

EMPLOYMENT APPEAL TRIBUNAL
52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 14 January 2015

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

24-7 PROPERTY LETTING (GLASGOW) LIMITED

APPELLANT

MISS LINDA SMITH

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR COLIN EDWARD
(Advocate)
Ramsay Employment Law
Suite 128, St James Business Centre
Linwood Road
Paisley
PA3 3AT

For the Respondent

No appearance or representation by
or on behalf of the Respondent

SUMMARY

TUPE; unfair dismissal; harassment based on religion. Tribunal comprising employment judge sitting alone.

The claimant asserted that her employment had been transferred under TUPE to the respondent. She claimed that she had been unfairly dismissed, and that the wife of the a director of the company from which she had been transferred had harassed her at work by making a remark derogatory of her religious beliefs. The respondent argued that the Tribunal consisting of an employment judge sitting alone could not hear a case of harassment on grounds of religion. Further he argued that no sufficient findings of fact had been made to set up a transfer under TUPE: and that no sufficient findings had been made as to the employment status of the director's wife. No issue was taken with findings that there had been unauthorised deductions of pay and a failure to pay holiday pay, but it was argued that the correct respondent had not been identified in light of the failure to make findings regarding the operation of TUPE.

Held: the arguments by counsel for the respondent are correct. Case remitted to a fresh Tribunal of three persons to be heard again, except in so far as relating to unauthorised deductions and holiday pay, where only the identity of the employer requires to be ascertained.

THE HONOURABLE LADY STACEY

Introduction

1. This is a Full Hearing following a decision by the Employment Tribunal comprising Employment Judge Sorrell sitting alone. The case was heard on 4 November 2013, and the results sent to parties on 21 November 2013. At the Tribunal the Claimant was represented by Mr W Renfrew, solicitor, and the Respondent by Mr Currie. I will refer to the parties as the Claimant and Respondent, as they were in the Tribunal below.

2. The Respondent has been represented before me by Mr Edward, advocate, and there is no appearance for the Claimant.

The Background

3. The background facts in this case are that the Claimant was employed in a business which dealt with property letting. Her employment began at the beginning of 2009 and ended on 27 July 2012. She worked as Branch Manager in an office in Shettleston in Glasgow. The business had half a dozen branches. Melanie Wright and David Wright, who are husband and wife or who were husband and wife, were directors of the company, and Mr Wright was also the secretary. The Tribunal found that Mr Wright was the Claimant's boss and that he trained her in all aspects of the business. He also was based at the Shettleston branch and he ran the company as a whole.

4. The ET found that Mrs Wright was not involved in the running of the business, although there were occasions when she tried to be. That finding was to some extent contradicted by later findings made by the Tribunal.

5. Mr and Mrs Wright's marriage broke down in October 2011. The locks in the Shettleston office were changed so that Mrs Wright could not obtain entry, but she was still in the habit of attending when the office was open. She and her husband would argue, and the ET found that caused chaos in the office. It found that Mrs Wright would telephone the Claimant, making enquiries about bank transfers and other matters, and reminding the Claimant that she was a director of the company. Mr Wright told the Claimant not to talk to Mrs Wright. The Claimant was, according to the ET, caught in the middle. On 20 July 2012 Mrs Wright was in the office when the Claimant arrived for her work. Mrs Wright asked the Claimant for safe keys and passwords and office keys. Mr Wright told the Claimant not to give Mrs Wright anything and to leave the office.

6. Mr Wright then phoned the Claimant and gave her instructions to go to a particular cafe. Mrs Wright then gave the Claimant instructions to leave the premises and to attend a meeting on 23 July. The Claimant did attend that meeting, as did Mr Wright. Once again, arguments broke out between husband and wife. The Claimant told the couple that she was arranging to see her doctor, as she could not work in such a volatile atmosphere. The ET found that the Claimant had a doctor's appointment on 25 July 2012 and was signed off work for two weeks due to stress. It found that she told Mr Wright what had happened at the doctor's, but he told her that Mrs Wright would sack her if she did not attend for work. He said that the Claimant could work just for him, and for the properties that he owned. The Claimant was distraught and felt she had no choice but to return to work. The ET found that Mrs Wright appeared as soon as the Claimant entered the office, and Mrs Wright challenged the Claimant being there. Arguments between Mr and Mrs Wright ensued. The police were called because Mr Wright made an allegation of assault against his wife. Mrs Wright made a remark about the Claimant's

religion. Both Mr and Mrs Wright were arrested, and all the staff were told to leave the premises.

7. On 27 July 2012 Mr Wright phoned the Claimant and said she still had a job, but the Claimant said she could not put up with it any longer. She picked up her final wages that day.

8. The Claimant lodged a form ET1. A form ET3 was lodged by Mr Wright, in which he stated amongst other things that he was not a director of the company. On 16 July 2013 another Employment Judge, not Judge Sorrell, ordered that another company, namely 24-7 Property Letting (Glasgow) Ltd, be added as a new Respondent. There is not any detail in the Written Reasons of the Decision before me as to why that happened. According to those Reasons on 1 November 2013 correspondence was faxed to the Tribunal offices by the new Respondent, requesting an extension of time to lodge their response to the claim. That correspondence apparently went missing, but when Mr Currie appeared on behalf of that last named company at the hearing, he explained that the correspondence had been sent in, and the Judge allowed him to lodge the form ET3 and to appear. The essence of the defence stated in the ET3 was that the Respondent had no knowledge of the circumstances surrounding the Claimant's claim nor any knowledge of the grounds by which the Claimant might fix liability on the Respondent. Mr Currie conducted the hearing on the basis that there was no evidence for the transfer of undertaking in accordance with the **TUPE Regulations**.

The Employment Tribunal Decision

9. The Tribunal decided as follows: (1) The Respondent was the employer of the Claimant at the date of her dismissal. (2) The Claimant was unfairly constructively dismissed. (3) Notice pay was due to the Claimant and should be awarded to her. (4) There was an unauthorised

deduction of wages from the Claimant. (5) Holiday pay was due to the Claimant and should be awarded to her. And finally (6) there had been harassment relating to religion of the Claimant, and an award was made in respect of that.

10. The ET set out the issues that it had to determine in paragraph 63 of its Judgment. These included whether or not relevant transfer of undertakings had occurred. They also included a question as to who was the Claimant's employer when her employment was terminated. In paragraph 64 of the Judgment the ET found that the Claimant was credible and that her evidence was reliable. It also stated that her evidence was unchallenged by the Respondent. That last assertion is not entirely accurate, as the form ET3 lodged on behalf of the Respondent challenged that there had been any relevant transfer.

11. The ET went on to make a finding that the first company (that is 24-7 Property Letting Ltd) was transferred to the second company (that is 24-7 Property Letting (Glasgow) Ltd; that is the Respondent). It found that the transfer happened on 20 July 2012 and that the identity of the economic entity which was transferred was retained after transfer. It found that the Respondent therefore took all rights and obligations of the company under the contract of employment with the Claimant under reference to the case of **Secretary of State for Employment v Spence and Others** [1986] ICR 651 and to the **TUPE Regulations 2006**.

12. The ET goes on in paragraph 65 of its Reasons to find that the Claimant resigned on 27 July 2012 because of the Respondent's actions in the workplace. It finds that the conduct amounted to a fundamental breach of the contract between the parties. In paragraph 66 the ET finds that the Respondent was not justified in the actions it took, and there was therefore unfair dismissal. It found in paragraphs 67 and 68 that there were deductions from wages and no

holiday pay. And in paragraph 69 the ET finds that the Claimant was subject to harassment related to religion.

The Respondent's Case

13. Mr Edward for the Respondent challenged the adequacy of the reasons given by the Employment Tribunal for its finding that there was a transfer under TUPE. He challenged the reasons as to why the ET found that the previous employer, that is 24-7 Property Letting Ltd, ceased to be the Claimant's employer and why, the ET not having made a finding that Mrs Wright was an employee, nor a finding being made that her employment had transferred from that latter company to the Respondent, the Respondent was liable for her actions. He made reference to Rule 62 of the **Employment Tribunal Rules 2013**, which state that the reasons given for any decision shall be proportionate to the significance of the issue. He argued that, in a case of this sort, a finding about the transfer of one entity to the other was essential as no liability would ensue for the Respondent unless there were proper findings about a transfer. He looked at paragraph 64 of the Tribunal Reasons in which the following is stated:

“Overall, I found the claimant to be a credible witness who gave reliable evidence. Her evidence was unchallenged by the respondent. On the basis of my findings I have accepted the claimant's evidence that there was a transfer of undertakings in accordance with the ‘TUPE Regulations 2006’ and that the respondent was her employer at the date of her dismissal. ‘The company’, an economic entity, which was situated in the UK immediately before the transfer was transferred to another person, the respondent on 20 July 2012 and retained its identity of the economic entity after the transfer. In accordance with the case of *Spence* ... the respondent therefore takes over all rights and obligations of ‘the company’ under the contract as if the respondent had contracted with the employees concerned from the date on which they were originally employed by ‘the company.’”

14. Mr Edward recognised that the ET had made a finding at paragraph 5 in the following terms:

“It is recorded by Companies House that there is a proposal to strike off ‘the company’ ... It is further recorded that the respondent was incorporated on 20 July 2012 ... All staff who worked for ‘the company’ continue to work for the respondent in the Shettleston office which still functions as a letting agency. Mr Shultz, the director of the respondent company is known to Mr Wright.”

15. However, Mr Edward argued that, notwithstanding that finding in fact, there is no explanation of why the ET decided as it did in paragraph 64 and in the paragraph just quoted that there was a transfer. Nor is there any explanation for the date chosen for the transfer. The Respondent company was incorporated on 20 July 2012 and therefore did not exist prior to that date, and so any transfer could not be before that date. There was, however, no explanation of any evidence tending to show that a transfer happened on that date. Counsel argued that without findings of that sort there was no legal liability brought home to the Respondent, because it was essential that the Employment Tribunal explained why it found that there was a transfer and gave a date for that transfer before there could be any legal liability. Further, he argued that the actions of Mrs Wright, which were said by the Employment Tribunal to breach the contract of employment between the Claimant and her employer, could not be ascribed to the Respondent. If there had been a transfer, there could be no liability unless there were findings that Mrs Wright acted in some capacity on behalf of the Respondent. He pointed out that there are no such findings.

16. The Employment Tribunal found that there was an act of religious harassment in the form of Mrs Wright making a remark about the Claimant's religion. Mr Edward argued that there was no legal liability on the Respondent in respect of any such action because of the reasons given above. Further, he pointed out that the **Equality Act 2010**, section 109, provides that anything done by a person in the course of his employment must be treated as also done by the employer. Further, that act provides that anything done by an agent for a principal with the authority of the principal must be treated as done by the principal. Whilst the Act also provides that it does not matter whether the thing done is with the employer's or the principal's knowledge or approval, Mr Edward argued that there had to be a finding that Mrs Wright was either in employment of the Respondent or was an agent for the Respondent and no such

finding was made. There is no mention in the Written Reasons of that section of the **Equality Act 2010**, and Mr Edward argued that it was essential to have regard to that and to make findings about it in order to bring home liability to the Respondent. Mr Edward argued that the finding by the Employment Tribunal of constructive unfair dismissal, whoever the employer was, was made on the basis of various acts which were said to breach the contract. They included the deduction of wages, the giving of instructions by Mr Wright in contradiction of those given by Mrs Wright and vice versa, and the alleged religious harassment. There was no specification in the Written Reasons of any of these matters being sufficient on their own, and he argued that the Reasons had to be read as showing that all of these were what constituted the breach of the contract necessary for constructive unfair dismissal.

17. The significance of the submission just mentioned is that Mr Edward also argued, in a separate ground of appeal, that the Employment Tribunal had no power to make a finding of religious harassment under the **Equality Act 2010** because it was constituted as an Employment Judge sitting alone. He referred to the **Employment Tribunal Act 1996**, section 4(1). That section sets out the situations in which an Employment Tribunal may be properly constituted with an Employment Judge alone, and Mr Edward argued that a claim for harassment based on religion under the **Equality Act** is not one of the occasions on which an Employment Judge is empowered to sit alone. He argued that for that reason the question of the religious harassment had to be heard before a Tribunal constituted by an Employment Judge and two lay members. That being so, he submitted that the matter of the religious harassment, the matter of the transfer under the **TUPE Regulations** and the question of unfair constructive dismissal should all be remitted to a freshly constituted Tribunal.

Conclusions

18. Dealing with the last ground of appeal first, I agree with Mr Edward that the Employment Tribunal had no power to hear the claim relating to harassment on the grounds of religion. Therefore that part of the case would be required to be remitted to a Tribunal of three. The real question in issue before me is whether Mr Edward is correct in his submission about the finding under the **TUPE Regulations** and whether the findings of unfair dismissal and the other findings concerning deduction of wages, notice pay and holiday pay can stand.

19. I have decided that the submission made by Mr Edward about the decision under the **TUPE Regulations** is correct. It may be that the decision of the Employment Judge was influenced by the fact that the first ET3 lodged by Mr Wright stated that he was not a director of the company and, in circumstances which I do not find to be very clearly explained, the second company (that is, 24-7 Property Letting (Glasgow) Ltd) came into the case. It is clear, however, from the ET3 lodged by that latter named company that it did put in issue the question of whether or not there had been a transfer. That was the only matter that it put in issue. The Employment Judge clearly appreciated that and directed herself correctly on the law concerning transfers under the Regulations. I have come to the view, however, that she did not explain in her Written Reasons why she found that a transfer had taken place, nor did she give any clear explanation of when that transfer was and what her reasons were for finding a date. Neither did she explain Mrs Wright's involvement in the transfer. I agree with Mr Edward that it is not clear from the Written Reasons whether the Employment Judge found that Mrs Wright was part of the economic entity which transferred. That last lack of explanation affects the liability for any religious harassment carried out by Mrs Wright of the Claimant. It may also affect the question of unfair dismissal.

20. I agree also with Mr Edward's submission that the reasons do not state clearly enough whether the unfair constructive dismissal is made out without the allegations of religious harassment. It may be that the Employment Judge was of the view that the other actions carried out were sufficient on their own, but she does not say so. Further, there is the complication, if the dismissal was as the Employment Judge found from the second company, of Mrs Wright's connection or lack of connection with that second company. No argument was presented before me that there was any flaw in the Employment Judge's finding that there was an unlawful deduction from wages and that holiday pay and notice pay were due from the employer, whoever that employer might be. But of course Mr Edward took issue with the liability being fixed on the Respondent for the reasons I have narrated above.

21. I therefore dispose of this case by allowing the appeal and remitting the case to be heard by a Tribunal of three persons. The questions before that Tribunal will be whether there was any transfer under the **TUPE Regulations** to the Respondent and, if so, when; whether there was unfair constructive dismissal, paying due attention to Mrs Wright's legal status vis-a-vis the Claimant, if her actions are founded on ; and whether there was any religious harassment and, if so, by whom and acting in what capacity. There is no need for the new Tribunal to consider the substance of the claims for holiday pay and deduction from wages, but only to consider who is the correct employer as regards those matters. The question of notice pay may, however, be influenced by the decision that the new Tribunal comes to on the unfair constructive dismissal, and so the new Tribunal requires to make findings about notice pay. Therefore, for all the reasons given above, I allow the appeal and remit to a freshly constituted Tribunal.

22. I should say before leaving this case that I have asked Mr Edward to make clear to those instructing him that the papers for the case were not in proper order and that attention should be paid by agents to the requirements of the **Practice Direction** when preparing papers for the Employment Appeal Tribunal.