Community Legal Service
Criminal Defence Service

Albion Chambers, Broad Street, Bristol BS1 1DR

Telephone 0117 927 2144
Fax 0117 926 2569
DX 7822 Bristol
Email clerks@albionchambers.co.uk
www.albionchambers.co.uk

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Albion Chambers EMPLOYMENT NEWSLETTER

TUPE – service provision change

Please can I have someone else?

Under the definition of a 'service provision change' introduced by the TUPE Regulations in 2006, service users are now finding it increasingly difficult to actually change service providers.

Let us assume that we run a local authority and employ a firm of cleaners to clean all of our offices. The cleaners are unreliable, rude and we want rid. We re-tender for the work and the old firm misses out. Hooray. But when the new firm starts, we find that the same bad pennies arrive for work. How on earth did that happen? How can we avoid it next time?

The Regulations

The new TUPE Regulations introduced a concept which is not to be found in the Acquired Rights Directive; service provision change ('SPC'). Under 'old' TUPE, only the familiar form of transfer was caught (an economic entity which retained its identity). That provision re-emerged as regulation 3 (1)(a) of TUPE 2006.

In addition, however, we have regulation 3 (1)(b) which also creates a protected transfer in three certain defined circumstances (paraphrased from the Regulations);

(i) Where services are outsourced to a new provider (having been undertaken 'in house' before);

(ii) Where services are no longer provided by provider 'A', but by a new provider 'B' instead;

(iii) Where services are taken back 'in house', having previously been undertaken by an external provider.

It is, by and large, the situation in (ii) that we are considering here.

In each case, the further provisions of reg. 3 (3) have to be met;

"The conditions referred to above 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 concerned do not consist wholly or mainly of the supply of goods for the client's use."

The important provision to note here is reg 3 (3)(a)(i) and the definition *'organised grouping of employees.'*

Iterpretation and application

I come from a genteel Lancashire Victorian coastal town called Southport. Imagine my dismay when I found that the Liverpool Employment Tribunal had recently concluded that requiring someone to work in Southport, who had previously worked in Birkenhead, was a 'material detriment'! That was the conclusion in *Royden and others v Barnetts Solicitors ET No. 2103451/07*. It was a case which illustrated the point that I made in the introductory paragraphs well.

Mr. Royden and others undertook work for a Birkenhead firm of solicitors ('LLW') in their conveyancing department doing work for the Britannia Building Society. In 2006 Britannia re-tendered for its work and the contract was won by Barnetts, over the Mersey and up the coast in Southport. Under reg. 3 (1)(b), the Tribunal found that two of the employees within the organised grouping employees (the conveyancing department at LLW) had been part of a grouping undertaking the Britannia work and, had it not been for the material detriment associated with the change and the lack of a mobility clause (reg. 4 (9)), they would have transferred to become employees of Barnetts. In other words, they would have simply followed the work.

Before moving on, though not directly relevant to this article, the very recent case of *Tapere v South London and Maudsley NHS Trust UKEAT 0410/08* sheds further light on the definition of 'material detriment' under reg. 4 (9).

This decision, though surprising to some, was very much in keeping with the first SPC decision that saw the light of day from the Reading Tribunal; *Hunt v Storm Communications ET No. 2702546/06*. That was a case in which an account manager with a PR firm became the subject of a TUPE transfer with the account when the client decided to move it to a new firm because her principal purpose had been to service that account with her old employer.

But what factors should we be looking at when deciding whether the service provider has changed for the purposes of reg. 3 (1)(b)? As in *Cheeseman*, should we be using a multi-factorial approach? Should we be considering issues of time (when the new provider started) or place (where the new work was undertaken) or manner (how they are carried out)? In short, no.

In *Metropolitan Resources v Martin Cambridge UKEAT/0286/08*, the EAT considered one of a number of cases involving the provision of services to asylum seekers under Home Office contracts. It stated that the *"a commonsense and pragmatic approach is required"* to these issues, the central question simply being whether *"the activities carried on by the alleged transferee are fundamentally and essentially the same as those carried out by the alleged transferor."*

Avoidance by splitting up the service

The point about the irrelevance of ▸

geographical location is illustrated well by the case of *Thomas-James and others v Cornwall CC and others (ET No. 1701021-2/07),* which was heard last year in the Bristol Tribunal. The case concerned a helpline which is provided by the Legal Services Commission in rather the same way as the NHS provide the NHS Direct phone line; members of the public can call to have questions answered in certain legal areas (benefits, employment rights etc..). Cornwall County Council won a bid to provide a portion of the service and their employees, sitting at home in parts of Cornwall, patched into the central switchboard at their allotted times and were provided with a portion of the incoming calls to answer. It came time for the LSC to re-tender. Cornwall decided not to bid. The new contracts were handed out to several new providers country wide. There was no doubt that *someone* was dealing with the portion of the work that the Cornish employees had previously handled, but who should the employees be transferred to? In theory, they could have been transferred to a business in Newcastle.

The Tribunal concluded that the work was so fragmented that it was impossible to clearly identify any recipient of the actual work that the Cornish employees (as distinct from anyone else) had handled before the re-tendering. The problem seemed to have been caused by the fact that the LSC central switchboard had handed out the calls randomly, with the result that the precise service that the Cornish employees had provided could never clearly be identified.

It can be argued that, to concentrate on the detail of the service (i.e. the consumer's/client's identity or location), is unnecessarily picky when considering whether a transfer has taken place. If, for example, the provision of postal services is transferred from A to B, would a tribunal be bothered to consider whether letters to the same addressees were being handled? Nevertheless, the approach adopted in T*homas-James* was later echoed in *Metropolitan Resources* and others that I will consider now.

The point that became clear from *Thomas-James* was that fragmentation of services could operate to prevent an SPC from occurring. There then followed *Kimberley and another v Hambley and others UKEAT 0488/07* and *Clearsprings Management Ltd. v Ankers UKEAT 0054/08*, both in the EAT.

As with *Metropolitan Resources* that followed, both cases concerned the provision of services to asylum seekers under government contracts. In *Kimberley*, services which had originally been provided by Lena Homes, were split, following re-tendering, between Kimberley and another. Where should the workforce go? Should they be split in proportion the work now handled by the two new providers, as had been argued and rejected in *Thomas-James* unsuccessfully? If so, how should the spilt be affected? Should a line be drawn down an alphabetical list? In fact, the Tribunal decided to split the financial liability between the Respondents in proportion to the work that they gained (because the employees had found work elsewhere in the interim). The EAT was not happy with that approach. Applying *Botzen [1985] ECR 519* and *Duncan Webb Offset [1995] IRLR 633*, it said that the employees should have been transferred to Kimberley because that transferees' had gained 97% of the work in one region and 71% in the other region. As the EAT was to say later in *Metropolitan Resources*, a tribunal should take a robust, pragmatic approach and look at the reality of a given situation on its facts.

In *Clearsprings*, the EAT dealt with very similar facts to *Kimberley* again, but the three new contractors received their clients (the asylum seekers) randomly from the source, as had been the case in *Thomas-James*. In those circumstances the EAT was unable to see who the real transferee should have been and, therefore, it found that no SPC had occurred.

Conclusions

Unless some thought is given to the nature of the service that you are tendering for and, crucially, who and how it is being carried out, you could well be landed with a workforce who claim that you are their new employers under the SPC provisions if you win the contract. The problem for a potential contractor is actually uncovering that information. How would you ever know if the service was being provided by an 'organised grouping of employees' within the old provider organisation? A very thorough approach to due diligence will be needed.

One way of satisfying yourself that there will not be a transfer is to concentrate on the nature of the services themselves; will they retain their identity or be fragmented into so many pieces that finding the old parts undertaken by the old providers becomes impossible. What is clear is that these are issues that are, by and large, out of the potential transferees hands. New contractors need to be alive to them.

From the client's perspective, if you really do want new people doing the work, the safest advice appears to be to either;

(i) Satisfy yourself that the current provider does not have an organised grouping of people within its workforce doing your work; or

(ii) Shuffle, mix and confuse the work upon its redistribution such that the approach that was taken in *Clearsprings, Thomas-James* and *Metropolitan Resources* is followed and no one can safely say that the service is the same as that which was provided before.

This remains challenging and difficult legislation for the unwary contractor looking for new work in times when it is often hard to find and frustrating law for those trying to shake off the underperforming workers who had been fulfilling the contract in the past.

John Livesey

Deception not necessary for a contract to be a sham

In the recent case of *Protectacoat Firthglow Ltd v Szilagyi [2009] EWCA Civ 98* the Court of Appeal upheld an employment judge's decision that a partnership agreement and contract for services entered into by a claimant was a sham and that the claimant was, in fact, an employee and not an independent contractor. In reaching its decision, the Court of Appeal confirmed that it was not always necessary to show that both of the contracting parties intended to deceive others and, in cases where it was argued that the true legal relationship was inconsistent with that set out in the written contract, an employment tribunal should consider whether the contract reflected the true nature of the parties' intentions at inception and, if relevant, throughout the duration of the contract.

Protectacoat Ltd (P) was a company which renovated external walls of residential

premises. Mr Szilagyi (S) started working for the company as an installer in March 2006 and, after a period of training, was informed by P that he required an assistant to work with him. S co-opted N for this purpose and, having done so, was asked by P to sign a partnership agreement with N and a services agreement between the partnership and P. The partnership agreement stated that it was governed by the Partnership Act 1980 and that it was terminable on two weeks' notice. The services contract stated that P would pay gross fees to the partnership on receipt of an invoice, who would then be liable to pay tax and national insurance. The services agreement also stated that the partnership was entitled to provide services to other customers if they so wished. S was provided with a van, fuel and tools by P and he was told to tell clients of P that he was P's employee. S and N were also required to attend P's premises for work at a specified time every morning.

A dispute arose in November 2006 between S and P over whether a certain job could be safely carried out without scaffolding. S believed scaffolding was necessary and ladders alone were insufficient. As a consequence, P terminated the agreement with the partnership and S brought a claim for unfair dismissal for refusing to work in unsafe conditions. P countered that S was not an employee and therefore had no right to claim for unfair dismissal.

Decision at first instance

The preliminary issues for the employment judge were whether or not S was an employee of P and, as his claim had been presented late, whether an extension of time was appropriateIn respect of the former, the judge took the view that the partnership agreement and contract for services were a sham and that they did not represent the true nature of the legal relationship between the parties, namely that of employer and employee. The judge took account of the fact that P had publicised the fact that its installers were employees and that, although S was technically allowed to provide services to other customers, it was widely known that that was not permitted. The employment judge also noted that the payment for the work done by S and N was not made to the partnership, but to S and N individually, with income tax deducted. S was granted an extension of time in which to bring his claim for unfair dismissal. P appealed on both findings to the EAT.

EAT endorses Employment Judge's decision

The EAT upheld the employment judge's decision that S was P's employee and not an independent contractor, but allowed P's appeal on the limitation issue. P appealed to the Court of Appeal.

Court of Appeal upholds EAT decision and clarifies 'Sham Contract Test'

On appeal, P argued that S was not an employee on the following grounds; first, that S had signed a partnership agreement with other assistants who had not given any evidence that they believed the agreement was a sham. Second, that the judge had applied the wrong test in deciding whether or not the partnership and service agreements were a sham and, lastly, that the judge's reasons for his decision had been inadequate.

P's primary argument was that the wrong test had been applied by the tribunal and the EAT in deciding whether or not the partnership and service agreements were shams. P referred to the House of Lords decision in *Snook v London & West Riding Investments Ltd [1967] 23 QB 786* and argued that, where parties had entered into such an agreement of their own volition, a court was not at liberty to re-write the agreement. Further, relying on *Consistent Group Ltd v Kalwak [2008] IRLR 505*, P sought to persuade the court that, in the absence of a common intention to deceive, the partnership and service agreements could not be held to be shams. Lord Justice Smith, who gave the leading judgment, disagreed and distinguished *Snook* on the grounds that it involved a hire purchase agreement and therefore differed in terms of the parties' respective bargaining power, in comparison to a service or employment contract. Smith LJ also held that there could not be an absolute requirement in proceedings for the evidence of a particular person to be heard; there was sufficient evidence and a determination could properly be made.

Thus the Court of Appeal held that the test for identifying a sham contract would depend on the facts of each individual case and referred to Elias J's judgement in the EAT in *Kalwak:*

' If the reality is that no one seriously expects that a worker will seek to provide a substitute or refuse the work offered, the fact that the contract expressly provides for these unrealistic possibilities will not alter the true nature of the relationship'.

In *Kalwak* the Court of Appeal held that, in order for a contract to amount to a sham, it must include words intended to create a misleadingly and different impression from the agreement's true effect. Controversially, it also held that there must be a clear finding that both parties intended the terms to be misleading. In the instant case, the Court of Appeal took the view that the test to be taken from the *Kalwak* decision was simply that a tribunal must determine the true legal relationship between the parties. In cases where a written agreement existed, if it was argued that the agreement did not represent the parties' true relationship, the tribunal had to decide what the true relationship actually was. It must consider whether the written agreement represented the true intentions or expectations between the parties at inception and during the course of their legal relationship. In reaching this decision, the Court of Appeal took into account the fact that, in P's field of business, parties to such contracts often had unequal bargaining power and the contractor or employee did not have a great deal of input into the terms. The court held that it was sufficient to conclude that the written agreement did not reflect the true nature of the parties' legal relationship; an intention to deceive a third party in this respect was not required. Taking into account the above test, the Court of Appeal held that the employment judge had been entitled to find that the partnership and service agreements were a sham and that they did not reflect the parties' true legal relationship.

Regarding P's last argument (that the employment judge had failed to provide adequate reasons for his judgment) the Court of Appeal agreed that the terms of the service agreement should have been examined in more detail, but that this omission had not rendered the decision invalid. The judge had made it clear in his reasons that P appeared to be seeking the benefits of being able to control S, but did not want to bear the burden of being his employers. P's appeal was dismissed.

In summary

The correct test to apply in deciding whether a written contract is a sham is to, first, assess the parties' true intentions and obligations and, secondly, to compare it with the written agreement. Smith LJ indicated that tribunals must be alive to the concern that *'armies of lawyers will simply place substitution clauses denying any obligation to accept or provide work in employment contracts, even where such terms do not begin to reflect the real relationship'*. The Court of Appeal did not overrule the approach adopted in *Kalwak*, but simplified the test by directing the focus to the parties' true relationship.

Having revisited the decision in *Autoclenz Ltd v Belcher and Others [2009] EWCA Civ 1046*, in which *Kalwak* was applied, the Court of Appeal on 13th October this year ▸

Albion Chambers Employment Team

Adam Vaitilingam
Call 1987
Recorder
Clerk Michael Harding

John Livesey
Call 1990
Part-time Employment Judge
Clerk Michael Harding

Michael Cullum
Call 1991
Recorder
Immigration Judge

Nicholas Sproull
Call 1992
Clerk Julie Hathway

Jason Taylor
Call 1995
Clerk Michael Harding

Liz Cunningham
Call 1995
Clerk Michael Harding

Richard Shepherd
Call 2001
Clerk Michael Harding

Gemma Borkowski
Call 2005
Clerk Michael Harding

Monisha Khandker
Call 2005
Clerk Michael Harding

Simon Emslie
Call 2007
Clerk Michael Harding

determined that the Claimants were in fact employees, reversing the findings of the EAT. Lady Justice Smith gave a judgement that is invaluable reading for practitioners faced with this issue.

Monisha Khandker

Legal representation at internal disciplinary hearings

The thorny issue of whether or not an employee can be legally represented at internal disciplinary hearings was dealt with in *Kulkarni v Milton Keynes NHS Foundation Trust and The Sec. State for Health [2009] EWCA Civ 789*. Lady Justice Smith gave a lengthy judgment ruling that the Claimant, a trainee doctor, was entitled to be legally represented during his disciplinary hearing into an allegation of misconduct. The case was on a fairly narrow point of the interpretation of the contract but the obiter remarks are wide-reaching.

Attempts by the Department of Health to limit the role of lawyers in disciplinary hearings seemed to Lady Smith to be based on groundless belief that lawyers over-complicate and lengthen proceedings:

"The way to avoid time-wasting and obstruction is for the chairman of the panel to exercise control over the proceedings. One cannot sensibly decide to exclude lawyers because some of them waste time. More important, one cannot sensibly say that time wasting and obstruction are to be equated with 'acting in a legal capacity."

It followed that an express term of the contract of employment that employees may 'retain' '…a companion [who] may be legally qualified but will not be acting in a legal capacity' was meaningless. There was no distinction between being 'retained' and being 'instructed'. Once a lawyer is admitted as a representative – whether as a friend doing a favour or an instructed professional – they are entitled to use all of their professional skills.

Obiter, the judgement went on to consider the question of whether or not it lawful to restrict an employee's rights of legal representation. Is it a breach of natural justice to do so (in purely domestic law)? Or is it a breach of Article 6 rights? It appeared to Her Ladyship that where 'all' that was at stake was the loss of a specific job, Article 6 would not be engaged. But where the potential loss was an employee's right to practise within the profession, it would be. The seriousness of the consequences of the findings is necessarily a core issue.

Her Ladyship reminded us, that when hearing an unfair dismissal claim, the role of the ET is not to consider whether or not the employee is guilty of the alleged misconduct, but whether the investigation was thorough and the employer's belief reasonable; also whether the employer acted reasonably in treating that misconduct as sufficient reason to dismiss the employee. So, a hearing before the ET cannot remedy the deficiencies in disciplinary proceedings to render the process as a whole compliant with the requirements of Article 6, and that will not be open to Respondent employees to argue.

Finally the judge restated that, despite the express terms of any contract, it is always open to an employer to waive them; in considering a request to allow legal representation an employer should do so 'fairly and rationally' (and, frankly, record their reasons in writing). Her Ladyship concluded that it would be sensible for The Secretary of State to give further thought to the question of legal representation.

In fact, in the vast majority of cases, the statutory right to be accompanied will be sufficient as the outcome of proceedings will not involve a possible referral to another body to determine the employee's ability to continue in their profession. Medics, teachers, those in the financial sector and everyone working with vulnerable people present their employers with a real concern if they ask to be allowed to have legal representation at a disciplinary hearing.

NB: also *R (on the application of G) v the Governors of X school and Y City Council [2009] EWHC (Admin)*.

Liz Cunningham