Appeal No. UKEATS/0012/13/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 16 July 2013

Before

THE HONOURABLE LADY STACEY

(SITTING ALONE)

MRS JESSIE P HAMILTON — APPELLANT

(1) STONEHOUSE COACHES LTD
(2) MR RAYMOND CLARKE & MS JUNE CLARKE
T/A RAY CARS & COACHES — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellant	Written Submissions
For the First Respondent	MR ALAN GRAVELLE (Solicitor) Beltrami & Co Ltd Solicitors 83 Carlton Place Glasgow G5 9TD
For the Second Respondent	Written Submissions

SUMMARY

TRANSFER OF UNDERTAKINGS – Continuity of employment

TUPE Regulations 2006. Circumstances in which a worker is held to object to her employment being transferred from transferor to transferee. The conclusion of the Employment Tribunal was that the worker had objected to a relevant transfer. The findings in fact and conclusions are insufficient to explain the reasoning of the ET and the matter is remitted to them for further explanation.

THE HONOURABLE LADY STACEY

Introduction

1. Mrs Hamilton, to whom I will refer to as "the Claimant" was employed by the First Respondent as an attendant on a bus used to take children to school. The contract for the bus run was put out to tender and the Second Respondent tendered successfully. The Claimant lodged an ET1 in which she stated that she had worked for the First Respondent from August 2000 until June 2012. She claimed that on 15 August 2012, when she phoned the office of the First Respondent, to see if she still had a job, that she was told that she did not. She claimed that the owner, Mr Cutmore, told her that Mr Clarke of the Second Respondent was to pay her redundancy money. She stated in her form that she never worked for Mr Clarke. She spoke to him and he said that it was nothing to do with him.

2. The First Respondent lodged a form ET3 signed by Mr Cutmore for the company in which it was stated that the Claimant was 'verbally notified on the 30th March 2012' and that she served notice from 1 April 2012 to 28 June 2012. The reason for this was stated to be that it was likely that the First Respondent would not be successful in a tender for a contract. Mr Cutmore explained that the Respondent had already lost out in a number of long-term contracts and that some drivers and all attendants other than the Claimant had moved to the Second Respondent in 2011. Mr Cutmore also stated that he resisted the claim for a redundancy payment as there had been a TUPE transfer to the Second Respondent who had been awarded the contract on which the Claimant had previously worked.

3. The Second Respondent lodged a form ET3 in which it was stated that the Second Respondent submitted a tender to provide school bus transportation for 3 years from 15 July 2012. Following an amendment to the contract, the Second Respondent was successful in the tender. The first service provided by the Second Respondent under the contract was 15 August

2012. In the form it is stated that at no point prior to the commencement of the contract did anyone indicate to the Second Respondent that TUPE applied. Even if it did apply no one gave the Second Respondent notification of employee liability, or otherwise indicated that there were any employees likely to be affected by the regulations. It is stated that the first contact made relating to the Claimant was after 15 August 2012 when the Claimant telephoned the Second Respondent's office to say that she had been made redundant by the First Respondent but that they contended that her redundancy payment was due by the Second Respondent. It is narrated that the Claimant said that she did not consider payment was due by the Second Respondent and requested confirmation that she had never been employed by them. She then requested such confirmation in writing and it was provided by letter dated 3 September 2012. The Second Respondent denies in the form that there had been any relevant transfer to the company; even if there had been a relevant transfer they deny that immediately before any such transfer the Claimant was employed by the transferor and assigned to any activity or undertaking which may have transferred to the Second Respondent.

4. Neither the Claimant nor the Second Respondent attended the hearing before me. The Claimant indicated that she intended to rely on written submissions which she supplied. The Second Respondent also supplied written submissions in which they amplified their position by stating that they had no knowledge of the Claimant's involvement with the contract until 21 August 2012, 37 days after their contract commencement on 15 July 2012. They also stated that the Claimant, at the ET, gave evidence under oath that she did not want to come and work for the Second Respondent as she already "had a wee job lined up".

5. The written material provided by the Claimant consisted of several handwritten pages in which there is repetition, and slightly varying versions of the Claimant's position. She explained that she had worked as a school attendant for Stonehouse Coaches from 2000; that

the business was taken over by Mr Cutmore in 2011 taking on all staff; that the company lost all the contracts in June 2011 except for the one on which she was employed, which had a year to run. She asserted that Mr Cutmore paid other staff redundancy payments in 2011. When school started again in August 2011 she returned to work and carried out her duties until June 2012, when the school broke up for holidays. She then stated "When I finish up on June 2012 Mr Cutmore said he would let me know what was happening." The Claimant went on to explain that she tried to contact Mr Cutmore "a few times" during the school holidays but heard nothing from him. She claimed that on 15 August 2012 at 0630 she phoned him, and he said she had no job as Mr Clarke had got the contract. The Claimant stated that she had sought advice from ACAS who advised her to write to Mr Cutmore asking for any sums due to her. She did so, and claims that Mr Cutmore then told her that he had spoken to ACAS who said that Mr Clarke should pay her redundancy. The Claimant then called ACAS again and spoke to another person who she says advised her to contact Mr Clarke to ask him to confirm by letter that she had never worked for him. She did so, and received such a letter in September 2012. Later she was asked by an ACAS officer, by phone if she would accept £600 as a settlement from Mr Cutmore and she declined as she believed she was due more. She added that she was never asked to transfer to Mr Clarke, and that is why she thought it was unfair that the judge thought she objected to being transferred.

6. The Claimant also sent a letter a letter dated 10 July 2013 in which she wrote:

> **"The only thing I would like the Tribunal to look at is I was never asked to be transferred to Mr Clark (sic) and I think after 12 years for working for Stonehouse Coaches Ltd I thought I was due some kind of compensation as he paid all the rest their redundancy and offered me £600 on November 2012 if I was not due any payment why did he get Mrs Gallacher from ACAS to phone me and ask me to accept £600."**

7. The Claimant also wrote that she had been informed by ACAS that she was due 18 weeks' pay at £70 per week, and 12 weeks' notice at £70 per week, totalling £2100.

The Employment Tribunal Judgment

8. The ET decision was to the effect that the Claimant had objected to a transfer of her employment to the Second Respondent and that the Second Respondent was not her employer and the claim against it should be dismissed. It also found that the claim against the First Respondent should be dismissed, on the basis that the objection operated so as to prevent the Claimant pursuing any claim based on dismissal in respect of the First Respondent.

9. In the reasons given for the decision, the ET set out findings in fact. They found that the Claimant began working for the First Respondent in August 2000. The contract on which the Claimant worked came to an end at the Easter holidays in March 2012, and the First Respondent obtained a temporary contract for the service for the summer term. It was anticipated that the First Respondent would lose the contract. On 9 June 2012 the Second Respondent tendered to provide the service covered by the contract. The destination of the children changed due to their being decanted to another primary school. That led the local authority (who were the authority for provision of school transport) to seek clarification of the tender bid. The Second Respondent was successful and the contract was due to start on 15 August 2012 for a three-year period. The ET made the following finding in fact, at paragraph 10: –

> **"In August 2012 the claimant telephoned Brian Cutmore (of the first respondent's) to enquire if she still had a job. She was told the contract had gone to the second respondent and she was to finish work on 28 August 2012."**

10. The ET found that the Claimant sent texts to Mr Cutmore on 31 July and 3, 9, 21 and 23 August. She wrote to him enquiring about a redundancy payment and she telephoned him about a redundancy payment. He told her by telephone that he would look into it. He also told that she may be transferred to another of his businesses, known as Trip in Time Ltd.

11. The ET found that Mr Cutmore did tell the Claimant that he had spoken to ACAS and had been told that any redundancy payment was payable by the Second Respondent.

12. At paragraph 20 the ET made the following finding in fact: –

> **"On or about 15th of August 2012 the claimant telephoned the second respondent to say that she had been made redundant by the first respondent but the first respondent maintained any redundancy payment was the responsibility of the second respondent. The claimant said she did not consider this to be the case and she asked for written confirmation that she had never been employed by the second respondent. This was provided. Up until then the claimant had not contacted the second respondent (she maintained in evidence that she had no idea why the second respondent was present at the hearing!)."**

13. The last finding in fact made by the Tribunal was that 4 named employees of the First Respondent had transferred to the Second Respondent. They make no finding as to the date of that happening.

14. In the section of the judgment headed "conclusion" the ET found that the question for it was the identity of the Claimant's employer – First or Second Respondent. The ET noted that the TUPE Regulations provide for dual routes for a relevant transfer, being standard transfers set out in regulation 3(1)(a) and service provision change is under regulation 3(1)(b). The Tribunal found in this case it appears that regulation 3 (1) (b) was most apt. The Tribunal found that the First Respondent was in terms of the regulations the transferor and the Second Respondent was the transferee. The Tribunal noted that each of the conditions set out in regulation 3(3) requires to be met. The Tribunal found in paragraph 25 that the bus service involved both the driver and an attendant which would constitute "an organised grouping of employees." The Tribunal found at paragraph 26 that there had been a relevant transfer in terms of the regulations. The Tribunal then turned its attention to regulation 4(7) noting that it provides that there will be no transfer of rights, powers, duties or liabilities in circumstances in

which an employee informs the transferor or the transferee that there is an objection to becoming employed by the transferee. The Tribunal noted that an objection can reflect the state of mind short of refusal and all manner of means can be used to convey an objection to the transfer. Such an objection can be imparted by word or deed or both. The Tribunal noted that it is a question of fact whether the employee's state of mind amounts to a refusal to consent to the transfer and whether that state of mind was brought to the attention of the transferor or transferee prior to the transfer. In paragraph 28 of the judgment of the ET found as follows: –

> **"In the circumstances of this case, the claimant did not seek a transfer (unlike the 4 employees mentioned above), repeatedly sought a redundancy payment from the first respondent, hoped to obtain further employment with Trip In Time Ltd and only contacted the transferee to obtain confirmation that she had never been employed by them. The circumstances appeared to the tribunal to be eloquent to (sic) an objection to the transfer."**

15. In the last paragraph of the judgment the ET found that having regard to regulation 4(8), in view of the objection, the relevant transfer operated so as to terminate the Claimant's contract of employment with the First Respondent and "she shall not be treated for "any purpose" as having been dismissed by the First Respondent. Accordingly she cannot pursue any claim in respect of dismissal."

The Submissions for the First Respondent

16. Mr Gravelle who appeared for the First Respondent appreciated that it was necessary to address the decision of the ET in light of all that the Claimant and the Second Respondent had written, even though they did not attend. He assisted me by looking carefully at all that had been written by the other parties. He argued that the decision of the ET was correct and that the appeal should be refused. He maintained that the ET had before it material from which it was entitled to find that the Claimant objected to the transfer. In those circumstances it had correctly interpreted the regulations. He made reference to the case of **Hay v George Hansen (Building Contractors) Ltd** [1996] IRLR 427 from which he argued that the objection could

be communicated by word or deed or both. In discussion, Mr Gravelle did accept that the conclusions set out by the ET in paragraphs 22 to 29 could be seen as not squarely based on findings in fact made in the judgment. He had anticipated a difficulty and was prepared to argue that if any party sought to lead new evidence they should not be allowed to do so under reference to the case of **Ladd v Marshall** [1954] 1 WL R1489 and the more recent case of **Adegbuji v Meteor Parking Ltd** [2010] 2131321. Once again, in discussion, he recognised that there was no motion before me to adduce new evidence.

Discussion and Decision

17. In my opinion the ET has not dealt with all of the disputed facts before it, and has not given full reasons for the conclusions which it drew in light of the findings in fact which it made. There appears to have been evidence from the Claimant that she phoned Mr Cutmore on 15 August, to find out if she had a job. There was also evidence, from Mr Cutmore, that he had given her notice in March. There is a finding that he said that she was to finish on 28 August. The conflicts in those parts of the evidence have not been resolved. There is no finding of the date when the Claimant ceased to be employed by the First Respondent. It is clear that the ET found that there was a relevant transfer, but it does not appear in its written judgment to have addressed the question of when that transfer took place. There is no finding that she was employed by the transferor immediately before the transfer, as there is no date for the transfer. Nor has the ET explained fully the evidence given by the Claimant, with regard to the assertions made by the Second Respondent as to her having said that she did not want to work for them as she had another job which she intended to take up. No finding has been made that she did say that; thus the conflict between that piece of evidence, if it were said, and the Claimant's evidence that she was not asked to work for the Second Respondent has not been resolved. The ET concluded that the Claimant did not seek a transfer and contrasted that with the 4 employees whom they found had transferred. It appears from the papers that the 4

employees were transferred in 2011, not 2012. The ET does not explain the significance of its finding. Further, it is not necessary that the Claimant seek a transfer; rather it is necessary that she objects to a transfer if that be her position. There may have been evidence before the ET that the Claimant objected to the transfer, but it is not apparent from the judgment that any such evidence was given, nor what the ET made of any such evidence.

18. I have therefore decided that this is a case which should be dealt with in the way described by Lord Justice Dyson in the first paragraph of case of **Barke v SEETEC Business Technology Centre Ltd** [2005] IRLR 633. I return the case to the Employment Tribunal which heard it and invite it to clarify, supplement, and give its written reasons, for coming to the conclusions that there was a relevant transfer; and that the Claimant objected to the transfer. I should make clear that the ET should not hear any further evidence. Rather it should consider the notes of evidence already heard, make any further findings in fact that are appropriate and expand on the reasons for those findings and the existing findings in the conclusions.