



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109579/2021

5

Held via Cloud Video Platform (CVP) on 19 April 2022

Employment Judge R King

10 **Miss Susan McCready**

**Claimant
In Person**

15 **AMK9 Ltd**

**First Respondent
Not present and
Not represented**

20 **VGM SAI Ltd**

**Second Respondent
Not present and
Not represented**

25 **Mr Vithursan Srikantharajah**

**Third Respondent
Represented by:
Miss Charalambous
– Solicitor**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that –

- 35
- (1) the claimant was not within an organised grouping of employees entitled to transfer from the first respondent to the third respondent on or around 25 January 2021 under regulation 4 (1) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE')
 - (2) the claim against the third respondent is therefore dismissed.

REASONS

Introduction

1. The claimant's claims are as follows:

- 5 • Unfair dismissal in terms of Regulation 7 of TUPE and section 98(4) of the Employment Rights Act 1996.
- Redundancy pay.
- Notice pay.
- Accrued but unpaid holidays.
- Sick pay.
- 10 • Unpaid pension contributions.

2. The claims arise out of the termination of the claimant's employment on or around 25 January 2021. Until then she had been an employee of the first respondent, which at the relevant time operated a number of petrol stations in Lanarkshire including BP petrol stations in Airdrie and in Carluke.

15 3. It is not in dispute between the parties that on 25 January 2021, the third respondent took over from the first respondent the running of the BP Carluke petrol station in circumstances giving rise to a service provision change in terms of regulation 3(1)(b) of TUPE and therefore a 'relevant transfer'.

20 4. As identified at a case management preliminary hearing on 19 August 2021, the dispute between the parties is whether the claimant was assigned to the organised grouping of the first respondent's employees that were subject to that transfer and therefore "in scope" to transfer automatically to the third respondent in terms of Regulation 4(1) of TUPE.

25 5. The first respondent asserts that she was in scope, whereas the third respondent and the claimant assert that she was not. In the circumstances, this preliminary hearing was fixed in order to determine only that question.

6. As confirmed at the preliminary hearing on 19 August 2021, the second respondent is no longer a party to the claim.

Preliminary Issue – absence of first respondent

7. At today's preliminary hearing, the first respondent did not appear and neither was it represented. The clerk drew the Tribunal's attention to the Tribunal administration's correspondence to the first respondent on 4 February 2022 enclosing a notice of the preliminary hearing. It was noted that this had been sent direct to the first respondent because its previous representative had withdrawn from acting for it.
8. The clerk also confirmed that the first respondent had not been in touch with the Tribunal at any time in advance of the hearing or on the morning of the hearing to give any indication that it would not be in attendance. Furthermore the other parties confirmed that they had received no communication from the respondent to that effect.
9. In the circumstances, Miss Charalambous made an application on behalf of the third respondent that the first respondent's response should be dismissed and the Tribunal should simply make a finding that the claimant was not part of an organised grouping, which was the position adopted by both parties present at the hearing. The claimant confirmed that she was in agreement with the third respondent's application.
10. Miss Charalambous submitted that if that application was refused and the hearing were to proceed in the absence of the first respondent there would be likely prejudice to the third respondent as a result. She explained that the first respondent had possession of the main documents in relation to the relevant transfer. As it had not engaged with the parties' preparation for the preliminary hearing and had therefore not disclosed potentially relevant material, there was a risk that the third respondent would suffer prejudice if the Tribunal made a decision in the absence of the full facts.

Decision on preliminary issue

11. The Tribunal was satisfied that the first respondent had received formal notice of the hearing and it was also satisfied that it had failed to make contact with the Tribunal or any of the other parties in order to advise of any difficulties in attending the hearing. The Tribunal was therefore left with no reasons whatsoever for its non-attendance.
12. Having regard to the parties' joint application and the terms of Miss Charalambous' submissions, the Tribunal took into account that the first respondent's absence without explanation indicated that it was unlikely that it would in future engage with any further hearing or with the production of relevant documents.
13. However it was also mindful that the bundle of papers already prepared and lodged by the third respondent contained certain documents which indicated that the claimant had, during her employment, been instructed to change her place of work from Airdrie to Carluke. The Tribunal considered that this issue in particular required evidence to be led in order that it could understand the circumstances of that request and the outcome, all of which appeared to be material to the disputed issues.
14. Having considered matters, the Tribunal therefore determined that the interests of justice required that the preliminary hearing should proceed in the absence of the first respondent in terms of Rule 47.

Relevant law

15. Regulations 3 and 4 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 provide as follows:
- 25 “3.—(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”);

5 (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

10 (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,

15 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.

(3) The conditions referred to in paragraph (1)(b) are that—

20 (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;

25 (ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and

- (b) *the activities concerned do not consist wholly or mainly of the supply of goods for the client's use.*

...

4. *Effect of relevant transfer on contracts of employment*

- 5 (1) *Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if*
10 *originally made between the persons who were employed and the transferee.*

Issues

16. The Tribunal therefore had to determine the following issues, in
15 circumstances where it was not in dispute that there was a relevant transfer between the first and third respondents on 25 January 2021:
- (i) How was the organised grouping of employees that was subject to the transfer defined?; and
- (ii) Was the claimant assigned to that organised grouping of employees
20 immediately before the transfer on 25 January 2021?

Findings in fact

During the hearing both the claimant and the third respondent gave evidence. Both witnesses referred to documents contained within the bundle of documents. Having heard evidence the Tribunal makes the following findings
25 in fact:

Background

17. Motor Fuel Group is an independent forecourt operator, which owns and operates a large number of petrol stations throughout the UK. While Motor

Fuel Group owns the petrol stations, they are run on a day to day basis by “contract managers” who employ the employees who work there.

18. At all material times, the first respondent was the contract manager at BP Dukes Petrol Station, 94 Carlisle Road, Airdrie ('BP Dukes, Airdrie') and prior to the transfer on 25 January 2021 it was the contract manager at the BP Carluke, 37 Stewart Street, Carluke ('BP Carluke'). On 25 January 2021 the third respondent became the contract manager for BP Carluke.

The claimant

19. The claimant was formerly employed by the first respondent between 8 January 2007 and 25 January 2021 as a deputy store manager. Although during the early part of her employment she worked temporarily at various BP petrol stations for the purposes of training in various aspects of the BP forecourt estate, her principal place of work was BP Dukes, Airdrie.
20. During her employment the claimant was subject to a number of TUPE transfers, the last taking place on 3 April 2020 when she transferred to the employment of the first respondent.

The claimant's place of work

21. When the claimant signed her original contract of employment, which was with BP Express Shopping Limited, it contained the following provision:

“6 POSITION AND PLACE OF WORK

Your job title is Trainee Deputy Store Manager and your normal place of work is as indicated on the front page of this document. During the course of your employment, the duties of your job may be changed from time to time to adapt the requirements of the business.

The company also reserves the right to transfer you on a temporary or permanent basis to another department or location, according to the needs of the business.

The company will always consult with you before making any significant changes or any significant change to your job duties or place of work.”

At that time, the claimant’s place of work was BP Dukes, Airdrie.

The claimant's flexible working request

5 22. In the early part of 2010, BP Express Shopping Limited proposed that the claimant should move location from BP Dukes Airdrie to a BP petrol station in Cumbernauld. As she had recently returned to work after a period of maternity leave and such a move was therefore unsuitable for her child care arrangements the claimant responded with a formal flexible working request,
10 in terms of which she asked to be allowed to work permanently at BP Dukes Airdrie.

23. On 11 June 2010, BP Express Shopping provided the claimant with its response to her flexible working request, which was in the following terms:

15 *“I am pleased to confirm that on this occasion, the company is able to accommodate your application.*

- *You will be transferred to Deputy Store Manager at BP Dukes Connect.*
- *Your working week will be 5 days out of 7 days on a rota basis. This will involve working both early shifts (6am to 2pm) and late shifts (2pm to 10pm) as rostered.*
- 20 • *The rosters will be completed at least two weeks in advance so that you are able to arrange your childcare around your rostered shifts.*

...

25 *Please note that the change to your working pattern represents a permanent change to your terms and conditions of employment and you have no right in law to revert back to your store.”*

24. The claimant understood that the outcome of the flexible working request was that her permanent place of work was from then on BP Dukes Airdrie and that

her employer had no contractual right to unilaterally insist that she worked at another store.

The events of September 2020

25. On or around 8 September 2020, the claimant felt unwell because of stress
5 at work. In the circumstances she telephoned the first respondent's Asif Naeem to advise him that she would not be in work the following day.

26. On 9 September 2020 Mr Naeem telephoned the claimant to inform her that,
with immediate effect, she was being transferred to work at BP Carluke in
order to provide cover while it was short staffed. Mr Naeem gave no
10 indication that this would be a permanent move so the claimant's
understanding was that it would be a temporary measure.

27. In response, the claimant explained to Mr Naeem that following her flexible
working request having been granted in 2010, her permanent place of work
was Airdrie. She informed him that she was still caring for her child and in
15 addition she now also looked after her disabled father. In the circumstances
she explained that she could not agree to such a move as it simply was not
feasible for her, having regard to the additional travelling that would be
involved. In reply Mr Naeem said that he would 'get back' to her.

28. Further, the claimant also told Mr Naeem that her GP had provided her with
20 a 'sick line' for a month and therefore in any event she would not be returning
to work for the time being.

29. On 10 September 2010, Mr Naeem wrote to the claimant in the following
terms:

"Dear Susan,

25 *Transfer of Place of Work*

*I refer to our conversation on 9 September 2020, when I confirmed that
effective 16/09/20, your place of work will be changing to:*

BP Carluke

37 Stewart Street

Carluke

ML8 5BY

This change has been necessary because we are short staffed at BP Carluke.

5 *The change is in line with your contract of employment, which states that where the demands of the business and organisation are such that employees can transfer from one location to another, then that is justified and reasonable. Also we took advice and further guidance from ACAS as well.*

10 *I also note that the BP Carluke is almost equally distant from your home in Blantyre to BP Dukes. Therefore this is a reasonable distance from your home and should not cause you an inconvenience.*

I can confirm that all other terms and conditions of your employment are unaffected.

Yours sincerely,

15 *Asif Naeem”*

30. That letter simply set out for the claimant what Mr Naeem had discussed with her on 9 September. The claimant did not respond in circumstances where she had already made her objection clear to him on 9 September and she anticipated that he would further consider that objection and respond to her.

20 31. Subsequently, on 6 October 2020, Mr Naeem wrote to the claimant in the following terms:

“Dear Susan,

Transfer of place of work

25 *I refer to our conversation on 9 September 2020 and my letter to you dated 10th September when I confirmed that effective 16th September 2020, your place of work will be changing to:*

BP Carluke

37 Stewart Street

Carluke

ML8 5BY

5 *The 16th September 2020 has now passed. I note that you are off sick. Therefore upon expiration of your sick note and your return to work, you should report to Ms Allison Rodgers MANAGER at BP Carluke, 37 Stewart Street, Carluke, ML8 5RA. Her contact details is, carluke@mfgplc.com. I tried to contact you several times over the phone but couldn't get through so*
10 *attached is your this month rota as well.*

The change is in line with your contract of employment which states that where the demands of the business and organisation as such, that employees can transfer from one location to another, then that is justified and reasonable.

15 *I can confirm that all other terms and conditions of your employment are unaffected. Also your shift patterns are exactly the same, **Tuesday to Friday 0600-1400** every week.*

Yours sincerely,

Asif Naeem

AMK9 Limited"

20 32. The claimant did not agree to the proposed change of her place of work as set out in that letter or in Mr Naeem's earlier letter. By the time she received Mr Naeem's letter of 6 October 2020 she was still off sick with work related stress and in fact she remained on sickness absence until the date of transfer on 25 January 2021.

25 33. During this period of absence she submitted her GP fit notes to both BP Dukes Airdrie and to Allison Rodgers at BP Carluke, but only because Mr Naeem told her in a WhatsApp message to contact Ms Rodgers in relation to sick pay during her absence. The claimant had no other contact whatsoever with

anyone at BP Carluke and she never attended there. Furthermore nobody from BP Carluke ever contacted her during her absence.

34. If she had been well enough to return to work prior to the transfer on 25 January 2021 she would have attended for duty at BP Dukes, Airdrie, as she still considered that was her permanent place of work. She did not agree to work at BP Carluke, even on a temporary basis, and she never worked there. In fact she has never set foot there.

The transfer

35. At 12 noon on 25 January 2021, the third respondent became the contract manager for BP Carluke in circumstances giving rise to a relevant transfer between the first and third respondents for the purposes of TUPE.

36. On that same day the first respondent provided the third respondent with the P45s of three employees that the first respondent claimed to be current employees there, namely the claimant and two others. No other information about employees was provided.

37. On receipt of the employees' P45s the third respondent contacted the claimant by telephone on 25 January 2021 to inform her that he was taking over BP Carluke and would become her employer. Until this telephone call took place the claimant had been completely unaware of this change of contract manager as the first respondent had provided her with no information about its plans and there had been no consultation.

38. During their call, the claimant explained to the third respondent that she was confused because she had never worked at BP Carluke and her place of work had always been BP Dukes, Airdrie. She told him that she had never even visited BP Carluke. In the circumstances she informed him she did not believe that her employment should transfer.

39. On 1 February 2021, the claimant received a letter from the first respondent dated 25 January 2021, which informed her that her employment would be *"transferring to a new employer as a result of imminent new ownership of the*

business". The first respondent had by then paid her only up to the transfer date.

BP Carluke

- 5 40. At all material times the petrol station at BP Carluke has been owned by Motor Fuel Group and operated by contract managers, initially the first respondent and subsequently the third respondent, who employ the employees there.
41. It is a petrol station with a petrol forecourt and a shop, which in addition to fuel products sells alcohol, soft drinks, groceries and tobacco. It also operates a Costa Coffee machine in terms of an arrangement with that company.
- 10 42. It opens seven days a week from 6 am to 10 pm and is normally staffed by only one person at a time who will deal with all customer sales transactions. A representative of the contract manager is required to be available between 9 a.m. and 5 p.m. each day.
- 15 43. Immediately before the transfer, the first respondent employed two employees who were permanently based there, both of whom were employed as customer assistants. It did not employ a deputy store manager.

Submissions

The claimant

- 20 44. The claimant submitted that she did not believe that she was part of the group of employees based at Carluke who should transfer to the third respondent. She had never visited BP Carluke, far less worked there. It had never been her place of work and she had not even agreed to move there temporarily in September 2020. Her belief was that her permanent place of work was at BP Dukes, Airdrie, as a result of the flexible working application that had been
25 granted in order to allow her to take care of her child.
45. She had never agreed to work anywhere else and she had never been consulted about any transfer of the business until the third respondent had made contact with her *after* the transfer.

Third respondent

46. Ms Charalambous submitted, in the first place, that the claimant had not given her consent to move to Carluke from Airdrie in or around 9 September 2020. The alleged purpose of the move was unrealistic, as she could not cover for BP Carluke station when she too was on sick leave. This was simply not achievable. In any event, she did not agree to the move.
47. Further, the claimant had never been on site at BP Carluke. After 9 September 2020, until when she had worked at BP Dukes, Airdrie, she never returned to work at all band during her absence she had no engagement with the first respondent, save in relation to her fit notes. Significantly, she had received no contact whatsoever *from* Carluke even though the first respondent claimed that was her place of work.
48. In addition, while the original contract of employment signed by the claimant had given the employer the right to move her in the event of business need, there had been a subsequent agreement in terms of which she would be permanently based in Airdrie, which was confirmed by the documentary evidence.
49. In the circumstances, there was no lawful basis for the first respondent to unilaterally change the claimant's place of work. The claimant had objected to the proposed move from Airdrie to Carluke in September 2020 and it had never taken place. Indeed, her objection was left unresolved because she was off sick and never returned to work.
50. Finally, she submitted that the fact that the first respondent had continued to engage with the claimant by letter *after* the transfer was further evidence that she was not truly in scope to transfer to the third respondent, who had never engaged with her at all.

Discussion and decision

51. Dealing with the issues in turn -

- How was the organised grouping of employees that was subject to the transfer defined?

52. The activities in question are the customer sales transactions carried out at the BP petrol station in Carluke, which has a petrol forecourt and a shop. In addition to fuel products it sells alcohol, soft drinks, groceries and tobacco and operates a Costa Coffee machine.

53. The organised grouping of employees that was subject to the transfer therefore consisted of the employees who were deliberately organised and essentially dedicated to carry out those activities at BP Carluke and for whom those activities were their principal purpose.

- Was the claimant assigned to that organised grouping of resources immediately before the transfer on 25 January 2021?

54. The Tribunal accepted that up to the point immediately before the transfer the claimant had not even set foot in BP Carluke, even though the first respondent had sought, in September and October 2020, to transfer her place of work from BP Dukes, Airdrie to BP Carluke, to which she had objected. It was mindful that this objection did not necessarily preclude her from being part of the organised grouping and nor did her lengthy sickness absence prior to the transfer.

55. However having considered the claimant's evidence and the documentation provided the Tribunal concluded that the claimant had been entitled to resist the first respondent's attempts to transfer her place of work. The Tribunal was satisfied that, even though her initial contract had included a valid mobility clause, by September 2010 her permanent place of work was BP Dukes, Airdrie and that the first respondent had no contractual entitlement to unilaterally change her place of work.

56. By virtue of her legitimate objection to the proposed transfer of her place of work, the claimant's place of work did not transfer from BP Dukes, Airdrie to BP Carluke. Therefore, if she had returned to work from sickness absence prior to 25 January 2021 she would have been entitled to return to her place

of work at BP Dukes, Airdrie. In the circumstances she was not, and could not have lawfully been, included in the organised grouping whose principal purpose was the activities carried out by the first respondent at BP Carluke.

57. The Tribunal therefore finds that the claimant was not within an organised
5 grouping of employees entitled to transfer from the first respondent to the third
respondent on or around 25 January 2021 under regulation 4 (1) of the
Transfer of Undertakings (Protection of Employment) Regulations 2006
(‘TUPE’)

58. There being no other basis upon which the claim against the third respondent
10 can continue, the claim against the third respondent is dismissed.

Further procedure

59. Date listing letters should now be issued to the remaining parties with a view
to fixing a hearing on the merits of the claims against the first respondent.

Employment Judge: R King
Date of Judgment: 03 May 2022
Entered in register: 27 May 2022
and copied to parties