

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

At the Tribunal
On 7 August 2013

Before

HIS HONOUR JUDGE BIRTLES

MR M CLANCY

MR S YEBOAH

MS M NABBUMBA

APPELLANT

MERTON PRIORY HOMES

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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For the Respondent

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SUMMARY

TRANSFER OF UNDERTAKINGS

UNFAIR DISMISSAL – Reason for dismissal including substantial other reason

TUPE transfer; dismissal one year later. The Employment Tribunal erred in failing to identify the reason or principal reason for the dismissal and gave no reasons for rejecting the Claimant's case that this was a TUPE Regulation 7(1)(a) rather than a TUPE Regulation 7(1)(b) case. The decision was therefore not **Meek** compliant. Case remitted to same ET to make relevant findings.

HIS HONOUR JUDGE BIRTLES

Introduction

1. This is an appeal from the judgment and reasons of an Employment Tribunal sitting at London South on 27 March and 17 April 2012. The unanimous judgment of the Tribunal was that (1) the claim for unfair dismissal is not well-founded and it does not succeed, (2) the Claimant is not entitled to an additional sum by way of redundancy payment and (3) the claim for unlawful deduction from wages is dismissed upon withdrawal. There is only one live ground of appeal, which followed a rule 3(10) hearing before HHJ Peter Clark on 20 February 2013. The amended ground of appeal appears in the appeal bundle at pages 11-12, and one can see from page 11 that HHJ Peter Clark approved that amended ground of appeal on 14 March 2013.

The material facts

2. These are short and set out in the reasons of the Tribunal, paragraphs 7-25. As they are short, we shall read them:

“7. The Respondent is a subsidiary and partner housing association of Circle Group, an organisation which manages a large stock of homes. The Respondent itself had taken over the housing stock of London Borough of Merton in March 2010.

8. The Claimant commenced employment with London Borough of Merton on 11 February 1998 as a legal assistant, progressing to the post of Principal Legal Assistant in 2003. The bulk of her work was property related in association with the Council’s housing stock.

9. The Claimant went on maternity leave in June 2009 and returned on 15 March 2010. [...]”

3. There are then some findings about the reduction in the Claimant’s hours. Then, from paragraph 10:

“There had been prior notification to staff that the Council’s housing stock was soon to be transferred to a third party. By a letter dated 17 March 2010 sent very soon after the Claimant’s return from maternity leave, the Council confirmed to the Claimant that she was to be transferred from London Borough of Merton to Merton Priory Homes on

22 March 2010. The reason for the transfer was stated to be ‘the transfer of the management and ownership of Council homes to Merton Priory Homes’.

11. We have to say that throughout this case we have found it very difficult to understand why the Claimant had been included on the transfer list. Although the bulk of her work appeared to be supporting the Council Housing Team she did work for other parts of the Council as well. She was clearly a member of the legal team rather than the housing stock team.

12. Of greater significance is the fact that the legal work supporting the work of the Council housing team did not transfer to the Respondent. We heard that the relevant legal files were packed up and sent to Devonshire Solicitors who provided legal support to the Respondent. The Respondent did not have an in-house legal team.

13. We have also heard in evidence that the Claimant’s inclusion on the transfer list happened very late and was the subject of negotiation between the Respondent and London Borough of Merton.

14. Although this seems very surprising the Claimant was eventually included in the transfer and at paragraph 10 of her written submission Counsel for the Claimant accepts that the Claimant’s employment transferred to the Respondent on 22 March 2010 and that this was a transfer in accordance with the TUPE [Transfer of Undertakings (Protection of Employment)] Regulations.

15. Unsurprisingly following the transfer the Claimant found there was no meaningful role for her with the Respondent as a principal legal assistant. Sharon Phillips from whom we heard evidence, and who had been the leaseholder manager at the Council prior to her transfer to the Respondent, sought to find work for the Claimant. For a while the Claimant supported the ‘right to buy’ work and she assisted Devonshire Solicitors with queries that they raised over the work that had been contracted out to them. She carried out various administrative tasks and did some computer training. However it is clear that she was not fully occupied with work that was appropriate for her role and that the Respondent struggled to provide such work to her. The Claimant raised concerns about her situation with the Respondent on a number of occasions but no solution was found.

16. On 16 October 2010 the Claimant went off sick and in fact she never returned to work with the Respondent.

17. In October 2010 Circle Living, another part of the Circle Group, took over management responsibility for the Respondent’s leasehold team and Helen Bowerbank commenced a review of the team’s operations.

18. She proposed a restructure of the leasehold team to make it more ‘customer focused and efficient’.

19. The role of leasehold team manager was removed and the service charge operations were to be dealt with in a different team. Administrative tasks were to be assigned to the Circle Living Sales and Business Support Team which was based in Norwich.

20. The proposed new structure for the remaining team is set out in the document at page 108 of the bundle.

21. Following a ‘job matching’ exercise it was clear there was no role for the Claimant in the new team (or indeed for Sharon Phillips, who was herself made redundant).

22. An announcement was made to the staff in the team on 15 February 2011 at a meeting where the Claimant was not present as she was off sick. Details of the proposal were sent to her.”

4. There then follow in paragraph 23 details of the consultation process carried out by the Respondent. The Claimant did not apply for any of the roles that were considered available for

her. There was a final consultation on 6 April 2011, and by a letter dated 7 April 2011 the Claimant was informed that her employment was being terminated on the grounds of redundancy with effect from 30 June 2011. She remained on gardening leave until the end of her notice period. There was a dispute about calculation of her redundancy pay, but that is not relevant to this case.

The Employment Tribunal decision

5. In paragraph 3 of its reasons the Tribunal identified six issues that were, we think, agreed with counsel:

“3.1 What was the reason for the Claimant’s dismissal on 31 June 2011 [sic]?”

3.2 Was the sole or principal reason for her dismissal either the transfer of the Claimant’s employment from London Borough of Merton to the Respondent itself, or was it a reason connected with that transfer?

3.3 If the Claimant was dismissed for a reason connected to that transfer, was there an economic, technical or organisational reason for her dismissal entailing changes in the workforce?

3.4 If an economic, technical or organisational reason applied, was her dismissal fair in all the circumstances?”

6. Sub-paragraphs 3.5 and 3.6 are not relevant.

7. The Tribunal’s decision is essentially set out in paragraph 26 of its reasons. It says this:

“26. Our unanimous decision is as follows.

What was the Reason for Dismissal?

26.1 We find that the dismissal was for a reason connected with the transfer, despite the fact that the notice of termination was issued around 12 months after the date of transfer.

26.2 Reaching a decision on this point has caused us some difficulty because, as we have said above, we cannot understand why the Claimant was included within the transfer of staff from London Borough of Merton to the Respondent, given that the legal work in which she was employed was never transferred to the Respondent. It seems to us this meant that the Claimant’s position was doomed from the point at which she transferred into the Respondent’s employment. There was no role for her as the Respondent was not carrying out in-house legal work to support the activities of the leasehold team.

26.3 However given that it is accepted that the Claimant had been transferred to the Respondent in accordance with the TUPE Regulations, our finding is unavoidable.

26.4 We do not however accept the Respondent's argument that the dismissal was unconnected with the transfer and that a series of supervening events had taken place resulting in a redundancy situation in March 2011 which was entirely distinct from the transfer. In our view the Claimant's dismissal stemmed from the circumstances of the transfer itself, even if it was not effected until March 2011.

8. They then go on in sub-paragraph 26.5 to comment on the fact that the Respondent did try to find an alternative role for the Claimant, and in sub-paragraph 26.6 they found, in answer to the question, "Was there an economic, technical or organisational reason for the dismissal?" that there was, and in answer to the question, "Was the dismissal reasonable in all the circumstances?" at sub-paragraph 26.7 they found that it was.

The ground of appeal

9. As we have already said, the ground of appeal is set out in the amended grounds of appeal approved by HHJ Peter Clark on 14 March 2013. In essence, it appears at paragraphs 7, 8 and 9 of the amended grounds of appeal. We take these in order. First, ground 1: **Meek**. This is, of course, a reference to the well-known line of cases beginning with **Meek v City of Birmingham District Council** [1987] IRLR 250. The case is well known; it is not necessary to cite from it. Was this decision **Meek** compliant? Mr McCombie relies upon what Beatson J said in **CAB Automotive Ltd v Blake and Ors** UKEAT/0208/07 (unreported); in particular, he relies on the principle set out by Beatson J (as he then was) at paragraph 30, where he said this:

"It is convenient to treat grounds 1 and 4 together. The Tribunal found that the dismissals were with a view to sale and was in our view entitled to consider the intention of the administrator in relation to both the regulation 8(1) and regulation 8(2) issues. The language of the decision is, however, somewhat compressed. In view of the guidance in *Jones v Mid Glamorgan County Council* [[1997] IRLR 685], that on its own would not have sufficed. However, we have been persuaded that the Tribunal did not adequately consider the question necessitated by the terms of regulation 8(1): that is whether the transfer or a reason connected with it was *the reason* or principal reason for the Claimants' dismissal. The final sentence of paragraph 6(5) of the Tribunal's reasons states that the dismissals were 'connected with a transfer'. This is not the same as, and lacks the essential requirement of, identifying *the*

reason for dismissal. In the light of the misquotation of regulation 8(1) to which we have referred, we consider that in this respect the Tribunal, in the final sentence of paragraph 6(5), erred in law.”

10. Mr McCombie relies on that principle. He fully accepts that the case is different on the facts from the present case, but he draws from it this proposition: what a Tribunal must do in these circumstances is first, identify the reason or principal reason for the dismissal and second, go on to find whether that reason or principal reason relates to (a) the transfer itself (Regulation 7(1)(a)) or (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce (Regulation 7(1)(b)).

11. Ms Musgrave submits that that principle is not applicable here, but in any event she submits that if one looks at paragraphs 26.1, 26.2, 26.4, 26.6 and 26.14 of the reasons, then it is clear that the reason or principal reason for the dismissal is redundancy. She uses the word “implicitly” in her skeleton argument; that, we think, is an acceptance that the Tribunal do not say that the reason or principal reason for the dismissal was redundancy explicitly. It follows that Mr McCombie criticises the wording of paragraph 26.1 of the judgment, which we have read, and his submission is that it is not **Meek** compliant.

12. We have stood back and looked at the judgment as a whole, and we, however, are unable to say that it is **Meek** compliant. We do so for three reasons. First, we accept Mr McCombie’s submission based upon **Blake** that the Tribunal should have first found the reason or principal reason for the dismissal, in other words the ordinary unfair dismissal requirement, and then gone on to decide whether it fell within either Regulation 7(1)(a) or 7(1)(b) of the **TUPE Regulations 2006**. We do not accept Ms Musgrave’s submission that one can implicitly draw

out of the reasons the Tribunal's finding; they in fact in paragraph 26.1 moved from the first stage and straight to the second.

13. Second, it was quite clearly an issue between the parties at the Employment Tribunal whether Regulation 7(1)(a) applied (the Claimant's case) or 7(1)(b) applied (the Respondent's case). Nowhere in paragraph 26 of the reasons do the Tribunal address the Claimant's argument; they simply find that the dismissal was a reason connected with the transfer. They do not give any reasons why they reject the Claimant's argument, and in our judgment **Meek** requires the Claimant to be able to know why her argument has been rejected.

14. Third (and this is a subsidiary point) there appears on the face of it to be some conflict at least between paragraphs 26.1 and 26.4 of the reasons. Paragraph 26.1, as we said, states, "We find that the dismissal was for a reason connected with the transfer". Paragraph 26.4, in the last sentence, says, "In our view the Claimant's dismissal stemmed from the circumstances of the transfer itself"; in other words, 26.1 uses the language of Regulation 7(1)(b), and paragraph 26.4 uses some at least of the language of Regulation 7(1)(a). It suggests at the least that there was some confusion in the Tribunal's mind, particularly in this somewhat unusual case of there being a transfer and the Claimant being left with no work to do.

15. It follows that in all the circumstances we find that this judgment was not **Meek** compliant.

16. Ground 2: Mr McCombie urges on us that what we should do is to substitute our decision for that of the Tribunal and find that this was not a Regulation 7(1)(b) case but a Regulation

7(1)(a) case. We did not hear the evidence; we did not hear the submissions. We do not think it is appropriate for us to substitute our decision for that of the Tribunal.

17. What I shall call ground 3 relates to a submission made by Ms Musgrave in her skeleton argument, that a certain comment made by HHJ Peter Clark at the rule 3(10) hearing on 20 February 2013 in paragraph 10 was wrong in law. Mr McCombie touched upon the point in his submissions. Tempted as we are, we think that this is not the right case in which to pursue that. The point raises two issues: whether Regulation 7 correctly transposes Article 4 of the EU Directive 2001; and second, whether the comments made in particular by Mummery LJ in **Warner v Adnet Ltd** [1998] ICR 1056 are still binding given that the structure of the UK **TUPE Regulations 2006** are different from the original Regulations. We do not think that it is necessary for us to go into those arguments. It is sufficient to say that the appeal is allowed and solely on the first ground of appeal; that is, **Meek**.

Conclusion

18. In those circumstances, the appeal will be allowed, and we are not prepared to alter the judgment of the Tribunal, as Ms Musgrave suggests, nor indeed do we think this is a suitable case for a **Burns/Barke** remission. The decision we are going to make is that the case be remitted to the same Employment Tribunal to decide two questions: first, what was the reason or principal reason for the dismissal; and second, was that reason caused by (a) the transfer itself (Regulation 7(1)(a)) or (b) a reason connected with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce (Regulation 7(1)(b))?