EMPLOYMENT TRIBUNALS

Claimant: Miss O Sohail

Potential Respondents:
1. WFS Ground Handling Services Limited ("WFS")
2. ASIG Manchester Limited ("ASIG")
3. Swissport Limited ("Swissport")

HELD AT: Manchester **ON:** 15 September 2017

BEFORE: Employment Judge Franey

REPRESENTATION:

Claimant: Neither present nor represented.
WFS: Mr S Brittenden, counsel
ASIG: Mr S Brochwitz-Lewinski, counsel
Swissport: Did not attend.

JUDGMENT:

Liability for any unlawful conduct on the part of former employees of WFS cannot have transferred to ASIG and Swissport respectively under the Transfer of Undertakings (Protection of Employment) Regulations 2006 and therefore the applications to join those companies as respondents are dismissed.

REASONS

Introduction

1. This was a Preliminary Hearing convened to determine applications made to join WFS, ASIG and Swissport as respondents.

2. The applications involved consideration of an issue of law about the proper interpretation of the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE"): could vicarious liability for conduct contravening the Equality Act 2010 transfer under regulation 4 of TUPE when it was not the victim but the alleged perpetrator whose contract was transferred? That issue was potentially determinative of some of the applications.

3. The claimant was unable to attend this Hearing, but I considered it appropriate to determine this preliminary issue in her absence. It was to be determined on agreed facts. Both sides of the argument were to be presented by experienced counsel. My reasons for proceeding are set out in more detail in the Case Management Order which is being issued at the same time as this judgment.

Procedural background

4. It is appropriate to summarise briefly the procedural background to put this decision into context.

5. The claimant was employed as a passenger service agent by Premier Work Support Limited ("Premier") between 18 July and 14 October 2016. In that period she was assigned to work for WFS, and worked with four members of staff who were employees of WFS: Ms Bailey, Ms Chaudhry, Mr Clarke and Ms Carr. The claimant alleged in her claim form presented on 15 December 2016 that those four employees subjected her to treatment which amounted to direct discrimination because of race or religion, or harassment related to race or religion. The allegations are denied and have yet to be determined on their merits.

6. The claimant also made allegations against an employee of Premier, "Justyna". At a Preliminary Hearing on 12 July 2017 those allegations were dismissed because they had no reasonable prospect of success.

7. In relation to the allegations arising out the conduct of the four individuals named above, Premier suggested that WFS should be added as a respondent because it was liable in principal for any discriminatory conduct by its employees pursuant to the contract worker provision in section 41 of the Equality Act 2010. WFS suggested, however, that any such liability now rested with employers to whom any of the four alleged perpetrators had subsequently transferred under TUPE.

8. It was later established that with effect from 1 November 2016 Ms Bailey and Ms Chaudhry transferred to ASIG, and Mr Clarke transferred to Swissport. Ms Carr resigned from her employment with WFS before the transfer. The position of WFS, therefore, was that it remained liable for any discriminatory conduct by Ms Carr, but it was no longer liable for any discriminatory conduct by the three other alleged perpetrators. It said that their new employers should be added as respondents.

9. Swissport did not attend this hearing (despite having been notified of it) but ASIG argued that no liability could have passed to ASIG arising out of the transfer of Ms Bailey and Ms Chaudhry. I took it that Swissport would rely on the arguments raised on behalf of ASIG.

Undisputed Facts

10. I made my decision on the basis of the following undisputed facts.

11. The claimant was a contract worker supplied by Premier to work for WFS between 18 July and 14 October 2016. She alleges that during that period she was

subjected to treatment by WFS employees Ms Bailey, Ms Chaudhry and Mr Clarke which contravened the Equality Act 2010. Two weeks after the clamant ceased to work at WFS those three individuals also ceased to be employed by WFS. For reasons unrelated to the claimant and her allegations Ms Bailey and Ms Chaudhry were transferred under TUPE to the employment of ASIG, and Mr Clarke was transferred under TUPE to the employment of Swissport.

The Issue

12. Section 109 of the Equality Act 2010 makes an employer liable for any discriminatory acts done by its employees in the course of their employment. Assuming for these purposes that claimant's allegations are well-founded, WFS was liable at the moment any such acts were done by the alleged perpetrators. Did that liability subsequently pass to ASIG/Swissport under regulation 4 of TUPE or did it remain with WFS?

Relevant legal framework

13. I will set out the provisions of the Equality Act 2010 before considering EU law and TUPE.

Equality Act 2010

14. The claim in these proceedings was brought under Part 5 of the Equality Act 2010 which deals with unlawful discrimination at work. Section 41 prohibits discrimination or harassment by a "principal" of a "contract worker".

15. Part 8 of the Act is headed "Prohibited Conduct: Ancillary". Section 109 is headed "Liability of Employers and Principals". Section 109(1) reads as follows:-

> **"Anything done by a person (A) in the course of A's employment must be treated as also done by the employer".**

16. Section 109 goes on to make clear that it does not matter whether that thing is done with the employer's knowledge or approval, but that there is a defence if the employer has taken all reasonable steps to prevent its employee from acting in that way.

17. The Equality Act makes no provision for a situation in which the employment of the individuals involved is subsequently transferred to another employer.

Council Directive 2001/23/EC

18. The TUPE regulations seek to implement EU Council Directive 2001/23/EC of 12 March 2001, commonly known as the Acquired Rights Directive ("the Directive").

19. There is an abundance of indications as to the purpose of the Directive. The title makes clear that it is concerned with the approximation of the laws of member states:-

> **"relating to the safeguarding of employee's rights in the event of transfers of undertakings…"**

20. Amongst the recitals is found the following:-

> **"(3) It is necessary to provide for the protection of employees in the event of the change of employer, in particular, to ensure that their rights are safeguarded."**

21. The operative provision is Article 3. It appears in Chapter II of the Directive, which is headed "Safeguarding of Employee's Rights". Article 3(1) reads as follows:-

> **"The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on a date of a transfer shall, by reason of such transfer, be transferred to the transferee.**
>
> **Member states may provide that, after the date of transfer, the transferor and transferee shall be jointly and severally liable in respect of obligations which arose before the date of transfer from a contract of employment or an employment relationship existing on the date of the transfer."**

Transfer of Undertakings (Protection of Employment) Regulations 2006

22. Article 3(1) is implemented in UK law by Regulation 4 of TUPE of which the material parts are as follows:-

> **"(1) Except where objections are made under paragraph (7), a relevant transfer shall not operate so as to terminate the contact 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.**
>
> **(2) Without prejudice to paragraph (1), but subject to paragraph (6) and Regulations 8 and 15(9), on the completion of a relevant transfer –**
>
> > **(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and**
> >
> > **(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee."**

23. Regulation 4(6) excludes from the effect of Regulation 4(2) the liability of any person to be prosecuted for, convicted of and sentenced for any offence. Regulation 8 makes special provisions in the event of insolvency. There are no other express exclusions from the scope of Regulation 4(2).

24. Nor has the UK chosen to make provision for joint and several liability as Article 3(1) the Directive allows. The only provision to that effect appears in Regulation 15(9) and is concerned with a failure to inform and consult employees about a relevant transfer. Otherwise, if Regulation 4(2) applies, the transferor is relieved of the liability when it passes to the transferee.

Case Law

25. It was common ground between the advocates that none of the reported authorities directly addressed the point of issue in this Hearing. I was, however, taken to the following cases.

26. **DJM International Ltd v Nicholas [1996] IRLR 76** was a decision of the Employment Appeal Tribunal ("EAT") chaired by Mummery P (as he then was) which concerned an employee forced to retire at the age of 60 but then re-employed on a part-time basis ten days later. Her employment was subsequently transferred to the respondent and she was then made redundant. Her complaint included a complaint of sex discrimination in relation to her retirement at age 60 before the transfer, and the point at issue was whether the liability for any unlawful discrimination transferred under TUPE (the 1981 Regulations) even though she was employed on a different contract by the time of the transfer. The EAT held that liability did transfer because what mattered was the employment relationship, not the particular contract (see Article 3 of the Directive). The EAT made reference in paragraph 16 of the Judgment to the fact that:

> **"The broad aim of the Regulations and the Directive is to ensure, as far as possible, that** [the employment] **relationship continues unchanged with the transferee".**

27. The Court of Appeal had cause to consider the position where an employee seeks to bring a tort claim for compensation for personal injury against his or her employer in two combined cases of which the first was **Bernadone v Pall Mall Services Group [2000] IRLR 487**. The claimant in that case had sustained personal injury in the course of employment before being transferred to a new employer under TUPE. The question was whether the effect of TUPE[1] was to transfer liability for negligence or breach of statutory duty to the transferee.

28. The Court of Appeal held that liability in tort transfers in the same way as liability for matters within the jurisdiction of an Employment Tribunal. The lead Judgment came from Peter Gibson LJ. He said at paragraph 16 that:

> **"It is not in dispute that TUPE must be given a purposive construction having regard to, and, so far as possible, consistently with, the Directive."**

29. He went on to say at paragraph 34:

> **"It is clear that [**the Directive's**] purpose is to safeguard the rights of employees on a change of employer by a transfer of an undertaking. The economic entity carrying on the undertaking after the transfer will be the transferee, and in general the employees are more likely to be protected if the rights and obligations to be transferred are more rather than less comprehensive. But such rights and obligations must of course fall within the limiting words "arising from a contract of employment or from an employment relationship". It would seem to me to be surprising if the rights and obligations were to be limited to contractual claims and to exclude claims in tort."**

30. So too did the rights of the transferor under any employer's insurance policy (paragraph 48). The right to claim indemnity from the insurers was a right which arose from and was in connection with the contract of employment of the transferred

[1] Regulation 5 of the 1981 Regulations which did not materially differ from the present provision.

employee, and was a matter in respect of which the insurer would have already received a premium (see Clarke LJ at paragraph 64).

31. Both of these authorities were concerned with situations where the contract of the injured party transferred. No reported authority appears to address the position when it is the contract of the alleged tortfeasor which transferred. However, Mr Brittenden was aware of a decision of Sheffield County Court of 2 December 2007 in **Doane v Wimbledon Football Club**. A transcript of the Judgment was not available. The summary of the case (reproduced in Mr Brittenden's skeleton argument) was that the claimant was a professional footballer playing for Sheffield United who was injured in an allegedly negligent tackle by a Wimbledon player. After the incident there was a TUPE transfer of the employment of the Wimbledon player to MK Dons. The County Court concluded that any liability to compensate the claimant for his actions also transferred to MK Dons. However, I declined to attach any weight to that decision in the absence of a transcript of the Judgment. As Mr Brochwitz-Lewinski pointed out, it was not clear whether the transfer of liability rested on TUPE alone or on a contractual assignment of liabilities between Wimbledon Football Club and MK Dons. I did not consider it binding upon this Tribunal.

Submissions

WFS Submission

32. For WFS Mr Brittenden had helpfully reduced his submissions to writing. Reference should be made to his written submissions as appropriate.

33. In broad terms, he contended that the plain and natural meaning of Regulation 4(2) was to transfer all liabilities in connection with any contract of employment transferred under TUPE, and that this extended to the contract of the alleged perpetrators not simply the contract of the claimant. There was no doubt that discrimination liabilities under what is now the Equality Act 2010 were covered in principle by Regulation 4(2), and he drew attention to a number of comments made in **Bernadone** about the breadth of the provision. However, the protection of employee's rights was not the only purpose behind the Directive and the Regulations.

34. He argued that by section 109 the actions of the alleged perpetrators were treated as actions of WFS, and upon the subsequent transfer of those employees those deemed actions of WFS were to be treated as done by the transferees. Accordingly, any liabilities on the part of WFS arising out of such actions were liabilities in connection with the contracts of employment of those employees which transferred under Regulation 4(2)(a).

35. In support of that Mr Brittenden pointed out that absent insolvency the UK Government had not chosen to exempt anything from the transfer of liabilities save for criminal matters, and further that there was no indication in the language of the Directive that any such limitation might be contemplated. The argument pursued by ASIG would require the insertion of a number of words into Regulation 4(2) to make its meaning plain, and there was no need to imply such words for the sake of protecting the rights of employees. Further, the decision in **Bernadone** that the right

to claim indemnity from the transferor's insurer transferred illustrated that regulation 4 could affect the position of third parties, not simply the employer and the transferring employee.

ASIG Submission

36. For ASIG Mr Brochwitz-Lewinski submitted that the interpretation for which WFS contended was entirely misconceived. The only purpose of the Directive was to protect the rights of employees. That was the purpose of TUPE too. Protection of the claimant's rights in this situation did not require so broad a reading of Regulation 4. It was never envisaged in the Directive or in TUPE that if a claimant did not herself transfer to a new employer any of her rights would nevertheless be transferred. That explained why in none of the reported cases was any discussion of this point to be found.

37. Mr Brochwitz-Lewinski supported his submission by reference to two examples. The first was where a member of the public brought a claim for compensation against an organisation for personal injury caused by negligence of one of its employees. If that employee subsequently was transferred under TUPE to a new employer, it would be nonsense to suggest that the claimant should pursue his claim against that new employer. The employing organisation at the time of the negligent act remained liable.

38. The second example was where a claimant brought a complaint of harassment against her manager, but subsequently the claimant and her manager both transferred under TUPE to different employers. Mr Brochwitz-Lewinski submitted that TUPE meant that the claimant's cause of action would lie against her new employer, not against the new employer of the alleged perpetrator.

39. He also drew my attention to the 21st Edition of Clerk & Lindsell on Tort which deals with the question of assignment in paragraph 5.65 – 5.70. The last of those paragraphs deals with the question of transfers of undertaking pursuant to the Directive and TUPE, and refers only to liabilities owed to the employee transferred. It makes no mention at all of liabilities owed to external third parties arising out of the actions of the transferred employee. He submitted that if Mr Brittenden were correct, that would be an astonishing omission from the leading textbook.

40. Finally, Mr Brochwitz-Lewinski submitted that not only was the construction for which Mr Brittenden argued unnecessary to give effect to the purpose of the Directive, it would actively frustrate it in some cases. A claimant might find herself having to pursue complaints against new employers of different perpetrators without having any information as to who those companies were because she had no connection with them.

Discussion and Conclusions

41. I considered the competing arguments in the absence of any authority on the point.

42. Mr Brittenden's argument had the advantage of matching the words found in Regulation 4(2). It did not require any qualification to the plain language of the Regulation. On his analysis, when Ms Bailey (for example) transferred to ASIG her contract of employment had effect as if originally made between her and ASIG. As a consequence by Regulation 4(2)(a) any liability to pay compensation to the claimant for unlawful actions by Ms Bailey in the course of her employment with WFS (if any are proven) would be a liability in connection with Ms Bailey's contract of employment, and therefore a liability which transferred to ASIG under Regulation 4(2)(a). Her actions were deemed to have been actions of WFS by 109(1) Equality Act 2010, and after the transfer would therefore be treated as acts of by virtue of Regulation 4(2)(b).

43. In the course of argument I asked Mr Brittenden to respond to the example given by Mr Brochwitz-Lewinski about a situation where the claimant and alleged perpetrator are both transferred under TUPE to different employers after the alleged unlawful conduct. He replied to the effect that both transferees would be liable jointly and severally and suggested that was a familiar situation under the Equality Act 2010. As for the personal injury example, he suggested the outcome would be as it appeared to have been in **Doane**.

44. Despite the compelling way in which Mr Brittenden presented these submissions, however, I preferred the argument of Mr Brochwitz-Lewinski.

45. TUPE cannot be read without consideration of the Directive which provides the purpose and context of TUPE. The Directive is plainly concerned with the protection of the rights of employees. Article 3 is found in a chapter devoted to the safeguarding of employee's rights. Nowhere is there any clue that it was intended to operate in respect of the rights of individuals other than employees affected by the relevant transfer. Mr Brochwitz-Lewinski's interpretation fully meets the purpose of the Directive.

46. In contrast, the interpretation for which Mr Brittenden contends would potentially operate contrary to that purpose. Under both EU law (the Contract of Employment Directive 91/533/EEC) and domestic law (section 1 Employment Rights Act 1996*)* an employee should be informed in writing of the identity of the body which employs her. If her employment is to be transferred under TUPE she has a right to be informed and consulted and told which company will employ her following the transfer if she does not object (TUPE Regulation 13). In principle, therefore, the transfer should have no effect on her ability to enforce her rights. If Mr Brittenden's interpretation were correct, however, those safeguards would be jeopardised. The claimant might have no information at all about the identity of the employer to which an alleged perpetrator has been transferred. That would in practice make enforcement of her rights more difficult if such a transfer has the effect of relieving her own employer of liability and transferring it to an organisation of which she knows nothing.

47. I do not accept that significant rewriting of regulation 4 would be necessary to make this clear. In my judgment the liabilities to which TUPE refers in Regulation 4(2)(a) are liabilities owed to the person transferred, not liabilities owed to third parties otherwise unaffected by the relevant transfer. The purpose of the Directive

requires that but nothing more. The right to claim indemnity from the transferor's insurer in **Bernadone** was a right to claim an indemnity in respect of such a liability**.** It was not inconsistent with Mr Brochwitz-Lewinski's argument. To add the words "owed to the person transferred" to Regulation 4(2)(a) would be to make express what is already necessarily implied.

48. Similarly, in Regulation 4(2)((b) the alleged actions of Ms Bailey (for example) towards the claimant were deemed by section 104 Equality Act 2010 to have been actions which WFS was deemed to have done in respect of the claimant and her contract. WFS was not deemed to have done them in respect of Ms Bailey's contract. When Ms Bailey's contract transferred to ASIG they did not become deemed actions of ASIG.

49. Accordingly whilst a literal and mechanical reading of Regulation 4 appears to support the argument pursued by WFS, a purposive reading in my judgment leads to the contrary conclusion.

50. The applications to join ASIG and Swissport to the proceedings must be dismissed because they are unsustainable as a matter of law.

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Employment Judge Franey

28 September 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

5 October 2017

FOR THE TRIBUNAL OFFICE