Appeal No. UKEAT/0223/11/ZT

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 November 2011
Judgment handed down on 17 February 2012

Before

THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)

(SITTING ALONE)

EDDIE STOBART LTD — APPELLANT

(1) MR J MOREMAN & OTHERS
(2) FJG LOGISTICS LTD
(3) MR M COOPER
(4) MESSRS HART & HOPKINSON (DEBARRED) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS JOANNE WOODWARD (of Counsel) Instructed by: Messrs Hill Dickinson Solicitors 1 St Paul's Square Old Hall Street Liverpool L3 9SJ
For the First Respondents	MS JANE WARING (Solicitor) Waring Associates LLP 354 Herringthorpe Valley Road Rotherham South Yorkshire S60 4LA
For the Second Respondent	MR DAVID PODDINGTON (Solicitor) Messrs Taylor & Emmet LLP Solicitors 20 Arundel Gate Sheffield South Yorkshire S1 2PP
For the Third Respondent	MR BRUCE FREW (of Counsel) Instructed by: Messrs Thompsons Solicitors City Gate East Tollhouse Hill Nottingham NG1 5FS
For the Fourth Respondents	Debarred

SUMMARY

TRANSFER OF UNDERTAKINGS – Service Provision Change

An "organised grouping of employees [whose] principal purpose is the carrying out of … activities … on behalf of [a particular] client" within the meaning of regulation 3 (3) (a) (i) of **TUPE** will only exist where the employees in question are organised by reference to the provision of services to the relevant client.

THE HONOURABLE MR JUSTICE UNDERHILL (PRESIDENT)

INTRODUCTION

1. The Claimants in these proceedings, who number 35, were employed by Eddie Stobart Limited ("ES") at a site at Manton Wood in Nottinghamshire. ES closed the site on 20 April 2009. It is their case that at that point the Claimants' contracts of employment transferred, by virtue of regulation 4 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"), to FJG Logistics Ltd ("FJG") and that they ceased to be their employees. FJG did not accept that that was so and declined to treat the Claimants as having become employed by them. It is evident that in those circumstances the Claimants were dismissed by either ES or FJG: the question is which. That question was decided in FJG's favour by Employment Judge Rostant, sitting in Sheffield, following a pre-hearing review on 14 February 2011. His Judgment and Reasons were sent to the parties on 8 March 2011.

2. ES have appealed against that decision. They are represented before me by Ms Joanne Woodward of counsel. FJG, who are the Second Respondents, are represented by Mr David Poddington of Taylor & Emmet LLP. Most of the Claimants are represented by Ms Jane Waring of Waring Associates LLP: these constitute the First Respondents to the appeal. However three Claimants are separately represented. One, Mr Cooper, is represented by Mr Bruce Frew of counsel, who, however, has made no submissions on the appeal. The other two, Messrs Hart and Hopkinson, have been debarred from participating. Mr Poddington, Ms Waring, Mr Taylor and Mr Frew appeared before the Employment Tribunal Judge but Ms Woodward did not. Where I need to refer to ES and FJG together I will refer to them as "the

Respondents", as they were in the Tribunal, notwithstanding that ES are the Appellants before me.

3. It will be convenient at this point to set out the relevant provisions of TUPE. Regulation 3 defines a "relevant transfer". Paragraph (1) identifies two types of such transfer. We are concerned with the second – "service provision change", which is defined, under head (b), as

> **"… a situation in which –**
>
> **(i) …**
>
> **(ii) activities cease to be carried out by a contractor on a client's behalf … and are carried out instead by another person ("a subsequent contractor") on the client's behalf;**
>
> **(iii) …**
>
> **and in which the conditions set out in paragraph (3) are satisfied."**

Paragraph (3) reads:

> **"(3) The conditions referred to in paragraph (1) (b) are that -**
>
> **(a) immediately before the service provision change -**
>
> **(i) there is an organised grouping of employees situated in Great Britain which has as its principal purpose the carrying out of the activities concerned on behalf of the client;**
>
> **(ii) the client intends that the activities will, following the service provision change, be carried out by the transferee other than in connection with a single specific event or task of short-term duration; and**
>
> **(b) the activities concerned do not consist wholly or mainly of the supply of goods for the client's use."**

In the case of a service provision change regulation 4 (1) operates to transfer the contracts of employment of any employee "assigned to the organised grouping of … employees that is subject to the relevant transfer" from the contractor to the subsequent contractor (described for these purposes as the "transferor" and "transferee" – see regulation 2 (1)).

THE FACTS IN OUTLINE AND THE PROCEDURAL HISTORY

4. ES are a well-known "logistics" business: that is, they provide warehousing and transport services. The operation at Manton Wood consisted of warehousing meat in bulk, both processed and unprocessed, on behalf of suppliers and delivering it either to the sites where it would be processed or to retail outlets. ES bought Manton Wood in early 2008. Originally there were five suppliers who were major clients – Parkhams, Bakkover, Dawn Meats, Forza and Vion. The first three, however, had been lost by early 2009; and at the time of the closure the only two left were Forza and Vion. Forza supplied meat only to ASDA. Vion had a number of customers, principally but not only the big supermarket chains. Different retailers had different agreed times during the day by which they would place orders for next-day delivery. In the case of ASDA, the timing of its orders was such that all or most of the products destined for it had to be "picked" principally by the night shift; but in most other cases products could be picked by the day shift. The result was that nightshift employees worked principally on tasks required by the Forza contract, whereas dayshift employees worked principally on tasks required by the Vion contract.

5. It was ES's belief, though it is disputed as a matter of fact, that on the closure of the site Vion had arranged for all of the work which had been done from Manton Wood to be taken over by FJG, another logistics business. They took the position that the work in question had been done by an organised grouping of employees whose principal purpose was to carry out the work required by the Vion contract, within the meaning of regulation 3 (3) (a) (i) of TUPE; that a relevant transfer, by way of service provision change, had occurred, with FJG as the transferee; and that accordingly the contracts of the employees assigned to that grouping had transferred to FJG under regulation 4.

6. On 16 April 2009 ES wrote to that effect to each of the employees whom they regarded as being "assigned to" the Vion contract. The majority of the employees in question were either those working wholly or mainly on the day shift, whose tasks would, for the reason explained above, necessarily be mostly "Vion-related" or employees more than 50% of whose tasks over the previous ninety days could be shown to have been performed for the purpose of the Vion contract. The latter exercise was possible because warehouse operatives when "picking" use a radio frequency gun ("RFG") which records both the identity of the operative and, by reading a bar-code, which contract each item is picked for. A few other individuals were identified simply by management assessment as spending the majority of their time on Vion-related work. The total number so identified, and to whom the letter of 16 April was sent, was 58.

7. FJG refused, as I have said, to accept that there had been any service provision change or, therefore, that any of the employees identified by ES as being assigned to the Vion contract had transferred to them.

8. The Claimants are all employees of ES who were notified that they had transferred. They commenced proceedings against ES and/or FJG raising claims of unfair dismissal, wrongful dismissal, and breach of the information and consultation obligations under regulation 13 of TUPE, and also claiming a redundancy payment. Other potential respondents were named by some Claimants on a precautionary basis, but the claims against them have not been pursued.

9. Following service of the Respondents' ET3s there were a series of case management discussions of which I need not give the details. Witness statements from each of the Claimants were directed to be served. On 15 September 2010 FJG applied for the claims against them to be struck out, under rule 18 (7) of the **Employment Tribunal Rules of Procedure**, on the basis

that the Claimants' witness statements disclosed no case "that they were assigned to any particular client of [ES]" and that accordingly their claims had no reasonable prospect of success. At a CMD on 27 September Judge Rostant directed, by consent, that that application be heard at a pre-hearing review on 1 December. Directions were given for the lodging of a bundle and for further witness statements. Para. 9 of the order recites that:

> **"The application to strike out is made on the basis that, for the purpose of the pre-hearing review only, the second respondent concedes that all of the claimants and the witness for the first respondent would succeed in making out the facts they rely on in their witness statements. On that basis, it is not anticipated that there shall be any live evidence called at the hearing and at the pre-hearing review and the matter shall be left to argument only."**

That hearing was subsequently postponed to 14 February 2011. None of the parties having asked that lay members should sit, the hearing was before Judge Rostant sitting alone.

THE TRIBUNAL'S REASONS

10. The Judge's Reasons are clear and carefully reasoned. At paras. 1-6 he sets out various introductory matters. At para. 7 he summarises the relevant provisions of TUPE. He notes that Mr Poddington in his submissions had identified not only the point about assignment raised in the original strike-out application ("the assignment point") but also the logically prior issue of whether there had immediately before the putative transfer been "an organised grouping of employees" with the relevant purpose within the meaning of regulation 3 (3) (a) (i): that issue was described by Mr Poddington, not quite accurately, as "the undertaking point". At para. 8 he summarises the background facts.

11. The meat of the Reasons is in section 9. At para. 9.1 the Judge refers to the submissions from the representatives. At para 9.2 he identifies, without discussing, two potentially relevant authorities and also notes that he is obliged to proceed on the basis that the evidence of the

various witnesses is unchallenged. He says that he proposes "to interleave my findings of fact with my conclusions". (I should say that that is a sensible course which employment judges should be less reluctant to follow in appropriate cases: rigid adherence to the standard template, in which findings of fact are separated from the dispositive reasoning, can sometimes produce real awkwardness or even error.)

12. At paras. 9.7ff. the Judge discusses what he describes as "the question of an organised group", i.e. Mr Poddington's "undertaking point". He begins by describing the organisation of the work at Manton Wood, as it appeared from the unchallenged evidence. He concludes, at para. 9.16, that the case for the existence of an "organised grouping" within the meaning of regulation 3 (3) (a) (i), and of the assignment of the Claimants to that grouping, amounted to no more than the fact that "the employees concerned spend all or most of their time on tasks necessitated by the Vion contract". At para. 9.17 he refers to the case-law on assignment; but at para. 9.18 he says this:

> **"For me, however, the question is a prior one. Is this evidence of the workers spending the majority or indeed the whole of their time on a particular task for a particular employee evidence of an organised grouping? Since it is the only evidence if I decide in the negative, then it must be that the case against the second respondent stands no reasonable prospect of success."**

13. The Judge answers that question at para. 9.19, which reads as follows:

> **"I have concluded that question in the negative, and for the following reasons:**
>
> **The Manton Wood site had serviced a number of contracts with a variety of customers. As at July of 2008 these included Parkhams, Bakkover and Dawn Meats as well as Vion and Forza. When the former three contracts were all lost, by early 2009, none of the employees employed at Manton Wood were transferred over. To my mind that is highly suggestive of the fact that it did not occur to the first respondent that the work done for those first three customers was done by an organised grouping of staff dedicated to those three customers. Given what I know about the organisation of the work at Manton Wood I do not find that remotely surprising. The**

organisation of work at Manton Wood was in no way by reference to the customers, but was by a shift system and job function within that shift. Since the nature of the warehousing and distribution work undertaken at Manton Wood for all of its customers essentially required a twenty-four hour operation, a shift system of some sort was inevitable. Even more inevitable was the fact that there would be a division of labour within each of those shifts. The fact that many of the staff (in particular those working days) found themselves, by March of 2009, working exclusively on work necessitated by the existence of the Vion contract, was a function not the organisation of the respondent's work so that there were teams dedicated to that contract, but by the time of day that Vion's own customers chose to place their orders. That does not seem to me to be a basis for saying that the first respondent so organised its work as to create a group of employees, whose principal purpose was to carry out work for any particular customer. The employees carried out the work set before them. In this context I do consider it significant, although only one factor, that the vast majority of the claimants were unable to say that they regarded themselves as plausibly assigned to one contract or another. They could not, as Mr Poddington pointed out, have identified themselves, if asked, as members of the Vion team. They could not do so because there were no such teams. There were simply a group of staff working for all the contracts, albeit that the vast bulk of some of the contracts fell to be done at the time that they were engaged to work."

14. Thus far the Judge had only considered the "undertaking point". But in a final unnumbered paragraph he said this:

"For the sake of completeness I would say the following. Were I not to have concluded the matter in favour of the respondent on the undertaking point I would not have been prepared to dismiss the claim against the second respondent on the assignment point. I do take the point made by Mr Taylor and by the claimants that that is fact sensitive, and I am not satisfied that it is a matter best decided by me without hearing evidence tested in cross-examination. It particular, it seems to me that the reliability or otherwise of the methods adopted by the first respondent in assigning staff is a matter which should be tested in cross-examination. In particular, there seemed to me to be a considerable group of staff where Mr Bradshaw has really advanced little or no evidence other than the bald assertion that management had assessed particular employees carrying out more work on one contract or another. I am also aware of doubts expressed about the RFG, and the way in which it was used, and that might lead to a variety of factual conclusions depending on the way in which the evidence fell out. In such circumstances I would have not been prepared even to order a deposit. However, it seems to me that the evidence advanced on behalf of the claimants and the first respondent as to the existence of an organised grouping is so scant that it is possible for me to say that there is no reasonable prospect of success in establishing the existence of that group, which is a necessary condition for there to be a transfer of undertakings in accordance with the service change provision."

THE APPEAL

15. In her skeleton argument and in her submissions before me Ms Woodward pointed out by way of preliminary that the basis on which the Judge decided the application did not correspond to the basis on which it had originally been put and on which a pre-hearing review had been directed, inasmuch as "the undertaking point" was clearly distinct from "the assignment point", which had been the only point originally taken. She accepted that ES had in fact had notice of the way that the argument was to be put and had made no objection, and she made it clear that she did not rely on this shift in the Claimants' ground as giving rise to a ground of appeal in its own right. She said, however, that it should be borne in mind when considering the shape of the witness evidence before the Judge, which had been addressed specifically to the assignment issue. She also advanced, though she did not press very hard, a submission that the undertaking point was not apt for determination by way of strike-out.

16. I accept that the issues of whether there existed an organised grouping satisfying the requirements of regulation 3 (3) (a) (i) and of whether, if so, all or any of the Claimants were assigned to that grouping are analytically distinct, and that the evidence before the Judge was addressed only to the latter issue. But the two points nevertheless self-evidently overlap to a very considerable extent, since for the purpose of considering who is assigned to a putative "organised grouping" it is necessary to identify what that grouping consists of. I do not believe that it could be suggested (and Ms Woodward did not suggest) that further relevant factual material, beyond what was already adduced on the assignment point, could have been put before the Judge if the "undertaking point" had been expressly taken at an earlier stage. As to its aptness for determination on a strike-out application, there is nothing wrong in an issue of law being decided in the context of such an application.

17. In her skeleton argument Ms Woodward summarised the pleaded grounds of appeal under three headings; but in her oral submissions she accepted that the essential question was whether it was sufficient for ES to show that there was a group of employees who did, as a matter of fact, mostly work on tasks required by the Vion contract or whether, as the Judge held, it was necessary that the employees in question be organised as, in effect, members of a "Vion team". She submitted that the former approach was correct, for the following reasons:

(1) That approach satisfied the literal words of regulation 3. There was a grouping of employees, namely those identified by ES as working mainly on Vion-related tasks (any factual issue on that question being irrelevant for the purpose of the pre-hearing review); and their principal purpose was to carry out those tasks.

(2) In the logistics industry it would be rare to have identified teams of the kind required on the Judge's approach. Accordingly in a case where a customer moved to a different supplier, as here, employees would not have the protection of TUPE. As a matter of policy that would be undesirable.

(3) The Judge's reasoning was inconsistent with the decision of the Court of Appeal in **Fairhurst Ward Abbotts Ltd v Botes Building Ltd** [2004] ICR 919. That case did not concern service provision change as such but rather the question of whether, in order to be caught by the terms of the version of TUPE then in force, a part of an undertaking had to exist as a "stable economic entity" prior to the putative transfer. The Court of Appeal held that it did not: it was sufficient if such an entity came into existence at the moment of transfer – see in particular *per* Mummery LJ at para. 32 (p. 929). Ms Woodward submitted that that decision should apply by analogy to the issue of identifying an organised grouping of employees. She also referred to **Kimberley Group Housing Ltd**

v Hamley [2008] ICR 1030 and **Clearsprings Management Ltd v Ankers** (UKEAT/0054/08).

18. I do not accept those submissions. I believe that the Judge came to the right answer for the right reasons. Taking it first and foremost by reference to the statutory language, regulation 3 (3) (a) (i) does not say merely that the employees should in their day-to-day work in fact (principally) carry out the activities in question: it says that carrying out those activities should be the (principal) purpose of an "organised grouping" to which they belong. In my view that necessarily connotes that the employees be organised in some sense by reference to the requirements of the client in question. The statutory language does not naturally apply to a situation where, as here, a combination of circumstances – essentially, shift patterns and working practices on the ground – mean that a group (which, NB, is not synonymous with a "grouping", let alone an organised grouping) of employees may in practice, but without any deliberate planning or intent, be found to be working mostly on tasks which benefit a particular client. The paradigm of an "organised grouping" is indeed the case where employers are organised as "the [Client A] team", though no doubt the definition could in principle be satisfied in cases where the identification is less explicit.

19. I do not regard that conclusion as objectionable on policy grounds. No doubt the broad purpose of TUPE is to protect the interests of employees by ensuring that in the specified circumstances they "go with the work" (though the assumption that in every case that will benefit, or be welcome to, the employees transferred is not universally true). But it remains necessary to define the circumstances in which a relevant transfer will occur, and there is no rule that the natural meaning of the language of the Regulations must be stretched in order to achieve transfer in as many situations as possible.

20. Indeed the policy considerations point, if anything, the other way. If the putative "grouping" does not reflect any existing organisational unit there are liable to be real practical difficulties in identifying which employees belong to it. It is important that on a transfer employees should, so far as possible, know where they stand (cf. the observations of this Tribunal in **OTG Ltd v Barke** [2011] ICR 781, at para. 21 (3) and (4) (pp. 796-7), approved by the Court of Appeal in **Key2Law (Surrey) LLP v De' Antiquis** [2011] EWCA 1567, at para. 103). In the present case, as the Judge pointed out in para. 9.19 of the Reasons (see para. 13 above), most employees would not even know who they were "picking" for (I was told that packs were identified by bar-code only). It would be very unsatisfactory if their fate had to depend on the kind of detailed enquiries which the Judge accepted (see para. 14 above) would be necessary on the assignment issue if it had arisen. By contrast, if the touchstone was whether a particular employee was assigned to a recognised team principally serving a particular client, the answer would normally be evident (though no doubt there would sometimes be marginal cases).

21. I see no inconsistency between that conclusion and the decision in **Fairhurst**. The Court of Appeal was dealing in that case with a problem arising under a different provision of TUPE (as it then stood) concerned with the transfer of part of an undertaking. The situations are not comparable. Whereas it is perfectly possible to see how a "part" of an undertaking may first become a separate entity only at the moment of transfer, it is the essence of a service provision change that the "organised grouping" should have existed prior to the loss of the contract. Still less can I see that the decisions of this Tribunal in **Kimberley** or **Clearsprings** have any bearing on the present issue: they were concerned with wholly different questions.

CONCLUSION

22. The appeal is accordingly dismissed.