Appeal No. UKEAT/0164/14/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 12 November 2014

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

JEAKINS WEIR LTD — APPELLANT

MR R WENBAN AND OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR GEOFFREY ISHERWOOD (Representative) Employment Law Advisory Services Ltd Charles House Albert Street Eccles Manchester M30 0PW
For Mr R Wenban and Others	MISS KEIRA GORE (Counsel) Instructed by: O H Parsons & Partners Sovereign House 212-214 Shaftesbury Avenue London WC2H 8PR
For the Secretary of State for Business Innovation and Skills	MR GEORGE ROWELL (of Counsel) Instructed by: Treasury Solicitors Department Employment Group One Kemble Street London WC2B 4TS

For Stroud District Council	MR DOUGLAS LEACH (of Counsel) Instructed by: Stroud District Council Ebley Mill Westward Road Stroud Gloucestershire GL5 4UB
For Quadron Property Services Ltd (in administration) and Renovo Services Group	No appearance or representation by or on behalf of the Respondents

SUMMARY

PRACTICE AND PROCEDURE - Perversity

Date and Time of Dismissal - Whether the Employment Tribunal were entitled to find that employees had not clearly been given to understand that they were dismissed

The appeal relied in part on grounds which had not been argued below, and to that extent discretion was exercised to reject the appeal. In central part, it argued that the findings of the Judge as to the date and time of dismissal were contrary to the evidence. They were not.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

Introduction

1. On 8 August 2013 Employment Judge Mulvaney, at the Bristol Employment Tribunal, sent out her Judgment holding that the dismissals of 12 Claimants had automatically been unfair since they related to a transfer of undertaking which she found to have taken place on 17 November 2009. On 10 October 2013 she confirmed those findings, though she revised her Judgment in some respects after reconsideration.

2. Whether a transfer, either as a service provision change or a transfer of undertaking, is made, if so when, and to whom, are all matters of fact. Accordingly conclusions on those matters may only be upset on appeal if the Judge has taken the wrong approach in law or has reached a decision which is perverse.

3. There were five Respondents to the claim made by the former employees of Quadron Property Services Ltd ("QPSL"). QPSL was in administration and appeared as such below as the First Respondent. Its parent company, Renovo SG, was the Second Respondent and does not appear on this appeal. Neither does QPSL. The Third Respondent was the Secretary of State for Business, Innovation and Skills; the Fourth, the alleged transferee, Jeakins Weir Ltd ("JWL"); and the Fifth, Stroud District Council.

4. The Employment Judge found, in summary, that there had been a service provision change compliant with Regulation 3(1)(b) of the **TUPE Regulations 2006**. The Claimants represented an organised grouping of employees that had as its principal purpose the carrying out of the activities concerned on behalf of the Council (that is Stroud District Council). The

Council intended that the activities would, following the service provision change, be carried out by JWL. Their dismissals after the transfer were automatically unfair, being for a reason connected with the transfer: that is, that JWL had taken on the activities but had not considered taking on the employees who had been carrying out those activities.

5. Critical to these findings was her rejection of submissions made by JWL and Stroud that the employees had been dismissed on 17 November before the transfer of undertaking such that the Secretary of State was responsible for all their redundancy payments, not after the transfer, in which case JWL was responsible for the unfair dismissal payments and any outstanding contractual liability such as arrears of pay, pay in lieu of holidays and the like.

6. JWL appeal, represented by Mr Geoffrey Isherwood. The Claimants respond through Miss Gore of Counsel; the Secretary of State for BIS through Mr Rowell of Counsel; and Stroud District Council appear by Mr Leach of Counsel.

The Claimants' Case

7. Essentially two grounds were permitted by HHJ Shanks to be considered fully at a hearing after an initial rejection of the appeal on the sift. Those two grounds are that the Judge might have been perverse and, secondly, that the analysis made by the Judge (that the administrators of QPSL may have been acting as de facto agents of the Appellants when they dismissed the Claimants but that the administrators' reason for dismissing was somehow irrelevant) was questionable.

8. Before me it is agreed that the case essentially raises one issue, and one issue alone, which is whether the Judge was perverse not to find that what happened on 17 November amounted to a dismissal prior to the commencement of the administration.

9. Resolution of this point has at the outset involved allegations made by both parties that their hands were tied below by the nature of their ET1s on one side and the ET3 on the other. Thus the Judge's conclusion, the reasons for which I shall describe below, was said to be perverse in part because in each of the ET1s, as Mr Isherwood puts it in his Skeleton Argument, the Claimants had said that they had been dismissed on 17 November, thereby accepting they were dismissed before the transfer. In fact they did not. There may be only a subtle difference in the wording but it may, in the present circumstances, by important. They each recorded against the question "If your employment has ceased or you are in a period of notice when did it or will it end?" the date "17/11/2009". That was not necessarily the date that each of them first understood that their employment had ended, nor does it say when during the day their employment had ended. No question was asked in the course of cross-examination about the reasons each put that date in the ET1. It was not submitted to the Judge that in some way the employees were bound to accept that date and, in particular, an occasion on that date when Mr Bennett spoke to the workforce, as being the occasion when their dismissal occurred. The whole case proceeded upon the basis that that was in issue. Indeed the Judge at the commencement of the case set out the issues which the Tribunal had to determine. The fourth of those, in paragraph 4(d) was:

> **"Were the claimants dismissed, when were they dismissed, and were they dismissed for a reason connected with the transfer?"**

There is no suggestion in that that the answer to the question "When were they dismissed?" was given simply by the placing of a date against the question as to the ending of the employment in the ET1.

The Respondents' Case

10. On the other side, Mr Rowell for the Secretary of State argues that the appeal on the grounds on which it is made cannot succeed because what is taken is a new point. In the ET3 submitted on behalf of JWL, at paragraph 2, JWL asserted that the employees were made redundant "by the administrator, Mr Ralph Paterson of Deloittes, of Bristol" and gave the date 17 November 2009. At paragraph 6 it is said that, apart from two employees, all the Claimants were "made redundant by the administrator on 17 November 2009". That was never departed from during the course of the evidence. The Judge rejected it. She did so in two parts of her reconsidered Judgment.

11. I should turn, before considering this point further, to the central findings which the Judge made, after which I shall return to consider Mr Rowell's submission that the appeal should not be heard because it takes a new point.

The Employment Tribunal Findings

12. The facts found by the Judge, in what appears to me to be an admirably careful and complete Judgment, are set out from paragraphs 17 to 21. The material parts read as follows:

> **"17. On 17th November 2009, the claimants attended work as normal at 8:00am. Some of the claimants commenced work on jobs that had already been issued to them, but all were called back to the depot for a meeting in the mid to late morning at which they were told by Mr Bennett, Contracts Manager for QPSL, that there was no money or work; that QPSL was going under and that their jobs were at an end."**

13. Pausing there, Mr Isherwood took me to that sentence as describing what Mr Bennett had said, and submitted that it was plain from that that he was dismissing the employees. However, in my view, the whole of the Tribunal Judgment has to be read and not simply a sentence in isolation. It went on:

> **"We had no evidence from Mr Bennett as to what exactly he said or what he intended by what he said. The claimants' evidence as to what exactly was said about their jobs varied. Some said that they were told they were redundant, some said that they were told they were going to be redundant and some said they were simply told that QPSL had gone bust. Mr Wenban's evidence [he was one of the Claimants] was that they were told in the afternoon of the 17 November not to take any more emergency calls and that QPSL had gone bust. Nevertheless he returned the following day as he 'hoped the matter would be sorted out'. He said there were lots of negotiations going on involving Mr Bennett and there was a hope that their jobs would be saved. Although a number of claimants accepted under cross-examination that they understood that their work was at an end there does appear to have been some confusion as to the effect of their employer's insolvency on their employment. Some of the claimants stayed at the depot for the rest of the day and some returned the following day to await events. In the afternoon they were told by the Council not to carry out any further emergency work and on the 18 November the locks were changed at the depot and those who had returned that day were told to leave the premises.**
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> **18. On 19 November 2009 the QPSL administrators sent out letters to all employees of QPSL dismissing those employees whose employment had not already transferred to other employers under the TUPE Regulations. The letter stated that the dismissals were effective from the 17 November 2009 notwithstanding that the date of the notification was 19 December 2009. One of the claimants produced his copy of this letter to the Tribunal and I found that that the letter had been sent to all the claimants.**
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> **19. In an email dated 8 December 2009 from Mr Paterson of Deloitte's, one of the subsequently appointed adminstrators, he informed the Council that:-**
>
>> **"Notifications of redundancy were made by telephone on 18th November once the administrators had conducted a brief review of the business. Given the number of employees, these notifications were made to contract managers to be passed on."**
>
> **20. It was submitted by the Council and JWL that the date in Mr Paterson's email of 18th November was an error and that it should have said the 17th November. It was not disputed that the claimants had not been informed on the 18th November of the termination of their employment. However, it was also clear that Mr Bennett's communication to the claimants on the 17th November came from QPSL and not from the administrators who had not been appointed at the time that Mr Bennett spoke to the claimants. Prior to the administrators' appointment they would not have had the authority to instruct Mr Bennett to dismiss employees.**
>
> **21. In the absence of any direct evidence from Mr Bennett or from QPSL I was not satisfied that Mr Bennett had given unequivocal notice of dismissal to the claimants on the 17 November 2009. The claimants' accounts of what was said differed and on balance I concluded that the situation would have been unclear to all including Mr Bennett. Some of the claimants stayed on after they had been told that the company had gone bust and later in the afternoon the Council confirmed that they should not do any more emergency work. The situation was fluid and the claimants hoped that their jobs might be saved."**

14. This led to her conclusion at paragraph 54. That paragraph, however, has to be read in the light of the way in which the Judge posed the issue she had to determine in the immediately preceding paragraph, which reads:

"53. The next issue that I had to determine was when the claimants' dismissals took effect. The claimants and the Secretary of State contended that the claimants' dismissals would not have been effected until they received notification *from the administrator* [emphasis added] on the 21 November 2009 by letter dated 19 November 2009. The Council and JWL contended that the claimants' dismissals were effected by Mr Bennett on the morning of the 17 November 2009.

54. I concluded on the facts found that Mr Bennett's communication to the claimants on the morning of the 17 November 2009 did not amount to unambiguous words of dismissal. The claimants were left in a state of some confusion as to what the impact on them would be. I was not satisfied that Mr Bennett acted with the authority of the administrators as they were not appointed at the time that he spoke to the claimants. The claimants were not taken on by JWL even though JWL took on the activities in the afternoon of the 17 November 2009. … On the basis of my conclusions that there had been a relevant transfer on the 17 November 2009, the claimants would by that time have been the employees of JWL by operation of law, and not of QPSL. I concluded that the claimants would have understood that their employment had been terminated on receipt of formal notification of dismissal from the administrators in their letter dated 19 November 2013 and received by the claimants on 21st November 2009. [the reference to 2009 is presumably an error; it should be 2013] Although the letter stated that the notice of dismissal only applied to employees whose employment had not transferred to another company, the claimants had not been taken on by JWL, and in the absence of any indication to the contrary would have understood from that letter that they were dismissed."

The last two sentences were added when the original judgment was reconsidered.

Perversity

15. In the Notice of Appeal, at paragraph 7(c), JWL argued that it was perverse of the Judge to say that she was not satisfied that Mr Bennett acted with the authority of the administrators. The point being taken there was a reference to the wording in paragraph 54 which I have quoted. The Judge declared herself not satisfied that he acted with the authority of the administrators. Without putting that expression in context, it does not appear to make sense. The moment it is put in context, by paragraph 53, and set against the pleading on behalf of the Respondent at paragraphs 2 and 6, it is plain that the Judge was answering the case which was being made by the Respondent. The Respondent's case throughout, submits Mr Rowell with the support of Miss Gore, was that the dismissal was effected by or on behalf of the administrator. The case put on appeal shifts tack. It is now asserted that the dismissal took place before there was any administration and not on behalf of or by the administrator but by Mr Bennett for QPSL. Mr Rowell complains that, had that been the case put below, further questions would have been asked, further disclosure provided and made necessary, and the case

would have taken on a somewhat different colour. Mr Leach, for the Fifth Respondent, responds, effectively arguing that although the ET3s said what they did, his closing submissions were faithful to the evidence and the question raised was one of appropriate analysis: the issue on appeal is not a new point at least insofar as it deals with the timing of the dismissal.

16. Mr Isherwood takes a point which I wholly reject, which is that the ET3 must be responsive to the ET1. I reject it because, in the ET3, the Respondent makes a positive case as to who actually dismissed the Respondents. That was the case on paper. It is not good enough, even before Tribunals where procedure is bound to be to some extent less formal than it is before the courts, for a party to regard the pleading simply as the first shot of the starting gun with free liberty to depart from it thereafter without notice. This is particularly so when complaint is made on what seems to me an unjustified basis, in the Notice of Appeal, arguing that the Judge has answered a question she should not, when that was the very question that she was actually being invited to answer, in part. The principles of law are clear. They are set out, in particular, in **Glennie v Independent Magazines UK Ltd** [1999] IRLR 719, a decision of the Court of Appeal and one of the Familiar Authorities before the EAT. The Appeal Tribunal has a discretion to allow a new point to be taken. But in general terms that should not be permitted on an appeal. As Laws LJ said, paragraph 18:

> **"… A new point ought only to be permitted to be raised in exceptional circumstances … If the new issue goes to the jurisdiction of the Employment Appeal Tribunal below, that may be an exceptional circumstance, but only, in my judgment, if the issue raised is a discrete one of pure or hard edged law requiring no or no further factual inquiry. …"**

17. That principle is applicable here. I accept that this point, if it had been raised below, would have required further evidence to be advanced. It would have invited further questions. I exercise my discretion not to permit the taking of any point or ground of appeal insofar as it relates to the identity of the dismissing party. I do accept, however, what Mr Leach said, which

is that the central issue in this case is not so much who, in the sense of which employer, effected the dismissal, but that of timing, which is whether the dismissal was effected before the transfer for reasons at that stage unconnected with the transfer, or after. The central thrust of this appeal, alleging perversity as to the Judge's findings in that respect, are not resolved in my view by my acceptance of Mr Rowell's preliminary challenge.

18. Mr Isherwood, in arguing that the decision of the Judge was perverse, has a high hurdle to overcome. It is not for this Tribunal to reach its own conclusion on fact. Fact-finding is for the Employment Tribunal. A decision will only be held perverse if it "flies in the face of reason", if it is in the words of some Court of Appeal Judgments "wholly impermissible": in the words of other Judgments if it would "excite astonished gasps from the well-informed observer". If there is some evidence which is capable of supporting a Judge's finding, that finding will not be perverse.

19. The classic application of those principles in the Employment Appeal Tribunal, in respect of an Employment Tribunal's Decision, is set out in **Yeboah v Crofton** [2002] IRLR 634, a decision of the Court of Appeal. In particular, it reminded the profession that an appellate tribunal does not have the advantage of listening to the whole of the evidence, of seeing the witnesses and understanding the nuances of it. The reflection given by notes of evidence, if they are obtained, is very often inadequate. Those notes themselves may require some interpretation.

20. An example is provided amply by the present case. Following Judge Shanks' order, the notes of evidence of the Employment Judge were obtained. I was taken to a typed copy. Two examples suffice to make the point that they require interpretation. I understood Mr Isherwood

to submit that when, in cross-examination of Mr Howard the words were noted "Confirm on 17/11 told made red (redundant). Not red - problem - No further work for us" this amounted to an acceptance by Mr Howard that he had been told he had been made redundant. This runs what was the question ("Confirm on 17/11 told made red (redundant)") into the answer, if it was indeed the question. I have viewed the notes of evidence as setting out the questions asked in a column which starts close to the left-hand margin of the page, with the answer to that question immediately underneath it and indented further from that margin: "Q" and "A" are not used. It is possible that they could be read together. That is how Mr Isherwood presented it. Thus, in the case of Mr Ashfield, what I read as the question "Despite being told redundant people hoping something will be sorted out" met with the answer "We hoped we'd get TUPE'd over so try to do things properly", was presented as Mr Ashfield being recorded as recognising that he had been told he had been made redundant (the words "despite being redundant" being his, and not those of the questioner). Though possible, this is not probable: I am satisfied that this must be a misreading of the notes of evidence. I am satisfied that the question contained an assertion – redundancy – which was not expressly accepted by the witness.

21. The submission made by Mr Isherwood is that the evidence was all one way. Beginning with the sentence which I have already mentioned which comes from paragraph 17 of the Judge's Judgment, he emphasised that what Mr Bennett had told the Claimants was that there was no money or work. QPSL was going under and their jobs were at an end. Since each of the Claimants had admitted that they had been dismissed on 17 November 2009, that was what had happened. However, as I have pointed out, that is actually in error. The finding was that the administrator was only appointed in the afternoon of 17 November at 2pm. He argued that for the Judge in paragraph 54 to suggest that if he had dismissed them before QPSL were in administration Mr Bennett would have needed the approval of the administrators to dismiss is

perverse. I have already commented upon that unfounded and unwarranted accusation of perversity.

22. He tried to demonstrate that the evidence was clear. He submitted it was simply not open to the Judge to come to any conclusion other than that what Mr Bennett had said and done was sufficient to amount to a dismissal.

Conclusions

23. Recognising that Mr Isherwood is a representative and not a professional lawyer, I would simply say this. He has no made point that any particular test was applicable. Counsel in the case agree that this is not a case which turns upon the precise test to be applied to decide whether words amount to a dismissal or not. If it became material, I would incline to say that whether there has been a dismissal by words or conduct has objectively to be assessed. Insofar as words are used, they must be understood in context in the light of that which the audience to whom they are addressed might reasonably be expected to understand, objectively viewed.

24. The central issue here then was not one of approach. It was simply whether the evidence allowed the Judge to make the conclusion she did. Ms Gore, in her Skeleton Argument, taking the same approach to the notes of evidence as I have thought correct, noted what Mrs Burrows said in her witness statement at paragraphs 6 to 9, and in evidence as to merits, in which she recorded herself as being very confused. Mr Taylor also said in his witness statement, paragraphs 10 to 13: “All very ... confused ... a lot of rumour about what was going to happen ... came in the next day ... and waited for something to happen” and used words to the same effect in cross-examination. And she mentioned Mr Medcraft, who thought “We all hung around hoping that we were going to get back to work”, denying that he was made redundant on 17

November; Mr Ashfield, at paragraphs 7 to 8 in his witness statement and in cross-examination in the words I have already cited; and Mr Howard, who thought he might have done a job on the 17th, but turned up for work on the 18th and 19th as well. In context, therefore, I conclude that there was evidence here which is capable of justifying the Employment Judge's conclusion that there was confusion, and that there was uncertainty. As a matter of fact, those to whom whatever words were spoken were addressed did not actually understand them as bringing the guillotine down on their former employment. Whether objectively they might reasonably have been expected to do so was, as the Judge effectively found, very difficult indeed to hold, given the fact that Mr Bennett was not called to give evidence. That may perhaps have been because the Respondents were running the case that it was not Mr. Bennett but the administrator who had actually effected the dismissals, which plainly on the findings of fact he had not.

25. But in the end she was not satisfied that there had been a dismissal. There was not only the evidence of 17th November from which to draw that conclusion but also the evidence of the behaviour of the parties immediately afterwards. That is evidential rather than of conclusive significance, but it showed that many of the Claimants did not understand that they had no job to go to. They went to it. It also shows what the understanding of the administrator was. The fact that a letter was written to employees telling them that they were dismissed indicated that someone thought there was a need to write it. It is some evidence of a recognition that the dismissals had not clearly and dispositively occurred on 17 November. Further, given that the transfers occurred at that time, and the administration began at 2.00 on the 17th, the Judge could not be faulted in thinking there was no clear certainty as to the timing of dismissals. She reached the permissible view that she expressed in paragraph 54. What she said in paragraph 54 by addition in reconsideration also goes some way to explain why the employees put the date they did in their ET1. It may not have been an intended as a reference, as Mr Isherwood

had taken it, to the date that Mr Bennett spoke to the workforce as a whole. It may rather have been a reflection of the date which was recorded in the letter of 21 November as the date of dismissal - a letter which they got just a few days later, closing the door firmly behind their employment.

26. I do not need to recite further submissions made by Mr Rowell by reference to further evidence which was given. Suffice it to say that he was able to add to the list of examples which Miss Gore gave of evidence which was capable of leading to the conclusion the Judge expressed. Since, therefore, there was evidence upon which the Judge could reach the conclusion she did, and since this appeal is one on perversity, it must be and is dismissed.

27. I should finally like to thank the parties for the admirable focus of their submissions.