Appeal No. UKEAT/0127/13/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 31 January 2014
Judgment handed down on 4 April 2014

Before

THE HONOURABLE MRS JUSTICE COX DBE

MR D BLEIMAN

DR B V FITZGERALD MBE LLD FRSA

JACKSON LLOYD LTD AND MEARS GROUP PLC — APPELLANTS

(1) MR S SMITH & OTHERS
(2) UCATT
(3) MR D WILLIAMS & OTHERS — RESPONDENTS

Transcript of Proceedings

JUDGMENT

© Copyright 2014

APPEARANCES

For the Appellants	MR RICHARD SHEPHERD (of Counsel) Instructed by: Sherbournes Solicitors LLP 10 Royal Crescent Cheltenham GL50 3DA
For the First & Second Respondents	MS ASSUNTA DEL PRIORE (of Counsel) Instructed by: Messrs O H Parsons & Partners Solicitors 3rd Floor, Sovereign House 212-224 Shaftesbury Avenue London WC2H 8PR
For the Third Respondents	MS ASSUNTA DEL PRIORE (of Counsel) Instructed by: Hill Dickinson LLP Solicitors 1 St Paul's Square Liverpool L3 9SJ

<u>SUMMARY</u>

TRANSFER OF UNDERTAKINGS – Transfer

An appeal by the Appellant companies against the Employment Tribunal's decision that there was a TUPE transfer under Regulation 3(1)(a) and that individual Claimants had locus and were entitled to bring protective award claims in their own names.

No error of law was found to be disclosed in the Tribunal's reasoning or conclusions on either transfer or locus and the appeal was dismissed.

THE HONOURABLE MRS JUSTICE COX DBE

Introduction

1. The Appellants, Jackson Lloyd Ltd and Mears Group Plc, are appealing against the judgment of the Liverpool Employment Tribunal, sent to the parties on 20 December 2012, in which they held: (1) that on 1 October 2010 there was a relevant transfer under Regulation 3(1)(a) **Transfer of Undertakings Protection of Employment Regulations 2006** (TUPE) from Jackson Lloyd Ltd to Mears Group Plc; and (2) that all the Claimants save one had locus standi and were entitled to pursue their claims for protective awards.

2. At a preliminary hearing before the Employment Appeal Tribunal the Appellants were permitted to pursue to full hearing the following grounds of appeal:

(1) That the Tribunal erred in failing to provide a concise statement of the applicable law; and in failing to apply the correct legal test under Regulation 3(1)(a) TUPE, namely the multifactorial test; or in failing to provide sufficient and clear reasons for their decision that there was a relevant transfer (the "TUPE transfer" point).

(2) Alternatively, that the Tribunal erred in finding, in the event that there was a transfer, that the transfer was to Mears Group Plc itself and not to Mears Ltd, its subsidiary (the "transferee" point).

(3) That the Tribunal erred in finding that the representative committees at Jackson Lloyd had no mandate to act for those that they represented after the expiry of their terms of office, and that the relevant Claimants had locus standi (the "locus" point).

3. Prior to the hearing before us a dispute arose as to whether witness statements and other documentary evidence adduced before the Employment Tribunal should be included in the EAT bundle, as the Appellants requested. We did not pre-read any of the evidential material submitted by the Appellants and, in the event, Mr Shepherd, appearing on the Appellants' behalf, did not seek to refer to any evidence save, by agreement, the Jackson Lloyd Employee Representative Committee Terms of Reference, which related to the locus issue.

4. Having considered the parties' written and oral submissions on appeal we decided unanimously to dismiss this appeal, with our written reasons to follow. These are our reasons for that decision.

5. In a carefully structured judgment the Employment Tribunal set out, separately, their findings of fact and conclusions in relation to the TUPE transfer and locus points. Since they raise discrete issues we shall adopt the same course in this appeal.

<u>The relevant facts: TUPE transfer</u>

6. As at 30 September 2010 Jackson Lloyd Ltd (JL) was engaged in the repair and maintenance of social housing. The company had a series of contracts with the providers of social housing in the north-west of England and north Wales.

7. The company employed 400-450 people, who were based at five sites, namely Preston, Wardley, Stockport, Skelmersdale and Congleton. JL's central and executive functions, identified in full at paragraph 2.2.1 of the Tribunal's reasons, were carried out by about 50 employees based at Skelmersdale, and comprised mainly health and safety, finance, IT, human resources, payroll and administration. The remaining employees at the various sites carried out the repair and maintenance work.

8. By September 2010 JL was in severe financial difficulties. On 1 October 2010, following an agreement dated 30 September 2010, Mears Ltd (ML), the subsidiary company of Mears Group Plc (MG), purchased 100% of the shares of JL.

9. Upon this acquisition the original JL Board resigned with immediate effect and were replaced by MG nominees. MG, the parent company of ML, announced to JL's workforce that MG had acquired JL and that it was now embarking on a programme of integration. JL's executive chairman told the company's employees that there would be no change to the terms and conditions of their employment.

10. The process of integration began immediately. A team of integration managers and their support staff from MG arrived at the JL sites on 1 October to assess JL's working methods and its current situation, and to see to the integration of the JL business and methods into those of MG.

11. Immediately prior to the share purchase, the CEO of MG, David Myles, appointed an "integration consultant", namely John Barrett, to manage the integration of JL into MG. Mr Barrett reported to Mr Myles via Tony Bower, an employee of MG who was the managing director of ML. The Tribunal found that Mr Barrett's remit was:

> **"…to turn around the Jackson Lloyd brand using Mears Group Limited systems, policies, procedures, methods and its central services, leaving Jackson Lloyd Limited's operatives in their former liveried uniform but to all intents and purposes controlled by Mears Group Plc, at least until such time as he had revived its business …"**

12. After 1 October 2010 Mr Barrett was, at all relevant times, the manager on site at JL. He received his instructions from Mr Bower, who was answerable to Mr Myles and was at all times following the policies and strategies given to him by Mr Myles. Mr Barrett's role was to effect

an improvement in JL's fortunes, but neither his initial appointment nor any instruction given to him emanated from the Board of JL. He was the servant of MG.

13. Also on 1 October 2010, without any resolution of JL's Board, JL's CEO, Duncan Williams, was removed from office. The decision to dismiss the CEO and subsequently JL's Contracts Director (both of whom had been the controlling minds of JL before acquisition) was taken by Mr Myles. It was effected, and its consequences managed by employees of MG and Mr Barrett.

14. At paragraphs 2.2.2 to 2.2.21 of the TUPE section in their judgment, the Tribunal set out their detailed findings of fact relating to the changes imposed on JL by MG. It is unnecessary to recite them here. Essentially the Tribunal found that, as from the date of acquisition by its subsidiary, MG imposed major changes on JL through their integration team and Mr Barrett and in the absence of any meetings of JL's Board.

15. Control was found to be exercised by MG, not by JL or ML, and the changes penetrated every aspect of JL's organisation. At paragraph 2.2.9 the Tribunal found:

> **"Jackson Lloyd's employees and customers were told that from 1 October 2010 onward they were to direct all of their enquiries, if any, to Mr Myles, the Chief Operating Officer of Mears Group Plc. In due course, a public announcement was made on 8 October 2010 … stating that there had been a takeover, that there was to be full integration and that 450 Jackson Lloyd Ltd's staff were to move over to Mears Group Plc."**

16. For commercial reasons, to preserve JL's contracts and to avoid the risk that a re-tendering process would be triggered, the outward appearance to be given was that JL was autonomous, separate and in competition with MG. However, in reality JL was not an autonomous, independent company. The Tribunal found that, as from 1 October 2010, JL was nothing other than a trading name.

17. From that date on JL's directors and HR team had no say and no involvement in the dismissal of staff by redundancy or otherwise. These matters were dealt with and decided upon by MG through Mr Barrett and the instructions of Mr Bower and Mr Myles. Control was exercised by MG, through its own employees, and its systems were imposed on JL without reference to JL's internal mechanisms for effecting such changes; and without reference to the JL personnel responsible for such processes.

The Tribunal's decision on transfer

18. After directing themselves to Regulation 3 of TUPE and relevant case law, the Tribunal found as follows at paragraph 2.4:

> **"2.4.1 Up to and including 30 September 2010 Jackson Lloyd Limited was a business being an economic entity with a defined identity, and independent autonomous control of its facilities, functions and operations.**
>
> **2.4.2 From 1 October 2010 and throughout a period of integration into Mears Group PLC, Jackson Lloyd Limited retained its outward appearance and name as if it were a stand alone company, but its management, facilities, amenities and functions all transferred to Mears Group PLC by means of integration teams and an integration consultant, Mr Barrett, whose appointment without any approval of the Jackson Lloyd Ltd board of directors was imposed on it by Mr Myles, and whose immediate effective Line Manager was Mr Bower (acting on Mr Myles' instructions).**
>
> **2.4.3 Jackson Lloyd Ltd's activities and practical identity were wholly integrated into and subsumed by Mears Group PLC. Mears Group PLC decide to maintain the fiction and appearance of there being a separate and continuing company, Jackson Lloyd Ltd., for commercial reasons but it was a façade on and from 1st October 2010 and for a considerable time thereafter while efforts were made to turn around its flagging performance. Whether or not it remained as such or whether there was a subsequent further TUPE transfer was outside the scope of these proceedings.**
>
> **2.4.4 Our remit was to consider whether there was a transfer on 1 October 2010 and we find that there was a classic or old style TUPE transfer under regulation 3(1)(a). We did not hear evidence or submissions and have not considered whether there was any subsequent later transfer of a fitter and healthier business back to a functioning Jackson Lloyd Limited, being a subsidiary company within a larger supportive group. There was however an effective transfer on 1 October 2010 and it was a transfer from Jackson Lloyd Limited to Mears Group PLC.**
>
> **2.4.5 The Board of Jackson Lloyd Limited did not at any time form an intention to decide upon or activate the transfer of its management function to a contractor and therefore this was not a service provision change. It was a takeover.**
>
> **2.4.6 The acquisition of 100% of the Jackson Lloyd Limited shares on 1 October 2010 by Mears Limited was genuine and not a sham; in itself, being a share transfer, it did not amount to a TUPE transfer to that company. Whilst we have adjudged that there was a TUPE transfer to Mears Group PLC however, the fact that the outward appearance that Jackson Lloyd Limited was an independent company does not amount to a sham agreement with the intention of depriving anyone of their rights. The purpose of maintaining the deceptive appearance was to avoid the necessity for re-tendering and the risk to contracts. The appearance may have been misleading or deceptive but it was not a sham in the sense of a**

sham agreement that could be looked behind and over-ridden. What is more important is the finding that there was a relevant transfer for the purposes of the TUPE regulations, and we did not consider that we needed to make any further findings on the submission that there was any form of sham.”

19. Thus notwithstanding the outward appearance, which was found to be due to the stated commercial reasons, MG was found to be operating JL’s business, which was to carry out repairs and maintenance under the contracts with housing providers. The sale of JL’s shares to ML was a genuine transaction. Further, it was not a TUPE transfer. Ms Del Priore, who appeared for the Claimants below, submits that the Tribunal did not seek to pierce the corporate veil to find that the TUPE transfer had occurred to ML in these circumstances. Nor were they invited to do so. She submits that it is clear from the Tribunal’s findings, read as a whole, that the share purchase by MG’s subsidiary provided the context within which MG began to operate JL’s business, so as to trigger TUPE.

<u>The appeal</u>

(1) The TUPE transfer point

20. Mr Shepherd, who did not appear below, complains first that, although the Tribunal were referred to the key authorities on the multifactorial approach to be adopted in considering whether there has been a transfer, they failed to refer to any of them in their judgment. Nor is it possible to discern from their reasons, he submits, that they applied the correct test correctly in arriving at their decision. He contends that they dealt superficially with only a few of the factors being relied upon by the Appellants, and that they carried out an inadequate analysis of the main factors. The Tribunal therefore applied the wrong legal test, or failed adequately to explain their reasoning in concluding that there was a transfer.

21. In seeking to make good his submissions as to the deficiencies in the judgment, Mr Shepherd referred in some detail to evidence said to be before the Tribunal relating to various factors, to which the Tribunal are said to have had no proper regard.

22. In summary these were the fact that there was no transfer of assets other than shares from JL to ML, or to MG; the Tribunal's failure, notwithstanding MG's announcement that JL's employees had transferred to them, to assess the evidence as to what in fact happened concerning the transfer of JL's employees, rather than what MG said had happened; the failure properly to assess and weigh the evidence, including Mr Barrett's "unchallenged" evidence concerning JL retaining its customer contracts, leading to a superficial conclusion that what happened was "for the sake of appearance"; the failure properly to analyse the facts and to have regard to the fact that JL, MG and ML retained legally separate corporate identities, which were registered with government bodies; the failure to analyse the evidence as to the extent to which the business of JL was similar or dissimilar to that of MG or to ML, when the evidence showed that it was ML which undertook work of the same type as that of JL; the failure to explain the finding, at paragraph 2.4.3, that JL's activities and identity were wholly integrated into and subsumed by MG, which was at odds with the evidence that, post share sale, JL continued to contract with its existing material and equipment suppliers; the failure, in referring to JL's use of MG's resources, to have regard to industry practice, in terms of failing businesses, as indicative of general attempts to revive an ailing business, rather than of a TUPE transfer; and having regard, erroneously, to matters occurring after 1 October 2010 to support their finding that a TUPE transfer occurred on that date.

23. Ms Del Priore submits that no error of law is disclosed in the judgment. The Tribunal directed themselves correctly on the law and, on the basis of their clear findings of fact on the evidence, concluded that there had been a TUPE transfer within the meaning of Regulation

3(1)(a) and 3(2). They adopted, as required by the case law, the broad, flexible, multifactorial and fact-sensitive approach and their conclusions are unimpeachable. Ms Del Priore submits that the Appellants are now effectively seeking to re-argue the facts and to re-interpret the evidence given below. We note, in this respect, that during argument, Ms Del Priore, who did appear below, took issue with a number of Mr Shepherd's assertions as to what the evidence below had established.

Discussion

24. There is no dispute as to the relevant legal principles, which are well established and well known. The question in relation to this ground is whether the Employment Tribunal correctly applied them. The relevant provisions of TUPE are Regulations 3(1)(a), 3(2) and 3(6), which provide as follows:

> **"3(1) These regulations apply to-**
>
> > **(a) A transfer of an undertaking, business or part of an undertaking or business situated immediately before transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;…**
>
> **…**
>
> **(2) In this regulation 'economic entity' means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.**
>
> **…**
>
> **(6) A relevant transfer-**
>
> > **(a) may be effected by a series of two or more transactions; and**
> >
> > **(b) may take place whether or not any property is transferred to the transferee by the transferor."**

25. We summarise the main principles to be derived from the relevant case law, which were not in dispute before us. The aim of Council Directive 77/187 is to ensure the effective protection of employees' rights in the event of a transfer. The examination required by a Court or Tribunal is fact sensitive. In determining whether there has been a transfer of an undertaking it is necessary to take into account all of the factors, including the nature of the activity, and

what happens to the assets and to the employees (see **Spijkers v. Gebroeders Benedik Abattoir C.V.** [1986] ECR 1119, paragraph 13).

26. It is for the national court or tribunal to make the necessary factual appraisal in deciding whether there is a transfer, in the light of the criteria established by the European Court of Justice. Those criteria involve consideration of all the facts characterising the transaction in question, as identified in **Spijkers**, in order to determine whether the undertaking has continued and retained its identity in different hands (**ECM (Vehicle Delivery Service) Ltd v. Cox and Others** [1999] ICR 1162, at 1168-69).

27. In **Cheesman v. R Brewer Contracts Ltd** [2001] IRLR 144, the EAT set out a list of factors, which are relevant to the question whether or not there has been a transfer of a relevant entity. The list is not exhaustive. While these factors provide helpful guidance, the test to be applied in considering whether there was a transfer is broad, multifactorial and fact-sensitive. The relevance and significance of the factors identified will therefore depend on the facts of each particular case. We agree with Ms Del Priore that the list is not a check list in which each factor must always be separately considered.

28. In our judgment this Employment Tribunal directed themselves clearly and correctly as to the applicable law. We reject Mr Shepherd's submission that their self-direction was superficial. Having made their findings of fact the Tribunal directed themselves succinctly as follows at paragraph 2.3:

> **"2.3 Applicable Law**
>
> **2.3.1 Regulation 3 of TUPE describes at regulation 3(1)(a) an 'old style' or 'classic' TUPE transfer, being the transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity. In this context, 'economic entity' means an organised grouping of resources which has the object of pursuing an economic activity. Case law provides that in considering whether there has been a transfer of**

a business undertaking or business, one must apply a multifactorial test and adopt a common sense approach in ascertaining the economic entity in question and whether or not it has been transferred. The matter is fact sensitive.

2.3.2 Regulation 3(1)(b) covers the situation of service provision changes and for our purposes at sub-paragraph (i) includes a situation where activities cease to be carried out by a person, such as Jackson Lloyd Limited, on its own behalf, and those activates are then carried out by another person, such as Mears Group PLC, on its behalf, where there is an organised grouping of employees, having its principal purpose as the carrying out of those activities and where there is an intention on the part of the client (Jackson Lloyd Limited) for those services to be carried out by the transferee (Mears Group PLC).

2.3.3 It was submitted by the claimants that there was a sham, that is an agreement to give an appearance that would deprive employees of their rights. Whilst the claimants accept that the share purchase by Mears Limited on 1 October 2010 was a genuine acquisition of 100% of the shares of Jackson Lloyd Limited (not in itself a TUPE transfer) there was still a 'sham' in so far as the public appearance was that Jackson Lloyd Ltd was independent of Mears Group PLC immediately post 1 October 2010 when in fact it was wholly controlled by Mears Group PLC. That, however, is a matter of perception rather than the constitution of a sham legal agreement. If we were to find that there had been no TUPE transfer, a matter of law and fact, then the perception will have been accurate. The claimants did not push this point."

29. This was in our view a concise statement of the applicable law, as required by the 2004 ET Rules then in force. While the Tribunal do not refer expressly to the case law, the essential task required of them, having regard to the authorities, is correctly identified. It is common ground that the relevant statutory provisions and authorities had been drawn to their attention, and the law in this area is well known to Employment Tribunals. There was no dispute in this case that JL retained its identity and was doing the same work and serving the same clients before and after transfer. The essential question for the Tribunal was whether there was a transfer from one legal person to another.

30. That the Tribunal understood the task required of them and applied the test correctly is in our view clear from their findings of fact and reasoned conclusions. On 1 October 2010 and upon the share purchase by ML, MG announced that it had acquired JL and that it was embarking on a process of integration. A team of integration managers and staff arrived on site that same day. The Tribunal were in our view entitled to take into account what happened after 1 October, having regard to that clear statement of intent and the arrival of the integration team on 1 October.

31. The main difficulty for Mr Shepherd, in seeking to make good his criticisms of the Tribunal's approach, is that it involved him in a selective analysis of the evidence given below, in referring to the various factors said to have been overlooked by the Tribunal, or inadequately assessed or given insufficient weight.

32. Matters of weight and the assessment of evidence are pre-eminently the province of the Employment Tribunal. Further, Ms Del Priore did not accept that Mr Shepherd's evidential references were all accurate; and Mr Shepherd fairly accepted that he was disadvantaged by not having represented the Appellants at first instance.

33. For example, Mr Shepherd described the evidence of Mr Barrett below as "unchallenged" on several issues. This was not accepted by Ms Del Priore. Further, we note in this respect the Tribunal's criticisms of Mr Barrett as a witness, and their finding that his evidence was in a number of respects "not credible" in the light of other evidence in the case (see paragraph 3.1 on page 14 of the judgment).

34. Mr Shepherd also accepted that the grounds of appeal which were permitted to proceed contain no perversity challenge to the Employment Tribunal's decision. We consider that, as Ms Del Priore submitted, Mr Shepherd was seeking effectively to re-argue the facts and to challenge the Tribunal's assessment of the evidence. Absent a perversity challenge, such an attack is doomed. It is unnecessary for the Employment Tribunal to refer to all the evidence and arguments advanced before them. In our view no error of law is disclosed in their legal directions, or in their analysis of the facts and conclusions, which we find to be sufficiently reasoned given their clear findings of fact on the evidence they heard. The Appellants would be in no doubt why they lost the case.

35. In our judgment the Tribunal were entitled to find that there was a TUPE transfer to MG and this ground of appeal therefore fails.

(2) The transferee point

36. Mr Shepherd's submission under this head can be shortly stated. He contends that the Claimants brought their case relying on **Print Factory (1991) Ltd v. Millam** [2007] ICR 1331, on the basis that a share purchase agreement could be, and in this case was the TUPE transfer.

37. Initially, in their ET3, the Appellants wrongly identified the share purchaser as MG, but this was amended, by consent, to make it clear that the shares were purchased by ML. The Claimants made no application to join ML as third Respondent to the ET claim, either at that stage or after the evidence and before making their closing submissions.

38. Mr Shepherd submits that if the share sale agreement was the TUPE transfer, as claimed by the Claimants, then the correct transferee was ML, not MG. The Tribunal's finding at paragraph 5 of their formal judgment, that there was a relevant transfer from JL to MG was inconsistent with the Claimants' case and the evidence.

39. In our view, there is no merit whatsoever in this ground of appeal, which seems to us to be misconceived. As Ms Del Priore submits, the case advanced by the Claimants before the Employment Tribunal was not that the share sale itself constituted a TUPE transfer, but that the share sale to ML triggered a co-extensive but separate TUPE transfer to MG. During the first part of the Tribunal hearing it became apparent that the shares had been purchased by ML not MG, but the Claimants did not apply to join ML to the proceedings because there was simply no evidence of a transfer to ML.

40. As Ms Del Priore submits, the case of **Millam** is not authority for the proposition that a share sale itself is a transfer, which would be inconsistent with **Brookes v. Borough Care Services** [1998] IRLA 636, as Buxton LJ observes in **Millam** (see paragraph 3). The argument advanced by the Claimants before the Tribunal, in accordance with the approach established in **Millam,** was that the evidence showed, as a matter of fact, that control of JL's business in terms of its day to day business activities had passed to MG.

41. In essence the Claimants' case, accepted by the Employment Tribunal, was that there had been a transfer of an undertaking to MG following, and in the context of, a share sale to ML, not that there was a TUPE transfer to ML. The share purchase by ML effectively provided the means by which the parent company MG gained control of JL, so as to trigger TUPE. The fact that the shares in JL were acquired by ML, as MG's subsidiary, did not preclude a TUPE transfer of JL's business to MG.

42. Thus, the Claimants' argument was not that the share sale itself was the TUPE transfer, but that it was the context for the TUPE transfer that the evidence showed occurred, and that MG announced had occurred upon the share sale (see paragraphs 2.2.2-2.2.3 of the judgment).

43. In any event, given the Tribunal's findings of fact, which are unchallenged in this appeal, it would not have been open to them to conclude that there was a TUPE transfer to ML. This ground of appeal also fails.

The locus standi point: the relevant facts

44. The second main issue to be resolved by the Tribunal was whether the Claimants had locus standi, that is whether they were entitled to present their TUPE claims to the Tribunal in their own names or as representatives of any of those named as Claimants.

45. It was agreed that the UCATT members at Preston were able to pursue their claims through UCATT and that UCATT had locus. In respect of all the other Claimants the Tribunal identified, at paragraph 2.1.2, the questions to be determined, as agreed with the parties.

46. The Tribunal found, so far as is relevant to this appeal, that as at 1 October 2010 the representative committees at JL had no mandate to act for those that they represented after the expiry of their terms of office; and that all Claimants, save one with whom we are not concerned, had locus to bring protective award claims in their own names.

47. Mr Shepherd submits that this finding was arrived at in error. Ms Del Priore submits that the Tribunal's reasoning and conclusions disclose no error of law and that the findings as to locus were plainly open to them on the evidence.

48. Before the Employment Tribunal the Appellants contended that, as at 1 October 2010, there were for the non-UCATT Claimants (hereafter 'the Claimants') existing employee representatives at the transferring entity, within the meaning of Regulation 13(3)(b)(i) TUPE, who had locus to claim in place of the named, individual Claimants whom they represented.

49. The context for this contention is important. It is not in dispute that the Appellants' main argument was always that TUPE did not apply in relation to JL's dealings with MG or ML. Mr Shepherd acknowledges that no consultation on TUPE took place at any stage, so the Appellants did not make any enquiries at the time as to the competent employee representatives for this purpose, or provide any TUPE information to anyone.

50. Having heard the evidence the Tribunal set out their findings at paragraph 2.2.2. Having regard to the JL Employee Representative Committee Terms of Reference they found that the

term of office of each elected employee representative was 12 months. Where for any reason a representative was unable to complete their term of office a replacement representative could be elected. However, the term of office of that replacement representative lasted only for the remainder of the 12 month term of the person replaced.

51. It was common ground that the Terms of Reference contained the agreement as to arrangements for employee representatives at JL. Paragraph 6 of the Terms included the following:

> **"Nominated/elected representatives will normally be expected to serve for an initial one year …**
>
> **The first election of the newly formed committee will be held in August 2009. Thereafter, individual Representatives will be up for re-election/replacement on a yearly basis. Elected terms of office will be 12 month periods."**

52. Save in respect of the Stockport site, there were no employee representative elections or nominations at JL after August 2009. At paragraphs 2.2.2.4-2.2.2.7 the Tribunal made findings as to the expiry of the representatives' mandate in each case. In particular they found, at 2.2.2.6-7, as follows:

> **"2.2.2.6 A proposal was subsequently made in September 2010 to elect operative and staff representatives, but those elections did not occur in respect of operatives until 8 October 2010 and staff on 14 October 2010. The election of new committees was deferred and even after the stated elections, the empowering of the new committees was not implemented pending training. The composition of each of the staff committees and operatives' committees following the October 2010 elections was not identical to the makeup of the said committees following the August 2009 elections.**
>
> **2.2.2.7 As of 1 October 2010 there were no elected representatives chosen and authorised to deal with consultation matters and issues including TUPE transfers. The mandates of each of the previously elected representatives had expired by 1 October 2010 and the ad hoc committees that continued in any shape or form were not mandated by the employees entitled to representation. The said committees no longer had appropriate authority to act as elected representatives by that date."**

53. Thus, the mandates of each of the previously elected representatives had expired by 1 October 2010 and the ad hoc committees that continued were found not to have been mandated by the employees entitled to representation. Further, different representatives were serving on

the committees following the October 2010 elections, so that there could be no implied continuity of representation.

54. After directing themselves to Regulation 15 of TUPE, the Tribunal found that, on 1 October 2010, there were no elected representatives authorised by the affected employees to deal with TUPE transfers, and that the named, individual Claimants were therefore entitled to pursue their respective claims.

The appeal

55. Mr Shepherd submits that the word “normally” in clause 6 of the Terms of Reference contemplates that the elected representatives would serve for longer than 12 months.

56. Further, he submits that a purposive construction of Regulations 13 and 14 of TUPE is required, and that the Tribunal failed to apply these Regulations correctly, to find that those whose term of office as employee representatives had expired were nonetheless competent representatives within the meaning of Regulation 13(3)(b)(i) of TUPE.

57. Mr Shepherd referred us to what he described as “unchallenged evidence” from the witnesses Ms Rowson, for the Appellants, and Mr Garforth, for the Respondents, that after the expiry of the 12 month period the elected representatives continued to act as representatives, receiving and disseminating TUPE information, so that there were representatives in position to fulfil that role and the requirements of the legislation were met.

Discussion

58. Regulations 13, 14 and 15 of TUPE provide, so far as material, as follows:

"13(3) For the purposes of this regulation the appropriate representatives of any affected employees are-

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(b) in any other case, whichever of the following employee representatives the employer chooses-

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;

(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

…

Election of employee representatives

14. (1) The requirements for the election of employee representatives under regulation 13(3) are that-

(a) the employer shall make such arrangements as are reasonably practicable to ensure that the election is fair;

(b) the employer shall determine the number of representatives to be elected so that there are sufficient representatives to represent the interests of all affected employees having regard to the number and classes of those employees;

(c) the employer shall determine whether the affected employees should be represented either by representatives of all the affected employees or by representatives of particular classes of those employees;

(d) before the election the employer shall determine the term of office as employee representatives so that it is of sufficient length to enable information to be given and consultations under regulation 13 to be completed;

(e) the candidates for election as employee representatives are affected employees on the date of the election;

(f) no affected employee is unreasonably excluded from standing for election;

(g) all affected employees on the date of the election are entitled to vote for employee representatives;

(h) the employees entitled to vote for as many candidates as there are representatives to be elected to represent them or, if there are to be representatives for particular classes of employees, may vote for as many candidates as there are representatives to be elected to represent their particular class of employee;

(i) the election is conducted so as to secure that-

(i) so far as is reasonably practicable, those voting do so in secret; and

(ii) the votes given at the election are accurately counted.

(2) Where, after an election of employee representatives satisfying the requirements of paragraph (1) has been held, one of those elected ceases to act as an employee representative and as a result any affected employees are no longer represented, those employees shall elect another representative by an election satisfying the requirements of paragraph (1)(a), (e), (f) and (i).

…

15. (1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground-

> **(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;**
>
> **(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;**
>
> **(c) in the case of failure relating to representatives of a trade union, by the trade union; and**
>
> **(d) in any other case, by any of his employees who are affected employees.**
>
> **…**
>
> **(3) If on a complaint under paragraph (1) a question arises as to whether or not an employee representative was an appropriate representative for the purposes of regulation 13, it shall be for the employer to show that the employee representative had the necessary authority to represent the affected employees."**

59. The BIS (Department for Business Innovations and Skills) Guide to the 2006 TUPE regulations for employees, employers and representatives, dated June 2009 states at page 23:

> **"There may be either existing representatives or new ones specially elected for the purpose. It is the employer's responsibility to ensure that consultation is offered to appropriate representatives. If they are to be existing representatives, their remit and method of election or appointment must give them suitable authority from the employees concerned."**

60. We agree with Mr Shepherd that a purposive application of these Regulations is required, but their clear purpose in our judgment is to ensure that employees give meaningful consent to those who are nominated to represent them collectively. We accept Ms Del Priore's submission that it is clear from this Tribunal's findings of fact and conclusions that they were correctly applying the statutory test contained in Regulations 13(3)(b)(i) and 15(3) to the evidence before them relating to locus.

61. The main issue in this case was whether, at the relevant time, there were representatives who had authority from the affected employees to receive information and to be consulted on a TUPE transfer. In our view the Tribunal were clearly entitled to conclude that, in this case, that authority depended on the scope of the suggested representative's mandate; and that on the evidence the mandate ceased when their 12 month term of office expired.

62. Once again the references to the evidence of Mr Garforth and Ms Rowson seem to us to constitute an attempt by Mr Shepherd to re-argue the facts, in circumstances where there is no perversity challenge to the Tribunal's findings. These included the finding of fact that Mr Garforth's term of office as an employee representative had expired on 26 August 2010 (paragraphs 2.2.2.5 and 2.4).

63. It is common ground that there was no evidence before the Tribunal that the committees had ever convened between the expiry of the representatives' terms of office and 1 October 2010. There was in fact no TUPE consultation in this case, and no evidence that consent to the representatives continuing to act after expiry of their terms of office was sought or obtained. In our judgment no error of law is disclosed in the Tribunal's reasoning or conclusions on this issue and this ground of appeal must also fail.

64. For all these reasons this appeal must therefore be dismissed.