Appeal No. UKEAT/0091/14/SM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 July 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

WGC SERVICES LTD — APPELLANT

(1) MR M OLADELE
(2) MS A SERWAA
(3) JANI-KING GB LTD - IN ADMINISTRATION — 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 MICHAEL OLADELE (The Respondent in Person)
For the Second and Third Respondents	No appearance or representation by or on behalf of the Second and Third Respondents

SUMMARY

TRANSFER OF UNDERTAKINGS - Service Provision Change

Service provision change - company holding cleaning contracts in respect of certain hotels - contracts lost to other cleaning contractors - common ground that service provision change provisions applied to those employed within individual hotels - dispute as to whether Claimants - one area manager and one training and area manager - were “assigned” to any organised group of employees which had as its principal purpose the carrying out of the activities concerned. Held: the Employment Judge did not make findings or give reasons sufficient to justify his conclusion that the Claimants were assigned to an organised group of employees which had as its principal purpose the carrying out of the activities concerned.

HIS HONOUR JUDGE DAVID RICHARDSON

1. This is an appeal by WGC Services Ltd ("WGC") against a Judgment of Employment Judge Freer, sitting alone in the London (South) Employment Tribunal, dated 7 September 2012. He had conducted a Pre-Hearing Review in proceedings brought by Mr Michael Oladele and Miss Akosua Serwaa against Jani-King GB Ltd ("JKG") and WGC. By his Judgment he held that Mr Oladele and Miss Serwaa were "assigned to the organised grouping of employees" who were the subject of a relevant TUPE transfer from JKG to WGC.

The Background Facts

2. JKG was a business providing housekeeping and cleaning services to the commercial sector including hotels. From 2001 onwards it provided those services to a number of Premier Inn sites. By June 2010 it provided those services to some 19 sites pursuant to contractual arrangements with Whitbread plc for whom it provided the services.

3. Between June and October 2010 Whitbread plc served separate notices terminating the arrangements with JKG in respect of each of the 19 sites. Housekeeping and cleaning services were awarded to new commercial cleaning contractors. Different notices provided for different dates; and hotels went to various contractors at various dates in the succeeding months. WGC was awarded contracts in respect of six hotels: Hammersmith, Edgware and High Wycombe, all of which transferred on 10 November 2010; Euston, 13 December 2010; King's Cross, 14 December 2010; and County Hall, 15 December 2010.

4. Mr Oladele and Miss Serwaa were Area Managers employed by JKG. Save for a very short time in the case of Mr Oladele they both worked in connection with Premier Inn Hotels.

Miss Serwaa was responsible for nine hotels including County Hall. Mr Oladele was responsible for ten hotels including Euston. He was also a Training Manager.

5. As JKG successively lost business at different hotels, Mr Oladele and Miss Serwaa ceased to be responsible for them. From November to December 2010 JKG retained the business of just six hotels. Of these six hotels those at Euston, King's Cross and County Hall were much the largest. Mr Oladele's evidence was that he worked last at Euston. He was still there when WGC took over and refused to accept him as an employee. Miss Serwaa's evidence was that she worked in this period at Euston and County Hall, not at King's Cross.

6. There was no agreement as to what should happen to Mr Oladele and Miss Serwaa when the Premier Inn business was lost. JKG believed their employment should transfer to WGC. WGC did not accept that this was the case. Mr Oladele and Miss Serwaa brought proceedings in the Employment Tribunal against both of them. The issue was listed for determination at a Pre-Hearing Review.

The Employment Judge's Reasons

7. The Employment Judge recorded that he heard evidence from Mr Oladele and Miss Serwaa as well as from Ms Shann, Operations Manager for JKG, and Miss Henry, an HR consultant for WGC. He said:

> **"6. It was not in dispute between the parties that there was a relevant transfer and the service provision change provisions of TUPE applied in the circumstances of this case. It was further agreed between the parties that the sole issue for determination by the Tribunal is whether the Claimants were assigned to the organised grouping of resources subject to that relevant transfer."**

8. He cited Regulation 4 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (hereafter "TUPE") at length. He did not refer to Regulation 3. The key paragraphs in his Reasons are the following:

> **"17. The Tribunal finds as fact from all the evidence available, that during the final period from 10 November 2010 to 14 December 2010 the majority of the Claimants' duties were required at the First Respondent's larger sites of Euston, County Hall and King's Cross. The Tribunal also finds as fact that there was genuinely work for them to do at these sites and that they undertook that work. Those three sites transferred to the Second Respondent on 12, 13 and 14 December 2010. The other remaining three sites transferred to ISS Ltd on or around the same dates.**
>
> **18. Regulation 4(3) stipulates that the time for consideration of any assignment is by reference to a person employed 'immediately before the transfer'.**
>
> **19. Regulation 4(3) also makes provisions that reference to a person employed 'immediately before the transfer' includes, where a transfer is effected over 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.**
>
> **20. The First Respondent was served with a series of termination notices in respect of contracts relating to the individual sites (see pages 130.1 to 134 of the bundle). The Tribunal accepts the First Respondent's unchallenged evidence that there was no schedule or program agreed between the First Respondent and Whitbread PLC for the gradual winding down of the relationship and also that the First Respondent was only made aware that a particular site was being cancelled once notice of cancellation was received. Up until receipt of the particular information notices in mid October, the First Respondent was hoping to retain the contract for those cleaning services. It had not envisaged losing all of the sites.**
>
> **21. The Tribunal concludes that the relevant transfer was the activities of the last group of hotels passing from the First Respondent to the Second Respondent.**
>
> **22. The Tribunal finds as fact upon the evidence presented to it that this was not the case of the loss of one single contract in June 2010 or a transfer effected by a series of transactions dating back to June 2010 or some other time. It was a number of contract cancellations, the extent of which was not certain at the stage of the first contract cancellation and which had no over-arching agreement schedule or program.**
>
> **23. Any historical analysis for the circumstances of this case would be imprecise and inappropriate. For example, how far back in time does any assessment go and which sites are relevant or not relevant as part of any assessment?**
>
> **24. The Tribunal finds as fact and which cannot be in any reasonable doubt, the Claimants were mainly employed and assigned as Area Managers to the Euston, County Hall and King's Cross sites immediately before the transfer of. The First Respondent did not retain any other sites after that point.**
>
> **25. The First Respondent referred to the authority of** *J Murphy & Sons v (1) Mr M Fox and (2) Northwest Holst Construction* **[1997] UKEAT 1222, in which the EAT relied upon an earlier decision of that Tribunal in** *Buchanan-Smith v Schleicher & Co International Ltd* **[1996] IRLR 547, where it was confirmed: 'Mr Reid submitted, correctly in our judgment, that the Industrial Tribunal wrongly considered the work which Mr Fox was doing before he was transferred to the depot and whether his employment was permanent or temporary. Regulation 3 (under the previous TUPE Regulations) provides that the employee need only be employed immediately before the transfer. There is no requirement for a long-term view of previous employment.'"**

The Appeal

9. This appeal was at first found to disclose no reasonable ground for appealing. However, at a hearing pursuant to Rule 3(10) of the **Employment Appeal Tribunal Rules 1993**, Mr Anthony Korn successfully applied to amend the Notice of Appeal and his amended grounds were considered to be arguable. HHJ Shanks pointed, in particular, to the following questions. He regarded it as arguable that the relevant organised grouping of employees was not identified sufficiently, it being arguable, he thought, that those working at each separate hotel comprised such a grouping. He thought it was arguable that there were insufficient specific findings of fact from which the conclusion that Mr Oladele and Miss Serwaa were assigned to that grouping could be drawn. He noted that there was no real assessment of what the Claimants were actually doing at the last six hotels, bearing in mind that their job title was still Area Manager, and he noted also the lack of any assessment of their evidence.

10. Today Mr Korn has appeared for WGC. Mr Oladele has appeared in person and addressed me. Miss Serwaa's solicitors have written to say that she does not resist the appeal. JKG's solicitors have recently written to say that they are no longer instructed, JKG having gone into administration. There has been no appearance on behalf of JKG.

11. Mr Korn submits that the Employment Judge did not carry out the analysis required by Regulations 3 and 4 of TUPE in order to decide whether Mr Oladele and Miss Serwaa's employment transferred to WGC. It was common ground that there was a service change, but in order to decide whether their employment was transferred, it was necessary to determine (1) what organised group or groups carried out the activities and (2) whether Mr Oladele and Miss Serwaa were assigned to that organised grouping. He emphasised that these were both important and conceptually distinct questions. He submitted that there were no clear findings,

analysis or reasoning. He submitted, in particular, that there was no consideration of the work which Mr Oladele and Miss Serwaa undertook, the base from which they undertook it, the hotels at which they undertook it and what their duties were as Area Managers. He argued that the contractual position had been left out of account when it was at least relevant to take it into account.

12. Mr Korn took me to several cases in support of his submissions including **Seawell v Ceva Freight (UK) Ltd** [2012] IRLR 802, [2013] IRLR 726, relying in particular on the Judgment of the Employment Appeal Tribunal; **Edinburgh Home-link Partnership & Ors v City of Edinburgh Council** UKEAT/0061/11; **Williams v Advance Cleaning Services Ltd and Engineering and Railway Solutions Ltd** EAT/0838/04, an older case on the transfer of undertaking provisions; and **Robert Sage Ltd (t/a Prestige Nursing Care Ltd) v O' Connell & Ors** [2014] UKEAT 0336_13_1303 (13 March 2014).

13. Mr Oladele submits that the Employment Judge sufficiently analysed the case and made the necessary findings. The existing of some organised grouping of workers was not in dispute. There was ample evidence on which the Employment Tribunal could conclude that he and Miss Serwaa were both employed in an organised grouping of workers dedicated to the activities of Premier Inn Hotels for Whitbread and that they remained so immediately before the transfer. He submits that the Employment Judge correctly concentrated on the position immediately before the transfer and made no error of law. Addressing me today, as he has done courteously and thoughtfully, he pointed out that 99% of the employees of the hotels transferred under TUPE. It was, he submitted, unjust that he and Miss Serwaa should have suffered as they did.

Statutory Provisions

14. The following are the central provisions of the TUPE relevant to this appeal.

> **"3.**
>
> **(1) These Regulations apply to—**
>
> **(a)a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;**
>
> **(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.**
>
> **...**
>
> **(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.**
>
> **...**
>
> **(6) A relevant transfer—**
>
> **(a)may be effected by a series of two or more transactions; and**
>
> **(b)may take place whether or not any property is transferred to the transferee by the transferor.**
>
> **...**
>
> **4.**
>
> **(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."

Discussion and Conclusions

15. This case is concerned with what are commonly known as the "service provision change" provisions of TUPE. The applicable type of service provision change was that identified in Regulation 3(1)(b)(ii) where "activities cease to be carried out by a contractor on a client's behalf...and are carried out instead by another person". A finding of a transfer under this provision entails answering several key questions. The Tribunal needs to consider each of these questions. The consideration does not need to be in watertight compartments, for the relevant evidence concerning these questions will usually overlap. But the questions are analytically separate and all need to be considered.

16. The questions are the following:

(1) Were "activities carried out by a contractor on a client's behalf" and what were they?

(2) Was there an organised grouping of employees which had as its principal purpose the carrying out of the activities concerned?

(3) Did those activities cease to be carried out by the contractor on the client's behalf and were they carried out instead by another contractor?

(4) Was the employee concerned assigned to that organised grouping of employees?

17. These are the key questions. With effect from TUPE transfers after 31 January 2014 at least there is a sub-set of question (3), for the new section (2A) makes it plain that the ET will

be concerned with "activities which are fundamentally the same as the activities carried out by the person who has ceased to carry them out". There will be other questions in some cases such as, for example, whether activities were carried out in connection with a single event of a task of short-term duration or whether they were concerned wholly or mainly with the supply of good for the client's use. But the ones that I have set out are core questions.

18. I have already commented that the questions are analytically distinct. In particular, it does not follow that, even if there is the requisite group of workers, an employee who is engaged working on the contract in question is necessarily assigned to the group (see **Williams** at paragraphs 11 and 15 and **Seawell** (EAT) at paragraph 18). A Project Manager, as in **Williams**, may work on a particular project without becoming assigned to the requisite group of workers for the purposes of TUPE. As pointed out in **Seawell**, an employee may work temporarily with such a requisite group without being assigned to it.

19. I turn to the Employment Judge's reasoning to see how he answered these questions.

20. As to the (1), the Employment Judge did make, in paragraph 21 of his Reasons, a finding as to the activities concerned. He said the activities were the activities of the last group of hotels, by which he clearly meant the cleaning and housekeeping at the six Premier Inn hotels which JKG retained until December 2010.

21. As to (2), the Employment Judge did not, within his Reasons, make a specific finding as to whether there was an organised group of employees which had as it is principal purpose the carrying out of those activities. It is plain from the terms of his Judgment that he thought there

was. It is implicit, but not explicit or reasoned, that he must have concluded that there was an organised grouping of workers dedicated to the carrying out of the activities of the six hotels.

22. As to (3), the Employment Judge did make, again in paragraph 21 of his Reasons, a finding that there was a transfer of the activities of the last group of hotels from JKG to WGC. As we have seen, three of the six in the last group of hotels were transferred from JKG to WGC. The others were transferred elsewhere.

23. As to (4), the Employment Judge concluded that Mr Oladele and Miss Serwaa were assigned to the organised grouping. The reasoning for this is that they both worked mainly at hotels where the activities were transferred to WGC. There does not appear to be any detailed reasoning on the precise question whether they were assigned to the organised grouping. The Employment Judge does not appear to have been concerned to establish which hotel specifically they were assigned to, no doubt because he treated the last group of six hotels as a group.

24. I have reached the conclusion that the Employment Judge has not made the requisite findings or made the necessary analysis to provide a sound legal basis for his conclusions. There is, to my mind, a problem about the finding that the activities were the work of the last group of hotels as a whole and that there was a transfer of those activities. The Employment Judge was quite specific that he was not dealing with a case of "the loss of one single contract". He said it was a number of contract cancellations which had no over-aching agreement, schedule or programme. If this is so, it is not obvious why the Employment Judge aggregated the last six hotels into a single set of activities, and I cannot see from his Reasons on what basis he did so.

25. It may help if I illustrate the position. Suppose that the operator of a chain of hotels places out a single tender for the cleaning and housekeeping services of its hotels in an area and awards a single contract to a contractor, who sets up a workforce specifically to service that contract. It might, then, not be at all difficult to characterise the activities as the activities of cleaning and housekeeping services for the group of hotels in question. And if the contract comes to an end and the activities are carried out by another contractor, it is easy to see how the service provision change provisions may work in respect of the group as a whole. Suppose, however, that the operator puts the work out to tender individually for its hotels and awards the work of cleaning and housekeeping services individually, hotel by hotel, and brings the contracts to an end individually at different days. Then, to my mind, it is much more difficult to say that "activities carried out by a contractor on a client's behalf" amount to the aggregate of the work of the hotels or that the transfer was a transfer of them all. It seems more natural to look at each hotel individually.

26. The question whether the activities are to be considered hotel by hotel or as a group carries over into the question whether there was an organised group of employees which had as its principal purpose the carrying out of the activities concerned. It is plain from the concession by WGC that the service provision change provisions applied, that there was some organised grouping. But it does not follow that it was a single organised grouping across all the remaining hotels. WGC was saying that each hotel had to be looked at separately and that the Area Managers were not assigned to any of them. It is impossible to see from the Employment Judge's Reasons why he concluded, as implicitly he did, that there was an organised grouping of workers across all the hotels.

27. Of course, if the activities were the work of the group of hotels as a whole, and if there was an organised grouping of workers whose principal purpose was to carry out those activities, it would be relatively straightforward to regard the two area managers as assigned to that group. This seems to have been the Employment Judge's reasoning. This, I think, is why it did not matter to him which individual hotel the two Area Managers worked at.

28. However, his reasoning would have to be quite different if the hotels were to be looked at individually. The question then would be whether the Area Managers were assigned to any organised grouping of workers, if there was one, at an individual hotel. This would require careful findings of fact. On the one hand, it is true to say that the question is to be answered principally by deciding what the employee was required to do immediately before the transfer. On the other hand, the question is whether the employee was assigned to the requisite group of workers and, as we have seen, an employee will not be so assigned merely because he happens for a time to work on the contract concerned.

29. The Employment Judge has, to my mind, not reasoned out the issues in a structured way and has not made some critical findings which he should have made. He was not bound by contractual provisions, but it was relevant for him to bear in mind the contractual provisions applicable to the parties. It was relevant for him to bear in mind and make findings concerning Mr Oladele's work as a Training Manager. It was relevant for him to consider and make findings as to what the Area Managers did in the last few weeks: that is to say, the time immediately before the transfer and whether they could be assigned to the requisite group of workers. And, as I have said, underlying this, it was important to identify what the activities, the relevant group of workers, and the transfer actually were. Were they of a group or were they of individual hotels?

30. I have reached the conclusion that the Employment Judge's Judgment cannot stand. I am not in any position today to make an assessment of my own. Primary findings of fact are required, and it is the task of the Employment Tribunal to make those findings. Accordingly, the matter will be remitted.

31. It is now the best part of two years since the matter was before the Employment Tribunal. In part, the delay has been caused by the process of hearing a rule 3(10) application and by amendment. In part, it has been caused by delay in the production of reasons by the Employment Tribunal. At all events, I have concluded that, after this lapse of time, the only sensible course is for it to be remitted for re-hearing by a freshly constituted Tribunal.