



# EMPLOYMENT TRIBUNALS

## Claimant

## Respondent

Mr Yapobi Attie

v

Optim Contract Services Limited

**Heard at:** Watford

**On:** 17 February 2020

**Before:** Employment Judge Palmer

## Appearances

**For the Claimant:** R Mannathukaran, Counsel

**For the Respondent:** D Charity, Consultant

## JUDGMENT

1. There was a TUPE transfer from Optim Contract Services to Mark West Limited on or about 21 November 2019.
2. The claims for unfair dismissal, holiday pay, notice pay, unpaid wages, bonus, against the respondent are dismissed.
3. The claimant withdrew his claim for failure to provide written reasons and this is dismissed.

## REASONS

### Claims

1. By a claim form filed on 15 April 2019, the claimant claims unfair dismissal, notice pay, holiday pay, arrears of pay and other payments, being a bonus. The claimant is not pursuing his claim for failure to be provided with written reasons.

### The issues

*TUPE transfer*

2. The respondent argues that its client, UPS,'s decision on or about 21 November 2018 to terminate its services and use a substitute contractor, was a service provision change within TUPE Reg 3(1)(b)(ii). The issues are:
  - 2.1 Was there a service provision change in that activities ceased to be carried out by a contractor (the Respondent) on behalf of a client (UPS) and were carried out instead by a subsequent contractor (Mark West Services Limited) on the client's behalf;
  - 2.2 Were the activities (vehicle washing and shunting) carried out by Mark West Limited fundamentally the same as the activities previously carried out by the respondent;
  - 2.3 Immediately before the change, was there an organised grouping of employees which had as its principal purpose the carrying out of the relevant activities;
  - 2.4 Immediately before the change, did the client intend that the activities would be carried out by the transferee and was this in connection with a single specific event or task of short-term duration.

### **Unfair dismissal**

3. The issues for unfair dismissal are what was the principal reason for dismissal and was it a potentially fair reason under ERA s98(1) and (2). The respondent asserts that there a transfer of services to Mark West Services Ltd so they are not the correct respondent. In the alternative they argue that the claimant was dismissed for redundancy, following the termination of the contract with UPS. They accept that no proper procedure was followed, though they did look for suitable alternative work but none was available.
4. If the dismissal was for a potentially fair reason, was the dismissal fair or unfair under s98(4) ERA and in particular did the respondent in all respects act within the so-called 'band of reasonable responses?'

### **Remedy for unfair dismissal**

5. Was there a chance that, if the respondent had followed a fair procedure, the claimant would have been dismissed in any event at some point and, if so, what adjustment, if any, should be made to the compensatory award. The respondent argued that if a fair procedure had been adopted, the claimant would still have been dismissed for redundancy a few weeks later as there no suitable alternative work available.
6. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal and to what extent ERA s122(2). The culpable conduct was

finding a cannabis spliff in his car which was parked in the respondent's premises.

7. The respondent agreed that the basic award was £1,350, but this was only payable by them if there was no TUPE transfer.

**Failure to provide written reasons for dismissal**

8. This claim was withdrawn by the claimant.

**Wrongful dismissal**

9. Did the respondent fundamentally breach the claimant's contract in terminating the claimant's contract without notice. If so, was it entitled to dismiss the claimant without notice or with pay in lieu of notice?
10. Was the claimant paid in lieu of notice of dismissal? The respondent agreed that notice pay of £900 was payable to the claimant if there was no TUPE transfer.

**Holiday pay**

11. The issue is whether there was outstanding holiday due at the termination of the claimant's contract. The claimant claimed 21 days outstanding holiday, including leave carried over from the previous year, but could not remember what days holiday he had taken.

**Arrears of pay**

12. It was agreed between the parties that, if there was no TUPE transfer, the respondent would be liable pay to the claimant the sum of £2,160 in respect of unpaid wages for the period he was suspended.

**Other payments**

13. The claimant claimed a bonus of £225 for the period 16 November 2018 to 23 January 2019. The issue is whether he was entitled to a bonus when he was not working. The respondent did not accept this was payable as the claimant was not working during this period and the bonus was only payable when he was performing his job to an acceptable standard.

**The evidence**

14. I heard evidence from Mr Pritchett, who owned and operated CA Support Services Ltd, which was then transferred to the respondent, where he managed staff and contracts.
15. I also heard evidence from the claimant.

16. There was an agreed bundle of documents and I read those documents to which I was referred.

**The facts**

17. The respondent provided services, to its client UPS, at the Feltham premises where parcels were sorted for delivery. The services, being vehicle cleaning and shunting services, were carried out by seven of its employees, including the claimant.
18. The claimant was employed by CA Support Limited (owned by Mr Pritchett) from 1 August 2014 as a Shunter Driver, then as a Supervisor at the Feltham premises though he was occasionally asked to work elsewhere. In his claim form he said he was employed to work at UPS Feltham and had continuously worked there for more than four years. This was consistent with his contract. I accept the respondent's evidence that the claimant spent the majority of his time at Feltham where he was assigned and had supervisory duties.
19. On 14 May 2018 the claimant along with six other employees doing the same work transferred from the CA Support Services Ltd to the respondent under TUPE.
20. On 20 November 2018 police visited the UPS Feltham Depot because of an alleged theft of parcels by one of their staff. Mr Davis, from UPS, said that the police had followed the claimant on to UPS premises on suspicion that he had been dealing drugs on site. As a result, the claimant and some other employees had been arrested, it being reported that the claimant had offered to take parcels containing valuable items such as iPhones as payment owed for drugs he had supplied. The claimant notified the respondent's Michael Pritchett by phone that the police had found cannabis in his car whilst parked at the client's site.
21. Mr Pritchett informed Mr Haigh, (at that time Operations Director for Optim) of the police visit by email dated 21 November 12:15 (31). He said that the police took no action and none of the respondent's staff had any stolen property.
22. Mr Pritchett then visited UPS Feltham and met with Mr Davis who said the respondent's employees were not permitted on site during the police investigation. Mr Davis said he may bring another supplier in if he needed to (30).
23. Mr Pritchett phoned the seven employees and told them not to go into work at Feltham whilst the investigation took place. The claimant was told that there had been allegations about drug supply and thieving against him and he could not return to site until they had the word from UPS. There was no suggestion by the respondent that the claimant was in fact involved in theft of parcels or in drug dealing.

24. Mr Davis told Mr Pickett, at a meeting, that the new supplier would be Mark West Services Ltd who would be brought in as temporary cover.
25. On 30 November Mr Haigh wrote to the claimant stating that all of the Optim team had been instructed to remain away from site while UPS concluded their investigations in conjunction with the police (32). The letter stated that Optim were working with the client to get this concluded so that hopefully, if members of the team were exonerated, they could return to work.
26. On 3 December Mr Haigh, who was hoping to keep the contract, spoke to Mr Davis who could give no assurances about any of the respondent's employees being allowed to return to UPS Feltham.
27. On 5 December Mr Haigh wrote to Mr Davis suggesting TUPE applied and asked for details of the new supplier (33). Mr Haigh said all employees assigned to UPS Feltham had the right to transfer and that this would be on the basis that they remained suspended until the UPS investigation was completed.
28. On 5 December 2018 Mr Haigh wrote to the claimant (and other employees) explaining that his employment with Optim had ended on 20 November 2018 and it would transfer to the new supplier (34).
29. On 5 December the respondent prepared TUPE liability information for the claimant and the other employees who were assigned to UPS Feltham (35).
30. On 12 December UPS confirmed to the respondent that the claimant and other employees would not be allowed back on site.
31. On 13 December 2018 Mr Haigh wrote to the claimant saying that the contract Optim had at the Feltham site had terminated on 20 November and his employment had transferred to the new service provider Mark Reed Services Ltd, who was the new contractor (36). Mr Haigh said that Mark Reed Services Limited would be given the details of the seven employees and would be in contact to make arrangements for the transfer. The names of the employees and their details were set out in a table on page 35. The claimant said he did not receive this letter.
32. On 17 December Mr Haigh, Mr Pritchett and Mr Davis met to discuss the situation. Mr Davis said he did not think TUPE would apply and the respondent's staff had been removed from site for reasons that did not relate to any transfer, referring to this as a SOSR (some other substantial reason). Mr Davis said the respondent's staff would not be allowed to return to UPS Feltham no matter who they were employed by.

33. In response to a letter from Mr Pritchett to Mr Davis asking for confirmation that staff could not return to the UBS site, Mr Davis confirmed that UPS's contract with Optim was terminated.
34. On 18 December Mr Haigh wrote to the claimant to say he was to be TUPE transferred to a new contractor at UPS Feltham. He said they would look for alternative positions within the company for 2 weeks and if nothing was identified, his employment could be terminated with immediate effect.
35. On 19 December 2018 Mr Davis wrote to Mr Pritchett confirming that none of their seven staff could return to UPS and that a UPS employee had admitted to stealing packages saying he had done so to repay a debt to the claimant. Mr Davis said that other UPS employees were either involved or had knowledge of what was going on (39-40). He concluded by saying that he no longer wanted the respondent dealing with his contract (as confirmed to him on that date).
36. On 3 January 2019 Mr Pritchett wrote to the claimant stating that the client had confirmed a client removal due to reasons deemed to be SOSR so, having not identified any vacancies, the claimant's employment was terminated with immediate effect (41). The claimant's leaving date was given as 20 November 2018, which was on his P45 (29).
37. On 18 January the claimant appealed against dismissal (p42). Mr Haigh responded on 23 January summarising what had happened and stating that suspension could be unpaid.
38. On 23 January Mr Haigh wrote to the claimant saying UPS had informed them that he was implicated in dealing drugs to UPS staff at the Feltham site and threatening one of their employees (43). As a result the police attended to check vehicles and the claimant was found in possession of a cannabis cigarette. This led to all staff not being allowed back on site, this being said to be a client removal based on some other substantial reason.
39. The claimant was sent his P45 on 11 December stating that his last day of employment was 21 November 2018.
40. I find that the respondent's seven employees, who were employed to do vehicle washing and shunting, did not work at the UPS Feltham site after 21 November 2018. Mark Reed Services Limited were brought in as the contractors. This was initially on a temporary basis but soon afterwards on a permanent basis, at least by 13 December when Mr Haigh wrote to the claimant saying that the new contractor would be Mark Reed Services Limited and his contract of employment would automatically transfer to the new employer without any break in service.
41. At the time, and not surprisingly, Mr Haigh was not familiar with the detail of the TUPE provisions. Attempts were made to find other employment for the seven employees even though they had, from a TUPE standpoint, transferred to the new contractor, Mark West Services Limited in

November. The respondent argued, and I accept, that Mr Haigh did not understand the position relating to TUPE and that if there had been a transfer, the claimant and other employees would no longer be employees of the respondent but of the transferee who took over the contract.

42. Again, unsurprisingly the client and new contractor did not provide details of the new arrangement but it is clear from Mr Haigh's letter to the claimant of 13 December that he knew that Mark Reed Services Limited had taken over the work previously done by the respondent's employees. In all probability I find that this was the case.
43. If the respondent's position on TUPE is wrong, the respondent acknowledges that the claimant is owed £900 notice pay, four days holiday, but not the bonus as the claimant was not working during the period to which it was owed as he was suspended.

### The law

44. Regulation 3(1)(b) TUPE Regulations 2006 provides that a service provision change occurs when:

“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);

(i) 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...”

The "activities" that are carried out by another person must be activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out (*regulation 3(2A), TUPE*).

45. Regulation reg 3 (3) (b) sets out conditions which are that:

“Immediately before the 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 (*regulation 3(3)(a)(i), TUPE*). The organised grouping of employees could be a single employee (*regulation 2(1), TUPE*).

(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 tasks of short-term duration; and

(b) The activities do not consist wholly or mainly of the supply of goods for the client's use (*regulation 3(3)(b)*)”

46. *In Metropolitan Resources Ltd v Churchill Dulwich Ltd (in liquidation) and another UKEAT/0286/08* the EAT held that tribunals should adopt a "straightforward and common-sense application of the relevant statutory words to the individual circumstances before them.

47. Where there is a service provision change, the person who carried out the activities before the service provision change is the transferor and the person who carries out the activities after the service provision change is the transferee.
48. The EAT in *Metropolitan Resources Ltd v Churchill Dulwich Ltd (in liquidation) and another UKEAT/0286/08* held that the activities carried on after the transfer should be "fundamentally or essentially the same" as those carried out before,
49. In *Eddie Stobart Ltd v Moreman and others [2012] IRLR 356*, the EAT held that, to constitute an "organised grouping", under Reg 3(3)(a) (i.) employees must be organised by reference to the requirements of the client and be identifiable as members of that client's team.
50. Where services are transferred to a new contractor over a period of time, it may be difficult for a tribunal to pinpoint a precise transfer time and the question is when the "essential nature" of the activity carried out by the alleged transferor is carried out by the new contractor (*Churchill*).
51. Where the service change definition is met the employment contracts of those "employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer" automatically transfer to the transferee on their existing terms (*regulation 4(1), TUPE*). Employees who are temporarily assigned to that group are not included (*regulation 2(1), TUPE*).
52. Regulation 4 provides that
  - 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.
  - 4 (2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—
    - (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
    - (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

## Submissions

53. The claimant argued that there was no TUPE transfer as there was no evidence that Mark West Service Limited had taken over the service



previously provided by the respondent. He argued there was an automatic unfair dismissal because of the transfer.

54. The respondent argued that there was a TUPE transfer, the claimant should have named Mark West Services Limited as a respondent as they had responsibility for the dismissal and other liabilities.

## **Conclusion**

55. The claimant's claims against the respondent fail and are dismissed.
56. I find that there was a TUPE transfer from the respondent (the transferor) to Mark West Services Limited (the transferee). The claimant and other six employees did not return to the UPS site after 21 November and were told, on 13 December, that the new contractor was Mark Reed Services Limited.
57. I find that the activities carried out by the seven employees working on vehicle washing and shunting were carried out by Mark West Services Limited, from about 21 November, or if that is not correct, at the latest by 11 December, by which time any temporary arrangement had become permanent.
58. The client, UPS, was the same, as were the activities carried out which were vehicle washing and shunting. Although Mark West Services Limited may have been initially taken on to carry out these activities for a temporary period, this soon became a permanent arrangement. The timing is not clear but it is matter of a few weeks (21 November to 11 December).
59. The activities (vehicle washing and shunting) carried out by Mark West Services Limited were fundamentally the same as the activities that had been carried out by the respondent.
60. Immediately before the change, there was an organised grouping of employees which had as its principal purpose the carrying out of the relevant activities.
61. Immediately before the change, UPS intended that the activities would be carried by the transferee and this was not for a short-term duration.
62. The transfer did not terminate the claimant's contract with the respondent as it was transferred to the new contractor Mark West Services Limited, with all the transferor's rights, powers, duties and liabilities under or in connection with his contract.
63. If there was no transfer, the claimant's dismissal would be for redundancy as the work he had been doing was being done by another contractor and there was no suitable alternative work.

64. The respondent accepts that they cannot argue that the dismissal was substantively fair, but argue there should be a Polkey deduction in that if the respondent had gone through a fair procedure, the redundancy is likely to have taken place four weeks later. Further, the finding of cannabis in the claimant's car on the respondent's premises is likely to have led to some contributory fault.
65. In relation to the claim for holiday pay, the claimant could not remember if he had taken holiday on days given by the respondent and has not therefore shown that he is owed the holiday he claims. The respondent argued that a maximum of four days holiday was owed as there was no right to carry forward unused holiday.
66. I find that a bonus was unlikely to have been paid over the period of suspension as the claimant was not working.
67. The respondent did not argue that the claimant had failed to mitigate his loss.

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Employment Judge Palmer

Date: 01/03/2020

Sent to the parties on: 03/03/2020

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For the Tribunal Office