Appeal No. UKEAT/0570/12/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 14 May 2013
Judgment handed down on 9 September 2013

Before

MR RECORDER LUBA QC

(SITTING ALONE)

RYNDA (UK) LTD — APPELLANT

MS A RHIJNSBURGER — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS CLAIRE DARWIN (of Counsel) Instructed by: Messrs Russell-Cooke LLP Solicitors 2 Putney Hill London SW15 6AB
For the Respondent	MR AIDAN BRIGGS (of Counsel) Instructed by: Lyons Davidson Solicitors Castle Buildings 13-19 Womanby Street Cardiff CF10 3AL

SUMMARY

TRANSFER OF UNDERTAKINGS – Service provision change

JURISDICTIONAL POINTS – Continuity of employment

Unfair dismissal claim. Employee only having sufficient continuity of employment if she could establish an earlier TUPE transfer.

Service provision case. Employee in an organised grouping of which she was the only member. Issue whether carrying out the transferred activities was the "principal purpose" of the grouping and whether the employee had been “assigned” to that group.

Employment Judge found facts establishing that the conditions in **TUPE** Reg 3 were satisfied.

Appeal dismissed. Judge had correctly applied the law to her findings of fact.

MR RECORDER LUBA QC

Introduction

1. This is an appeal from the Judgment of Employment Judge Grewal given on 22 May 2012 following a Pre-Hearing Review conducted at the London Central Employment Tribunal on 22 March 2012. The issue for the Employment Judge had been whether Ms Rhijnsburger (hereafter "the Claimant") had sufficient continuity of employment to maintain a claim for unfair dismissal that she had brought against her employers, Rynda (UK) Ltd (hereafter "Rynda"). That question itself turned on whether there had been a **Transfer of Undertakings (Protection of Employment) Regulations** (TUPE) transfer of the Claimant's employment from her former employers to Rynda when she began to work for Rynda at the beginning of January 2011. The Judgment of the Employment Judge was that the Tribunal had jurisdiction to hear the Claimant's complaint of unfair dismissal as she had the requisite length of service to bring such a complaint.

Factual summary

2. It is not in dispute that the Claimant began to work for Rynda at the beginning of 2011. The relevant period considered by the Employment Judge in order to determine whether there had been a TUPE transfer ran from May 2009, when the Claimant first began employment with her previous employers, Drivers Jonas Services Company. The findings of fact made by the Employment Judge divide up the period from 19 May 2009 to 31 December 2010 into essentially three sub-periods.

3. First, from May to October 2009 the Claimant was employed under a six-month fixed-term contract to manage premises in the Netherlands held in the portfolio of H20 commercial properties.

4. The second sub-period began in October 2009 when the Claimant began employment in an associate role for Drivers Jonas Services Company but no longer as a fixed-term employee. Under the associate role she remained working on the Dutch portfolio of office premises but also took responsibility for management of the office dealing with the German portfolio of H20 commercial properties.

5. The third sub-period begins in March 2010, when the Claimant became ill, partly because of the pressure of taking on the additional German work. When her health recovered, it was agreed with her line manager that she would stop working on the German property portfolio (at least for the time being) and that her responsibilities would be confined to managing the Dutch H20 properties. She was the only member of staff engaged in managing the office property portfolio in the Netherlands.

6. On 1 April 2010 the Claimant's employment transferred under the TUPE Regulations to Messrs Drivers Jonas Deloitte. Towards the end of 2010 it became clear that Rynda would assume responsibility for managing the H20 property portfolio in the Netherlands. That was subsequently reflected in changed arrangements, and the Claimant's employment with Drivers Jones Deloitte ended on 31 December 2010. She began employment with Rynda on 1 January 2011, and her initial responsibility remained to manage the Dutch properties in the H20 portfolio. The Claimant remained with Rynda until her dismissal on 22 October 2011. She had insufficient continuity of service to bring a claim for unfair dismissal based only on the period from 1 January to 22 October 2011, and therefore prayed in aid her previous period of employment with Drivers Jonas Deloitte. That could only be achieved if she could show that

there had been a service provision change of the type covered by the TUPE Regulations between her previous employer and Rynda.

The law

7. The relevant statutory provisions are contained in the **TUPE Regulations 2006**, SI No. 246. So far as material, they provide as follows:

> **"Interpretation**
>
> **2(1) In these Regulations—**
>
> **'assigned' means assigned other than on a temporary basis;**
>
> **References to 'organised grouping of employees' shall include a single employee;**
>
> **'relevant transfer' means a transfer or a service provision change to which these Regulations apply in accordance with regulation 3 and 'transferor' and 'transferee' shall be construed accordingly and in the case of a service provision change falling within regulation 3(1)(b), 'the transferor' means the person who carried out the activities prior to the service provision change and 'the transferee' means the person who carries out the activities as a result of the service provision change […].**
>
> **A relevant transfer**
>
> **3(1) These Regulations apply to—**
>
> **(a) a transfer of an undertaking, business, or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity;**
>
> **(b) a service provision change, that is a situation in which—**
>
> **[…] (iii) activities cease to be carried out by a contractor or a subsequent contractor on a client's behalf (whether or not those activities had previously been carried out by the client on his own behalf) and are carried out instead by the client on his own behalf, and in which the conditions set out in paragraph (3) are satisfied. […]**
>
> **3(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.**
>
> **Effect of relevant transfer on contracts of employment**
>
> **4(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and**

assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee."

The Judgment of the Employment Judge

8. The Employment Judge directed herself that she had the following issues to determine:

> **(i) Whether there was immediately before the putative transfer an organised grouping of employees that had as its principal purpose the provision of property management services to the H20 properties in the Netherlands; and**
>
> **(ii) if there was, whether the Claimant was assigned to that organised grouping of employees."**

9. Having set out her findings of fact (paragraphs 5-20 of her Judgment), the relevant statutory provisions (paragraph 21) and the relevant authorities (paragraphs 22-24), the Employment Judge succinctly set out her conclusions (paragraphs 25-33). In her conclusions she divided up the Claimant's previous period of employment from May 2009 to the end of 2010 into the three different sub-periods I have already identified. Faithful to the requirement imposed by Regulation 3(3)(a), she directed herself primarily to the situation "immediately before the service provision change", i.e. at the end of 2010. She therefore focused on the period after March 2010 and at paragraphs 32 and 33 of her Judgment said as follows:

> **"32. Whatever the purpose was in October 2009, it was changed by agreement in March 2010. Drivers Jonas LLP [sic] and the Claimant agreed that from then on the Claimant would only work on the Dutch portfolio and would not do any work in respect of the German properties. The fact that this agreement was to be reviewed once there was further clarity about the merger makes no difference. Thereafter the Claimant worked solely on managing the Dutch properties, but that was not purely by chance or accident or without any deliberate planning or intent. […] In the present case, the Claimant and her employer agreed in March 2010 that she was to work solely on the property management of the Dutch properties.**
>
> **33. In all the circumstances of this case, I am satisfied that immediately before the service change Drivers Jonas had organised its employees so that the Claimant's principal purpose was to carry out property management services of Rynda's H20 properties in the Netherlands. It was the only work that she did and she was the only person who did it. She was, therefore, the organised grouping that carried out that activity and it follows that she was assigned to that organised grouping. There was, therefore, a relevant transfer of her contract of employment on 1 January 2011."**

This appeal

10. This appeal came before me for hearing on 14 May 2013. I had the assistance of oral and written submissions from counsel for each side. Both counsel made reference in the course of their submissions to a Judgment of the Employment Appeal Tribunal in Scotland in the case of **Seawell Ltd v Ceva Freight (UK) Ltd** [2012] IRLR 802. Before I could deliver this reserved Judgment, the Inner House of the Court of Session gave Judgment in an appeal from that decision of the Employment Appeal Tribunal. The Inner House (Eassie, Brodie and Wheatley LJJ) handed down Judgment on 21 June 2013 (see [2013] CSIH 59). In those circumstances I gave liberty to both parties to make written submissions as to the consequences, if any, for this appeal of the content of the Court of Session's Judgment. I am grateful for the written submissions that I subsequently received, and I have taken them into account in finalising this Judgment.

11. The Judgment of the Court of Session sets out in helpful terms a succinct exposition of the operation of the material provisions of the TUPE Regulations as they apply in this class of case. The opinion of the Court was delivered by Eassie LJ, who said as follows:

> **"29. In our opinion, and echoing views expressed in some of the tribunal decisions to which we were referred, in considering whether this condition may be satisfied in a particular case an appropriate starting point will be the 'activities'. The term 'activities' is, of course, also used in paragraph (1) of regulation 3 as a central element in defining a service provision change. In that context it is in our view evident that it refers to the prestations by way of service or services which (in the variety of service provision change in the present case) required to be provided by the contractor in terms of his contractual arrangements with the client and which, following the cessation of those arrangements, are then performed by the client himself on his own behalf. In the present case the extent of those service prestations are not controversial. They are set out by the Employment Tribunal and are summarised by us in paragraph 3 *supra*. It is also not in dispute that after December 2009 those activities were performed by Seawell on its own account.**
>
> **30. Having thus identified the scope and nature of the activities, the focus must then pass to the manner in which the contractor has arranged for the performance of the service prestations, or, perhaps more technically, reflecting the wording of the regulations, how the activities are 'carried out'. Plainly, in very many cases the employees engaged in providing the services to the client who (in the present variety of service provision change) takes the services 'in house' will also be providing services to other clients or customers. The extent to which their working time is devoted to the client will vary greatly. Accordingly, for various reasons, the notion that there be a transfer of their contracts of employment would be vested with much uncertainty. Hence one finds the requirement in paragraph (3)(a)(i) of regulation 3 that there be an**

'organised grouping of employees' having as its 'principal purpose' the carrying out of the activities in question. The requirement is necessary in order to give practical definition – or to set discernible parameters – to the important event, from the perspectives of each of the contractor, the client (the potential transferee) and the employee, of a transfer of the contract of employment.

31. Having regard to that consideration we agree with the view expressed by the Employment Appeal Tribunal at paragraph 18 of its judgment in *Eddie Stobart Ltd v Moremanand Ors* [UKEAT/0223/11] that the concept of an organised grouping implies that there be an element of conscious organisation by the employer of his employees into a grouping – of the nature of a 'team' – which has as its principal purpose the carrying out *de facto* of the activities in issue."

12. In my judgment, that helpful statement of the law brings succinctly together the approach taken in the earlier Judgments of this Employment Appeal Tribunal in both England and Scotland. It is not therefore necessary for me to refer further to the earlier authorities extensively cited to me by both parties. In the event, there was relatively little between the parties as to the relevant legal principles falling to be applied on this appeal. That is not to say that the parties did not expend a good deal of energy and effort in argument as to the proper approach to the meaning of the words 'principal purpose' in Regulation 3(3)(a)(i). As initially presented, the case before me appeared to involve a contestation as to whether one focused on the *subjective* intent of the former employer (as to what was to be the principal purpose of the relevant grouping) or whether one was to have regard to an *objective* assessment of the employer's principal purpose. In the event, as Ms Darwin was to recount in paragraph 3(2) of her written submissions on the effect of the **Ceva** case, it was "uncontroversial" that it was the employer's principal purpose that was relevant and the focus must be on the objectively assessed intentions of the employer. I did not understand either party to demur from that position by the conclusion of oral argument, and it is now put beyond doubt by the exchange of final written submissions. Against that background I can turn to the eight grounds of appeal advanced by Rynda.

13. By its first ground Rynda asserted that the Employment Judge had erred when seeking to identify the "principal purpose" of the organised grouping of employees, which group only included the Claimant, by focusing on the work actually carried out by her rather than on the question of whether the then employer had deliberately organised the Claimant into a grouping to work exclusively on the Dutch portfolio.

14. I regret that having heard counsel for Rynda and carefully read her initial and subsequent written submissions I am wholly unpersuaded that the learned Judge made the error asserted. What she did do, as I have shown, was to discretely identify three different stages or sub-periods of the Claimant's employment with her previous employer. She focused, as the Regulations require her to do, on the stage immediately prior to the alleged transfer. She correctly directed herself to the question of whether at that point there was an organised grouping of employees with the "principal purpose" of carrying out the activities concerned. She found as a fact that there was, i.e. that there was a group comprised only of the Claimant and that the relevant activities were the management of the Dutch H20 property portfolio. As Mr Briggs succinctly put it for the Claimant, the Employment Judge expressly found that this was not a matter of "happenstance" but rather the outcome of the then employer's conscious decision that from March 2010 the Claimant was to work exclusively on the Dutch property portfolio. That was to be "exclusively" both in the sense that she was to be the only company employee managing that property portfolio and that it was to be the sole focus of her work. To my mind, that is the clear finding made by the Employment Judge, and I can detect in it no error such as that suggested by the first ground of appeal.

15. The second and third of Rynda's grounds of appeal are directed to the correctness or otherwise of the Employment Judge's treatment of the third sub-period or stage of the

Claimant's former employment. Put shortly, the case advanced by Ms Darwin was that the Employment Judge ought to have treated the arrangement between employer and employee, going forward from March 2010, as a temporary arrangement only and therefore ought to have disregarded it in the light of the terms of Regulation 2, which provide that 'assigned' means assigned other than on a temporary basis. Although the wording of the Regulations is primarily directed to the effect of temporality on the question of assignment, Ms Darwin applied the same approach to the question of determining what the "principal purpose" was. She submitted that (paragraph 50 of her skeleton argument):

> **"Further, in determining this principal purpose, the Employment Judge should have disregarded the effect of the Claimant's health, the lack of recruitment, the merger and the Claimant's day-to-day work after the temporary agreement. Further, the Employment Judge should have asked herself whether the fact the Claimant was just working on the Dutch properties during the third period was a result of 'happenstance' or 'accident', rather than 'deliberate planning or intent'."**

16. I have no hesitation in rejecting this submission. The Employment Judge made the findings of fact she was entitled to make on the evidence before her. She was entitled to hold that there had been clarity in the primary purpose for which the Claimant had been employed at least from March 2010 up to the date of the purported transfer. I accept Mr Briggs' submission that the Judge was right to look at the position immediately before the alleged transfer. Here she was looking at a period that had obtained since March 2010; it had lasted some eight months. The arrangement had, on the facts, become irreversible because of the complexities of the transfers of business and the segregation of the management functions in relation to, on the one hand, the Dutch and, on the other hand, the German portfolios. This was not a temporary arrangement in the sense that it was short-term, finite or subject to review. The Employment Judge was perfectly entitled to make the findings of fact that she made on the basis of the evidence, and in the light of them there is nothing in grounds 2 and 3 of Rynda's grounds of appeal.

17. The fourth ground of appeal advanced by Rynda attacks the Employment Judge's Judgment on the basis that she adopted what is said to have been a quantitative and/or arithmetical approach to working out the "principal purpose". In developing that point, Ms Darwin took me to aspects of the Employment Judge's Judgment in which she had taken into account the respective number of properties in Germany and the Netherlands, the respective number of trips made by the Claimant to those two countries and the number of employees working on the two different property management portfolios. It was suggested that in adopting this quantitative approach the Employment Judge had erred in law.

18. In my judgment, there is nothing in this ground of appeal. It is right that the Employment Judge did have regard to factual matters such as the amount of time spent on relevant work. It was, in my judgment, essential for the Employment Judge to take into account all of the relevant circumstances in determining the legal question before her. To the extent that Ms Darwin was suggesting that one looks only at the employer's subjectively held "purpose" and ignores the reality of what happens on the ground, I reject that submission. It seems to me entirely relevant for the Employment Judge to consider the actuality of what takes place between employer and employee. I can detect no error of law in relation to this suggested ground.

19. The fifth ground of appeal advanced by Rynda is a restatement of its criticism of the Employment Judge for focussing on the third and final sub-period of the Claimant's employment with her previous employers. For the reasons I have already given, I reject this submission. The Regulations expressly draw the attention of those who come to decide these questions to the position immediately prior to the transfer. Whilst it is true that a strictly

temporary period may be set to one side, this Employment Judge carefully considered the position and decided that the most recent period of employment with the former employers could not be put to one side on that basis. There was, in my judgment, nothing erroneous in her taking that approach.

20. On the basis that it may have succeeded on grounds 1-5, Rynda advanced a sixth ground attacking the Judge's alternative finding than in relation to the second stage or sub-period of the Claimant's previous employment she had not been engaged to manage the German properties as a principal purpose.

21. Again, I accept the contrary submissions advanced to this ground by Mr Briggs. Here, the Employment Judge was simply dealing with an alternative proposition, advanced by Rynda before her, and rejecting it. Although it is true that she expresses at paragraph 31 the possibility that the Claimant "was to carry out both activities equally" in that second sub-period, she is not advancing that as a platform for a decision but rather as marking the highest-possible watermark of the case being advanced by Rynda before her. That is to say that Rynda's case fell short of persuading her that the primary purpose of the arrangement between employer and employee was at that time the management of the German properties.

22. The seventh ground of appeal advanced by Rynda is in essence a perversity challenge attacking the Judge's conclusions on the evidence before her on the basis that they were not open to any Tribunal reasonably and properly directing itself. I have carefully considered the Particulars set out in support of this ground in the skeleton argument advanced by Ms Darwin. I have no hesitation in holding that they disclose no material capable of sustaining a perversity

challenge given the high threshold that any such challenge must surmount in the light of the decision in **Yeboah v Crofton** [2002] IRLR 634.

23. Ground 8 of the grounds of appeal contends that the Judge erred in finding that, at the point of her dismissal by Drivers Jonas, the Claimant was employed by Drivers Jonas LLP rather than by Drivers Jonas GmbH. In response to that ground of appeal Mr Briggs took the preliminary point that the issue had been conceded before the Employment Judge. However, it is not necessary for me to dispose of this appeal on that narrow basis. I have carefully considered the arguments advanced by Ms Darwin and the rebuttal offered by Mr Briggs on the ground itself. I am quite satisfied that on the material before her the Employment Judge reached a decision on this issue that was open to her. The high watermark of Rynda's case under this ground, as it appeared to me, was that the documentary evidence showed that the Claimant was being paid by Drivers Jonas GmbH at the relevant time but that the Employment Judge referred in paragraph 10 of her Judgment to some of that evidence (that the Claimant's salary might have been included in the Drivers Jonas GmbH management accounts) as "hearsay". In my judgment, it is plain that she did so, because the only evidence given by Rynda was given by a witness who himself was relying on information provided by another as to the way in which payments were being made. That, in my judgment, is rightly capable of being described, in parenthesis, as "hearsay" evidence, but, even if the Judge was wrong in her description of the quality of this evidence, it nevertheless was but a small ingredient in her overall assessment and determination of the identity of the employer at the relevant time. If error it was, it was immaterial.

24. The ninth and final ground of appeal contends that the Employment Judge erred in law in finding that the Claimant had been "assigned" by her former employer to the organised

grouping of employees that she alone comprised. Ms Darwin contended in support of this ground that one could extract from the Employment Judge's Judgment the proposition that she had simply made an assumption that because the Claimant happened to spend all her time on the Dutch property portfolio she had been assigned to an organised grouping to do that work. In my judgment, on a fair reading of the Employment Judge's reasons, no such inference is to be drawn. Here, the Employment Judge correctly directed herself to the question of whether the Claimant's undertaking of the Dutch portfolio property management work had been accidental, coincidental or simply a matter of happenstance, or whether the arrangement between her then employer and the Claimant showed that she had been assigned to this particular work. The only appropriate reading of the Judgment is that the Employment Judge had concluded on the findings of fact that she had made that there had indeed been an assignment by the then employer of the Claimant to that specific work.

Conclusion

25. For the reasons given above, the appeal brought in this case fails on all nine of the grounds advanced. It follows that it must be, and is hereby, dismissed.