Appeal No. UKEAT/0157/14/MC

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 February 2015

Before

MR RECORDER LUBA QC

(SITTING ALONE)

MR P L JINKS APPELLANT

LONDON BOROUGH OF HAVERING RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR DANIEL MATOVU (of Counsel)
For the Respondent	MR OLIVER ASSERSOHN (of Counsel) Instructed by: London Borough of Havering Legal Services Town Hall Main Road Romford Essex RM1 3BD

<u>SUMMARY</u>

TRANSFER OF UNDERTAKINGS

TRANSFER OF UNDERTAKINGS - Transfer

A council contracted with a company to manage one of its properties, including an associated car park. The company sub-contracted the operation of the car park to a sub-contractor. The Claimant claimed to have been employed by the sub-contractor.

The main contract ended. The council took the management of the site and associated car parking in-house.

The Claimant contended that **TUPE** operated to make him an employee of the council.

The Employment Judge struck out the claim on the basis that, on the pleaded case, the council had never been the client of the sub-contractor.

TUPE Regulation 3(1)(b) refers to the "client".

The Claimant appealed. Appeal allowed and a remitted to the Employment Judge to determine, on the facts, whether the council was a client of the sub-contractor.

TUPE Regulation 2(1) and **<u>Horizon Security Services Ltd v Ndeze</u>** UKEAT/0071/14/JOJ (19 May 2014) considered.

MR RECORDER LUBA QC

Introduction

1. This is an appeal from the strike-out of an unfair dismissal claim in which the Claimant asserted that his employment had transferred to the Respondent by the operation of the **TUPE Regulations 2006**. The Employment Judge struck out the case at a Preliminary Hearing on the basis that it had no reasonable prospects of success. The Employment Judge held that the claim was based on a fundamental misunderstanding of the law relating to transfers of undertakings. The Employment Judge heard no evidence but gave his ruling based on the pleaded cases of both parties. The point on which he struck out the case was not itself a point taken by the Respondent but one the Judge took of his own motion.

2. The single ground of appeal set out in the Amended Grounds of Appeal is in essence that, in the absence of a hearing of the evidence, the Employment Judge could not have been satisfied that the claim based on the **TUPE Regulations** was bound to fail and indeed was himself guilty of a misdirection as to the relevant law in concluding that the Claimant's claim had no reasonable prospect of success.

Factual Summary

3. The core background facts are as follows. The Respondent, which I shall call the "Council", owns a site in its district which previously comprised the Romford Ice Rink and an associated car park. The Council contracted-out the management of the whole site to the company Saturn Leisure Ltd, to which I shall refer as "Saturn". Saturn sub-contracted the management of the car parking to the company Regal Car Parks Ltd, which I shall call "Regal".

Regal made the car parking spaces available to others, primarily by issuing permits to the staff of the local NHS Trust.

4. In mid-April 2013 the ice rink closed. The car parking activity continued for a few weeks, but Saturn gave up occupation of the whole site at the end of April 2013. The Council immediately took control of the site and closed the car park. The Council subsequently granted a licence to the NHS Trust to use the car park for its staff before finally converting it a few months later into a public use car park.

5. The Claimant's case was that he had previously been employed by Saturn and that from mid-April 2013 his employment had transferred to Regal. Thereafter, when the Council had taken upon itself the function of operating the car park, his employment had transferred to the Council. Its failure to accept him as a council employee was the foundation of his claim for constructive unfair dismissal.

6. In his application to the Employment Tribunal Service he put his claim in this way:

> **"My Employer Saturn Leisure Limited operated a Management contract for Romford Ice Rink on behalf of the London Borough of Havering, part of the contract involved Managing Car Access onto the site (primarily by issuing permits to the Staff of Barking, Havering and Redbridge Hospitals Trust). This function was sub contracted to Regal Car Parks Limited and on the 14th April 2013 I transferred to Regal Car Parks Limited.**
>
> **The London Borough of Havering terminated the contract for the Car Access Management on 31 May 2013 on or about the 1 June 2013, the London Borough of Havering re opened the Car Park and in conjunction with the Barking Havering and Redbridge [Hospital] Trust began issuing permits to the staff of Barking Havering and Redbridge Hospital Trust.**
>
> **In accordance with the TUPE 2006 regulation 3. (1)(b) (1 to 3) there has been a service provision change.**
>
> **By email dated 20 June 2013, the Respondent refused the [Applicant's] request for transfer of employment.**
>
> **As a consequence of the Respondent failing to give the applicant employment, the applicant considers that they have been unfairly/constructively dismissed."**

7. The Council's answer to the claim was that the Claimant had not established that he had been employed by Regal, although it was accepted that he was the director and ultimately beneficial owner of both Saturn and Regal. In any event, the Council contended, there had been no transfer from Regal to the Council. It invited a strike-out of the claim.

The Judgment

8. The matter came before Employment Judge Kurrein at a Preliminary Hearing. The Employment Judge heard the matter on 29 October 2013 and gave his Written Reasons on the following day, 30 October 2013. The Claimant appeared before the Judge in person, and the Council appeared by counsel, Mr Oliver Assersohn.

9. The Employment Judge did not, in the event, consider it necessary to finally determine whether the Claimant's employment had transferred from Saturn to Regal or whether the Claimant had been an employee of Regal at all. He approached the matter, it would seem, on the basis pleaded by the Claimant: that is to say, that he had at the material time been employed by Regal. In his Written Reasons the Judge explained why he struck out the claim as having no real prospect of success. He said this:

> **"9. In the case of a transfer by way of a service provision change it is axiomatic that "the client" to which the sub-contractor is bound must be the same both before and after the transfer: *SNR Denton UK LLP v Kirwan* [2012] IRLR 966.**
>
> **10. It is apparent that "the client" which engaged Regal was Saturn. That client gave up such interest as it had in the car park, without appointing an alternative contractor, on 30 April 2013. At that point Regal's sub-contract came to an end.**
>
> **11. The Respondent took control of the car park on that date, and promptly closed it until it granted the former Second Respondent [the NHS Trust] a license from 15 May 2013. The Respondent was never a sub-contractor to Saturn.**
>
> **12. There was never any direct contractual link between Regal and the Respondent, whether before or after the Respondent took possession. The Respondent did not take control of any undertaking. It is a different legal entity to Saturn."**

10. So, in short, the Employment Judge had held that, for the purposes of the relevant provisions of the **TUPE Regulations**, the client which had engaged the services of Regal was Saturn. Saturn had given up the interest it had in the car park without transferring the benefit of its own contract with the Council to anyone else. At that point the sub-contract between Saturn and Regal had ended. There had been no contractual relationship between Regal and the Council before or after the Council regained possession of the site. The requirements for a TUPE transfer were therefore not conceivably met, and for that reason the Judge had decided that the claim fell to be struck out.

The Regulations

11. The **TUPE Regulations 2006** apply, *inter alia*, to what are called service provision transfers. They do so where the terms of Regulation 3(1)(b) are satisfied. The relevant terms are as follows:

> **"3. *A relevant transfer***
>
> **(1) These Regulations apply to -**
>
> > **…**
> >
> > **(b) a service provision change, that is a situation in which -**
> >
> > > **(i) activities cease to be carried out by a person ("a client") on his own behalf and are carried out instead by another person on the client's behalf ("a contractor");**
> > >
> > > **(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; or**
> > >
> > > **(iii) activities cease to be carried out by a contractor or a subsequent 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 the client on his own behalf,**
> >
> > **and in which the conditions set out in paragraph (3) are satisfied."**

12. For the purposes of applying these Regulations, Regulation 2(1) provides that references to "contractor" shall include a sub-contractor.

The Issue

13. Each of the three scenarios captured by Regulation 3(1)(b) refers to the "client". On this appeal the Claimant accepts that for the purposes of the sub-regulation the activities carried out before and after the putative transfer must be carried out for the same client. That is, in any event, the force of four authorities relied on by the Respondent. Those authorities include the decision of the Employment Appeal Tribunal in the case of **SNR Denton LLP v Kirwan** [2013] ICR 101, to which the Judge himself referred and the decision of the Court of Appeal in **Hunter v McCarrick** [2013] ICR 235.

14. It will be recalled that the Claimant's contention before the Employment Judge was that at the date of alleged transfer, he worked for Regal. To proceed with his claim he needed to have a reasonable prospect of showing that the Council was Regal's client. For the reasons I have already shortly summarised, the Employment Judge found that, on the facts of this claim as advanced to him, only Saturn could have been the client of Regal for the purposes of Regulation 3(1)(b).

15. The Claimant, represented before me by Mr Matovu of counsel, contends that the Employment Judge was wrong and that he should have enquired into the facts to determine whether the Council was, or at least could have been, the ultimate or real client of Regal. If it was, then he submits that the terms of Regulation 3(1)(b) were met, at least potentially, on the facts of the case. Put at its highest, as Mr Matovu explained, the Claimant's pleaded case was that the terms of paragraph 3(1)(b)(iii) were satisfied. Mr Matovu submitted that the error that the Judge had made was an error best illustrated by his inclusion in paragraph 9 of his Written Reasons of the words "to which the subcontractor is bound". Absent those words, Mr Matovu would have been content that paragraph 9 contained an appropriate self-direction. But, Mr

Matovu submits, by the insertion of the additional words, the Employment Judge was plainly holding that, in a sub-contracting scenario, the client, for Regulation 3(1)(b) purposes, of the sub-contractor was necessarily the entity to which the sub-contractor was legally bound: i.e. the contractor. Mr Matovu contends that the reach of Regulation 3(1)(b)(iii), when read with Regulation 2(1) is not so limited. The question is, he contends, one of fact: that is to say, on whose behalf did the sub-contractor undertake the relevant activities?

16. For his part Mr Assersohn, appearing for the Respondent, contends that the Employment Judge made no error in his approach to the law or in his application of it. There was, he submitted, nothing on which to base any contention that the Council had been or was the client for Regulation 3(1)(b) purposes. Mr Assersohn submitted that the instant case was closely analogous to a decision of this Employment Appeal Tribunal in **Horizon Security Services Ltd v Ndeze** UKEAT/0071/14/JOJ, which was decided on 19 May 2014.

17. I should record that the instant appeal was the subject of a Preliminary Hearing conducted before HHJ Eady QC. She directed that there be a Full Hearing of this appeal on the basis that it was arguable that the Council had been the client of Regal notwithstanding the absence of any direct contractual relationship and "ignoring the position of Saturn" or, strictly, that the Employment Judge ought at least to have allowed that case to be advanced after a hearing concerned to establish the full facts. It was HHJ Eady, sitting alone, who had given the Judgment in the **Horizon** case. That is a case to which I shall have to give further consideration in due course.

Discussion

18. When read with the benefit of the interpretative provision in Regulation 2(1), enabling the word "contractor" to be treated as including the word "sub-contractor", Regulation 3(1)(b)(iii) can be satisfied where:

> **"(iii) activities cease to be carried out by a [sub-contractor] … on a client's behalf … and are carried out instead by the client on his own behalf …"**

19. As I have indicated, the Claimant's case was that, on the facts, Regal was the sub-contractor and that it was formerly carrying out activities on behalf of the Council which were activities the Council later carried out itself. The Claimant seeks a determination of the correctness or otherwise of that case on the facts.

20. As HHJ Burke was at pains to make clear in **Metropolitan Resources Ltd v Churchill Dulwich Ltd** [2009] ICR 1380, the application of Regulation 3 of the **TUPE Regulations 2006** raises plain questions of fact. At paragraph 27 of his Judgment he said:

> **"… the new provisions appear to be straightforward; and their application to an individual case is, in my judgment, essentially one of fact."**

21. In the instant case it might be said that the following factual questions arose. Prior to the alleged transfer, who was Regal running the car park for "on behalf of"? Who was its client or customer? Could one answer have been that it was the Council? If it could have been, should the claim be subject to investigation and determination of that point?

22. It seems to me that if A contracts with B to provide it with a service, A is obviously the customer or client. If B then sub-contracts to C to provide part of that service, plainly B is, or at very least may be, the client or customer of C. But can A also be, by virtue of the sequence of transactions, a client of C in respect of the service it provides?

23. Here the Council contracted with Saturn to provide it with the services of operating the ice rink and the car park. Saturn's client was the Council. Saturn contracted out the management of the car park to Regal. In one sense, at very least, Regal's client was Saturn. Could it be said that, additionally or alternatively, the Council was the real or ultimate client of Regal in respect of the car parking service?

24. I accept Mr Matovu's submissions that in this case the Employment Judge took an impermissible short cut by treating the client of a sub-contractor as necessarily being, and only being, the contractor to which it was contractually bound to provide a service. In my judgment Regulation 3(1)(b), when read with Regulation 2(1), is not so limited. Paragraphs 9 to 12 of the Employment Judge's Reasons plainly evidence, in my judgment, the impermissibly narrow approach that he took. The **Horizon** case supports the conclusion that the strict legal or contractual relationships do not necessarily answer the Regulation 3 question.

25. I must now return to the Judgment of HHJ Eady in that case. That was a case in which, like the present case, the Council was the owner of a site. It contracted with a company, Workspace, for the provision of services. Workspace sub-contracted an aspect of those services (that is to say, site security) to a company called PCS. The Council later arranged for a further and different company, Horizon, to provide security services. The Claimant in that case had been a security guard employed by PCS. In reply to his claim to the Employment Tribunal Service, both PCS and Horizon pleaded that the "client" for Regulation 3 purposes, that is to say the entity for whom the security services were provided, was Workspace. They did not suggest that the client was the Council. The Claimant himself advanced no positive case.

26. The Employment Tribunal inferred from the facts it found that the Council had been the client throughout. This Employment Appeal Tribunal allowed an appeal. In this instant appeal it was Mr Assersohn who primarily relied on **Horizon**. He did so for its analogous factual scenario, helpfully demonstrated by a table in his Skeleton Argument. He also relied on the outcome, the allowing by this Employment Appeal Tribunal of the appeal in that case.

27. But in my judgment Mr Matovu was correct to draw my attention to three important principles established by the **Horizon** case. The first principle is that the question of who is the client for Regulation 3 purposes is one of fact, not law. Secondly, the principle that there could be more than one "client" in any given case. Thirdly, the principle that the terms of Regulation 3(1)(b)(iii), read together with Regulation 2(1). Together they show that the person on whose behalf services are provided by a sub-contractor may not necessarily be the contractor from whom the sub-contract is held.

28. Those three principles or propositions, it seems to me, derive in particular from paragraphs 41 and 42 of the Judgment of Judge Eady in the **Horizon** case. She said this:

> **"41. … it must be right that the assessment of who is the client in a service provision change case will generally be a matter for the Employment Tribunal as a finding of fact. Further, it may well be that there will be situations where [there] might appear to be more than one client, perhaps in an agency situation. In such cases, however, the Tribunal would need to ask (as in the *Denton* case) who was the real client. …**
>
> **42. Asserting, as PCS has done, that there is a subcontractor relationship does not answer the question. Regulation 3(1)(b) plainly recognises subcontractor cases and the possibility of a service provision change in such circumstances is thus envisaged under (iii). That, however, is about the change in provider; it does not define the client."**

29. Although the initial decision in the **Horizon** case (that the Council was the client) was overturned by this Employment Appeal Tribunal, that was not because it was a conclusion reached contrary to the true construction of the Regulations. Indeed, HHJ Eady says in terms,

at paragraph 45, that she had initially thought that the appeal in that case could be answered simply by upholding the decision on a finding of fact (that the client was the Council).

30. In truth, the decision of the Employment Tribunal in the **Horizon** case fell to be overturned because it had impermissibly drawn an inference from the facts it had found. In addressing her reasons for that assessment, it is illuminating that, in paragraph 46 of her Judgment, HHJ Eady treats the fact that the sub-contract of PCS was held from Workspace as but only one of several matters sustaining the conclusion that it and not the Council was the real or ultimate client on whose behalf services were provided.

31. In the light of **Horizon**, the reasoning of which I respectfully treat as correct, this appeal can have only one result. It must be allowed, on the basis that the Employment Judge wrongly directed himself in law. I have no doubt that, had an experienced Employment Judge such as Judge Kurrein been taken to Regulation 2(1) and its impact on Regulation 3(1)(b), he might have reached a different conclusion. Moreover, he did not have the benefit of HHJ Eady's Judgment in **Horizon**, which was only handed down subsequent to his own decision.

32. For the reasons I have given, however, the approach of the Employment Judge was too narrow and was wrong. But what follows? That cannot be the end of the matter. Proceedings should not be remitted if there is no case on this point for the Council to meet. One might expect to find in a case of this nature a pleading that, despite the existence of a contract and sub-contract, the real or ultimate client of the sub-contractor was the principal in the chain of contracts. I accept Mr Assersohn's submission that a Claimant's case to this effect must be pleaded so that it is possible for a Respondent to understand on what basis it is said that the client of a sub-contractor is someone other than the contractor from whom the sub-contractor

holds. Mr Assersohn's submission is that in the instant case there is insufficient material in the application made to the Employment Tribunal Service for the Respondent to know what case it has to meet. In particular, it does not appear in the form ET1 at any stage that there is an express or explicit contention that Regal was providing its services on behalf of the Council as its client as opposed to on behalf of the contractor from whom it held the sub-contract.

33. I have already set out the relevant parts of the ET1. I heard crisply presented exchanges from both counsel as to the adequacy of that pleading. I am just about satisfied that paragraph 5.2 is pregnant with the contention that the true client of Regal was the Council. However, in my judgment the matter is put beyond doubt since, in the course of the hearing, I was shown the Reply to Grounds of Resistance which the Claimant put to the Employment Judge and in which, in at least three or four places, he makes clear his case that Regal had as its client the Council. In those circumstances it seems to me that there is a matter to be determined as a question of fact by the Employment Judge and I shall therefore both allow the appeal and remit the question to an Employment Tribunal. I shall hear counsel as to the nature of any further direction I need to give.

Outcome

34. This appeal will be allowed on the basis that the Employment Judge misdirected himself in law on the correct approach to the **TUPE Regulations**. In those circumstances, Mr Matovu submits that the matter should be remitted to a different Employment Judge. He urges upon me that the effect of the order of the Employment Judge was to demolish the entire claim advanced by the Claimant and on the basis of a point not taken by the Respondent but taken by the Judge himself. Those indicia, submits Mr Matovu, suggest that the matter should go back to a different Judge.

35. I am not satisfied that the basis has been made out for excluding the Employment Judge in question, Judge Kurrein, from reconsidering this matter. It seems to me that the point has been decided exclusively on a question of law and that there have been no findings of fact, as the Employment Judge made clear in the terms of his Written Reasons. The matter proceeded before him on the case as pleaded. I do not, therefore, consider that there is any likely prejudice to either party if the matter is remitted to Judge Kurrein. However, I do not expressly remit the matter to him. It seems to me that the strike-out application should be remitted to Judge Kurrein or any other Judge of the Employment Tribunal Service as the Regional Tribunal Judge may direct.

36. I make that indication because it seems to me that the opportunity will be taken on the strike-out application to resurrect the points that the Respondent had actually wished to advance. It may be that no party takes the point as to "the client" that has been at issue in this appeal. So the strike-out application is at large, and what I remit to an Employment Judge to determine is the Preliminary Hearing of the application to strike-out on the basis that it is presently formulated, or as it is hereafter formulated by amendment of that application on the Respondent's part.

37. So my order shall be: (1) Appeal allowed. (2) Application to strike-out remitted to any convenient Judge of the Employment Tribunal Service, which may include Judge Kurrein.