Appeal No. UKEAT/0191/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 19 December 2013

Before

THE HONOURABLE MR JUSTICE SINGH

MS P TATLOW

MR M WORTHINGTON

LONDON BOROUGH OF BARNET APPELLANT

(1) UNISON
(2) NSL LTD RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR JOHN CAVANAGH (One of Her Majesty's Counsel) Instructed by: Legal Services to Barnet & Harrow Council P O Box 2 Civic Centre Station Road Harrow HA1 2UH
For the First Respondent	MR OLIVER SEGAL (One of Her Majesty's Counsel) Instructed by: UNISON Legal Services UNISON Centre 130 Euston Road London NW1 2AY
For the Second Respondent	Written Submissions

SUMMARY

REDUNDANCY – Collective consultation and information

The Appellant is a local authority which was contemplating redundancies of staff and also transfers of some employees to third parties. The Employment Tribunal found that it had breached the consultation and information requirements in section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992** and regulation 13 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (SI 2006 No. 246). It went on to make a protective award under the 1992 Act and an award of compensation under the 2006 Regulations. In calculating the periods for which those awards should be made it took as a starting point the maximum that is available in law and worked down from that.

Held (1) The Tribunal had misdirected itself in law because the starting point of the maximum was, in accordance with Court of Appeal and EAT authority, only to be used where the employer had not engaged in any consultation at all. Those were not the circumstances of the present case. The case would therefore be remitted to the same Tribunal, which was familiar with the evidence, having conducted a two day hearing, to reconsider its decision in accordance with the judgment of the Appeal Tribunal. (2) The Tribunal had also erred in law in failing to make a declaration that the Second Respondent (the transferee in one case) was jointly and severally liable for breach of the 2006 Regulations under regulation 15(9). A declaration to that effect would therefore be made by the Appeal Tribunal. (3) The Second Respondent's cross-appeal would be dismissed, as any question of apportionment as between that Respondent and the Appellant was a matter for the ordinary courts and not for the Employment Tribunal.

THE HONOURABLE MR JUSTICE SINGH

Introduction

1. This is the unanimous judgment of this Tribunal. The Appellant appeals against the decision of the Employment Tribunal at Watford after a hearing which took place on 17 and 18 December 2012. The Tribunal sent its reserved Judgment to the parties on 4 February 2013.

2. By its decision the Tribunal decided first that there had been a failure by the First Respondent, which is the present Appellant, to comply with section 188 of the **Trade Union and Labour Relations (Consolidation) Act 1992** with respect to certain redundancies which took effect on 31 March 2012. It also made a protective award determining that it was just and equitable that the protected period should last for 60 days in respect of that breach. Secondly, the Tribunal found that there had been a failure to comply with Regulation 13 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (SI 2006 No. 246) (TUPE). It did so first with respect to what became known in the proceedings as the housing transfer; that was a transfer to an organisation at arms length, Barnet Homes. In that context the Tribunal determined that the appropriate compensation to be paid to the people who transferred was pay equivalent to 40 days pay. Thirdly, the Tribunal decided that there had been a similar breach of the TUPE Regulations in respect of what became known as the parking transfer. It determined that the award in that context should be the equivalent of 50 days pay.

Factual background

3. It is unnecessary for the purposes of the present appeal to set out the facts in detail. They were identified by the Tribunal first in summary form in setting out the issues at section 3 of its Judgment and secondly in greater detail in section 5. As the Tribunal observed at paragraph 5.1, in large part, although not completely, the facts were not disputed and there were relatively

few facts that the Tribunal needed to find itself. We will seek to summarise the factual background in brief outline for the purposes of the present appeal.

4. On 26 October 2011, Unison and other trade unions received notice under section 188 of the 1992 Act from the local authority, Barnet, indicating that it was proposed to delete 77.5 full-time equivalent posts which would place 97 people at risk of redundancy. Barnet decided to commence a 90-day consultation period. It was proposed that redundancy dismissals would take effect by 31 March 2012. In the event, on that date there were around 16 dismissals by reason of redundancy. That was the subject of the complaint before the Employment Tribunal under the 1992 Act.

5. Secondly, there was a TUPE transfer relating to the housing transfer that took place on 1 April 2012 of housing staff from Barnet to Barnet Homes.

6. Thirdly, there was a TUPE transfer on 1 May 2012 of some parking staff from Barnet to an organisation called NSL Limited which is the Second Respondent in the present appeal. We will return to the position of NSL towards the end of this Judgment.

7. The housing transfer and the parking transfer were the subject of the complaints made by Unison under the TUPE regulations.

8. On 1 October 2011 the **Agency Workers Regulations 2010** (SI 2010 No. 1993) came into force and for present purposes had the effect of amending the relevant statutory provisions in both the 1992 Act and TUPE. We will set those pieces of legislation out in due course. However, neither Barnet nor Unison at least at the branch level knew of that amendment at the time. Nevertheless, it is also clear from the facts that Unison did raise the issue of information

around agency workers and specifically referred to "lack of transparency" around such workers in a meeting on 9 November 2011 between Human Resources at Barnet and Unison. Furthermore, there was a meeting of the GNCC on 20 January 2012. It was accepted before the Employment Tribunal by Barnet that it was aware that Unison was unhappy about the information it was receiving about agency workers.

9. In substance, as things transpired, liability was accepted. Certainly before this Appeal Tribunal there has been no dispute about the question of whether there was a breach of the underlying legal obligations in the relevant legislation. The complaints on this appeal have been about the manner in which the Employment Tribunal dealt with the protective or equivalent awards which it should made.

Material legislation

10. Sections 188 to 192 of the **Trade Union and Labour Relations (Consolidation) Act 1992** are relevant to the first part of this case. Under section 188 a duty falls upon an employer who is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, to consult about the dismissals (for material purposes) a relevant trade union which represents those employees. The consultation must include consultation about ways of avoiding dismissals, reducing the numbers of employees to be dismissed and mitigating the consequences of the dismissals and has to be undertaken by the employer with a view to reaching agreement with the appropriate union representatives.

11. For the purposes of the consultation, section 188(4) requires the employer to disclose in writing to the relevant union a number of matters which are set out in paragraphs (a) to (i): they include, for example, the reasons for the proposals, the numbers and descriptions of employees whom it is proposed to dismiss as redundant and (materially to the present appeal) paragraphs

(g), (h) and (i) relate to the specific issue of agency workers. Paragraph (g) requires the information to include the number of agency workers working temporarily for and under the supervision and direction of the employer. Paragraph (h) requires information as to the parts of the employer's undertaking in which those agency workers are working. Paragraph (i) requires information as to the type of work those agency workers are carrying out.

12. As we have already mentioned those last three paragraphs were inserted by way of amendment by the Agency Workers Regulations, which entered into force on 1 October 2011.

13. For present purposes it is open to a trade union which is dissatisfied with the employer's conduct under section 188 to make a complaint to the Employment Tribunal under section 189. If the Tribunal finds the complaint to be well founded it must a declaration to that effect and has a discretion also to make a "protective award"; see section 189(2). Under section 189(3) a protective award is an award in respect of one or more descriptions of employees (a) who have been dismissed as redundant or whom it is proposed to dismiss as redundant and (b) in respect of whose dismissal or proposed dismissal the employer has failed to comply with a requirement of section 188, ordering the employer to pay remuneration for the protected period. By virtue of subsection (4) the protected period begins with the date on which the first of the dismissals to which the complaint relates take effect or the date of the award, whichever is the earlier, and (b) "is of such length as the Tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of section 188." The period cannot exceed 90 days.

14. Section 190 of the 1992 Act makes it clear that where a tribunal has made a protective award every employee of a description to which the award relates is entitled, subject to the provisions of that section and section 191, to be paid remuneration by the employer for the

protective period. There is similar legislation in the context of the TUPE Regulations, in Regulations 13 to 16. TUPE for relevant purposes relates not to consultation but the provision of relevant information. Regulation 13 imposes a duty on an employer to inform (for present purposes) a representative union of any affected employees of various matters which are set out in paragraph (2), sub-paragraphs (a) to (d). They include the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it. They also include the measures which the employer envisages it will, in connection with the transfer, take in relation to any affected employees.

15. By virtue of paragraph (2A), the information now required to be supplied by an employer under TUPE includes suitable information relating to the use of agency workers. That information is defined in sub-paragraph (b) to mean the number of agency workers, the parts of the employer's undertaking in which those agency workers are working and the type of work those agency workers are carrying out. As will be seen these are very similar provisions to the amending provisions inserted into section 188 of the 1992 Act. These provisions also were inserted by way of amendment by the Agency Workers Regulations with effect from 1 October 2011.

16. The TUPE Regulations in material part also provide for a complaint to be made to an Employment Tribunal if, for example, the relevant union considers that there has been a breach by an employer of the requirements of Regulation 13. By virtue of Regulation 15(7) where the Tribunal finds a complaint to be well founded against a transferee it must make a declaration to that effect and may order the transferee to pay appropriate compensation to such description of the affected employees as may be specified in the award. Similarly under paragraph (8) of the same regulation where the Tribunal finds a complaint against a transferor to be well founded it

must make a declaration to that effect and again may order the transferor to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

17. Importantly for the purpose of ground 2 in the present appeal, paragraph (9) of Regulation 15 provides that:

> **"The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph 8(a) or paragraph 11."**

18. Regulation 16(3) defines "appropriate compensation" in Regulation 15 to mean such sum not exceeding 13 weeks pay for the employee in question as the Tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty. As will be seen that terminology is very similar to the equivalent provision in the 1992 Act dealing with a protective award.

Principal authorities

19. A number of authorities were cited both to the Employment Tribunal and to this Appeal Tribunal. However, for present purposes we would hope that it will suffice to set out two in some detail. The first, and recognised to be the leading authority in this area, is the decision of the Court of Appeal in **Susie Radin Ltd v GMB & Others** [2004] ICR 893. The main judgment in that case was given by Peter Gibson LJ. It is unnecessary to set out the background both in the legislative history and the conflicting authorities which to some extent had grown up at the level of this Appeal Tribunal in the years leading up to the decision in that case.

20. Suffice it to say that Peter Gibson LJ drew attention at paragraph 28 to the fact that the origins of the legislation lay in a directive in 1975 from the European Community. As he

observed in that paragraph it is clear that the Employment Tribunal's ability to make a protective award, albeit discretionary, must be taken as intended to fulfil an obligation under European Community law to provide an effective sanction for breach of the employer's obligation to consult.

21. Secondly, it is clear from the judgment of Peter Gibson LJ that an approach which had found favour for a number of years at the level of this Appeal Tribunal, to the effect that the purpose or a purpose of the legislation concerned was to provide compensation for loss suffered by an employee, was disapproved.

22. Drawing the strands together and in order to give guidance in particular to Employment Tribunals Peter Gibson LJ, summarised the position in the following way at 45:

> **"I suggest that Employment Tribunals in deciding in the exercise of their discretion whether to make a protective award and for what period should have the following matters in mind:**
>
> **(i) The purpose of the award is to be provide a sanction for breach by the employer of the obligations in section 188; it is not to compensate the employees for loss which they have suffered in consequence of the breach.**
>
> **(ii) The Tribunal have a wide discretion to do what is just equitable in all the circumstances. But the focus should on the seriousness of the employer's default.**
>
> **(iii) The default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.**
>
> **(iv) The deliberateness of the failure may be relevant as may be the availability to the employer of legal advice as to his obligations under section 188.**
>
> **(v) How the Tribunal assess the length of the protective period is a matter for the Tribunal but a proper approach in a case where there has been no consultation is to start with the maximum period and reduce it only if there were mitigating circumstances justifying a reduction to an extent which the Tribunal consider appropriate."**

23. The other principal authority to which we would make reference at this juncture is the decision of this Appeal Tribunal in **Todd v Strain & Others** [2011] IRLR 11. The judgment was given by the then President, Underhill J, who sat with two lay members. At paragraph 29 Underhill J said:

> **"29 Mr McDowall reminded us of Peter Gibson LJ's point 6 in *Susie Radin* where reference is made to taking the maximum award as the starting point and discounting if appropriate the mitigation circumstances and as we understand it he made the same submission to the Tribunal, but that guidance was directed at the case where the employer has done nothing at all and it should not applied mechanically in a case where there has been some information given and/or some consultation but without using the statutory procedure."**

24. We need in due course to return to that case for other reasons.

The Judgment of the Employment Tribunal

25. At section 6 of its judgment, the Employment Tribunal set out the relevant legislation to which we have already made reference. It then set out its understanding of the relevant authorities; in particular it expressly quoted from paragraph 45 of the Judgment of Peter Gibson LJ in **Susie Radin**; see paragraph 6.12 of its judgment. It recognised in express terms that that was the leading case in this area. It also observed at paragraph 6.13 that the case of **Sweeting v Coral Racing** [2006] IRLR 252 makes it clear that the guidance set out in **Susie Radin** applies equally in a case of failure to consult under the TUPE regulations. Strictly speaking that should be a reference to a failure to provide information under the TUPE regulations but no point has been taken about that in the present appeal before us.

26. Furthermore, at paragraph 6.14 of its judgment the Employment Tribunal quoted expressly from **Todd v Strain** setting out the words which we also have quoted earlier from paragraph 29 of the Judgment of Underhill J. The Employment Tribunal then referred to a number of other authorities which it is unnecessary to rehearse for present purposes. In section 7 of its Judgment the Employment Tribunal set out the rival submissions on behalf of the parties. As it observed at paragraph 7.2 by the time of its decision at least Barnet had come to accept that there had not been compliance with the requirement to give information. When it

came to the issue of the protective award or equivalent compensation at paragraph 7.3 the Employment Tribunal said:

> **"Mr Segal** [Counsel for Unison before the Employment Tribunal and before us] **asked us to start with the maximum when considering the period for the protective award whereas Ms Cohen** [who appeared for Barnet below but not in this Appeal Tribunal] **states that we only do that if there is *no* consultation." (the emphasised word is in the original text of the Judgment)**

27. At paragraph 7.5 the Employment Tribunal said that it understood there to be no significant difference between the parties on the law with these exceptions:

> **"Whether we start with the maximum protective period and work backwards and the description of employees."**

28. At section 8 of its judgment the Employment Tribunal set out its conclusions. At paragraph 8.1 it made a reference to Regulation 15(9) of the TUPE Regulations which concerned joint and several liability, although, for reasons that will become apparent when we consider ground 2 on this appeal, it is not entirely clear what it was saying about that provision or its effect. From paragraph 8.2 it dealt with the principal issue before the Tribunal and before us which related to the question of a protective award or equivalent compensation under the TUPE Regulations. The Tribunal observed that this was a case where there had been some consultation and there had been some information supplied even in respect of the provisions relating to agency workers; in particular section 188(4) paragraphs (g) and (h); see paragraphs 8.2 and 8.3 of its Judgment.

29. Its principal finding of where there had been an breach, although not entirely clear, was at paragraph 8.4 where it found that there had been a breach of the provision in section 188(4) paragraph (i) of the 1992 Act and its equivalent in regulation 13(2A)(b)(iii) of the TUPE Regulations.

30. Paragraph 8.5 of the Judgment is central to the dispute between the parties in this appeal and must be set out in full:

> **"For these purposes we consider together all matters raised (the redundancies and the two transfers) before deciding what it is appropriate to award. In general terms we accept that we have to consider what is just and equitable. The guidance contained within *Susie Radin* is quite clear and we must consider the seriousness of the breach. We also accept that *Susie Radin* indicates that we start with a maximum only where there is no consultation and that cannot be said to be the position in this case** [we interpose only to say that Mr Cavanagh QC, who has appeared for the Appellant in this appeal hearing, accepted that if the Employment Tribunal had stopped there he would have had no arguable basis for saying that they had fallen into error as a matter of law]**. Having said that we are not quite sure where we should start if we do not start with the maximum and work down. It was not put to us by either of the Respondents' representatives that there was a better place to start and given that in our view this is a relatively serious failure we do indeed start with the maximum."**

31. It is the latter passage which is the subject of the complaint on this appeal under ground 1.

32. The Employment Tribunal then proceeded to set out the factors which it took into account in deciding what sort of awards to make; see paragraph 8.6. It regarded the breaches in this case as being relatively serious as we have already observed. It considered that the information was relatively easy to produce, that the employer was aware that the trade unions wanted the information and that it was central in its view to the consultation process. It therefore decided that it was appropriate to make a protective award under section 188 of the 1992 Act and compensation under the TUPE Regulations. However, as it explained at paragraphs 8.7 to 8.9 it considered that there were some differences between the three events under consideration which meant that in its view the award should be different in each case. Having set out what it considered to be relevant factors it decided to make an award in relation to a protective period of 60 days from 31 March 2012 in respect of the redundancies issue. Secondly, in relation to the housing transfer it considered that compensation in the order of 40 days pay would be just and equitable in all the circumstances. Thirdly, in relation to the

parking transfer it considered that this was not as serious as the redundancies issue but was more serious than the housing transfer issue and accordingly awarded compensation equivalent to 50 days pay.

Ground 1 in the appeal

33. The fundamental submission which Mr Cavanagh QC has made on this appeal is that at paragraph 8.5 of its judgment the Employment Tribunal misdirected itself in law. He submits that the Tribunal was clearly directing itself as to the legal approach which it should take to the question of a protective award or equivalent award of compensation under the TUPE Regulations. He submits that it fell into error as a matter of law and therefore, although there is no perversity challenge on this appeal, he does not need to have one. He submits that if there has been a misdirection of law of the type alleged then this appeal should be allowed for that reason alone. We will return later to the issue of whether if the appeal is allowed the matter should be remitted to the Employment Tribunal or not.

34. On behalf of Unison Mr Segal QC submits that there was no error of law in the approach taken by the Employment Tribunal. He submits that it is not appropriate to take one or two sentences in isolation and out of context. He submits that when paragraph 8.5 is read as a whole, and in particular when it is read in the context of the reasons of the Tribunal in section 8 as a whole, it cannot realistically be said that the Tribunal fell into error as alleged.

35. He submits that the Tribunal was not using the concept of a starting point towards the end of paragraph 8.5 to mean that that was the award which should be presumptively made subject to reduction for reasons of mitigation. He submits that it is clear that the Tribunal was well aware that the **Susie Radin** case indicated that that approach should only be taken where there had been no consultation at all; see the middle of paragraph 8.5, and also the quotations from

the authorities which it had already set out at paragraph 6.12 and 6.14 of its Judgment, in particular the reference to the "slight gloss" placed by Underhill J in **Todd v Strain** on the guidance given in **Susie Radin**.

36. Mr Segal submits that in many walks of life, for example sporting events or school examinations, someone who is making an assessment must start somewhere. It was perfectly appropriate, he submitted, to start at one end of the spectrum or the other and then explain how the assessor has moved back or forwards from that end of the spectrum. He submits that that is all that the Tribunal was seeking to do in the two sentences towards the end of paragraph 8.5 about which Mr Cavanagh has complained in this appeal.

37. We do not feel able to accept those submissions by Mr Segal. We do not consider that these passages can simply be regarded as an infelicity of language. We accept the central submission made by Mr Cavanagh that the Tribunal was having difficulty in understanding how it should approach the question of a protective award. It did indeed have regard to the guidance in **Susie Radin** and **Todd v Strain** which it correctly summarised earlier in its judgment and correctly summarised again up to the middle of paragraph 8.5, but in what we regard as to be sentences which were not simply asides but which were crucial to the understanding by the Tribunal of its role, it began the next passage with the words, "having said that, we are not quite sure where we should start if we do not start with the maximum and work down." Furthermore, we are not able to accept the submission by Mr Segal that what the Tribunal was doing was simply identifying a scale and saying that it would start its consideration by looking at the maximum that it could award in law; this is particularly because of its use of the phrase in the final sentence of paragraph 8.5, "given that in our view this is a relatively serious failure we do indeed start with the maximum."

38. Furthermore, Mr Segal fairly accepted during the course of this hearing that, if his submission were correct, the Tribunal must be taken to have been using the phrase, "start with a maximum" in two different ways in the very same paragraph. Earlier when it was outlining the effect of the guidance in **Susie Radin** it must be taken on Mr Segal's submission to mean "start with" in the sense of presumptively make an award subject to any reduction for mitigation. However, on his submission, when it used the very same phrase towards the end of the same paragraph it must be taken to mean not that but rather something different. We do not feel able to accept that, reading the reasons of the Tribunal fairly and as a whole, that is the correct way of interpreting paragraph 8.5.

39. Accordingly, the conclusion to which we have come is that the Tribunal did fall into error as a matter of law in its approach to the question of a protective award or equivalent compensation under the TUPE Regulations. Therefore as we will summarise at the end of this Judgment the appeal will succeed on ground 1.

40. We next have to consider the consequences of allowing the appeal on that ground. Mr Cavanagh submitted that we should reserve the matter to ourselves. Alternatively he submitted that if this Appeal Tribunal remitted the case to the Employment Tribunal it should so to a differently constituted one. We do not accept those submissions. As Mr Cavanagh fairly accepted the matter is very much within the discretion of this Appeal Tribunal. In the circumstances of this case we consider that the appropriate and just course to take, having allowed the appeal on ground 1, is to remit to the same Tribunal as before for reconsideration in accordance with this Judgment as to the correct direction that the Tribunal should have given itself at paragraph 8.5. As we have already indicated, and as Mr Cavanagh accepted at this hearing, if the Tribunal had directed itself in accordance with the passage which we have quoted from paragraph 8.5 before the last two sentences which begin, "having said that" there

would have been no error of law in its approach. The error of law was made because of the self-direction it gave in the ensuing passage towards the end of paragraph 8.5. It should therefore reconsider the matter in accordance with the correct direction as we have indicated it to be.

41. As Mr Segal has observed before us, remission is very often the outcome when this Appeal Tribunal allows an appeal by reason of a misdirection of law of this kind. There will be instances of course where the parties may agree, for example, that for reasons of cost or convenience this Tribunal should substitute its own decision as to the merits. That was done in some cases to which our attention has been drawn including **Todd**.

42. Proportionality is also a relevant consideration but in this case, as we have been informed, the amount at stake of the awards concerned is something like £850,000. Furthermore, we are very conscious that although we do have the findings of fact of the Tribunal set out on paper, we do not necessarily have the same feel for the evidence that the Tribunal will have, having conducted a hearing lasting two days. Finally, Mr Cavanagh made the observation that there was a risk at least that human nature being as it is there might be a temptation, if only subconscious, without any risk of bias, for a Tribunal to come to the same decision as it previously reached. Having considered all the circumstances of the present case and the submissions of the parties, we do not consider that to be a "live risk", as he called it, in the present case. Rather, we would regard it as unfortunate if a differently constituted Tribunal had to consider this matter because it would not have the benefit of having considered the evidence previously and that would no doubt lead to some inconvenience and cost to the parties which we would wish to avoid if possible. For those reasons we propose at the end of this Judgment to remit the appeal in relation to ground 1 so that it can be reconsidered in the light of this Appeal Tribunal's judgment.

Ground 2 in the appeal

43. We can deal with this ground more briefly. This does not concern any dispute between the Appellant and Unison, rather it concerns a dispute between the Appellant and the Second Respondent, NSL Ltd. NSL Ltd does not appear before this Tribunal at this hearing, however it did submit written grounds in the Respondent's answer in which it also made a cross-appeal.

44. The essential submission which Mr Cavanagh makes on behalf of the Appellant under this ground is that the Tribunal erred in law because it failed to make a declaration that both the local authority, Barnet, and the transferee in relation to the parking transfer, NSL Ltd, were jointly and severally liable for breach of the TUPE Regulations in accordance with Regulation 15(9), which we have already set out.

45. We find that ground to be made out. There was no resistance to it because it does not directly concern Unison but Mr Segal helpfully assisted this Tribunal by saying that he also agreed with that analysis. Clearly that is the effect of Regulation 15(9) of the TUPE Regulations and for some reason, which it is not entirely easy for us to fathom, the Employment Tribunal simply failed to act in accordance with that legislative provision. Accordingly in our view, subject to any submissions that counsel may wish to make as to remedies, a declaration should be made by this Tribunal reflecting the joint and several liability point. However, there is one other matter we need to address.

46. In its cross-appeal NSL Ltd asked this Tribunal to make a finding that would apportion liability as between Barnet and itself. We do not feel to accept that submission which has been made in writing to this Tribunal.

47. In that context we would return to the decision of this Tribunal in **Todd v Strain** in which Underhill J dealt with Regulation 15(9) of the TUPE Regulations at paragraphs 33 to 35 of his Judgment. He stated that the terms of Regulation 15(9) are unequivocal. Furthermore, he said at paragraph 35 that any question of apportionment of liability was not a matter for the Employment Tribunal but rather for the ordinary courts of if it became necessary to determine the point. That point was also recently endorsed by this Tribunal in **Country Weddings Ltd v Crossman & Others** (Appeal No: UKEAT/0535/12/SM) in a Judgment given on 30 April 2013 by HHJ Serota QC sitting with two lay members. At paragraphs and 3 and 7 Judge Serota made it clear by reference to **Todd v Strain** that any question of apportionment on liability is a matter not for the Employment Tribunal but rather for the ordinary courts under the provisions of the **Civil Liability Contribution Act 1978**. We would respectfully agree. Accordingly we would allow this appeal on ground 2 also. However, because in our judgment ground 2 is clearly made out and does not call for any further decision to be made by the Employment Tribunal we do not remit this case to the Employment Tribunal so far as it concerns ground 2.

Conclusion

48. In the result therefore for the reasons we have given this appeal is allowed on both grounds. In relation to ground 1 only it is remitted to the Employment Tribunal to reconsider in accordance with the judgment of this Appeal Tribunal.