

Mustafa and another v Trek Highways Services Ltd and others

THE FACTS

1. The Second Respondent (Amey) had been appointed to provide highway maintenance services to Transport for London (TfL) in the North of London from 2007 to 31 March 2013. In November 2011 Amey entered into a sub-contract with the First Respondent (Trek) under which Trek provided traffic management services to TfL on Amey's behalf. The claimants were employed by Trek as traffic management operatives and worked wholly or mainly in the North East part of the area covered by the subcontract between Trek and Amey.
2. In November 2012 TfL carried out a retendering exercise in which the North of London was split into two separate regions, the North East and the North West. Two new contractors were appointed to provide highway maintenance services in place of Amey from 1 April 2013. The North East contract was awarded to the Third Respondent (Ringway Jacobs) and the North West contract to F M Conway. It was initially accepted by the incoming contractors that the traffic management operatives assigned respectively to the North East and North West areas would transfer under TUPE.
3. In early March 2013 a commercial dispute arose between Trek and Amey and on 8 March Trek suspended operations and told the traffic management staff to go home and wait to be contacted. On 20 March 2013 the dispute between Trek and Amey was settled and the subcontract between the two companies was terminated by mutual agreement. On the same day, Trek wrote to the traffic management employees informing them that they had transferred to Amey under TUPE. Amey did not agree that TUPE applied and failed to employ the relevant employees.
4. Between 8 and 31 March 2013, Amey provided traffic management services to TfL on an ad hoc basis, using contractors to carry out specific tasks. Towards the end of March, Ringway Jacobs informed Trek and the Trek employee representative that it did not accept that any North East employees would transfer to it under TUPE, because the service transfer provisions could only apply if Amey had terminated

Trek's subcontract at the request of TfL. Ringway Jacobs ultimately offered employment to only one of the Trek traffic management operatives, who commenced employment on 8 April 2013.

EMPLOYMENT TRIBUNAL'S DECISION

5. Before the employment tribunal, the claimants put their case in two alternative ways, viz:
 - 5.1. that there was a relevant transfer on 20 March 2013 from Trek to Amey, followed by two subsequent transfers on 1 April 2013, from Amey to Ringway Jacobs (in the North East) and from Amey to F M Conway (in the North West);
or
 - 5.2. that there were two relevant transfers on 1 April 2013 directly from Trek to Ringway Jacobs and F M Conway respectively.
6. Rejecting both ways of analysing the case, the Employment Judge (EJ) held that TUPE did not apply at all. In his view, the cessation of operations by Trek between 8 and 31 March 2013 was fatal to the claimants' contention that TUPE applied. He pointed out that the Trek employees were not doing any work between those dates and concluded that they could not therefore be said to constitute an organised grouping of employees.
7. The EJ went on to hold that, even if he were wrong about the effect of Trek's cessation of operations, the claimants' claims could not succeed for the following reasons:
 - 7.1. There could be no SPC between Trek and Amey because the exception in regulation 3(3)(a)(ii) TUPE applied. The effect of regulation 3(3)(a)(ii) is that there is no SPC if the client intends that the activities will, following the SPC, be carried out by the transferee in connection with a task of short-term duration. According to the EJ, Amey's involvement in succession to Trek was bound to be a matter of short-term duration, because the new contracts were coming into force on 1 April 2013.

7.2. There was in any case no transfer of an economic entity to Ringway Jacobs, for two reasons. First, there was no evidence that any of the resources deployed by Trek were intended to be deployed by Ringway Jacobs, in which context the EJ said that “one can put the employees to one side”. Second, the EJ considered that it was difficult for him to conclude that the function of providing traffic management services would continue as before because Ringway Jacobs did not employ specialised traffic management operatives.

7.3. Even if there was a relevant transfer from Trek to Ringway Jacobs on 1 April 2013, the claimants did not attract the protection of regulation 4 TUPE because they were not employed immediately before the transfer. They had been dismissed by 20 March 2013 by Trek’s unsuccessful attempt to persuade Amey that there had been a transfer of the traffic management staff and by Trek’s action in informing the employees that they had transferred to Amey.

DECISION OF EMPLOYMENT APPEAL TRIBUNAL

8. On the claimants’ appeal to the EAT, Mrs Justice Simler held that the findings outlined above involved the following errors of law.

Temporary cessation of activity does not preclude transfer or SPC

9. The EJ had erred in law in treating the cessation of work by Trek as determinative of whether there was an organised grouping of employees. Approving the approach taken by His Honour Judge Serota QC in *Inex Home Improvements Ltd v Hodgkins and others* [2016] ICR 71, the President held that there is no requirement for a grouping of employees to be working immediately before the putative transfer or SPC in order to constitute an “organised grouping”. She pointed out that there may be cases where, on the particular facts, a temporary lay-off caused by the absence of work might be sufficient to dissolve the organised grouping, but went on to say that a temporary cessation of work does not by itself mean that a grouping of employees can no longer said to be organised.

10. Rejecting an attempt by the respondents to distinguish *Inex*, Simler J held that the fact that Amey made interim ad hoc arrangements after 8 March 2013 to provide traffic management services to TfL could not alter the conclusion that the temporary cessation of activity by Trek was not in itself sufficient to destroy the organised grouping of employees.

Task of short-term duration

11. The EJ had also misdirected himself in holding that there could be no SPC from Trek to Amey because Amey's involvement would be of short-term duration. The question to be considered under regulation 3(3)(a)(ii) of TUPE is whether the client intends that activities will be carried out by the transferee in connection with a *task* of short-term duration. TfL had never intended the provision of traffic management services to be a short-term task, because traffic management services were required on a continuous and ongoing basis, even after 1 April 2013. Accordingly, the EJ had erred in focusing on the duration of Amey's *involvement* and not on the duration of the *task* in respect of which Amey was involved.

Importance of examining reason why employees not taken on

12. The EJ had also erred in law in holding that it was permissible to "put the employees to one side" in deciding whether there was an organised grouping of resources which retained its identity in the hands of Ringway Jacobs. The Trek employees were a critical part of the organised grouping of resources dedicated to delivering the traffic management service. Having regard to the principles explained by the Court of Appeal in *ADI (UK) Ltd v Willer and others* [2001] IRLR 542 and *RCO Support Services Ltd and another v UNISON and others* [2002] ICR 751, it was incumbent on the judge to address the question of why Ringway Jacobs did not take over the employees assigned to the North East part of the contract, and in particular to determine whether its reasons for not taking the employees on reflected an intention to avoid TUPE or an erroneous view that TUPE did not apply.
13. There was strong evidence in the EJ's findings of a motive to avoid the application of TUPE, and Ringway Jacobs' somewhat opportunistic stance in relation to the

commercial dispute between Amey and Trek should have been examined in the light of the history of its approach.

Post-transfer changes in organisation of service do not preclude transfer

14. The EJ had erred in relying as a relevant consideration on the fact that Ridgway Jacobs did not employ specialised traffic management operatives. The decisions of the Court of Justice in *Klarenberg v Ferrotron Technologies GmbH* C-463/09 [2009] ICR 1263 and *Ferreira da Silva e Brito and others v Estado Portugues* C-160/14 [2015] IRLR 1021 make clear that the fact that a transferee chooses to integrate an economic entity into its own operations after the transfer does not prevent the Directive (or TUPE applying). Consequently, the question to be addressed was not whether Ringway Jacobs would choose to organise the delivery of the traffic management service in precisely the same way as it had previously been organised but whether Ringway Jacobs would pursue identical or analogous activities using elements of production that had transferred or should be deemed to have transferred.

Informing employees that they had transferred did not amount to dismissal

15. The EJ had been wrong to hold that the traffic management staff were dismissed by Trek by 20 March 2013. Trek's actions in attempting to persuade Amey that a relevant transfer had taken place and in informing the employees that they had transferred to Amey did not evince an intention by Trek to dismiss them.

Outcome

16. The EAT allowed the claimants' appeal and remitted the case to the same employment tribunal for further consideration.

The Appellants, whose claims were supported by their trade union UNITE, were represented by Melanie Tether of Old Square Chambers and Nabila Mallick, instructed by Michael Michaeloudis of Thompsons.