Appeal No. UKEATS/0048/12/BI

EMPLOYMENT APPEAL TRIBUNAL

52 MELVILLE STREET, EDINBURGH, EH3 7HF

At the Tribunal
On 20 November 2012

Before

THE HONOURABLE LADY SMITH

(SITTING ALONE)

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(1) MRS CATHERINE TRIMBLE
(2) MISS CATRIONA THOMSON — APPELLANTS

(1) NORTH LANARKSHIRE COUNCIL
(2) NORTH LANARKSHIRE LEISURE LTD — RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellants	MR J MORGAN (Barrister) Instructed by: Thompsons Solicitors Berkeley House 285 Bath Street Glasgow G2 4HQ
For the First Respondent	No appearance
For the Second Respondent	MR M MCLAUGHLIN (Solicitor) DWF Biggart Baillie Dalmore House 310 St. Vincent Street Glasgow G2 5QR

SUMMARY

EQUAL PAY ACT

PRACTICE AND PROCEDURE – Amendment

Equal Pay. Amendment to add a respondent. TUPE. Whether or not Tribunal erred in refusing the amendment.

THE HONOURABLE LADY SMITH

Introduction

1. This is an employees' appeal from a judgment of the Employment Tribunal sitting at Glasgow, Employment Judge F Eccles presiding, granting an application, by the transferee in a TUPE transfer, to revoke a prior order allowing the Claimants leave to add them as Respondents. The judgment was registered on 28 June 2012. The order allowing the Second Respondents to be added was granted on 22 September 2011 - following an order granting the Claimants leave to amend dated 21 September 2011 - in the absence of the Second Respondents and without them having had the opportunity to make representations to the Tribunal. Accordingly, a Pre-Hearing Review took place thereafter at which they were represented and the Tribunal was addressed on the issue of whether or not the orders of 21 and 22 September should be revoked.

2. I will, for convenience, continue referring to parties as Claimants and First and Second Respondents. The First Respondents were the transferor employer; they did not participate in the appeal. The Second Respondents were the employer to whom the Claimants' contracts of employment had transferred under and in terms of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE").

3. The Claimants were represented by Mr J Morgan, barrister, before the Tribunal and before me. The Second Respondents were represented by Mr M McLaughlin, solicitor, before the Tribunal and before me.

Background

4. The First Claimant was employed by the First Respondent as a pavilion attendant and the Second Claimant was employed by them as a leisure attendant. Their contracts of employment

transferred to the Second Respondent under TUPE in September 2006. The Second Respondent was incorporated in September 2006.

5. Parties were agreed that the Second Respondent was an associated employer within the meaning of s1(6) **EPA** but, in the end of the day, nothing seems to have turned on that.

6. The First Claimant presented her form ET1 to the Employment Tribunal on 13 June 2006, naming only North Lanarkshire Council as Respondent and alleging that her employer had not paid her the equal pay to which she was entitled under the equality clause in her contract (see: **Equal Pay Act 1970** s.1 ("EPA")). The Second Claimant presented her form ET1 to the Employment Tribunal on 25 April 2007, also naming only North Lanarkshire Council as Respondent and also alleging that they had not paid her the equal pay to which she was contractually entitled.

7. The First Claimant raised a grievance with the First Respondents on 31 March 2006, under the statutory grievance procedures that were then in force. The Second Claimant raised a similar grievance on 14 July 2006.

8. On 17 August 2007, the Second Claimant advised her solicitors, Messrs Thompsons, that her employment had transferred to the Second Respondents. The First Claimant, for whom Thompsons also act, advised them on 18 October 2007 that her employment had transferred to the Second Respondents.

9. The effect of TUPE was to transfer to the Second Respondent, on completion of the transfer, all of North Lanarkshire Council's duties and liabilities under or in connection with the Claimants' contracts of employment: reg 4(2)(a) of TUPE. Further, any act or omission of or in

relation to North Lanarkshire Council's duties before the transfer was completed was deemed to have been an act or omission of or in relation to the Second Respondent, as transferee: reg 4(2)(b) of TUPE. Accordingly, even if the First Respondents were in breach of the relevant equality clauses prior to the transfer, that liability could not be enforced against them after the transfer.

10. It should also be noted that once the Claimants' contracts of employment had transferred to the Second Respondents, a six month time limit would have applied in relation to any fresh claim against the Second Respondents: s.2ZA(3) EPA; **Sodexo Ltd v Gutridge and Others** [2009] ICR 1486. The Claimants would also have had the benefit of the former statutory grievance procedures which afforded them a further three months. Time would have run from the date of transfer to the Second Respondents (September 2006).

11. At a Case Management Discussion on 28 July 2011, the solicitor for the First Respondents indicated that the Claimants' contracts of employment had transferred to the Second Respondents. The Claimants thereafter applied to amend their claims, by application dated 30 August 2011, to add the Second Respondents to the proceedings. The application was made by email in which Mr O'Donnell, solicitor, acting on behalf of the claimants stated *inter alia*:

> **"We have been advised by the respondent that the following claimants have transferred from the council to North Lanarkshire Leisure Trust: -**
>
> - **Catherine Trimble 108930/2006**
> - **Catriona Thomson 108623/2007**
>
> **We have now confirmed the position with our clients and it is agreed that our clients did transfer to the Trust.**
>
> **In these circumstances, we apply herewith to amend these claims to include a second Respondent at part 2 of the ET1. The second Respondent is:**
>
> **North Lanarkshire Leisure Trust …"**

12. Nowhere in that application is it suggested that the Claimants also sought to claim that the Second Respondent had, independently of the First Respondents, failed to pay them the equal pay to which they were entitled after the date of transfer. Their claims continued to be confined to an allegation that the First Respondents – and only the First Respondents - had failed in their equal pay obligations. Mr Morgan did not suggest otherwise.

13. I observe that the application to amend which was presented on 30 August 2011 gives the clear impression that it was only at that stage that the Claimants' solicitors had become aware of the TUPE transfer. However, in a Minute of Agreement entered into for the purpose of the hearing before the Tribunal, it was expressly agreed between parties that – as noted above - the Second Claimant informed Messrs Thompsons of the transfer on 17 August 2007 and the First Claimant informed Messrs Thompsons of the transfer on 18 October 2007. That is, the true position was that Messrs Thompsons had been advised of the TUPE transfer by their own clients some four years or so before they applied to amend the forms ET1. How, in those circumstances, they thought it appropriate to make a representation to the Employment Tribunal, when applying to amend the claims, that that matter had only just come to light in August 2011 – that is, how they thought it appropriate to make what appears to be a *mis*representation about the matter - was not explained to the Tribunal nor was it explained to me.

14. As above noted, the decision on the issue of amendment which is the subject of this appeal was reached in circumstances where, initially, amendment was allowed but that was before having heard parties. Having done so, the Employment Judge revoked her earlier order.

The Tribunal's Reasons

15. The Employment Judge decided that the Claimants ought not to have been given leave to amend and that, accordingly, the Second Respondents ought not to have been added. Her reasons for doing so can be summarised as follows:

- Under rule 10(1) of the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004** Sch 1, she had power to allow the amendment, power to revoke her orders in relation to the application to amend and she had a discretion in the matter;

- Her earlier orders were made in the absence of the Second Respondents and before she was provided with all the relevant information;

- The Claimants' representatives provided no explanation for having failed to act on the information provided by their clients, in 2007, that their employment had transferred to the Second Respondents;

- Regard should be had to the guidance in **Selkent Bus Co. Ltd v Moore** [1996] IRLR 661 which meant that she should take account of the following:
    - The amendment would not be a new cause of action – it would be a claim for the enforcement of the equality clause in the transferred contracts of employment and the change in identity of respondent employer did not mean that it was a new claim;
    - The issue of time bar did not arise in relation to the Claimants' claims that the First Respondents had not paid them equal pay because the Claimants had

presented claims for enforcement of that equality clause – albeit against the wrong employer – in time; and

- The timing and manner of the application was such that there had been unexplained delay between the Claimants' solicitors being advised by their clients of the TUPE transfer in 2007 and their applying to amend the claims in 2011.

- Turning to considerations of relative prejudices, she recognised that the Claimants would be prejudiced by losing the ability to prosecute their claims in relation to their allegations that they had not received equal pay when in the employment of the First Respondents;

- The Employment Judge considered that the Second Respondents would also be prejudiced in respect that they would, at this stage, have to defend claims dating back as far as 2001 (five years prior to the date of transfer – see: **EPA** s.2ZC(2)) which would inevitably be difficult – obtaining the relevant information and documents in such circumstances would not be straightforward;

- The Second Respondents' difficulties in that event were not to be laid at the door of the First Respondents – rather, the Employment Judge was critical of the failure by the Claimants' solicitors to act once they were told about the transfer and their failure to provide any explanation for that failure. That is, she gave more weight to the prejudice on the Second Respondents' side because of the failings of the Claimants' solicitors; and

- The Employment Judge also evidently gave less weight to the potential prejudice to the Claimants in respect that she referred to the Claimants not being wholly without a remedy, given the fault of her advisers. At paragraph 23, she stated:

> **"…The claimants have been legally represented throughout the proceedings. I recognise that a claim against a representative is not equivalent to a remedy against the correct respondent. In this case, however, the fact that the representatives were informed of the transfer as far back as 2007 and failed to act on receipt of that information are factors to which I consider it is appropriate to attach some weight. In all of the above circumstances, I am satisfied that the relative injustice and hardship to the second respondents in refusing the applications to revoke the Orders outweighs the injustice and hardship to the claimants in granting them."**

Relevant Law

16. As the Employment Judge rightly observed, she had, in terms of the relevant rule, a discretion to revoke the earlier orders allowing the amendment and adding the Second Respondents to the claim.

17. As with all applications to amend, it was incumbent upon her to take account of all the circumstances and seek to balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it (**Selkent**, paragraph 21). It is inevitable that, where an issue arises, each party will point to there being a downside for them if the proposed amendment is allowed/not allowed. Thus, it will rarely be enough to look only at the downsides or 'prejudices', to use the common shorthand, themselves. They require to be put in context and that is why it is important to look at the whole surrounding circumstances.

18. Such decisions being discretionary ones, they are not readily susceptible to interference on appeal. As observed by Henry LJ in **Noorani v Merseyside TEC Ltd** [1999] IRLR 184:

> **"Such decisions are, essentially, challengeable only on what loosely may be called *Wednesbury* grounds, when the court at first instance exercised the discretion under a mistake of law, or disregard of principle, or under a misapprehension as to the facts, where they took into account irrelevant matters or failed to take into account relevant matters, or where the conclusion reached was 'outside the generous ambit within which a reasonable disagreement is possible,' see *G V G* [1985] 1WLR 647."**

The Appeal

19. There were, essentially, three submissions for the Claimants.

20. First, the Tribunal had given undue weight to delay; it ought not to have been given the weight it was given because revocation of the allowance of the amendment would mean that that was an end of the Claimants' equal pay claims thus causing them the loss, potentially, of six years arrears of pay[1]. Any prejudice to the Second Respondents was that they would be put in a position that has to be faced by any transferee employer where there is an outstanding equal pay claim relating to the conduct of the transferor.

21. Secondly, the Tribunal failed to give sufficient weight to the principle that underlies TUPE, as articulated in the preamble to 2001/23/EC of 12 March 2001, namely that it is necessary to provide for the protection of employees' rights if there is a change of employer. It was odd that the directive had, he said, the effect of knocking out a valid claim and the Tribunal ought to have given considerable weight to that, in favour of the Claimants. The policy of protecting employees on transfer ought to have been recognised by the Tribunal.

22. Thirdly, the Tribunal's decision was a perverse one. There was no evidence given for the Second Respondents to show that there would be prejudice to them. There was no particular prejudice, just like the respondents in the case of **Walsall MBC, Housing 21 Ltd v Birch and Ors** [2011] WL 1151420. It was not unusual for respondents in equal pay claims to have to make historical investigations. The Tribunal had failed to recognise the realities of equal pay litigation; there were many claims north and south of the border against local authorities where investigations had to be made. Mr Morgan did, however, accept that the issue for the Tribunal

was essentially whether or not to allow the amendment and that the onus lay, accordingly, on the Claimants.

23. Mr Morgan also referred to **Jackson v Computershare Investor Services Plc** [2008] IRLR 70 for the observation by Mummery LJ, at paragraph 29 as to the purpose and effect of TUPE.

24. For the Second Respondents, Mr McLaughlin submitted that the appeal should be dismissed. The Claimants' submissions proceeded, erroneously, on the basis that the effect of the Tribunal's decision was to say that TUPE caused the loss of the Claimants' equal pay claims but that was not right. As the analysis at, for instance, paragraph 60 of **Gutridge** demonstrated, the right to equal pay due by the transferor is not lost on transfer; that right transfers. **Gutridge** imposed time limits notwithstanding that TUPE applied and the claims were equal pay claims.

25. It was not open to the Claimants to attack that decision which was what, in essence, they sought to do.

26. As to prejudice, evidence was not required. The Claimants did not give evidence that they would lose the right to prosecute their equal pay claims – that was taken as read. In the same way, that there would be difficulties for the Second Respondents in meeting such late claims could readily be deduced. He referred to paragraph 58 of **Gutridge** as an example of judicial preparedness to accept that there would be difficulties where a respondent has to meet a claim years after the circumstances giving rise to the claim had ceased to exist, without evidence to that effect.

[1] Six years would be the relevant period in England and Wales but these being Scottish claims, the relevant period

27. Mr McLaughlin accepted that TUPE protected employees' rights but TUPE was not intended to put them in a better position which is what was the thrust of the Claimants' submissions.

28. This was, in essence, a perversity appeal and it had not been demonstrated that the Tribunal had erred. The Employment Judge had taken account of the balance of prejudices but that was not all that she had to do. She looked, correctly, at the whole circumstances and did not given undue weight to any of them. It was open to her to look not at delay alone but at the length of the delay, the lack of explanation for it, the Claimants' knowledge and the knowledge of their solicitors. The longer the delay the more she was entitled to give it weight. She did not misdirect herself in law, she had regard to principle and the high test for perversity was not met.

Discussion and Decision

29. I do not consider that there is any merit in this appeal. In the end of the day, Mr Morgan's attack did not identify any relevant factor that the Employment Judge failed to take into account, nor any irrelevant factor that she took into account; I do not accept that she was not entitled to proceed on the basis that there would be inevitable difficulties for the Second Respondent in responding to a claim which related to a period spanning five years prior to the date of transfer (i.e. before they even came into existence) where that date itself was some five years earlier. Insofar as his argument was that she should have given less weight to the delay, the fault for it, the effect of it and the prospect of the Claimants having an alternative remedy (a matter which the Employment Judge was careful not to overstate) and more weight to the prejudice to the Claimants, this is not one of those rare cases where it could be said that it was perverse not to afford a different weighting to the relevant factors. What to make of the

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is five years.

competing factors in a case such as this is generally very much a matter for the Tribunal of first instance and there is nothing in the particular facts and circumstances of this case which points to the disapplication of that general rule.

30. The aspect of the appeal which was pressed most strongly by Mr Morgan was that by revoking the authority to amend, the purpose of TUPE was undermined; employees' rights which, under the Acquired Rights Directive and TUPE, were meant to be protected on transfer, would be lost. That may be so but that is not to say that the purpose of TUPE was not fulfilled; on transfer, as at September 2006, the Claimants retained their rights to claim any arrears of pay due to them on account of their not having received equal pay from the First Respondents during the five years prior thereto. Those rights were, as the directive and domestic legislation intended, preserved on transfer. The Claimants had, at that stage, six months (plus the extensions to which their having presented grievances entitled them) within which to raise separate proceedings against the Second Respondents (who fell heir to the First Respondents' obligations under the transferred contracts of employment). It was also open to the First Claimant to seek, at that stage, to add the Second Respondent to her existing claim and it is difficult to see that authority to do so would not have been granted. The Second Claimant could – and ought – when she presented her claim in April 2007, to have directed it against the Second Respondent. Her failure to do so was, apparently, a mistake but steps were not taken to rectify it at an early stage when, again, it is difficult to see that amendment would not have been granted. The problem for the Claimants was of their – or at least their agents' – own making in respect that years were allowed to pass with no steps being taken to direct the claims against the Second Respondents and with no hint of any explanation for the lengthy delay being offered to the Tribunal.

31. In any event, Mr Morgan's submission seemed to be that TUPE was a special case and therefore special care had to be taken in relation to the rights that it protects. The need to be allowed to add a respondent typically arises where it is realised some time after the instigation of a complaint that the claimant's case should be directed against someone else – often someone who appears more likely to have been the relevant employer. Such complaints may be by way of assertion of various other statutory rights which emanate from European Directives such as rights not to be discriminated against and it is quite wrong to suggest that if a European source for the asserted right can be identified, special weight has to be given to it in the sort of balancing exercise that a tribunal has to carry out when considering whether or not to allow the addition of a new respondent; Mr Morgan did not point to any authority in support of such an approach. Further, I would observe, as I did in the course of the hearing, that the setting of reasonable time limits in equal pay claims has been approved by the ECJ. In particular, in their judgment in what is known as **Preston No.1** [2001] ICR 961, at paragraph 33, they observed that the setting of reasonable limitation periods not only satisfied the principle of effectiveness but also satisfied "the fundamental principle of legal certainty" and at paragraph 34, they stated:

> **"… the imposition of a limitation period of six months, as laid down in section 2(4) of the EPA, even if, by definition, expiry of that period entails total or partial dismissal of their actions, cannot be regarded as constituting an obstacle to obtaining the payment of sums to which, albeit not yet payable, the claimants are entitled under Article 119 of the Treaty. Such a limitation period does not render impossible or excessively difficult the exercise of rights conferred by the Community legal order and not therefore liable to strike at the very essence of those rights."**

32. Whilst the decision under scrutiny in this appeal was not on a time bar issue, it seems clear from that discussion that it would not be contrary to accepted principle to refuse the late addition of a respondent even if the result is that that, in effect, brings an end to the claim. In all these circumstances, I am readily satisfied that the conclusion reached by the Employment Judge on the issue that she had to decide was one which was open to her. It was a permissible option.

Disposal

33. In these circumstances, I will pronounce an order dismissing the appeal.