



EMPLOYMENT TRIBUNALS

Claimants: (1) Mr S Galea
(2) Mr Neil Hunt
(3) Mr Nigel Hunt
(4) Mr B O'Connor

Respondent: (1) Solvitall Limited
(2) Thompson Facilities and Project Management Services Ltd

Heard at: Cardiff **On:** 3 September 2021

Before: Employment Judge Ward

Representation:
Claimants: Ms Hall (Citizens Advice Bureau)
Respondent: (1) Mr Brown (counsel)
(2) Mr Tinnion (counsel)

JUDGMENT

The Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE") applied to transfer the contracts of employment of all of the claimants from the second Respondent to the first respondent on 5 August 2020.

REASONS

The issues and applicable law

1. The preliminary hearing was listed to determine whether the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE") applied to transfer the contracts of employment of all or any of the claimants from the second Respondent to the first respondent and if so when?

2. Regulation 3 of the TUPE Regulations defines a relevant transfer as either (a) a transfer of an undertaking or (b) a service provision change.
3. In circumstances where contractors are engaged by the client, as occurred in this case. A service provision change in accordance with Regulation 3 (b) (ii) is a situation where; activities cease to be carried out by a contractor on a clients behalf and are carried out instead by another person (“a subsequent contractor”) on the clients behalf, and (in accordance with Regulation 3 (3)) which immediately before the service provision change there is an organised grouping of employees, situated in Great Britain, which has as its principal purpose the carrying out of activities concerned on behalf of the client, which is not a single event, task of short duration or consist wholly or mainly of the supply of goods for the clients use.
4. In accordance with Regulation 4 of TUPE such a relevant transfer shall not operate 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.
5. The following issues were for the Tribunal to determine:
6. Have activities by a contractor on a client’s behalf ceased, which are instead carried out by a subsequent contractor on the same client's behalf?
7. Are the activities fundamentally or essentially the same after the change?
8. Was there, immediately before the change, an organised grouping of employees, situated in Great Britian, which had as its principal purpose the carrying out of the activities concerned on behalf of the client?
9. Were the claimants' employed by the second respondent immediately before the transfer?
10. Were the claimants assigned to the organised grouping of employees subject to the transfer?

The evidence

11. The Tribunal heard evidence from the four claimants, Mr Thompson the Director of the second respondent and Mr Evans the Managing Director and

Owner of the first respondent. All witnesses provided written statements and gave evidence to the Tribunal.

12. A bundle of 462 pages was submitted together with a chronology and written submissions from all parties.

The relevant facts

13. The claimants were employed by the second respondent at Celsa Steel UK steelworks. The activity undertaken by the claimants was reprocessing of defective steel. This contract commenced on 1 May 2017 and was for a three year term.
14. The claimants have long career histories working on the site; Mr Galea as a team member since 2012, Mr Neil Hunt as a team member since 2003, Mr Nigel Hunt as team leader since 2003 and Mr O'Connor as a team member since 2014. In fact, all of the claimants had previously worked for the first respondent until 2017 when following a retender of Celsa's reprocessing contract, their employment transferred under TUPE to the second Respondent.
15. The claimant's all worked as part of a reprocessing crew. This was a team of eleven men, five men including a lorry driver working the 6am to 2pm shift and five men working the 2pm to 10pm shift on a two week rota.
16. In March 2020 the Covid 19 pandemic impacted on the services being required on site. Although the steel works remained open there was a reduction in production.
17. The pandemic affected the claimants in different ways.
18. Mr Galea on 23 March 2020 commenced sick leave. Mr Neil Hunt continued to work. Mr Nigel Hunt on 24 March 2020 self-isolated. Mr O'Connor on 23 March 2020 self-isolated.
19. The second respondents contract for reprocessing ended on 1 May 2020, although the second respondent continued on site providing the contracted reprocessing services.
20. On 5 May 2020, the client Celsa, advised the second respondent that upon reviewing the work currently on site, that there wasn't enough work for the two reprocessing shifts to be running. Four members of the team were not working (three of these were the claimants for the reasons identified above) and two further workers were identified by Celsa to be furloughed under the

governments job retention scheme. (B 364) From this date only one shift was operative on site.

21. On 6 May 2020 Celsa advised the second respondent to place all staff currently on sick leave (this affected Mr Galea, Mr Nigel Hunt and Mr O'Conner) on furlough instead which would be reviewed on a three week basis and would require Celsa's consent before returning to work. (B413)
22. Mr Galea and Mr Nigel Hunt were furloughed on 11 May 2020 and Mr O'Connor on 24 May.
23. On 11 May Celsa advised the second respondent that the reprocessing contract would be retendered. (B 415)
24. On 2 June 2020 the second respondent took the decision to furlough all the reprocessing team. This was due to the lack of response from Celsa about the contract terms for the services continuing and payments that were overdue. (B 368) There were no reprocessing services provided by the second respondent from this date. When questioned Mr Evans denied that the first respondent went on site at this time.
25. Mr Neil Hunt was therefore furloughed from 2 June 2020.
26. On 9 June 2020 Celsa put the reprocessing contract out to tender. The tender specified the activities in section 8.2 under the title reprocessing crew duties. (B371-379)
27. On 17 July Celsa advised the first respondent they had been successful in their tender and would be awarded the reprocessing contract.
28. On 21 July 2020 Celsa advised the second respondent that their tender had not been successful. (B454)
29. On 5 August 2020 the first respondent provided reprocessing services at Celsa Steel works. This did not include any of the claimants as Mr Evans had been told by Celsa that there were no workers on site as the reprocessing activities had completely ended. The team engaged by the first respondent was initially a six man team working one shift 6am to 2 pm, though this increased back to the two shifts and 11 workers once full production was back on site on 7 June 2021. Mr Evans agreed in evidence that the reprocessing duties undertaken by the first and second respondent were the same.

Conclusions

30. The first question is to identify what are the relevant activities? These are the duties of the reprocessing crew carried out at the Celsa site in Cardiff.
31. These activities were carried out by the second respondent on Celsa's behalf. They ceased on 2 June 2020 and on 5 August 2020 were instead carried out by the second respondent.
32. A crucial issue is when the alleged relevant transfer takes place, as only those employees employed and assigned 'immediately before' the transfer will transfer automatically to the first respondent under Celtec Ltd V Astley and ors 2005 ICR. The person responsible for carrying out the activities on behalf of the client was the second respondent and this occurred on 5 August. The date of any transfer therefore must be the 5th August 2020.
33. The activities are set out in the retender documentation and all parties agreed that the activities were fundamentally the same after 5 August 2020.
34. There was no change in the work carried out. The only identified difference from the first respondent was the fact that they only tendered and operated one shift from 5 August 2020. For this to require a conclusion from the Tribunal that this made the activities not essentially the same would require a substantial change to the quantity of work. I do not find this to be the case here. The second respondent undertook all the reprocessing work on the Celsa site, this reduced from two to one shift due to the pandemic. The first respondent undertook all the reprocessing work at the site, this initially required one shift and then increased back to the two shifts.
35. The reprocessing activities carried out by the second respondent had an organised grouping- a crew of 11 men. Their principal purpose was undertaking the reprocessing activities. They undertook no other activities.
36. The question for the Tribunal was whether because the work had come to a halt on site, due to expiry of the second respondents contract, the organised grouping didn't exist immediately before the transfer? This required me to consider the position immediately prior to 5 August 2020 and the fact that no work on site had occurred between 2 June and 5 August 2020. The case of Inex Home Improvements Ltd v Hodgkinson and Ors 2016 ICR 71 is a helpful reminder that the general purpose of the TUPE Regulation is to protect employment. There is no requirement for the organised grouping to actually be in work before the alleged transfer. There was a cessation of work, because the second respondents contract expired, reprocessing of steel was still required. The contract was being retendered with a contract commencement

date marked as soon as possible after submissions of tender on 19 June 2020. This was only a temporary cessation and did not mean the organised grouping ceased to exist.

37. The final question to consider was therefore whether the claimants, all of whom were employed by the second respondent, were assigned to the organised grouping of employees subject to the transfer? The issue here related to the fact that all four claimants on 4 August 2020 were on the Government's Job Retention Scheme. This created an absence from the workplace. Fairhurst Ward Abbotts Ltd v Botes Building Ltd and Ors EAT 1007/20 helpfully considers whether employees absent at the time of a transfer do in fact transfer. The question is a factual matter of whether if the claimants could have worked where would they have been required to work? This was a temporary situation subject to a 3 week review. Although the first respondent suggested that the fact the claimants could not in fact simply have returned to work and needed consent from the client made a difference I do not agree with. The contract of employment had been suspended under the national job retention legislation, it was temporary due to the pandemic and did not sever the employees from the organised grouping.

Employment Judge Ward
Dated: 1 October 2021

REASONS SENT TO THE PARTIES ON 4 October 2021

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche