

EMPLOYMENT TRIBUNALS

Claimant: Mr J E Chaney

First Respondent: Leicestershire Action for Mental Health Project

Second Respondent: The Richmond Fellowship

Heard at: Leicester

On: Wednesday 30th May 2018

Before: Employment Judge Legard sitting alone

Representation

Claimant: Mr Meichen of Counsel

First Respondent: Mr Famutimi, Consultant

Second Respondent: Ms Criddle of Counsel

JUDGMENT

1. A relevant transfer within the meaning of regulation 3(1)(b) TUPE did not take place as between the First and Second Respondent.
2. The Second Respondent is dismissed from claim no 2602016/2017.

REASONS

1. **Introduction**

- 1.1 By a claim form presented to the Tribunal on 22nd November 2017 and, more specifically, within his comprehensive 'grounds of complaint' spanning 29 pages, the Claimant makes a number of allegations in connection with his employment with the First Respondent ('LAMP') and his subsequent dismissal. Within his claim form, the Claimant also questions whether he may have been transferred under TUPE and accordingly brings further complaints alleging a failure to consult under regulation 13 TUPE and automatic unfair dismissal under regulation 7 TUPE. In the event that I was to find that a TUPE transfer had occurred, then the Claimant pursues those same complaints against the Second Respondent ('RF').
- 1.2 In its defence LAMP denies all the complaints against it but also contends that the Claimant's employment transferred under regulation 4 TUPE to RF on or about 2nd October 2017. Accordingly LAMP maintains that, should the Claimant succeed on all or any of his various complaints, any liability in respect of the same is inherited by RF.
- 1.3 RF contends that no TUPE transfer occurred and accordingly the Claimant was never employed by it and therefore it bears no liability whatsoever for any of his complaints.
- 1.4 By a separate claim form received by the Tribunal on 18th January 2018 (and later consolidated) RF (the 'claimant' in that claim) brings a complaint against LAMP under regulation 12(3) TUPE on the basis that LAMP failed to provide it with relevant employee liability information. Within the claim form, RF maintains that the services provided under the contract awarded to it on or about 14th July 2017 (and which went 'live' on 2nd October 2017) were fundamentally different to those provided by LAMP under the pre-existing 'Genesis Project.' This claim is resisted by LAMP both on its merits and on jurisdictional 'time' grounds.

2. **Issue**

- 2.1 By letter dated 19th March 2018, Employment Judge Blackwell directed that a preliminary hearing take place in order to determine whether a relevant transfer had taken place.
- 2.2 At the outset of the hearing and, following discussion with the parties' representatives, it was agreed that the sole issue for consideration at this preliminary hearing was whether there had been a service provision change ('spc') within the meaning of regulation 3(b)(ii) TUPE and, more specifically, whether there had been a relevant transfer of the activities comprising LAMP's 'Genesis' contract with Leicester City Council ('LCC') to RF on 2 October 2017.
- 2.3 It was common ground that the Claimant met the criterion of being an 'organised group of employees' whose principal purpose was the carrying out of the activities which comprised the Genesis Project.
- 2.4 The area of dispute narrowed even further as the parties' representatives agreed that the key issue for my determination was whether the activities being carried out by RF post putative transfer were *'fundamentally the same'* as those previously carried out by LAMP.

3. **Application to adduce evidence**

- 3.1 By email dated 13th June, approximately two weeks after the hearing had concluded, LAMP sought to adduce two letters into evidence. In support of their application, LAMP contended that the letters in question had been referred to by its witness, Mrs Langley, in the course of cross-examination and, according to their email,

"...evidenced the fact that the activities under the Genesis Project had transferred to the second Respondent, and therefore, the Claimant's role had transferred to the second Respondent accordingly."

- 3.2 'Mis-filing' was given as LAMP's explanation for its failure to previously disclose or rely upon these letters. LAMP maintained that no prejudice would befall either or both of the other parties and that the interests of justice weighed in favour of their inclusion. Finally, in support of its application, LAMP referred me to the CPR (specifically Rule 31) as well as McTear and another v Engelhard and others [2016] EWCA Civ 487 and the guidance set out in Denton v White [2014] EWCA Civ 906.
- 3.3 Both the Claimant and RF objected to their inclusion and provided written submissions in support of their objections.
- 3.4 I refuse the application. First of all, LAMP conspicuously failed to provide any adequate explanation for its failure to previously disclose or rely upon the same. I do not accept that 'mis-filing', even if true, amounts to a good reason. Second, the application to adduce this evidence was made long after the evidence had concluded. Neither the Claimant nor RF have had (nor could they have had) the opportunity to cross-examine Mrs Langley upon their contents or adduce their own evidence in rebuttal. In short the 'new' evidence could not have been tested unless the hearing was re-convened. Re-convening the hearing was not an option sought by any party and, in any event, would have been wholly inconsistent with the overriding objective. Finally, I am not satisfied that the contents of either letter, even if taken at face value, were probative of the case that LAMP purported to make. In short, neither letter appeared to be relevant to the issue, namely whether or not the activities actually transferred from LAMP to Richmond and/or whether the same were fundamentally the same.
- 3.5 The letter dated 16th July 2016 refers to funding from the existing CCG grants, being used to fund a new program, namely, the "joint health and social care locality mental health resilience and recovery hubs." It is far from clear that this is a reference to the wellbeing and recovery service (which RF later successfully bid for). Likewise the reference to an 'Information and Peer support service' is not, to my mind, in any way synonymous with the Genesis Project. The letter dated 27th March 2017 and addressed to Mrs Langley from a Mr Bosworth, of the East Leicestershire and Rutland Clinical Commissioning Group ('CCG'), simply informs LAMP that it was to lose approximately £10,000 in funding from

Leicester City CCG and that it would continue to provide health advocacy services across Leicester, Leicestershire and Rutland. There is nothing within those letters which, at first blush, would assist a Tribunal in making a determination as to whether activities transferred under TUPE and, if so, whether those activities remained fundamentally the same.

4. Evidence

- 4.1 I have been taken to a number of documents within an agreed bundle, numbering approximately 450 pages. The parties were reminded that it was their responsibility to draw to my attention those documents upon which they intended to rely in support of their respective cases and they should not automatically assume that I had read any documents other than those referred to within the various witness statements.
- 4.2 I heard evidence from the Claimant in person and, on behalf of LAMP, from Mrs Langley (CEO) and, on behalf of RF, Mrs Lawrence (Locality Manager). All witnesses were thoroughly cross-examined.
- 4.3 On the whole I found all 3 witnesses to have done their best to give truthful and careful evidence in this case. However, where there were differences in recollection or interpretation, I unhesitatingly preferred the evidence given by the Claimant and Mrs Lawrence.

5. Findings of Fact

- 5.1 The following findings of fact are reached on the balance of probability. I have attempted to restrict my findings of fact only to only those matters relevant to the issue in this case. From time to time I will have inevitably strayed into areas which may form the subject of factual enquiry by another Judge or Tribunal at a later stage. It is important to stress that none of my findings, other than those relevant to the TUPE question, should be read as being in any way binding on any subsequent Judge or Tribunal whose task it will be to enquire into the underlying merits of the remaining complaints.

- 5.2 The key facts in this case are as follows. LAMP is a relatively small charitable organisation dedicated, as its name suggests, to the assistance of those suffering mental health problems by providing mental health advocacy and advisory services. It describes itself as a ‘user-led’ organisation with over 50% of its staff, volunteers and Board of Trustees with ‘lived experience’ of mental ill-health.
- 5.3 LAMP has a long history of providing mental health advocacy services in the Leicestershire area via separate contracts with Adult Health & Social Care for Leicester City Council (‘LCC’), Leicestershire County Council and various Clinical Commissioning Groups (‘CCG’s).
- 5.4 At a strategic Board Meeting that took place on 1st December 2016 LAMP described its ‘mission’ as:

“To work together to overcome stigma and for social acceptance by using our advocates to help/empower service users and carers to have a voice.”

- 5.5 From approximately 2002 LAMP ran a group advocacy project in the Leicestershire area, commissioned by LCC, namely the Genesis Service User and Carer Involvement Project (‘the Genesis Project’). In September 2014 LCC ran a re-tender exercise for two specific services, one of which was called the ‘Mental Health Service User and Carer Involvement Service.’ The other tendered service was the ‘Mental Health Community Based Low Level Support Service.’ The contracts were due to expire at the end of March 2017 although the ‘Involvement Service’ contract was later extended to September 2017. LAMP successfully bid for the Involvement service which was, to all intents and purposes, very similar in scope to the Genesis Project. The Claimant was one of the authors of this successful bid. Notably LAMP did not bid for the Low Level Support Service. The contract sets out a summary of the service to be delivered under the Involvement service contract:

“This service will enable people who have mental health problems and their carers to share their views and experiences of services and to influence local decision making.” (p.422)

- 5.6 Within the tender documentation (p.189 -192) LAMP details the 'key features' of the service that they intended to provide, if successful:

"LAMP has been delivering a successful service-user and carer-led involvement service called the Genesis Project for over ten years....The Service will be organised and administered by a Project manager (32 hours) and a Development Worker (18 hours)..."

Elsewhere, in the tender documentation, LAMP describes the structure of its proposed 'Involvement' service as follows:

"It is designed to support and enable people with mental health problems, and their carers, to share their views and experiences of services. It will also help to shape and influence local decision making."

"At the heart of the new service will be a group of Service-users and Carers enabled to meaningfully contribute to the planning, design, commissioning and evaluation of adult social care services. The service will provide training, development, information and support to create a resource of 'lived experiences' from across Leicester's diverse communities that provides empowering involvement in accordance with the Leicester City Council's Adult Social care Engagement Strategy."

"The Service will consist of outreach consultations and 'Introduction to Involvement' workshops delivered to community settings across Leicester"

"Volunteers will present the views and opinions of service-users and carers at the Mental Health Partnership Board, other meetings, conferences and community gatherings. They will take an active role in engaging people from their own communities..."

There will be 12 'Involvement meetings' a year which will:

- ...
- *be a platform for service-user and carer representatives to 'report back' on their involvement activities...*

There will two 'Review' events a year; these meeting will be:

- *A platform to celebrate the work of the service, deliver information, gather feedback and recruit volunteers.*
- *...*
- *...*

Upon completion of an involvement opportunity LAMP will signpost those involved to other opportunities and projects..."

- 5.7 In essence, therefore, the intention of LAMP was for the Involvement service, if delivered by them, to be a continuation of the Genesis Project. Any subsequent reference to the Genesis Project within the context of this Judgment is therefore a reference to the Involvement Service contract.
- 5.8 In her witness statement, Mrs Langley claimed that the key features for the proposed tendered service as described above, when compared to the actual service delivered on the ground, were 'not necessarily accurate' but without, either in written or oral evidence, identifying in what way one differed from the other.
- 5.9 RF is also a charitable organisation, employing approximately 1,100 staff, specialising in the provision of housing, care and support services to adults with mental health problems. Since 2014 RF has provided a 'Life Links' Service in Leicestershire (although excluding the city of Leicester) which is described by Mrs Lawrence as a
- "...community based preventative service, working one to one with service users and social groups."*
- 5.10 At one point (it is not clear precisely when) RF also delivered a 'crisis service' across Leicestershire (including Leicester). There were occasions, during this period, that LAMP (through its Genesis team) raised concerns around the provision of this crisis service with a view to altering the way in which this service should be provided going forward. This

Case No: 26002016/2017 & 2600113/2018

represents a good example of the Genesis project working in action, as an advocacy service designed to influence the methodology and nature of the provision of mental health services – feeding in the concerns and suggestions of both service users and their carers so that the end service was fit for purpose and met their needs.

- 5.11 The Claimant was employed by LAMP from 6th June 2013 until 2nd October 2017 initially in the role of Genesis Involvement Advocate and, with effect from February 2014, as Genesis Project Manager. He was the only person whose employment was dedicated to the Genesis Project (save, for a relatively brief period 2015 to February 2017, when he was supported by Nitish Lakhman).
- 5.12 In essence the Genesis project was a service whereby information (or ‘feedback’) would be collated about mental health services in the Leicestershire area (from service users, their carers, charitable and mental health organisations) with a view to using that information to help service providers design, plan, commission and ultimately improve the provision of mental health care and support in the area.
- 5.13 Insofar as his day-to-day activities were concerned the Claimant, whose evidence I accept, put it thus:

“My day to day role as Genesis Project manager involved running a feedback service with users of mental health services throughout Leicester (“the Genesis Project”). This project was commissioned by LCC to deliver group advocacy for mental health service users in Leicester. The feedback gathered from service users concerned mental health support services they received from LAMP and other service providers in the city. This feedback would be collated and used by the Genesis Project to assist service providers in the planning, design, commission and evaluation of mental health services.

This data assisted them to identify areas where service users felt they were performing strongly, and where improvements could be made, or new services developed for particular service user needs. I was

responsible for organising and running community workshops and social events to gather feedback from mental health service users.....”

- 5.14 When cross-examined by RF, the Claimant agreed that the Genesis Project for which he was responsible was an ‘*advocacy service looking to assist mental health users and carers influence mental health policy in the City of Leicester.*’
- 5.15 In his role as Project Manager, the Claimant was responsible for arranging community workshops and monthly ‘feedback’ meetings. These also included a monthly ‘Speak Up!’ service. Indeed, to a large extent, the Genesis Project and ‘Speak Up!’ service were synonymous with one another and the parties’ representatives appeared content to refer to the service as a whole as ‘the Genesis/Speak Up! Project.’ For ease of reference, however, I simply refer to the ‘Genesis Project’ throughout. The Claimant also delivered what is described as an ‘Information Hub’ (whereby information pertaining to local mental health services could be accessed or disseminated) and organised various social events and fundraising initiatives.
- 5.16 The Claimant also undertook a number of tasks which were not directly attributable to the Genesis Project such as volunteer training and management. That said, to all intents and purposes, his overarching job was to manage the Genesis Project, something accepted by LAMP. Indeed, within email correspondence addressed to RF, Mrs Langley states that the Claimant “*works solely on the Genesis Project.*”
- 5.17 Within the bundle there are two separate Job Descriptions pertaining to the Claimant, one of which the Claimant only saw for the first time as part of the TUPE process. I accept his evidence that the Job Description at p.396 best reflects his role. Within that document, one of his principal responsibilities is described as:

‘...to develop and support an empowerment project offering effective forums for people experiencing mental health difficulties and for carers’

When read as a whole, the Job description clearly points to the Claimant as having overall responsibility for an 'empowerment' project designed to help service users and carers 'express their needs' so that they can 'contribute to consultation and planning processes relating to the improvement and development of mental health services' in the Leicestershire area.

- 5.18 In the bundle there is a promotional leaflet (p.411) which describes and explains in detail the essence of what the Genesis Project was all about, namely the collection of information; the provision of feedback; the sharing of knowledge and experience all in order to improve the wider mental health service in the Leicestershire area.
- 5.19 In January 2017 the Claimant was warned that he was at risk of redundancy. At that time he was the only person in the potential 'pool' (the only other Genesis employee, Nitish Lakhman, having already resigned). A redundancy consultation meeting took place on 2nd February 2017 chaired by Mrs Langley. Mrs Langley explained that LAMP was considering closing the Genesis project and explained the rationale behind the decision in the following terms:

"The deficit in the budget means that redundancy of your position is being considered. Going forward, without stakeholder engagement, the position of Genesis Project Manager is redundant.

The CCGs have said that they won't fund stakeholder engagement past September as you are aware."

- 5.20 The matter was further complicated by the fact that the Claimant was the subject of a disciplinary investigation (also in January 2017) and in respect of which he received a first written warning. The redundancy and disciplinary processes led to the Claimant becoming unwell and, from late February 2017, he was absent from work on grounds of ill health. As a consequence both the appeal process (eventually heard on 21st September 2017) and the redundancy situation appear to have been put on hold for several months.

- 5.21 The above coincided with a decision by the City and County Councils (as well as the relevant CCGs) to restructure their mental health services across the county of Leicestershire. Relevant providers were invited to bid for a range of mental health services. There were some exploratory discussions between LAMP and Richmond at or around this time concerning the possibility of a joint bid on the tender but these did not progress, principally because both sides recognised that there was a lack of compatibility between their respective services.
- 5.22 The new service, for which tenders were invited, was termed 'Locality-based Mental Health Wellbeing and Recovery Support service.' It was to be jointly commissioned by LCC and Leicestershire and Rutland CCGs.
- 5.23 LAMP elected not to bid for this re-tendered service. It is their case that, in accordance with LCC's objectives, the Genesis Project was to be absorbed within this new, wider wellbeing and recovery support service. That said, they did not have sufficient resources to deliver the new contract in its entirety and accordingly opted to stand aside from the tendering process.
- 5.24 RF, on the other hand, did tender for the new service as it complimented their resource structure. Their case is that this new proposed service was commissioned by a different body to that which had commissioned the Genesis Project (namely LCC) and, in any event and perhaps more importantly, was fundamentally different from anything delivered by the Genesis Project.
- 5.25 The draft service model for this new service refers to the provision of information 'signposting' and community recovery services but does not specifically, or even impliedly, refer to mental health carer/service user 'involvement' or 'advocacy.' There is a requirement for the successful tenderer to develop links, work alongside and forge partnership arrangements with existing mental health organisations and its aim is articulated as follows:

"To build mental health wellbeing and recovery within local communities through the provision of information, advice, navigation and community

recovery services, working in partnership with other providers and mainstream resources.”

5.26 In evidence Mrs Lawrence explained, and I accept, that the services actually delivered were broadly compatible with the service for which they successfully tendered. Their primary role, under the new contract, is delivering recovery support and signposting services. They do not, and never have, provided a campaigning, advocacy or involvement service. RF does not speak for the carers and/or the service users with a view to influencing how services ought properly to be provided nor does it seek to express the views of service users and/or carers in order to mould policy or practice in the field of mental ill-health provision.

5.27 Again, in oral evidence, Mrs Lawrence explained the fundamental difference between the service provided by RF as opposed to that previously provided by LAMP in this way:

“I represent RF which delivers services as opposed to going to meetings in order to influence the way in which services are to be commissioned.”

5.28 The Claimant was equally clear and concise in his evidence, when cross-examined. He did not deliver mental health support services although he occasionally helped with ‘signposting’. According to the Claimant, the Genesis project was *“not a support service. That’s not what we did.”* One of his main roles had been to provide LCC and CCGs with feedback so as to help them commission a service which best reflected the needs of service users and their carers. Much of that feedback came from volunteer service users. His role had been to *‘encourage and empower’* service users and carers to provide that feedback in a constructive and meaningful way. Under cross-examination, the Claimant put it thus:

“The fundamental difference is that [RF] delivered support services to service users. We didn’t. We were an advocacy project, concentrating on feedback to improve services. We were a volunteer-led project. The advocacy service cannot deliver support service because a conflict of interest arises.’

In terms of a potential conflict of interest, the Claimant was referring to the fact that the advocacy service, in order to work effectively, must stand independently from a support service so that the service user and/or carer have the confidence that their feedback (which may include complaint and criticism) can be fairly represented and independently assessed without fear that their continuing service provision would be adversely affected.

- 5.29 On 26th July 2017 RF was informed that it had been successful in securing the contracts and wrote to LAMP, amongst others, requesting TUPE information in respect of any potentially affected employee. LAMP indicated that the Claimant was one such employee. They wrote to the Claimant (who remained absent due to ill health and remained presumably on notice of redundancy) inviting him to a TUPE consultation meeting stating to him in correspondence:

“...the contract which includes the Genesis Project has been awarded to the Richmond Fund.

Our current understanding is that [TUPE] will apply to this transaction and, ..., your employment will automatically transfer from us to [RF] which is expected to take effect on or around 2nd October 2017.”

- 5.30 Unsurprisingly, given that this case is now before a Tribunal, by letter dated 6th September 2017, RF disputed that TUPE applied, stating:

“...we have concluded that the activities carried out by LAMP under the existing service as commissioned, and for which you receive funding, are not fundamentally the same when compared to those to be carried out under the new contract to take effect from 2nd October 2017. There will be no service provision change, and as such [TUPE] will not apply to staff currently employed by you on the existing contract.”

On their part, LAMP contended that the Claimant’s role aligned ‘perfectly to the work being transferred under the tender.’ As is fairly typical in such cases, there followed ‘ping pong’ correspondence between the two parties as they disputed the applicability or otherwise

of TUPE. Meanwhile the Claimant, as is also sadly typical of such cases, was left foundering in the middle of two opposing camps.

- 5.31 That said, it is clear that the Claimant's primary position throughout is that no TUPE transfer took place. In correspondence to LAMP, he put it this way:

"It is my understanding that the Mental Health Recovery and Resilience hubs service contract is a completely new service contract, it does not include the Genesis Project, and it is also commissioned by a different statutory body than the body...."

"I have not transferred to [RF]

"RF did not take over the Genesis Project. The Genesis Project was terminated with the conclusion of the city council contract at the end of September 2017. It no longer exists in any form."

"The service contract does not include the Genesis Project. The Genesis Project has ended and the recovery and resilience contracts are new contracts."

"[The new contract is]....a radically different service from the Genesis Project with completely different strategic goals."

- 5.32 The Claimant was understandably doing what he could to preserve his employment and accordingly his comments must be read with that caveat in mind. Furthermore the Claimant's views are only one part of the evidential matrix and questions as to the nature of the activities and whether the same remained fundamentally the same are ultimately ones of fact for myself to determine.

- 5.33 On 2nd October 2017 the Claimant attended LAMP premises, handed in his latest fit note but then received a letter from Mrs Langley informing him that his employment had terminated with LAMP that very day and that, so far as they were concerned, his employment had transferred under TUPE to RF.

6. **Relevant Law**

The Regulations

6.1 Regulation 3 TUPE Regulations 2006 provides:

(1) These Regulations apply to—

(a) ...

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

(i) ...

(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

(iii) ...

and in which the conditions set out in paragraph (3) are satisfied.

(2) ...

(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) ...

Caselaw

- 6.2 In Churchill Dulwich Ltd (in liq) v Metropolitan Resources Ltd, [2009] IRLR 700 the EAT stressed that, when considering the service provision change ('spc') question, and specifically whether there had been an assumption of 'activities' by another person from the original service provider, the employment tribunal has to consider whether the service provided after the change is fundamentally or essentially the same as that provided before the change.
- 6.3 Regulation 3(1)(b) does not therefore apply where the activities following termination of a contract where a service provider were substantially different. So held the EAT in OCS Group UK Ltd v Jones (EAT/0038/09) (2009), unreported and see also Love v Ward Hadaway Solicitors [2010] All ER (D) 250 (May).
- 6.4 The term 'activities' should be given its ordinary, everyday meaning defined in a common sense and pragmatic way without excess generality – Arch Initiatives v Greater Manchester West Mental health NHS [2016] ICR 607.
- 6.5 When considering whether the activities are fundamentally the same, the focus must be on the work done on the ground, not the work which might be done under the contract – Lorne Stewart plc v Hyde (UKEAT/0408/12).
- 6.6 It is possible for some activities carried out by a putative transferor to be transferred, whilst others are not – Arch Initiatives (supra.). That said, there may be some circumstances in which a service is so fragmented that it ceases to be identifiable as a service.
- 6.7 In Nottinghamshire Healthcare Trust v Hamshaw & Os [2011] UKEAT 0037 it was held that an Employment Tribunal was entitled to find that there was no relevant transfer (be that a transfer of undertaking or spc) where residents hitherto housed within a single care home were re-housed

in individual homes. In short, the economic entity did not retain its identity and the activities carried out/services provided were not fundamentally or essentially the same.

6.8 In Johnson Controls Ltd v Campbell & Os EAT 0041/12 Langstaff P reviewed the position on the question of whether the service remained essentially the same. It was held that the Tribunal acted correctly in first identifying the relevant activity carried out by the original contractor and then determining whether it was essentially the same service carried out in the hands of the new contractor(s). In that case (and applying the principles set out in Enterprise Management Services Ltd v Connect-Up Ltd & Os [2012] IRLR 190) the EAT agreed with the Tribunal that the new service, whilst incorporating many of the former tasks, was fundamentally different in that it was no longer centrally co-ordinated (a taxi ordering service). Therefore the correct approach to be adopted is first to identify the relevant activities carried out by the original contractor, then ask if the activities carried on by the subsequent contractor are fundamentally or essentially the same, before going on to consider the reg 3(3) factors and the question of assignment. The identification of the activity requires a holistic assessment rather than a simple enumeration of tasks and asking whether quantitatively the majority is the same pre and post putative transfer.

6.9 Case law emphasises that the application of regulation 3 to an individual case is essentially a question of fact. In particular, whether the activities carried out by the putative transferee are fundamentally or essentially the same as those carried out by the putative transferor is a question of fact and degree. Some minor differences between the nature of the tasks or the way in which they are performed does not mean that there is no service provision change. The critical point is that the activities before and after the transfer must be fundamentally the same (reg 3(2A) and see QLog Ltd v O'Brien UKEAT/0301/13).

7. Submissions

7.1 There was insufficient time available for oral submissions. Consequently, I gave directions for the exchange of written

submissions and I am grateful to all representatives for their comprehensive and professional approach to the same.

LAMP

- 7.2 I do not propose to rehearse the contents of the same within the context of this Judgment. In very broad summary LAMP complained that, in approaching the TUPE question, RF had adopted too narrow an approach. LAMP cited in support the case of Salvation Army Trustee v Bali (UKEAT/0120/16/RN). LAMP argued that RF tendered for a contract which fused a number of services that were provided to the client by different contractors (which they contended included the Genesis Project). Otherwise LAMP maintained that the services delivered under the 'Involvement' Service contract (i.e. the Genesis Project) were broadly similar to those delivered by RF under the 'Wellbeing and Recovery' service. LAMP argued that the Claimant was, in practice, actively engaged in 'wellbeing' and 'signposting' services by, for example, organising social evenings, running monthly peer support meetings, distributing newsletters and promoting social inclusion.
- 7.3 LAMP further contended that its advocacy service was a completely different service to the Genesis project. The Genesis project was, according to LAMP, "...a model of helping people get better through active involvement...aimed at the general public at large." Mr Famutimi also referred to what it described as the '*reality of life*' relating to voluntary sector funding whereby it is said that projects replace each other when new funding is made available. He also made reference to general 'NHS principles.' However, in both cases, LAMP elected not to lead any evidence in support of either matter.
- 7.4 Mr Famutimi argues that comparing the Genesis project to the activities performed under the Wellbeing and recovery contract is unfair and misleading on the basis that the latter is a 'wider' project. The principal question, he says, is whether the activities under the Genesis project were 'absorbed' under the Wellbeing and recovery Services contract even if those activities were not its main focus. The fact that the Claimant did not

undertake a number of activities that later fell under the Wellbeing and recovery contract was entirely understandable because the latter contract was an 'amalgamation' of services rendered by different contractors.

- 7.5 That said, Mr Famutimi's written submissions appeared to alter course somewhat to that which had been agreed at the outset of the hearing, in that they also invited the Tribunal to concentrate on the issue of 'fragmentation.'

RF

- 7.6 On its part RF disputes that this is a 'fragmentation' case. Not only was this never an issue identified by any of the parties, the fact is, says Ms Criddle, that LAMP has itself throughout maintained that RF is carrying out *all* the activities of the Genesis project. Ms Criddle argued that there was no evidence to support a 'fusing together' of different services post tender and pointed to the fact that, in oral evidence, the Claimant accepted that the Wellbeing and Recovery contract '...had the feel of...' the mental health low level support service for which LAMP did not bid in 2014 because it lacked the expertise to do so.

- 7.7 Ms Criddle maintains that the key to this case is a comprehensive look at the activities which RF is required to undertake under the Wellbeing contract and to compare those against LAMP's (and specifically the Claimant's) activities undertaken as part of the Genesis project. She maintains that, having done so, the only logical conclusion is that the activities are wholly different in nature (an advocacy service as opposed to a support service) and accordingly fall short of what is required in order for an effective spc to have taken place.

Claimant

- 7.8 The Claimant adopts a broadly neutral view but, in doing so, invites the Tribunal to accept his evidence.

8. Conclusions

8.1 I am satisfied, on the evidence, that RF, in providing the Wellbeing and Recovery Service, does not carry out the activities associated with the Genesis Project.

8.2 LAMP (specifically its Genesis project) and RF are both charitable organisations that work in the mental health sector. However, that is where the similarities end. It is abundantly clear that LAMP is primarily a mental health ‘advocacy’ service. On behalf of LCC, and up until September 2017, LAMP provided, via its Genesis/Speak Up! Project, a service which sought to encourage and co-ordinate feedback from service users and carers so as to ensure that the delivery of mental services (for example, one-to-one counselling; housing and so forth) met their needs and was appropriately targeted. On the other hand, RF was and remains a deliverer of mental health services.

8.3 I agree with the proposition advanced by Ms Criddle, namely that the Genesis Project was an “..advocacy service providing a forum for service users and carers to express concerns about mental health provision in Leicester and be party to improving it. It was *not* a service user support service.” The evidence bears that out. The Claimant’s own evidence was the most informative and helpful. He made it clear, on several occasions, that, on a day to day basis, he did not deliver mental health support or a mental health service as such. That was ‘not what we did.’ The nearest he came to matching the activities of the Wellbeing and Recovery service was ‘signposting’ but this was an activity that he undertook only occasionally. His main effort was targeted at encouraging and creating the conditions for service users and carers to provide feedback. This was undertaken in a variety of ways (including outreach stands and other forums) but it was a fundamentally different service from that now provided by RF.

8.4 One of the reasons why LAMP did not provide service user support services was that it would have created a conflict of interest with the Genesis Project, designed and presented as an independent advocacy service. Once again, I agree with Ms Criddle that the Wellbeing and

Recovery service is much more akin to the Low level support service which LAMP decided not to tender for in 2014 because it was beyond its expertise and not something which it did. It was an advisory and advocacy service.

- 8.5 Both parties perhaps spent too much time concentrating on the written contractual and tender documentation as opposed to activities 'on the ground.' That being said, I accept that some assistance could be derived from the same. Within the documentation there was a complete absence of any mention of advocacy or involvement as part of the wellbeing and recovery service. According to the 2014 tender documentation for the Genesis Project, the relevant activities were to provide forums for service users to discuss issues of interest to them in terms of mental health provision and a feedback service. I am satisfied that, in both cases, the contractual specifications and requirements set out in the tender documentation fairly reflected the activities carried out on the ground.
- 8.6 Furthermore there is no suggestion that the Wellbeing and Recovery Service had, as its main focus (let alone included within its aims) the need to influence mental health policy. By contrast, that was the main focus of the Genesis Project. One important element of the Wellbeing and recovery service was, as the name suggests, a recovery support service. That was, in essence, is a 1:1 wellbeing service and is not something which the Genesis Project did.
- 8.7 The Genesis project's principal aim, and the activities generated in pursuance of that aim and carried out by the Claimant and his team of volunteers, were focused on enabling mental health service users and carers to '*meaningfully contribute to the planning, design, commissioning and evaluation of adult social care services.*' The Claimant, whose gave clear and cogent evidence on the point, accepted that that aim, and associated activities, were not compatible with a support service.
- 8.8 It is clear that LAMP recognized that neither LCC (nor CCGs) were prepared to continue the funding of the Genesis Project or indeed any similar Project, whether as part of a new wider service or otherwise beyond September 2017. It was for this reason that LAMP, knowing that a

re-tendering exercise was underway, elected to make the Claimant redundant (although, due to his ill-health, this process was placed in abeyance).

- 8.9 Ultimately, Mrs Lawrence is correct when she describes RF as being *“concerned with the delivery of services to adults with mental health problems whereas the Genesis Project is concerned with ensuring that those with mental health problems and their carers can influence how services are planned, developed and delivered.”* That is a fundamental difference between the two organisations and the services they provide.
- 8.10 The activities that underpinned the Genesis Project and the Wellbeing and Recovery service were equally fundamentally different. I am satisfied that the activities that LAMP ceased to carry out on LCC’s behalf were not those that were subsequently carried out by RF. Furthermore, the activities carried out by RF pursuant to the Wellbeing and Recovery service were fundamentally different to those carried out by the Claimant and his volunteer team when delivering the Genesis Project on the ground. Yet further, the commissioning ‘client’ was not the same pre and post putative transfer. On any objective view, this cannot be classed as a ‘fragmentation’ case.
- 8.11 For those reasons, I find that there was no service provision change within the meaning of regulation 3(1)(b)(ii) on 2nd October 2017 as between LAMP and RF. Accordingly, I dismiss RF from claim number 2602016/2017. The parties shall notify the Tribunal as to how they wish the Tribunal to deal with claim no 2600113/18.

Employment Judge Legard

Date 27th July 2018

Case No: 26002016/2017 & 2600113/2018

30 July 2018

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FOR THE TRIBUNAL OFFICE