Appeal No. UKEAT/0255/16/LA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 28 February 2017
Judgment handed down on 28 March 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

BORN LONDON LIMITED — APPELLANT

SPIRE PRODUCTION SERVICES LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

© Copyright 2017

APPEARANCES

For the Appellant	MR JEFFREY JUPP (of Counsel) Instructed by: Sykes Anderson Perry Limited 5th Floor Salisbury House London Wall London EC2M 5QQ
For the Respondent	MR JEREMY LEWIS (of Counsel) Instructed by: Gowling WLG (UK) LLP Two Snowhill Snow Hill Queensway Birmingham B4 6WR

SUMMARY

TRANSFER OF UNDERTAKINGS

Transfer of undertaking - notification of employee liability information - regulation 11 ***TUPE***

Born had taken over a contract from Spire in circumstances that amounted to a service provision change for **TUPE** purposes. In providing information to Born prior to the transfer, Spire had stated that a non-contractual Christmas bonus was in place. Born contended that this was wrong: in fact the bonus was contractual in nature and Spire had given incorrect employee liability information for the purposes of regulation 11 **TUPE**.

Determining Born's complaint under regulation 12 **TUPE**, the ET concluded it had no reasonable prospect of success: even assuming the bonus was contractual, regulation 11 had required Spire to provide particulars as defined by section 1 **Employment Rights Act 1996** ("ERA"); that did not require it to state whether or not remuneration was contractual. EU law did not assist Born in this regard. Its complaint was dismissed.

On Born's appeal.

Held: *dismissing the appeal*

The ET had correctly construed the obligation upon Spire: section 1 **ERA** set out the requirements upon an employer in respect of a statement of employment particulars; those particulars were not limited to contractual terms and conditions and there was no obligation to state whether the matters to be set out were contractual or not; specifically there was no such obligation in respect of remuneration (specifying the method by which it was to be calculated did not mean an employer had also to state whether any particular aspect of remuneration was contractual). The EU Directives relied on by Born did not assist: both **Council Directive 91/533/EU** and **Council Directive 2001/23/EC** were concerned with entitlements and rights and obligations, more broadly defined than simply those which were properly to be defined as contractual in nature.

A **HER HONOUR JUDGE EADY QC**

Introduction

B 1. I refer to the parties as "Born" and "Spire"; they are print finishing firms, in dispute as to the application of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"); specifically as to the obligation upon Spire (the transferor), pursuant to regulation 11 **TUPE**, when providing employee liability information relating to a Christmas C bonus payment. By a Judgment, sent to the parties on 3 November 2015, the London (Central) Employment Tribunal (Employment Judge Goodman, sitting alone, on 18 September 2015; "the ET") dismissed a claim by Born, brought under regulation 12 **TUPE**, as disclosing no D reasonable prospect of success. Born appeals.

2. In permitting the appeal to proceed, His Honour Judge Richardson allowed that Born E had raised a reasonably arguable question of law as to whether the employee liability information provided by Spire failed to comply with regulation 11 **TUPE**, either by applying ordinary canons of statutory interpretation or by reference to underlying European law.

F

The Factual Background and the ET's Decision and Reasoning

3. The ET did not receive any evidence but based its determination on the parties' pleaded cases and submissions, from which it summarised the relevant factual background as follows:

G

> **"3. In 2006, Sotheby's, the well-known auctioneers, outsourced the printing of their catalogues to the respondent, Spire, a print finishing firm. That contract ended, and Sotheby's then contracted with the claimant, Born, to do the work. In the process 32 print finishing employees transferred from Spire to Born on 1 January 2015. I understand it to be common ground that this arrangement is a service provision change as described in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE).**
>
> **4. Prior to the transfer, Spire provided Born with employee liability information as required by TUPE. Employees' terms were listed separately as "contractual" and "non-contractual". Under the heading "non-contractual", it was said that each employee was entitled to a Christmas bonus of one week's pay, plus £7.50 per year of service, payable each November.**
>
> **5. After the transfer, four employees produced a statutory statement of particulars of employment, supplied to them by Spire, which included a description of the Christmas bonus,**

H

> **but did not say it was non-contractual. Some of them however have statements of employment particulars which say the bonus is non-contractual. It also appears that all 32 employees have in fact been paid bonus for each year they were employed by Spire."**

4. On 29 May 2015, Born lodged a complaint with the ET. It contended that, so far as the Christmas bonus was concerned, Spire had not complied with regulation 11(2)(b) **TUPE** and it sought compensation of something over £100,000 (to span the lifetime of the contract). Separately Born also lodged a further ET claim seeking a declaration of employees' statutory statements of employment particulars and as to the contractual status of the bonus term; the Respondents to that claim being three of the transferred employees. The hearing in the second claim took place before Employment Judge Snelson on 9 December 2015, when it was held that:

> **"… each of the Respondents had, or ought to have had, contained within his/her statement of employment particulars (under the 1996 Act, s1) and/or any statement of change (under the 1996 Act, s4), a provision that he/she was, after two years' continuous service, contractually entitled to a Christmas bonus of one week's pay plus £7.50 per year of service, payable in November, such provision being an express term of his/her contract of employment, alternatively a term necessarily implied through custom and practice."**

The Judgment of EJ Snelson was obviously not available to the ET at the hearing in September 2015. In any event, in the claim with which this appeal is concerned, it was Spire's case that it had provided such information as it had been required to do under **TUPE**.

5. The ET identified the core issue before it as being whether regulation 11 **TUPE** required a transferor to say whether or not a term as to remuneration was contractual: if there was no such obligation it was hard to see how a complaint could be pursued of a failure to comply under regulation 12.

6. Adopting that approach, the ET observed that regulation 11(2)(b) required the transferor to provide those particulars of employment that an employer is obliged to give to an employee

pursuant to section 1 **Employment Rights Act 1996** ("ERA"). It noted that section 1 did not - when addressing particulars of remuneration at section 1(4)(a) and (b) - state that the particulars as to amount and frequency of remuneration were contractual, although it could have done so, and, indeed, used the language of contract - "terms and conditions" - elsewhere. The ET did not consider that assistance was provided by **Council Directive 91/533/EU** (on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship; "the 1991 Directive"), not least as that covered both a "contract or employment relationship" without distinction. The ET further observed that, when defining wages, at section 27 **ERA**, it was allowed that there might be non-contractual entitlements. A similarly general approach - using the terminology of rights and obligations - was to be seen in **Council Directive 2001/23/EC** (the Acquired Rights Directive; "ARD").

7. Returning to the obligation upon a transferor under **TUPE** and the **ERA**, the ET concluded Spire had provided the particulars required of it; the complaint under regulation 12 was thus misconceived. Noting that this was an unattractive conclusion - not least as it appeared that at least some of the information *volunteered* by Spire as to whether the bonus had contractual force was untrue - the ET concluded any remedy open to Born must lie elsewhere.

The Relevant Legislative Provisions

8. By regulation 11 **TUPE**, it is provided:

> **"11.** ***Notification of Employee Liability Information***
>
> **(1) The transferor shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a relevant transfer -**
>
> **(a) in writing; or**
>
> **(b) by making it available to him in a readily accessible form.**
>
> **(2) In this regulation and in regulation 12 "employee liability information" means -**
>
> **(a) the identity and age of the employee;**

(b) those particulars of employment that an employer is obliged to give to an employee pursuant to section 1 of the 1996 Act;

(c) information of any -

(i) disciplinary procedure taken against an employee;

(ii) grievance procedure taken by an employee,

within the previous two years, in circumstances where [a Code of Practice issued under Part IV of the Trade Union and Labour Relations Act 1992 which relates exclusively or primarily to the resolution of disputes applies];

(d) information of any court or tribunal case, claim or action -

(i) brought by an employee against the transferor, within the previous two years;

(ii) that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor; and

(e) information of any collective agreement which will have effect after the transfer, in its application in relation to the employee, pursuant to regulation 5(a).

(3) Employee liability information shall contain information as at a specified date not more than fourteen days before the date on which the information is notified to the transferee.

(4) The duty to provide employee liability information in paragraph (1) shall include a duty to provide employee liability information of any person who would have been employed by the transferor and assigned to the organised grouping of resources or employees that is the subject of a relevant transfer immediately before the transfer if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(5) Following notification of the employee liability information in accordance with this regulation, the transferor shall notify the transferee in writing of any change in the employee liability information.

(6) A notification under this regulation shall be given not less than [28 days] before the relevant transfer or, if special circumstances make this not reasonably practicable, as soon as reasonably practicable thereafter.

(7) A notification under this regulation may be given -

(a) in more than one instalment;

(b) indirectly, through a third party."

9. Regulation 12 then provides a remedy for failure to comply with regulation 11:

"12. ***Remedy for failure to notify employee liability information***

(1) On or after a relevant transfer, the transferee may present a complaint to an employment tribunal that the transferor has failed to comply with any provision of regulation 11.

…

(3) Where an employment tribunal finds a complaint under paragraph (1) well-founded, the tribunal -

(a) shall make a declaration to that effect; and

(b) may make an award of compensation to be paid by the transferor to the transferee.

(4) The amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances, subject to paragraph (5), having particular regard to -

(a) any loss sustained by the transferee which is attributable to the matters complained of; and

(b) the terms of any contract between the transferor and the transferee relating to the transfer under which the transferor may be liable to pay any sum to the transferee in respect of a failure to notify the transferee of employee liability information.

(5) Subject to paragraph (6), the amount of compensation awarded under paragraph (3) shall be not less than £500 per employee in respect of whom the transferor has failed to comply with a provision of regulation 11, unless the tribunal considers it just and equitable, in all the circumstances, to award a lesser sum.

(6) In ascertaining the loss referred to in paragraph (4)(a) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to any damages recoverable under the common law …"

10. Regulation 11 **TUPE** enacts into domestic law the first sentence of article 3(2) of the **ARD**, which provides:

"2. Member states may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. …"

11. Domestic enactment of this provision was framed by regulation 11(2)(b) **TUPE** by reference to section 1 of the **ERA**, which provides:

"1. *Statement of initial employment particulars*

(1) Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2) The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.

(3) The statement shall contain particulars of -

(a) the names of the employer and employee,

(b) the date when the employment began, and

(c) the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4) The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment containing them) is given, of -

(a) the scale or rate of remuneration or the method of calculating remuneration,

(b) the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c) any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours),

(d) any terms and conditions relating to any of the following -

(i) entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii) incapacity for work due to sickness or injury, including any provision for sick pay, and

(iii) pensions and pension schemes,

(e) the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment,

(f) the title of the job which the employee is employed to do or a brief description of the work for which he is employed,

(g) where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(h) either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer,

(j) any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made, and

(k) where the employee is required to work outside the United Kingdom for a period of more than one month -

(i) the period for which he is to work outside the United Kingdom,

(ii) the currency in which remuneration is to be paid while he is working outside the United Kingdom,

(iii) any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and

(iv) any terms and conditions relating to his return to the United Kingdom.

(5) Subsection (4)(d)(iii) does not apply to an employee of a body or authority if -

(a) the employee's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and

(b) any such provision requires the body or authority to give to a new employee information concerning the employee's pension rights or the determination of questions affecting those rights."

12. It is, further, Born's case that section 1 **ERA** must be read consistently with the **1991 Directive**, which relevantly provides:

"Article 2. ***Obligation to provide information***

1. An employer shall be obliged to notify an employee to whom this Directive applies, hereinafter referred to as 'the employee', of the essential aspects of the contract or employment relationship.

2. The information referred to in paragraph 1 shall cover at least the following:

(a) the identities of the parties;

(b) the place of work, where there is no fixed or main place or work, the principle that the employee is employed at various places and the registered place of business or, where appropriate, the domicile of the employer;

(c) (i) the title, grade, nature or category of the work for which the employee is employed; or

(ii) a brief specification or description of the work;

(d) the date of commencement of the contract or employment relationship;

(e) in the case of a temporary contract or employment relationship, the expected duration thereof;

(f) the amount of paid leave to which the employee is entitled or, where this cannot be indicated when the information is given, the procedures for allocating and determining such leave;

(g) the length of the periods of notice to be observed by the employer and the employee should their contract or employment relationship be terminated or, where this cannot be indicated when the information is given, the method for determining such periods of notice.

(h) the initial basic amount, the other component elements and the frequency of payment of the remuneration to which the employee is entitled.

(i) the length of the employee's normal working day or week;

(j) where appropriate;

(i) the collective agreements governing the employee's conditions of work;

or

(ii) in the case of collective agreements concluded outside the business by special joint bodies or institutions, the name of the competent body or joint institution within which the agreements were concluded.

3. The information referred to in paragraph 2(f), (g), (h) and (i) may, where appropriate, be given in the form of a reference to the laws, regulations and administrative or statutory provisions or collective agreements governing those particular points."

The Appeal

13. Born's grounds of appeal are essentially two-fold. First, it is said the ET erred in law in determining that, when Spire provided employee liability information under regulation 11(2)(b) **TUPE**, it was entitled to describe the employees' entitlement to bonus as "non-contractual" even if it was in fact contractual. By the second ground, essentially the same complaint is made in respect of the obligation upon an employer under section 1 **ERA**. In support of its contentions on the appeal, Born relies on article 2 of the **1991 Directive** and - to the extent it is

considered that domestic law is unclear on this point - submits it would be appropriate to refer this matter to the Court of Justice for a preliminary ruling. For its part, Spire resists the appeal, relying on the reasoning of the ET.

Submissions

Born's Case

14. Mr Jupp observed that the force of Spire's case must be that a transferor was obliged to set out the payments and the regularity of those payments but not whether or not they were contractual; Born's position was that the ET erred in its construction of Spire's regulation 11 obligation, failing to afford section 1 **ERA** a natural construction that would require particulars to contain details of the employee's entitlement to a contractual bonus. The short point was that regulation 11(2)(b) **TUPE** must require the transferor to give accurate information about the nature of a bonus scheme when it provides employee liability information to the transferee.

15. Section 1 **ERA** required the *employer* to give the particulars to the *employee* when starting *employment*. Section 230 **ERA** provides that "employee" refers to a "person employed under a contract of employment". When section 1 requires a written statement of the particulars of employment to be provided it must therefore mean a written statement of the particulars of the employment contract; a statement of the employee's contractual entitlements (allowing that section 1 particulars neither constitute a written contract nor are conclusive of its terms, they provided strong *prima facie* evidence of contractual terms, see, for example, **Robertson and Anor v British Gas Corporation** [1983] ICR 351 CA, at 354-355). That accorded with the purpose of section 1, which was to inform employees of their specific entitlements; implicit in that must be the nature of the entitlement.

16. Moreover, section 1(4) **ERA** imposed a mandatory requirement upon employers in respect of particular terms and previous case-law suggested that the mandatory terms - specifically those required under section 1(4)(a) and (b) - were seen as contractual in nature (see **Eagland v British Telecommunications plc** [1993] ICR 644 CA, in particular per Parker LJ at 652E-H). On Spire's case, the employer could notify an employee that he was entitled to £500 per week but then assert that £250 of that sum was non-contractual and entirely discretionary; that could not be right; the particulars required under section 1(4)(a)and (b) must be contractual.

17. Section 1(4)(a) and (b) could be contrasted with section 1(4)(c) and (d): there was no obligation to have those terms (hours of work; holidays; sick leave; pensions), although if they were present then they would need to be set out. Whilst other provisions - section 1(4)(e), (f) and (h) - did not use the language of contract, that was because it was obvious: if those terms existed, they must be contractual clauses. Similarly, at section 1(4)(k): the first three matters addressed did not use the language of terms and conditions as it was obvious that was what was being addressed; the provision only used the language of terms and conditions when necessary to do so (see section 1(4)(k)(iv)). If the provision was contractual then, in Born's submission, section 1 required that it be notified; if not contractual, there was no requirement to notify. A purely ex gratia, discretionary bonus did not need to be included but if a bonus had taken on contractual effect then it had to be notified and an employer would be in breach if it failed to include the bonus, even if mistakenly believing it was non-contractual.

18. Alternatively, Born argued it was necessary to focus on section 1(4)(a) and to ask what was meant by the "method" of calculating remuneration. In most cases that will simply be the way remuneration was calculated but, when dealing with bonus, if there was a discretion then

A that would be part of the method; the employer would need to explain that the bonus was discretionary in order to comply with section 1(4)(a). That submission was supported by section 1(4)(b), which dealt with the intervals at which remuneration was paid; if discretionary then the employer would need to say there was no obligation to pay but if contractual the employer would need to say that a payment was to be made on specified (contractual) date.

B

19. Thus, purely on domestic construction of the legislation, by providing information that the bonus was non-contractual when in fact it was contractual, Spire breached regulation 11.

C

20. This accorded with the purpose of regulation 11: the UK had not been required to enact regulation 11 but it had chosen to do so precisely - Born argues - to protect against what happened here. And, whilst a transfer of undertaking was likely to see warranties in the contract between transferor and transferee, if a service provision change there was less likely to be any warranty as the transferee was taking over a contract.

D

E

21. Born's arguments were further supported by article 2 of the **1991 Directive**. Whilst to speak of "the contract or employment relationship" could refer to that which was contractual or non-contractual, using the term "essential" must mean that which is contractual. Remuneration was an essential aspect of any contract or employment relationship and that must include bonus entitlement. Moreover, the requirement that the notification should contain details of the remuneration to which the employee is entitled must mean that the basis of the entitlement was identified; in turn, that must mean stating whether or not the remuneration was contractual.

F

G

22. A similar point could be made arising from article 3(2) **ARD**: if the transferor knows or ought to have known that a bonus scheme open to its employees was contractual, that was

H

information it was required to provide to the transferee. Accepting (per **USA v Nolan** [2016] AC 463 SC, at paragraph 14) that if not enacting a mandatory requirement of a Directive, domestic law did not have to be read compatibly, this approach accorded with the purpose of article 3(2) **ARD** and regulation 11 **TUPE** (and article 3(2) could inform the construction of regulation 11). Moreover, it was plainly intended that a transferee know what its exposure was in respect of liabilities towards transferring employees (hence "employee liability information"); that would no doubt inform its commercial decision as to whether to take over a particular service or undertaking.

23. If the Court was not with Born then it would be appropriate to refer this matter to the Court of Justice for a preliminary ruling as to the requirements of the **1991 Directive**.

Spire's Case

24. There could be no breach of regulation 11 if Spire had failed to give notification of matters that did not amount to employee liability information; specifically, the only relevant obligation had been to give particulars of the scale and rate of remuneration, which it had. The method of payment was clearly set out in terms: it was stated to be paid each November; to suggest there was a further obligation to state whether or not the bonus was contractual went too far (anything more was for due diligence). In truth Born was seeking to rely on regulation 11 because of the difficulties it would face if it sought to pursue any common law action. Its overly broad approach to regulation 11 would give rise to real difficulties, not least as the question whether there was a contractual liability could be difficult to assess.

25. Spire had inherited terms from Sotheby's, which had included what it understood to be a non-contractual Christmas bonus. It was hard to assess whether a custom and practice had

A crystallised into contractual entitlement and some of the employees' terms and conditions had expressly identified the bonus as "non-contractual". Although EJ Snelson may have found otherwise, without seeing the reasoned Judgment, it was impossible to know what concessions might have been made. If the obligation under section 1 **ERA** was only to notify of contractual terms then that would presumably require an employer to ascertain (and be alive to) a shift from non-contractual to contractual and thus to issue a fresh statement under section 4. That could be particularly difficult in the case of a bonus payment: a non-contractual bonus might still have contractual effects, see for example **Farrell Matthews & Weir v Hansen** [2005] ICR 509 EAT, **Chequepoint (UK) Ltd v Radwan** A1/99/0681 and **Brogden and Anor v Investec Bank plc** [2014] IRLR 924 HCt (Comm). The reality was that there was no bright line between the contractual and the non-contractual and the fact that an entitlement was contingent upon an employer not removing a bonus policy (or any other non-contractual policy) did not mean it did not give rise to an obligation for **TUPE** purposes (a point reinforced in the EU context, see **Procter & Gamble Co v Svenska Cellulosa Aktiebolaget SCA** [2012] IRLR 733 HCt (Ch)).

26. Turning to the language of section 1 **ERA**, what was required was clear (see section 1(4)(a) and (b)) and did not require stating whether the remuneration was contractual or not. The definition of "employee" etc did not assist: the fact that section only applied to employees did not answer the question whether it concerned contractual or non-contractual rights; section 230 **ERA** defined the sub-category of worker who qualified for certain rights, it did not mean that the only information to be given under section 1 was about terms of employment. Indeed, just as the **1991 Directive** covered both contractual and non-contractual entitlements (and made clear that the source of the entitlement could be other than the contract), section 1 of the **ERA** should be read in the same way. This was also obvious from any straightforward reading of section 1: it was, for instance, clearly not the case that entitlement to holidays could only derive

from a contractual source; similarly, the date on which continuous service began was a statutory matter, not the notification of a contractual element. More specifically, the intervals for payment of remuneration might be contractual or non-contractual - the employer could reserve the right to change the practice - but, in either case, there was still an obligation to notify employees of the intervals at which they could expect to be paid; it was implicit in section 1(4)(b) that it referred to remuneration paid in relation to the employment on a regular basis (see **Jones v Liberata Life Pensions Investments Ltd** UKEAT/0897/03) - such as a Christmas bonus. More generally, unless section 1 actually used the language of contract - "terms and conditions" - there was no reason to construe it as limited to contractual terms.

27. Regulation 11 **TUPE** and section 1 **ERA** were default provisions, intended to set a minimum requirement as to the information to be provided; the question whether payments were contractual could be difficult to assess (see above). Consistent with being a default provision, regulation 11 was designed to require provision of information that could be stated with certainty. Where that was more difficult, regulation 11(1)(d)(ii) allowed the obligation to be qualified by reference to reasonable grounds for the belief; if a transferor was required to assess whether - and to what extent - a practice in relation to remuneration had contractual effect then it might be expected that a similar qualification would have been applied. Further, if section 1(4) **ERA** excluded remuneration paid pursuant to a practice or policy, that would have anomalous and undesirable consequences: it was important that the transferee be informed of such payments whether or not contractual as (a) discontinuance of the practice could give rise to a dismissal even if not contractual (see regulation 4(9) **TUPE** and **Abellio London Ltd v Musse** [2012] IRLR 360 EAT) and (b) a non-contractual policy could give rise to an entitlement over time in any event.

28. As for the **1991 Directive**, whilst that set out a requirement to set out remuneration to which the employee was "entitled", even if that requirement was to be read into section 1(4)(a) and (b) **ERA**, it would not assist: "entitlement" was not limited to a contractual entitlement as Born contended; entitlement was broader than "contractual obligation" in the EU context (see **Procter & Gamble**, supra) and as a matter of domestic law a non-contractual entitlement could give rise to certain rights (at least so long as the policy or practice remained in place (see above) and see section 27(1)(3) **ERA**, which includes a bonus whether payable under the contract or not). In any event, nothing in the **1991 Directive**, section 1 **ERA** or regulation 11 **TUPE** imposed an obligation to state or express an opinion as to the legal effect of the information; that was a matter for the transferee's own assessment as part of its due diligence process.

Discussion and Conclusions

29. As a preliminary observation, I note that the Judgment with which I am concerned was made under Rule 37, Schedule 1 to the **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("ET Rules"), which permits an ET to strike out a claim that it considers has no reasonable prospect of success. There is no criticism of the ET having determined this claim under Rule 37 but, in so doing, it had to assume any underlying facts in Born's favour. It was thus appropriate to assume that the bonus was contractual in nature (an assumption that EJ Snelson's Judgment would appear to support). On the basis of that assumed factual background, Spire's characterisation of the Christmas bonus as "non-contractual" was wrong. The question for the ET was whether it was in breach of Spire's obligations under regulation 11 **TUPE**.

30. The relevant requirement upon Spire, pursuant to regulation 11(2)(b), was to notify Born of the particulars of employment that an employer is obliged to give to an employee

pursuant to section 1 **ERA**. Section 1 provides a right to a statement of employment particulars for all employees at the commencement of their employment; the obligation it thus imposes on employers is incorporated into regulation 11 but it is of far broader application.

31. Moreover, although a right pertaining to employees (as defined by section 230 **ERA**), section 1 does not state that it is a right to a written contract of employment but to a statement of employment particulars. As case-law has made clear (see, for example, **Robertson v British Gas**), the section 1 statement thus provided does not constitute a contract of employment, although it will be persuasive (but not conclusive) evidence of the terms of the employment contract.

32. Notwithstanding that characterisation of a section 1 statement, it is apparent that some of the particulars it requires to be given are likely to be contractual in nature. I do not, however, accept that this has to be the case in respect of all the information required and I do not consider it is possible (or even helpful) to try to distinguish between those particulars that would be contractual and those that would not; not least as much might depend on the particular context - something that may well be true of remuneration. While pay is likely to be an important part of the contract of employment, there are forms of remuneration that may be non-contractual (as section 27 **ERA** expressly acknowledges) and I am not persuaded that it is intended that these are to be left out of a section 1 statement.

33. By defining the employee liability information by reference to section 1 **ERA**, I therefore consider that the notification required by regulation 11 is not limited to contractual terms; it means what it says: the transferor is to notify the transferee of those matters required to be included in a section 1 statement, regardless of their contractual effect.

34. That, it seems to me is consistent with the **1991 Directive**. Sometimes misnamed "*the Contracts of Employment Directive*", this in fact describes "*an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship*" and provides that employers are to notify employees "of the essential aspects of the contract or employment relationship". "Employment relationship" obviously means something more than what is specifically governed by the employment contract and the particulars that then follow (see article 2(2)) are similar to those required by section 1 **ERA**, allowing that both contractual and non-contractual matters are to be included. And, for completeness, I do not see that the use of the phrase "essential aspects" modifies the breadth of article 2 in this regard: that simply differentiates between that which is significant to the relationship and that which is less so; it does not limit the requirement to provide information of purely contractual terms.

35. I am also satisfied that this way of approaching the obligation upon a transferor is consistent with the **ARD**. The **ARD** safeguards employees' rights arising from a contract of employment or from an employment relationship (article 3(1)) and I do not read the requirement imposed upon a transferor - to notify the transferee of "*all the rights and obligations that will be transferred*" - to be limited to simply the contractual rights.

36. I am unable to see that Born's argument is thus assisted by any appeal to EU law and I have not been persuaded that any reference to the Court of Justice would be required. I therefore return to the secondary argument pursued in relation to section 1 **ERA** (albeit this does not appear to have been an argument run below) and the question whether the requirement to provide particulars of "the method of calculating remuneration" gives rise to a duty to state whether or not the remuneration is contractual.

37. Whilst I can see that particularising the method of calculating the remuneration in question may provide a strong indicator as to whether it is contractual or non-contractual, I am unable to read section 1(4)(a) as requiring an employer to specify the nature of the payment in this way. I take that view primarily because I consider that it is possible to state a method of payment without actually defining whether the payment has contractual effect (albeit that it may be good evidence one way or another). Had it been intended that an employer should particularise whether the payment was contractual (or not), I cannot see why this would not have been clearly stated, rather than providing for the more general requirement that particulars be given of the method of calculation. Moreover, requiring an employer to give particulars of the method of calculation, rather than specifying whether the payment is contractual in nature, enables an employee to understand how their pay is determined while avoiding the problems of legal definition that can arise when dealing with certain forms of remuneration. In this regard, I consider Mr Lewis makes a fair point for Spire: it is not always readily apparent whether a bonus is contractual and, if it is, as to the extent that it is. The difficulty is likely to be all the greater in circumstances in which a bonus has become contractual due to custom and practice (which might also give rise to a consequential obligation to give the employee a statement of changes, pursuant to section 4 **ERA**).

38. For these reasons, I consider the ET was correct in its conclusion that Spire did not breach its regulation 11 duty. Even on the assumption that it had wrongly volunteered that the Christmas bonus payment was "non-contractual", that was information supplied in addition to the particulars it was required to provide for regulation 11 purposes; it was not part of the employee liability information for those purposes. This reading of section 1 **ERA** allows for a broad approach to the information that is to be supplied to employees; it is not simply confined to that which is contractual. Whilst this would not provide a putative transferee with a clear

contractual categorisation of the employment particulars, it will provide a comprehensive list of the rights and obligations listed under section 1 and thus enable a commercial assessment to be made as to the potential liabilities arising from a relevant transfer. It may be the transferee would wish to have greater clarity as to the precise nature (contractual or otherwise) of some of the matters listed, but that must be for it to pursue as part of its due diligence; it is not a requirement laid down by regulation 11, which limits the transferor's obligations for these purposes to the information listed under section 1 **ERA**.

39. For all those reasons, the appeal is dismissed.