



THE EMPLOYMENT TRIBUNALS

Claimant
Ms M Bagley

Respondent
RTB Commercial Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS
EMPLOYMENT JUDGE GARNON (sitting alone)

ON 24th April 2017

Appearances

For Claimant Mr P Lott Solicitor
For the Respondent Mr B Hendley Consultant

JUDGMENT

The Judgment of the Tribunal is:

1. The claims of entitlement to a redundancy payment and wrongful dismissal are not well founded and are dismissed .
2. The claim for compensation for untaken annual leave is well founded. I order the respondent to pay compensation of £248.40

REASONS

1 Introduction and Issues

1.1. On 9th February 2017, the claim was presented and seemed simple. As Mr Lott accepts , entitlement to a redundancy payment and wrongful dismissal claims can only succeed if there was a dismissal. The response denied there was and raised the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).

1.2. The issues , expressed broadly, are

- (i) Was the claimant dismissed?
- (ii) Would there have been there a relevant transfer?
- (iii) If so, did the claimant object to being transferred?

The respondent conceded liability and remedy on the annual leave claim

2 The Relevant Law

2.1. TUPE can be very complicated but in this case, I believe I can simplify the parts which are relevant. Regulation 3 says:

(1) These Regulations apply to—

(a) 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;

(b) a service provision change, that is a situation in which—

(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");

(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; or

(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.

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

2.2. Pausing there, whether or not there is a transfer of an economic entity which retains its identity, was explained in European Law is Spijkers –v- Gebroeders Benedik Abattoir and in the United Kingdom by Cheeseman –v Brewer. No one argues there was a transfer as defined in Reg 3(1)(a), and, though there could in theory be one, on the facts of this case there is no point discussing it further

2.3. Regulation 3 continues, as far as relevant ,

(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;

2.4. Regulation 2 contains

“ assigned” means assigned otherwise than on a temporary basis”

"relevant transfer" means a transfer or a service provision change to which these Regulations apply in accordance with regulation 3 and "transferor" and "transferee" shall be construed accordingly and in the case of a service provision change falling within regulation 3(1)(b), “ the transferor” means the person who carried out the

activities prior to the service provision change and , “ the transferee” means the person who carries out the activities as a result of the service provision change

‘references to organised grouping of employees shall include a single employee’.

2.5. In Schmidt v Spar-und Leihkasse 1995 ICR 237, the ECJ held the fact an economic activity is performed by a single employee is not in itself sufficient to preclude the application of the transfer rules. Rynda (UK) Ltd v Rhijnsburger 2015 ICR 1300, is a good example of a claimant being the only employee responsible a certain group of properties being ‘an organised grouping of employees’, which had as its principal purpose the carrying out of that property management activity.

2.6. Regulation 4(1) says:

(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 .. employees that is subject to the relevant transfer which would otherwise would be terminated by the transfer but any such contact shall have effect after the transfer as it were originally made between the person so employed and the transferee.

(3) Any reference in paragraph 1 to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in Regulation 7(1) ...

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

2.7. The conjoined appeals British Fuels v Baxendale and Wilson v St Helen’s Borough Council. 1998 ICR 1141 held where there had been an actual dismissal as a consequence of the transfer or a reason connected with it ,as Lord Slynn explained, although the dismissal was automatically unfair, it was not void.

2.8 Regulation 18 says there can be no contracting out of TUPE other than in specific circumstances none of which apply in this case.

2.9. The activities here are simply the cleaning of various pubs. The question of “assignment” was considered in Botzen-v- Rotterdamsche Droogdok 1985 ECR 519.. The Advocate General, Sir Gordon Slynn, had proposed a test which was simple and definite ,” was the employee wholly (subject to a de minimis exception) engaged in the part transferred.” Duncan Web Offset-v- Cooper confirmed the

decision is one of fact for the Tribunal taking into account all the relevant circumstances. The percentages of time spent on activities associated with the part transferred and that which is not is one factor, but not the only one, though MRS Environmental –v- Duke shows sometimes there are no other relevant factors. In CPL Distribution-v-Todd the Court of Appeal upheld a Tribunal's finding that a personal assistant to the manager of one part of a business (which was transferred) was not assigned to that part because she did a significant amount of work for a manager of a part which was not transferred. Kimberley Group Housing – v- Hambley 2008 IRLR 682 re-iterated the importance of the Botzen test

2.10. Immediately before the service provision change there must be an organised grouping of employees which has as its principal purpose the carrying out of the activities concerned on behalf of a client' The BIS Guide states Reg 3 (3) (a) (i) intended 'to confine the Regulations' coverage to cases where the old service provider (*i.e.* the transferor) has in place a team of employees to carry out the service activities, and that team is essentially dedicated to carrying out the activities that are to transfer'. The Guide gives an example where this requirement would not be met: 'If a contractor was engaged by a client to provide, say, a courier service, but the collections and deliveries were carried out each day by various different couriers on an ad hoc basis, rather than by an identifiable team of employees, there would be no "service provision change" and the Regulations would not apply.'

2.11. Deciding whether the 'principal purpose' requirement is satisfied where there are multiple clients will not always be straightforward but, as the BIS Guide states, a team of employees does not need to work exclusively on the activities that are to transfer for Reg 3(1)(b) to apply.

3. Findings of Fact and Conclusions .

3.1 The claimant had prepared a witness statement which she verified. The respondent called Mr Paul Metcalf and Mr Chris Joyce who was a manager of Portgate Leisure (Portgate) which owns two pubs the "Life of Riley" and "Viva" .

3.2. The claimant was employed as a cleaner first from 22nd December 2005 to 19th June 2014 by Mr Metcalf and from then to 15th November 2016 by the respondent, a company he incorporated to carry on his cleaning business. It is agreed there was no break in continuity of employment. She worked a basic 16 hour week for a wage of £7.20 per hour but sometimes did extra hours.

3.3. About two years before she was dismissed the claimant cleaned predominantly a pub not owned by Portgate . When the respondent lost that contract, there was a possibility the claimant may have transferred under TUPE but she and Mr Metcalf agreed she would stay working for the respondent on its contract with Portgate to clean its pubs . She spent latterly at least 11 hours a week cleaning the "Life of Riley" (about 2 at Viva). Ms Pauline Newton did most of the cleaning at Viva. The respondent had cleaning contracts at two pubs called Sand Dancer and Rattler, neither owned by Portgate. Both the claimant and Ms Newton did some work at each occasionally, mainly to cover the usual cleaners' sick and annual leave.

3.4. Portgate decided to end its contract with the respondent and employ cleaners itself. On 15th November 2016 Mr Metcalf telephoned the claimant and, she says, terminated her employment with immediate effect using the words "There is no work for you". Mr Metcalf says he did not dismiss her but told her employment would transfer under TUPE to Portgate. He says she did not wish to transfer to any other employer, said she was having trouble with her knees anyway and resigned. She says there was no mention of a TUPE transfer and she did not "resign".

3.5. The claimant says Mr Metcalf rang out of blue but she knew he had lost some work. Mr Joyce says Portgate would have been happy to employ the claimant, even with her long service, and told Mr Metcalf that. As Mr Metcalf says he had nothing to gain by not "passing the claimant on" to Portgate.

3.6. This case is mainly about the burden of proof. The claimant must convince me it is more likely than not she was dismissed. I prefer Mr Metcalf's evidence but do not find the claimant is lying. More likely she misunderstood "I have no (other) work for you" as "There is no work for you" and saw a dismissal where there was none.

3.7. There was an organised grouping of employees of, either the claimant and Ms Newton whose principal purpose was cleaning under the respondent's contract with Portgate both its pubs, or, each individually formed an organised grouping, the principal purpose of which was to clean respectively Life of Riley and Viva. Portgate intended the same activities would, following the service provision change, be carried out by itself. The claimant was assigned to the organised grouping of employees subject to the relevant transfer immediately before it. She was not dismissed expressly by Mr Metcalf or by reason of the transferee refusing to engage her. Rather she objected to being transferred.

T M Garnon EMPLOYMENT JUDGE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 24th APRIL 2017

JUDGMENT SENT TO THE PARTIES ON

25 April 2017

**G Palmer
FOR THE TRIBUNAL**