Appeal No. UKEAT/0042/14/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 23 May 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

MRS R CHAPMAN

MS P TATLOW

MR O CETINSOY & ORS — APPELLANT

LONDON UNITED BUSWAYS LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR RAD KOHANZAD (of Counsel) Instructed by: Employment Law Advocates Hamilton House 1 Temple Avenue London EC4Y 0HA
For the Respondent	MR RUSSELL BAILEY (of Counsel) Instructed by: Moorhead James LLP Kildare House 3 Dorset Rise London EC4Y 8EN

SUMMARY

TRANSFER OF UNDERTAKINGS

TRANSFER OF UNDERTAKINGS - Dismissal/automatically unfair dismissal

UNFAIR DISMISSAL - Constructive dismissal

Bus drivers who were required to work from a different depot following a TUPE transfer of the bus route on which they worked resigned (some a month after the transfer) and complained of unfair dismissal, relying on Regulation 4(9) of TUPE and the EAT decision in **Musse v Abellio**. Although the decision by the EJ was muddled, and flawed in a number of respects, he came to a central conclusion that in the context of Bus Drivers working in London, and the contractual arrangements which they had enjoyed under which they could have been required to change base to a depot more inconvenient that the one to which they objected, the change of location did not amount to a substantial change in their working conditions. Since in the particular circumstances of the case there could only be a fundamental breach of contract if the change were thought substantial, this conclusion meant there was no dismissal either at common law or as provided for by Regulation 4(9). **Musse** was not authority that if there was change from one base depot to another, in breach of contract following a transfer, it would necessarily amount to either a fundamental breach or a substantial change in working conditions: rather, it was authority that this was question of fact and assessment for the judge to determine, which if he approached matters correctly and came to a conclusion which was not perverse, would stand. The judge's conclusion here could not be said to be perverse, and therefore the appeal against it failed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal is from a Decision of Employment Judge Etherington, sitting alone at London Central, in which although he heard the case in January 2013, judgment was not given until some nine months later on 10th September 2013. The issue which is central is whether the judge was perverse to conclude that there had been a substantial change in the working conditions of the Claimants following a transfer of the undertaking in which they had been employed.

2. Regulation 4 of the TUPE Regulations 2006 provides for the effect of a transfer of undertaking. In this case the Claimants, amongst others, had worked as bus drivers for CentreWest, driving route 10. They worked out of the Westbourne Park depot. With effect from 30th January 2010 CentreWest transferred that bus route to London United Busways. That transfer fell within Regulation 3 of the TUPE Regulations 2006, as was accepted before the judge. A consequence of the transfer was that Westbourne Park depot was no longer available as a base from which to work. The Claimants were required to change the location of the depot from which they worked to Stamford Brook. They did not like this change. Two resigned on 30th January 2010, two worked for a while, in one case until 2nd April and in the other until 23rd April, from Stamford Brook before resigning. They claimed the benefit of the provisions of Regulation 4 as providing that, in the circumstances which they argued had occurred, they were entitled to resign and should be regarded as having been dismissed for all purposes by London Busways.

3. Regulation 4 paragraph 9 provides:

> **"… where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1) such an employee**

> **may treat the contract of employment as having been terminated and the employee shall be treated for any purpose as having been dismissed by the employer."**

4. The other provisions of Regulation 4 are to the effect that the contract continues in effect with the transferee as it had with the transferor.

The Facts

5. The contracts under which the Claimants were employed provided that their primary place of work would be Westbourne Park. Those contracts incorporated a mobility clause. Headed "Location", it provided as follows:

> **"During your training you may be allocated to any of the Company's work locations or to the work locations of any external training providers used by the Company.**
>
> **On full completion of training you will commence employment in your substantive grade and we will endeavour to accommodate your preferred work location of Westbourne Park but this will be subject to the vacancy situation at the time you complete training. The Company will always endeavour to allocate you to your preferred work location but reserves the right at any time, without payment of compensation, to require you to work at any of the Company's work locations as defined in the Contracts of Employment folder. When you have completed six months service satisfactorily in your substantive grade you may apply for a transfer to a more residentially suitable location within CentreWest London Buses Limited. Full details of the transfer provisions within CentreWest London Buses Limited can be examined at your work location."**

6. The work locations as defined in the folder did not include Stamford Brook. It was therefore common ground between the parties that to require the Claimants to work at Stamford Brook was to break the contract with those employees. In doing so the parties were faithfully following the decision made by the Employment Appeal Tribunal in the case of **Musse & Others v Abellio London Ltd & CentreWest London Buses Ltd** [2012] IRLR 360.

7. The Claimants argued before the Tribunal that requiring them in breach of contract to work from Stamford Brook, which was some 3 ½ miles away from Westbourne Park, was not only a breach of contract, as was common ground, but was a fundamental breach of contract; that it was repudiatory. Therefore, it was submitted, the Claimants had been dismissed within

the meaning of Section 95 of the **Employment Rights Act 1996**. It was for the employer to show what the reason for dismissal was and for the Tribunal to assess its fairness. They said that the reason related to the transfer and so it was automatically unfair.

8. Alternatively, they argued that they came within Regulation 4(9): the transfer involved or would involve a substantial change in working conditions to their material detriment.

The Decision

9. It might be thought from that introduction and with the assistance of the authority of **Musse** that the judge's task here should have been relatively simple. He had to evaluate whether there was such a breach of contract by the employer as on familiar law entitled the Claimants to resign and claim that they had been constructively dismissed.

10. Secondly, if there were no breach of contract, or a breach which was not fundamental, he had to determine whether there was in any event a substantial change in working conditions to their material detriment. As the Appeal Tribunal said in **Musse** the findings in both respects are conclusions essentially of fact and evaluation. If the correct approach is taken to making those findings then they can only be set aside if the decision is perverse.

11. Mr Kohanzad, who appears for the Claimants before this Tribunal, though he did not appear below, argues that the approach of the Tribunal was in error. The Tribunal, beginning with its discussion and conclusions at paragraph 29, spent approximately two pages arguing that the decision in **Musse** was in error. This was not a conclusion it had been invited to make by the parties. It was irrelevant to its decision. The judge should not have engaged in it. If it had been relevant, it would in any event have been binding upon the Tribunal.

12. In concluding at paragraph 36.4 and 36.5 that there was no repudiatory breach the Tribunal took into account the terms of the contract and:

> **"In particular that the transfer to Stamford Brook involved no greater burdens upon the Claimants than those to which they were potentially subject under their contracts with CentreWest."**

13. At 36.5 the Tribunal said as follows:

> **"…one cannot ignore that one of the terms embraced by the TUPE transfer … was a power in the Respondent to change the terms of contract with no other fetter or condition placed on that power than consultation. The Respondent raised the existence of the right to amend the contract when the issue of the Stamford Brook (sic) first arose in their full written responses to the Claimants drawing attention to that power. It is clear from those early discussions that the one thing the Respondent thought it had was the right to change work location following consultation. Far from demonstrating an intention not to be bound by the terms of the contract the Respondent was signalling its intention to work within the terms. But their determination to give effect to the contractual terms was interrupted by the Claimants' resignations and thwarted by their own failure to act immediately. Following what I might call the *Mitie* principle** [that was a reference to the case of *Mitie Managed Services Ltd v French & Ors* [2002] IRLR 512 in which it was accepted that where employees were disadvantaged by a transfer because the precise terms of their contract with the transferor could not be replicated with the transferee, substantial equivalence would suffice**] and my arguments set out above whilst I accept that this case has proceeded in the light of the decision in *Musse* on the basis that there was a breach of contract for all the addressed reasons I am satisfied that there was no fundamental breach of contract, if breach at all."**

14. The judge went on to say in relation to the Regulation 4(9) claim that on two bases the change to the employees' working conditions was not substantial. First, he took the view that it was:

> **"Not a substantial change to the working conditions which they could at any time have been required to accept under the terms of their contracts. We are dealing with legislation, the purpose of which is to protect employment and the terms and conditions on which it is enjoyed. By the transfer to Stamford Bridge the Claimants' jobs were preserved with all the attendant duties and responsibilities at a location more convenient to them than had they been required to move to one of the five locations specified in their contracts, all which transfers would have had a worse impact than did the move consequent on the TUPE transfer to Stamford Brook. I find on this basis that the change to their working conditions was not substantial."**

15. At paragraph 42 he set out an alternative approach:

> **"… if "working conditions" is confined to the environment the Claimants enjoyed at Westbourne Park was the change substantial and was it to the material detriment of the Claimants?"**

16. Having posed that question he answered it as follows:

> **"Following *Tapere* [that is a reference to the case of Tapere v South London & Maudsley NHS Trust [2009] ICR 1563] and *Musso* [meaning *Musse*] it cannot be argued that there was not a change in working conditions by the move from Westbourne Park to Stamford Brook. Clearly there was. The first question therefore is whether or not that change was substantial. In my opinion it was not. It is my view that to add overall to one's daily travel in the case of Serghini 30 to 60 minutes approximately that is 15 to 30 minutes in the morning and similar in the afternoon, was not a substantial change. The changes for Mr Cetinsoy and Mr Hussein were greatest – namely on average 30 minutes at the beginning and end of each day. As to Mr Wardhere the increase in average journey time was less. I concluded that the increases in context were not substantial. And as to material detriment, and adopting the approach propounded in *Musse/Taphere*, looking at the change from the employees' points of view I found that they regarded changes as detrimental, but that that was not a reasonable position for them to have adopted given relatively slight impact of the changes, particularly when viewed against the loss of valuable jobs. Thus, in summary I concluded that the extended journey to work times, were not substantial changes; nor did they amount to material detriments."**

17. The Grounds of Appeal argued first that the judge had taken the wrong approach in applying the law in respect of repudiatory breach. Secondly, that he had erred in concluding that the breach was not repudiatory: location, it was submitted, was a fundamental term of the contract and a breach of it always fundamental. The third ground was that the judge applied a subjective rather than objective test in deciding whether there was repudiatory breach. He took into account the subjective intention of the employer, and not the conduct of the employer which objectively might be said to manifest that intention. He took into account, wrongly, that the Respondent's determination to give effect to the contractual terms had been interrupted by the Claimants resignations, and thwarted by their own failure to act immediately, thereby suggesting that the breach, if it was a breach, was capable of remedy which on plain authority (**Bournemouth University Higher Education Corporation v Buckland** [2010] EWCA Civ 121), it was not.

18. Ground four argued that the conclusion that there was no substantial change in working conditions was perverse, that the judge had conflated the question of substantial change with the question of material detriment, and had erred in his first approach to the Regulation 4(9)

question by having specific regard to the contract, when what was in issue was a matter of how people worked, not what they had agreed.

19. The fifth ground was that the Tribunal had applied the wrong test in deciding material detriment; the test was whether employees regarded the changes as being to their detriment and, if they did, whether a reasonable employee could have taken that view. The Tribunal had adopted an objective approach rather than the prescribed subjective one.

20. The sixth ground attacked the finding of the judge that the dismissals, being caused by the resignations, on the ground of a change of location, could not be said to be for an economic, technical or organisational reason as the judge had gone on in his judgment to say.

21. We do not mean any disrespect to the arguments of Mr Kohanzad, all of which we have carefully considered, by saying that we need to focus here upon the two central questions: first was the judge entitled to conclude that there was a repudiatory breach and, second, was he entitled to come to the conclusion that there had been a substantial change in working conditions to the material detriment of the employees? It should be noted that in this case the two are inter-linked. It was said that there was repudiatory conduct because the employees were required to move their base to Stamford Brook. The substantial change in working conditions relied on was exactly that same change. If the change in working conditions was not substantial it would be bound to follow that the breach of contract which consisted of making that change would not be a substantial one. There would be a plain inconsistency between a conclusion reached by the judge as to there being no substantial change in working conditions and a finding, if he had made it, that there had been a fundamental breach nonetheless.

22. We accept the bulk of Mr Kohanzad's submissions to the effect that the judge gave a muddled judgment, concentrating on matters which were not directly relevant in many respects to the decision he had to make. We accept that he made some errors of approach. But we accept also, as stated at paragraph 15 of Mr Kohanzad's Skeleton Argument, that a Tribunal considering a claim for constructive dismissal needs to ask itself the following questions; a)(i) Has the employer breached the contract? (ii) If so, does that breach go to the root of the contract? b) Has the employer shown an intention not to be bound by the contract?

23. We accept this subject to a qualification advanced by Mr Bailey. He points out that a) deals with an actual breach whereas b) deals with an anticipated breach. For an anticipated breach to be repudiatory it too must be of sufficient seriousness. The words, "the root of the contract" now look slightly old fashioned. The effect, however, is the same as the more modern formulation that in examining whether there has been a repudiatory breach the test is to ask whether the employer has abandoned and altogether refuses to perform the contract. That is of course to be measured objectively and not by regard to evidence of the employer's subjective intention.

24. Paragraphs 36.4 and 36.5, dealing with the judge's answer to those questions, came to a somewhat unspecific finding that the breach was not fundamental because of the terms of the contract. He appeared to take into account that when the Respondent proposed to breach the contract, as it must be accepted it did by requiring a transfer from one location to the other outside the terms of the contract as it then stood, it was signalling its intention to work within its terms (a conclusion which is questionable to say the least) and the fact that the Claimants resignations had "thwarted" their giving effect to the contract - a view which is, as we have pointed out, beside the point. Accordingly, had matters stood there we would have had some

considerable doubt whether the judgment, given everything that led up to this point in the reasoning, was adequately reasoned or correct in approach.

25. However, the judge's expression of the alternative approach which he took to "working conditions" was clear. The question whether a transfer involves or would involve a substantial change in working conditions is not asking about contractual terms (although it may take account of those terms, as Mr Bailey rightly points out). It is asking about a change in the way in which, or the environment in which, people work when comparing the position after the transfer of undertaking with that before.

26. This evaluation is one based on factual assessment; accordingly it can only be set aside if the answer to the question is perverse or if it has not been approached properly. The judge in paragraph 44 treated it as a question of fact. He set out the facts, if briefly, although the facts here probably could not have been elaborated much further. His approach to this issue does not display error. By using the words "in context" Mr Bailey submitted, we think correctly, that the judge was referring to the context of travel within London for bus drivers, and it may well have been also a context in which the terms of the contract were relevant. The terms of the contract which the Claimants said each of them agreed with CentreWest had envisaged the possibility of moving, without breach, to other garages in the same general area, though some involved a greater travel distance for the claimant concerned. In London, in the context of those contractual arrangements and having heard the witnesses, the judge came to the view he did.

27. A great advantage which this Tribunal has is that it contains two lay members. They in particular are able to contextualise the disadvantage suffered by a move of location in relation to their experience of employment practices. The lay members are strong in their view that this

finding was one which was open to the judge. The case does not depend upon a contrast with the facts in **Musse** where there was a transfer from Westbourne Park, north of the Thames, to Battersea, south of the river, some considerable distance away, and out of the general location of Westbourne Park. The facts of **Musse** are the facts of another case: what matters when considering a previous decision, particularly where the central findings are those of fact and evaluation which are to be determined by the particular circumstances of the individual case before the Tribunal, is the principle which has been applied rather than the facts which are merely illustrative of the application of that principle to that particular case. The principle in **Musse**, so far as this part of the argument is concerned, was not that in law a change of location for a bus driver was substantial, but rather was that the judge in that case was entitled to come to the view on the facts of that case that there had been a substantial change. We have to apply essentially the same principle: there is no error if it was within the entitlement of the judge to come to the conclusion of fact and evaluation he did on the facts of this case. We think that it was.

28. Regulation 4(9) is such that even if the judge erred in his approach to material detriment, nonetheless there could be nothing coming within Regulation 4(9) if the change in working conditions was not itself substantial.

29. We should give a word of caution before this decision is applied to other cases. At the outset of today's hearing Mr Kohanzad argued that the approach which the judge had taken to knowing what could be substantial was in error. He wished to argue that in the context of these regulations the word, "substantial" meant, "not insubstantial". This was not a point which arose for decision in **Tapere**. It did not arise for decision in **Musse**. There is thus no authority thus far on it. The analogy which Mr Kohanzad sought to draw was with disability discrimination,

where the context is very different. It might be thought that the Regulation here stressed the need for there to be a change which was more than merely insubstantial given the wording, the context and possibly the parallels with constructive dismissal more generally. But we have not heard developed argument upon it (and do not, therefore, give any concluded opinion upon this point) because Mr Bailey objected that this argument was not run below, he being present at the hearing below as Mr Kohanzad was not. He had not come to this court prepared to meet the argument since it had been foreshadowed in neither the Notice of Appeal nor in the Skeleton Argument. It did not fall within one of those exceptional cases to which **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719 CA applies. Given those objections Mr Kohanzad accepted that he could not pursue the point here.

30. We therefore have approached the matter upon the basis upon which it was argued below between the parties. On that basis, taking the approach that "substantial" in this context means something which in colloquial language would be regarded as substantial, we concluded that the judge was entitled to reach the view he did. Whether he was right or whether he was wrong about the approach to material detriment is therefore beside the point, because it would follow that on the Judge's findings of fact the Claimants could not succeed in showing they were within Regulation 4(9).

31. We think there is some force in the criticism which Mr Kohanzad makes of the failure to apply the approach from **Shamoon**, though again this was not altogether foreshadowed in the Notice of Appeal and Skeleton Argument, and although **Shamoon** too is a decision in a slightly different context. The question here was not whether there was any detriment but whether if so it was "material". Adopting the view which this Tribunal took in **Musse**, that it means "not immaterial", we would have had some difficulty in thinking that the Judge was correct, or

correctly approached the question of material detriment - but as we say that is beside the point: the Claimants had to show that the material detriment was caused not just by a change in their working conditions, but by a "substantial change". It was that upon which their claims foundered.

32. Having come to the conclusion that the judge was entitled to reach the view that there was here no substantial change in working conditions, we return to the findings he made in respect of fundamental breach.

33. Though we have expressed some criticism of aspects of his approach, these do not affect the factual conclusion as to whether there was a substantial change. In the light of his unassailable finding in paragraph 44, we would in any event be bound to hold that he could have come to no other conclusion properly than that here the breach of contract was not repudiatory. In the circumstances of this case, "substantial change" and "fundamental breach" go together. Mr Bailey has given further powerful arguments for supporting that conclusion. He submits that what is repudiatory is assessed objectively. Objectively the contract here envisaged a range of possible depots to which the Claimants could have been deployed. It also envisaged that a simple process might be undertaken by the employer to add a depot to the list after which (and after, as the judge pointed out, just consultation, falling short of agreement) the employer could have required the employees to attend it, without its direction being in breach of contract. That is relevant because it may demonstrate objectively the intention of the parties at the time they entered the contract and may indicate the degree of importance the parties gave to the issue of the precise location of their working base within a general geographical area. We think there is force in that argument, although the judge did not himself articulate it in precisely that way.

34. Accordingly it follows that since our view is that the judge was entitled to come to the conclusion he did on the central issue, and since we are not persuaded that that conclusion was perverse, this appeal must be dismissed. We do so with gratitude for the way in which Counsel have addressed their arguments to us which has made our task easier, particularly the economy with which some of those arguments have rightly been expressed.