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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Mrs B Peasley

AND

Respondent

(1) West Midlands
Ambulance Service NHS Trust
(2) West Midlands Police and
Crime Commissioner

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Birmingham

ON 11 September 2017,
reserved to 13 November 2017

EMPLOYMENT JUDGE DEAN sitting alone

Representation

For the Claimant: Mr K McNerney, of counsel

For the First Respondent: Mr M Brewer, solicitor

For the Second Respondent: Mr A Aamodt, of counsel

RESERVED JUDGMENT

The judgment of the Tribunal of the Preliminary Issue is that:

At the material time there was a relevant transfer, a service provision change, within the meaning of regulation 3(1) (b) (iii) of the Transfer of undertakings (Protection of Employment) Regulations 2006 from the First respondent to the Second respondent.

REASONS

Background

1. By way of background in this case the claimant complains that she has been unfairly dismissed either by the First or Second respondent in these proceedings. The central dispute in the case to be determined by me as a preliminary issue is whether the claimant's employment transferred from the First to the Second

respondent pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE").

2. The claimant's principal complaint is that there was a relevant transfer of a service provision from the First respondent to the Second respondent and that she was dismissed as a result of the transfer. Accordingly the claimant's principal complaint is that she was automatically unfairly dismissed by the Second respondent for a reason connected with the transfer and at that there was a failure to consult about the prospective transfer and measures that would be taken by both the First and the Second respondent. The claimant maintains a complaint of wrongful dismissal against the Second respondent.

3. The First respondent's principal position is that there was a relevant transfer and that the claimant's employment therefore transferred to the Second respondent who is liable for the claims. The First respondent denies the lack of consultation regarding the transfer. In the alternative the First respondent asserts that work was available for the claimant notwithstanding the lost contract with the Second respondent but that the claimant unreasonably refused to consider alternative positions with the First respondent and that any resulting dismissal was fair and lawful and that the claimant is not entitled to a redundancy payment from the First respondent.

4. The Second respondent's principal position is that there was no relevant transfer, the claimant was never its employee and the Second respondent has no liability towards her.

5. The only issue that I have to determine at this preliminary hearing is the preliminary issue set out below.

Issues

6. This case comes before me in an open preliminary hearing to determine the preliminary question as directed by Employment Judge Gaskell at a case management preliminary hearing held on 9 June 2017 [50-52]:

"Whether or not at any time material to this claim, there was a relevant transfer, a service provision change, within the meaning of Regulation 3 (1) (b) (iii) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE"), (The Preliminary Issue)."

7. In order that I may determine the preliminary issue it is necessary for me to be able to determine the following questions;

1. Was any transfer of administrative functions between public authorities, i.e. not a relevant transfer?
2. Were the activities before and after the relevant transfer fundamentally the same?
3. Did the activity cease to be carried out by contractor and were they instead carried out by the client on its own behalf?

4. Immediately before such change was there an organised grouping of employees that had its principal purpose of carrying out activities on behalf of the client?
5. Did the client intend that the activities following the service provision change be carried out by the transferee other than in connection with the single event or task of short duration?
6. Did the claimant object to either respondent about being transferred (obliquely or directly)?
7. When was the date of the relevant transfer?

The parties in this case agree what the nature of the service was and the nature of the work that the claimant did under the contract.

Law

The relevant parts of Regulations 3 and 4 of the TUPE Regulations which provide:

A relevant transfer

3.—(1) *These Regulations apply to—*

....

(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.

(2A) References in paragraph (1)(b) to activities being carried out instead by another person (including the client) are to activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out.”.

(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; and

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

(4) Subject to paragraph (1), these Regulations apply to—

(a) public and private undertakings engaged in economic activities whether or not they are operating for gain;

(b) a transfer or service provision change howsoever effected notwithstanding—

(i) that the transfer of an undertaking, business or part of an undertaking or business is governed or effected by the law of a country or territory outside the United Kingdom or that the service provision change is governed or effected by the law of a country or territory outside Great Britain;

(ii) that the employment of persons employed in the undertaking, business or part transferred or, in the case of a service provision change, persons employed in the organised grouping of employees, is governed by any such law;

(c) a transfer of an undertaking, business or part of an undertaking or business (which may also be a service provision change) where persons employed in the undertaking, business or part transferred ordinarily work outside the United Kingdom.

(5) An administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer.

Effect of relevant transfer on contracts of employment

4.—(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 originally made between the person so employed and the transferee.

The respondents have referred me to a significant bundle of authorities and the 2nd respondent has produced a lever arch file authorities some of which have been referred to by all parties. I have considered the authorities to which I have been specifically referred by the parties in their written and oral submissions and to which I have had full and proper regard, they include: –

Argyll Coastal Services Limited v Stirling and others UKEAT/00121/11 EAT

Rynda (UK) Ltd v Rhiinburger [2015] EWCA Civ 75 CofA

Arch Initiatives v Greater Manchester West Mental Health NHS Foundation Trust and others UKEAT/0267/15

Metropolitan Resources Ltd v Churchill Dulwich Ltd in liquidation and another UKEAT/0286/08
Salvation Army Trustee Company v Bahi and others UKEAT/0120/16
Eddie Stobart Ltd v Moreman and others [2012] ICR 919EAT
Ceva Freight (UK)Ltd v Seawall Ltd [2013] IRLR 726 Ct Sess (Inner House)
Henke v Gemeinde Schierke and another [1997] ICR 746, ECJ
Mayeur v Association Promotion de l'Information Messine (APIM) [2002] ICR 1316
Dundee City Council v Arshad EAT 1204/98
Collino and anor v Telecom Italia SpA [2002] ICR 38 ECJ
Scattolon vMinisterio dell'Instruzione, dell'Univesita e della Ricera [2012]ICR 740,ECJ
Piscarreta Ricardo v Portimao Urbis Em SA (in liquidation) and ors Case C- 416/16 EJC
Hay v George hanson (Building Contractors)Ltd [1996] IRLR 427, EAT

Evidence

8. At the open preliminary hearing to determine the issue I have been presented with witness statement evidence from Mrs Beverley Peasley, the claimant who has adopted her written witness statement as her evidence without supplement or further examination.

9. For the First respondent I have heard from Mr Charles Knight who adopted his written witness statement and been subject to limited cross examination by the claimant's counsel.

10. For the Second respondent I have heard from Mr Mark Kenyon, who adopted his written witness statement and has been cross-examined by the claimant's counsel only. A fourth witness statement was produced by the second respondent's prospective witness Gemma Brookes who has not been subject to examination, her witness statement has been given relatively light weight to the extent it does not otherwise refer to objective evidence contained elsewhere within the bundle.

11. I am grateful to the parties for having agreed a single bundle of documents extending over some 185 pages, I have referred and considered only those documents to which I have been expressly referred in the evidence as well as to the pleaded case and earlier case management orders.

Findings of Fact

12. In light of the documents to which I have been referred and the evidence that has been before me I make the following findings of fact that I have limited as closely as I can to the issues that are to be determined by me in respect of the Preliminary Issue.

13. The claimant was employed by the First respondent as an audit manager and has continuous employment within the NHS from 1980. The claimant began employment with the First respondent trust in April 1998 when her employment was

subject to a TUPE transfer from South Birmingham Mental Health Trust. The claimant worked as an audit manager continuously for the First respondent as an audit manager on a part-time basis within the West Midlands Internal Audit Consortium (WMIAC) a consortium (under the auspices of West Midlands Ambulance Service NHS Trust) hosted by the First respondent. The claimant working within WMIAC as an audit manager was required to work on client contracts located in south and central Birmingham and latterly, since 2011 she has been located at West Midlands Police headquarters in Birmingham city centre where she has been employed by the First respondent working exclusively within the WMIAC consortium working only for the Second respondent under a contract for services between the First and Second respondent.

14. The claimant worked within the internal audit department of the Second respondent where she worked alongside the Second respondent's own audit staff all of whom were employees of the Second respondent. On a day-to-day basis the claimant reported to the head of audit at the Second respondent and maintained timesheets of her attendance which were authorised by the head of Department of the Second respondent and forwarded to the First respondent who raised invoices for the contracted daily rate. The invoices delivered to the Second respondent covered the claimant's salary costs and made a contribution to the operating costs of WMIAC consortium. Since 2011, with the exception of a short period in 2014 the claimant has devoted all of her working time to the First respondents contract for the Second respondent, has not worked for any other of the consortium clients and has little contact with the First respondent's management other than to notify them of her annual leave requests, after the First agreeing them with the Head of Audit and the Second respondent and in relation to any sickness or other absence.

15. During the course of 2014 the contract between the First and the Second respondents came to an end in May and the claimant for a short while was required to attend the First respondents Dudley offices and a new contract was issued to her on 23 May 2014 indicating that her permanent base was to be at their premises in Dudley [56- 57]. The claimant's job description [79] clearly identified the claimant's purpose to be that of working:

“ The examination and evaluation of the adequacy and effectiveness of the systems of management control operating within the client organisations.”

16. In June 2014 the contract under which the First respondent provided services of an audit manager to the Second respondent was renewed and the claimant returned to work at the Second respondents premises in Birmingham. From 2014 the claimant was the only employee of the First respondent who was providing the service to the Second respondent.

17. The First respondents contract with the Second to provide audit manager services was fulfilled by the claimant who was then their only employee who delivered the service. No other employees of the First respondent were allocated or worked at and provided audit management services to the Second respondent and house, it being a requirement of working at Lloyd House that the First respondents employee was security cleared. The claimant was the only of the First respondents employees who had security clearance to work at the Second

respondents process. Paragraph at Mr Kenyon on behalf the Second respondent has confirmed that following his appointment as deputy chief executive and chief finance officer for West Midlands police and crime Commissioner in September 2015 part of his role was responsibility for the internal audit system which is a joint service for both the Police and Crime Commissioner and West Midlands Police. Mr Kenyon confirmed that he wished to modernise the audit service under his management and to deliver a risk-based audit service and the Second respondent's audit team of which the claimant was an integral part all did the same sort of audit work. Mr Kenyon has given account that, prior to his arrival in the Second respondents business, to address resourcing issues at the internal audit service at the Second respondent, the then head of internal audit had made arrangements with WMIAC to provide an internal audit service through the First respondent to address a lack of internal resource in the internal audit department. The arrangements continued from 6 June 2011 to 9 April 2014 and, following a short hiatus, a similar arrangement recommenced on 28 July 2014 which ceased on 26 November 2016. Prior to April 2014 the claimant had been one of two employees of the first respondent dedicated to working exclusively at the Second respondent's premises in the internal Audit team, in that first period another employee of the First respondent Trevor Amphlett also assigned to work exclusively on the contract for services to the second respondent. From July 2014 the claimant was the only employee of the First respondent who was assigned to work exclusively on the contract to provide Audit Manager resource to the Second Respondent.

18. Having reviewed the internal audit arrangements Mr Kenyon determined that the internal audit team, which included the claimant would be modernised. The internal audit team comprised for direct employees of the Second respondent in addition to the audit manager resource provided by the First respondent through the services of the claimant, in total a team of 5. Mr Kenyon determined that the internal audit contract under which the First respondent provided audit services to the Second respondent through WMIAC would be continued beyond March 2016 until November 2016. I have been referred to purchase order documentation in respect of the charges for audit services provided by WMIAC[87-88] which confirms the contractual arrangements.

19. Mr Kenyon has confirmed that the internal audit management team underwent a gradual and progressive change in the way in which they worked from a financial assurance basis to an increasingly risk-based approach. The claimant along with the Second respondent's direct employees delivered audit manager services as the Second respondent required. The claimant only worked on the assignment to deliver the service to the second respondent.

20. As the First respondent's representative working at West Midlands Police headquarters the claimant was informed in late January 2016 by the chief finance officer that the contract between the First and Second respondents would not be extended after November 2016 as it was the Second respondents intention to make a permanent appointment to fulfil their previous shortfall in resources. The claimant was asked to inform the First respondents of that intention which she did.

21. Having read the witness statement of Gemma Brooks principal auditor for the Second respondent she confirms that she supervised the claimant with the support

of the chief finance officer Mark Kenyon from October 2015. Miss Brooks in her witness statement, and as confirmed in an email to Mr Kenyon 1 December 2016 [150] confirmed that she had informed Charles Knight, head of internal audit at the First respondent that it was the intention of the Second respondent to end the arrangements with the First respondent for the provision of an audit manager in November 2016 because of planned recruitment into the vacant post. It is disappointing that the First respondent and Second respondent did not maintain communication during the period February 2016 to November 2016 about the proposed termination of the contract to provide services from the First respondent to the Second respondent.

22. I find that for a period between 2011 and 26 November 2016 the Second respondent contracted with the First respondent to provide the activity of a dedicated audit manager to the Second respondent. The Second respondent gave notice to the First respondent that it was the Second respondents intention to cease the contractual arrangements with the First respondent in November 2016 and that those activities provided by the services of an audit manager carried out previously by the First respondent as undertaken by the claimant to their client the Second respondent would cease and would instead be carried out by the client the Second respondents on their own behalf through the recruitment of an employee to directly replace the services previously provided by the First respondents employee the claimant. In light of the evidence I have heard it is apparent that the First respondents provided their services of an audit manager resource to the Second respondents through a single employee whose principal purpose it was to carry out audit management activities on behalf of the client, the Second respondent, in the manner that she was directed by the Second respondent.

23. In light of the clear and unequivocal evidence given by Mr Kenyon I find that the Second respondent intended to carry out the same activities, that of internal audit management following the termination of their contract with the First respondent themselves by the recruitment of a direct employee, in effect the work that had previously contracted out to a service provider was taken back in house and the second respondent intended to provide the internal audit service resourced entirely by its own directly employed staff. Mr Kenyon has confirmed in his account that the progressive internal audit restructure was finalised in July 2016 and that an internal audit manager was engaged to start in October 2016 in anticipation of the termination of the contract with the First respondent. Mr Kenyon confirmed that the newly appointed internal audit manager undertakes the same duties and responsibilities as were undertaken by the claimant and the internal audit work continues to be undertaken by the existing 4 members of the internal audit team and the additionally recruited internal audit manger who continues to do the work previously undertaken by the claimant under the services provided by the first to the Second respondent.

24. On 2 November 2016 Mr Kenyon on behalf of the Second respondents sent an email confirming an earlier conversation he had had with Colin Larby, deputy head of auditing and assurance for the First respondent to confirm that the arrangements for internal audit services between the First and Second respondent would come to an end on 30 November 2016 should be the last day that the claimant was to work for the Second respondents.

25. I have been referred to evidence correspondence and memorandums that ensued between the First respondent and the Second during the course of November 2016 regarding the employment of the claimant and in particular whether or not the termination of the contract that the First respondent had for the provision of audit services to the Second respondent amounted to a transfer of undertaking. The First respondent asserted that the contractual rate's and the termination of the contract for the provision of services amounted to a transfer of an undertaking such that the claimant who the First respondents assert was an employee working solely for the Second respondent would transfer her employment to the Second respondents at the end of the contractual arrangements with effect from 1 December 2016.

26. It is beyond the scope of the single issue that I am required to determine that I should make any further findings of fact in relation to the claimant's employment and the arrangements for the effective service provision change.

Argument and Conclusions

27. Having made my findings of fact based upon the evidence relevant to the issues I am to determine I have considered the written and oral submissions that have been made to me by the representatives.

28. I deal first with the final submissions that the parties have made in relation to a suggestion that the claimant did or did not object to the transfer. All parties before me have agreed that that issue is not one that I am asked to consider as a preliminary issue.

29. The Second respondent asserts that even were the change of the contractual arrangements to amount to a service provision change that Regulation 3 (5) states that *"an administrative reorganisation of public administrative authorities or the transfer of administrative functions between public administrative authorities is not a relevant transfer."*

30. Mr Aamodt for the Second respondent accepts that the Regulations do not define public "administrative authorities" or "administrative functions" and refers me to a number of European cases that have considered such matters. He refers to the starting point being the ECJ's decision in Henke, a case which related to activities involving the exercise of public authority. Mr Aamodt acknowledges that there are a number of cases where the Henke exception does not apply where the activities have been "economic" in nature. Mr Aamodt argues that the Second respondent and the first are both public administrative authorities within the Regulations. Whilst I acknowledge that the respondents are public sector organisations the subject of the contract, namely the provision of auditing services is an internal function of a public sector organisation and is not of itself a particular task of public administration. I do not consider on any reasonable interpretation of "internal auditing" that function is the performance or exercise of either of those organisations public powers and the transferring activity of internal auditing does not amount to the performance of an administrative function.

31. I conclude that the service provision change is not an administrative reorganisation of public administrative authorities or the transfer of administrative functions between administrative authorities to amount to an exception such that there is not a relevant transfer. There was not a transfer of administrative function between public authorities to exclude the transfer from the TUPE Regulations.

32. Turning to the substance of the issue, whether or not there was a relevant transfer between R1 and R2 as defined by Regulation 3, it is accepted by the parties that it is trite law that an organised grouping of employees can comprise of one employee. In this case based on findings of fact I have made it is evident that immediately before the transfer the first respondent had a single employee dedicated to delivering only the service that her then employer, the first respondent, provided to the 2nd respondent to undertake internal audits through an audit manager. Applying the principles in Argyle Coastal Services Limited immediately before the transfer the first respondent had an organised grouping of employees whose principal purpose was carrying out activities on behalf of its client, the Second respondent.

33. Mr Kenyon for the Second respondent agreed that the service provided by the First respondent was the provision of audit services within the internal audit department of the Second respondent's organisation. Mr Kenyon agreed that the services before the termination of the contractual arrangements were exactly the same as those undertaken by the Second respondent on their own behalf after the service provision had been brought to an end. I have found that the claimant was the employee of the transferor, the First respondent who only carried out internal audit activities on behalf of the Second respondent. The claimant was the employee who had been organised by the first respondent into a "grouping", albeit of one, whose sole purpose was carrying out of the internal audit services for the Second respondent.

34. In light of my findings of fact I am led to conclude that the client, the Second respondent as confirmed by Mr Kenyon intended that the activities, internal auditing, following the service provision change were intended to and did in fact continue to be carried out by the client, the transferee in the long term. The arrangement was not a single event or for a task of short duration but the need to undertake internal auditing was an ever present requirement of the Second respondents internal administration and process.

35. All parties have agreed that whether or not the claimant objected to either respondent about being transferred is outside the remit of this preliminary hearing.

36. I am led to conclude that at the material time there was a relevant transfer of a part of an undertaking being a qualifying service provision change where activities cease to be carried out by a contractor on behalf of the client and are carried out instead by the client, the Second respondent on its own behalf. The conditions referred to at Regulation 3(3), are met and the transfer date was 30 November 2016.

Signed by Employment Judge Dean on 16 November 2017

Judgment sent to Parties on 16 November 2017