

Appeal No. UKEAT/0298/13/DM

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

At the Tribunal
On 10 December 2013
Judgment handed down on 16 April 2014

Before

THE HONOURABLE MRS JUSTICE SLADE DBE

MR C EDWARDS

MR J R RIVERS CBE

MR G ALLEN AND OTHERS

APPELLANTS

MORRISONS FACILITIES SERVICES LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellants

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For the Respondent

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SUMMARY

TRANSFER OF UNDERTAKINGS

Acquired rights directive

Consultation and other information

TUPE Regulation 13(4) does not impose an obligation on a transferee to provide information to employees of the transferor. The obligation on the transferee is to provide such information to the transferor at such a time as will enable the transferor to perform their obligations under Regulation 13(2)(d). These are for the transferor to provide representatives of their affected employees with information about the measures the transferor envisages the transferee will take in relation to affected employees who transfer.

A complaint to an Employment Tribunal under Regulation 15(1)(d) can only be brought by an employee against his employer. The Claimants' employer at the time of the alleged breach of Regulation 13(4) was the transferor not the transferee Respondent. The only route for employees of the transferor to obtain compensation from the transferee for breach of their obligations to a transferor under Regulation 13(4) is to pursue a claim against the transferor for breach of Regulation 13(2)(d) and for the transferor to give notice to and join the transferee as a party to the proceedings under Regulation 15(5). An Order against the transferee can only be made if the Tribunal find the transferor to be in breach of Regulation 13(2)(d) and to have established that it was not reasonably practicable to have performed that duty because the transferee had been in breach of their obligation to give the transferor information under Regulation 13(4).

Mitie Group v Mullineaux UKEAT/0708/04 considered.

THE HONOURABLE MRS JUSTICE SLADE DBE

1. This appeal concerns the correct construction of Regulations 13 and 15 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ('TUPE'). The particular question arising in claims of individual Claimants against the Respondent transferee is whether a claim can be brought against the transferee by transferred employees for failure by the transferee to comply with their obligation under Regulation 13(4) to provide information to the transferor to enable them to comply with their obligations under Regulation 13(2)(d).

2. The Claimants appeal from the judgment of an Employment Tribunal, Employment Judge Forrest and members ('the ET') which by a corrected judgment sent to the parties on 9 April 2013 ('the judgment') held by majority that the claims against the transferee, the Respondent to this appeal, for a failure to consult under Regulations 13 of TUPE failed and were dismissed. In reaching that conclusion the ET held that transferring former employees of the transferor could not pursue claims against the transferee for breach of TUPE Regulation 13(4).

3. This is one of those rare appeals in which the issue is one of pure law. Accordingly we will set out the background facts very briefly. Leeds City Council has a large stock of housing which requires maintenance. Various private contractors provide maintenance services to the Council. Three of those contracts were due to end in the spring of 2011 and new contracts were awarded to two different providers, one of which was the Respondent, formerly the seventh Respondent to the claims. About four or five hundred employees transferred from the outgoing contractors to Mears Group plc (formerly a Respondent) and the Respondent. The majority transferred on 1 April 2011 and some gas engineers in mid May 2011. It was agreed that there

was a service provision change on a change of provider which was a relevant transfer of an undertaking within the meaning of TUPE on those dates.

4. In June 2011 four ET1s were lodged against seven Respondents, the three transferor companies, the two transferee companies, Leeds City Council and another company. The claims against the Council and the original fifth Respondent were withdrawn and dismissed. Over one hundred employees brought various claims. In addition claims were brought by Unite, the Union and the GMB for breach of the duty to inform and consult over proposed redundancies under the **Trade Union and Labour Relations (Consolidation) Act 1992** and in the alternative, a breach of the Respondent's obligations to comply with their information and consultation duties under TUPE Regulation 13. Claims were settled or withdrawn leaving some claims by individuals against the Respondent and claims for a failure to inform and consult under Regulation 13 of TUPE.

The relevant statutory provisions

5. Transfer of Undertakings (Protection of Employment) Regulation 2006:

“13. Duty to inform and consult representatives

(1) In this regulation and regulations 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 transfer 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—

...

(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.

...

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

...

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

...

15. Failure to inform or consult

(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—

...

(d) in any other case, by any of his employees who are affected employees.

(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—

(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and

(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.

...

(5) On a complaint against a transferor that he had failed to perform the duty imposed upon him by virtue of regulation 13(2)(d) or, so far as relating thereto, regulation 13(9), he may not show that it was not reasonably practicable for him to perform the duty in question for the reason that the transferee had failed to give him the requisite information at the requisite time in accordance with regulation 13(4) unless he gives the transferee notice of his intention to show that fact; and the giving of the notice shall make the transferee a party to the proceedings.

...

(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—

(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or

(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.

...

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

6. **Directive 2001/23/EC** on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses:

“Article 7

1. The transferor and transferee shall be required to inform the representatives of their respective employees affected by the transfer of the following:

— the date or proposed date of the transfer,

— the reasons for the transfer,

— the legal, economic and social implications of the transfer for the employees,

— any measures envisaged in relation to the employees.

The transferor must give such information to the representatives of his employees in good time, before the transfer is carried out.

The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.

2. Where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of his employees in good time on such measures with a view to reaching an agreement.”

The decision of the ET

7. The ET recognised that if transferring employees could not bring a complaint against a transferee of failure to provide the transferor with information required by Regulation 13(4) such employees would have no redress for wrong or inadequate information provided by the transferee to the transferor under Regulation 13(4). If the transferor gave their employees all the information they had and the assessment they had made about measures, in connection with the transfer, which they envisaged the transferee would take in relation to any affected employees who will become employees of the transferee after the transfer, they would not be in breach of Regulation 13(2)(d). If the transferor has taken all the steps they can to obtain such information about such measures they will not be in breach of Regulation 13(9). On a strict reading of TUPE, notwithstanding that the transferee may have given the transferor misleading or inaccurate information, the ET will not find a complaint against the transferor well founded and the Claimants can have no redress against them. The ET recognised that there would be practical difficulties in requiring a transferee to consult transferring employees of the transferor. The ET considered that those difficulties had less force post-transfer and were not in themselves a reason for not allowing the transferring employees to complain of a failure to perform that duty.

8. The ET considered that Regulation 15:

“...is primarily concerned with the post-transfer situation.”

They held at paragraph 55 that at that stage employees who can bring claims against an employer included under Regulation 15(1)(d):

“...any of his employees who are affected employees. At that time, post-transfer, ‘his’ employees must relate to the transferee’s employees; and by that time, all the transferring employees have become employees of the transferee and are therefore the appropriate people to bring such a claim.”

The ET observed:

“There is no restriction in the opening words of Regulation 15 to confine claims either to claims against particular employers or to suggest that those claims are restricted to employees of those employers.”

They considered that TUPE Regulation 15(7) provides a route for an ET to order the transferee to pay appropriate compensation. However the power to do so only applies where an ET is asked to make a finding against a transferor of a breach of Regulation 13(2)(d) or 13(9) and to consider the transferee’s liability for failing to give the information to the transferee in the first place. Where, as alleged here, the transferor passes on the limited information given to them by the transferee but the transferee fails to pass on information, the former employees of the transferor have no redress.

9. If the issue had been free from authority, all three members of the ET would have concluded that transferring employees have a right under Regulations 13 and 15 to complain against a transferee, for a failure of the transferee to comply with a duty under Regulation 13(4) to give information to the transferor without bringing a claim against the transferor. However, the majority of the ET, the Employment Judge and one lay member, considered that they were bound by the judgment of the Employment Appeal Tribunal (‘EAT’) in **Mitie Group v Mullineaux** UKEAT/0708/04 to find:

“There is no individual right to complain by an affected employee ... when a transferee fails to provide the information to a transferor which is envisaged by the combination of Regulation [13(2)(d) and 13(4)].”

10. The dissenting member distinguished **Mitie** for three reasons including that the claimant in that case was not at any stage employed by the transferee. The dissenting member reasoned that because Mrs Mullineaux declined to transfer it was:

“...unclear why she should be given a remedy to complain of failure to inform or consult since, in any event, she was not going to be affected by any measures introduced subsequent to the transfer.”

The dissenting member found that:

“...it is open to the transferred employees, or their representatives, to bring a claim against the transferee alone, for breach of the duty to consult, pre-transfer, under Regulation 13.”

11. The claims were dismissed as the majority of the ET decided that the ET has no jurisdiction to entertain a freestanding claim against a transferee when no claim was being pursued against the transferor.

The submissions of the parties

12. Mr Ford QC for the Claimants submitted that the real dispute between the parties on appeal is whether the exclusive route for an employee to complain of a breach by the transferee of their obligation under Regulation 13(4) is by way of a claim against the transferor under TUPE Regulation 15(1)(d) and for the transferor to make the transferee a party to the proceedings under Regulation 15(5). If that were the only route for transferred employees to make a claim for an Order for compensation to be made against the transferee, there would have to be a finding against the transferor of a breach of Regulation 13(2)(d) or 13(9) and a finding that they had established a failure by the transferee to give them the requisite information at the requisite time.

13. Counsel referred to the change in the wording of Regulation 13(2)(d) from that in Regulation 10 of the **Transfer of Undertakings (Protection of Employment) Regulations 1981** ('TUPE 1981') which was considered in Mitie. The change was from:

“...if the employer is the transferor the measures which the transferee envisages he will, in connection with the transfer, take in relation to such of those employees as ... become employees of the transferee after the transfer...”

in Regulation 10(2)(d) of TUPE 1981 to:

“...which he [the transferor] envisages the transferee will take ...”

in Regulation 13(2)(d) of TUPE 2006. Counsel contended that the obligation on the transferor under the Regulation 13(2)(d) of TUPE 2006 is easier for them to satisfy than the obligation in Regulation 10(2)(d) of TUPE 1981. The chances of establishing a breach are reduced. Mr Ford QC contended that there is a hole in the protection given to employees by TUPE if employees have no remedy if a transferee gives a transferor wrong information on the basis of which the transferor envisages that the transferee will take certain measures in relation to the transferring employees. The focus of the amended provision is on the subjective view of the transferor of the action which the transferee will take. Provided the transferor can establish that they have communicated their subjective view of what action the transferee will take in relation to transferred employees no liability will attach to them.

14. Mr Ford QC submitted that on the construction of TUPE advanced by the Respondent, in the circumstances under consideration the transferee may not be brought before the ET at all. The transferee would only be joined in a claim by transferring employees if the transferor was contending that it was not reasonably practicable for them to perform their obligations under Regulation 13(2)(d) or 13(9) because the transferee had failed to comply with their obligation under Regulation 13(4). If the defence of a transferor to a claim by their former employees was that they had complied with their duty under Regulation 13(2)(d) because they did not envisage

the transferee taking any measures other than those which, after reasonable enquiry of the transferee, the transferor has communicated to their employees, the transferor would have no basis or need to give notice to the transferee under Regulation 15(5). In those circumstances the transferee could not be made liable to pay compensation to the transferred employees.

15. Mr Ford QC submitted that where it is clear that the transferee provided false information to the transferor and the transferor simply passed that information to their employees or their representatives it makes little sense to require a claim to be brought against the transferor when the party responsible for providing false information is the transferee.

16. Mr Ford QC pointed out that free from the authority of Mitie, the ET would have held that the Claimants could pursue a claim against the Respondent transferee. He contended that to do so would achieve the purpose of Directive 2001/23/EC to safeguard the rights of employees in a transfer of an undertaking. It was said that the purpose of Article 7 of the Directive, which is implemented by TUPE Regulation 13(2), is that employees are informed before the transfer of the measures envisaged to be taken by the transferee after the transfer. The purpose of providing this information is not only for consultation but also to enable employees of the transferor to decide whether to object to becoming employees of the transferee. Article 19 requires the provision of an effective remedy for breach of the rights member states are required to implement. On the construction of TUPE Regulations 13 and 15 advanced by the Respondent, the Claimants would have no effective remedy for failure to provide them with accurate information as to the measures the transferee envisages they will take in respect of transferring employees.

17. If there is no duty on the transferee to inform or consult with the transferor's employees prior to the transfer as held by the ET in paragraph 35 nor, according to the EAT in Amicus v UKEAT/0298/13/DM

City Building (Glasgow) LLP [2009] IRLR 253, to inform or consult their employees after the transfer, employees of the transferor are dependent upon information given to them by the transferor as to plans of the transferee which would affect them if they transferred.

18. Mr Ford QC submitted that TUPE Regulation 13(4) can and should be interpreted to give employees of the transferor a direct right of action against a transferee for a breach of their obligations under the Regulation.

19. Mr Ford QC submitted that to the extent that **Mitie** decided that employees of a transferor may not bring a claim against a transferee for breach of Regulation 13(4) without bringing a claim against the transferor it is wrong. **Mitie** was decided before the amended wording of Regulation 13(2)(d) and the judgment of the Court of Appeal in **Royal Mail Group Ltd v CWU** [2010] ICR 83, in which it was held that Regulation 13(2)(d) is satisfied if the employer communicates their genuine belief about the specified matters. Accordingly the EAT perhaps gave no consideration to the problem which arises when the transferor is not in breach of their obligations because they communicate to their employees the measures they subjectively envisage the transferee will take but the transferee has been in breach of Regulation 13(4).

20. It was said that it was not clear how Mrs Mullineaux could in any event have brought a claim against Mitie, the transferee. She did not transfer and under TUPE 1981 Regulation 11(1)(d) a complaint may only be brought against an employer by any of **his** employees who are affected employees.

21. The Claimants settled their claims against the transferors. Ms Sen Gupta, counsel for the Respondent, submitted that in the absence of any continuing claim against a transferor there

is no mechanism under TUPE for the Claimants to recover compensation from the Respondent transferee. The obligation imposed by Regulation 13(4) is for the transferee to provide information to the transferor to enable them to perform their duty to inform their employees of measures they envisage the transferee will take in relation to affected employees who will transfer. No duty is imposed by TUPE on the transferee to provide information to employees of the transferor. Regulation 13(4) together with 13(2)(d) provide for the only “cross-over” of information from the transferee to the transferor about envisaged measures to be taken in regard to transferring employees. Affected employees of the transferee can bring a claim against the transferee. Affected employees of the transferor can bring a claim against the transferor but TUPE does not provide for employees of the transferor to bring a claim against the transferee. The only means by which the transferee may be made liable to pay compensation to employees of the transferor is if they bring a claim against their employer at the time of the alleged breach, the transferor, and the transferor serves notice on the transferee under Regulation 15(5).

22. Ms Sen Gupta contended that the purpose of Regulation 13(4) is to require the transferor to take responsibility for finding out what measures the transferee proposes to take in respect of the transferor’s employees, for considering the information given to them by the transferee and providing their affected employees with information about the measures the transferor envisages the transferee will take regarding any affected employees. It was said that the decision in Mitie that there was no entitlement under TUPE 1981 for an employee of a transferor to bring a claim against a transferee for a failure to provide the information required to be given to a transferor was persuasive authority for there being no such right under TUPE 2006. Ms Sen Gupta contended that this is highlighted by the change in the wording of what is now Regulation 13(2)(d). This Regulation focuses on what measures the transferor envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer. It was said that this wording makes it clear that the duty owed by

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the transferor to the affected employees is not entirely dependant on the provision of information to the transferor by the transferee and its onward transmission to the transferor's employees. The transferor is under a duty to provide information about measures which *he envisages* the transferee will take. It was submitted that this requires the transferor to undertake some consideration and analysis of the information received from the transferee before providing information to their affected employees.

23. Ms Sen Gupta contended that the structure of the Regulations is to impose a duty on the transferor to give information to their employees. Regulation 15(5) is the only route by which a transferee can be made liable to pay compensation in respect of affected employees of the transferor. Preconditions for such liability are a finding against the transferor that they have failed to perform the duty imposed upon them by Regulation 13(2)(d) or regulation 13(9) and that they show that the transferee failed to give them the requisite information at the requisite time in accordance with Regulation 13(4) to enable them to perform that duty.

24. Ms Sen Gupta contended that Directive 2001/23/EC does not assist the Claimants. The obligation in Article 7.1 is for the transferor and the transferee to provide information to the representatives of their respective employees affected by the transfer. The Directive does not require the provision by employers of information to representatives of those who are not their employees.

Discussion

25. TUPE represents the domestic implementation of Directive 2001/23/EC which re-enacts Directive 77/187/EC together with later amendments. TUPE 2006 replaced TUPE 1981.

26. The provision to be implemented by member states relevant to this appeal is Article 7.1 which requires the transferor and the transferee to inform the representatives of their respective employees affected by the transfer of certain specified matters including “any measures envisaged in relation to the employees”. By Article 7.1:

“The transferor must give such information to the representatives of his employees in good time, before the transfer is carried out.

The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.”

Article 7.2 provides:

“2. Where the transferor or the transferee envisages measures in relation to his employees, he shall consult the representatives of his employees in good time on such measures with a view to reaching an agreement.”

and by Article 7.6:

“Member States shall provide that, where there are no representatives of the employees in an undertaking or business through no fault of their own, the employees concerned must be informed in advance of:

- the date or proposed date of the transfer,**
- the reason for the transfer,**
- the legal, economic and social implications of the transfer for the employees,**
- any measures envisaged in relation to the employees.”**

Article 9 imposes the usual requirement that member states introduce into their national legal systems such measures as are necessary to enable all employees and representatives of employees who consider themselves wronged by failure to comply with the obligations arising from this Directive to pursue their claims by judicial process after possible recourse to other competent authorities.

27. The Directive imposes no obligation on member states to introduce legislation to require a transferor or transferee to give information to representatives of the other party’s employees or to those employees. The obligations required to be introduced are “vertical” and not “horizontal”. Nor does the Directive impose requirements to introduce legislation to oblige a

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transferor to give information to a transferee or vice versa. The Directive does not require the provision of any right of redress at the suit of transferor or transferee. The requirement is to give employees and their representatives the right of redress for failure to comply with the obligations in the Directive.

28. The Directive does not require the introduction by member states of an entitlement to the right to redress sought by the Claimants in this appeal. It does not impose an obligation on the transferee to notify affected employees of the transferor or their representatives of any measures they envisage taking in relation to them. Nor does the Directive require the introduction of legislation obliging a transferee to give the transferor information about measures they propose to take in relation to transferring employees of the transferor.

29. We do not accept the contention of Mr Ford QC that to hold that an employee can pursue a claim against a transferee for breach of the transferee's obligations under Regulation 13(4) to provide information to the transferor would achieve the purpose of the Directive. The Directive does not require the conferring of such a right on employees. The Directive sets out a scheme for the safeguarding of employees' rights in the event of transfers of undertakings. The scheme does not include such a right to pursue a claim against a transferee for failing to provide information to a transferor about measures they propose to take in respect of the transferor's transferring employees.

30. Regulation 13 of TUPE sets out the duties of employers to inform and consult appropriate representatives of **their** affected employees. Regulation 15 sets out who can make a complaint to an ET of failure to comply with a requirement of Regulation 13. Regulation 15 does not impose obligations. It provides a means of redress for breach of the requirements of Regulation 13 and 14.

31. Regulation 13(4), imposes no obligation on a transferee or a transferor to any employee, not even to their own employees. Regulation 13(4) requires the transferee to give the transferor such information as will enable them to perform the duty placed on the transferor by Regulation 13(2)(d). That is the obligation of the transferor to inform the representatives of **their** employees of the measures in connection with the transfer they envisage the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer. The time when the obligation under Regulation 13(4) is to be performed is before the transfer so that the transferor can give representatives of their affected employees the necessary information and views long enough before the transfer in compliance with Regulation 13(2)(d). Regulation 13(2)(d) makes it clear that the information is to be given by the transferor to representatives of his affected employees “who will” become employees of the transferee after the transfer by virtue of Regulation 4. The obligation under Regulation 13(4) has to be complied with by the transferee before the transfer. Any entitlement to be provided with information under Regulation 13(4) is that of the transferor, not his or the transferee’s employees.

32. The scheme of entitlement to information and consultation in TUPE follows that in the Directive. It is “vertical” not “horizontal”. It is the representatives of the transferor’s own employees who are to be informed of the various matters set out in Regulation 13(2)(d). The transferor must give the required information to the representatives of their employees before the transfer takes place. This is necessary to enable the transferor’s employees to decide whether to object under Regulation 4(7) to becoming employees of the transferee.

33. Regulation 15 confers no additional rights which can found a complaint. The Regulation provides the means by which complaint may be made of breach of provisions of
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Regulations 13 and 14 and the remedies for any established complaint. Regulations 15(1)(b) and (d) do not give the Claimants or their representatives a cause of action which is not conferred by Regulation 13 or 14.

34. The standing of an employee to bring a claim for breach of an obligation under TUPE Regulation 13 is determined at the date of the breach of the obligation not at the date the claim is lodged. If a transferor fails to give representatives of their affected employees the information required by Regulation 13(2)(d) they can pursue a claim against the transferor notwithstanding that at the time of lodging an ET1 the employees may have transferred to the transferee. The identity of the claimant's employer at the time of making the claim, or indeed whether he is employed, is immaterial. What is material is the claimant's status at the date of the alleged breach of Regulation 13 which is the basis of a claim under Regulation 15. An employee of a transferor cannot obtain standing to claim against a transferee for breach of pre-transfer obligations because he became an employee of the transferee on the transfer of the undertaking. Mr Ford QC observed that it was not clear how Mrs Mullineaux could have brought a claim against the transferee, Mitie, as she did not become their employee on the transfer. As Mr Ford QC observed in footnote 11 of his skeleton argument, Regulation 15 and its predecessor restrict claims for breach of Regulation 13 and its predecessor, to those against an employer made by **his** affected employees. However, we do not agree that the fact that Mrs Mullineaux did not become an employee of Mitie, the transferee, is a relevant distinction from the current appeal. What is material is the employee's status at the time of the alleged breach of Regulation 13. Even if Regulation 13(4) gave rise to an obligation on a transferee to give information to employees, Regulation 15(1)(d) enables a complaint of a breach of Regulation 13 to be presented against an employer by any of **his** affected employees. Even if an employee could bring a complaint of breach of Regulation 13(4), the obligation imposed is on the transferee and it is only affected employees who were employees of the transferee at the time of

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the alleged breach who could bring a claim under Regulation 15. The Claimants were not employees of the transferee at the date of the alleged breach. Accordingly even if employees could establish a right to be provided with information by a transferee under Regulation 13(4), Regulation 15(1)(d) would not enable them to bring a complaint to an ET.

35. In our judgment, whether or not they transfer, Regulation 15(5) provides the exclusive route for an affected employee of a transferor to obtain compensation from a transferee. The relevant obligation owed to affected employees of the transferor is that imposed on the transferor by Regulation 13(2)(d). The affected employees of the transferor at the time of the breach by them of that obligation may bring a claim under Regulation 15(1)(d). The transferor may have communicated to their affected employees the measures they envisaged the transferee would take, taking into account information given to them by the transferee. The transferor may have a successful defence to the claim. It is only if the affected employees bring a claim against the transferor and the transferor alleges that the transferee had failed to give them the requisite information at the requisite time in accordance with Regulation 13(4) and give the transferee notice under Regulation 15(5) that the transferee is made a party to the proceedings. It is clear from the scheme of the Regulations that the transferee cannot be made a party to the proceedings by any other means. An Order can only be made against a transferee if the Tribunal finds the complaint against the transferor under Regulation 15(1) well founded and the transferor shows that the transferee failed to perform their obligations under Regulation 13(4).

36. The Claimants in this case settled or withdrew their claims against all the transferors. Therefore the ET could not make the findings which are the necessary preconditions for an Order that the transferee Respondent pay compensation under Regulation 15(8)(b). Nor is there an independent cause of action which can be pursued by the Claimants against the Respondent transferee in these circumstances.

37. Whilst we acknowledge the sense of grievance the Claimants feel as a result of a “hole” in the redress available to them, TUPE does not provide them with an independent cause of action against the transferee Respondent. The appeal is dismissed.