

Appeal No. UKEAT/0535/12/SM

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

At the Tribunal
On 30 April 2013

Before

HIS HONOUR JUDGE SEROTA QC

MS G MILLS CBE

MR J R RIVERS CBE

COUNTRY WEDDINGS LTD

APPELLANT

MRS P J CROSSMAN & OTHERS

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MS M KHANDKER
(of Counsel)
Instructed by:
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Bristol
BS1 6BA

For the First Respondent

MR L ASHBY
(of Counsel)
Instructed by:
Lyons Davidson
Westbury House
701-705 Warwick Road
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For the Second Respondent

No appearance or representation by
or on behalf of the Second
Respondent

SUMMARY

TRANSFER OF UNDERTAKINGS – Consultation and other information

Where an Employment Tribunal makes orders for compensation in tort against Respondents jointly or jointly and severally, it has no power to apportion liability between the Respondents. The Employment Tribunal can do nothing other than to make an order for joint or joint and several liability, as the case may be. If there is an issue between the parties who have been found liable as to the relative share of the liability that they should bear, this is a matter that has to be determined in the County Court or the High Court under the provisions of the **Civil Liability (Contribution) Act 1978**.

HIS HONOUR JUDGE SEROTA QC

1. This is an appeal by the First Respondent, supported by the Second Respondent, against a decision of the Employment Tribunal in Bristol, sent to the parties on 15 August 2012. The hearing was presided over by Employment Judge Cooksey, who sat with lay members.

2. The Claimant claimed unfair dismissal, constructive dismissal, and she received compensation of £6,807.59. Also it was established that there had been a breach of TUPE Regulation 15, in that the Second Respondent had failed to inform her of the fact that there was a TUPE transfer, both of the date of the transfer and the reasons, and it had also failed in its obligations to secure the election of an employee representative. Indeed, it seems that either the Respondents were completely unaware of TUPE or made no attempt whatsoever to comply with its obligations under TUPE.

3. The Claimant was ordered to pay £5,104.20. The appeal is limited to the payment of the compensation. The Employment Tribunal chose to apportion the compensation for a breach of TUPE regulations as to make the whole sum payable by Country Weddings. On the other hand, it is quite clear that the regulation provides for the liability to be joint and several of any party responsible. This brings it into line with the general principle applied in Employment Tribunals, that where orders for compensation are made in claims in cases involving liability of more than one party, there is no power on the part of the Employment Tribunal to do anything other than to make an order for joint and several liability, and if there is an issue between the parties who have been found liable as to the relative share that they should bear, this is a matter that has to be sorted out in the County Court or the High Court under the provisions of the Civil Liability Contribution Act.

4. This case has been referred to a full hearing by Lady Smith on 29 October 2002. I do not think I really need spend a great deal of time on the facts, because nothing turns on them, but I do note that the Claimant worked initially for what is now the Second Respondent as a wedding consultant. She organised and supervised weddings at Maunsel House. Maunsel House and the Second Respondent were, I believe, both owned by Sir Benjamin Slade. The Second Respondent got into financial difficulties. It has subsequently changed its name to Naboth's Field and is now in liquidation.

5. On 31 August 2011, the employees (and I assume the business) of the Second Respondent were transferred to the First Respondent, which I believe was also controlled by Sir Benjamin Slade, but there had been no notice to employees or any attempt to comply with TUPE obligations. At the time, and no doubt by reason of its financial difficulties, there were delays in making payment of wages. Failure to pay wages on time is generally considered to be a repudiatory breach of contract. Also, there were allegations of serious wrongdoing made by the Respondents against certain staff members, including the Claimant. So far as the Claimant is concerned, the allegations against her have been held by the Employment Tribunal to be unfounded, but as a result particularly of the delay in making payment of her wages the Employment Tribunal held that she had been constructively dismissed and the dismissal was unfair.

6. The Employment Tribunal referred to **Regulation 59 of TUPE**, which as I have said, provided for joint and several liability of the transferee and transferor, but nonetheless, the Employment Tribunal went on to apportion all the liability to the First Respondent. There is clear authority in the case **Todd v Strain** UKEATPA/1487/12 (which Ms Khandker has drawn to our attention, a decision of Underhill J) to the effect that the Employment Tribunal cannot apportion compensation awarded under Regulation 59, but it is obliged to make an order for UKEAT/0535/12/SM

joint and several liability. In those circumstances (and I note that the Claimant is not here; she has no interest in this appeal) and although I am not able to see what the utility will be to the Respondents in the order that I will make, we will set aside the decision of the Employment Tribunal and instead substitute an order that the order should be that compensation will be the joint and several liability to both Respondents.

7. This is a supplement to the judgment. Our attention has been drawn to the IDS Employment Law Handbook, published in March 2011, on Transfer of Undertakings, paragraph 3.1.20, which suggests that in such applications, the Employment Tribunal has jurisdiction to apportion liability, as this particular Employment Tribunal did. We are quite satisfied that this is not correct for the reasons we have given and that the matter is disposed of by the authority we referred to of **Todd v Strain**. As I also drew attention to earlier in this judgment, it is clear from the **London Borough of Hackney v Sivanandan & Ors** [2013] IRLR 408 that there is generally no power in an Employment Tribunal to apportion liability in relation to any awards of compensation for what might be regarded as tortious activity. It may be that this matter will be brought to the attention of the editors of the transfer of undertaking to which we referred.