Appeal No. UKEATS/0005/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 24 June 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

CROSSROADS CARING SCOTLAND LIMITED — APPELLANT

MRS IRENE McGUIRE and OTHERS — FIRST RESPONDENTS

MRS SHEILA WARD — SECOND RESPONDENT

CROSSROADS (EDINBURGH) CARE ATTENDANT COMPANY (IN LIQUIDATION) — THIRD RESPONDENT

SECRETARY OF STATE FOR BIS — FOURTH RESPONDENT

JUDGMENT

APPEARANCES

For the Appellant	Mr Ian Truscott (One of Her Majesty's Counsel) Instructed by: Lindsays, Solicitors 1 Royal Bank Place Glasgow G1 3AA
For the First Respondents	Mr Brian McLaughlin Solicitor Fox and Partners, Solicitors 15 – 19 York Place Edinburgh EH1 3EB
For the Second Respondent	Mrs Sheila Ward (The Second Respondent in person)
For the Fourth Respondent	Mr Brian Napier (One of Her Majesty's Counsel) Instructed by: Morton Fraser LLP Quartermile Two 2 Lister Square Edinburgh EH3 9GL

SUMMARY

TUPE. Regulation 8(7).

The appellant was a company which had been transferee in a transfer from another company, which went into liquidation. The ET decided that regulation 8(7) of TUPE did not apply, because the transfer took place before the transferor company went into liquidation. The appellant argued that the ET had erred in law by failing to appreciate that administration proceedings and the appointment of a provisional liquidator are not analogous, and that regulation 8(7) does apply.

Held: the ET erred in law in failing to explain its reasoning. Further, parties had agreed that the case would be heard in two stages and so argument was not complete before the ET. Case remitted to the same ET to hear all arguments on the facts already found.

THE HONOURABLE LADY STACEY

1. This is an appeal by Crossroads Caring Scotland Limited against the decision of the ET taken by EJ Hendry sitting alone, advised to parties on 24 July 2013. The claimants had been employed by Crossroads (Edinburgh) Care Attendant Company Limited, now in liquidation. That entity was not represented at the ET or before me and I will refer to it as "Crossroads Edinburgh". The claimants then became employed by Crossroads Caring Scotland Limited who were the first respondents at the ET and were the appellants before me. I will refer to them as "the appellants". The Secretary of State for Business, Innovation and Skills was the third respondent before the ET. I will refer to them as "BIS". Representation before the ET was the same as before me: Mr Truscott QC for the appellants, Mr McLaughlin for all of the claimants except Mrs Ward who appeared on her own behalf, and Mr Napier QC for BIS.

2. The decision was to the following effect:-

> **"The ET finds it established that there was a relevant transfer of (*sic*) in terms of regulation 3(1)(b) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) namely a service provision change from the first respondents to the second respondents (*sic*) on 2nd April 2010 and that regulation 8(7) was not engaged as there was at the point of transfer no relevant bankruptcy or analogous insolvency proceedings opened."**

The decision is as stated above but it is clear that the intention was to find that there had been a service provision change from Crossroads (Edinburgh) Care Attendant Company to Crossroads Caring Scotland Limited. The word "opened" is used, which presumably was intended to be "instituted".

3. The issues before the ET were identified at a Case Management Discussion as

being:

1. Was there a transfer of an undertaking to which the TUPE regulations apply?
2. If there was, was regulation 8(7) engaged?
3. If not was regulation 8(6) engaged?

4. The case had been before a different EJ, Mr Ian MacPherson, at an earlier stage and his decision had been the subject of an appeal which was unopposed. The first EJ had not made a finding that a relevant transfer had taken place. Before EJ Hendry, oral evidence was led to remedy that defect and I need say no more about it. Thus the hearing before the EJ proceeded as a legal debate.

5. In the judgment it is noted that there had been discussion between counsel which narrowed down the matter in contention and at paragraph 9 the EJ set out the issue in dispute thus:-

> **"The issue in dispute can be put shortly; whether a petition for the appointment of the provisional liquidator, albeit with the intention of simply liquidating the assets (sic)company, is a process that engages regulation 8(7). If it does, then, as Crossroads Edinburgh is insolvent and has no assets the claimants seek payment of certain sums through the statutory regime administered by BIS. If it does not then the staff of Crossroads Edinburgh transferred to Crossroads Scotland and with them certain liabilities. It was agreed that I did not have to consider regulation 8(6)."**

6. It is not clear that, as was stated by the EJ at paragraph 9, if the appointment of a provisional liquidator is a process that engages regulation 8(7), the claimants sought payment of certain sums through the statutory scheme administered by BIS. Mr Napier argued before the EJ that regulation 8(7) was not engaged and BIS was not liable. At paragraph 26 the EJ stated the following:-

> **"In approaching this matter I should, Mr Napier indicated, bear in mind that the purpose of the regulations was to protect employees' rights and that this was best served, in general, in allowing liabilities to pass to the new solvent enterprise. The Secretary of State would not pay the claims made by the former employees of Crossroads Edinburgh as the company was not insolvent at the point they began working for Crossroads Scotland. This was he advised strictly a matter for consideration for another day but if the decision was that TUPE was disapplied the Secretary of State would not feel bound to satisfy any claims as there was no winding up order at that point as required by section 182 and 183 of [ERA]."**

At paragraph 27 the EJ stated:-

> **"In response to this particular matter Mr Truscott indicated that I should decide the matter on the basis of the issue before me and in effect leave any possible consequences for another day."**

7. Thus at the hearing before EJ Hendry counsel for BIS and counsel for Crossroads Scotland both anticipated that there would be a further hearing at which the position of BIS would be considered.

8. The terms of regulation 8(7) are as follows:-

> **"Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."**

The decision of the EJ, quoted above, was to the effect that regulation 8(7) was not engaged. The EJ found that the facts did not satisfy the conditions set out in regulation 8(7) because there were no relevant bankruptcy or analogous insolvency proceedings "opened" by which he presumably meant "instituted". The effect of that finding is that the appellants are liable for any claims made by employees in respect of redundancy or other payments.

9. The decision of HHJ Clarke at the sift was as follows:-

> **"The employment judge was entitled to regard the Court of Appeal decision in *Key2Law* [*Key2Law(Surrey) LLP v De'Antiquis* [2012] ICR 881] as one of "compelling persuasiveness" (reasons paragraph 70). However it is reasonably arguable on appeal that the lodging of the petition for the appointment of the provisional liquidator in the present case is not analogous**

with the administration order under consideration in *Key2Law* and that regulation 8(7) TUPE is engaged on the facts here."

10. There was no dispute about the facts. On 2 March 2010 Mr Homer of Crossroads Edinburgh wrote to the claimants stating that the company would cease operating at midnight on 1 April 2010. On 26 March 2010 the directors of Crossroads Edinburgh met and resolved that it was in the best interests of the company's creditors to apply to have the company wound up. On 30 March 2010 a petition for appointment of provisional liquidators with special powers was lodged. On 1 April 2010 provisional liquidators were appointed, with the powers sought being granted. On 2 April 2010 the joint provisional liquidators wrote to the claimants, in terms which I narrate fully below. On 2 April employment of the claimants by the appellants began. On 27 April 2010 a winding up order was granted and on 18 June 2010 joint liquidators were appointed.

11. The terms of the correspondence and orders referred to above, so far as relevant, are as follows. Mr Homer's letter stated:-

"I am writing to confirm that as the company will cease operating at midnight on 1 April 2010 you will be redundant at that date and cease to be employed by us…

Staff who have been employed more than two years are entitled to a redundancy payment…

You are also entitled to a period of notice which is calculated on the basis of one week for every year of service. If that period of notice would run beyond April payment in lieu of notice would be made for that period of notice…"

12. The letter dated 2 April from the provisional liquidator was, so far as relevant, in the following terms:-

"I write to advise you that I was appointed provisional liquidator of the company on 1 April 2010.
In my capacity as agent of the company I have to advise you that the company is no longer in a position to make payment for services rendered by you under its contract of employment with you….Under the insolvency provisions of ERA 1996, any claims you may have for unpaid wages, accrued holiday pay, redundancy or payment in lieu of notice may, subject to

certain limitations, be paid to you by the Redundancy Payments Service out of the National Insurance Fund…"

13. The petition was a petition to wind up Crossroads Edinburgh under the Insolvency Act 1986. Reference was made in the petition to sections 122(1) and 123 of the Act which provide, so far as relevant as follows:-

"s.122(1)

The company may be wound up by the court if –

(a) the company has a special resolution resolved that the company be wound up by the court;

…

(f) the company is unable to pay its debts.

s.123

A company is deemed unable to pay its debts –

(1) …

(e) if it is proved to the satisfaction of the court that the company is unable to pay its debts as they fall due."

14. The grounds for winding up stated were that the directors had a meeting on 24 March 2010 at which they considered the financial position of the company as disclosed by a statement of affairs as at 24 March 2010. That disclosed a deficit of £126,400, largely due to deterioration in the pension fund. It was averred that:-

"The liabilities of the company exceed the assets. The company is insolvent. The directors resolved that the company was unable to pay its debts as they fell due. Accordingly the directors resolved that it was in the best interests of the company's creditors that the company be wound up by the court in terms of section 122(1)(f) of the Act."

15. The petition explained that the company was a charity providing home care attendants for people with chronic or disabling handicaps. It was subject to supervision of the Office of the Scottish Charity Regulator (OSCR). It was stated that the directors and trustees of the company had agreed winding up arrangements with OSCR.

Paragraph 9 of the petition is in the following terms:-

> **"9. That for the following reasons provisional appointments are sought:-**
>
> **a. the company provides personal support services. It has approximately 30 employees. Immediate control over the company is required to allow employees, assets, information and care clients to be dealt with as seamlessly as possible with the minimum of disruption to the provision of services. The provisional liquidators will be able to act without any hiatus in the provision of the services. A delay between the cessation of the business and the appointment of *interim* liquidators may give rise to uncertainty for the Board and trustees.**
>
> **b. As the company supplies care facilities to clients in their own home under the contract with Edinburgh Council as at termination of that on 1 April 2010 there will be a need for a swift transfer of data and equipment to the new provider of those services. In an insolvent situation and pending the appointment of *interim* liquidators the concern is that the board and trustees may consider that they are not in a position to take the necessary decisions to reach agreement on the transfer of assets and information to the third party taking over the services. That would potentially damage the level of service provided which cannot, given its purpose and those to whom it is provided, be halted and restarted once an *interim* liquidator is appointed.**
>
> **c. The employees will require to be made redundant and, owing to the insolvency position, any claim for arrears of wages, holiday pay, notice pay and redundancy pay requires to be submitted to the Redundancy Payments Office. The necessary claims and information can be collated and dealt with more quickly by the appointment of provisional liquidators keeping any delays in employees receiving payments to a minimum. If employees cannot be paid it may cause disruption to the services.**
>
> **d. The compiling of final returns to HMRC and any cessation documentation is more straightforward while employees remain in position. Any period where employees leave or move on owning non-payment of salaries will potentially increase the difficulty faced in preparing and obtaining the necessary information.**
>
> **e. Regulatory bodies including OSCR, the Pensions Regulator and the Care Commission will require to be involved from the outset and to receive the necessary assistance and information to satisfy their requirements. Provisional liquidators will be best placed to deal with these issues and ensure that the regulatory requirements are met.**
>
> **f. The transfer of the essential care services is likely to give rise to a need generally for the company to provide essential information and assistance in a timely manner and the appointment of provisional liquidators will permit this. The board of the company are part time and establishing a quorum or a suitable appointee to act on their behalf may be problematic.**
>
> **g. The company operate from premises which are not owned and the period between cessation of trade and appointment of an *interim* liquidator may put information and assets at risk.**
>
> **The said appointees are suitable persons so to act and have consented to do so."**

16. The petition explained that the company had a contract with the City of Edinburgh Council, which they did not expect to be renewed. They had no work for the

employees to do and, as stated above, were unable to pay their debts as they fell due. Due to the nature of their work, that is providing care for vulnerable people, they did not wish to have a break in the provision of care. The company therefore made arrangements with the appellants that they would take over the provision of care as from 2 April 2010. The court made an order appointing two provisional liquidators with the powers sought.

17. This case has had a long history in the tribunal system. The first judgment was given as long ago as 8 November 2011. While it is correct that that judgment did not contain a finding that there had been a relevant transfer and was therefore made in error of law, it is not satisfactory that the case was remitted to a different tribunal in order that all the facts be found once more. The second tribunal, against whose decision the appeal before me is argued, gave its judgment and found different facts from the first tribunal. It also came to a different view of the law. The first tribunal decided that Crossroads Edinburgh were the subject of insolvency proceedings which had been instituted with a view to liquidation of its assets and on that basis dismissed the appellants from the proceedings and directed that the claims proceed against the third respondents, Secretary of State for BIS. The second tribunal took a different view and found that the appellants were liable as transferees.

18. The arguments presented to both tribunals on behalf of BIS were arguments which went to the liability of BIS to pay anything at all, rather than arguments about whether it was the transferor or transferee, that is the appellants or Crossroads Edinburgh which should pay. On that basis, there was always a risk that the claimants would find

that Crossroads Edinburgh were liable but could not pay them. That being so one would have expected that the claimants would have put up arguments at both tribunals and before me to safeguard their interests. It appears that that did not happen at the second tribunal as it appears that both counsel, who appeared for the transferor and transferee stated in terms that arguments about BIS and its liability were "for another day". Mr McLaughlin who appeared for most of the claimants and Mrs Ward who was there to safeguard her own interests did not put forward substantive submissions. At the hearing before me parties took up the same attitude. Mr Truscott, senior counsel for the appellant, in his skeleton argument stated that the disposal which he sought was a remit to the tribunal to proceed. That skeleton was available to parties before the hearing. Mr Napier's skeleton, also available in advance to parties, clearly made arguments that BIS were not liable. Mr McLaughlin adopted Mr Napier's submissions. Mrs Ward did not wish to add anything to all that she had heard. When I asked Mr Truscott what he meant by his motion to remit, he stated that while it was not for him to make Mr McLaughlin's arguments he assumed that there would be an argument at the Employment Tribunal between the claimants on the one hand and BIS on the other about the liability of BIS to pay each claimant. I asked him if he meant that certain claimants for example would have to show that they had worked for two years and he indicated that was not his point; he meant that the question of BIS paying at all was still to be argued. I explained to him that that was not apparent to me as the arguments from Mr Napier had been made at the tribunal below and before me. I asked Mr Napier for clarification and he indicated that he had not considered fully the question of the disposal as his motion was simply that the appeal should be refused.

19. At paragraph 58 of the judgment the ET stated that the transfer must occur after the insolvency proceedings have opened. In fact the word used in the regulation is "instituted". "Opened" is used in regulation 8(6). Counsel's research did not disclose what difference if any there is in the meaning of the two words.

20. It seems to me that this case has gone procedurally awry. It is not a good use of time to argue the question of the liability of BIS to make payment twice. However, as it is clear to me that all parties seem to have proceeded on that basis at the tribunal below and at the tribunal before me I am prepared to take that into account in my disposal.

21. Mr Napier's contention is that ERA and the TUPE regulations require to be read together. He maintains that insolvency is defined in ERA; that definition applies to TUPE. He argues that as the order for winding up was not made until 27 April, three weeks after the transfer, that regulation 8(7) does not apply. Mr Truscott on the other hand argues that on a plain reading of the regulations, the petition proceedings are proceedings which are analogous to bankruptcy and there is an insolvency practitioner appointed as soon as the court made the appointment of the joint provisional liquidators.

22. Because this case has been presented in the way described by me above, I do not propose to give a considered judgment on Mr Napier's submissions as this matter requires to be argued fully with such input as Mr McLaughlin and Mrs Ward consider fit before the ET. I am conscious that if I give a decision now then I would deprive parties

of one level of decision making and I would also be in the unfortunate position of giving a decision without having heard a proper contradictor, from the claimants' point of view.

23. I have decided however that the tribunal below has erred in law. Mr Truscott's main point is that the tribunal has decided that the proceedings are similar to that of administration. There is no explanation for that decision. It is an error of law in my opinion for the ET to make the finding without any explanation of why it did so; there is no note of any consideration by the ET of the case of **Key2Law**. The reason for that may be that the EJ was not addressed on this matter. I appreciate that the ET cannot be said to have erred in law if it has decided the case on the arguments put before it. But as the history of this case shows it is vital in deciding whether regulation 8(7) is engaged to decide on the nature of any proceedings involving insolvency. That vital step was not taken. That is an error of law. The decision made at sift indicates that there may be an argument about the nature of the insolvency and whether it can said to be similar to administration. It is necessary for the ET to explain why it found that the situation was similar to administration.

24. Guidance on this issue is given in the case of **Key2Law**. The claimant was employed by an LLP referred to as DK. On 21 July 2008 she was dismissed on grounds of redundancy. HMRC applied to have joint administrators appointed to DK. The court made the requested order on 25 July. The joint administrators entered into a management agreement with Key2Law on 28 July concerning two of DK's five offices. The claimant made a claim against Key2Law as transferee of part of DK's business. That claim failed.

Having heard the evidence, the ET found that DK was not subject to "analogous insolvency proceedings ….instituted with a view to liquidation of its assets." The ET found that regulation 8(7) did not apply. That decision was upheld on appeal to the EAT, although the reasoning for the EAT decision was different from that in the ET.

25. In the Court of Appeal BIS was permitted to appear as an intervener. In a long and comprehensive judgment the Court of Appeal reviewed the history of the regulations, the Directives which they implement and the cases. At paragraph 18 Rimer LJ set out the terms of article 5 of the Directive of 2001. His Lordship quoted with approval the judgment of Elias J when president of the EAT in the case of **Secretary of State for Trade and Industry v Slater [2008] ICR 54** in which he set out the point of regulation 8(7) as being to relieve the burden on transferees in insolvency situations:-

> **"13. The scheme of the 2006 Regulations is broadly this. Typically, where there is a transfer of an undertaking, regulation 4 provides that the employees are automatically transferred to the transferee with the latter taking over all of the liabilities of the transferor.**
>
> **14. Regulation 7 provides that any dismissal will be automatically unfair unless it is for an economic, technical or organisational reason connected with the transfer. However, it is recognised that to apply these principles to insolvent businesses would discourage potential purchasers of the business from acquiring the business. That would be to the detriment of the employees.**
>
> **15. Regulation 8 therefore aims to relieve transferees of the burdens which would otherwise apply in certain defined circumstances.**
>
> **16. Essentially this is done in two quite distinct ways. The most extensive exception from the effect of the regulations is created by regulation 8(7) (which is intended to reflect the provisions of article 5(1) of Directive 2001/23/). This provides that where the insolvency proceedings are analogous to bankruptcy proceedings and have been instituted with a view to liquidation of the assets, then neither regulation 4 nor 7 applies at all. There is no transfer of staff to the transferee and no claim for unfair dismissal against him……"**

His Lordship then traced cases both in the Court of Justice and in the domestic courts. He came to the view that purpose of administration had to be considered generally, rather than on a factual basis in the particular case. In doing so he relied on the terms of the

Insolvency Act 1986 , schedule B1 which is to the effect that every administrator when he is appointed must first consider whether the "primary objective of rescuing the company as a going concern is overridden by either of the considerations identified at sub- paragraph (3)." There is a difference between administration and winding up. That has not been fully discussed in the ET judgment.

26. I therefore remit this case to the same tribunal which considered it before. There is no need for further evidence and the tribunal is to consider all arguments on the facts already found. It will be a matter for parties to present what they wish and for the ET to make such decision as it finds correct in law.

27. For all the reasons given above I allow the appeal.