



EMPLOYMENT TRIBUNALS

Claimant: Georgina Nash

Respondent: Essex Partnership University NHS Foundation Trust

RECORD OF A PRELIMINARY HEARING

Heard at: Cambridge Employment Tribunal **On:** 11 July 2018

Before: Employment Judge Tynan (sitting alone)

Appearances

For the Claimant: Ms L Emery, Solicitor

For the Respondent: Mr N Caiden, Counsel

ORDER

- (1) The Tribunal determines that, in accordance with Regulation 4(1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006, the Claimant was assigned to the organised grouping of employees that was subject to the relevant transfer between Horizon Choices Limited and the Respondent.

REASONS

Final hearing

- (2) In view of the likely length of time to secure a final hearing I agreed with the parties' representatives that I should list this case for a final hearing with a provisional time estimate of four days. Ms Emery confirmed that even if I determined that the Claimant had not been assigned to the organised grouping of employees that was subject to the relevant transfer, the Claimant would continue to pursue claims against the Respondent under the Equality Act 2010.
- (3) All issues in the case, including remedy if appropriate, will be determined at a final hearing before an Employment Judge sitting with Members at the **Employment Tribunals, Cambridge Employment Tribunal, Cambridge County Court, 197 East Road, Cambridge, Cambridgeshire, CB1 1BA** to start

at 10.00am or so soon thereafter as possible on **11 to 14 March 2019** inclusive. The parties are to attend by 9.30am on the morning of the first day.

- (4) The Claimant and the Respondent **must** inform the Tribunal as soon as possible if they think there is a significant risk of the time estimate being insufficient and/or of the case not being ready for the final hearing.

The preliminary hearing

- (5) All references hereafter to the TUPE Regulations are to the Transfer of Undertakings (Protection of Employment) Regulations 2006.
- (6) The Claimant commenced employment with Horizon Choices Limited (“Horizon”) as an administrative clerk on 23 May 2016. The Claimant contends that her employment terminated on 24 November 2016.
- (7) Horizon got into financial difficulties in 2016 and there were concerns that it may cease trading (which in fact it did at the end of November 2016).
- (8) It is common ground between the parties that on 14 November 2016 there was a “relevant transfer” (for the purposes of Regulation 3(1)(b) of the TUPE Regulations) as between Horizon and the Respondent. The “activities” in question were anti-coagulation services for patients living in and around Essex. These activities comprising phlebotomy and warfarin services, and were commissioned by the Bedford Clinical Commissioning Group (“BCCG”). As well as the anti-coagulation services, Horizon had also been commissioned to run vasectomy and ultrasound clinics. These latter two services did not transfer to the Respondent.
- (9) In order for there to be a “relevant transfer” under Regulation 3(1)(b) of the TUPE Regulations – which deals with a change of service provider, as opposed to the transfer of an undertaking – the conditions in regulation 3(3) must be met. It being common ground between the parties that there was a relevant transfer, it follows that the parties agree that these conditions were met. The first of the conditions is that there was, at the relevant transfer date, an organised grouping of employees situated in Great Britain which had as its principal purpose the carrying out of the activities concerned on behalf of the client (Regulation 3(3)(a)(i) of the TUPE Regulations). I return below to the issue of who that organised grouping comprised.
- (10) The case came before me in order to determine as a preliminary issue whether, in accordance with Regulation 4(1) of the TUPE Regulations the Claimant was assigned to the organised grouping of employees that was subject to the relevant transfer.
- (11) I heard evidence from the Claimant and also from Mr Neil David, a Senior Human Resources Advisor at the Respondent. Both had made written statements. I was referred to a preliminary hearing bundle in the course of the hearing, comprising 36 documents.

- (12) Ms Emery and Mr Caiden filed written submissions at the beginning of the hearing, though these were supplemented in each case by oral submissions. I was also provided with case reports in respect of three of the cases referred to in their written submissions.

Findings

- (13) The Claimant commenced employment with Horizon on 23 May 2016. She completed Section 5.2 of Form ET1 on the basis that she was employed as a Clerical Administrator. In fact, her job description at pages 44a and 44aa of the hearing bundle documents that her job title was Administration Clerk. The job description further confirms that she reported to the Operations Manager and that her job was to provide an administrative service for the clinics operated by Horizon, with particular focus on booking patient appointments. The Claimant's key responsibilities are listed at page 44a of the hearing bundle. They are somewhat generic, though there is specific reference to "Utilisation and administration of the INR Warfarin Patient Information System". Following the key responsibilities is a list of general responsibilities. The job description concludes with the following statement:

"Horizon Health Choices Limited retains the right to change or modify job duties at any time. The above job description is not all encompassing. Needs and requirements may vary between locations and according to business and clinic necessity. This job description is not exhaustive and may be adjusted periodically after review and consultation. You would also be expected to carry out any reasonable duties which may be requested from time to time".

- (14) In addition to the job description there was a person specification for the role. This too is a fairly generic document (page 44b of the hearing bundle). Whilst it refers to a need to understand patient confidentiality and states that experience of working in a healthcare environment is desirable, it does not state that the post-holder should have specific experience of or knowledge in any one or more of the four services that Horizon was providing.
- (15) On commencing employment with Horizon the Claimant initially undertook administrative tasks in relation to the phlebotomy service. After approximately two weeks she was trained on ultrasound administration, at which point she undertook administrative tasks in relation to both services. She was then trained on warfarin and finally on vasectomy. Initially, these last two areas comprised a smaller amount of her work. In the case of vasectomy related work, this continued to be a small part of what the Claimant did as the administrative support was covered by someone who left the Respondent's employment approximately 2 weeks' prior to the relevant transfer.
- (16) At pages 61 and 62 of the hearing bundle there is a spreadsheet comprising employee liability information provided by Horizon to the Respondent purportedly in compliance with Regulation 11 of the TUPE Regulations. The spreadsheet is undated. However, it must have been provided only a matter of days prior to the relevant transfer as there are emails in the hearing bundle dated 4 November 2016 between the Respondent and BCCG which refer to the employee liability

information then being outstanding (pages 45 to 47 of the hearing bundle) and a letter dated 8 November 2016 from the Respondent's Chief Executive to BCCG which refers to "TUPE information" having still not been provided (page 56 of the hearing bundle).

- (17) Included on the she spreadsheet are the details of seven administrative clerks and clinical administrators. However, the Claimant's details appear twice at entry numbers 14 and 25. I presume this was the result of an administrative error on Horizon's part. The Claimant's job title is given as Clinical Administrator, which differs from her job description. Excluding the Claimant, 28 other individuals appear on the spreadsheet (assuming that there is no other duplication in the spreadsheet). Of these 28 individuals, 13 have job titles that denote a connection to phlebotomy and a further 11 have job titles that denote a connection to anti-coagulation i.e, both the phlebotomy and warfarin services. The remaining four individuals, including two clinical administrators, are recorded as having job titles that denote no specific connection to phlebotomy, warfarin or anti-coagulation services. However, there is a separate column in the spreadsheet headed "Location", with a sub-heading "Service", in which the words "Phlebotomy" or "Warfarin" appear against all 30 individuals on the spreadsheet.
- (18) In the case of the Claimant, the stated "Service" is "Phlebotomy" in the first entry against her name, but "Warfarin" is used in the second entry. The Claimant is one of just three individuals in respect of whom there is an additional note, "Works over both services" in an "Additional Comments" column in the spreadsheet. As noted already, 13 individuals have job titles that denote a connection to both phlebotomy and warfarin, though in their cases the Additional Comments column has not been completed on the basis that they work over both services.
- (19) The other clinical administrators and administrative clerks included on the spreadsheet have just one "Service" denoted against their details, though the two clinical administrators who are indicated to be part of the warfarin service have nothing in their job title to indicate that connection.
- (20) Two of the Claimant's colleagues who undertook administrative work started with Horizon around the same time as the Claimant, one in March 2016, the other in June 2016. Their job titles are recorded on the spreadsheet as "Administrative Clerk – Phlebotomy". I accept the Claimant's evidence that there was no practical difference between what she and they did, notwithstanding the different job titles. Likewise, I accept her evidence, that there was no "hard dividing line between who did what work". The clinical administrators and administrative clerks sat together and operated as one team. They had a single manager and there were occasional team meetings. The Claimant was unaware that some of her administrative colleagues had different job titles and her evidence was that she did not understand them to be doing different jobs. With the exception of the two part-time clinical administrators who often worked in the warfarin clinic itself, the Claimant's evidence, which I accept, is that her colleagues' working day did not differ to her own. They each covered the work that came in when one or more of them was absent. There was no hand over of work when one of them was on leave, which is consistent with each of them simply picking up whatever

administrative tasks were required from day to day, rather than any one or more of them having clearly defined or identifiable areas of responsibility.

- (21) In her witness statement, the Claimant does not seek to define her role in terms of a percentage split of her time by reference to the four services, namely phlebotomy, warfarin, vasectomy and ultrasound. However, I accept her evidence that phlebotomy was the busiest service and that prior to the relevant transfer the majority of the administrative tasks she performed was for phlebotomy and warfarin. That is certainly consistent with the spreadsheet having been completed on the basis that she worked across both those services. Although trained to undertake administrative work for the vasectomy service, I accept that there was relatively limited work for the Claimant to do in this area.
- (22) At paragraph 6 of her statement, the Claimant refers to a colleague, Shirley Randall, who joined Horizon a few weeks after she did. Ms Randall's details are at entry number 12 of the spreadsheet. Like the Claimant, she also provided administrative support to the ultrasound service. Unlike the Claimant, it was accepted by the Respondent that she transferred to it under the TUPE Regulations. I conclude that the only difference between them was their respective job titles, but that their job functions were substantively the same.
- (23) It was put to the Claimant in the course of cross-examination that the majority of her time was spent on ultrasound, something she denied. I accept her evidence. It is not possible, and in any event, it is not necessary, for me to place a percentage figure on the amount of her time that was allocated to ultrasound. However, I find that a major part of the Claimant's duties and time was in respect of phlebotomy, with the balance of her duties and time mainly divided between warfarin and ultrasound. I conclude that in the period prior to the relevant transfer warfarin required slightly more of the Claimant's time than ultrasound as the Claimant's two colleagues who spent more of their time in the warfarin clinic worked part-time, with the result that Claimant and her colleagues tended to pick up more of this work in the afternoon.
- (24) The Respondent took over the anti-coagulation services on very short notice. The Respondent was approached by BCCG at the beginning of November 2016 to take over the services. By 14 November 2016, the transfer had been effected. Mr Davis said that he had not been involved in a similar TUPE transfer before; a transfer which ordinarily might have been planned for and executed over a period of several months was concluded within a matter of days. The available evidence is that employee liability information was provided a few days before the relevant transfer rather than 28 days before the transfer as Regulation 11 of the TUPE Regulations requires.
- (25) Mr Davis acknowledged that the Claimant was the only employee on the spreadsheet in respect of whom a challenge was made. This was after the transfer date and only after the Claimant had notionally transferred to the Respondent. At the Respondent's request the Claimant had completed a new employee questionnaire on 15 November 2016 (pages 64C to 64J(i) of the hearing bundle). I cannot identify anything in that form that might have given the Respondent cause to question the Claimant's status, specifically that might

indicate she was not assigned to the organised grouping of employees that was subject to the relevant transfer. On 18 November 2016, a copy of the Claimant's passport was certified by a member of the Respondent's HR team, presumably as part of the Respondent's post-transfer right to work checks. The first indication (or evidence) of an issue in relation to the Claimant are two action points from a Negotiation Meeting Agenda dated 21 November 2016:

"Arrange for a challenge to be sent to Horizon for the TUPE staff that may be outside of the service".

"Review staffing to see if there are any obvious gaps that can be identified as part of the challenge".

(Pages 64r and 64s of the hearing bundle)

- (26) There was no evidence before me as to why a challenge was then being considered. Questioned by Ms Emery, Mr Davis accepted that he had not spoken with the Claimant and that there was no evidence in the hearing bundle to suggest that anyone within the Respondent's management team had spoken with the Claimant before a challenge was raised. Further limited details regarding the challenge are to be found in an email from Liz Semain, Director of Contracting & Business Development at the Respondent to Melanie Brooks at BCCG at page 66 of the hearing bundle. Horizon was not copied on the email. In the email, Ms Semain refers to an unnamed staff member (the Claimant), "for whom potentially only 30% of their time was spent working on that contract". Mr Davis agreed with Ms Emery that there was nothing in the hearing bundle to identify where that figure of 30% had come from and that no-one from the Respondent had spoken with the Claimant before arriving at that figure. It is at odds with my own assessment at paragraph 21 above.
- (27) In an email to Jane Carr, HR and Office Manager at Horizon, sent at 11:03am on 24 November 2016, Helen Smart of the Respondent challenged that the Claimant should have transferred. Ms Smart's email does not name the Claimant though refers to a discussion that had then just taken place between herself and Ms Carr. The stated reason for the challenge was that, "I only agreed to accept staff on TUPE list that could be proved they worked over 50% on the services being transferred". By inference the Claimant was considered not to meet this requirement, though there is no further explanation in Ms Smart's email as to why this was the case or that she had had regard to any other considerations in arriving at her conclusion. As I set out below, the question of whether an employee is assigned to an organised grouping of employees is a multifactoral test. Ms Carr responded within a matter of seconds to Ms Smart's email and confirmed that she would "remove [the Claimant] from the list". In other words it was immediately accepted by Horizon that the Claimant should not have transferred, albeit there is no evidence available to me as to why that was, except perhaps that Horizon did not challenge that the Claimant worked less than 50% of her time in the activities that had transferred.
- (28) Mr Davis confirmed that he was not privy to any discussion(s) between Ms Smart and Ms Carr.

- (29) The Respondent effectively has not put forward a positive case as to why the Claimant was not assigned to the organised grouping of employees. That does not of itself mean that the Claimant should succeed on the preliminary issue. Ultimately, the Claimant has the burden of proving, on the balance of probabilities, that she was assigned. The Respondent is entitled to put her to proof in this regard. Indeed, given the circumstances in which the Respondent took on the anti-coagulation services, it is not surprising that it may have had an incomplete understanding of the situation on the ground immediately prior to the transfer. However, the fact is that 18 months on from the transfer, the Respondent is unable to provide any further clarity as to why in November 2016 it raised an objection to the Claimant transferring. All I have is Ms Smart's very brief email but nothing further as to what may have been discussed between her and Ms Carr on or around 24 November 2016.
- (30) In which case the Respondent must largely rely upon what the Claimant said under cross-examination. In that regard, the Claimant accepted that she had provided administrative support across all four services and that she had not been assigned specifically to any one activity. She also confirmed that she had not been invited to an initial meeting in early November 2016 about the transfer. This was because Ms Carr had informed her that she would not transfer to the Respondent. The Claimant did not challenge this at the time. That is not entirely surprising; the Claimant came across in evidence as a reserved and unassertive individual. I accept the Claimant's evidence that Ms Carr initially did not say why the Claimant would not be transferring, but some days later on when she told the Claimant that she would in fact be transferring said that the reason she had originally suggested otherwise was because there were insufficient available jobs at the Respondent. I accept the Claimant's evidence that it was never suggested to her by Ms Carr that she would not transfer because she was not considered to be assigned to the organised grouping.

Law and Conclusions

- (31) In their respective submissions, Ms Emery and Mr Caiden refer in some detail to the EAT's decision in *Costain Limited v Armitage & Another UKEAT/0048/14/DA* in which the EAT confirmed that Tribunals should first define the organised grouping of employees before determining whether an employee was assigned to that grouping. The EAT emphasised a two-stage multifactorial approach and that too much emphasis should not be placed on one single factor.
- (32) Lady Smith's observation in *Seawell Limited v Seva Freight UK Limited [2013] IRLR 726* that the concept of an organised group "is not a matter of happenstance" is often cited. It might be said that assignment too is not a matter of happenstance and there is support for that proposition insofar as her Honour Judge Eddie QC in *Costain* refers to the fact that merely being involved in the carrying out of the relevant activities immediately prior to transfer will not necessarily mean that the employee was assigned to the organised grouping.
- (33) In *Edinburgh Home-Link Partnership v The City of Edinburgh Council (UKEATS/0061/11)* (cited in *Costain*), Lady Smith gave the example of an

employee whose role is strategic and principally directed to the survival and maintenance of the transferor as an entity, who therefore might not be assigned.

- (34) Tribunals must take care to consider the whole facts and circumstances in which a particular employee worked in order to answer the assignment question.
- (35) In *Duncan Offset Maidstone Limited v Cooper and Another [1995] IRLR 633* (referred to in *Costain*) Mr Justice Morrison identified three fairly common factual situations in which issues in relation to assignment arise. The first such situation is where X has a business in which it employs a number of persons and X transfers part of that business to Y. Mr Justice Morrison was describing a relevant transfer under what is now Regulation 3(1)(a) of the TUPE Regulations, but his observations equally apply to a change in service provider under Regulation 3(1)(b). Mr Justice Morrison suggested that relevant factors in answering this question of fact will include:
- (i) The amount of time spent on one part of the business or the other;
 - (ii) The amount of value given to each part by the employee;
 - (iii) The terms of the contract of employment showing what the employee could be required to do; and
 - (iv) How the cost of the employee's services were allocated.
- (36) Time spent in other parts of a business (or on other activities) is not conclusive regarding the issue of assignment. An employee may be assigned to an organised grouping even if they spend their time on other activities. In *Botzen and Others v Rottersdamsche Droogdok Maatschappij BV 1986 2CMLR*, the European Court of Justice ruled that a person does not have to be engaged exclusively in the business or part transferred to be regarded as being assigned to it. The decision concerned the transfer of an undertaking rather than a service provision change but under the TUPE Regulations the requirement for assignment applies regardless.
- (37) As I have already alluded to, the issue of assignment cannot necessarily be determined simply by establishing the relative percentages of time spent by an employee on the activities that have transferred. In so far as Ms Smart and Ms Carr appear to have approached the matter on that basis, I consider that they fell into error. In any event, I do not accept that the Claimant spent 30%, alternatively less than 50%, of her time on the anti-coagulation services. She spent the majority of her time on these services. I note the specific connection to warfarin services in the Claimant's job description
- (38) Notwithstanding the Claimant's job description included a requirement for flexibility, that flexibility did not in my view preclude her from being assigned to the organised grouping that was subject to the relevant transfer. In particular, I have found that she did essentially the same job as her colleagues as part of a single unified team that shared out work as it came in and which covered the entire work as it came in. The majority of the work they did was in respect of the anti-coagulation services. It is also relevant in my view that the Claimant's duties were directly concerned with the performance of the activities rather than at a managerial/supervisory level.

- (39) The organised grouping comprised the employees who had as their principle purpose the carrying out of the anti-coagulation services. That is the employee group identified on the spreadsheet. As I have set out at paragraphs 16 to 19 above, there is a lack of consistency in terms of how their connection to the activities is identified. Ultimately, however, I am satisfied that the clinical administrators/clerical assistants, including the Claimant, were assigned to this organised grouping notwithstanding they all spent varying amounts of time doing ultrasound and vasectomy work. I have not simply assumed that because the Claimant supported the anti-coagulation services she was thereby assigned to the organised grouping. Instead, I am satisfied that she was an integral member of the administrative team providing a very similar level of administrative support as her colleagues. She was as much a part of the organised grouping as they were.
- (40) I do not attach significance to the fact that the Claimant did not initially challenge Ms Carr when she was told that she would not transfer. Nor do I attach significance to the Claimant's failure to respond to an email from Mr Davis dated 2 December 2016 in which he stated that the majority of the work she did was not for the services that transferred; as noted already that is not determinative of assignment, but in any event the Claimant signalled that she did not agree with Mr Davies as she was in contact with ACAS under the early conciliation scheme the following month.
- (41) I do not consider it is appropriate to characterise the Claimant's role (or indeed that of her colleagues) as that of a "support worker" as Mr Caiden seeks to do in his submissions. I do not agree that she was detached from the activities of the organised grouping and I do not consider her assignment to have been of a temporary nature. The fact she was just over 6 months in post is not in my view a material consideration. In that regard her colleague Ms Randall was accepted to be assigned to the organised grouping even though she had shorter service than the Claimant. I find that, along with her colleagues, the Claimant was an essential and integrated part of the service even if she undertook work for ultrasound and vasectomy. Notwithstanding the requirement for flexibility in the Claimant's job description, I am satisfied that her working arrangements were sufficiently settled that they had a permanence about them. In all the circumstances I determine as a preliminary issue that, in accordance with Regulation 4(1) of TUPE, the Claimant was assigned to the organised grouping of employees that was subject to the relevant transfer as between Horizon and the Respondent.
- (42) Having so determined, there will need to be a case management hearing to ensure that this case is ready for hearing in March next year. Unless the parties request otherwise, I am content to conduct that hearing by telephone. I shall list the matter for a telephone case management hearing on 6 September 2018 and order the parties to file an agreed Agenda and List of Issues with the Tribunal prior to that hearing or, if they cannot agree the Agenda and List of Issues they should each file their own Agenda and List of Issues. A separate Notice of Hearing will be issued to the parties. I will convert the hearing to a hearing at the

Tribunal at the request of either party, though in that event the hearing will not take place on 6 September 2018.

ORDERS

Made pursuant to the Employment Tribunal Rules of Procedure

1. The parties are ordered to file an agreed Agenda and List of Issues with the Tribunal by no later than 31 August 2018. In the event they cannot agree the Agenda and/or List of Issues they should, as the case may be, each file their own Agenda and List of Issues.
2. **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**
3. **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

Employment Judge Tynan

Date: 15 August 2018

Sent to the parties on:

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For the Tribunal:

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