Appeal No. UKEAT/0024/15/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 & 17 July 2015
Judgment handed down on 10 August 2015

Before

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

(SITTING ALONE)

SERVICES FOR EDUCATION (S4E LIMITED) APPELLANT

(1) MR K WHITE
(2) BIRMINGHAM CITY COUNCIL RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR JEREMY LEWIS (of Counsel) Instructed by: Anthony Collins Solicitors LLP 34 Edmund Street Birmingham B3 2ES
For the First Respondent	MR PHILIP McLEISH (of Counsel) Instructed by: Association of Teachers & Lecturers Legal Services Department 7 Northumberland Street London WC2N 5RD
For the Second Respondent	MR COLIN BARAN (of Counsel) Instructed by: Birmingham City Council Legal and Democratic Services PO Box 15992 Woodcock Street Birmingham B2 2UQ

SUMMARY

TRANSFER OF UNDERTAKINGS

JURISDICTIONAL POINTS - Continuity of employment

The transferee employer appealed against a Decision of the Employment Tribunal ("the ET") that the employee's continuity of employment was preserved by section 212(2) of the **Employment Rights Act 1996**, despite a transfer of the undertaking in which the employee was employed, between a transferor employer and the transferee. The issue was whether the ET had been entitled to hold, on the evidence, that the employee was employed by the transferor "at the time of the transfer". The appeal was dismissed on the grounds that the ET had correctly directed itself in law and was entitled so to hold on the facts.

THE HONOURABLE MRS JUSTICE ELISABETH LAING DBE

Introduction

1. This is an appeal from the Employment Tribunal ("the ET"). The Claimant in the ET was Mr White. He is the First Respondent to this appeal, but I will refer to him as "the Claimant". The Respondents in the ET were Birmingham City Council (which I will call "the Council") and Services for Education ("S4E").

2. In a Reserved Judgment sent to the parties on 4 September 2014 Employment Judge van Gelder ("the EJ") decided three points.

(1) The Claimant had been an employee of the Council until the expiry of his last fixed-term contract on 31 July 2013 and he is an employee of "the second Respondent" [I infer that this is a mistake and that the First Respondent in the ET, S4E, was intended].

(2) The Claimant's continuity of employment with the Council was preserved and continued with S4E by section 212(3)(b) of the **Employment Rights Act 1996** ("ERA").

(3) That finding (by virtue of section 212(3)(b) and section 218(2)) did not depend on a transfer from the Council to S4E by virtue of Regulation 4 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE").

3. S4E appeals against points (2) and (3) of that Decision.

The Facts

4. The relevant facts from the ET Decision can be shortly stated. The Claimant worked as

a sessional music teacher for Birmingham Music Service ("BMS"), which was part of the Council, from September 1992, under a series of contracts. Each ran for the academic year (the beginning of September to the end of the July in the next year). The last contract expired on 31 July 2013. He worked at various schools, and for variable hours. Work was identified in September at the start of the academic year. The Claimant agreed that there was no guarantee of work the following year, but that he had an expectation that there would be work.

5. BMS employed permanent salaried music teachers and sessional music teachers. In October 2011, the Council began to consult with the unions about a proposed transfer of BMS from BCC to S4E, a company limited by guarantee which had been set up for the purposes of the transfer. The original intention was that the transfer would be in September 2012. But there were substantial delays in getting access to the Teachers' Pension Scheme for the permanent staff who were to transfer. As a result the transfer agreement was not made until 1 September 2013.

6. In April 2012, Mr Perkins of the Council wrote to sessional staff to tell them about the proposed transfer to S4E. The transfer was described as a change of service provider. Staff were asked whether they wanted to be considered for work with the new company, and if so, they were asked for permission to release their details to S4E. The letter was the result of advice to the Council that sessional staff should not be treated as transferring under **TUPE** but should be invited to be considered for work by S4E after the transfer.

7. On 1 September 2013, the music service provided by the Council was transferred to S4E. S4E made contracts with the schools who had previously had music services from the Council. S4E also offered contracts to the sessional teachers who had expressed an interest in

working for S4E. The standard contract was a zero-hours contract, from 3 September 2013 until the end of the academic year in July 2014. On or about 3 September 2013, S4E gave the Claimant a contract of employment, but he did not return it to them. He worked for S4E after that, however, according to S4E, under the standard terms.

8. He then made claims against the Council and S4E for unfair dismissal and for unpaid holiday pay. He claimed that he had been dismissed by S4E and re-engaged on different terms. The Council claimed that the Claimant was a casual worker and not an employee, which meant that he could not rely on **TUPE**.

9. A case management order made on 21 May 2014 recorded that the Claimant did not claim that he had an overarching contract with the Council. His case was that he had been engaged under a series of contracts and that there was no contract between him and the Council during the summer holidays. He relied on section 212 of **ERA** to bridge the gaps in his continuity of employment. Paragraph 3 of the order (as interpreted by the EJ), recorded that BCC accepted that the Claimant was absent from work on account of a temporary cessation of work (see section 213(3)(b) of **ERA**). S4E's case was that as there was no contract of employment during the summer holidays, the Claimant was not employed immediately before the transfer. The Claimant's case was that the continuity of his employment was preserved during the summer of 2013 by section 212 of **ERA**, because he was engaged by S4E from 3 September 2013; continuity should be assessed from the start of the September 2013 contract, retrospectively.

10. The EJ also recorded that the Council conceded, at the start of the hearing, that the Claimant had been their employee, and that the Respondents' counsel had agreed in discussion

that the Claimant had been employed both by the Council and by S4E.

The EJ's Reasons

11. Having made his findings of fact, the EJ considered the legal framework. He referred to and set out section 95 of **ERA**, and then sections 210(5), 212(1), (3), (4), and 218(1)-(6). He set out Regulations 4 and 7 of **TUPE** (section 7 of the Reasons). He summarised the parties' submissions in section 8 of the Reasons. There are nine salient points.

(1) The Claimant submitted that he was employed immediately before the transfer or would have been but for his unfair dismissal in breach of Regulation 7 of **TUPE**. The EJ found (in accordance with section 95(1)(b) of **ERA**) that the dismissal was on 31 July 2013. The effect of **TUPE** was that he was employed by the transferee immediately before the transfer.

(2) The Claimant's alternative submission was that he could rely on section 218 of **ERA**. A gap in employment that would not otherwise count in computing the period of continuous employment could be bridged if it related to "the machinery of the transfer". "At the time of the transfer" should not be too restrictively construed.

(3) According to the Claimant, 31 July 2013 was not the effective date of termination but a temporary cessation of work, and the Claimant was dismissed on 1 September 2013 or on 3 September 2013. With hindsight, the Claimant did resume work in September, albeit with a new employer.

(4) The Council accepted that the Claimant's employment down to 31 July 2013 was continuous. He had been absent in all the previous summer holidays on account of a temporary cessation of work. But his employment by the Council ended on 31 July 2013, and there was no further gap which could be bridged. He was not, therefore, employed by the Council immediately before the transfer, and so

his contract of employment could not transfer to S4E under **TUPE**.

(5) Even if the Claimant was employed by S4E after the transfer, he could not rely on section 212 of **ERA** retrospectively to make him an employee. The role of section 212 is to compute periods of continuous employment, not to create a contract of employment where none otherwise exists. There is an important distinction between continuity for statutory purposes and contractual rights.

(6) S4E submitted that the Claimant was employed by nobody between 1 August and 3 September 2013. He had conceded that there was no overarching contract between him and the Council, and that there was no contract between them during the summer.

(7) Section 212 can only bridge sessional contracts between the same employer. That meant that the Claimant was not employed "immediately before 1 September 2013", so he was not employed immediately before the transfer. The transfer took place on 1 September.

(8) The presumption of continuity in section 201(5) does not apply to employment with 2 employers.

(9) As a matter of law, the time of transfer may extend over a period and it is question of fact for the ET to decide the length of the period (see **Clarke & Tokeley Limited v Oakes** [1999] ICR 276). But the transfer here was clearly on 1 September, so there was no potential for a longer period to apply.

12. The EJ's conclusions are in section 9 of his Reasons. He considered **TUPE** first (paragraphs 91-9.6), and then statutory continuity (paragraphs 9.7-9.15).

13. He decided that by 1 August 2013 the Claimant was no longer the Council's employee.

The expiry of his fixed-term contract was a dismissal for the purposes of section 95(1)(b) of **ERA**. The Claimant did not rely on an overarching contract. The process by which the contract of employment ended in July 2013 was the same as the process in each of the earlier years. The decision about the termination of that contract had been taken in September 2012 when the fixed-term contract had been offered to the Claimant.

14. There was no evidence to suggest that the Council had an extraneous motive for offering that contract then. The EJ recorded the Claimant's argument that because the Council "had finally concluded its arrangements with S4E during the currency of the final contract" the decision to terminate the contract of employment had been the transfer or a reason connected with it. He rejected that argument, because on the authority of the European Court Justice ("ECJ"), "the relevant period at which employment status is identified under the Regulations [sc **TUPE**] is limited to '...a particular point in the transfer process and not in relation to the length of time over which that process extends.' " It followed that the Claimant's dismissal was not for a reason which fell within Regulation 7(1) of **TUPE**. The continuity provisions in **ERA** did not help in that context, as they could not "impose a contractual obligation which does not otherwise exist".

15. The EJ said that the Claimant's second argument was that he was an employee of BCC at the time of the transfer to S4E. "At the time of the transfer" should not be construed in a restrictive way, as that would run counter to the purpose of the provisions, which was to protect employee's rights. As the negotiations had begun well before the final fixed-term contract and were concluded on September 1 (the date of the transfer agreement), the Claimant had been employed "during the period of time covered by the transfer" and the gap in his employment related to the machinery of transfer. The Claimant's absence was due to a temporary cessation

of work (section 213(3)(b)).

16. The EJ recorded the Council's argument that continuity was lost when the last fixed-term contract expired on 31 July 2013. If the Claimant was not employed by the Council at the transfer date, he could not rely on section 218(2). He recorded S4E's argument that the Claimant could not rely on section 213(3)(b) because section 212 applied only to employment by one employer. Section 218 is a series of exceptions to the one employment rule, and it was for the Claimant to prove that he fell within one of them. The Claimant was not an employee of the Council at the time of the transfer. The date of the transfer agreement was 1 September, after the date on which the contract with the Council ended.

17. In paragraph 9.10 the EJ summarised the decision of the Court of Appeal in **Clarke**. The questions, when a business is transferred and what is the time of the transfer, are questions of fact and degree. He referred to a passage in Mummery LJ's judgment, in which he described the usual business transfer as "more in the nature of a process" and described some of the possible components of such a transfer. "The actual state of affairs" rather than legal and technical considerations like the execution of documents "are what is known to the employee and make it easier for him to identify the time of the transfer". He also referred to a passage in which Mummery LJ said that the fortuitous timing or structuring of a transfer might, if it did not ensure that the employee was still in the transferor's employment at the precise moment of the completion of the formalities of transfer, deprive a long-serving employee in the undertaking of employment rights acquired by service in that undertaking. He also referred to the statement in the concurring judgment of Sir Christopher Staughton that "the time of the transfer" was "not the instant when the property was conveyed by one party, but the process by which that result was achieved."

18. The Council and S4E relied on the decision in **Celtec v Astley** [2005] ICR 1409. The EJ said, rightly, that that case was clear authority in favour of them on **TUPE**, but that it did not deal with section 218 of **ERA**. Under section 218, the:

> **"9.15. … transfer of a business is seen as part of a process the identification of which is a question of fact and degree. In this case, the process was extremely protracted extending for well over a year during which time the Claimant agreed that [the Council] could forward his personal details to S4E clearly with a view to the continuation of an employment relationship based in a similar fashion on a fixed contract for the academic year. Were the [ET] to find that the [Claimant] had not been an employee on the transfer date … this would deny him the benefits of continuity of employment accumulated over many years. It would be to rely on 'the instant the property was conveyed' or 'legal and technical considerations' eschewed by [the Court of Appeal] in *Clarke*. In the [ET's] Judgment it would be wrong in principle and as a matter of legal analysis to deny the [Claimant] continuity of employment under section 218(2). Viewed in retrospect from the perspective of the [Claimant's] employment beginning with S4E, the [Claimant] enjoyed continuity of employment from September 1992 until, with the benefit of section 212(3)(b), the commencement of his contract of employment with S4E and continuing thereafter."**

The Law

19. Section 218(1) of **ERA** provides that subject to section 218, Chapter 1 relates only to employment with one employer. The relevant provision of section 218 is section 218(2), which provides that if an undertaking is transferred from one person to another, the period of employment of an employee in the undertaking at the time of the transfer counts as a period of employment with the transferee and the transfer does not break the continuity of the employment of the employee.

20. Paragraph 17 of Schedule 13 to the **Employment Protection (Consolidation) Act 1978** ("the 1978 Act") is one of the statutory predecessors of section 182. It was interpreted by this Tribunal, and by the Court of Appeal, in **Clarke**.

21. The facts of **Clarke** are important. They were summarised by Lindsay J in paragraphs 1-6 of the decision of the EAT ([1997] IRLR 564). The employee worked for a company which sold and hired vehicles. It had a franchise from Mercedes Benz (UK) Limited ("MBU"). The employer got into financial difficulties. There were negotiations with Clarke and Tokeley

Limited ("C&T") about the sale of the business of the employer which started in late 1995 or early 1996. A receiver was appointed by MBU on 1 March 1996, to safeguard MBU's assets. On 5 March, the employer's bankers appointed an administrative receiver. Negotiations continued for the sale of the business. The EAT observed that the Industrial Tribunal ("the IT") must have had in mind that the bank's receiver had arrived at least at an agreement in principle with C&T for the sale of the business.

22. A liquidator was appointed on 7 March 1996. The IT had held that the appointment of the liquidator "frustrated the coming into being of the sale agreements which had earlier been discussed", although negotiations had continued. The employee was dismissed by the liquidator of his employer on 14 March 1996. The employee was re-employed on 21 March 1996. Although he went to work voluntarily in the interim, it was common ground that he was unemployed in that period. The IT described the business at that stage as being "in the process of transfer". Also, on 21 March, a transfer agreement for the sale of the business in which he had been employed was signed. The EAT noted that it was possible that the employee, who had been re-employed in the evening, was re-employed after the agreement was signed.

23. At paragraphs 14-20 of the judgment of this Tribunal, Lindsay J lucidly analysed the structure of paragraph 17. I cannot improve on that analysis. He concluded, and his conclusion was upheld by the Court of Appeal (at p 284B-C), that paragraph 17(2) did not bridge any gaps in employment, and that if an employee was dismissed before the transfer, paragraph 17(2) did not apply. He also concluded, and this conclusion, too, was upheld by the Court of Appeal, that "at the time of" could refer to a period rather than to an instant (see paragraph 21; and p 285C). He explained that the complexity of a transfer meant that it might take many months for an agreement in principle to be put into effect. He said that the IT in that case had spoken

correctly of the "process of transfer" and the "course of transfer".

24. He did not try to define when the transfer began or ended (paragraph 23). He summarised the facts again, mentioning the offers by C&T in late 1995 and early 1996. The receivers continued the negotiations and arrived "importantly at what was at least an agreement in principle with C&T". The appointment of the liquidator frustrated the coming into being of the sale agreements on the terms earlier discussed. "Having regard to that 'process' or 'course' of transfer … and without our needing to put a precise date to the beginning of the transfer, we conclude that the 'transfer' did begin earlier than 14 March". Also, because it was unlikely that all property passed on 21 March 1996, it was, further, likely that the employee was re-employed before the transfer was completed. Whether or not that was right, he was employed "at the time of the transfer". The Appellant's submissions that "at the time of the transfer" had to be given a restrictive meaning and could not include antecedent negotiations (recorded at p 286(2) and (3)) must have been rejected by the Court of Appeal. The Court of Appeal held that the IT's findings were sufficient to support its conclusion (p 287E) per Mummery LJ.

25. Sir Christopher Staughton agreed with Mummery LJ. He observed that " 'the time of the transfer' *may* refer to quite a significant period of day, or even weeks". The employee was an employee of the business when the transfer began. He did not have to be one throughout the period.

26. Mummery LJ mentioned five "particular considerations" which led him to that conclusion. I condense them somewhat.

(1) "At the time of the transfer" was ambiguous. It should be given the wider of the two available meanings which was consistent with the statutory purpose of

protecting employees' rights. It should be construed in accordance with the interpretation which Stephenson LJ had given it in **Teeside Times v Drury** [1980] ICR 338.

(2) A trade or business or undertaking will usually be a going concern of some complexity. Transferring one is not the same as transferring real or personal property. The completion of the transfer of the different elements may not all happen at the same time, and such a transfer is "more in the nature of a process extending over … time" than an instantaneous event (cf the richer description in paragraph 21 of the judgment of the EAT). The actual state of affairs known to the employee is important.

(3) If paragraph 17(2) is too narrowly construed accidents of the timetabling and structure of the "manner or machinery of the transfer" could deprive an employee of statutory protection. A gap in employment whether "ineptly, arbitrarily or expertly engineered" could have this effect. The purpose of paragraph 17(2) was to avoid such an outcome "in the case of an employee employed by the transferee in the same undertaking after the transfer".

(4) The IT did not err in law. It treated the transfer as a process and held that the employee had been dismissed "in the course of that process". There was sufficient evidence on which a reasonable IT could hold that as a matter of fact, the employee was an employee of the transferor at the time of the transfer.

27. At pp 282G-283F Mummery LJ also approved the reasoning of this Tribunal about the relationship between paragraph 17(2) of Schedule 13 to the **1978 Act** and **TUPE**. In short, the two instruments have quite distinct purposes and their language is different. Thus, a conclusion about the "date of the transfer" for the purposes of **TUPE** does not necessarily entail a similar

conclusion about "the time of the transfer" for the purposes of what is now section 218(2) of **ERA**. This is a succinct answer to Mr Lewis's indication that, should this case go further, he would wish to argue that a court should adopt towards section 218(2) of **ERA** the approach of the ECJ in **Celtec Limited v Astley** (C-478/03) [2005] ICR 1409 to the interpretation of the Acquired Rights Directive.

Discussion

28. Where, therefore, there is a transfer of an undertaking for the purposes of section 218(2), there is a composite question. This is whether the employee has a "period of employment with the employer at the time of the transfer". The question whether he had a period of employment at the time of the transfer must be answered by considering the other provisions of Chapter 1. In this case, there is no dispute but that the Claimant had a period of continuous employment with the Council as at 31 July 2013 when his last fixed-term contract ended. The issue is whether he was employed at the time of the transfer. It is clear from **Clarke** that the employee must show, both that he was in the employment of the employer, and that he was in that employment at the time of the transfer.

29. I reject Mr McLeish's submission that the Claimant can rely on section 212(3)(b) of **ERA** to tide him over a gap (if there is one) between 31 July 2013 and "the time of the transfer". Section 218(1) clearly prevents this. This is clear from the language of section 218(1). It is also, unsurprisingly, the approach taken by this Tribunal in **Secretary of State for Employment v Cohen** [1997] IRLR 169. To the extent, therefore, that the ET relied on this reasoning (see the last sentence of paragraph 9.15 of the EJ's Reasons), it erred. However this is, in my judgment, an immaterial error, if the ET's decision that the latest date when the Claimant was employed by the Council was a date during "the time of the transfer".

30. I also reject his submission that, on the assumption that the Claimant was dismissed before "the time of the transfer" it would be enough if the Claimant were re-employed later at a point during the time of the transfer. The expiry of the last fixed-term contract with the Council was, for statutory purposes, a dismissal. If that dismissal occurred before the start of the time of the transfer, that dismissal would have broken the Claimant's continuity of employment before the transfer and section 218(2) could not apply: see per Stephenson LJ at p 354A-B, and Goff LJ (as he then was) at p 354G of **Teeside Times v Drury**, citing a dictum of Lord Salmon in **de Rosa v John Barrie Contractors Limited** [1974] ICR 480, 500. That is a rationale for the decision of the majority in **Teeside Times v Drury** to reject the approach of Eveleigh LJ to the construction of the phrase "in employment at the time of the transfer" (see, for example, per Stephenson LJ at p 354B-C).

31. In the course of Mr McLeish's oral submissions I suggested to him that he might get some help from the fact that the premise of section 212(3) is that there is no subsisting contract of employment, yet it refers to "employee" and "employer". We then looked at the definition of "employee" in section 230. "Employee" is defined as a person who has entered into, or works under (or where the employment has ceased, worked under) a contract of employment". I have reflected on this, and it is not a good point. First, the definition only includes someone who has worked under a contract of employment as an "employee" if his employment has ceased. Second, section 153(1) of the **1978 Act** defined "employee" in the same way. That was the statute which applied in **Clarke**, and the Court of Appeal clearly held that, for what is now section 218(2) to apply, the employee had to be employed at the time of the transfer.

32. So the issue in this case is whether the ET was entitled to hold that 31 July 2013 was a date during "the time of the transfer". The ET was referred to **Clarke**. The EJ cited from it in

the critical part of his Reasons. He clearly understood that a transfer can be a process, and that, when it is a process, the precise identification of "the time of the transfer" is a question of fact and degree for the ET. He explained the policy reasons (given in **Clarke**) for giving an interpretation to the provisions which tended to preserve continuity and to minimise the impact of any fortuities in the timing and structure of a transfer which might defeat employees' rights.

33. Mr Lewis submitted first, that, as a matter of fact and degree, an ET should distinguish between what is mere preparation for a transfer, and the transfer itself. There was no sign that the ET had done so, and if it had been open to the ET on the facts to conclude that 31 July 2013 was during the time of the transfer, the case should be remitted to the ET for it to make further findings. He submitted, more fundamentally, that it had not been open to the ET to hold in this case that that was so, as none of three matters which could be detected as potentially supporting the ET's decision (the facts that consultation had begun, or that the transfer was delayed, or that details were sought from sessional employees) could, as a matter of law, support the decision.

34. Mr Lewis relied, in particular, on two aspects of the decision of the Court of Appeal. The first was Mummery LJ's citation and adoption (pp 288C-E and 289) of the reasoning of Stephenson LJ in **Teeside Times v Drury** [1980] ICR 388.

35. At p 353H in that case, Stephenson LJ said:

> **"… there is no one stage in the process of transferring a trade or business or undertaking which can be excluded from the time of the transfer by any hard or fast rule...but the question … must be one of fact and degree to be answered by [ITs] in the light of common sense and their knowledge of trade and industry applied to all the circumstances of the particular case."**

36. Stephenson LJ qualified this by expressing his own view that he could not see:

> **"… how the mere opening of negotiations for a transfer could itself be a transfer so that the time of the transfer could begin to run then. Nor can I accept that any step in furtherance of a transfer in the future can be regarded as part and parcel of a transfer already in being."**

37. The second part of the decision Mr Lewis relied on was Mummery LJ's indicative description of a transfer of a trade or business or undertaking ["TUB"] (at p 289C-E). Mummery LJ said that

> **"… a [TUB] will "usually be a going concern of some complexity giving rise to different considerations than a simple transfer of a piece of real or personal property. The [TUB] may comprise personal and real property, stock-in-trade, incorporeal property, such as goodwill and work in progress, the benefit of existing contracts and the employees themselves. The completion of the transfer of these different elements of the [TUB] may occur at different times. Such a transfer is more in the nature of a process extending over a period of time than an event timed to take place only at a particular moment in time … the 'actual state of affairs' rather than 'legal or technical considerations', for example, the execution of documents, are what is known to the employee and make it easier for him to identify the time of the transfer".**

38. Mr Lewis drew two propositions from these passages. The first was that negotiations about, preparations for, and preliminaries to, a transfer do not take place during "the time of the transfer". The second was that the time of the transfer is the time during which transactions, such as conveyances of land, and transfers of corporeal and incorporeal property take place; the nuts and bolts of transferring the physical and abstract property of a TUB from one person to another. He submitted that the factors to which the ET referred expressly in this case were either negotiations, or similar exchanges, and/or preparations for, rather than the transfer itself (in the words of Stephenson LJ, "steps in furtherance of a transfer in the future").

39. In oral argument, Mr McLeish took me to various provisions in the transfer agreement. The transfer agreement was before the ET. These provisions showed that this was an elaborate transaction with many stages. For example, S4E, the Council and the administering authority for the relevant Local Government Pension Scheme fund, had to enter into an admission agreement (the negotiation and finalising of this seem to have delayed the signing of the transfer agreement, on the ET's findings). The transfer agreement referred, in paragraph 6 of Schedule 6, to "payroll and other costs" of S4E which the Council had been bearing since April 2012. The signing of a minority protection agreement was a condition precedent of the transfer agreement (clause 2). Clause 6 of the transfer agreement imposed contractual obligations on

the parties to comply with consultation obligations imposed by **TUPE**.

40. Mr Lewis objected strongly in his reply to the use of this material, which had not been foreshadowed in Mr McLeish's skeleton argument. However late Mr McLeish's references to it were, the transfer agreement was before the ET. The use which I can make of it is limited, because I do not know to what extent its ramifications were teased out by the ET. There are no findings, for example, about when the admission agreement was made. But as a document it supports the ET's view that this transfer was a process (and a complex process at that), with a number of associated transactions. Some of the obligations described in the agreement (for example the consultation obligations), are expressed as future obligations, but relate to acts which would have been completed by 1 September 2013. I have no doubt that the ET was entitled to find that the transfer was not a single, instantaneous transaction.

41. The real questions are whether, as Mr Lewis submits, (1) the material to which the ET referred could support, and could only support, the conclusion that "the time of the transfer" began later than 31 July 2013, because that material was no more than analogous to "the mere opening of negotiations" or steps in furtherance of a future transfer, and/or, (2) the material to which the ET referred was not material of the type described by Mummery LJ in the passage to which I have referred. I have not found the first question easy to answer.

42. The short answer to the second argument is that Mummery LJ was not pretending to make an exhaustive and exclusive statement of the transactions which could amount to a transfer. He was giving a general indication. What count in any particular case are the incidents of the actual transfer which the ET is considering, and that will depend on the nature of the transfer itself. A transfer involving a public sector transferor will often have different

characteristics from a transfer between two private sector bodies because, for example, of frequent complications caused by the securing of pension entitlements which are the same as, or equivalent to, existing public sector pension entitlements.

43. I turn to the first argument. I see the force of the contention that, for example, the setting up of S4E (referred to in paragraph 6.2 of the ET's Reasons) was a preparation for a future transfer rather than being part of the transfer itself. I do not consider that the making of the admission agreement was in the same category, however, because the existence of an admission agreement is the foundation of the provisions about pensions in clause 9 of the transfer agreement.

44. Further, one of the elements of the transfer to which Mummery LJ referred was the transfer of staff. The ET expressly found that the letter seeking information about the sessional staff in April 2012 was sent "clearly with a view to the continuation of an employment relationship based in similar fashion on a fixed contract for the academic year". I do not consider that this point is affected by the fact that the parties only dealt in the transfer agreement with the permanent staff, who, in their view, were the only employees to whom **TUPE** applied. Up until the date of the ET hearing, the Council had contended that the Claimant was not an employee. They then conceded that he was at the hearing.

45. A further point is that the parties, (prophetically, perhaps) began to comply with their consultation obligations in October 2011. Of course, those obligations were imposed, independently of the transfer agreement, by **TUPE**, but inter se, the parties to the transfer agreement did not take any chances, and imposed the obligations on each other as a matter of contract (by clause 6). It had been intended that the transfer would be completed by September

2012. The process was prolonged by difficulties in sorting out the pension arrangements (this must mean, among other things, in arriving at a signed admission agreement). On balance, in my judgment, the ET was entitled to find that some at least of the matters it referred to were part of a transfer process.

46. Like the IT in **Clarke**, the ET did not, because it did not need to, find when "the time of the transfer" began. I can detect no misdirection of law in its Reasons (apart from the incorrect, but legally superfluous references to section 212(3)(b) of **ERA**). I reject the submission of Mr Lewis that the matters which the ET referred to were, as a matter of law, preparations for the transfer, and could not be parts of the process of transfer. I also reject the submission that, if the ET was or might have been entitled to find that some or all the matters it referred to were parts of the process, the case should be remitted to the ET for it to make further findings.

47. It follows that the appeal against the decision that the Claimant's employment was continuous between 1992 and his employment with S4E fails.

The Cross Appeal

48. There was a cross appeal by the Claimant. The Claimant sought to rely on an argument based on the **Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002**. This was a new argument, which he did not rely on before the ET. The Claimant was represented during the ET proceedings by a solicitor working for his union. It is a new argument which is also inconsistent with the argument which he did run at the ET. At the ET he conceded that his employment came to an end on 31 July 2013 and that there was no overarching contract between him and BCC. This argument would require further factual findings by the ET, since BCC would be able to rely on, and would want to invoke (as Mr

Baran told me on its behalf) a defence of justification. I accept Mr Lewis's submission that, in the light of **Secretary of State for Health v Rance** [2007] IRLR 665 and the cases referred to in that decision, I should not permit this argument to be advanced unless there are exceptional circumstances. Mr McLeish did not identify any. I therefore dismiss the cross appeal.

Conclusion

49. I dismiss the appeal and the cross appeal.