioner ("CQC") and was about to lose its registration with that body - a pre requisite of its continued operation. Its single local authority client, Wakefield Council, had placed an embargo on any admissions into the care home and at the point of the administration the 60 bed facility only had 17 residents.
- 3.3. On 5 August 2015 the administrators entered into what was termed an "operating agreement" with the First Respondent. The First Respondent is a specialist management company set up to specifically provide short term management solutions to banks, administrators and care home proprietors. Mr McNamara, its chairman, is a qualified nurse and the First Respondent has a track record of successfully managing care homes in similar circumstances.
- 3.4. At the outset, the possibility was envisaged of the care home being put in a state where a sale could be completed to a purchaser. It was expected therefore that the involvement of the First Respondent under the operating agreement would be short term but in the sense that it was unclear how long the arrangement might endure and that quite possibly it could endure for in excess of 6 months.
- 3.5. It was indeed foreseen that the First Respondent might be involved in the acquisition of the care home through an associated corporate vehicle set up for such purpose. A period of exclusivity was agreed in the arrangements reached with the Second Respondent's administrators during which the Brantwood Hall care home would not be actively marketed. Indeed, the care home business was subsequently acquired by Roseberry Care Centres (Wakefield) Limited (an associated company of the First Respondent) on 27 May 2016 following the completion of an asset purchase agreement between such corporate vehicle and the Second Respondent's administrators of that date. This coincided – as it was a condition of a completion of the sale - with the re-registration of the care home with the CQC under the name of Roseberry Care Centres (Wakefield) Limited. The sale was recognised as transferring the employees employed as at 27 May 2016 pursuant to TUPE to Roseberry Care Centres (Wakefield) Limited.
- 3.6. However, at the commencement of the operating agreement with the First Respondent such outcome was by no means assured. As already

noted the care home was already under significant scrutiny. Its viability depended upon retaining CQC registration and there was a need for the First Respondent to undertake an initial assessment to gauge the home's long term viability. Only some 10 to 12 weeks before the completion of the asset purchase agreement did the application process commence to seek to re-register the home with the CQC in the name of Roseberry Healthcare (Wakefield) Limited.

- 3.7. In the meantime, the First Respondent acted as professional advisors to the administrators ensuring the proper running of the care home from the point of view of operational efficiency but also in terms of legal, financial and care quality standard compliance.
- 3.8. At the date of the commencement of the operating agreement there was already in place a care home manager directly employed by the Second Respondent and on a continuing basis by the Second Respondent (in administration). She at some point relatively shortly afterwards left her employment and was replaced by a new care home manager recruited by the First Respondent (but an individual who had never previously been employed by the First Respondent) and who indeed worked at the care home on the basis of her having an employment relationship with the Second Respondent (in administration) and no contractual relationship with the First Respondent.
- 3.9. Such care home manager was responsible for day to day issues which arose within the home and, in terms of the First Respondent's management services, had now access to a regional manager employed by the First Respondent who looked after a number of care homes and who now included within his/her remit responsibility for the care home at Brantwood Hall. Through the regional manager the care home indeed had 24 hour 7 day a week support in that cover was provided within the First Respondent for the regional manager when outside his/her working hours.
- 3.10. Also providing professional advice and services to the care home were the First Respondent's estate's manager based at its head office in the North East of England, who assisted with matters relating to the premises and health and safety. Further support came from the Respondent's in house finance team who ensured appropriate auditing took place of residents' finances and petty cash. The care home had the benefit of the First Respondents quality assurance personnel. Further, the First Respondent assisted with the management of the First Respondent's payroll through a third party payroll bureau known as Data Plan. The First Respondent collated records of hours worked by the staff, passed these to the payroll bureau who raised the necessary amounts included by way of preparation of required pay slips. The First Respondent then contacted the administrators regarding the payments to be made and the administrators arranged to make payments themselves directly into the individual employees' bank accounts. Pay slips during the course of the operating agreement were provided to staff, including the Claimant, under the name of Brantwood Hall and sent by Data Plan by post to them in an envelope also displaying the logo of "Roseberry Care Centres".

- 3.11. Schedule 5 to the aforementioned operating agreement contained a template letter purportedly sent by the administrators of the Second Respondent to the care home staff advising of their appointment. This recited that since they were acting as agent of the Second Respondent, the terms of their employment would remain unaltered. The letter also referred to the administrators having appointed “a specialist management company, Roseberry Healthcare Limited, to assist them in continuing to professionally operate the care home”. It was re-affirmed that the employees’ contracts of employment were with the Second Respondent. It was then stated that it was the administrator’s intention and hope to obtain a purchaser and if they were successful in doing so the sale would amount to a relevant transfer pursuant to TUPE. The care home manager would operate any process of consultation but the letter gave to employees the ability to alternatively contact “the representative of Roseberry”.
- 3.12. The Claimant maintains that she never received such a letter and the Tribunal has been provided with no evidence of it having been sent to her. Nevertheless, it is likely that she was written to or at least that it was intended that she be written to in such form given that the sample letter contains also the standard information in terms of continuing liability which administrators habitually give to employees on a business going into administration, not least to assist in limiting their own personal liability.
- 3.13. The Claimant referred to having attended a staff meeting where she was told that the Second Respondent was going into administration and that “a new firm was stepping in to take over”. She denied being told that she would stay as an employee of the Second Respondent. She also said on being questioned, albeit this was not referred to in her witness statement, that she was told that she would get a new contract with the First Respondent. This later assertion is viewed by the Tribunal as unlikely to be accurate in circumstances where it is clear from the documentation that neither the administrators nor the First Respondent ever envisaged that the First Respondent would enter into direct (or any) contractual relationships with the employees.
- 3.14. The Claimant said that she noticed changes in the business following the appointment of the First Respondent under the operating agreement including the care home ceasing to use one of the buildings on site and an amount of building work being undertaken, including remedial work to areas which were deemed unsafe. She said that a lot of the paperwork to be completed changed and telephone numbers were given out to staff to use if they needed to make contact with the First Respondent.
- 3.15. The Tribunal has been referred to correspondence prior to and then to the final operating agreement entered into between the First and Second Respondent (in administration). The correspondence is consistent with aim to determine whether Brantwood Hall and another care home in a separate locality operated by the Second Respondent had a long term future with a hope that, if so, there could be an agreed basis for the First Respondent taking over an assignment of the care home lease. Clearly the overriding intent was to preserve the care home operations if that was possible, with the First Respondent

commencing the process of seeking re-registration in its name with the CQC.

- 3.16. The operating agreement itself defines the services which the First Respondent was to provide with reference to a schedule appended to the Agreement. The services are widely defined to include the carrying out of nursing and care functions, using reasonable endeavours to ensure compliance with regulatory standards and liaising with the CQC. In terms of staff, the First Respondent was to be responsible for the supervision, training direction and control of employees "*as agent for the Company* [the Second Respondent] *and/or the administrators*". An audit was to be undertaken regarding the lawful employment of the staff at the care home. In terms of business management the First Respondent was to use all endeavours to assist in the collection of fees and supervise accounting functions.
- 3.17. Pursuant to Clause 4.1 the First Respondent was to maintain its own professional indemnity insurance and public liability insurance was to be continued by the Second Respondent. Clause 4.4.8 provided that where possible the First Respondent should notify the administrators 24 hours in advance if it took a decision to institute disciplinary action against any employee. Mr McNamara's evidence was that he clearly construed the obligation as requiring consent to the taking of any disciplinary and indeed dismissal action and referred to weekly reporting meetings often taking place by telephone with the administrators where there would be an update regarding staff issues in advance of the First Respondent taking any action.
- 3.18. Upon commencement of the agreement the First Respondent was to nominate a responsible individual pursuant to the Care Homes Regulations 2001. Mr McNamara took on this responsibility.
- 3.19. Clause 4.14 provided that any person in the employment of the Second Respondent would remain in such employment and nothing in the agreement served to alter the terms of employment provided that the First Respondent was to govern and supervise the employees and might discipline them in accordance with best practice and its own internal procedures.
- 3.20. Pursuant to Clause 7.1 the First Respondent was to be paid a management fee of £6,000 per month for services delivered at the care home.
- 3.21. Pursuant to Clause 9.2 the agreement was terminable on 20 working days notice without cause.
- 3.22. Clause 10 specifically dealt with employees and provided that the First Respondent and administrators agreed that TUPE was not applicable to the agreement and that the employees would be employed by the Second Respondent. Clause 10.2 went on to provide that if it was deemed that a service provision change had occurred so as to make TUPE apply, the parties agreed that the specific purpose of that change was to ensure that the business continued to operate whilst the Second Respondent was in administration. Any employees employed after the commencement date were to be employed by reference to a standard template letter appended to the agreement which made it clear that employment was with the Second Respondent in administration with the

administrators taking no responsibility for their employment, them being acting as agents of the company in administration then noting that the First Respondent had been appointed to provide services prior to the identification and completion of a sale when necessary authorisation had been received from the CQC.

- 3.23. Pursuant to Clause 11 the First Respondent was to act as agent of the Second Respondent in the performance of customer contracts and any new customer contracts would be with the Second Respondent. Limits on authority in terms of expenditure were also provided for.
- 3.24. The Tribunal has also been referred to the administrator's statement of proposals dated 25 September 2015. This referred to the intention to seek to continue to trade to rescue the Second Respondent as a going concern with a statement that it was believed that this purpose was achievable *"because of the engagement of an experienced nursing home management team, who will manage the ongoing trade and allow the business opportunity to return to successful trading ..."* There was also a statement of confidence in the expertise and experience of the First Respondent to manage the home effectively.
- 3.25. As already referred to the Claimant was dismissed with effect from 24 February 2016. The Tribunal was shown the letter of such dismissal on the notepaper of Winnie Care Group/Brantwood Care Home and signed by a Ms Banaras as home manager at Brantwood Hall – a person who was employed directly by the Second Respondent (in administration).

4. Applicable law

- 4.1. Pursuant to Regulation 3(1)(a) of TUPE: *"... 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"* constitutes circumstances where the Regulations apply.
- 4.2. Alternatively, the Regulations apply to a service provision change which, as relevant in these proceedings, is defined as a situation in which according to Regulation 3(1)(b)(i): *"activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor")"*. Even if that applies additional conditions need to be satisfied which include that there must be immediately before the service provision change *"an organised grouping of employees ... which has as its principal purpose the carrying out of the activities concerned on behalf of the client"*.
- 4.3. Further, the client must intend 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.
- 4.4. The Tribunal is guided by the summary of Peter Clarke HHJ in the case of **Enterprise Management Services Limited v Connect-Up Limited** [2012] IRLR 190. There he set out a recommended approach where a Tribunal's first task is to identify the activities performed by the in-house employees. Next the Tribunal should consider the question whether those activities are fundamentally the same as those carried out by the new contractor. 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 principle purpose the carrying out of the activities on behalf of the client. Following this the Tribunal should consider whether the aforementioned exceptions apply. Finally the Tribunal must be satisfied that each individual Claimant is assigned to the organised grouping of employees.

- 4.5. Applying the relevant legal principles to the facts as found the Tribunal reaches the following conclusions.

5. Conclusions

- 5.1. As referred to the administrators of the Second Respondent completed an asset sale agreement with Rosemary Care Centres (Wakefield) Limited on 27 May 2016. That would certainly have amounted to a TUPE transfer – the transfer of an economic entity preserving its identity.
- 5.2. Prior to that sale and from 5 August 2015, the Second Respondent had contracted with the First Respondent to provide a services to it. That might be seen as a first stage in a TUPE transfer taking place on 27 May 2016 to an associated company of the First Respondent but it is not argued that it was in itself the transfer of an economic entity which preserved its identity – it is not said that a standard TUPE transfer occurred.
- 5.3. A transfer indeed only on 27 May 2016 does not assist the Claimant in any claim against the First Respondent arising out of a dismissal for conduct reasons occurring in February 2016.
- 5.4. If the Claimant was dismissed prior to 27 May 2016 then any claim must be against the Second Respondent unless the agreement reached in August 2015 itself constituted a transfer of undertaking pursuant to the service provision changeling of TUPE. That is how this case is argued on behalf of the Claimant.
- 5.5. The Second Respondent ran a care home. It leased premises from a third party landlord and contracted with Wakefield Council and private residents to care for elderly people in its care homes. They paid the Second Respondent fees. The Second Respondent was registered with the CQC and had a compliant with regulatory requirements. It employed a home manager and staff to provide care to the residents.
- 5.6. From 5 August 2015 the administrators engaged the First Respondent to perform a range of services in return for a monthly fee.
- 5.7. It was intended that the Second Respondent would continue to employ the staff at the home. The Tribunal has already referred to a sample letter to be sent by the administrators of the Second Respondent to staff which the Claimant maintains she did not receive. The Claimant certainly never agreed to be an employee of the First Respondent nor did she receive any separate agreement from them.
- 5.8. The administrators of the Second Respondent clearly intended to seek to sell the home at some future date and the First Respondent was in the box seat to complete a purchase with a period of exclusivity but without any obligation to do so and only a likelihood of so doing if the business could be deemed viable, not least in terms of future CQC registration.

- 5.9. The care staff continued to be managed by a home manager employed by the Second Respondent and indeed it appears a succession of such managers. As already noted the First Respondent provided access to a regional manager if issues arose and various central services were utilised in the management of the care home at which the Claimant was employed as part of the business of the First Respondent in managing care homes.
- 5.10. Staff employed at the Second Respondent's care home continued to be paid by the Second Respondent and the Second Respondent contracted still with residents and the local authority client. All new staff were engaged as employees of the Second Respondent.
- 5.11. The First Respondent could only incur material expenses with the administrators approval. The Second Respondent retained public liability and employer's liability insurance (reflecting where responsibilities lay). The First Respondent could discipline and instigate the dismissal of employees but understood a need to consult with the administrators before so doing and where again from the Claimant's own dismissal that a dismissal was ultimately by the Second Respondent acting through its home manager.
- 5.12. The Claimant seeks to argue that the entire running of the care home constituted the relevant activity which ceased to be carried out by the Second Respondent as client and was carried out by the First Respondent, a contractor on the client's behalf.
- 5.13. The Tribunal pointed out that this appeared to be an argument that the Second Respondent's business in terms of the operation of the Brantwood Hall Care Home transferred to the First Respondent the situation appeared more obviously to be amenable to the potential of a standard TUPE transfer in circumstances where it was accepted that no such transfer had indeed occurred by the commencement of the operating agreement but where it was difficult to see this as effectively the contracting out of a service. The service provision change limb of TUPE was introduced to seek to remove or at least reduce uncertainty in the contracting out of services whether from clients to contractor or from first to second generation contractor or indeed back into an in-house operation. The Tribunal accepted that it was not impossible for this limb of TUPE to bite in wider or even unintended circumstances and that it could be argued that a contracting out of an entire business was caught – the service provision change limb of TUPE did not only apply to the outsourcing of ancillary functions.
- 5.14. In terms however of a contracting out of the entire operation, the Second Respondent here still however operated the care home and was liable for anything arising out of its operation. It held the registration of the CQC. In some respects the First Respondent acted as its agent but with the Second Respondent still liable for its activities as its principle.
- 5.15. The reality of the situation here is not that the Second Respondent transferred a care home or the operation of a care home to the First Respondent but that it utilised the First Respondent's expertise in engaging it to manage specific functions.

- 5.16. The relevant activities here in this case the Tribunal finds are the management functions are the First Respondent now carried out on behalf of the administrators of the Second Respondent.
- 5.17. There is no evidence of any organised grouping of employees who within the Second Respondent previously carried out those functions. There is no evidence of how these activities were carried out at all prior to any putative transfer such that one might be able to judge whether the activities carried out by the First Respondent were the same or substantially the same thereafter.
- 5.18. Certainly, however, it cannot and is not said that the Claimant was involved in those management activities which did come to be carried out by the First Respondent.
- 5.19. There was therefore no transfer of an activity wider than management activities falling within the service provision change limb of TUPE. Indeed, the only relevant activity the Tribunal can find where the service provision change limb of TUPE might potentially bite was the professional management services provided under the operating agreement. The Claimant was not assigned to those activities.
- 5.20. Therefore, when she was dismissed in February 2015, the Claimant was dismissed from her employment with the Second Respondent and any claim can rely against the Second Respondent only.
- 5.21. The circumstances are such that there is at this point in time no existing company comprising of the Second Respondent. To pursue any complaint against such company and indeed in circumstances where such complaint that realistically have to be limited to aspects of compensation and entitlement which will be underwritten by the Secretary of State, the Claimant will need to successfully reinstate the Second Respondent to the register or company. That involves a process outside these Employment Tribunal proceedings such that it was agreed with the Claimant's representative that whilst the claims against the First Respondent would as a result of its Judgment now be dismissed, those against the Second Respondent would be stayed until 20 May 2017 to give the Claimant an opportunity to reinstate the Second Respondent to the register of company. It was envisaged that if that occurred and the Tribunal should be advised of the earliest time when that did indeed occur, the Tribunal might clarify with the Second Respondent whether it intended to seek to defend these proceedings. If the proceedings were to proceed on an undefended basis it may be that the Claimant could then be asked to provide an appropriate schedule of loss and that the Tribunal could consider giving Judgment in her favour without the need for a further hearing.

Employment Judge Maidment

Date: 15 March 2017

Sent on: 15 March 2017