



EMPLOYMENT TRIBUNALS

Claimants (1) Mrs C Collinson
(2) Royal College of Nursing

Respondents (1) University Hospitals Plymouth NHS Trust
(2) CRGW Limited
(3) CRGW (Plymouth) Limited

PRELIMINARY JUDGMENT

Employment Judge Goraj (in chambers) on 13 December 2022

The JUDGMENT of the Tribunal is that: -

1. With the consent of the parties, the Second Respondent (CRGW Limited) is dismissed from the proceedings.
2. The First Respondent is granted leave to amend its response / amend the list of issues as set out below.

REASONS

1. This Judgment is issued further to the judgment and case management order both dated 12 October 2022 which were sent to the parties on 26 October 2022 (respectively “the Judgment dated 12 October 2022” and “the Order dated 12 October 2022”). The Tribunal noted when preparing this Judgment that the Judgment dated 12 October 2022 is incorrectly referred to at paragraph 4 of the Order dated 12 October 2022 as the Judgment dated 12 July 2022 which is a typographical error.
2. The recent correspondence addresses two issues namely: - (a) whether the second respondent (R2) or the third respondent (R3) is the correct respondent in these proceedings and (b) whether the first respondent (R1) should be

permitted to amend its response (if required)/ the list of issues should be amended as requested in its letter dated 21 October 2022.

The correct identity of the respondent

3. As far as the first issue is concerned, all parties agree that the correct respondent is R3 (CRGW Plymouth Limited) and that R2 should therefore be dismissed from the proceedings. R2 is therefore dismissed from the proceedings as recorded above.

R1's application dated 21 October 2022

4. The background to R1's application dated 21 October 2022 is contained in the Judgment dated 12 October 2022 and the accompanying Order dated 12 October 2022. In brief summary, a new factual issue was raised by R3 on 5 October 2022 concerning the split of R1's NHS and privately funded IVF services, which it was given leave to pursue (with associated directions for the future conduct of the case). This new factual issue had potential consequences for the issues of "deliberate organisation" and "assignment" as relied upon by (then) R2/ R3 (not R1/R2 as stated at paragraph 3 of the Order dated 12 October 2022 (a further typographical error) at paragraphs 15 -18 of its closing submissions dated 5 October 2022.
5. In response to the raising of such new factual issue, the claimant sought leave to contend that the relevant transfer from R1 to R3 included not only the NHS IVF patients but also the private individual patients who were engaged in an IVF process before the transfer who continued with the process after the transfer. R1 also sought associated disclosure. The applications were opposed by (now) R3. As there was insufficient time to deal with the matter on 6 October 2022, it was agreed that R1 would be required to make a formal application which would be dealt with on paper. The claimant accordingly made the application dated 21 October 2022 which is opposed by R3 as set out in its response dated 4 November 2022. The Tribunal has not received any response to the application dated 21 October 2022 from the claimant.
6. The Tribunal has had regard in particular to the matters referred to below when determining the application dated 21 October 2022.

Background

7. It is common ground that: - (a) prior to any relevant TUPE transfer R1 provided IVF services in two ways namely, pursuant to a NHS contract with the local CCG and by way of privately funded patients and (b) that the claimant provided care to both categories of patients.
8. The claimant's pleaded case is that at the material times: - (a) 75% of her work with R1 was dedicated to the IVF Service and (b) that she was assigned to the organised grouping of employees working in the IVF Service and

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accordingly that her employment transferred to R2/R3 (now R3) by virtue of TUPE on 5 August 2022. The claimant did not draw any distinction between NHS and privately funded IVF services/ duties.

9. R1's pleaded case is put simply at paragraph 2 thereof namely that, " The Claimant was assigned to the IVF service and her employment transferred to the Third Respondent as part of an organised grouping". Again, R1 did not draw any distinction between NHS and privately funded IVF services/ duties.
10. R3's pleaded case is (paragraph 2 of the particulars of claim) that: - (a) R1 delivered 2 distinct "services" fertility and IVF which were governed by two "distinct contracts" (b) that R3 submitted a successful tender for the IVF contract which it accepted was a relevant transfer pursuant to TUPE. R3 did not however, make any reference in its response to the now contended 50/ 50 split of NHS/ privately funded IVF work or the potential consequences thereof for the issues identified below.
11. At the case management hearing on 27 January 2022, at which all parties were in attendance, and in the associated order ("the Order dated 27 January 2022) the issue to be determined at the Preliminary Hearing (paragraph 2(a)) was identified as "Whether the Claimant's employment was assigned to the IVF service which transferred from the First Respondent to the Second/ Third Respondents on 5 August 2020. The Claimant and the First Respondent say yes. The Second and Third Respondents say no. It is essentially a question of fact". The Order also records at paragraph 6 thereof (in a discussion of the claims and issues) that R3 maintained that the claimant's job was not assigned to the Service and so refused to have her and that the claimant maintained that 75% of her duties were for the "IVF Service". There was no suggestion at that time that the split between NHS and privately funded IVF clients had any bearing on the Issues to be determined at the Preliminary Hearing.
12. The Preliminary Hearing was unable to proceed in July 2022 because of lack of judicial resources however the matter was the subject of a further case management hearing on 18 July 2022 ("the Order dated 18 July 2022").
13. The Tribunal recorded, having agreed the wording with the parties that :-
"It is agreed by all parties that there was a relevant transfer being a Service Provision Change of the IVF service contract from the First Respondent to the Second/ Third Respondents on 5 August 2020, and further it is agreed by all parties that there was a deliberately Organised Grouping of Employees which had as its principal purpose the carrying out of the IVF service contract.

The Preliminary Issues to be determined are these:-

- (1) Whether the claimant was deliberately organised to carry out activities pursuant to the IVF service contract specifically (the position of the Claimants and the First Respondent is that this element of the legal test is not required); and
 - (2) If so, was the Claimant assigned to the Organised Grouping of Employees (and the position of the Claimants and the First Respondent is that this is the only legal test required), such that the First Claimant's employment transferred to the Second/ Third Respondents."
14. There was no suggestion at that time that the split between NHS funded and privately funded clients in the IVF service had any bearing on the above issues in the case/ the matter was prepared for hearing accordingly.
15. The oral evidence at the Preliminary Hearing in October 2022, focused on the split of work undertaken by the claimant between R1's IVF service and the general fertility service. No distinction was drawn for such purposes between the work undertaken by the claimant for R1's NHS and privately funded IVF clients until the issue was raised during Dr Acharya's evidence on behalf of R3 on the 5 October 2022 (as subsequently relied upon by the R3 as set out at paragraphs 15 -18 of R3's closing submissions dated 5 October 2022). Further whilst R1's witnesses acknowledged in their written/ oral evidence that the NHS IVF work transferred to R3 pursuant to the contract with the CCG the question of whether the privately funded IVF clients also transferred to R3 was not an issue before the Tribunal. Further, the Tribunal has been unable to locate any note of evidence of either of R1's witnesses formally accepting in evidence that the privately funded IVF clients did not transfer to R3.
16. As recorded in the subsequent Judgment dated 12 October 2022/ Order dated 12 October 2022, the Tribunal rejected the contentions of the claimant and R1 that R3 had made formal admissions that the "relevant transfer" included privately funded IVF patients and R3 was granted leave to pursue what the Tribunal held to be a new factual issue in the case, concerning the split between the NHS and privately funded IVF services undertaken by the R1 prior to the transfer to R3 together with the alleged consequences thereof as identified at paragraphs 15 -18 of R3's closing submissions dated 5 October 2022.

Determination of R1's application dated 21 October 2022

17. Having given careful consideration to R1's application dated 21 October 2022, R3's objections dated 4 November 2022 (and attached legal authorities) together with the matters referred to above, the Tribunal is satisfied that it is appropriate to exercise its discretion to grant R1 leave to

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amend its response/ the agreed list of issues (as identified in the Order dated 18 July 2022 on the basis/ to the extent set out below).

18. Leave is given to amend the second part of paragraph 2 of R1's existing response as (underlined) as follows:- " The Claimant was assigned to the IVF service and her employment transferred to the Third Respondent as part of an organised grouping of employees. The IVF service included the CCG contract, in respect of the NHS IVF activities, together with the privately funded IVF patients who were engaged in an IVF process with R1 prior to 5 August 2020 who continued with such process with R3 after that date.
19. Leave is also given to add an additional issue (3) to the List of Issues referred to at paragraph 13 above to reflect the above amendment namely :-
"(3) Whether there was also a relevant transfer being a Service Provision Change of the privately funded IVF patients who were engaged in an IVF process with R1 prior to 5 August 2020 who continued with such process with R3 after that date and in respect of which the claimant also meets the criteria set out at (1)/ (2) above.
20. When granting leave to amend (albeit in the slightly revised amended form outlined above), the Tribunal has had regard to the representations of R1 and the objections of R3 dated 4 November 2022 including the legal authorities referred to therein and in particular those of **Selkent Bus Co Limited v Moore [1996] IRLR 661 EAT, Vaughan v Modality Partnership [2021] IRLR 97 and Ottimo Property Services Ltd v Duncan and ors [2015] IRLR 806 (EAT).** The Tribunal has limited the ambit of the amendments to the above, which more accurately reflect what is recorded in the Order dated 12 October 2022, as it is not satisfied that the wider interpretation of IVF patients to include those on the waiting list could reasonably be considered to be engaged in an IVF process at the time of any relevant transfer.
21. When reaching its conclusions, the Tribunal has balanced, in particular, the respective hardship and injustice to the parties of allowing or refusing the amendments and has allowed the amendments for the following reasons: -
 - 21.1 It is clear from the background findings referred to above, that both the claimant and R1 pleaded that the claimant's employment with R1 was transferred to R3 as she was assigned to the organised grouping of employees working in R1's IVF Service which was transferred to R3 pursuant to TUPE. Further the claimant contended in her particulars of claim that she spent 75% of her time working for the IVF service. Such references to the IVF Service were not limited to the work undertaken by R1 pursuant to its contract with the CCG for NHS patients. R3 was therefore made aware at a very early stage of the proceedings that the claimant and R1 were taking a generic approach to the IVF service but did

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not raise in its response or at the subsequent case management hearings any issue relating to the split between NHS and privately funded IVF services (and the potential consequences thereof upon which it now seeks to rely as set out at paragraphs 15 -18 of its closing submission dated 5 October 2022).

- 21.2 Further at the Preliminary Hearing the oral evidence / cross examination of the claimant and other witnesses focused on the split between the claimant's work in fertility and IVF and in respect of which no distinction was made between the IVF work undertaken by the claimant for NHS or privately funded clients. The IVF service was treated for such purposes as one generic service. The issue did not arise until Dr Acharya's oral evidence on day 3 of the Preliminary Hearing and in respect of which R3 was given leave to rely as recorded in the Judgment dated 12 October 2022.
- 21.3 Whilst the Tribunal accepts the amendment now granted to the R1 goes beyond the question of the R1's split between NHS and privately funded IVF clients it is satisfied that it is a related and not unreasonable response particularly as the parties (including R3) had, prior to Dr Acharya's evidence, treated the IVF service in evidence / cross examination as one generic service for the purposes of the extensive forensic analysis of the claimant's duties without seeking to distinguish in any way between the IVF work which the claimant undertook for the NHS and privately funded clients. Further as indicated above the Tribunal is not satisfied that R1 made any formal admissions, that the privately funded IVF services did not transfer to R3 as contended by R1.
- 21.4 The Tribunal is not satisfied that the amendments, as formulated above, have no reasonable prospect of success/ that it is legally flawed in the light of the EAT judgment in **Ottimo**. All parties have sought to rely on **Ottimo** at some stage of the proceedings. R3 acknowledges in its objections dated 4 November 2022 that the word "client" for the purposes of Regulation 3 (1) (b) (ii) of TUPE includes clients plural and that there does not have to be a single contract between the legal entities comprising the client and the contractor. Further, the Tribunal is not satisfied that it can determine at this stage (without further evidence/ submissions from the parties) whether R1 is able to establish some link or commonality of intent for the purposes of Regulation 3 (3) (a) (ii) of TUPE. The parties will be directed to address this matter in any further oral evidence/ submissions.

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21.5 Finally, when reaching its conclusions, the Tribunal has had regard to the timing of the application dated 21 October 2022 in the context of where we are at in the proceedings and impending restored hearing in February 2023. The Tribunal is however satisfied that the late stage of the application has to be weighed in the context of the fact that R1 did not raise any issues regarding the split of NHS / privately funded IVF services and the potential consequences thereof until the third day of the Preliminary Hearing which has precipitated the current application. Further the Tribunal is putting in place associated “firm and focused” case management orders to ensure that the matter is ready for the restored hearing commencing on 6 February 2023.

22. In all the circumstances, R1 is given leave to amend its response / the List of Issues as identified above.

Employment Judge Goraj
Date: 13 December 2022.

Judgment sent to the Parties: 23 December 2022

FOR THE TRIBUNAL OFFICE

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