Appeal No. UKEAT/0276/13/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 11 December 2013
Judgment handed down on 13 February 2015

Before

HIS HONOUR JEFFREY BURKE QC

(SITTING ALONE)

MR S D MARSHALL — APPELLANT

GAME RETAIL LTD — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SHANE SIBBEL (of Counsel) Instructed by: Lewis Silkin LLP Solicitors King Charles House Park End Street Oxford Oxfordshire OX1 1JD
For the Respondent	MS ALICE MAYHEW (of Counsel) Instructed by: Game Retail Ltd Unity House Telford Road Basingstoke RG21 6YJ

SUMMARY

TRANSFER OF UNDERTAKINGS - Dismissal/automatically unfair dismissal

UNFAIR DISMISSAL - Automatically unfair reasons

The Claimant was employed in a senior position by GSG, which went into administration. The administrators closed part of the business and transferred part to the Respondent. The Claimant had been employed in the transferred part of the business but was dismissed as redundant days before the transfer, which was admittedly a TUPE transfer.

His claim that he had been automatically unfairly dismissed for a reason connected with the transfer failed. On appeal, held:

1) The Employment Judge had failed to apply the principle in **Kuzel v Roche** [2008] IRLR 530 which applied to the claim in this case and had the effect that, once the Claimant had produced some evidence in support of his case, the burden lay on the Respondent to establish that the reason for the dismissal was not the automatically unfair reason. He had imposed on the Claimant a higher burden and had rejected his case on the basis that he had not discharged the evidential burden. See paragraphs 22 to 28.

2) However the facts were not so clear that the EAT could decide that if the burden of proof had been correctly applied, the Respondent must be taken to have failed to discharge it. There must be a remission; but that remission should be to the same Employment Judge, applying the **Sinclair Roche** criteria.

Spaceright Europe Ltd v Baillavoine [2012] ICR 520 and **Hynd v Armstrong** [2007] IRLR 338 in particular considered.

HIS HONOUR JEFFREY BURKE QC

The Facts

1. This is an appeal by Mr Marshall, the Claimant before the Employment Tribunal, against the Judgment of that Tribunal, sitting at Southampton and constituted by Employment Judge Pirani sitting alone, sent to the parties on 12 March 2013 after a 3-day hearing in December 2012 and January 2013. By that Judgment the Employment Judge dismissed the Claimant's claims against Game Retail Ltd, the Respondent before the Tribunal, that he had been automatically unfairly dismissed for a reason connected with a transfer under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE 2006") and that the Respondent owed him expenses and holiday pay.

2. I take the facts from the factual findings of the Employment Judge. The Claimant was, from January 2011, employed by Game Stores Group Plc ("GSG"), a UK-based company which, before the economic downturn, had 610 shops in the UK and over twice that number worldwide. He was the Director of Group Finance; the Group sat above the management structure of each territory or country in which GSG was active, including the UK; his position was therefore a senior one; he had a base salary of £180,000 per annum and a 6 month notice period.

3. However by 2011 trading and market shares were in decline; and it is clear from the Employment Judge's findings of fact that, by early 2012 GSG's financial difficulties had become severe. One of the steps taken was the merger of the UK and Group sides of the business; as a result, the Claimant's position was redundant; but with effect from 19 March 2012 he was appointed UK Financial Controller. The Employment Judge resolved what had

clearly been a substantial factual issue between the parties at the hearing as to whether the Claimant had been assigned to the UK business before the TUPE transfer to which I will come by finding, at paragraphs 65 to 66 of his Reasons, that the Claimant had assumed the role of UK Financial Controller prior to the relevant transfer and that he was at the date of his dismissal assigned to the UK part of GSG's business. That conclusion is not now challenged.

4. By the latter half of March 2012 GSG was unable to pay the quarterly rent due on its stores and their bankers the declined to extend further facilities. On 21 March GSG gave notice of intention to appoint administrators; and on 26 March Price Waterhouse Coopers, who had been working in the business for 3 to 4 weeks as advisers to GSG's bankers, were appointed as administrators and took over the running of the business. On the same day, one of the administrators, Mr Jervis, informed the meeting of Head Office employees, including the Claimant, that all those working for the Group, as opposed to those in the UK business, would be made redundant on that day; and he said that this included the Claimant. On the same day the Claimant was sent a letter which said:

> **"the financial circumstances of the Company mean that it is no longer able to meet existing staff and salary costs. In light of the Company's insolvency, I regret to advise you that your employment with the Company is terminated with immediate effect, because of redundancy."**

5. On the same day the administrators sent a letter to HMRC which said:

> **"the Administrators need to take urgent action to preserve as much of the trade as possible. A number of options have been considered and it is felt that a 'pre pack', whereby the Group's assets are packaged up ready for sale to a third party, would be the best option to secure the future of the business thereby saving thousands of jobs. The intention therefore, is to hive down the trade and assets of the UK part of the Group into a new UK Company ("Newco") and sale [sic] Newco to a third party or to control by the existing lenders to the Group as soon as possible ideally by 30 March 2012 in order to preserve the business thereby saving as many jobs as possible."**

6. Six days later, on 2 April 2012, the UK business of GSG, together with 333 of its shops and nearly 3200 employees, was transferred to a company called Baker Acquisitions Ltd, which

was then renamed Game Retail Ltd, i.e. the Respondent. The remaining 277 shops were closed and 2000+ employees were dismissed. The Respondent was a vehicle of a private equity partnership, OpCapita LLP, which had expressed an interest in buying part of GSG earlier in the year; it appeared to have lost interest by early March; but that interest had been revived. The Employment Judge found that there had been a request for "due diligence" on 21 March, which had then been followed up; that request arose before the Claimant's dismissal.

7. It was not in dispute that the transfer of the UK business, or at least of that part of it which survived, was a TUPE transfer; but the Claimant had been dismissed 6 days earlier. He claimed, firstly, that the administrators had made a mistake in dismissing him because he was, by virtue of his appointment on 19 March, part of the UK business and was no longer a Group employee; that was not accepted. Secondly, he claimed that he had been dismissed for a reason connected with the transfer of the UK business to the Respondent. The Respondent appointed as their Finance Director a Mr Blunden, who had been directly below the Claimant in the Group structure at a salary which was substantially smaller than that which the Claimant had enjoyed; the Employment Judge found, however, that his was a lesser role than that occupied by the Claimant before the changes which I have described. At the meeting on 26 March those present had been told that Mr Blunden would be retained to run the UK finance function. It was the Claimant's evidence that, whether by Mr Blunden or otherwise, all of his job functions were carried out in the new business; and at paragraph 82 of his Reasons the Employment Judge found that the Claimant's role had been effectively split between the much more senior role of interim Chief Financial Officer and the more junior role undertaken by Mr Blunden.

The Employment Judge's Decision

8. The issues which the Employment Judge had to resolve were set out at paragraph 3 of his Judgment; they were, principally, first, whether the Claimant was assigned to the UK business which was transferred to the Respondent and, secondly, whether the sole or principal reason for the Claimant's dismissal was that transfer or a reason connected with that transfer, which was not an economic, technical or organisational reason entailing changes to the workforce, such that the dismissal was automatically unfair.

9. The second of those issues arose from the words of Regulation 7(1) of **TUPE 2006**, namely:

> **"Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part X of the 1996 Act (unfair dismissal), as unfairly dismissed if the sole or principal reason for his dismissal is-**
>
> > **(a) the transfer itself; or**
> >
> > **(b) a reason connected with the transfer, that is not an economic, technical or organisational reason entailing changes in the workforce"**

10. I have already summarised the Employment Judge's decision on the assignment issue, which can be seen in greater detail at paragraphs 58 to 66 of his Reasons. His conclusion on the reason for dismissal, after he had directed himself on the law at paragraphs 42 to 47, is to be found at paragraphs 67 to 86 of his detailed and carefully argued Reasons. In his self-direction on the law the Employment Judge said, at paragraph 55:

> **"It is accepted and conceded on behalf of the claimant that the burden is on the claimant to provide evidence sufficient to establish a case on the balance of probabilities that the sole or principal reason for his dismissal was an automatically unfair reason under Regulation 7(1)."**

11. At the outset of the section of his Reasons to which I have just referred, at paragraph 67, he said:

> **"Although it is accepted that the burden is on the claimant to show on the balance of probabilities that the sole or principal reason for his dismissal was the transfer itself pursuant to Regulation 7(1) …"**

12. The Employment Judge then, at paragraph 68, pointed out that it was an unusual feature of this case that neither party had called the administrator who made the decision to dismiss the Claimant or had asked questions of the administrator which could be put before the Tribunal in writing, as had been done in the recent case of **Spaceright Europe Ltd v Baillavoine** [2012] ICR 520. He said, trenchantly but justifiably, that the parties had taken an evidential gamble; he referred, at paragraph 57 of his Reasons, to the emphasis put by Ward LJ in **Dynamex Friction Ltd v Amicus** [2008] IRLR 515 on the need, in deciding whether the reason for dismissal was a transfer-related reason, to put under the microscope the thought process of the person who had made the decision to dismiss. He then, at paragraphs 70 to 71, set out the Claimant's arguments on the facts in support of his case that he had been dismissed to make the sale of the business a more attractive proposition to purchasers. The Claimant relied on the facts that the administrator had said to HMRC on 26 March that they were intending to hive down the trade and assets as soon as possible and to sell to a third party or to existing lenders what remained (see the letter set out at paragraph 5 above), that OpCapita had been involved in a due diligence exercise from 21 March, that therefore a prospective purchaser was already on the scene and the sale of the UK business, reduced by the closure of a substantial proportion of the shops and the dismissal of a substantial proportion of the staff, took place within a very short period. He relied on other factual points set out in paragraph 71, in particular that there was no redundancy of his post and that his duties continued in the hands of the Respondent.

13. At paragraphs 72 to 73 the Employment Judge summarised the Respondent's factual case; who argued that, when the administration commenced, immediate cost reductions were necessary irrespective of any prospective sale and that, once the administrators were running the business, the Claimant's role as financial controller was truly redundant - there was no

longer a need for a financial controller - and made other factual points as set out in those paragraphs.

14. The Claimant's arguments were based to a considerable degree on a comparison with the facts of and the decision of the Court of Appeal in **Spaceright**; the Respondent's arguments were based to a similar extent on a comparison with the decision of the Employment Appeal Tribunal in **Honeycombe 78 Ltd v Cummins** (EAT/100/99, HHJ Peter Clark presiding). In **Spaceright** the Claimant, who was the Chief Executive of his employers, was dismissed by administrators on the day on which his employers went into administration. The administrators sold the assets and business to the Respondent transferee one month later. The Employment Tribunal found on the facts that the reason for the Claimant's dismissal was connected with the relevant transfer, that that reason was not a reason entailing changes to the workforce; and the defence of an economic, technical or organisational reason for the dismissal (the "ETO" defence) was not available to the Respondent and that the dismissal of the Claimant was automatically unfair. The Respondent's appeals to the EAT and the Court of Appeal were unsuccessful. In **Honeycombe 78** the Claimants were dismissed on the day after their employers had gone into administration and at a time when the directors of the employers had offered to purchase the business from the administrators. The Employment Tribunal decided that the Claimants were dismissed by reason of the transfer; but their decision was overturned by the EAT on the basis that the Tribunal was bound to conclude that the principal reason for dismissal was economic in that there was no money to pay the wages in spite of the potential sale and not with a view to effecting it.

15. I feel bound to interpose into my account of the Employment Judge's Reasons, which demonstrate the reliance placed by the parties on those 2 decisions in particular, that a

comparison between those 2 decisions reveals that cases of the present type may be very fact-sensitive. The extent to which the facts of one case can guide the decision in another must be limited.

16. At paragraphs 75 to 76 the Employment judge said:

> **"75. In general, I accept the closer in time a dismissal is to a relevant transfer, the more likely it will be that it is transfer-connected. Where a dismissal takes place around the time of the transfer, there may be a strong presumption that it is so connected. However, the case law demonstrates that timing is not everything and it is certainly not determinative. Dismissals can be carried out just before a relevant transfer without being connected with it. For instance, a struggling business might need to dismiss employees owing to financial constraints, regardless of the impending transfer.**
>
> **76. If the reason for a dismissal is simply to help make a business a more attractive proposition to potential purchasers, that dismissal will, more than likely, be 'connected with' any transfer that does eventually take place, and hence, in the absence of an 'ETO reason', automatically unfair under Regulation 7(1). However, it is the motive of the person who carries out the dismissal or, in the case of an insolvency administrator, requires dismissals to be effected, that has to be scrutinised."**

17. He continued, after setting out at paragraphs 77 to 78 the issues in **Spaceright** and the Tribunal's decision in that case, which was ultimately upheld , at paragraphs 85 to 87 in these terms:

> **"85. The claimant says that when he was told by Mr Jervis (whose decision it was to dismiss) that he was to be made redundant the reason he was given orally was because he was a "group" employee. Irrespective of the sale there was no need for any group employees going forward. As set out above, I have concluded that at the time of dismissal the claimant was a UK based rather than a group employee. However, I have heard no evidence from Mr Jervis as to what his belief was based on. The Claimant said himself in his letter to Mr Fishburn: "I understand that during an administration process it is very difficult to ensure that all decisions are made correctly." As was set out in the judgment of Lord Cairns in *Abernethy v Mott Hay & Anderson* [1974] ICR 323: "A reason for the dismissal of an employee is a set of facts known to the employer or it may be beliefs held by him, which cause him to dismiss the employee." If Mr Jervis was genuinely mistaken this would not support the claimant's contention that the reason for his dismissal was to make the Company a more attractive proposition for sale. It would have been Mr Jervis' view that the claimant would not have transferred in any event.**
>
> **86. In conclusion, there is nothing inexorably in the explanation given by the administrators in their letter to the claimant dated 26 March 2012 at page 228, or the context of the dismissal, which leads me to the conclusion that the reason why the claimant was dismissed was to make the business of the Company a more attractive proposition to prospective transferees of a going concern. It may or may not be said that the Claimant's dismissal was in order to make the sale of the business more attractive. Cogent arguments have been made on behalf of both parties why the sole or principal reason for the claimant's dismissal was or was not the transfer itself. One could endlessly speculate as to the motives and the reason of the person who made the decision to dismiss the claimant. However, bearing in mind the burden of proof is on the claimant to show that the sole or principal reason for his dismissal was the transfer itself or a reason connected with the transfer I conclude that the claimant has not made his case out. There is insufficient evidence to say on the balance of probabilities that the sole or**

> **principal reason for his dismissal was the transfer itself or a reason connected with the transfer.**
>
> **87. Since TUPE does not apply to transfer any liability over to the respondent (in the absence of a breach of Regulation 7) the claimant's claims for outstanding holiday pay and expenses against the respondent must also fail."**

18. Accordingly, no liability to the Claimant had passed to the Respondent, and the Claimant's claims failed. The Employment Judge did not, on the basis of his findings, need to decide and did not decide whether, had his conclusion been in the other direction the ETO defence would have been available.

Grounds of Appeal

19. Before me the Claimant was represented by Mr Sibbel of Counsel, who appeared before the Employment Tribunal; the Respondent was represented by Ms Mayhew of Counsel. I am grateful to both for the substantial help which they provided.

20. By Mr Sibbel, the Claimant advanced five Grounds of Appeal. As refined during argument, they were:

1) The Employment Judge erred in law by imposing on the Claimant the burden of proving that the reason for his dismissal was an automatically unfair reason falling within Regulation 7(1) of **TUPE 2006**; the only burden on the Claimant was to adduce some evidence in support of his case; if he discharged that burden the Respondent then had to show that the reason for the dismissal did not fall within that regulation or that there was an ETO defence.

2) The Employment Judge imposed on the Claimant an obligation to provide evidence from the decision-maker, i.e. the administrator, who resolved to dismiss the Claimant when there was in law, no such obligation.

3) (a) The Claimant had provided evidence which raised the issue as to whether the reason for his dismissal fell within Regulation 7.

(b) The burden then fell on the Respondent to prove that the dismissal was not connected with the transfer or that there was an ETO defence and had failed to do so; the Employment Judge should, therefore, have decided that the Claimant had been automatically unfairly dismissed for a reason connected with the transfer.

4) The Employment Judge could only on the facts have found in favour of the Claimant.

5) Alternatively, the Employment Judge's conclusion that the Claimant had not been automatically dismissed for a Regulation 7 reason was perverse.

Ground 1 - The Burden of Proof

21. It is common ground that the guiding principles as to the burden of proof, in a case such as this, are to be found in the decision of the Court of Appeal in **Kuzel v Roche Products Ltd** [2008] IRLR 530. The Claimant in that case asserted that she had been automatically unfairly dismissed for making protected disclosures; the Respondent's case was that she had been dismissed because there had been a serious breakdown of trust between her and her colleagues. The Employment Tribunal found that the reason for the dismissal was a loss of temper on the part of the dismissing manager and his failure to follow advice given to him by his HR director and that, therefore, the Respondent had not established a potentially fair reason for the dismissal but that the Claimant's case of dismissal for making protected disclosures was "not made out". The EAT allowed the Claimant's appeal on the basis that, by those words, the Employment Tribunal had wrongly imposed on her the burden of proving the reason for her dismissal and remitted her case to the Tribunal. She then appealed to the Court of Appeal against that

remission; the Respondent cross-appealed, asserting that the burden of proving the prohibited reason for the dismissal lay upon the Claimant.

22. In a Judgment which, if I may respectfully say so, is expressed in extremely straightforward and helpful terms, Mummery LJ, with whom Arden and Longmore LJJ agreed, said this at paragraphs 52 to 60 :

> **"52. Thirdly, the unfair dismissal provisions, including the protected disclosure provisions, pre-suppose that, in order to establish unfair dismissal, it is necessary for the ET to identify only one reason or one principal reason for the dismissal.**
>
> **53. Fourthly, the reason or principal reason for a dismissal is a question of fact for the ET. As such it is a matter of either direct evidence or of inference from primary facts established by evidence.**
>
> **54. Fifthly, the reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge.**
>
> **55. Sixthly, the burden of proof issue must be kept in proper perspective. As was observed in *Maund* [*v Penwith District Council* [1984] IRLR 24], when laying down the general approach to the burden of proof in the case of rival reasons for unfair dismissal, only a small number of cases will in practice turn on the burden of proof.**
>
> **56. I turn from those general comments to the special provisions in Part X of the 1996 Act about who has to show the reason or principal reason for the dismissal. There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. Thus, it was clearly for Roche to show that it had a reason for the dismissal of Dr Kuzel; that the reason was, as it asserted, a potentially fair one, in this case either misconduct or some other substantial reason; and to show that it was not some other reason. When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.**
>
> **57. I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.**
>
> **58. Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.**
>
> **59. The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET *must* find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.**
>
> **60. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. In brief, an employer may fail in its case of fair dismissal for an**

admissible reason, but that does not mean that the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason."

23. It is accepted that the principles set out in those paragraphs were, although the Judgment in **Kuzel** itself may not have been, put before the Employment Judge and that Mr Sibbel did not put his case forward on the basis that the burden of proof lay throughout on the Claimant. It was not suggested that the fact that the inadmissible reason relied upon by the Claimant in this case was not that relied upon in **Kuzel** in any way reduces the applicability in the present case of the principles which Mummery LJ set out in the passage cited above. Accordingly, applying those principles, there was a burden on the Claimant in the present case to produce some evidence supporting his case that his dismissal was by reason of or connected with the transfer; once that stage had been reached, it was for the Respondent to prove that the reason or principal reason for the dismissal was the different reason on which they relied. If the Respondent failed to do so, then it would be open to the Employment Judge to find that the reason was the inadmissible reason on which the Claimant relied. That would often be the consequence of a failure of that type; but it was not in law a necessary consequence of such failure; see **Kuzel** at paragraph 59.

24. Mr Sibbel submitted that the Employment Judge at paragraphs 55 and 67 of his Reasons, the relevant parts of which are quoted above, misdirected himself and failed to apply the principles established by **Kuzel**. The Employment Judge had proceeded, he submitted, at paragraph 55 of his Reasons on the erroneous basis that the Claimant had conceded that the burden of proof lay on the Claimant to establish the reason for dismissal or the principal reason for the dismissal to have been the automatically unfair reason specified in Regulation 7 and had repeated that error at paragraph 67; and he had, at paragraph 86 based his resolution of the claim upon that error.

25. Ms Mayhew on the behalf of the Respondent did not take issue with the application to the present case of the principles set out in **Kuzel** or with the content of those principles. Her submission was that, on a proper analysis of the Employment Judge's Reasons, it could be seen that no more was required of the Claimant than that he should have discharged the evidential burden laid upon him by those intervals. Thus, at paragraph 55, the Employment Judge had said:

> **"… the burden is on the claimant to provide evidence sufficient to establish a case …"**

and paragraph 67 should be read in the light of and construed together with paragraph 55, on the basis of the undoubtedly correct principle that an Employment Tribunal's Judgment should be read as a whole and on the basis that the reference in paragraph 68 to the evidential gamble taken by the parties only made sense on the basis of the Employment Judge's appreciation that there was a burden on the Respondent. When the Employment Judge at paragraph 86 said that the Claimant had not made out his case, she submitted, he was not saying anything inconsistent with what he had said earlier; he was concluding that the Claimant had not overcome the hurdle of discharging the evidential burden.

26. Although they were expressed in attractive and cogent terms, I do not accept Ms Mayhew's submissions for the following reasons:

1) The Employment Judge did not refer to **Kuzel** and does not at any point refer to the principles there set out or to the difference between the evidential burden placed on a Claimant by those principles and the burden placed on the Respondent should be evidential burden be discharged.

2) The reference to the burden on the Claimant in paragraph 55 of the Reasons is not said to be one which, if discharged, imposed a burden of proof on the Respondent; it is described as a burden to provide evidence sufficient to establish a case on the

balance of probabilities; that is so with the language in paragraph 67; and in paragraph 86 the words used by the Employment Judge, in my judgment, make clear, at that central point of his decision, where there were factual arguments on both sides, his view that the Claimant had to prove that the sole or principal reason for his dismissal was the transfer or a reason connected with it and that the Claimant had not made that case out.

27. For these reasons, I am not persuaded that that the Employment Judge was basing his decision on a failure on the Claimant's part to discharge the evidential burden: indeed, there being "cogent argument" on behalf of both as to what the reason for the dismissal was, it could hardly be said that the Claimant had failed to discharge the burden of producing some evidence to support his case. Ms Mayhew's argument that the reference in the Reasons to the evidential gamble demonstrated the Employment Judge's correct understanding of where the burden of proof lay was deft but ultimately unsuccessful. In paragraph 68, where he referred to that gamble, the Employment Judge was not considering the burden of proof; he was, correctly on the evidence, saying no more than (wherever the burden of proof lay) both sides had taken that gamble; and, even if there is some strength in the argument, the terms of paragraph 86, which are, as I see it, unequivocally in favour of Mr Sibbel's argument, overcome it. The error as to the burden of proof appears to have been decisive.

28. In **Kuzel**, Mummery LJ said, at paragraph 55 of his Judgment that the burden of proof issue must be kept in proper perspective and only a small number of cases will in practice turn on the burden of proof. I hope it is not out of order for me to say, in this Judgment on an appeal which I heard in the last week in which I sat in court as a Judge after 30 years as a part-time or full-time Judge, that I am respectfully in full agreement with that. In that time I can think of

only one case which I decided purely on the basis of the burden of proof; but in this case it is demonstrated that the Employment Judge in paragraph 86 approached the reason for the dismissal issue by applying an incorrect principle as to the burden of proof; I cannot avoid concluding that, in what I have said earlier was a careful and closely reasoned Judgment, he made, in that respect, an error of law.

Ground 2 - Evidence of the Decision-Maker

29. By this ground of appeal, Mr Sibbel focused on the Employment Judge's saying, at paragraph 68 of his Reasons, that neither party had put forward any evidence from the administrator who had taken the decision to dismiss the Claimant. His argument was that when that paragraph is read together with what the Employment Judge had said earlier as to the burden of proof, he was, in effect, putting an onus on the Claimant to call or at least put in evidence from the administrator when the burden of proof that the reason for dismissal was not connected with the transfer fell on the Respondent and not on the Claimant; the onus was on the Respondent to call such evidence, because the Claimant had put forward some evidence to support his case.

30. Ms Mayhew submitted that the principles in **Kuzel**, discussed in the last section of this Judgment, required the production by the Claimant of some evidence supporting his case; and the Employment Judge should not be taken to have been indicating anything more than that the Claimant could have called the administrator or put in some evidence from him. The Employment Judge was not imposing a burden on the Claimant to call the administrator; he was commenting that neither party had put forward any evidence from the administrator.

31. On this issue, I am not persuaded that there was any error of law. I do not read paragraph 68 as indicating any more than a correct description of the state of the evidence before the Tribunal, namely that, in contrast to other recent cases - in particular **Spaceright** - the Tribunal had not received any evidential assistance from the administrator who had taken the decision to dismiss the Claimant. I do not interpret what the Employment Judge said as imposing a burden on the Claimant to call or to present written evidence from the administrator. He was, quite simply, commenting in a neutral manner that he had not had any help from that source. He did not, in this section of his Reasons, place any burden on the Claimant or neglect any burden on the Respondent.

Ground 3 - Did the Respondent discharge the Burden of Proof?

32. This ground of appeal as put forward by Mr Sibbel, contained two separate propositions, which I have identified in paragraph 20 above; I can summarise them again at this stage, I hope, conveniently, in this way: that (i) the Claimant put forward sufficient material to satisfy the evidential burden and (ii) the Employment Judge on the evidence could only have concluded that the Respondent had failed to discharge the burden of proof which, as a result, fell on it.

33. I do not propose to review Mr Sibbel's detailed factual arguments in support of the first proposition, which involved to a substantial degree a comparison between the facts in the case of **Spaceright** and the facts of the present case; I am prepared to accept for present purposes that there was sufficient evidence arising from the sequence of events between 19 March, when the Claimant was appointed to his new post in the UK business, and 2 April, when the Respondent purchased what was left of that business, to discharge the evidential burden. It is not necessary to embark on a comparison between the facts of the present case and those in **Spaceright** - in so far as they appear, in no great detail, in Mummery LJ's Judgment - to reach

that position. I am, however, far from persuaded that, if the Employment Judge had reached that point, and had then asked himself whether the Respondent had discharged the burden which then fell on it, he would necessarily have found or could only have found that the Respondent had failed to discharge that burden. Mr Sibbel, with commendable frankness, admitted in the course of argument that his submission was, in effect, the same as or perhaps the obverse of his argument on ground 5, his perversity ground, and that he was deploying it, entirely legitimately, of course, to avoid the remission which might follow should his arguments on ground 1 prevail; the fact that the arguments were put forward for legitimate tactical purposes does not detract from their merits; but having considered their merit, I am not prepared to go as far as Mr Sibbel would like me to go.

34. I accept that the Employment Judge made no finding that the dismissal of the Claimant was for redundancy, i.e. for a reason unconnected with the transfer, or that the dismissal was for an ETO reason which was not that of the Respondent but of the transferor; any such reason had to be that of the transferor and not the transferee; see the principle in **Hynd v Armstrong** [2007] IRLR 338; and it is true that the Employment Judge said, at paragraph 86, that there were cogent arguments made on behalf of both parties why the sole or principal reason for the Claimant's dismissal was or was not the transfer or connected with it. It was arguably not to the advantage of the party on whom the burden of proof lay that no evidence from the administrator was put before the Tribunal. There was, it seems, no direct evidence that the Claimant's salary could not be paid by the administrator - as there had been in other cases such as **Honeycombe 78** and **Crystal Palace FC Ltd v Kavanagh** [2013] EWCA Civ 1410. However, despite these principal and other factual points made by Mr Sibbel, it is important, in my judgment, that the Employment Judge was not testing the evidence on the basis that a burden of proof lay on the Respondent. His analysis, as can be clearly seen from paragraph 86,

was founded on the approach, the correctness of which I have addressed under ground 1, that the burden of proof lay on the Claimant. It was in that context that he said:

> **"It may or may not be said that the Claimant's dismissal was in order to make the sale of the business more attractive."**

Neither the evidence, as set out in the Reasons, nor the conclusions lead, in my judgment, inexorably to the conclusion that the Respondent must have failed to show that the factual points in their favour, which the Employment Judge set out at paragraph 73, could succeed in discharging the burden of proof which lay on it. Some of Mr Sibbel's argument rested on an assessment of Mr Blunden's evidence which, even if it was not challenged, is difficult for me to appreciate to any satisfactory degree. Of course it seems unlikely, on the face of it, that the Claimant, having been taken on by the UK business in mid-March, albeit for a trial period, was seen by the administrator as redundant only 10 days later; but that of itself does not lead to the conclusion that, on the basis of a correct placement of the burden of proof, the Employment Judge had to conclude that they had failed to show either that the dismissal was not connected with the transfer, or that it was for a permissible ETO reason.

35. I did not have the advantage of hearing the evidence and seeing the witnesses; I do not have any form of note of the evidence which was put before the Employment Judge. I have said earlier in this Judgment that this type of case is fact-sensitive. I have no doubt that I cannot reach a factual conclusion which would bring the Claimant home without a remission, as Mr Sibbel has sought to persuade me to do.

Ground 4 - The Evidence of Mr Blunden

36. The focus of the argument on behalf of the Claimant under this ground was based on the principle in **Hynd v Armstrong**, to which I have already referred. The point, in summary

form, was that the evidence of Mr Blunden, retained by the administrator to run the financial function of the UK business (see paragraph 28 of the Reasons), that the Claimant had been made redundant because the administrator realised that, if there was to be a business going forward it would be too small to require a financial controller at the Claimant's level (see paragraph 83 of the Reasons), was, bearing in mind that the administrator intended a quick sale, necessarily evidence supporting an ETO reason in the transferee and not in the transferor and, therefore, could not avail the Respondent.

37. The Employment Judge did not, however, reject the Claimant's claim or uphold the Respondent's case on the basis of Mr Blunden's evidence; he rejected the claims because he considered that the Claimant had not discharged the burden of proof which, according to the Employment Judge, lay on him. Further, in considering Mr Blunden's evidence, at paragraph 83, he expressly reminded himself of the **Hynd v Armstrong** principle but did not exclude the possibility that the dismissal occurred because the Claimant was simply no longer needed either pre- or post-transfer. It may be that the administrator intended a quick sale; and the ultimate purchaser was "in the frame" before the Claimant was dismissed; but a quick sale or, indeed, a sale at all was not guaranteed; and the administrator may have had to make arrangements for the running of such part of the business as was to be kept alive in the absence of a purchaser. In my judgment, there was not, in the respects argued under this ground, any failure of law in addition to that which I have already identified under ground 1; it appears to me to be clear that, in paragraph 83, the Employment Judge expressly did not either neglect or misunderstand the effect of **Hynd v Armstrong**. The evidence of Mr Blunden did not, as I see it, require a conclusion that the saving of the cost of employing the Claimant would only be an ETO reason of the Respondent.

Ground 5 - Perversity

38. I asked Mr Sibbel to identify what finding or findings by the Employment Judge were, on his argument, perverse; his entirely fair response was the failure to find that the Claimant had discharged the burden of proof which had been (erroneously - see above) placed on him and his erroneous distinction of the decision in **Spaceright** in which the essential facts were not materially different from those of the present case.

39. As to the general point, I have already said that I am not satisfied that, had the Employment Judge applied the burden of proof in accordance with the principles in **Kuzel**, he would inevitably have found in favour of the Claimant or that the Respondent had not discharged the burden of showing that the dismissal was not connected with the transfer or was for an inadmissible ETO reason, i.e. a reason of the transferee. How the evidence should be assessed in the light of the appropriate placing of the burden of proof is a matter of fact, the resolution of which is not so clear, in my judgment, for the Reasons I have set out earlier, that I can impose my own factual assessment based only on the documentary material available. It must follow that I cannot determine what the outcome would, as a matter of probability, have been if the burden of proof had been correctly applied. Nor can I conclude that, on the hypothesis that the burden of proof fell on the Claimant, it was perverse of the Employment Judge not to find that he had discharged that burden. It may well be that the Claimant had a strong case, based in particular on the short period between his appointment to a senior post in the UK business and his dismissal by the administrator in the context of his wish to achieve a speedy sale: but I do not have the material to conclude that it has been overwhelmingly demonstrated that the Employment Judge reached a decision on the facts which no reasonable Judge could have reached and that he could, acting reasonably, only have found, on the basis

that the burden of proof did rest on the Claimant, that he had discharged it. As he said, there were arguments which supported each side.

40. Mr Sibbel put forward detailed arguments as to the distinctions made by the Employment Judge between the case before him and **Spaceright**; his first argument was that reference should not have been made to the fact that other senior personnel were dismissed by the administrator; the Employment Judge, it was submitted, should have concentrated on the reason why the Claimant was dismissed, as was the focus in **Spaceright**. I accept that the question which arises in a case such as this and arose in **Spaceright** was whether the sole or principal reason for the dismissal fell within Regulation 7(1); but that does not preclude the Tribunal from asking itself what had happened to the other employees; the answer to that question may illuminate the answer to the central question.

41. A comparison between the facts of the present case and those of **Spaceright** does not, in my judgment, produce a compelling result. The essential facts of **Spaceright** were not identical to those of the present case. Indeed the details of those facts are not set out in the Judgment of the Court of Appeal (as I have said earlier); the decision of the Court of Appeal turned primarily on the interpretation of the words "connected with" in Regulation 7(1) and, in very brief terms, whether there could be an ETO reason. The perversity argument put forward on behalf of the transferee was summarily disposed of in paragraph 41. I do not accept that it is possible to deduce from the Judgment in **Spaceright** that the Employment Judge in the present case could only have come to the decision that, if the burden of proof lay on the Claimant, he had discharged it or, if the burden of proof lay on the Respondent, it had failed to do so. There were evidential points, of greater or lesser strength, on both sides; see paragraphs 70 to 73 of the Employment Judge's Reasons.

42. Accordingly, I reject the perversity ground of appeal.

Disposal

43. Therefore the appeal succeeds, but only on ground 1.

44. At the end of the argument, it was clear that the conclusions which I might reach gave rise to at least the possibility of a remission to the Employment Tribunal. Mr Sibbel was, naturally, anxious on behalf of the Claimant to avoid a remission. I make no criticism of Counsel in saying that the parties did not have all the authorities which might have been relevant to hand; and Counsel helpfully agreed to provide supplementary submissions in writing within a limited time and did so. I am grateful to them both for their help in that respect.

45. However, having found in favour of the Claimant only on ground 1, I find the position as to the correct way forward to be more simple than might have been the case otherwise; and I do not need to go through the authorities to which Counsel have referred. I do not doubt that recent cases have widened the discretion in an appellate court to substitute and have encouraged substitution where possible, as a way of saving both cost and time. However, having regard to my conclusions that the Employment Judge fell into error only in respect of the burden of proof and that I am unable to conclude either that, had the burden of proof been correctly placed on the Claimant, he must have been found to have discharged it or that, on the basis that the burden of proof rested on the Respondent, they must have been found not to have discharged it, it is wholly clear to me that the only appropriate disposal is a remission to the Employment Tribunal to reconsider the claims, according to law. The only question which remains is whether the remission should be to the same or to a fresh Tribunal.

46. Because the submissions so far had not specifically considered whether, in such circumstances, a remission should be to a fresh or the same Tribunal, I asked for and received with commendable speed brief submissions in writing from both Counsel on the point. Mr Sibbel in his supplemental submissions had said that there is no need for any further factual investigation; the Employment Judge had all the evidence. Having considered the new submissions, I can see no compelling reason, having considered the factors set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, for the introduction of a new Employment Judge. As to proportionality, the unfair dismissal claim is, I accept, a claim for the maximum compensation; and the other claims, the result of which turned on the decision as to whether liability passed to the Respondent, were no doubt substantial. Mr Sibbel submits that a rehearing would take 2 days, as did the original hearing and that a further hearing by the original Employment Judge would take one day; thus, having regard to the size of the claim, little would be saved by the latter course; but unless further evidence were to be presented - and Mr Sibbel does not suggest that there would be any need for that - I do not see why submissions should take more than half a day; the Judge will have read the file, his notes and the EAT's Judgment; and in any event the saving of one day's time, expense and demand on Tribunal time is significant. Further Ms Mayhew states that the hearing took 3, not 2, days; and the Judgment appears to confirm that as correct; on that basis to start the evidence again in front of a new Judge would be even more disproportionate.

47. Even if one of the parties now wished to add to the evidence, for example by providing some evidence from Mr Jervis, it would not be necessary for all the evidence to be recommenced before a different Employment Judge. It will be for the parties to decide whether they wish to deploy any further evidence and for the Judge to decide whether they should

provide him with written or oral submissions before he reconsiders. However neither side has suggested that further evidence would be needed.

48. As to time, although the hearing took place almost two years ago, I do not see that that period - which includes delay on my part, for which I apologise to the parties - is so great as to amount to a strong factor in favour of a rehearing. The Employment Judge will have his notes; his Reasons set out the facts in considerable detail; I am not persuaded that there will be real difficulty in achieving a fair result by reason of the time which has passed if the remission is to the same Judge.

49. This was not a totally flawed decision. The Employment Judge made an error as to the burden of proof; the other grounds of appeal have not succeeded.

50. I do not see that, if the remission is to the same Judge, there is any danger of what Mr Sibbel describes as perceived bias. There has been no suggestion that there has been the appearance of anything other than impartiality in the Judge's conduct of the hearing or in his Judgment; and I see no danger of such an appearance arising from the "second bite of the cherry" argument. There is no indication that the decision on remission will be reached other than in an appropriate professional manner.

51. Accordingly I conclude that the remission should be to the same Employment Judge. Whether he wishes to make directions for the further hearing will be a matter for him.