Appeal No. UKEAT/0249/13/RN

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 16 October 2013

Before

HIS HONOUR JEFFREY BURKE QC

MR P M SMITH

MR S YEBOAH

WARD BROTHERS (MALTON) LTD — APPELLANT

(1) MR G MIDDLETON AND OTHERS
(2) UNITE THE UNION
(3) BULMERS TRANSPORT LTD (IN ADMINISTRATION) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR STEVEN MEYERHOFF (Solicitor) Backhouse Jones Solicitors The Printworks Hey Road Clitheroe BB7 9WD
For the First and Second Respondents	MRS LAURA DANIELS (of Counsel) Instructed by: Bridge McFarland Solicitors Suite 1 Marina Court Castle Street Hull HU1 1TJ
For the Third Respondent	No appearance or representation by or on behalf of the Third Respondent

SUMMARY

TRANSFER OF UNDERTAKINGS – Insolvency

Haulage company B was in severe financial difficulty HMCR had issued a winding-up petition. It ceased to trade on a Friday; on the following Monday the Appellants started to perform B's major contracts, using B's ex-employees, save for some who did not wish to accept lower terms as offered by the Appellant. Before B closed, a firm of insolvency practitioners were at B's premises at B's invitation. The Tribunal found that there had been a transfer of undertakings from B to the Appellant unless B was "under the supervision of an insolvency practitioner within Reg. 8(7) of **TUPE 2006**, in which case Regs 4 and 7 of TUPE did not apply and the Appellant was not required to take on B's employees on the same terms. The Tribunal found that the insolvency practitioners were on site only to advise, had never been appointed to act and B was not under their supervision.

Held on appeal that the issue was not one of pure fact and that there needed to be a clear line; **Slater v Secretary of State for Industry** (2007 IRLR 928) and **Key2Law v De Antiquis** (2012 URLR 212) followed; they established that an appointment (formal or informal) was necessary before there could be said to be supervision by an insolvency practitioner; in the present case there had been no such appointment. Appeal dismissed.

HIS HONOUR JEFFREY BURKE QC

The nature of this appeal

1. In this appeal, the Appellant challenges the decision of the Employment Tribunal at Leeds, presided over by Employment Judge Elgot and sent to the parties on 3 July 2012, that there had been a transfer of undertakings between the Appellant (Ward Brothers (Malton) Ltd) and a company called Bulmers Transport Ltd, as a result of which pursuant to Regulations 4 and 7 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** the employment of 13 employees of Bulmers, as we shall call them, was transferred to the Appellant. The appeal raises an interesting point on the proper construction or application of Regulation 8(7) of the 2006 Regulations. The parties to the hearing before the Employment Tribunal were 13 employees, originally employees of Bulmers, and their union, Unite, as Claimants, and Bulmers and the Appellant as Respondents. Bulmers was formally dissolved on 23 November 2012 and therefore is and can be no longer a party to these proceedings. Unite claimed that there had been inadequate consultation in the interests of its members, both the 13 individual Claimants and a substantial number of other employees who were working for Bulmers when Bulmers went into liquidation and subsequently worked for the Appellant.

2. Unite's claim as to failure of consultation has not yet been resolved and is outstanding for determination by the Tribunal. Of the 13 Claimants, one of them, Mr Middleton, declined to accept the terms offered by the Appellant; and therefore the Tribunal which considered the question we are called upon to answer, if so, also considered whether he had been dismissed and fairly dismissed. They found in his favour. Other employees, we are told, are in a similar position; in some cases there have been determinations that there was a dismissal which was unfair, and there either has been or progress is being made towards remedies hearings. The question whether there was a transfer under the Regulations from Bulmers to the Appellants,

however, affects all of the claims by the 13 individual Claimants and the union. In the case of any Claimant or employee who did accept employment with the Appellant, in so far as his or her terms and conditions are less than those that they enjoyed with Bulmers, they may have claims for anything that they have lost by reason of any such difference.

3. The union and the Claimants have all been represented together before us by Mrs Daniels of counsel; the Appellants have been represented by Mr Meyerhoff of the Appellant's solicitors. We are grateful to both for their helpful submissions.

4. Although the Notice of Appeal spreads a broader canvas, Mr Meyerhoff accepts that only one point was permitted to the Appellant to go to a full hearing at a rule 3(10) hearing heard by HHJ McMullen QC on 13 May 2013. That point is as to the effect of Regulation 8(7) of what we call and everybody else calls "TUPE". Before we come to the terms of Regulation 8(7), it will be helpful to set out the facts.

The facts

5. We take the history, largely undisputed, from the Employment Tribunal's findings of fact and a chronology prepared by Mr Meyerhoff for this appeal. Bulmers was a haulage business based in Hull and Middlesbrough. They had two relevant contracts in the Hull area. One, called "the Samskip activity" by the Tribunal, was a contract with a Dutch shipping and logistics company pursuant to which Bulmers' lorries carried Heinz products manufactured in Holland from docks in Hull to the Heinz distribution centre in Wigan and, on their return journeys, carried other Heinz consignments. Mr Middleton was one of the employees who carried out that work. Bulmers also had what the Tribunal called "the Hulkstra contract" under which they carried hazardous chemicals from Immingham to unspecified destinations, using a

depot near Immingham which Bulmers had leased for the purpose and 11 specialist vehicles similarly obtained.

6. It is clear that Bulmers, in 2010, found themselves in serious financial difficulties. As a result, on 17 December 2010 Her Majesty's Revenue & Customs presented a petition to the High Court for the winding-up of Bulmers. The hearing date was to be 9 February 2011. However, no doubt seeing that the writing was on the wall, Bulmers ceased to trade on Friday, 4 February 2011. Before that cessation Mr Bulmer of Bulmers and Mr Ward of the Appellant had been in discussions. On 5 February a meeting took place at Bulmers' premises, attended by staff of Bulmers, but not the drivers, and by Mr Ward. The Tribunal found that the Appellant had, entirely properly no doubt, seized upon the commercial opportunity of taking on the Heinz work that Bulmers were no longer going to be able to carry out; and the Tribunal found that, by 4 February, the Appellant had negotiated an agreement with Samskip for them to take over almost all of the work previously covered by Bulmers. They similarly arranged to take over the Hulkstra work. Two of Bulmers' traffic operation staff went to work for the Appellant, as did 35 of the 45 staff involved in Bulmers' Hull operation. The Appellant, by the afternoon of 4 February, had obtained an extension of its operating licence from the Traffic Commissioners so that they could operate 105 rather than 45 vehicles, and, the Tribunal found, it was that extension which finally facilitated Bulmers' closure, at the close of business on 4 April.

7. The Tribunal found that, subject to the Regulation 8(7) point, there was a transfer from Bulmers to the Appellant of the economic entities of Bulmers, consisting of the Samskip and Hulkstra contracts. As often happens in situations such as that which we have described, the Appellant believed, and may well have been advised, that there would not be a TUPE transfer

in the situation that they believed to exist. Some parts of Unite, we have been told, shared that view. That was not necessarily accurate advice; that there was, subject to the Regulation 8(7) argument, a transfer of undertakings from Bulmers to the Appellant is not now challenged. It is at that point that the spotlight falls on Regulation 8(7). We shall come to the words of that Regulation in due course. For the moment, we shall stay with the facts which relate to the questions arising under Regulation 8(7) and, in particular, whether the transferors, Bulmers, were at the time of the transfer under the supervision of an insolvency practitioner, for that, as we shall see, is the vital question which arises under Regulation 8(7).

8. The Appellant's contention was that Bulmers were under the supervision of an insolvency practitioner; Bulmers' contention was that they were not. Those positions were taken because, if Bulmers were under the supervision of an insolvency practitioner, Regulations 4 and 7 of TUPE would not have applied, the contracts of the Bulmers employees would not have been transferred to the Appellant and the Appellant would not be liable under Regulation 7 for dismissals or burdened with any terms of contracts which gave greater benefits than those that they wished to confer on the transferred employees.

9. There is no doubt that the winding-up petition was presented on 17 December 2010 and that Bulmers ceased to trade on 4 February 2011, which was a Friday, and that the Appellant started work on what had been the two Bulmers contracts we have described on the following Monday morning, 7 February. No administrators were formally appointed, or insolvency practitioners for that matter, until 14 February, when Messrs Harrisons were so appointed by a factoring company used by Bulmers. Before the transfer, however, a different firm of insolvency practitioners, called Begbies Traynor, were, to put it deliberately vaguely for the moment, on the scene. What they did we shall come to in a moment. The vital issue which the

Tribunal had to decide - and that they decided in favour of those who argued that there was a transfer of undertakings - was whether at the time of the cessation of business Bulmers, although up to that time in business, was under the supervision of Begbies Traynor. The Tribunal approached that issue in paragraphs 6.6 to 6.9 of their decision, which are in these terms:

> **"6.6 The transferor is the First Respondent. The First Respondent was, at the time of the transfer, the subject of insolvency proceedings because Her Majesty's Revenue & Customs had presented a petition to the High Court to wind up the First Respondent as a result of a failure to pay Income Tax (PAYE) and National Insurance contributions together with interest thereon. That petition was presented to the Court on 17 December 2010 with a hearing date fixed for 9 February 2011. In the event, the First Respondent ceased trading at the close of business on 4 February 2011, as we have said. Administrators, Messrs Harrisons, were appointed on 14 February 2011 and that fact is not a matter of dispute. The Administrators were appointed, as is agreed between the parties, by a factoring company used by the First Respondent. The formal appointment of Administrators therefore took place after the transfer occurred.**
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> **6.7 We cannot agree with the submission of Mr Meyerhoff on behalf of the Second Respondent that the prospective Administrators who were originally contacted by Mr Ward, Messrs Begbies Traynor, acted in anything other than an advisory capacity when they were consulted by the First Respondent about the inevitability of a cessation of its trading activity and the possibility of a voluntary winding up. There was no appointment of Begbies Traynor as Administrators, whether provisional or final. The situation as conveyed to him by Mr Bulmer is accurately described in Mr Ward's witness statement at paragraph fourteen. Mr Bulmer told Mr Ward that he was:–**
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> > **'Looking into appointing the Administrators himself shortly to coincide with the ceasing of trading.'**
>
> **6.8 That conversation took place on or around 28 January 2011. In paragraph eighteen, Mr Ward was told by Mr Bulmer that:–**
>
> > **'He had taken the decision to cease trading as of Friday 4 February 2011 at which point I understood an insolvency practitioner was likely to be appointed.'**
>
> **6.9 As we have said, that appointment did not occur and instead Harrisons were appointed some ten days later on 14 February. Mr Ward's oral evidence confirmed that Mr Clay and Mr Jenkins of Begbies Traynor were in the First Respondent's office during the week ending 4 February 2011 with a view to being appointed on 4 February 2011 but, said Mr Ward 'they walked away', not least because they found no net worth in the First Respondent's business and therefore they 'pulled out'. Mr Ward thus confirmed to us in robust and vivid terms that Begbies Traynor did not want the appointment as Administrators, were not so appointed and were not supervising any proceedings instituted with a view to the liquidation of the assets of the transferor. Begbies Traynor took the view that there were no such assets."**

10. It can be seen, therefore, that their conclusion was that Begbies Traynor were not supervising Bulmers or its business or the liquidation of the assets of Bulmers and that Bulmers were not under the supervision of an insolvency practitioner. That is the conclusion which lies at the heart of this appeal.

The statutory provisions

11. With that background, we turn to the statutory provisions. We do not need to go to the familiar provisions of TUPE which precede Regulation 8. Regulation 8 provides:

> **"(1) If at the time of a relevant transfer the transferor is subject to relevant insolvency proceedings paragraphs (2) to (6) apply.**
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> **(2) In this regulation 'relevant employee' means an employee of the transferor—**
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> **(a) whose contract of employment transfers to the transferee by virtue of the operation of these Regulations; or**
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> **(b) whose employment with the transferor is terminated before the time of the relevant transfer in the circumstances described in regulation 7(1).**
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> **(3) The relevant statutory scheme specified in paragraph (4)(b) (including that sub-paragraph as applied by paragraph 5 of Schedule 1) 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.**
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> **(4) In this regulation the 'relevant statutory schemes' are—**
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> **(a) Chapter VI of Part XI of the 1996 Act;**
>
> **(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.**
>
> **(6) In this regulation 'relevant insolvency proceedings' means insolvency proceedings which have been opened in relation to the transferor not with a view to the liquidation of the assets of the transferor and which are under the supervision of an insolvency practitioner.**
>
> **(7) 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."**

12. As Elias P, as he then was, set out in his judgment in **Secretary of State for Trade and Industry v Slater** [2007] IRLR 928, the statutory scheme set out by Regulation 8 envisages the operation of two different sub-schemes. One scheme arises under Regulation 8(3)-(6) and applies where there are no bankruptcy proceedings or analogous insolvency proceedings instituted with a view to the liquidation of the assets of the transferor. The other scheme is that which falls within Regulation 8(7). We do not need to add to, nor could we possibly improve

upon, the description of these schemes given in the judgment in **Slater** by the EAT at paragraphs 13-19; that judgment that was subsequently described by the Court of Appeal in **Key2Law (Surrey) LLP v De'Antiquis** [2012] IRLR 212 as "luminous".

13. It is helpful too to set out section 388 of the **Insolvency Act 1986**, subsection (1) of which provides as follows:

> **"A person acts as an insolvency practitioner in relation to a company by acting—**
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> **(a) as its liquidator, provisional liquidator, administrator or administrative receiver, or**
>
> **(b) where a voluntary arrangement in relation to the company is proposed or approved under Part I, as nominee or supervisor."**

14. There is no suggestion that subsection (1)(b) applies in this case.

The submissions; and Conclusions

15. Mr Meyerhoff submits that, on the Tribunal's findings of fact in this case, we should conclude that Bulmers were under the supervision of Begbies Traynor at the time of and before the transfer. He points to the Tribunal's findings that, on 28 January or around that time, Mr Bulmer told Mr Ward that he was looking into appointing administrators himself shortly, to coincide with the ceasing of trading (paragraphs 6.7 and 6.8), that as a result Mr Clay and Mr Jenkins of Begbies Traynor were in Bulmers' office during the week ending 4 February 2011 with a view to being appointed on 4 February 2011 (paragraph 6.9) and were acting in an advisory capacity (paragraph 6.7). It is common ground that Begbies Traynor then, on a date that is unspecified but was either on or shortly before 4 February, decided that they did not want to be appointed as administrators or liquidators or in any other official capacity and left the scene both physically and in terms of playing any further role in Bulmers' affairs. The Tribunal found that Begbies Traynor had taken the view that there were no assets; and in

effect, there was no net worth in Bulmers to make their involvement justifiable. On those findings the Tribunal concluded that Begbies Traynor were not appointed to act as administrators or in any other role, that nobody else was appointed until Harrisons were appointed some time later, that Begbies Traynor had been acting only in an advisory capacity and that Bulmers were not under the supervision of an insolvency practitioner.

16. Mr Meyerhoff sought to argue that there was evidence before the Tribunal which pointed to a greater participation in what was going on in the final days of Bulmers than that expressed by the Tribunal. Mrs Daniels objected to Mr Meyerhoff's introduction of additional material. There had been no attempt to agree any notes, no request had been made for the Employment Judge's notes, there was nothing to show us what other evidence there was than that which is set out in the Tribunal's judgment; and we made it clear – and Mr Meyerhoff accepted – that he could not go beyond the facts that are set out in that judgment. He submitted that, in any event, on those facts the Tribunal ought to have found that Begbies Traynor were supervising as insolvency practitioners; the other two factual issues which arise under Regulation 8(7), namely that the transferor was the subject of bankruptcy proceedings or analogous insolvency proceedings – in this case, compulsory winding-up proceedings – which had been instituted with a view to the liquidation of the assets of the transferor were satisfied, and therefore Regulation 8(7) ought to have been held to have applied to the facts and to have led the Tribunal to the conclusion that Regulations 4 and 7 of TUPE did not apply.

17. In his Notice of Appeal Mr Meyerhoff had put forward a perversity argument. He accepted that HHJ McMullen QC at the rule 3(10) hearing had, in effect, ruled such an argument out, although the order which stems from that hearing does not in terms say so; and we acknowledge Mr Meyerhoff's responsible approach in taking that line, although there were

times during the submissions when he perhaps will not mind if we say that the perversity cloak was being gently trailed. Mrs Daniels submits that the findings of fact are clear and that they did not fall within or anywhere close to the line which represents supervision.

18. There are two ways in which the problem we have described can be approached. One approach is for us to say that the word "supervision" is not a term of art – it is not a legal word – that it is a word which has purely factual content, and that it is for a Tribunal in each case to decide on the facts whether the situation was one or was not one which falls within the relevant words of the Regulation. If that is the right approach, then we have no doubt that the findings of fact which the Tribunal made in this case cannot be successfully attacked, and have not been successfully attacked, in this appeal. Looking at it as a factual question, we have no doubt that it was open to the Tribunal on the primary findings of fact which we have been through to reach a secondary factual conclusion that the third element of Regulation 8(7) was not satisfied. Insofar as perversity is still an issue before us, perversity has to be overwhelmingly demonstrated, and no perversity in the sense that the Tribunal reached a conclusion that no reasonable Tribunal could reach has been demonstrated at all, never mind overwhelmingly.

19. However, both Mr Meyerhoff and Mrs Daniels have sought to persuade us not to resolve this appeal in that way, and the reason for that is one that was considered in detail on another aspect of Regulation 8(7) by the Court of Appeal in the case of **De'Antiquis,** to which we have already referred. The issue there was whether administration proceedings were proceedings instituted with a view to the liquidation of the assets of the supposed transferor. In an earlier decision of this appellate Tribunal, **Oakland v Wellswood (Yorkshire) Ltd** [2009] IRLR 250 the Employment Appeal Tribunal had taken the view that a question of that nature was one of fact. The EAT in **De'Antiquis** and the Court of Appeal took the view that there should be an

absolute answer to that question which applied to all cases, or, to take the expression that has been used in the present case, a red line should be established so that parties in the future, and those who never became parties but had to make their own decisions or sought advice as to what to do, would know with more certainty what the law was.

20. We understand the importance of establishing, if possible, a red line. It is extremely unfortunate that the experience of all who have had any substantial experience in cases which turn on the TUPE Regulations is that it is not infrequently the case that parties and their advisers take a view as to whether TUPE applies which turns out to be wrong. It is regrettable that so much uncertainty exists; and we agree that, if decisions on aspects of the words of the TUPE Regulations are to be regarded purely as decisions of fact, that may cause problems which it would be better if the law could avoid. Having said that, we recognise that whether there is a transfer – a very basic question – is very much a question of fact, and there are many, many decisions of the EAT and at a higher level which say so.

21. If a red-line approach to this case is appropriate, what is that line? Mr Meyerhoff says that it is sufficient if the insolvency practitioner is shown to be onsite at the transferor and in control of the business. We see very real difficulties that Mr Meyerhoff faces in that submission. Firstly, there is no finding that Begbies Traynor were in control of the business of Bulmers; the finding is that they were acting in an advisory capacity only. Secondly, if the red line were drawn at that point, we can see many if not endless debates about what "control" means. Thirdly, we do not see why a business should not be under the supervision of an insolvency practitioner without the insolvency practitioner being on site. Communications electronically through video links and the like might be sufficient for the type of control of which Mr Meyerhoff was speaking. Much might depend upon the nature of the business.

22. Mrs Daniels, in contrast, proposes a test based on authority. In **Slater**, which was a case on the effect of the same words in Regulation 8(7) as those that we are considering, Elias P at paragraphs 30-32 said this:

> **"30. During the course of the hearing the court raised the question whether at the time of the sale, the proceedings were under the supervision of the insolvency practitioner, a requirement for both regulations 8(6) and 8(7) to apply. It appears to have been assumed before the Employment Tribunal that Mr Ramsbottom of Deloittes was, from the moment when he was initially asked to assist the company, an insolvency practitioner within the meaning of the Regulations.**
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> **31. I heard written submissions on that point and both parties accepted that this assumption was wrong. The definition of insolvency practitioner, set out above, makes it plain that it was not until he was appointed liquidator that he could be so described. He was of course qualified to act as an insolvency practitioner, but he was not acting in that capacity with respect to the transferor.**
>
> **32. Accordingly, the transferee accepts that on this ground alone, his principal contention must fail. Assuming that the transfer was effected on the 27 July, as the Tribunal found, this was on any view before the proceedings were under the supervision of the insolvency practitioner."**

23. It is not suggested that what the EAT there said was obiter; it plainly was not. Mr Meyerhoff submits that the facts of that case were different; it was not a case of a winding-up petition, but it was a case in which the insolvency practitioners were involved well before the transfer (see the facts as set out at paragraphs 3-5). In our judgment, there is no reason why we should depart from the principle set out in those paragraphs. They are not formally binding upon us; but of course they command considerable respect; and we respectfully agree that what is there set out is an appropriate and sensible red line and is the correct principle to apply. It is consistent with section 388, which, as we have said, provides that a person acts as an insolvency practitioner in relation to a company by acting as its liquidator, provisional liquidator, administrator or administrative receiver; if not appointed as such, then a person is not acting as an insolvency practitioner.

24. Clearly, that red line is not an entirely straight line. There may be disputes, for example, as to whether an insolvency practitioner was on the facts, appointed before a formal letter of appointment was provided or even drafted, but that difficulty does not deter us from regarding the principle established by those paragraphs in **Slater** as being appropriate for this case too. Clearly, that red line was not crossed in this case so as to satisfy the third element of the three elements in Regulation 8(7).

Conclusion

25. Accordingly, whether we adopt the factual approach or the red-line approach – i.e. the approach on principle – this appeal must fail; it is therefore dismissed. That has the effect that the cases of the various Claimants and other employees which are continuing before the Tribunal will go on as before. We make it clear that that has not been a consideration in the decision that we have reached.