Appeal No. UKEATS/0002/14/SM

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 30 April 2014

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

LLDY ALEXANDRIA LTD (FORMERLY LOCH LOMOND DISTILLERY COMPANY LTD) — APPELLANT

(1) UNITE THE UNION — FIRST RESPONDENT
(2) PEOPLEFORWORK LIMITED — SECOND RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellant	Mr B Campbell (Solicitor) Brodies LLP 2 Blythswood Square Glasgow G2 4AD
For the First Respondent	Mr A Tinnion (of Counsel) instructed by: Thompsons Solicitors Berkeley House 285 Bath Street Glasgow G2 4HQ
For the Second Respondent	Mr John Lee (Solicitor Advocate) DWF Biggart Baillie No 2 Lochrin Square 96 Fountainbridge Edinburgh EH3 9QA

SUMMARY

TUPE Regulations 2006: reg 13(2).

The first respondent decided to outsource part of its activities to the second respondent. The claimant is a Trade Union, representing the workers affected by the transfer. It claimed that TUPE reg 13(2) was breached in that not all of the reasons for the decision to transfer were provided to it. The claimant had been in discussion with the first respondent about a pay rise. No agreement had been reached and the claimant asserted that the first respondent decided on the transfer because of the dispute, and because the managing director had stated that if no agreement was reached he would outsource the work. Further and in any event the information given to the claimant was not given long enough before the transfer to enable consultation between the claimant and the first respondent. The claimant sought a declaration and award of compensation under TUPE reg 12. The ET made the declaration on both counts and adjourned the question of remedy to a later hearing.

The first respondent appealed arguing that the ET had erred in law by deciding that the first respondent had a duty to consult, as provided for in reg 13 (6), despite no such argument being before it; that it erred in law in deciding that the first respondent had decided on the transfer due to the dispute or due to the managing director's words; that it erred in law in deciding that the information provided was not provided long enough before the transfer to enable consultation. The second respondent supported the appeal.

The claimant argued that the ET was entitled to reach its decisions.

Held: The ET did not decide that the first respondent had a duty to consult under reg 13(6), that regulation not being engaged. The ET was entitled to find that the dispute and the intention

expressed by the managing director were reasons for the decision. It was entitled to find that the reasons given did not include all of the reasons. The ET was entitled to find that the information was not provided long enough before the transfer to enable consultation between the claimant and the first respondent. Appeal refused.

THE HONOURABLE LADY STACEY

1. This is an appeal by LLDY Alexandria Limited, which was the first respondent in the Employment Tribunal (ET). Unite the Union was the claimant and Peopleforwork Limited was the second respondent. I will refer to the parties as claimant, first and second respondent as they were in the ET.

2. The ET comprised Employment Judge Garvie, Mr R McPherson and Mr R Taggart. The decision against which appeal is sought was notified to parties on 14 October 2013. It is in the following terms:-

> **"The unanimous judgment of the Tribunal is that the complaint that there was a failure in the duty to inform and consult representatives as set out in regulation 13(2) of the Transfer of Undertakings Protection of Employment Regulations 2006 succeeds, and the claimant is entitled to a declaration under regulation 12 of the said regulations since the Tribunal has found the complaint to be well founded, and that, with the agreement of the representatives, the award of compensation will be determined at a remedy hearing which is to be arranged."**

At both the ET and the EAT, the claimant was represented by Mr A Tinnion, counsel, the first respondent was represented by Mr B Campbell, solicitor and the second respondent by Mr J Lee, solicitor advocate.

The issues

3. The issues before me were whether the ET was entitled to decide that the first respondent had not given all of the reasons for its deciding to outsource its spirit-handling work; whether the first respondent provided information long enough before a relevant transfer to enable it to consult the representatives of the affected employees; and lastly, in light of the decision, if the ET had erred in law by deciding that the first respondent had a duty to consult, which was not a question before it. All of these matters arise from the terms of regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). It is

convenient to note the terms of that regulation as follows:-

> **"13. – Duty to inform and consult representatives**
> **(1) In this regulation and regulations 13A, 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transferor or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.**
> **(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of –**
> **(a) the fact that the transfer is to take place, the date proposed date of the transferor and the reasons for it;**
> **(b) the legal, economic and social implications of the transfer for any affected employees;**
> **(c)the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and**
> **(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.**
> **(2A)…**
> **(3)…**
> **(4) the transferee shall give the transferor such information at such a time as will enable the transferor or to perform the duty imposed on him by virtue of paragraph (2) (d).**
> **(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them, or sent by post to an address notified by them to the employer, or (in the case of representatives of trade union) sent by post to the trade union at the address of its head or main office.**
> **(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking the agreement to the intended measures.**
> **(7) in the course of those consultations the employer shall –**
> **(a) consider any representations made by the appropriate representatives; and**
> **(b) reply to those representations and, if he rejects any of those representations state his reasons.**
> **(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.**
> **(9) If in any case there are special circumstances which rendered it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take such steps towards performing that duty as are reasonably practicable in the circumstances.**
> **(10)…**
> **(11)…**
> **(12)…"**

The controversy in this case arises out of a decision by the first respondent to outsource its spirit handling work to the second respondent. That decision triggered the provisions of regulation 13 of TUPE. The claimant, which is an independent trade union, brought a complaint in relation to an alleged failure to inform and consult with the claimant as a recognised trade union. It sought a declaration that the respondents failed in their duty to inform and consult in contravention of regulation 13 of TUPE.

Background

4. The following facts are a summary taken from the ET's findings. The first respondent is a drinks company, engaged in the manufacture of whisky and operating a distillery and bonded warehouse. In 2011 its second largest customer went elsewhere, causing profits to reduce from about £8 million to about £5 million.

5. During August and September 2011 the claimant was involved in an application to the first respondent in respect of pay and conditions. In or around March 2012 the first respondent offered the members of the claimant a 3% pay rise. The union officials dealing with the matter were Mr Burns, a shop steward and Mr Parker, a regional officer. Later Mr Jordan also a regional official became involved as Mr Parker was on holiday. Mr Parker attended meetings with the managing director of the first respondent, Mr Jagielka and with Mr Peterson, a member of the first respondent's staff. Mr Parker was of the view that the 3% offer was something that the members should consider. They did so and rejected the pay offer. The first respondent arranged a meeting for 30 March 2012 which Mr Parker attended along with Mr Jagielka and Mr Burns. Mr Parker gave evidence at the ET to the effect that Mr Jagielka was upset that the 3% offer had been rejected. His evidence was that Mr Jagielka said that pay negotiations with the union members "never ran smoothly" and he was "getting fed up with it". His position was that he would give the union members a last chance to accept the offer but if it was rejected he would rescind the offer. Mr Parker stated that he would recommend that members would accept the offer. Nevertheless the members rejected the offer.

6. Mr Parker's evidence was that he had a telephone conversation with Mr Jagielka after the rejection of the offer, in April 2012, in which Mr Jagielka said that he was fed up and was left with no option but to subcontract the work. Mr Jagielka asked Mr Parker to be sure that the

members understood the position. He said that 3% was fair and was in line with the industry. Mr Parker stated that Mr Jagielka was being a bit hasty and that he was issuing a threat. Mr Parker explained the position in a letter to Mr Burns. The members of the claimant wrote to him on 24 April 2012 rejecting the offer and pointing out that they thought that the company was trying to bully the members by making threats.

7. The directors of the first respondent wrote to the members of the claimant by letter dated 1 May 2012 stating that the 3% offer would be withdrawn on 11 May 2012 if not previously accepted. The claimant replied by letter dated 3 May 2012 reiterating that they rejected the offer and stating that they felt they were being constantly bullied and threatened. On 20 June 2012 the claimant advised the first respondent that industrial action would take place in the shape of a discontinuous strike between Thursday 28 June and Tuesday 17 July 2012. Thereafter there was correspondence between Mr Peterson and Mr Parker. They agreed to seek assistance from ACAS and to postpone strike action.

8. The first respondent by letter of 22 June 2012 told affected employees that it intended to transfer its spirit handling functions to the second respondent. The letter is in the following terms:

> **"Dear**
>
> **Further to our announcement on 22 June 2012 I am writing to confirm that Loch Lomond Distillery is transferring spirit-handling activities to Peopleforwork Limited.**
>
> **We believe that this amounts to what is known as a "relevant transfer" under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (referred to in the this letter as the "Regulations"). By virtue of the regulations, we are required to provide you, the employees affected by the transferor, with certain information. The information is as follows.**
>
> **1. Fact of the Transfer**
> **Lomond Distillery is transferring spirit-handling activities to Peopleforwork Limited.**
> **2. Likely date of the Transfer we intend that the transfer will take place on the 2 July 2012.**
> **3. Reason for the Transfer**
> **The last year or so has been a difficult time for the Company. Over that time we have lost around 3million litres of blended whisky sales from 2 biggest customers. With the economic recession likely to continue, the level of activity in the warehousing/bond is much reduced.**

The situation is liable to grow worse when the minimum pricing of alcohol becomes law in April 2013. This is likely to result in reduced sales for High Commissioner. This will mean that the company will have to sell more new make spirit direct from the distillery, rather than put it into casks, mature it and then sell it as blend.

It is clear that the Company will require more flexibility in warehousing/blends area. Against a background of increasing costs, e.g. stop raw materials and energy, the Company must take all available measures to reduce operating costs and maintain a viable business.

The Company has identified contracting out of spirit handling activities as a way of reducing operating costs and has decided to award the contract to Peopleforwork Limited.

4. Legal implications of the transfer for the affected employees.
As we have said, we believe that the Regulations apply to this change.

This means that the employees who are working in the spirit-handling activities will transfer to Peopleforwork Ltd on their existing terms and conditions of employment.

However the employees' entitlement to membership of Loch Lomond Distillery pension scheme may cease on transfer. This is because any rights, duties and powers and liabilities in relation to an occupational pension scheme do not transfer by virtue of the regulations.

The employee's statutory continuity of employment will be preserved their previous continuous service with Law Lomond Distillery will transfer to the employment with Peopleforwork.

5. Social implications of the transfer for the affected employees.
We do not believe that there are any social implications of the transfer.

6. Economic implications of the transfer for the affected employees.
There will be no economic implications in regard to remuneration.

The employees' entitlement to membership of the Loch Lomond Distillery pension scheme may cease on transfer. Peopleforwork Ltd proposals in respect of pensions are set out in 8 below.

7. Measures that Loch Lomond Distillery will take in relation to the affected employees.
We do not envisage taking any measures in relation to the affected employees that are connected to the transfer.

8. Measures that Peopleforwork Ltd will take in relation to the affected employees.
We envisage that Peopleforwork will take the following measures in relation to the affected employees that are connected to the transfer.

- **Peopleforwork will evaluate the operational structure of the department and may implement restructuring; redundancies may result in the restructuring.**
- **If the LLD pension scheme is not available (we are in discussions) a similar scheme will be put in place to cover those employees currently in the LLD scheme.**

We would like to hold a meeting with employee representatives on Tuesday 26th June 2 p.m. in order to consult with you about the information we have provided in this letter, to answer your questions and seek your views.

This consultation is a legal requirement under the Regulations because we are proposing to take measures in connection with the transfer which relate to the affected employees and your full participation will be welcomed.

Loch Lomond Distillery is determined to ensure that we achieve a smooth transition and keep you fully informed about the transfer plans. We aim to keep the affected employees advised of the situation as matters progress.

Yours sincerely

On behalf of Loch Lomond Distillery"

9. I note that the letter is internally inconsistent in that it states that Loch Lomond Distillery does not envisage taking any measures in relation to the affected employees that are connected to the transfer, but it also states that consultation is a legal requirement under the Regulations because we [Loch Lomond Distillery] are proposing to take measures in connection with the transfer which relates to the affected employees. Nothing was made of this before me, nor so far as I can tell before the ET.

10. Mr Parker wrote to Mr Peterson on 27 June 2012 asking him to reconsider the decision to put the members' jobs out to a private contract. He stated that if the decision were to be reversed, the members would accept the 3% increase. There was also correspondence in which Mr Burns explained that he needed a full time union official to assist on the matter of the regulations and on 29 June 2012 Mr Henry, the first respondent's warehouse manager, on behalf of the first respondent agreed to postpone the proposed transfer day to enable members to meet with a regional officer. Mr Jordan was available and a meeting was held on 4 July 2012.

11. On 1 July 2012 a collective grievance was submitted by the claimant asserting that ACAS conciliation was proposed in order to allow the transfer to take place before industrial action was taken.

12. A meeting was held on 4 July 2012. Mr Henry stated that the first and second respondents had been in discussion for the previous nine months with regard to transfer of the operation, with the decision being made concrete around four months previously. According to Mr Henry's evidence about the meeting, the implications for the affected staff were discussed as was the impact on pension terms and conditions, redundancies and the degree of cost saving. Questions were asked by the staff about Christmas bonuses, Christmas bottles and the staff

shop entitlement. There was also discussion about why the warehouse and not the distillery was affected. Mr Henry wrote by letter dated 5 July 2012 to the members confirming that the transfer would take place on 9 July 2012. He explained that from that date the employer would be the second respondent and employment with the first respondent would cease but continuous service would not be broken. Mr Henry's evidence was that the decision to transfer the spirit handling operation was taken by the first respondent but as he was not privy to board meetings he could not give an exact date. He thought that matters had been considered by the directors between January and April and the decision taken in May.

The case for the claimant

13. The case raised by the claimants before the ET was that the first respondents had breached regulation 13(2) of the TUPE Regulations in two ways as follows:-

1. The reasons claim: the first respondent breached its duty to inform the claimant of the reasons for the transfer by failing to inform the claimant that the real reason was the making good of a threat made by Mr Jagielka to Mr Parker in April 2012 to subcontract the work;
2. The consultation claim; the first respondent provided the information in the letter of 22 June 2012 only 10 business days before the TUPE transfer on 9 July 2012. That was not long enough to enable proper consultation.

14. It was argued that the first respondent had a duty to inform all affected employees of the reasons for transfer and it was emphasised that that was not just the principal reason, or one reason, but all reasons. Thus it was submitted that if an employer had more than one reason parliament's intention must have been to impose an obligation on the employer to disclose all such reasons. The claimant's position was that the refusal of the claimant's members to accept the 3% offered had led to Mr Jagielka threatening to outsource the work. Thus, it was argued,

the continuing failure of the claimant members to accept the offer led to the work being outsourced. Further, Mr Jagielka wished to carry out the threat he had made. The letter did not state that, and therefore did not give all the reasons for the proposed transfer.

15. It was argued that Mr Jagielka had not given evidence; the first respondent had led evidence only from Mr Henry. Mr Henry was not a board member and was two levels below Mr Jagielka. Mr Parker did give evidence, and spoke to the telephone conversation in which according to him Mr Jagielka made the threat. The ET should draw an inference that the threat was one of the reasons for the transfer. If that was not so, then the first respondent could have led Mr Jagielka to say so. It was argued that the ET was entitled to draw an adverse inference from the fact that evidence had not been led under reference to the case of **Benham Limited v Kythira Investments Limited [2003[EWCA Civ 1794**.

16. It was submitted that the first respondent admitted that not all reasons for the transfer were disclosed and the issue before the Tribunal was whether the reason that the claimant alleges was one of those undisclosed reasons. Mr Henry accepted in evidence that one of the reasons for transfer was because he did not have the expertise to do a cost cutting exercise by restructuring, and that was not mentioned. He said he did not think it was relevant. The admission showed that the first respondent was content to miss out such reasons as it thought were irrelevant. It was argued that there was clear evidence that the managing director, Mr Jagielka had said that he was fed up and he had threatened to outsource the claimants work if they did not settle their wage claim. The ET should draw an inference that the dispute and the threat were reasons for the decision to outsource.

17. It was argued that consultation meant consultation on proposals which were still at a formative stage, and that there had to be adequate information for the union to have meaningful

consultation and adequate time in which to respond. The authority for that was the case of **Cable Realisation Limited v GMB (2010) IRLR 42**. It was argued that both respondents were under a duty to consult, but even if there was no legal duty to do so, the first respondent was under a duty to provide information long enough before the transfer to enable it to engage in voluntary consultations. It was argued that the purpose of regulation 13(2) was not merely to put at ease the minds of employees affected by change but was designed to allow the representatives of those employees to engage in consultation with the employer on an informed basis. It was accepted that there was no definition of the time other than the time "long enough", under reference to the case of **I Lab Facilities v Metcalfe (2013) IRLR 605**.

The case for the first respondent

18. It was submitted that there was not enough evidence to show that the threat had been made. Even if it was made, there was not enough evidence to show that the dispute or the threat or either of them were reasons for the decision. It all amounted to no more than a suspicion. The contention was undermined by the fact that even after the claimant accepted the pay rise which had previously been offered the transfer still went ahead. Reference was made to the case of **Royal Mail Group Limited v Communication Workers Union (2010) ICR 83** which the court upheld the judgment of the ET to the effect that the requirements of regulation 13 were met by the employer giving information which in its genuine belief was correct even if it was subsequently determined that the information was erroneous. In any event, the letter did mention the cost saving achieved by out sourcing which was sufficient information.

19. The timing was sufficient. The date of transfer had been postponed to accommodate the claimant who wished a full time official to be present. Various questions were asked and answered. Thus there had been meaningful consultation.

The decision of the ET

20. The ET began its discussion of the information provided in the reasons letter at paragraph 148. It found that the refusal to accept the 3% offer was one of the reasons for the outsourcing. That is a question of fact. The ET came to its view after consideration of the extensive submissions that had been made to it and which it reproduces in its written reasons. It considered the oral evidence and the documentary evidence put before it. It was not contended before me that the ET had acted perversely in so finding. That being so, there is no basis for the EAT to interfere with the fact finding function of the ET.

21. At paragraph 170 the ET turned to the second issue which it described as "the consultation claim". It found that the wording of regulation 13 (2) "carries a strong implication that the duty to inform and the duty to consult are interlinked." It referred to the heading of the regulation, which is "Duty to inform and consult representatives". It concluded that "there is an obligation both to inform and to consult, notwithstanding there is no claim to the effect that regulation 13(6) was breached is set out on (sic) in the claim."

22. In paragraph 171 the ET stated the following: –

> **"In reaching this conclusion the Tribunal considered that the approach adopted by the Employment Appeal Tribunal in *Cable* (see above) is binding on this Tribunal and that Regulation 13 (2) is designed to allow the representatives of the affected employees to engage in consultation about a wide range of matters, even where as here, consultation was entered into on a voluntary basis rather than as a result of the mandatory requirement set out in regulation 13 (6)."**

23. The tribunal then went on to state that it was not persuaded that the meeting on 4 July did afford enough opportunity to the claimant and its members to engage in meaningful consultation. It noted that the meeting took place in the mid afternoon of Wednesday 4 July, 48 hours before the first respondent's close down at 3.30 p.m. on Friday 6 July for the weekend, the transfer taking place the following Monday 9 July. The ET found that there was no

evidence why the transfer could not be postponed. At paragraph 173 it stated the following: –

> **"The issue therefore was whether the first respondent informed the claimant long enough before the transfer to enable proper consultation to take place. Against this, that is no doubt that information was provided, albeit not all reasons were provided, (see above). To a large extent given the terms of the letter of 22 June 2012, following a meeting on 4 July 2012 which lasted approximately one and a half hours, there was information available to the claimant and its members. The first respondent accepted that the original meeting was postponed as the workplace representatives were not in a position to deal with matters themselves as, understandably, they wanted to have a full-time official present."**

24. The ET made reference to the case of **R v British Coal Corporation ex.p Price [1994] IRLR 72** which is referred to in the case of **Cable**. The ET quoted in paragraph 175 paragraph 37 of **Cable** but made no reference to paragraph 38, which qualifies the preceding paragraph. The relevant part of the case is in paragraph 38, as follows:-

> **"….In order to engage fully in a meaningful consultation exercise it was essential that the union side representatives were available to speak with management and that those representatives could communicate with the members of the represented. That was not practicable during the shutdown as the transferor must have known. In those circumstances we agree with Mr Goldberg that the employment tribunal was entitled to take into account the effect of the shutdown in answering the "long enough" question posed by regulation 13 (2)."**

25. The first respondent argued that the ET did not give clear reasons for its findings. I have some sympathy with that submission in that it seems to me that it is not entirely clear what the ET finds. It does make it clear in paragraph 177 as follows: –

> **"In all the circumstances, the Tribunal concluded that the claimant's submission is well founded and they are entitled to the declaration sought to the effect that the respondents breached the duty to inform and consult in that they failed to provide all the reasons for the transfer and that, in relation to the information provided, this was not long enough before the transfer to enable meaningful consultation to take place."**

The issues argued before the EAT

26. I am not persuaded that the ET has made a finding that the first respondent had a duty to consult. If it had then that would have been an error of law. It is clear, however, that the ET understood that there was no allegation before it that the first respondent had any duty to consult as provided for by regulation 13 (6). It did find that in accordance with the case of **Cable**, the first respondent had a duty to provide information long enough before the transfer to allow consultation. It is clear from the case of **Institute of Civil Servants and others v**

Secretary of State for Defence [1987] IRLR 373, which was also before the ET that the consultation under regulation 13 (2) is voluntary. Further, it is clear from the case of **I Lab Facilities Limited v Metcalfe and others**, referred to above, that the duty to provide information arises if a transfer is to take place. That is not a duty to provide the information as soon as the decision is made but rather a duty to provide information in time to allow consultation with representatives. I respectfully adopt what was said by Underhill J (as he then was) at paragraph 20 of that case as follows: –

> **" It is necessary to appreciate that the time at which an employer must comply with the obligations under regulations 13 (2) and (6) is not defined by reference to when he first envisages that he will take the relevant "measures". Rather, the obligation is to take the necessary steps "long enough before" the transfer to allow consultation to take place. That being so, it can never be said definitively that the employer is in breach of that obligation until the transfer has occurred."**

27. It was therefore for the ET to decide whether in all the circumstances of the case if the information was provided long enough before the transfer. That is a question of fact and the ET in this case decided that it did not. I was to some extent concerned at paragraph 175 which tends to suggest that the ET thought that the consultation had to be at the stage when the proposals were at a formative stage. I do not find any warrant for that in the legislation or in the case of **Cable**.

28. I do not find however that the ET was unaware of that. It asked itself the question, in paragraph 176, if the information was given long enough by being given 48 hours ahead of an early closing for a weekend. It answered the question in the negative. It was entitled so to do.

29. The ET found that the existence of the dispute about the pay rise and the threat made by Mr Jagielka were among the reasons for the decision to outsource. That is a question of fact. It was not argued before me that the decision made by the ET was perverse. It is clear from the written reasons that the matter took some considerable time before the ET, which comprised an experienced employment judge and lay members. There were complicated submissions made

before the ET and to some extent before me on what should be a relatively simple matter of fact. It was for the ET to decide if the managing director made the threat Mr Parker said he made. There was no evidence to contradict Mr Parker and so would not be difficult for the ET to find that his evidence was acceptable. The existence of the industrial dispute was not in dispute. It was then up to the ET to decide, if the threat was made, and on the basis that the industrial dispute did exist, whether these two things were reasons for the transfer. They did not require to be the only reason but if they were reasons at all then they required to be mentioned. Once again, that is a matter of fact for the tribunal to decide. The next point which the tribunal had to decide was whether, if these things that were part of the reasons, were they mentioned in the letter. As can be seen from the terms of the letter, the costs savings achieved by outsourcing were mentioned. That is a broad reference to the cost of the work which was to be outsourced. It would, however, have been a simple matter for the writer of the letter to have expanded on that and to have stated that the existence of the industrial dispute, and the view taken by the managing director of that failure to settle it would result in outsourcing were relevant in the decision making. He did not do so. The question before me is whether the ET was entitled to take the view that absent direct mention of these matters, which they found to be reasons, the first respondent was in breach. I am conscious that the ET had the advantage I did not of hearing the evidence. The ET also had experienced lay members, bringing their own knowledge of industrial practice. The decision it reached was one it was entitled to reach. It could not be said that the decision was made in error of law.

30. I therefore refuse the appeal. The ET continued the matter for a remedy hearing and I therefore remit it for that purpose.