Appeal No. UKEAT/0128/14/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
on 28 April 2015
Judgment handed down on 14 May 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF

SITTING ALONE

NHS DIRECT NHS TRUST (now known as South Central Ambulance Service NHS Foundation Trust)	APPELLANT
MS L J GUNN	RESPONDENT
SECRETARY OF STATE FOR EDUCATION	INTERESTED PARTY

JUDGMENT

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APPEARANCES

For the Appellant	MR TOM GILBART (of Counsel) Instructed by: DAC Beachcroft LLP Park Square East Leeds LS1 2LW
For the Respondent	MR DAVID MASSARELLA (of Counsel) & MS JENNIFER DANVERS (of Counsel) Instructed by: Equality & Human Rights Commission Arndale House The Arndale Centre Manchester M4 3AQ
For the Interested Party	MR ALAN PAYNE (of Counsel) Instructed by: Treasury Solicitors One Kemble Street London WC2B 4TS

SUMMARY

TRANSFER OF UNDERTAKINGS

TRANSFER OF UNDERTAKINGS – Objection to Transfer

PRACTICE AND PROCEDURE

PRACTICE AND PROCEDURE – Striking out/Dismissal

An employee whose disabilities were such that she worked 8.5 hours per week for her employer was part of a service which was to be taken over by NHS Direct NHS Trust (now known as South Central Ambulance Service NHS Foundation Trust). In advance of the transfer, NHS Direct let it be known that its employees worked a minimum of 15 hours weekly. She requested that this be adjusted for her case, to a minimum of 10. When this was rejected, she decided to object to her employment transferring, and she remained in the service of her current employers, albeit on reduced terms as to hours and pay. She claimed that NHS Direct had discriminated against her. To do so, she had to come within the class of those who could claim, as set out in s.39 **Equality Act 2010 ("EqA").** An EJ's decision that she was an "applicant" for a job within the meaning of that section, notwithstanding that she was guaranteed a continuation of her own contract under TUPE, was appealed. Following a review of the documents upon which this decision had been based, but after initial argument on the appeal had concluded, the parties were recalled for further argument, to the effect that what had occurred was that NHS Direct contemplated ceasing work at the place where the Claimant had been employed, thereby creating a potential redundancy situation, in which it was appropriate to write to her (as NHS Direct did) to offer suitable alternative employment. Leave was given to advance this argument. On this basis, the Judge was plainly right in the conclusion to which she came, and the appeal was dismissed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. Does a proposed transferee offer employment (within the meaning of section 39(1) of the **Equality Act 2010**) to an existing employee of an undertaking due to be transferred? If the answer is "No", does that answer change if the transferee proposes to seek changes to the terms and conditions of the employee's employment once the transfer is effective? Does the answer to that question depend on whether that which the transferee proposes will (if brought into effect) be discriminatory?

2. The facts giving rise to these questions are, in summary, these. Until 19th March 2013 Shropshire Doctors Cooperative Ltd ("Shropshire Doctors") provided a 111 Service on behalf of the NHS. In late 2012 it was proposed that with effect from 12th March 2013 that service would be provided by NHS Direct (in fact the effective date was 19th). The change of provider constituted a service provision change within the scope of the transfer of undertakings (Protection of Employment) Regulations 2006.

3. The Claimant is and was employed by Shropshire Doctors. She suffered from rheumatoid arthritis, and was thus disabled within the meaning of the **Equality Act 2010**. She worked 8½ hours per week. She was assigned to the 111 Service and thus was due to be transferred to the employment of NHS Direct in March 2013. In November 2012 she was told by letter from NHS Direct that it required all of its staff to work a minimum of 15 hours per week. In response, she offered to work 10. This offer was rejected.

4. She claimed that to insist, albeit in advance of her actual employment by NHS Direct, that her hours of work should change, was to threaten to cancel an adjustment which had been made to those hours in the light of her disability. She claimed this was a discriminatory act. It had

been committed by NHS Direct. If the threat to increase her hours were to be carried into effect, she would be unable to cope with continuing in her employment. Rather than risk this, she objected to the transfer of her contract of employment from Shropshire Doctors to NHS Direct. Accordingly it was not automatically transferred under Regulation 4 of the TUPE Regulations 2006. She remained in the service of Shropshire Doctors who found her an alternative post, which I was told was less remunerative and congenial, but which she was able to keep.

5. In a claim made in April 2013 the Claimant asserted that NHS Direct had failed to meet their duty under the **Equality Act 2010** to make a reasonable adjustment. Since this led directly to her being unable to take up employment and training opportunities with NHS Direct which non-disabled employees were able to take, she claimed this was discrimination on the grounds of disability.

6. NHS Direct responded that since the Claimant did not come within any of the classes of those entitled to make a claim as set out in sections 39 - 52 of the **Equality Act 2010**, her claim should be struck out. That application came before Employment Judge Woffenden in Birmingham, who for reasons sent on 2nd December 2013 dismissed that application. In the central paragraph of her reasons she said:-

> **"25. The only question for me is whether the Claimant falls within section 39(1) of the EqA. She is not and was not an employee of the Respondent. Her employer was and continues to be Shropshire Doctors. However I conclude that, in response to the Claimant's request for certain terms of employment with the Respondent post-transfer in respect of her hours of work, on 23 January 2013 the Respondent (an employer) offered the Claimant certain terms of employment in respect of those hours. There is no material difference which I can discern between a request for certain terms of employment and an application for certain terms of employment. That the request (or application) by and resulting offer to the Claimant were both made in the context of what is accepted to be a relevant transfer for the purposes of TUPE and the Claimant did not have to accept any proposed changes to her existing terms of employment contained in that offer are**

irrelevant considerations. The fact was an offer was made and it would appear, though I make no finding of fact, it contributed to, or was the cause of the Claimant objecting to the transfer. The construction entirely accords with Article 5 of the Equal Treatment Directive to enable disabled person (sic) to have access to, participate in, or advance in employment."

7. There are thus three strands of reasoning to her decision: (1) that when NHS Direct said "we are happy to offer you a contract for 15 hours per week…" by way of rejection of the Claimant's wish to continue to work 8½ hours (or the 10 she had offered), that constituted an offer of employment within the meaning of Section 39(1) of the **EqA 2010**; (2) a "request" was equivalent to an "application" in this context, such that when the Claimant made a request that she be excused a minimum working week of 15 hours, she was applying for employment within s.39 **EqA 2010**; (3) TUPE was irrelevant.

8. Mr. Gilbart, Counsel for NHS Direct, submitted that the Claimant was never its employee. Her contract had not transferred to it. Further, there could be no question of a transfer of a contract of employment pursuant to regulation 4 of TUPE amounting to an offer of employment. A transferee was obliged to accept the contract as it was. Accordingly, section 39(1) of the **Equality Act 2010** (which contains the right not to be discriminated against in relation to work) did not apply to her. That section is headed "Employees and applicants". It provides:

> **"An employer (A) must not discriminate against a person (B) –**
> **(a) in the arrangements A makes for deciding to whom to offer employment;**
> **(b) as to the terms on which A offers B employment;**
> **(c) by not offering B employment"**

9. These three limbs all relate to offers of employment (and thus relate to the class of "applicants" described in the heading to the section), and involve an employer making a choice – as to who the employee should be, or should not be: (a) and (c); or as to the terms of the offer of employment: (b). Where there is a transfer of an undertaking or service provision change

under TUPE, the transferee has no choice. It has to accept the employee, whoever he is; and must honour the existing terms and conditions of employment, such that it has no right other than any which the transferor employer might have had to alter them.

10. Although the heading to a section does not have the same statutory force as the words of the section itself (**R v Montila and ors**. [2004] 1 WLR 3141), Schedule 8 to the **EqA 2010** applies where a duty to make reasonable adjustments is imposed, and that adopts the term "applicant" within the operative text. Under Part 2 of that Schedule, dealing with who is to be regarded in relation to employers bearing the duty to make reasonable adjustments as an "Interested Disabled Person" under section 39, the description of the disabled person in respect of an employer deciding to whom to offer employment is:

> **"A person who is, or has notified A that the person may be, an applicant for the employment"**

and in relation to "Employment by A" is:

> **"An applicant for employment by A" as well as "An employee of A's".**

The word "applicant" is otherwise undefined. In my view, it must at least at first blush be given the meaning which is ordinary or natural in its particular context.

11. If the Claimant's employment had been transferred under TUPE, she could have made a claim in respect of the transferee's failure to make a reasonable adjustment in the light of her disability. That was ruled out because she objected to the transfer. She did not wish to be employed by the transferee. Mr. Gilbart submitted that she was therefore not an applicant for employment by it. She was never in a position to make a claim in respect of reasonable adjustments against it. Adopting the approach at paragraph 61 of the Appeal Tribunal's decision in **Onu v Akwiwu** [2013] ICR 1039, where an issue as to the meaning of a Statute

arises a Tribunal should first enquire what the meaning of the statute is, if construed as a domestic statute, and if that construction would not accord with a relevant European obligation then ask whether it might be possible nonetheless to interpret it to do so, even if that might involve writing words into or omitting them from the legislation. Taking this approach, the legislation is to be interpreted, as a domestic statute, so as not to extend to individuals whose contracts are about to transfer under TUPE. This approach is not out of step with the Equal Treatment Directive (2000/78/EC) since once individuals have transferred across to a transferee, they are able to enforce all the rights to equal treatment they enjoyed in the service of the transferor, and the transferee will be required to continue to act in accordance with the principles of the Directive.

12. The Secretary of State for Education intervened as Interested Party. She contends that, on its proper construction, the Claimant does not fall within section 39(1). Prior to a transfer taking place, transferees are under no obligation to consider, negotiate or agree any variation to their existing terms and conditions with individual employees, nor are they obliged to consider, negotiate or agree reasonable adjustments with individual employees who potentially will transfer prior to any transfer taking place. Once the transfer has occurred, and the transferee has become contractually responsible to the employee, it is then obliged to consider and make any reasonable adjustments necessary to discharge its obligations under the **Equality Act 2010**. The situation of an employee subject to a TUPE transfer is not comparable to applicants applying for, or being offered, employment within the contemplation of section 39 of the **2010 Act**. An interpretation of section 39(1) in line with that of the Employment Tribunal would in practical terms oblige transferees to enter into negotiations with those potentially being transferred, as to their terms of employment, in advance of that transfer, since a refusal to agree to reasonable adjustments could be subject to challenge. It could require transferees to investigate any requests for such adjustments beforehand. This could be a huge task in the case

of large transfers, require transferees to make decisions without having full knowledge of the situation of many affected individuals, and might adversely affect the viability of such transfers. It would remove the certainty afforded by TUPE transfers, namely that people transfer on existing terms and conditions.

13. Mr Massarella, with whom Ms Danvers appeared, for the Claimant argued that the appearance of the term "Applicant" in the heading of Section 39 **EqA** was not determinative. On an ordinary reading of the text, NHS Direct was an employer (described as "A" in the section) who (the Claimant says) discriminated against her ("B") "…as to the terms on which A offers B employment". The offer of 15 hours per week was expressly referred to as "an offer of suitable alternative employment". Under 39(1)(a) **EqA** NHS Direct was an employer which in giving notice of its required minimum hours of work was "making arrangements for deciding who should be offered employment" since it was implicit in a policy of minimum acceptable hours that a person not able or willing to meet the minimum hours requirement would not be employed. The Judge was right not to interpret "applicant" restrictively: Waite LJ in **Jones v Tower Boot** [1997] IRLR 168 observed at paragraphs 31-32 that the legislation (in that particular case the **Race Relations Act 1976**) had traditionally been given a wide interpretation. This approach was equally applicable to disability discrimination.

14. Central to his argument was that where, as here, a claimant is told that a requirement which she regards as discriminatory is to be applied to her by the intending new employer, which will affect arrangements made with her present employer to accommodate her disability, she should not be required to make a choice between allowing herself to transfer to the employment of the new employer, and then be obliged to issue discrimination proceedings almost as soon as she had joined it, or refusing transfer, claiming constructive dismissal (against the transferor) and entering an unstable labour market. Though she made a sensible

choice to mitigate her loss by staying in employment with the transferor instead of transferring, this was on significantly less advantageous financial terms. She had been forced into taking up a weaker position. It would be wrong if she were to have no remedy for being put in this position, which was a consequence of her disability.

15. The position in domestic law was, in their submission, underpinned and emphasised by the Equality Directive (2000/78/EC), which itself had to be interpreted in accordance with the UN Convention on the Rights of Persons with Disabilities ("UNCRPD"): see **H K Danmark v Dansk almennyttigt Boligselskab** [2013] ICR851 at paragraphs 28 to 32. Article 27 of the Directive calls for states to prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment including conditions of recruitment, hiring and employment, continuance of employment, career advancement and safe and healthy working conditions.

Initial Consideration

16. After conclusion of the oral argument, at which the arguments I have summarised were advanced, the central question seemed to be whether an employee about to be transferred under TUPE was in any relevant sense being made an offer of employment within section 39(1) (a) (b) or (c) of **EqA 2010.** At her paragraph 25, the Judge concluded that in response to the Claimant's request for "certain terms of employment with the Respondent", proposing that she increase her weekly hours to ten, the Respondent made an offer (of 15). She thought that making such a request made the Claimant an "applicant" within section 39.

17. The essential points which seemed to me well-founded were that the Claimant could not be regarded as an applicant for employment she already enjoyed. Her contract, exactly as it was, would automatically be transferred to NHS Direct. There was no room for any "offer"

from NHS Direct to honour it. Upon transfer, she would retain against the transferee all the remedies under the **Equality Act 2010** which she had enjoyed in respect of her service with Shropshire Doctors. Accordingly, the Claimant's submissions relying upon the importance of the elimination of discrimination were misplaced: it is of the highest importance, but the submission is predicated upon there being an adverse effect which would not otherwise occur. In law, she had every right against the transferee which she would have enjoyed against the transferor. I would add that there would in principle be no difference in the legal position as between Shropshire Doctors (if it had chosen to do so) seeking to secure a commitment to a minimum 15 hours per week from the Claimant and NHS Direct doing so, at a time when each was in the position of employer, since the underlying premise of the TUPE regulations is that the contract of employment continues with the transferee exactly as it has with the transferor, save only for the change of identity as between the two. An integral part of this is that every power which the transferor had in respect of her employment with it becomes, on and after transfer, a power enjoyed by the transferee. This is the force of the words in Regulation 4(1) of the TUPE Regulations 2006, a paragraph which ends with the words "…any such contract shall have effect after transfer as if originally made between the person so employed and the transferee"[1]. Accordingly, so far as the terms and conditions of her employment were concerned, the Claimant was in exactly the same position vis-à-vis her employer when employed by Shropshire Doctors pre-transfer than she would be if she had been employed by NHS Direct post-transfer: just as vulnerable to the suggestion she should work a minimum of 15 hours per week, instead of (as her contract actually provided) "Guaranteed hours of work: an average of 8.5 hours per week worked in accordance with the Four Week Rota Pattern, which may be reviewed from time to time." What was to change therefore were not the terms and conditions to which she could be required to work, or the law relating to making any change in

[1] Though there are protective provisions preventing the variation of a contract of employment where the sole or principal reason for it is the transfer (Regulation 4(4)), and an exclusion from that protection in the circumstances envisaged by Regulation 4(5), I do not see these as being material to the present discussion

those terms, but rather the willingness of those individuals in charge of the transferee undertaking to seek to change her terms. It is in such situations that she could exercise the right not to transfer against her will, recognised by Regulation 7 of TUPE: indeed, if she chose to do so and came within the scope of Regulation 9, she could sue the transferor for constructive dismissal, since to seek to transfer her to another employer is well recognised as an anticipatory and repudiatory breach of contract (as happened in **Oxford University v Humphreys** [2000] ICR 405, CA).

Further Argument

18. In the course of re-reading the bundle of documents which had been before the Employment Judge, whilst considering my judgment, I re-read the email from Philippa Sweeney to the Claimant dated 28th January 2013. Its material parts read as follows:

> **"As you are aware we will not be operating our service from your current base of work, thereby putting you in a potential redundancy situation. Further to our conversation yesterday as requested I am confirming that we have given full and careful consideration to your request to work 10 hours per week if you TUPE to work for Future NHS Direct and take up suitable alternative employment at our Dudley site…."**

The letter then went on to deal with the request from the Claimant to work a maximum of ten hours, referred to a stipulation of NHS Direct that staff on substantive contracts of employment should work a minimum of 15 hours per week, and rejected the adjustment proposed by the Claimant in her case for reasons which were spelt out. Having said that it continued:

> **"However, we are happy to offer you a contract for 15 hours per week..…if you do accept the offer of suitable alternative employment of 15 hours per week at our Dudley site I appreciate that you stated that your disability means that you do suffer with fatigue. Of course we would look to support you by making reasonable adjustments whilst at work and I would be happy to discuss this further with you…."**

19. The use of the words "offer of suitable alternative employment" in the context of a proposal to discontinue work at the place where the Claimant had been working suggested to me that the writer was contemplating that after transfer the Claimant's post was likely to be

made redundant, and in accordance with usual employment practice NHS Direct would seek to offer her alternative work, so that in consequence she did not suffer the loss of a job, nor would it have to pay her a redundancy payment.

20. The parties were invited to make further submissions, since the letter appeared to contain this line of reasoning:

(i) The 111 service would no longer be worked from the site at which C had been working;

(ii) Accordingly, since the needs of the business for work to be done in the place it had been done would cease or diminish, there was potentially a redundancy situation[2];

(iii) Unless there was suitable alternative employment, her contract (transferred under TUPE) would therefore end

(iv) Suitable alternative employment could be offered, rather than effecting a dismissal by reason of redundancy

(v) This alternative employment would be offered on the basis that C worked a minimum of 15 hours per week.

21. If this was a fair reading of the letter, was there any reason in law why this "offer" of suitable alternative employment (which was not, therefore, an "offer" to the Claimant to the effect that she should continue under the same contract she had been performing, just with different hours of work, but an offer of a different kind) should not be construed on the facts as an offer of employment to which section 39(1)(b) **EqA** would apply – it might be said, if this reading was correct, that what was being "offered" was indeed a fresh contract of employment: this was not therefore a case in which she was being "offered" employment which she had already secured (by reason of TUPE), in which case it might not come within s.39(1) at all for

the reasons set out by the Respondent and Secretary of State (subject to the interpretative arguments). Instead it was a case in which the "offered" employment was truly under a fresh contract.

22. It might be said that s.39(1) covers the case of a job offer made to an existing employee just as it does an offer to someone who is not already an employee, and that there is no reason why an offer of suitable alternative employment made to ameliorate a coming redundancy should not be such an offer.

23. This point, in these terms, had not been raised in argument, save for a passing reference by Mr Massarella.

24. The parties were given the option of providing written submissions, unless any party would wish to advance further submissions orally. In the event, one did, and the case was restored for further hearing – regrettably, it was not possible to arrange a suitable hearing date until some five months had passed since the initial argument.

25. The critical question for me raised by these further submissions was whether I should exercise the discretion of the Appeal Tribunal to allow the parties to argue a point which was not taken below, nor indeed during oral argument on appeal (though part of Mr Massarella's argument touched on it), and not fully appreciated until it was raised by the Court itself.

26. The jurisdiction to accept a new point on appeal to the Appeal Tribunal is not unfettered. A series of authorities touches on it, four of which are so often cited as to have become part of the bundle of familiar authorities kept in each court at the Appeal Tribunal to which parties

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[2] Section 139(1)(a)(ii) Employment Rights Act 1996

may have regard without the need for further copying and bundling. They are **Kumchyk v Derby City Council** 1978 ICR 1116 (a decision of the Appeal Tribunal); **Jones v Governing Body of Burdett Coutts School** [1999] ICR 38 (C.A.); **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719, C.A. and **Secretary of State for Health v Rance and others** [2007] IRLR 665. Though the last is an authority at Appeal Tribunal level, whereas **Jones** and **Glennie** were decided by the Court of Appeal, it post-dated those decisions, and within it HHJ McMullen QC drew together the principles of law expressed in those authorities to form a series of principles set out at paragraph 50:

> **"(1) There is a discretion to allow a new point of law to be argued in the EAT. It is tightly regulated by authorities; Jones paragraph 20.**
>
> **(2) The discretion covers new points and the re-opening of conceded points; ibid.**
>
> **(3) The discretion is exercised only in exceptional circumstances; ibid.**
>
> **(4) It would be even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated; ibid.**
>
> **(5) Where the new point relates to jurisdiction, this is not a trump card requiring the point to be taken; Barber v Thames Television plc [1991] IRLR 236 EAT Knox J and members at paragraph 38; approved in Jones. It remains discretionary.**
>
> **(6) The discretion may be exercised in any of the following circumstances which are given as examples:**
>
> > **(a) It would be unjust to allow the other party to get away with some deception or unfair conduct which meant that the point was not taken below: Kumchyk v Derby City Council [1978] ICR 1116, EAT Arnold J and members at 1123**
> >
> > **(b) The point can be taken if the EAT is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing. Wilson v Liverpool Corporation [1971] 1 WLR 302, 307, per Widgery LJ.**
> >
> > **(c) The new point enables the EAT plainly to say from existing material that the Employment Tribunal judgment was a nullity, for that is a consideration of overwhelming strength; House v Emerson Electric Industrial Controls [1980] ICR 795 at 800, EAT Talbot J and members, followed and applied in Barber at paragraph 38. In such a case it is the EAT's duty to put right the law on the facts available to the EAT; Glennie paragraph 12 citing House.**
> >
> > **(d) The EAT can see a glaring injustice in refusing to allow an unrepresented party to rely on evidence which could have been adduced at the Employment Tribunal; Glennie paragraph 15.**
> >
> > **(e) The EAT can see an obvious knock-out point; Glennie, paragraph 16.**
> >
> > **(f) The issue is a discrete one of pure law requiring no further factual enquiry; Glennie para 17 per Laws LJ.**

(g) It is of particular public importance for a legal point to be decided provided no further factual investigation and no further evaluation by the specialist Tribunal is required; Laws LJ in Leicestershire para 21

(7) The discretion is not to be exercised where by way of example;

(a) What is relied upon is a chance of establishing lack of jurisdiction by calling fresh evidence; Barber para 20 as interpreted in Glennie para 15.

(b) The issue arises as a result of lack of skill by a represented party, for that is not a sufficient reason; Jones para 20.

(c) The point was not taken below as a result of a tactical decision by a representative or a party; Kumchyk at page 1123, approved in Glennie at para 15.

(d) All the material is before the EAT but what is required is an evaluation and an assessment of this material and application of the law to it by the specialist first instance Tribunal; Leicestershire para 21.

(e) A represented party has fought and lost a jurisdictional issue and now seeks a new hearing; Glennie para 15. That applies whether the jurisdictional issue is the same as that originally canvassed (normal retiring age as in Barber) or is a different way of establishing jurisdiction from that originally canvassed (associated employers and transfer of undertakings as in Russell v Elmdom Freight Terminal Ltd [1989] ICR 629 EAT Knox J and members). See the analysis in Glennie at paras 13 and 14 of these two cases.

(f) What is relied upon is the high value of the case; Leicestershire para 21."

He added in the succeeding paragraph that attention should also be paid to the nature of the judgment-making in the Employment Tribunal: a judgment on the papers without an investigation of the evidence would not command the same protection as one after a contested hearing. There was less repugnance about a Respondent having a second bite of the cherry when the Claimant had not been put to proof and the Respondent had not suffered a contested defeat.

27. Mr Massarella argues that the EAT is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing. In particular, he points to the fact that the Employment Judge heard no evidence orally. She had regard to a 95 page bundle of documents. Amongst them was the copy email of Philippa Sweeney from which came the extract set out above. The issue, he submitted, was one of pure law requiring no further factual enquiry. It was an obvious knock-out point. The case is one of public importance generally. None of the matters set out at HHJ McMullen's sub-paragraph 7 applied.

28. No one could assist as to why the point had not been taken before the Employment Judge. There was some speculation that it might have been because the Claimant was in person. By contrast, the failure to take the point during first argument on appeal was frankly and disarmingly conceded by Mr Massarella as simply being that it had not occurred to him.

29. Mr. Gilbart submitted that I should be cautious in exercising jurisdiction. The email could not inescapably be found to be an offer of employment: the offer was only in respect of a *potential* redundancy. Though its author described it as an offer, this was in law and in fact an inaccurate description: and it is the reality that matters, not a label inappropriately attached to it (**Young and Woods Ltd v West** [1980] IRLR 201; **Quashie v Stringfellow Restaurants Ltd** [2013] IRLR 99, C.A. per Elias LJ at paragraph 52 – "…the parties cannot by agreement fix the status of their relationship…"). The email was sent when it was still only a possibility that the Claimant would transfer across: it was simply an indication of what the position would be if she did transfer. Moreover, the employment was not truly alternative – it was "clearly the same job", since if the Claimant had agreed to work 15 hours per week she would have continued in the same role and with continuity of employment. This should be a matter of assessment by the Tribunal in the first place, and it was not appropriate to consider it for the first time on appeal.

30. Mr Payne, for the Secretary of State, made similar points in his written argument, and doubted that on the facts the circumstances could properly be characterised as a redundancy situation. He did not wish to advance submissions as to whether the Court should exercise its discretion or not, but argued that the Claimant's case was that it would have been the change in hours (proposed variation to her terms and conditions of employment) which would have brought the contract to an end, not the change in location.

31. Finally, he cautioned – entirely correctly in my view – against seeking to impose a legal analysis, ex post facto, on an hypothetical situation which did not occur to either party either at the time of events or at the hearing, and that there was a real danger that a fact specific decision in this case, in circumstances where the facts had not properly been considered, could give rise to significant ambiguity as to the potential circumstances when a proposed future variation of a contract of employment which novates under TUPE might amount to a fresh offer of employment.

Discussion

32. The first question is whether resolution of the new argument involves any issue which requires further facts to be established. Though Mr. Gilbart has asserted this in oral submission, when I asked him to say what those facts might be, he identified three matters. The first was whether a mobility clause existed. If there were such a clause, the same contract would apply to the Claimant in Dudley as it had in Shrewsbury. Second, whether the door was closed on the issue of reasonable adjustment – there is no finding of fact as to whether NHS Direct would have continued to review reasonable adjustments. Third, whether the contract under which the Claimant worked was a contract for 8½ hours per week, or a minimum. No evidence was given on these points, and it would be necessary in his submissions for that to be the case.

33. He argued more generally that I should not exercise my discretion to permit a new point to be argued. The new point which had arisen from the Court's re-reading of the evidence before the Tribunal could not be said to be of general importance. Rather, it related to the Claimant's particular situation. The Court needed to look with care as to the reason why such an argument was not raised before.

Exercise of Discretion

34. I am clear that if making the argument would require any or further finding of relevant fact, I would not permit it to be made. I do not accept that Mr Gilbart identified any additional fact which it would be necessary for the Tribunal to find before the argument could be run. It is worth restating the central point of the argument – that NHS Direct showed at the time that it thought there was a redundancy situation, and therefore made the Claimant an offer of suitable alternative employment. It is this to which any unfound but supposedly necessary additional fact must be relevant. So far as the first, "mobility clause" point is concerned, it is not. Whether or not there is a redundancy depends on whether the statutory definition of redundancy is satisfied. The test proposed in Section 139 of the **Employment Rights Act 1996** is factual. Prior to the decision of the **House of Lords in Murray v Foyle Meats Ltd** [1999] ICR 827, a line of authority including **Nelson v British Broadcasting Corporation (2)** [1980] ICR 110[3], CA, and cases which had followed its lead, suggested that the test was otherwise. It was whether the employee could contractually be required to work elsewhere. Nelson himself could be required under his contract of employment to do any work to which he might be assigned by the BBC. In fact he worked for the General Overseas Service, broadcasting to the Caribbean. In 1974 the BBC reduced its services to the Caribbean, as a result of which his services in that capacity were no longer needed. Brandon LJ said (page 126) that Mr Nelson had been right in law to maintain that "because the work which he was employed to do continued to exist, he was not redundant". That remark and the decision in the two **Nelson** cases gave rise to the "contract test" which required consideration of whether there was a diminution in the kind of work according to the terms of his contract, the employee had been engaged. That approach was rejected as heresy by the House in **Murray**. It is a question of what was the factual position, not what it might be within the terms of an employee's contract. Accordingly, it cannot affect the possibility of a dismissal by reason of redundancy that the

contract should contain a mobility clause under which the employer could require the employee, within reason, to work elsewhere. The scope of the present enquiry before me is whether the letter is to be understood as making an offer of suitable alternative employment in a situation in which there was potential for dismissal by reason of redundancy. On authority the presence or absence of a mobility clause in the Claimant's contract has no objective impact on this.

35. The second argument, too, does not affect the way in which the email is to be understood in the circumstances. The extent to which the Respondent might have maintained reasonable adjustments in another location might affect the suitability of the offer of alternative employment, but cannot logically prevent it being an offer within that sense.

36. The third ("maximum hours") point falls at the same hurdle.

37. By contrast, I accept Mr Massarella's categorisation of the point as being potentially a "knock-out" point, and a discrete issue of law. The Claimant had been employed at Shrewsbury since she was first engaged there by Shropshire Doctors. There was no possibility of her continuing to work at Shrewsbury after the transfer – the email made that clear. The email did not seek to rely on any mobility clause even if one existed: and it was plain that, from the outset of taking responsibility for the service, NHS Direct intended to change the location of the work. An offer of suitable alternative employment has generally to be made in advance if conventional and appropriate standards of practice are to be adopted. It cannot be suggested that offers cannot be made by an employer to an employee – for instance, the offer of a promoted post, or supplementary contracts, to someone currently in service. Nothing within the terms of TUPE prevented an offer of suitable alternative employment in the event of a

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[3] Following on from [1977] ICR 649, CA

redundancy situation arising being made by the party that would be the employer at the time: indeed, good employment practice demanded that such an offer be made in advance and hence, here, in advance of transfer.

38. The argument that the email might not be construed as the Court had suggested was insubstantial: Mr Gilbart's submission that it was in respect of a potential redundancy is not such an argument. If a situation arises in which an employer intends to cease work at a particular location, the fact that his decision rests in intention and not at that stage in the inevitability of execution does not prevent the statute applying, for it deals expressly with such a case (Section 139(1)(a) "…has ceased or *intends to* cease…" and (b) "…has ceased or diminished or *is expected to* cease or diminish"). Where such a situation arises, it is to be expected nowadays that almost any employer will alert those employees who might be affected by it in advance. Where suitable alternative employment is offered and accepted, a dismissal may not then occur by reason of the redundancy where otherwise it might: and so it is to be expected that where the place of work changes significantly an employer will not only contemplate that this is a redundancy situation within the meaning of the Statute but that an offer of suitable alternative employment should be made, if there is such employment available.

39. Though I am deeply conscious of being over attracted by a point of the Court's own making, and aware of the dangers of being seduced by it, influenced by the proprietorial instincts which come from having been first to recognise it – both of which give me considerable caution – nonetheless the reading of the email as making an offer of suitable alternative employment in appropriate circumstances seems to me to hold good. If so, an offer of employment was being made by NHS Direct to the Claimant. There was no need for the Employment Judge to consider whether this was in response to a request, or whether the request itself made the Claimant an "applicant": for this was something self-described as an

offer, which had all the characteristics of that which statute itself describes as an offer in relation to suitable alternative employment in a redundancy situation.

40. I accept too that the Appeal Tribunal is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing; that the point is an obvious knock-out point; that the issue is a discrete one of pure law requiring no further factual enquiry; and that there is some injustice in refusing to allow the Claimant (unrepresented as she was before the Tribunal) to rely on material which was actually adduced at the Tribunal, when she was facing the strike-out of her claim. This point is all the stronger since it was in a case in which no oral evidence was heard, in which the Judge expressly determined the issue on a bundle of documents of which this email was one, and was of significant importance. The points made in **Rance** at paragraph 50(6)(b), (e), (f) and the point above similar to that at (d), together with the points made in paragraph 50(1), argue in favour of the exercise of the jurisdiction.

41. What goes the other way? Mr Payne is right to some extent to say that allowing the argument to be run (and it would follow, deciding the appeal) on the basis of this new argument would be to miss the opportunity that the decision would otherwise make such a significant general contribution to the law concerning the inter-relationship between the duty to make reasonable adjustments to accommodate disability on the one hand and the requirements of the TUPE regulations on the other. However, this should not be over-stated: I have indicated above what, absent this argument, would have been my view. Though this expression of view lacks the formal quality of ratio, the reasoning has had the advantage of both full argument, and the intervention of the Secretary of State, and in the absence of any contrary decision therefore represents important guidance even if ultimately it will not have been determinative of the

appeal itself. I recognise, too, that exercising a discretion to permit the argument to be made will be the exception rather than the rule.

42. The parties did not insist upon a formal amendment to the Notice of Appeal.

43. Though repeating that this discretion should be very sparingly exercised, I have decided I should permit the argument to be made: in my judgment the reasons for doing so outweigh those against.

Conclusions

44. The Judge's decision was that the claim should not be struck out. Though I do not consider the reasoning she adopted to reach that conclusion was satisfactory, the conclusion was in any event plainly and unarguably right. The "new point" shows it. In what is a statutory jurisdiction, the Claimant came within the terms of Section 39(1) as an "applicant"; what was described in its own terms as an "offer" fell within the terms of Section 39(1); it was exactly what it purported to be, since what is properly to be described as an offer of employment is to be expected where a redundancy situation looms, and one did. That is sufficient for the claim to proceed to a determination on its merits. Though it is no part of the reasoning which persuaded me, I am pleased this should be so since the focus of this case will then not be on whether the Claimant qualifies to complain of discrimination (irrespective of whether it occurred or not) but on whether the making of the offer was discriminatory, a matter in which both parties are bound to have a real interest.

45. For those reasons this appeal is dismissed.