Appeal No. UKEAT/0078/14/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 27 July 2015

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

MR U AGUEBOR APPELLANT

(1) PCL WHITEHALL SECURITY GROUP (DEBARRED)
(2) KINGDOM SECURITY GROUP LTD RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR PETER EGUAE (Representative)
For the First Respondent	First Respondent debarred from taking part in this appeal
For the Second Respondent	MR SEAN O'BRIEN (of Counsel) Instructed by: Messrs Bramhalls Solicitors The Old Reading Rooms 76 Eastham Village Road Eastham Village Wirral CH62 0AW

SUMMARY

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

TRANSFER OF UNDERTAKINGS

1. The Employment Judge erred in law in concluding that there was no significant difference between the Securicor contract in the year 2000 and the PCL terms and conditions in 2010. On the true construction of the Securicor contract the employer was obliged to provide full-time work, i.e. generally 56 hours per week unless otherwise agreed.

2. The Employment Judge erred in law in failing to address in her Reasons the question whether, applying Regulation 3(1)(a) of **Transfer of Undertakings (Protection of Employment) Regulations 2006**, there was a transfer of an undertaking or part of an undertaking from PCL to Ward Security.

HIS HONOUR JUDGE DAVID RICHARDSON

Introduction

1. I have before me an appeal from a Judgment of Employment Judge Hill, sitting in Reading, dated 21 October 2013. By her Judgment she dismissed a claim of constructive unfair dismissal which Mr Uhun Aguebor ("the Claimant") brought against PCL Whitehall Security Group (hereafter "PCL") and Kingdom Security Group Ltd (hereafter "KSG").

The Background Facts

2. For more than 12 years, from October 2000 until March 2013, the Claimant had regular full-time work as a security officer at Thames House, a large office building on the edge of the town centre at Maidenhead. This case concerns the circumstances in which he lost that work.

3. Originally the Claimant was employed under a contract of employment dated 3 December 2000 with a company called Securiplan Plc (hereafter "Securiplan"). It was headed "Uniformed Security Officers and Hourly Paid Staff (Full Time)". The contract did not provide for a permanent place of work; to the contrary, clause 9 made it plain that the Claimant might have to work at a series of customers' sites in accordance with the demands of the business. The contract did, however, make important provision concerning his entitlement to work. Relevant provisions were clauses 7 and 8:

> **"*7. Working hours***
>
> **7.1. There are no normal working hours applicable to your employment although your contracted hours will generally be 56 hours per week unless otherwise agreed. You agree to accept and comply with the Company's shift pattern and you understand that: -**
>
> **7.2. Your hours of work will vary from assignment to assignment.**
>
> **…**
>
> **7.5. The Company may change the shift pattern that you are required to work. You will be given reasonable notice of any such change.**
>
> **…**

8. Full-time appointment

8.1. Your employment by the Company is a full-time appointment. You agree that: -

> **8.1.1. You will devote the whole of your working time and attention to your duties under this Contract, unless you are too ill to work.**
>
> **8.1.2. While you are employed by the Company, you will not (without the prior written consent of a Director or Manager of the Company) do any security work for or directly or indirectly engage in any other security business, whether as an employee or on your own account or through a company or in partnership with anyone else. You agree that you will be available to work at any time as and when required by the Company on 24 hours' prior notice from the Company's Scheduling Office.**

…"

4. As a matter of fact the Claimant was not moved from site to site; he worked at Thames House all the time. He had plentiful work. There came a time when security services at Thames House were taken over by another company, PCL. They provided him with a statement of terms and conditions of employment dated 22 January 2010. The statement recognised the Claimant's continuity of service from October 2000. There is every reason to suppose that PCL took him on by virtue of a transfer under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (hereafter "TUPE"). This statement of conditions also made it plain that the Claimant did not have a single place of work. As regards hours of work the statement said the following:

"*7. Hours of Work*

…

7.2. Due to the nature of security work "The Company" cannot guarantee either maximum or minimum hours available. Precise working hours for security officers and other hourly paid staff will be as per the appropriate duty roster and may be varied by "The Company" at any time at its absolute discretion. Where possible, reasonable notification of such a variation will be given, however, employees must accept that the requirements of "The Company" may dictate that such notice could be minimal.

…

7.4. "The Company" reserves the right to increase or decrease your hours of work and/or change your start and or finish times on reasonable notice should it be considered necessary for the needs of the business."

5. In fact it appears that the Claimant continued to work regular hours at Thames House as before until about March 2013. That is when everything changed. PCL's contract for security

services at Thames House was with the tenant, an organisation known as PGS. The tenancy terminated on 28 February 2013. The landlord, Standard Life, appointed management agents, MJ Mapp Ltd, who in turn appointed an alternative security company, Ward Security. Ward declined to take over the Claimant's employment under **TUPE**. They said there was no such change because the client had changed. They relied on **Hunter v McCarrick** [2013] ICR 235, decided by the Court of Appeal in October 2012.

6. PCL retained the Claimant as an employee and endeavoured to give him alternative work. It happens, coincidentally, that the business of PCL was transferred to KSG on 1 April 2013 with the effect that the Claimant's employment with PCL was transferred under **TUPE** to KSG, subject to one of the points of the appeal, to which I shall come. PCL and KSG endeavoured to find alternative work for the Claimant, but, as the Employment Judge found, his role changed dramatically, and his pay was cut. He resigned in May 2013.

The Employment Tribunal Proceedings and Reasons

7. The Employment Tribunal hearing took place on 10 October 2013. The Claimant was represented by Mr Eguae, KSG by Miss Mensah. The Claimant's case was that his treatment after 28 February 2013 amounted to a fundamental breach of contract that entitled him to resign. His complaints included the following: important and significant changes in his duties, substantial reduction in his pay and working hours and significant alteration of his working location.

8. The Employment Judge quoted provisions from the 2010 statement of conditions provided by PCL. She said the following:

> **"19. I had enormous sympathy for the Claimant that his stable, comfortable job had disappeared. He was only offered ad hoc guarding duties but his obligation under the contract was to work for such assignments as were made available to him. The only**

assignments the Respondent could provide were those that they had. They offered him those assignments, some of which he took and some of which he did not. That is as far as the contractual arrangement had to go. The contract clearly stated there were no minimum hours.

20. There is no breach of contract by the Respondents in this unfortunate situation in seeking to provide the Claimant with work to keep him ticking over. He was unhappy with the way the contracts worked, and the limited amount of money he was earning. The Respondents were not liable to ensure that he retained the same type of work, i.e. indoor guarding duties or that he was in receipt of the same sort of money when they did not have a contract in which they could place him."

9. It had, however, been the Claimant's case that his employment was governed by the contract with Securiplan Plc in the year 2000. His representative argued that **TUPE** applied, his terms and conditions were carried over and any detrimental variations were of no effect by reason of **TUPE**. The Employment Judge dealt with this as follows (paragraph 11):

"11. I had before me the Claimant's contract of employment that he originally signed on 3 December 2000 and the contract that he signed with PCL Whitehall Security on 22 January 2010. Although the Claimant's representatives sought to argue there were fundamental differences between them, I am satisfied that there are no real differences. Even if there were, the Claimant has worked for over two years in accordance with the contact signed on 1 February 2010 without making any complaints, such that he would be deemed to have affirmed it."

10. KSG had an additional argument. It said that there had been a transfer of undertaking from PCL to Ward Security at the beginning of March 2013. The Claimant was employed in the undertaking; his employment had therefore transferred to Ward Security. KSG's ET3 had put it as follows (paragraph 4):

"4. Whether as a service provision change or a transfer of an undertaking or part of an undertaking, the Claimant's employment transferred from PCL to Ward on 28th February 2013. …"

11. KSG's case was therefore put in three ways in its claim form. The Employment Judge dealt with the first, relating to service change provision, in paragraph 16 of her Reasons:

"16. I was satisfied that there was no service provision transfer that applied in relation to Ward Security. If the security services had been engaged by the landlord of the premises, there would be a service provision transfer. In this case, however, it was a tenant in the building that had engaged security. That tenant ceased trading there and no person providing the same sort of work took over. The managing agent is not described as a tenant and therefore is in a different relationship. They put in security for the building. This is a case that is on all fours with the case of [*Hunter*] - there is a change both of contractor and of client. There is no contractual interface for any of the persons involved such that you could find that there is a TUPE transfer."

12. The Employment Judge did not expressly deal with either of the other ways in which KSG put the case. As her own Reasons made plain, she had read the papers in advance. After doing so, she indicated her conclusion to the parties. When she did so, KSG's counsel said:

> **"I would like to talk about [the transfer between PCL and Ward Security Limited] being a service provision change or a standard TUPE transfer."**

The Employment Judge said:

> **"It cannot be a TUPE transfer. It can only be a service provision change."**

There the matter rested; the Employment Judge did not return to it in any express way in her Reasons.

The Claimant's Contractual Terms

13. On behalf of the Claimant Mr Eguae places reliance on the provisions in the Securiplan contract concerning working hours. Clause 7.1 defined working hours as "generally … 56 hours per week unless otherwise agreed". The Claimant had in fact consistently worked 66 hours per week since the year 2000. In March 2013 he was given only a small fraction of those hours; the Employment Judge ought to have found that there was a constructive dismissal on this basis.

14. Mr Eguae submits that the Employment Judge must have erred in law in the interpretation of the Securiplan contract. She thought there was no significant difference between the two contracts, whereas in respect of working hours there was a critical difference. The Employment Judge was therefore wrong in law to rely on clause 7.1 of the PCL terms; these would be a detrimental variation and void (see Regulation 4(4) of **TUPE** and such cases

as **Credit Suisse First Boston (Europe) Ltd v Lister** [1998] IRLR 700 and **Regent Security Services Ltd v Power** [2008] IRLR 66).

15. Mr Eguae also informs me, and I do not think there is really any dispute about this, that the Employment Judge expressed her view that there was no significant difference between the two contracts at an early stage. He says she would not permit him to cross-examine in reference to issues raised by the Securiplan contract.

16. On behalf of KSG Mr O'Brien accepts that if a provision of the PCL terms was detrimental to the Claimant when compared to the Securiplan contract that provision would be void by virtue of Regulation 4(4). He submits, however, that the Employment Judge was correct to find that there was no significant difference between the Securiplan contract and the PCL terms. No minimum hours of work were guaranteed by the Securiplan contract, which provided no more than that 56 hours would "generally" be the hours worked. The reference to "full-time employment" in the Securiplan terms denoted no more than a prohibition on outside work without management permission. Mr O'Brien also argued that even if the Securiplan agreement applied, the Claimant had in fact agreed to a reduction in hours of work by virtue of working under the PCL terms and conditions.

17. I prefer the submissions of Mr Eguae concerning the meaning of the Securiplan contract in so far as it relates to working hours. To my mind, the Securiplan contract cannot possibly be read as if it were a zero-hours contract giving the Claimant no entitlement to work. Clause 7.1 entitled him to 56 hours per week unless otherwise agreed. The qualification of the 56 hours by the word "generally" allows some latitude for a short period of time or for an emergency, but it cannot be read as permitting the employer to reduce the Claimant's hours unilaterally below

that level for any significant period. Reading clause 7.1 in the context of the agreement as a whole, it was plainly intended to confer an entitlement to full-time work. The heading of the contract and clause 8 of the contract make the position clear. If therefore the stage was reached where the Claimant was no longer generally offered 56 hours per week and if he did not agree, there would be a breach of contract.

18. The PCL terms are very different in this respect. They expressly state that there is no guarantee of either maximum or minimum hours of work and that hours may be varied by the company at any time at its absolute discretion. I conclude that the Employment Judge erred in law in finding that there was no significant difference between the two contracts. As regards entitlement to hours of work there plainly was such a difference.

19. Given this conclusion it is common ground today that the Employment Judge ought to have approached the Claimant's claim for constructive dismissal on the basis that he had the benefit of clause 7.1 of the Securiplan agreement. That did not of course entitle him to 66 hours of work each week as it appears he had been receiving at Thames House. It did not entitle him to work at Thames House or to work nights. It did give him a general entitlement to 56 hours of work. The Employment Judge made no findings as to whether he was given or offered work in accordance with that contract. Subject to KSG's ground of appeal, to which I shall come in a moment, the matter will have to be remitted for findings to be made on the question of constructive dismissal.

20. I should say that Mr O'Brien argued in the alternative that the Claimant must have accepted reduced hours by working for PCL after receiving PCL's statement of terms and conditions. I see no basis for that argument in the Employment Judge's Reasons. She found

that the Claimant had a stable job until 2013. There is no reason to suppose that PCL offered him or he accepted reduced hours.

Transfer of Undertaking

21. Mr O'Brien submits that the Employment Judge erred in law in failing to address in her Reasons KSG's contention that there was a transfer of undertaking or part of an undertaking from PCL to Ward Security. If she thought there could be no transfer of undertaking from PCL to Ward Security, she was wrong in law. Whether such a transfer took place was dependent on findings of fact and the application of the appropriate legal tests, which were multi-factorial (see **Cheesman v R Brewer Contracts** [2001] IRLR 144).

22. Mr Eguae submits that the Employment Judge sufficiently dealt with all the ways in which the **TUPE** point was put. There were as regards Regulation 3(1)(a) two central questions: whether there was an identifiable business entity; and if so, whether there was a transfer of that entity. He submitted that the answers to these questions could be discerned in paragraph 16 of the Employment Judge's Reasons. He submitted that it was decisive in the Employment Judge's mind that there had been a change of client.

23. On this part of the case I prefer the submissions of Mr O'Brien. **TUPE** is designed to protect employees who are caught up in the transfer of the business for which they work. It contains two different gateways into protection. The first gateway is found in Regulation 3(1)(a), which applies where there is a transfer of an undertaking or part of an undertaking. The second gateway is found in Regulation 3(1)(b), which applies where there is a service provision change. The former is derived from European law, the latter from domestic law; there are

fundamental differences between them. I adopt with gratitude the summary of the law given by Elias LJ in paragraphs 9 to 23 of **Hunter**.

24. The two gateways are not mutually exclusive (see **Hunter** at paragraph 11). There are, however, great differences in the way in which they operate. The transfer of undertaking gateway has proved difficult to apply in cases where the putative undertaking is based wholly or mainly on manpower (see **Hunter** at paragraphs 17 to 18). This difficulty was indeed the reason for the introduction of the service provision change gateway, but it remains open to the employer or the employee to rely on the transfer of undertaking gateway; where it does so, the test is multi-factorial. All relevant factors must be considered (see **Hunter** at paragraph 16, approving the approach in **Cheesman**, and paragraphs 18 and 45). Elias LJ left open in paragraph 48 the potential significance of a change of client in the context of the transfer of undertaking gateway.

25. I do not read the Employment Judge as attempting in paragraph 16 of her Reasons to address the transfer of undertaking gateway. She made no relevant primary findings of fact in her decision. The reasoning in paragraph 16 does not begin to address the **Cheesman** factors. As I have explained, the transfer of undertaking gateway was raised by KSG; it was the Employment Judge's duty to make findings and give reasons in respect of it. Paragraph 16 does not suffice for this purpose.

26. It might be that the Employment Judge regarded this as a very straightforward case in terms of the transfer of undertaking gateway, she might have thought there was very little evidence to support the existence of a stable economic entity, and she might have thought that the change of client was integral, as Elias LJ suggests it may perhaps be in **Hunter**, but she has

not given any reasons in respect of her decision. It is not open to the Employment Appeal Tribunal to make its own findings on such a question (see **Jafri v Lincoln College** [2014] IRLR 544).

Disposal

27. It follows that both aspects of the case with which the appeal has been concerned must be remitted for re-hearing before an Employment Judge. I see no benefit in returning the matter to the same Employment Judge. It is now more than a year since she dealt with it, and it would be difficult for her to capture the evidence before her. Indeed, there is a significant risk that she may have foreclosed evidence by her approach to the hearing. The correct course is for the matter to be remitted to a fresh Employment Judge. He or she should consider the matter in accordance with this ruling. The questions will be whether or not there was a **TUPE** transfer by virtue of the transfer of undertaking gateway and whether given the contractual provision relating to hours of work, as I have found it to be, the Claimant was constructively dismissed.