Appeal No. UKEAT/0431/14/BA
UKEAT/0432/14/BA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 22 April 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MRS A E JAKOWLEW — APPELLANT

(1) NESTOR PRIMECARE SERVICES LIMITED T/A SAGA CARE
(2) WESTMINISTER HOMECARE LIMITED — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR ANTHONY KORN (of Counsel) Instructed by: Blavo & Co Solicitors 19 John Street London WC1N 2DL
For the First Respondent	MR ROMAN SCUPLAK (Consultant) Croner (Litigation) Croner House Wheatfield Way Hinkley Leicestershire LE10 1YG
For the Second Respondent	MR MICHAEL SALTER (of Counsel) Instructed by: Matthew Arnold & Baldwin 21 Station Road Watford Hertfordshire WD17 1HT

SUMMARY

TRANSFER OF UNDERTAKINGS - Service Provision Change

The First Respondent had an organised grouping of employees which worked on a contract for the London Borough of Enfield. The Claimant was one of those employees. On 19 June 2013, the London Borough of Enfield issued an instruction to the First Respondent that the Claimant and others should no longer work on the contract. The First Respondent did not accept that instruction: it wrote to the London Borough of Enfield challenging the instruction. The organised grouping transferred to the Second Respondent on 1 July 2013. The question arose whether the Claimant was assigned to that organised grouping immediately before the transfer. The Employment Judge held that by virtue of the instruction of the London Borough of Enfield, the Claimant was no longer assigned to the organised grouping.

Held: Appeal allowed. It was for the employer, not the London Borough of Enfield, to assign its employees. The Employment Judge had erred in law by failing to consider whether the First Respondent had acted on the instruction. On the facts it was plain that the First Respondent continued to assign the Claimant to the organised grouping of workers immediately before the transfer. **Fairhurst Ward Abbotts Ltd v Botes Building** [2003] UKEAT/1007/00/DA, [2004] IRLR 304 and **Robert Sage Limited T/A Prestige Nursing Care Limited v O'Connell** [2014] IRLR 428 considered.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by Mrs Angelika Jakowlew ("the Claimant") against a Judgment of Employment Judge Mahoney sitting in the Employment Tribunal at Watford dated 3 April 2014 in proceedings which she brought against Nestor Primecare Services Ltd ("Saga") and Westminster Homecare Ltd ("Westminster").

2. The Claimant's claim against both Saga and Westminster was for unfair dismissal. Her principal argument was that her employment had transferred from Saga to Westminster by reason of a service provision change within the **Transfer of Undertakings (Protection from Employment) Regulations 2006** ("TUPE"). The Employment Judge found that her employment did not transfer and that she remained an employee of Saga because at the material time she was not employed in the organised grouping of employees concerned. She challenges that finding, arguing that at the material time she was so assigned.

The Background Facts

3. The Claimant was employed as a Care Manager by Saga at its Enfield branch office, working principally on a contract with the London Borough of Enfield ("Enfield") for a geographical area within the borough. Saga's contract ended on 30 June 2013. Enfield had asked it to renew the contract, but Saga did not wish to do so. Westminster took over the contract from 1 July 2013. The Claimant was informed that her employment would transfer to Westminster.

4. There had, however, been a problem at Saga's Enfield branch office. The Claimant and a colleague, Ms Joanne March, did not see eye to eye with her line manager, Ms Lesley Clegg. Following an incident on 26 February 2013, they were all suspended on full pay.

5. Saga's contract with Enfield included the following clause:

> **"10.5. The Authority reserves the right to reject staff that they consider to be unsuitable for the duties proposed. Where staff are rejected the Contractor shall supply alternative staff. In addition, the Authorised Officer may (but not unreasonably or vexatiously) instruct the Contractor to or to remove from work in or about the provision of the Services any person employed by the Contractor and the Contractor shall immediately comply with such instruction, shall, as soon as it is reasonably practicable thereafter provide a substitute."**

6. Enfield was concerned about the continued employment of the three persons concerned on its contract. On 14 June 2013, it wrote expressing its concerns, noting that it had taken Saga some four months to decide whether they should be disciplined. Enfield said it wished to hear the outcome of any disciplinary proceedings in order to consider whether the employee should be removed under Clause 10.5. Saga did not reply. By letter dated 19 June 2013, Enfield wrote informing Saga of its decision that Saga was to remove the three members of staff from working on the contract pursuant to Clause 10.5

7. It was not in dispute before me that Enfield's instruction to remove the three members of staff was lawful. That, however, was not Saga's position at the time. Saga protested and objected to the instruction. The Employment Tribunal made the following findings.

> **"17. On 21 June Mr Jackson replied to Enfield Council by email stating that he was taking legal advice.**
>
> **18. On 26 June Enfield Council emailed Mr Jackson requesting confirmation that the claimant had been removed from the Enfield Contract with effect from 19 June 2013. By a further email dated 26 June 2013, Mr Jackson from Enfield Council expressed surprise that no reply had been received from the first respondent particularly as the Council were aware that the claimant had not been informed that Enfield Council had removed her as an acceptable individual.**
>
> **19. By email dated 26 June sent at 17.44, the first respondent's solicitor replied to Enfield Council stating that the first respondent was prepared to legally dispute the matter on the basis that the notice under section 10.5, schedule 1 of the contract was both unreasonable and**

vexatious and set out four particular factors that the first respondent considered to be appropriate."

8. At the same time Saga took steps to deal with the outstanding disciplinary issues. The Claimant was called to a disciplinary hearing on 27 June. The outcome was a written warning for conduct. The warning was, on the Employment Tribunal's findings, given on the day of the disciplinary hearing, although it was not confirmed in writing until 5 July. The Employment Tribunal made the following findings as to what occurred after the disciplinary hearing:

"20. At the end of the disciplinary meeting on 27 June 2013, the claimant was asked by Mr Reilly, who was chairing the meeting, whether she had had any TUPE briefing. The claimant confirmed that she had had one meeting but nothing else. The claimant asked what was the process for Monday (1 July 2013) regarding the TUPE transfer and Mr Reilly stated that he would let her know as soon as possible, possibly over the weekend and took her mobile telephone number. The meeting concluded at 12.05pm when the claimant went home.

21. Later that afternoon the claimant received a telephone call, it would appear, from the second respondent, requiring her to attend at their premises, which the claimant duly did. The claimant met with Ms Hurn of the second respondent who told her that the claimant was now employed by the second respondent but because her name was not on the TUPE list the claimant was being sent back home but on full pay.

22. On 11 July 2013 the claimant was called into a further meeting with Ms Hurn who confirmed that the claimant had been TUPE'd over to the second respondent but also told her Enfield Council had informed her on 5 July that they had told the first respondent on 14 and 19 June, that they did not want her to work on the Enfield Contract. In those circumstances the claimant would not be working on the Enfield Contract and that she would be provided with a list of vacancies.

23. By a letter dated 15 July 2013 from the second respondent to the claimant, this was confirmed. The reason for this was because Enfield Council considered the claimant to be unsuitable for the duties required for the provision of services on the Enfield Contract. The letter confirmed that the second respondent would continue to pay the claimant.

24. On 18 July, the claimant emailed Mr Jackson informing him that she had just been told that Enfield Council had removed her from their contract but that the list of vacancies provided by the second respondent was not suitable as she had an eight year old daughter who attended a local school.

25. Mr Jackson arranged a meeting with the claimant for 25 July which he then postponed because he had a meeting with Enfield Council on 24 July.

26. Further meetings took place between Mr Jackson and Mrs Foster of the second respondent as a result of which an agreement was made between the first and second respondent that there had not been a TUPE transfer in respect of the claimant and that she remained the employee of the first respondent.

27. By email dated 29 July 2013, Mr Jackson confirmed to the second respondent that having met with representatives of Enfield Council, the first respondent accepted Enfield Council had reasonable ground to take the action removing the claimant as an acceptable member of staff and that the claimant had therefore not transferred over to the second respondent but had remained an employee of the first respondent and still so remained such an employee."

9. Accordingly by late July 2013, Saga had accepted that the Claimant's employment had not transferred to Westminster. Saga continued to pay the Claimant. But its Enfield office had closed and it no longer held the contract on which the Claimant had worked. She was told that she was at risk of redundancy and she was eventually dismissed on grounds of redundancy on 20 September 2013. Enfield never resiled from its instruction in respect of the Claimant. It did, however, relent in the case of one of the other two who were suspended, Ms Joanne March. She continued to work for an employer which took over part of Saga's contract with Enfield.

The Employment Tribunal's Reasons

10. The Employment Judge identified that the issue was whether the Claimant, immediately before the relevant transfer on 1 July 2013, was assigned to the organised grouping of employees which had as its primary purpose the carrying out of the activities transferred (see paragraph 1 of its Reasons).

11. The Employment Judge set out findings of fact on which I have already drawn in this Judgment. He recorded that both Saga and Westminster argued that no transfer had taken place. He set out relevant provisions of **TUPE**. He said that he had been referred to a number of legal authorities from which he distilled principles of law. It is sufficient to cite the following passage which concerns these principles:

> **"34. An employment relation is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he or she is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred by reason of a transfer, therefore, it is necessary to establish to which part of the undertaking or business the employee was assigned.**
>
> **35. The appropriate test is whether the employee had been employed to work in the part transferred immediately before the transfer, ie whether the part transferred was his contractual place of work and that was where the employer would have required him to work immediately before the transfer.**
>
> **36. The TUPE regulations must apply whatever misunderstandings there may be by the parties involved. It is a common situation, particularly where an undertaking organised in a complex way is being transferred, that the parties are uncertain or mistaken about their position. It is not consonant with the objectives of the regulations to allow such uncertainty**

per se to prejudice the position of employees to whom the regulations did apply at the material time on a proper understanding of the facts of the case."

12. Against this background the Employment Judge stated his conclusions briefly. The relevant paragraphs are the following:

> **"Conclusions**
>
> **38. The service provision in this case was the contract between the first respondent and Enfield Council to provide domiciliary care services in part of the London Borough of Enfield. That clearly was in Great Britain.**
>
> **39. Immediately before the transfer the claimant had been removed by Enfield Council from that service provision by virtue of the letter from Enfield Council to the first respondent dated 19 June 2013.**
>
> **40. The confusion of the first and second respondent as to the true effect of the TUPE regulations is not relevant and therefore the history of the matter whereby the second respondent understood the claimant to have transferred during the early part of July is of no relevance in determining the essential issue.**
>
> **41. The essential issue is that at the date of the transfer, namely 1 July 2013, the claimant was not employed in the organised grouping which carried out the Enfield Council contract and in those circumstances she did not transfer. The claimant therefore remained at all material times an employee of the first respondent."**

Submissions

13. On behalf of the Claimant, Mr Anthony Korn puts his case in the following way. He accepts that the Employment Tribunal was entitled to find that Enfield had exercised its right under the contract to remove the Claimant from the contract. He submits, however, that this cannot be conclusive on the question whether the Claimant was assigned to the group of employees who transferred. The Employment Tribunal erroneously treated Enfield's instruction as conclusive of the matter. Saga did not act on the instruction. It disputed the instruction and was continuing to dispute it on 1 July when the transfer took place. Mr Korn accepts that the Respondent may have been in breach of its contract with Enfield by disputing the instruction but he says that it cannot be determinative for the purposes of **TUPE**. Enfield was not the employer of the Claimant and could not take away her rights under **TUPE**. He

submits that on the evidence, Saga plainly continued to treat the Claimant as assigned to the Enfield contract until after the transfer date.

14. On behalf of Westminster, Mr Michael Salter submitted that the Employment Tribunal had identified the correct question in paragraph 35 of its Reasons. Given this correct legal approach it is impossible to fault the Employment Tribunal's conclusion. Realistically Saga had no alternative but to obey the contractual instruction of Enfield. It is inconceivable that Saga would have required the Claimant to work on the Enfield contract immediately before the transfer. The Employment Tribunal was entitled to reach the conclusion it did and there was no error of law in it.

15. Counsel took me to leading authorities on the question whether an employee is assigned to an organised grouping of transferee employees: **Fairhurst Ward Abbotts Ltd v Botes Building** [2003] UKEAT/1007/00/DA (HHJ Burke QC) approved by the Court of Appeal, [2004] IRLR 304 at paragraph 21, **United Guarding Services v St James Security Group plc** [2004] All ER (D) 158 and most recently **Robert Sage Ltd v O'Connell** [2014] IRLR 428.

Statutory Provisions

16. The following are the relevant provisions of **TUPE**:

> **"3.** ***A relevant transfer***
>
> **(1) These Regulations apply to -**
>
> **…**
>
> **(b) a service provision change, that is a situation in which -**
>
> **…**
>
> **(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;**

…

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

…

4. ***Effect of relevant transfer on contracts of employment***

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as 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, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

…

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

…

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee."

Discussion and Conclusions

17. In this case there was and is no dispute that an organised grouping of workers existed which had as its principal purpose the carrying out of activities on behalf of Enfield. Equally there is no dispute that this organised grouping of employees was subject to a transfer under the service provision change legislation from Saga to Westminster. Again, there is no dispute that until the last fortnight of June the Claimant was assigned to this organised grouping of workers.

The sole question is whether the Claimant was assigned to that organised grouping immediately before the transfer.

18. The word "assigned" is part of a phrase which is repeated in Regulation 4(1) and (3) - "employed by the transferor and assigned to the organised grouping of resources of employees". It derives ultimately from European law concerned with the **Acquired Rights Directive** (see **Botzen v Rotterdamsche Droogdok Maatschappij** [1986] 2 CMLR 50). To my mind the regulation contemplates assignment by or with the authority of the putative transferor, the employer concerned. This is the natural reading of the legislation. I do not think it contemplates assignment by the unilateral act of a third party without the employer's intervention or authority.

19. It is now well established that the question of whether an employee was so assigned is not purely a matter of contract. In **Botes Building** in the Employment Appeal Tribunal, at paragraph 78 HHJ Burke QC said:

> **"… The appropriate test, in our judgment, was whether he was employed to work in Area 2 immediately before the transfer i.e. whether Area 2 was his contractual place of work and that was where Botes would have required him to work immediately before the transfer, had he not been excused from attendance. …"**

20. In that case the employee was sick at the time of transfer. It was by virtue of his sickness that his employer excused his attendance. But the Employment Appeal Tribunal said the same test would apply to an employee who was on holiday, study leave or maternity leave (see paragraph 78 again). The Judgment of Mummery LJ in the Court of Appeal applied the same test and gave the same examples (see paragraph 40).

21. **Botes Building** was recently applied in **Robert Sage Ltd v O'Connell**, a case reported after the Judgment of the Employment Tribunal in this case. That case, like this one, concerned an employer who was a care provider to a local authority. The employer was responsible for the provision of a service to a particular person with severe learning difficulties. As in this case, the employee had been suspended. The local authority sent a specific request to the employer that the employee not be placed with the particular individual. The employer accepted this request and informed the employee that it would be inappropriate for her to return to looking after the patient. The Employment Tribunal in that case, by a contractual test, decided that the employee was assigned to look after the patient.

22. The Employment Appeal Tribunal allowed the appeal. Applying **Botes Building** the key question was whether the employee would be required to work immediately before the transfer (see paragraphs 49 to 55 of the Judgment). In passing Slade J said that the employer could not employ the employee to work with the patient if, as was the case, the council considered it to be inappropriate for her to work with the patient after the conclusion of the disciplinary proceedings.

23. Although **Robert Sage** is close to the facts of this case, there are important differences which require examination. Firstly, in that case the employer accepted the request of the local authority that the employee not be placed with the employer. In this case Saga did not accept the local authority's instruction. It protested it in the case of all three employees concerned and ultimately the local authority changed its mind in respect of one of the employees. Secondly, in that case the employee worked with a specific patient, whereas in this case the employee was a manager working in Saga's office. Thirdly, in that case the employee remained under suspension. In this case the employee had been given a written warning. And, while the

Employment Tribunal does not make a finding as to whether it had happened, the employer would be expected to lift the suspension insofar as it had been imposed pending the disciplinary hearing.

24. Before passing on from the **Botes Building** line of authority, I would make one further observation. The **Botes Building** formulation is in part dependent upon the facts in that case and also predates the service provision change amendments made to **TUPE** in 2006. The key question for the purpose of the amendments is whether immediately before the transfer the employee was assigned to the organised grouping of employees which was subject to the relevant transfer. So, transposing the **Botes Building** test, the question is whether, immediately before the transfer, the employee would have been required by the employer to work in that group if he had not been excused from attendance.

25. In this case it has not been argued that suspending an employee on full pay pending disciplinary proceedings has the effect of removing him from the organised grouping of employees to which he belonged. There is no reason why it should. I agree with Mr Salter, who said that suspension of this kind is another category of excusal from attendance like holiday, study leave and sickness absence. The expectation of the parties will be that, if the disciplinary proceedings do not end in demotion or transfer, the employee will return to work in the group to which he had belonged.

26. What is the position where, as here, a third party instructs an employer to remove an employee from working upon particular activities? Does it follow that the employee immediately ceases to be assigned to the organised grouping of employees carrying out those activities irrespective of the employer's stance? I do not think it does. I do not think that the

unilateral instruction of a third party in itself has that effect. It is the employer or those whom the employer has authorised who decide to what grouping of workers an employee is assigned.

27. In this case Clause 10.5 of Enfield's contract enabled Enfield to give an instruction to Saga. It did not, however, authorise Enfield to assign an employee itself. It was for Saga to decide what action to take. It could have taken steps immediately to remove the Claimant from the group of workers dealing with the contract. If so, she would no longer have been assigned to the group because the employer would not longer have required her to work in that group if her absence had not been excused at that time. This was the position in **Robert Sage**. Saga, however, did not take this course. It protested the instruction and sought to change Enfield's viewpoint. In such circumstances, an employer will not necessarily change the assignment of an employee from the group of workers concerned.

28. I can envisage two possible scenarios. Firstly, an employer may ignore an instruction, treating it as unlawful and retaining an employer as part of the working group. That would, no doubt, be a risk in terms of an allegation of breach of contract. But if an employer did so, I do not see why the employee would cease to be assigned to the group in question. Secondly, an employer might protest, attempt to persuade the third party to change its mind, and excuse the employee's absence while doing so. If so, it seems to me that, in the ordinary sense of the word, the employee would remain assigned by the employer to remove the workers while this process continued. Except for the fact that he was excused attendance, the group of workers with which he was required to work remained the same.

29. This analysis seems to me to accord with practical reality and justice. If the law were otherwise, it would treat an employee as no longer assigned to an organised group of employees

even though the employer still wished him to be such and treated him as such. Take the position here of the third employee, in whose case Enfield eventually, after the date of transfer, relented. It would be odd indeed if she had lost her **TUPE** protection even though her employer had treated her as at all material times belonging to the group of workers which transferred and even though the employer was in due course vindicated.

30. In this case the Employment Judge said that the Claimant had been removed by Enfield Council from that service provision by virtue of the letter to Saga dated 19 June 2013 (see paragraph 39 of the Reasons). In my judgment this was an error of law. The Employment Judge's task was to concentrate on the action taken by the employer and to ask whether the employer required the employee to continue working in the organised grouping or would have done so but for excusal from attendance immediately before the transfer. The Employment Judge erred in law in ignoring (in his conclusions) what Saga did when it received the instruction.

31. The question then arises whether the Employment Appeal Tribunal is in a position to substitute its own decision on this question. The applicable principles have been restated recently in **Jafri v Lincoln College** [2014] IRLR 544 and **Burrell v Micheldever Tyre Services Ltd** [2014] IRLR 630. In essence, the Employment Appeal Tribunal must only substitute its own decision if it satisfied what the result must have been if the law were correctly applied. It must make no factual judgment of its own or follow its own view of the merits of the case. It may be robust in the way in which it applies the **Jafri** approach, but it must conscientiously apply the **Jafri** approach.

32. In my judgment it is plain from the findings of the Employment Judge that up to the relevant date Saga did nothing to remove the Claimant from her assignation to the organised group of workers to which she had belonged. That was the position today expressed to me in his brief submissions by Mr Scuplak. He said, and I hope I do him no injustice, effectively that Saga sat on the fence. Mr Salter submitted that I should look particularly at the evidence of Mr Jackson. I have done so. Mr Jackson's evidence supports what Mr Scuplak says (see, in particular, paragraphs 23 and 24 of Mr Jackson's statement).

33. The disciplinary hearing was on 27 June, a Thursday. The Claimant did not work on the 28th. The Employment Tribunal has described the circumstances in which she attended for work with Westminster on 1 July. It was not until late July that Saga's approach changed and it accepted the Claimant as its employee. I do not think it can be inferred from the fact that the Claimant did not attend on Friday 28th that Saga accepted Enfield's instruction and re-assigned the Claimant. Excusal of her attendance on the Friday is entirely consistent with the practical reality that the transfer was about to take place and with Saga's continuing to protest its position with Enfield. On the Employment Judge's findings Westminster itself understood that her employment had transferred: see paragraphs 21 and 22 of the Employment Judge's Reasons.

34. In the result, therefore, I am satisfied that, if the correct legal test is applied to the findings of the Employment Tribunal, only one outcome is possible. The Claimant remained assigned to the grouping of workers which transferred on 1 July. It follows that the appeal will be allowed and a declaration made in accordance with this Judgment.