



01 JUN 2007

## EMPLOYMENT TRIBUNALS

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**AT: READING**

**BETWEEN:**

**Claimant**

**and**

**Respondent**

**Ms K A Hunt**

**Storm Communications Ltd (First Respondent)  
Wild Card Public Relations Ltd (Second Respondent)  
Brown Brothers Wines (Europe) Ltd (Third Respondent)**

**Represented by:**

**Represented by:**

**Mr D Grey-Jones, Solicitor**

**First Respondent, Mr C Head, Employment Law Consultant  
Second & Third Respondent, Mr S Tenhove, Solicitor**

**On: 27 March 2007**

**Chairman: Mr Richard Byrne**

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### **RESERVED JUDGMENT ON PRE-HEARING REVIEW**

The Claimant's employment with the First Respondent transferred to the Second Respondent on 28 July 2006 applying the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006. The Third Respondent is dismissed from the proceedings. The claim of unfair dismissal and remaining claims against the Second Respondent will be listed for Hearing accordingly.

## **REASONS**

1. The Tribunal listed for determination at a pre-hearing review before a chairman alone determination of whether there was a transfer under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) and if so whether the Claimant's employment transferred, and if so when and to whom.
2. I heard evidence from the Claimant, from Mr Derek Lowe the Chief Executive of the First Respondent, from Mr Barnaby Evans the Managing Director of the Third Respondent and from Mr Simon Holborow the HR and Operations Director for the Second Respondent. The parties had agreed a bundle of documentation and references that follow in brackets are to page numbers in that bundle. In addition the First Respondent had prepared a separate bundle which duplicated most of the documentation in the agreed bundle but also included some documents that were not otherwise included. References in brackets prefixed by R are to documents in that bundle.

### **Findings of Fact**

3. On 2 April 2001 the Claimant began her employment with the First Respondent. The terms of her contract of employment were set out in a document signed by her on 6 February 2002 (35-36). Her job title was account manager. The business of the First Respondent was the provision of public relation services. The Third Respondent was one of the First Respondent's clients. The Third Respondent did organise some of its own public relations events such as stands at exhibitions and county fairs but there were specialised services for which it relied in the First Respondent. In particular the First Respondent was appointed to communicate the Brown Brothers name, its core values, product range and availability. This included developing and maintaining excellent relationships with top wine writers and providing non wine related media with information about the Third Respondent and its wines.
4. In the course of her employment the Claimant was issued with a job description for an account manager (38-39). It set out a substantial list of skills she was required to possess but made no specific reference to providing services to any particular client.
5. On the First day of her employment she started working on the Third Respondent's account and continued working on that account without interruption until she ceased working for the First Respondent. Her job involved the day to day management of the Third Respondent's account. She was particularly effective in developing strong links with wine writers and opinion formers in the wine industry. The First Respondent had a

structure in place for providing services to a particular client. Each client had an account director, (in the case of the First Respondent this was Caroline Fosbury), an account manager, the Claimant, and an account executive. The account executive would carry out administrative tasks such as collating documentation, photocopying and organising posting. Whilst there were account executives nominated to deal with particular accounts the First Respondent's system was flexible and it was often a case of using whoever was available. In the course of a week an account executive might assist the Claimant with her work for the Third Respondent on some 3 or 4 occasions but it was not a major input to servicing the account.

6. In April 2005 Caroline Fosbury left the employment of the First Respondent to work on her own account under the title Fosbury PR Ltd. However she retained her involvement with the Third Respondent's account working on a consultancy basis for the First Respondent and effectively continued as account director for the Third Respondent. The Third Respondent was aware that she was no longer an employee of the First Respondent but regarded her still as an integral part of the services provided by the First Respondent to the Third Respondent.
7. When Caroline Fosbury left the employment of the First Respondent the Claimant's responsibilities in relation to the Third Respondent's account increased. Caroline Fosbury continued to spend 4-8 hours per week carrying out work in conjunction with the Claimant to service the Third Respondent's account.
8. The Claimant was successful in her work for the Third Respondent. She gained increasing expertise in the field of wine and public relations, developing key relationships with a number of wine writers. The full extent and scope of the work she undertook were fully set out in a briefing note she prepared in July 2006 for Amanda Williams a director of the First Respondent following the termination by Caroline Fosbury of her relationship with the First Respondent and Third Respondent. (42-46).
9. The Claimant's evidence, which was tested in cross examination, was that she spent some 70% of her working time each year on the First Respondent's account although the amount of time spent would vary each month. She said it never fell below 50% in any one month. There was very little documentary evidence to confirm those figures. What evidence there was is set out in a document headed "Hours breakdown supplied to solicitors in response to their request dated 13 September" (56) which showed that in a 6 month period from January to July 2006 the Claimant had spent some 52% of her recorded hours in work servicing the First Respondent's account. She also said, and I accepted her evidence, that there was other work she did at home at evenings and at weekends for

the First Respondent which was not recorded against the account. When asked why she did that additional work she replied "I did it because I felt it needed doing". I accept that she was fully committed and worked hard in providing a good service to the Third Respondent. That she was successful in this is evidenced by a letter from the Third Respondent to the managing director of the First Respondent dated 21 August 2006 (R23) in which Mr Evans records "I would like to take this opportunity to thank Storm for its support and endeavours on behalf of Brown Brothers and in particular to Karis Hunt whose work has been exceptional". I accept that the amount of time on which the Claimant was engaged in carrying out work for the Third Respondent was in the order, as she has claimed, of some 70% of her working time in the course of a year.

10. In June 2006 the Third Respondent gave notice to the First Respondent that it was re-tendering for the provision of public relations services. Mr Lowe received a letter dated 6 July from the Third Respondent in which they informed him that the public relations account was up for review and that the Respondent's were to stop work on 28 July. There was to be a re-pitch for the account and the new contract would commence on 1 September.
11. The First Respondent pitched for the business at a meeting at the Third Respondent's premises on 8 August 2006. The First Respondent's managing director Amanda Williams was notified by Mr Barnaby Evans, the Third Respondent's managing director, that they were unsuccessful in retaining the account and that the work was going to the Second Respondent. This was confirmed by letter dated 21 August from the Third Respondent to Amanda Williams at the First Respondent (R23).
12. The Claimant returned from holiday on 29 August 2006 and met with Derek Lowe the First Respondent's managing director. He informed her that although the First Respondent believed there was a TUPE transfer and that the Claimant's employment would transfer to the Second Respondent that had not yet been discussed or agreed.
13. On 1 September 2006 on arriving at work the Claimant was informed by Derek Lowe that he had not heard back from the Second Respondent in response to his letter of 21 August (48,49) ,and that he would allocate to her temporary assignments until matters were sorted out with the Second Respondent. He informed her that she had no option but to go ahead with the transfer and that she should not look for alternative employment because her job would be transferring.
14. On 5 September 2006 the solicitors instructed by the Second Respondent wrote in response to the First Respondent's correspondence which had

asserted that the Claimant's employment would transfer to the Second Respondent under TUPE (52).

15. The solicitor's letter of 5 September requested statutory information under Regulation 11(2) of TUPE which information was supplied by letter from Mr Lowe dated 6 September (53). He pointed out in that letter that the contract between First and Third Respondent was suspended by virtue of the Third Respondent's letter of 6 July 2006 and that his further letter of 21 August 2006 asserted that the Claimant's contract of employment was to be transferred to the Second Respondent from 1 September 2006.
16. In reply the Second Respondent's solicitors requested "an indication (preferably supported by documentation such as time sheets) of the percentage of Ms Hunt's time spent on the Brown Brothers account". That was supplied (56).
17. There was then further correspondence between the Second Respondent's solicitors and the Claimant in which the First Respondent continued to argue that there had been a transfer to the Second Respondent and Second Respondent's solicitors argued there had not. In their letter of 19 September 2006 (62) they stated "We see that Ms Hunt spends less than 55% of her time on the Brown Brothers' account. She has a number of other accounts and activities which she carries out for you as well. In our view, therefore, she is not "essentially dedicated" to the Brown Brothers account and there was therefore no "service provision" transfer. On 2 October the Second Respondent started to supply public relation services to the Third Respondent under the terms of a contract signed by them on 5 October 2006. Shortly prior to that, their letter dated 28 September, the Second Respondent's solicitors wrote to the legal advisors to the First Respondent stating "as there is no TUPE transfer, your client should either terminate Ms Hunt's employment because she is redundant, or re-assign her to other work. We should say that it would be very unfair to Ms Hunt if your client were to suggest that she should turn up to our client's premises on Monday morning, as there is no prospect of her being offered work and that would merely waste her time and that of our client".
18. On 2 October the First Respondent proposed in a letter (65-66) to make available to the Claimant as a loan an amount equivalent to the sum he considered she was entitled to by way of statutory redundancy payment. She did not accept this offer. She was paid by the First Respondent for work she had undertaken up to 28 September 2006.
19. The Claimant accepted that she did work for other accounts and those were identified in document 56. The accounts in question were Blue Nun, Ferrarelle, Acdoco, and ITN. It is clear however from consideration of the

information provided in that document and from her oral evidence to me that the bulk of her work was for the Third Respondent.

20. The evidence from Mr Evans was that after 28 July at no time did the Third Respondent itself do any public relations work prior to the contract between Second Respondent and Third Respondent taking effect on 2 October 2006. He also accepted in evidence that the reason why the contract did not take effect until October, instead of 1 September as originally envisaged, was because "there was concern over TUPE - we asked them to hold off". During that period, that is from 28 July until 2 October 2006 I accept the Claimant's evidence that she referred any telephone enquiries that related to public relations matters for the Third Respondent to Jo Brackley who was the marketing manager for the Third Respondent. This carried on throughout August and September and all contacts enquiries received by the Claimant, and there were many, were referred by her to Jo Brackley.
20. During September the account manager appointed by the Second Respondent to deal with the Third Respondent, Annabel Elliot, was liaising with the Third Respondent to identifying the work to be done by the Second Respondent after 2 October 2006. Mr Evans had no personal involvement on a day to day basis with the work done by Jo Brackley and was not in a position to contradict or challenge what the Claimant said she had done in liaison with Jo Brackley after 28 July. Mr Holborow, who gave evidence on behalf of the Second Respondent, was involved in the marketing pitch to obtain the work but had no direct involvement in the work itself after 2 October 2006.
21. I am satisfied on the evidence I have heard that the Third Respondent took back "in house" from 28 July 2006 the work that had previously been done by the First Respondent ( and practically by the Claimant)The Third Respondent dealt with the work on a "caretaker" basis pending the Third Respondent taking on the work from October 2006.They originally intended that the Second Respondent should be providing services to them from 1 September 2006 held back because of their concern over the possible TUPE ramifications.

### The Law

22. This claim is brought under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 which came into force on 6 April 2006 (TUPE). TUPE applies wherever there is a "relevant transfer". A Claimant can pursue this claim by either or both of two routes being –

Reg 3(1) (a) A "Transfer of an undertaking, business or part of an undertaking or business" where there is a "Transfer of

an economic entity which retains its identity". For these purposes "Economic Entity" means "An organised grouping of resources which has the objective of pursuing an economic activity", whether central or ancillary; and/or

(b) A "Service Provision Change".

23. In this claim the Claimant relies on Regulation 3(1) (b) of TUPE and argues that the transfer of the PR account which she managed from the First Respondent to the Second Respondent was a "Service Provision Change" as defined by Regulation 3(1)(b).

24. A "Service Provision Change" is defined as a situation in which-

(b)(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"); or

(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.

(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 do not consist wholly or mainly in the supply of goods for the client's use.

25. For there to be a service provision change there does not have to be an "economic entity" before the alleged transfer, so long as there is an organised grouping of employees and the other above tests are met. Regulation 2 provides that "An organised grouping of employees" can include a single employee (see Schmidt [1995] ICR 237 (UCJ)).

### **Submissions**

26. This is an unusual case in that there appear to be no decided cases with reference to Regulation 3(b) of TUPE and Service Provision Transfer. I was assisted by oral submissions on behalf of the First Respondent, written submissions on behalf of the Second and Third Respondent and submissions on behalf of the Claimant in the form of a skeleton argument.

### **The First Respondent's submissions**

27. It was submitted that this was a transfer within the provisions of Regulation 3(1) (a) in that there had been a transfer of part of an undertaking. The organised grouping relied on by the First Respondent was the Claimant herself. Further it was argued that there was also a service provision change under Regulation 3(1) (b) and that that took place with effect from Friday 28 July when the PR Activities ceased to be carried out by the Third Respondent as a client on its own behalf applying Regulation 3(b) (iii). There was subsequently a relevant transfer from the Third Respondent to Second Respondent implemented at the beginning of October.

### **Submissions on behalf of the Second and Third Respondents**

28. It was submitted on behalf of the Second and Third Respondent, and in my view this was a correct submission, that Regulations 3(1)(a) & (b) were not mutually exclusive and that I needed to consider the possibility that they might both apply. It is further submitted that with reference to Regulation 3(1) (a) the factors in Cheesman -v- R Brewer Contracts Ltd [2001] IRLR 144 EAT remain relevant, and that on the facts of this case there is no economic entity as Regulation 3(1) (a) requires.

29. It is submitted on behalf of the Third Respondent that the claim against them falls under Regulation 3(1) (b) (iii) in that the services were taken back "in house" and that on the evidence of Mr Evans there is no evidence that the activities have been carried out by Brown Brothers on its own behalf and therefore the claim against them cannot succeed. Turning to



the claim against the Second Respondent it is pointed out that Council Directive 2001/23/EC does not refer to a "Service Provision Transfer" and that this part of the Regulation is made under the Employment Relations Act 1999 Section 38. It is submitted on behalf of the Second and Third Respondent that the Claimant spending 52% of her working time on the Third Respondent's account does not amount to principal purpose because she was not essentially dedicated to the task. It is argued that is because the Claimant had no contractual obligation to carry out that work and that her "principal purpose" under the Regulations was not carrying out the Brown Brothers' account work. Further it is argued that under Section 3(3) (a) (i) "the activities concerned" that she carried out on behalf of the client have to be carried out by "an organised grouping of employees". It is argued that in this case the "activities" are not carried out by a single group of employees, but by two separate groups Ms Hunt and Ms Fosbury. It is submitted on behalf of the Second Respondent that the position may be analogous to employees assigned to the part of an undertaking being transferred which is pre 2006 case law. It is argued that the assignment test is of relevance and I should consider the case law reviewed in *Duncan Webb Offset (Maidstone) Ltd -v- Cooper* [1995] IRLR 633 where it was held that why the employee was employed by A to work on B's list and B transferred this business to C, the Regulations would not prima facie apply.

#### **The Claimant's submissions**

30. The Claimant relies on Regulation 3(1) (b) of TUPE on the basis that the transfer of the PR account which she managed from the First Respondent to the Second Respondent was a "Service Provision Change" as defined by Regulation 3(1) (b). The Claimant points out that the Second and Third Respondents deny there was a relevant transfer and that their defence to the claim is based on her assertion that the Claimant had only devoted 50-52% of her time to the Third Respondent's account and that her work on the account was therefore not the "principal purpose" of her employment. It is also argued that although Caroline Fosbury carried out work on the Third Respondent's account as a consultant after leaving the First Respondent's employment there could still be a transfer of that part of the undertaking that was left after she had ceased employment.
31. It is argued on behalf of the Claimant that it is inappropriate in any event to apply tests based simply on the percentage of time that an employee spent on the relevant contract when considering the "principal purpose" test set out in Regulation 3(3). Further that the Tribunal should consider all the circumstances of the case when deciding whether an employee was assigned to an undertaking, applying the guidance of the EAT in *Duncan Webb Offset (Maidstone) Ltd -v- Cooper* [1995] IRLR 633 .It is argued that when considering whether a "Service Provision Change"

transfer exists the permanency of the length of the arrangement should be taken into account, particularly where the undertaking was essentially based on the employees working on it, as would usually be the case with a contract that is subject to a "Service Provision Change". (Sanchez Hidalgo -v- Asociacion de Servicios Aser [1999] IRLR 136). In the Claimant's case she had worked on the contract on a permanent basis since the First day of her employment in early 2001. Finally it is argued on behalf of the Claimant that it is clear from the consultation papers issued by the DTI that the Government envisaged that the Service Provision Change of Provisions introduced in TUPE 2006 would broaden the scope of TUPE – see "Revision of the Transfer of Undertakings (Protection of Employment) Regulations 1981 – Final Regulatory Impact Assessment January 2006 paragraphs 25-30".

## Conclusions

32.

32.1. Has there been a relevant transfer under Regulation 3(1)(a)?

32.1.1. In order to answer this question I need to consider whether on the findings of fact set out above there has been a transfer of an economic entity which retains its identity. I am satisfied the answer to that question is no. In determining this particular aspect of the matter I have had particular regard to the principles distilled in Cheesman and others -v- R Brewer Contracts Ltd [2001] IRLR 145.

32.1.2. There needs to be a stable economic entity whose activity is not limited to performing one specific works contract, an organised grouping of persons and of assets enabling (or facilitating) the exercise of an economic activity which pursues a specific objective.

32.1.3. In order to be such an undertaking it must be sufficiently structured and autonomous but will not necessarily have significant assets, tangible or intangible.

32.1.4. In certain sectors such as cleaning and surveillance the assets were often reduced to the most basic and the activities essentially based on manpower.

32.1.5. An organised grouping of wage-earners who are specifically and permanently assigned to a common

task may, in the absence of other factors of production, amount to an economic entity.

32.1.6. An activity of itself is not an entity; the identity of an entity emerges from other factors such as its workforce, management staff, the way in which its work is organised, its operating methods and, where appropriate, the operation resources available to it. On the facts of this case the Claimant's provision of PR services to the Third Respondent was the activity, however, I do not consider that it was an entity because it was an activity performed within the First Respondent's organised grouping of wage-earners who were not specifically and permanently assigned to a common task but provided PR services to many different clients. There was no structured or autonomous undertaking. I take note of the Claimant's own submission which is that she does not rely on the transfer falling within Regulations 3(1) (a) but on Regulation 3(b). Taking all these factors into account I do not find that the work she undertook for the Third Respondent as a single employee amounted to an economic entity. Accordingly there was no relevant transfer under Regulation 3(1)(a).

32.2. Was there a transfer under the provisions of Regulation 3(1)(b)?

32.2.1. Was there a service provision change?

The answer to that on the facts found is clearly yes. Specialist PR Services, a service provision, were provided by the First Respondent to the Third Respondent until 28 July 2006. The First Respondent was unsuccessful in retaining the work and it was taken away by the Third Respondent with effect from that date. The PR activities in question were covered on a caretaker basis by the Third Respondent until October 2006 at which point the agreement entered into between Third and Second Respondent for the provision of specialist PR Services by the Second Respondent was implemented. Those activities were specialist activities and could not in my view have been carried out by the Third Respondent itself. On the facts found there was no service provision change within Regulations 3(1) (b) (iii). The activities were from October carried out by the Second Respondent

and there was a service provision change within Regulation 3(1) (b) (ii).

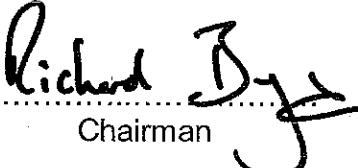
32.3. Are the provisions of Regulation 3(3)(a) & (b) satisfied?

32.3.1. The "organised grouping of employees" on the facts of this case is the Claimant herself. The provision of PR Services was in conjunction with Carol Fosbury. However it is common ground between the parties and is confirmed in the findings of fact above that she was not an employee. She cannot therefore fall within "an organised grouping of employees". The Claimant also had assistance on an ad hoc basis from an account executive to deal with the tasks identified at paragraph 5 of these reasons but that was peripheral and administrative and not part of the specialist provision of PR services supplied by the Claimant. I am satisfied that the principal purpose of the organised grouping of employees i.e. the Claimant was throughout her employment the carrying out of the specialist PR Services concerned on behalf of the Third Respondent, (the service provision) and that was her principal purpose. I refer to the findings of fact set out at paragraphs 3,4,5,6,7,8,9&19 of these Reasons in coming to that conclusion. I am also satisfied on the evidence heard that the Third Respondent intended that the activities would, following the services provision change, be carried out by the Second Respondent as transferee other than in connection with a single specific event or task of short-term duration and indeed this is what happened in October 2006. The activities do not consist wholly or mainly of the supply of goods for the client's use. Accordingly I find there was a service provision change of an organised grouping of employees namely the Claimant and that the Claimant's employment transferred to the Second Respondent.

32.4. What was the date of the transfer?


32.4.1. I am satisfied that the date that the employment transferred was the date on which the Third Respondent terminated its contract with the First Respondent and thereby dispensed with the services of the Claimant.

Although the Second Respondent did not begin to provide the specialist PR support required under the contract until October 2006 it was not specialist support that could be provided by the Third Respondent to itself – that was the whole purpose of the awarding of the contract for provision of those services to the Second Respondent. The delay in implementation of the contract was caused in part by the Third Respondent's accepted uncertainty at whether or not the TUPE provisions applied in this case. However the need for the service provision had not disappeared, the provision of it was simply "put on hold" until the beginning of October. Accordingly on the facts of this case I find that there was a relevant transfer applying the provisions of Regulation 4(1) of TUPE of the contract of employment of the Claimant from the First Respondent to the Second Respondent on 28 July 2006. That was the date on which the First Respondent's services were dispensed with by the Third Respondent in the full knowledge that the service provision would thereafter be provided by the Second Respondent.——

  
.....  
Chairman

Judgment sent to the parties on...31/05/07.....

Any application for review of this judgment must be made within 14 days of this date. Any appeal against this judgment must be instituted within 42 days of this date.

  
..... for Secretary of the Tribunals