Appeal No. UKEAT/0505/13/JOJ

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 3 February 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

SECRETARY OF STATE OF BUSINESS INNOVATION & SKILLS APPELLANT

MR S DOBRUCKI AND OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR TOM POOLE (of Counsel) Instructed by: Treasury Solicitor's Department One Kemble Street London WC2B
For the Respondents	No appearance or representation by or on behalf of the Respondents

SUMMARY

TRANSFER OF UNDERTAKINGS - Insolvency

RIGHTS ON INSOLVENCY

Employees were transferred from a company in administration to a former 90% shareholder who purchased its business. Three days later the business folded. All employees claimed arrears of pay, and holiday pay, three claimed for unpaid notice pay, and one for a redundancy payment. An Employment Judge found there had been a TUPE transfer, that Regulation 8(7) did not apply but that Regulations 8(1)-(6) did, and that applying Regulation 8(3) the transferor was liable for the payments for which the redundancy provisions and Part XII of the **Employment Rights Act 1996** makes provision, which accordingly fell to the Secretary of State to discharge.

On the Secretary of State's appeal, Held: Regulation 8(3) did not apply to debts which had not accrued as such by the time of transfer. **Pressure Cooler v Molloy** [2012] ICR 51 was authority directly in point, supported by dicta of Elias J and Underhill P in earlier cases, binding on the Employment Judge, and was followed.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. This appeal by the Secretary of State for Business Innovation and Skills is against a decision by Employment Judge Goodman sitting alone at London (Central) on 13 November 2012. The appeal is made out of time, but I am happy to extend time if that be necessary for the appeal to be made. The reason for that is that the Secretary of State was not told of the decision of the Tribunal until after the period for appealing had expired.

The Facts

2. The facts can be stated shortly. A company, Response FM, carried out emergency maintenance cover work for businesses around the M25 until it ran into financial difficulty in 2011. The principal shareholder, having 90% of the shares, William Sibley, the Third Respondent, sought a purchaser for the business. However, on 2 June 2011 the company's bankers reduced the funding facilities available to the company, causing a cashflow crisis.

3. At 12.30 on 14 June, joint administrators, the Second Respondents, were registered as such. Two hours later the business was sold to William Sibley as a going concern. The business, now in the hands of Sibley, continued to trade but only for three further days. Some time on 17 June, it ceased trading. There is no material before me, nor was there before Judge Goodman, as to whether William Sibley was insolvent or bankrupt.

4. Of the 13 employees whom the business had employed, six made claims to the Employment Tribunal against the Secretary of State of Business Innovation and Skills, relying upon Part XII of the **Employment Rights Act 1996**, the administrators as Second Respondents, and Mr Sibley. They claimed (1) arrears of pay due when their work ceased; (2) notice pay; (3)

in the case of the First Claimant, Mr Dobrucki, a claim for redundancy. No other employee had sufficiently long service to make such a claim; and (4) outstanding holiday pay. Of the six Claimants, one, Mr Webber, withdrew his claim before the Tribunal.

5. The Judge held that, in these circumstances, there had been a transfer of undertaking from Response FM to William Sibley. She concluded that the transfer occurred after the company had become insolvent. Insolvency proceedings had begun. Accordingly she had to deal with the interaction of two sets of provisions. The interaction has in the past proved problematic for the courts.

6. The **Employment Rights Act 1996** provides in Part XII by section 182 for an employee to have certain rights on the insolvency of an employer:

> **"If, on an application made to him in writing by an employee, the Secretary of State is satisfied that -**
>
> > **(a) the employee's employer has become insolvent,**
> >
> > **(b) the employee's employment has been terminated, and**
> >
> > **(c) on the appropriate date the employee was entitled to be paid the whole or part of any debt to which this Part applies,**
>
> **the Secretary of State shall … pay the employee out of the National Insurance Fund the amount to which, in the opinion of the Secretary of State, the employee is entitled in respect of the debt."**

7. The appropriate date referred to in section 182 is defined by section 185. That provides:

> **"In this Part "the appropriate date" -**
>
> > **(a) in relation to arrears of pay … and to holiday pay, means the date on which the employer became insolvent,**
> >
> > **(b) in relation to a basic award of compensation for unfair dismissal and to remuneration under a protective award so made, means whichever is the latest of -**
> >
> > > **(i) the date on which the employer became insolvent,**
> > >
> > > **(ii) the date of the termination of the employee's employment, and**
> > >
> > > **(iii) the date on which the award was made, and**

(c) in relation to any other debt to which this Part applies, means whichever is the later of -

(i) the date on which the employer became insolvent, and

(ii) the date of the termination of the employee's employment."

8. The **Transfer of Undertakings (Protection of Employment) Regulations 2006** provide, by Regulation 4, that except where an objection to the transfer is made under paragraph 7 a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor. Any such contract is to have effect after the transfer as if originally made between the person so employed and the transferee. Regulation 4(2) provides, in summary, that the transferors' liabilities under or in connection with any such contract are transferred to the transferee, and any act or omission in respect of the employee is deemed to have been an act or omission by the transferee.

9. Regulation 8, under the heading "Insolvency", provides for two separate situations as recognised by Elias J in **Secretary of State for Trade and Industry v Slater** [2008] BCC 70. By Regulation 8(7) it is provided:

"Regulations 4 and 7 do not apply to any relevant transfer where the transferor is the subject of bankruptcy proceedings or any analogous insolvency proceedings which have been instituted with a view to the liquidation of the assets of the transferor and are under the supervision of an insolvency practitioner."

That provides for one situation: where there is no realistic hope recognised by the courts that the business can be revived or maintained as a going concern. The second situation is dealt with in paragraphs (1)-(6). They relate to insolvency proceedings which have been opened which are not with a view to the liquidation of the assets of the transferor, and which are under the supervision of an insolvency practitioner (Regulation 8(6)). "Administration" involves such proceedings. Since administration is only to be undertaken where there is a realistic prospect of the business being, in colloquial terms, "saved", it was the view of Underhill J, in **OTG**

Limited v Barke [2011] ICR 781, that inevitably those proceedings would be proceedings within 8(6) and not 8(7). That view was upheld and applied by the Court of Appeal subsequently in **Key 2 Law (Surrey) LLP v De'Antiquis** [2012] BCC 375.

10. Accordingly, where there is, as there was here, a company in administration the provisions of Regulation 8(1) to (5) apply because of the wording of Regulation 8(6), in contradistinction to the provisions of Regulation 8(7). Those subsections of Regulation 8 provide, materially, as follows:

> **"(2) In this regulation "relevant employee" means an employee of the transferor -**
>
> > **(a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or**
> >
> > **(b) whose employment with the transferor is terminated before the time of the relevant transfer in the circumstances described in regulation 7(1)."**

(Regulation 7 deals with the dismissal of an employee because of the relevant transfer.)

> **"(3) The relevant statutory scheme specified in paragraph (4)(b) … shall apply in the case of a relevant employee irrespective of the fact that the qualifying requirement that the employee's employment has been terminated is not met and for those purposes the date of the transfer shall be treated as the date of the termination and the transferor shall be treated as the employer.**
>
> **(4) In this regulation the "relevant statutory schemes" are -**
>
> > **…**
> >
> > **(b) Part XII of the 1996 Act.**
>
> **(5) Regulation 4 shall not operate to transfer liability for the sums payable to the relevant employee under the relevant statutory schemes."**

11. The Tribunal, which did not have the guidance of the case-law to which I shall come, approached the interaction of these provisions. At paragraphs 39 to 43, dealing with the First Claimant, Mr Dobrucki, it set out the sums to which he was entitled given that his employment had come to an end on 17 June. The Judge recognised at paragraph 42 that William Sibley was *prima facie* liable to pay those sums. She noted that if Sibley were insolvent, Mr Dobrucki could apply to the Secretary of State for payment in respect of his redundancy, but she added, in any case:

> **"… Regulation 8(6) of the TUPE Regulations 2006 operates, as the transferor (Response FM Ltd) was subject to relevant insolvency proceedings. Mr Dobrucki was a relevant employee and the statutory scheme for redundancy payments applied 'irrespective of the fact that the qualifying requirement that the employee's employment has been terminated is not met, and for these purposes the date of transfer shall be treated as the date of termination and the transferor shall be treated as the employer' (Reg 8(3)). The transferor was insolvent, on the date of transfer the employment had not been terminated, (though it was on 17 June), and the date of transfer, 14 June, should be taken as the date of termination for the statutory scheme. The redundancy payment is to be met by the Secretary of State."**

12. By similar processes of reasoning the Judge allowed the claims by each of the five Claimants who pursued their claims to a decision before it, by assessing the payments due under statute as if they had been employed relevantly until 17 June. Therefore in each case the Judge held that the Secretary of State was liable not merely for those arrears of pay which were outstanding at the date of transfer but those which had accrued due between 14 June and the time on 17 June (whenever it was) that the employments actually ceased, and no further work was available. Those sums came, in the case of Mr Dobrucki, to £626 for arrears of pay; Mr Roberts, £690.22; Mr Silk and Mr G Dennehy £1,200 each; and Mr M Dennehy £1,142.

13. In addition the Judge concluded that the Secretary of State was liable to pay notice pay based upon the lengths of service of the respective employees of £2,800 to Mr Dobrucki and £400 to each of Mr Roberts and Mr Silk. She concluded that the Secretary of State should make a redundancy payment of £4,600 to Mr Dobrucki.

14. The Secretary of State appeals against that decision on the ground that the Judge misapplied the law. The essential contention made by Mr Poole, who appears before me though he did not appear below, is that Regulation 8(3), which deems employment to have terminated on the date of transfer, does not have the effect of allowing debts which only became payable on a date after the transfer to be the responsibility of the Secretary of State. The appropriate date within the **Employment Rights Act**, section 185, was not advanced forward in time by the wording of Regulation 8(3).

15. The Respondents have, for their various reasons, not chosen to be present to argue this question. Mr Silk, Mr Webber, the administrators of Response FM, and Mr Sibley entered no response and were debarred. The Dennehys did not attend the hearing below and have said that they do not intend to be present or represented but to rely on written submissions. Mr Roberts observed that the case had been going on far too long; this may be a consequence of the delay in issuing the Notice of Appeal in the first place, but it is, I recognise, unusual that an appeal takes over two years to reach a hearing and this throws no credit, in general terms, on the system. He observed that he would be unable to attend the hearing due to work commitments having attended the Tribunal three times now with "no results". The remaining Claimant, Mr Dobrucki, has said to the Tribunal this morning by telephone that he does not intend to be present.

16. The arguments that they might have advanced, along the same lines as that which appealed to Employment Judge Goodman without the benefit of authority, however, had been considered in the Appeal Tribunal case of **Pressure Coolers v Molloy** [2012] ICR 51, a decision of the Appeal Tribunal chaired by Mrs Justice Cox. She rejected them. The headnote summarises the decision accurately:

> **"… the effect of regulation 8(3)-(5) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 was that, where a transfer took place in any form of insolvency situation falling within regulation 8(6), debts of the transferor owed to an employee which were within the scope of the state guarantee, namely those listed in section 184 in Part XII of the Employment Rights Act 1996, were frozen at transfer and paid by the state, not by the transferee, thereby promoting a rescue culture by minimising the burden on acquiring employers; but that the relevant debts had to arise before the transfer in order to come within the state guarantee, and the claimant's employment had been terminated only after transfer; that the deeming provisions of regulation 8(3) had effect only for the purpose of adapting Part XII to achieve the policy underpinning the provisions by modifying section 182, and did not have the effect that the statutory scheme applied to any relevant employee irrespective of the fact that his employment had not in fact been terminated; and that, accordingly, the transferee, as the acquiring employer who unfairly dismissed the claimant after the transfer, was liable for his basic award and notice pay …"**

17. In reaching those conclusions, carefully reasoned, in a reserved Judgment after submissions from experienced counsel, Cox J relied upon *a priori* reasoning but also drew

support from two earlier decisions, made by Elias J in **Secretary of State v Slater** and Underhill J as President of the EAT in **OTG Ltd v Barke**.

18. In **Slater** Elias J had referred to the Regulations as making the Secretary of State liable for obligations which were "still outstanding" at the date of transfer. In **OTG v Barke** Underhill J had observed that the deeming provisions in Regulation 8(3) did not apply to the accrual of the obligations themselves; in other words, for the purpose of deciding whether or not a dismissal gave rise to a debt, one could not apply Regulation 8(3) to assume that a relevant dismissal had occurred at the date of transfer. Not only do I entirely accept and adopt the reasoning of Cox J as summarised in the headnote, but observe that if it were otherwise, difficult questions might arise as to which post-transfer dismissals were, in accordance with Regulation 8(3), to be treated as if they had happened on the date of transfer.

19. **Pressure Coolers v Molloy** is all the stronger a case since the employees concerned there were guaranteed their rights in any event. As Mr Solomon pointed out in that case, the only question was the party liable. Here the Claimants may well have had no claim upheld relevantly against Mr Sibley. Whether, in the light of this Judgment, they have any wish to pursue him - if they consider that he is worth pursuing - then a Tribunal will doubtless consider whether, in the circumstances which have arisen, they might extend time to do so. But I have to be concerned only with the proper interpretation of the Regulations and statute. I am satisfied that if the Judge had had the benefit of considering **Pressure Coolers** and, as it may be, **Slater** and **OTG** and reflected upon the fact, as Mr Poole carefully points out, that in the subsequent Court of Appeal case of **Key 2 Law (Surrey) LLP** the decision of Underhill J in **OTG v Barke** was not adversely commented on, though it might well have been had the Court of Appeal taken a different view, and that the expressions of principle in that case were broadly consistent

with the approach of Cox J in **Pressure Coolers**, she would not have concluded as she did. She approached the Regulations unguided.

20. In conclusion therefore I am satisfied that her decision was bound by authority to be other than it was. In a situation such as this, only those debts which have accrued as such prior to or coincident with the transfer remain the liabilities of the transferor, and hence potentially the liabilities of the Secretary of State assuming the statutory regime in sections 182 and following, and that in the redundancy payment provisions, apply.

21. Regulation 8(3) does not have the effect of bringing forward in time the appropriate date in respect of those liabilities. It follows that the Secretary of State, as he acknowledges through Mr Poole, is liable here for the arrears of pay up and until 14 June but not thereafter. Some small modification will therefore have to be made to the sums awarded under that heading by the Employment Judge for she allowed some two to three additional days' pay.

22. Adopting Mr Poole's suggestion, I direct that the Secretary of State will provide calculations of the amount he considers due to each of the five relevant Claimants. If the Claimants dispute that that is the amount upon a proper calculation, they are entitled to and will have that dispute remitted to the same Employment Judge for her consideration.

23. The claims in respect of notice pay and redundancy payment against the Secretary of State fail. Awards under that head made to Mr Dobrucki, Mr Roberts and Mr Silk are set aside, as is the payment in respect of redundancy to Mr Dobrucki. Should any sum be payable, it is the liability of Mr Sibley to make that payment. No issue arises in this case in respect of

outstanding holiday pay. The Judge thought there was insufficient evidence to establish any particular figure or liability in any particular case.

24. There may well be an argument for supposing that, although the employment continues by virtue of Regulation 4 of **TUPE**, accrued holiday pay may be a debt due where the transferor is insolvent and hence payable by the Secretary of State within the statutory limits. This argument, however, has not been advanced before me. It does not arise for decision, and I specifically leave it for later determination should an appropriate case arise. It would be both wrong and unnecessary for me to attempt to resolve that issue now on an academic basis.

Conclusion

25. Accordingly the appeal is allowed, with the consequences which I have set out above.