Appeal No. UKEAT/0121/16/DM

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 24 July 2017

Before

HIS HONOUR JUDGE DAVID RICHARDSON

(SITTING ALONE)

XEROX BUSINESS SERVICES PHILIPPINES INC LTD — APPELLANT

MR J ZEB — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR THOMAS CORDREY (of Counsel) Instructed by: Xerox Europe Legal Department Riverview Oxford Road Uxbridge Middlesex UB8 1HS
For the Respondent	MR NESAR RAFIQ (Advocate)

SUMMARY

TRANSFER OF UNDERTAKINGS - Varying terms of employment

TRANSFER OF UNDERTAKINGS - Dismissal/automatically unfair dismissal

REDUNDANCY - Definition

Within the Xerox group of companies the work of a Finance Accounting Team was transferred from a UK company in Wakefield to a Philippines company and then taken offshore to Manila. It was agreed that there was a **TUPE** transfer. The Claimant stated that he wished to relocate to the Philippines on UK terms and conditions. The Respondent dismissed him for redundancy, stating that he was employed to work in Wakefield and that it was prepared to transfer him only on local terms and conditions. The Employment Judge found that there was a variation of his contract of employment by which he was entitled to work in the Philippines on UK terms and conditions; and that he was not redundant.

Appeal allowed. On the Employment Judge's own findings there had been no variation of the contract; and her reasons for finding that the Claimant was not redundant had failed to apply the statutory wording in section 139(1)(b)(ii) of the **Employment Rights Act 1996**. Comments also on the importance of addressing regulation 7 of **TUPE 2006** in a case of this kind.

HIS HONOUR JUDGE DAVID RICHARDSON

1. By a Judgment dated 8 January 2016, Employment Judge Rogerson, sitting alone in the Leeds Employment Tribunal ("the ET"), upheld a complaint of unfair dismissal brought by Mr Jahan Zeb ("the Claimant") against Xerox Business Services Philippines Incorporated ("the Respondent"). The Respondent appeals against that Judgment.

The Background Facts

2. The Claimant was employed as a Commercial Executive in a Finance Accounting Team in Wakefield with effect from 20 October 2009. The company for which he originally worked transferred its undertaking to Xerox UK Limited (hereafter "X UK") on 8 October 2011. His contract provided for his work location to be "Leeds or Wakefield" with the proviso that the employer could require him to work at any other location within a reasonable commuting distance from his home. He tells me he was once employed at Leeds but at the time relevant to this case, he was employed at Wakefield at a business park near junction 41 of the M1.

3. X UK and the Respondent are both companies under the ultimate control of the Xerox Corporation. In 2014, it took a decision to move some work to offshore locations. In particular, it chose to move the Finance Accounting Team function from X UK in Wakefield to the Respondent at Manila in the Philippines. The stance which X UK and the Respondent took may be summarised as follows:

a. They arranged for the transfer of the business to take place on 1 October 2014.

b. They accepted that it was a transfer of an undertaking within the meaning of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** (hereafter "TUPE").

c. They did not suggest that the requirements overall for work to be done by the Finance Accounting Team had diminished. The number of roles was not being reduced and the work had to be done to the same standard in the new location, but they did say that the requirements for employees to do that work in Wakefield had ceased or diminished or were expected to do so.

d. They told the employees that they each had a choice. They could object to the transfer. If they did, their employment would not transfer to the Respondent; X UK would make them redundant on more generous terms than the law required. Alternatively, if they did not object, they could and would transfer to the Respondent but if they did so, they would still be made redundant and only with the statutory minimum redundancy pay because the Respondent would have no requirement to carry out the transferring work in the UK after the transfer.

4. A series of questions and answers issued to the relevant employees contained the following question and answer:

> **"Q. Is there any scope for the company to relocate staff to Manila who are willing to go? If so, what terms and conditions would this be on?**
>
> **A. If individuals are interested in potentially relocating to Manila employment would be offered on the local terms and conditions of ACS Philippines. (Details of a contact person in Manila were provided)."**

5. The Claimant was off work ill with depression during the period from April onwards when X UK presented the position to the affected employees. As part of the process, employees were given vacancy lists for other jobs in the Xerox Group in this country but no

special preference was given to them if they applied. The Employment Judge noted that this did not accord with X UK's stated redundancy policy.

6. The Claimant applied, unsuccessfully, for other jobs in this country but he did not object to the transfer and so his employment was set to transfer to the Respondent at the expected date of transfer, 1 October 2014. On 29 September, letters were written to him by both companies confirming the position which had already been stated. If he transferred to the Respondent, his role in the United Kingdom would cease and he would be redundant. He was invited to a meeting with a representative of the Respondent on 2 October 2014. On 1 October, the Claimant wrote to the Respondent:

> **"I do not accept that my position has been made redundant as the parent company still has a presence in the UK. I am prepared to relocate to the Philippines to do the job and I am entitled to be taken on with the same terms and conditions. Why am I not able to work in the Philippines?"**

7. The Respondent rejected this suggestion. In reply, it said that the effect of **TUPE** was that he would transfer on his existing terms and conditions, including his work location and that he was not employed to work in the Philippines, so his role was redundant, as the Respondent "has no requirement for the work you are employed to be carried [out] at Junction 41".

8. A consultation meeting took place on 8 October between the Claimant and the Respondent's Mrs Bone. At this meeting, the Employment Judge found, Mrs Bone rejected the Claimant's offer to move to Manila on his existing terms and conditions. The Employment Judge put it as follows:

> **"47. … Mrs Bone did reject his request because if he was permitted to go with the work on his terms and conditions it would defeat the purpose of the transfer which was to make cost savings. It was within her authority to offer employment to the Claimant on his transferred terms and conditions but she absolutely did not want him to relocate on those terms, which is why she rejected his offer and dismissed him. It was not a redundancy reason in relation to the Claimant because he was prepared to relocate, and wanted to relocate with the work knowing and accepting there was no requirement for the work to be performed in the UK post transfer."**

9. The Employment Judge found that there was a definite vacancy in the Philippines. The only issue was the terms and conditions. If he had accepted local terms and conditions, Mrs Bone would have facilitated a move to the Philippines. In the result, the Respondent dismissed the Claimant by letter dated 9 October 2014, paying him his statutory redundancy payment, a payment in lieu of notice and accrued holiday.

The ET Proceedings and Reasons

10. At the hearing, the parties were represented as they are today: the Claimant by a consultant, Mr Rafiq; the Respondent by Mr Thomas Cordrey.

11. The Claimant complained of unfair dismissal. His case was that he was offered and requested relocation with the work when it transferred to Manila on the same conditions as he had enjoyed in the UK. He believed he was entitled to those terms because of **TUPE** protection. The ET commented that this would mean, in real terms, that he would have nearly 10 times the salary of his colleagues in Manila recruited locally. He contended that the dismissal was not really for redundancy and if it was, there was no proper consultation, no appeal process and no offer of suitable alternative employment.

12. The Respondent, consistently with the stance which I have described, said that the dismissal was by reason of redundancy and argued that it was fair, having regard to the process followed by X UK prior to the transfer and the single post-termination meeting. It accepted that the Respondent had not offered the Claimant an appeal. It said that an appeal would have been futile. It put forward "some other substantial reason" as an alternative to redundancy, stating it was "business reorganisation carried out in the interests of economy and efficiency".

13. I shall have to come later in this Judgment to regulation 7 of **TUPE**, a provision which interacts with the general law of unfair dismissal. The Respondent took the point that the Claimant did not rely on this provision. It argued, alternatively, that if the regulation applied, the reason for dismissal was an "economic, technical or organisational reason entailing changes in the workforce" and therefore deemed to be for redundancy.

14. In her Reasons the Employment Judge set out findings of fact on which I have already drawn. She turned to address the applicable law and the submissions of the parties and her own conclusions in a section running from paragraphs 50 to 69. There are, I think, two key conclusions.

15. The first key conclusion was that the Respondent had not established that redundancy was the true reason for dismissal. The reasoning for this is within paragraphs 53 to 56. She addressed section 98 without any specific reference to regulation 7. She said:

> **"53. In a TUPE context, on a relevant transfer, employment contracts do not terminate. Instead they automatically continue with the substitution of the Respondent as the employer and there is no dismissal unless the employee objects or is dismissed before the transfer, which did not apply here. The Claimant's employment transferred on 1 October 2014, without objection to the identity of the Respondent or to the new location in the Philippines. The Claimant was the only employee out of 10 who had not objected or left voluntarily. He had refused the ex-gratia payment and transferred knowing that the work (and place of work) was transferring to Manila and agreeing to that change in workplace prior to and after the transfer.**
>
> **54. Mrs Bone did not want him to work in Manila on his UK salary because he was too expensive: it would defeat the costs savings purpose of the transfer and she did not believe he was entitled to so she rejected that offer and dismissed him for that reason on the 9th October 2014.**
>
> **55. Any anticipated need for redundancies before this request was made and rejected was not the reason for the Claimant's dismissal. It would have been a different case if the Claimant had transferred knowing the work was relocating to Manila and was not prepared to go with the work. However the Claimant transferred to the Respondent knowing that the only way of continuing his employment was to relocate to Manila, which he agreed to do.**
>
> **56. In the circumstances the Respondent has not shown the reason for the Claimant's dismissal was redundancy and the dismissal was therefore not for a potentially fair reason and is automatically unfair."**

16. Part of the background to this finding may lie in a comment which the Employment Judge made at the end of her findings of fact:

> **"49. There was an inextricable link between the Claimant's dismissal and his request to relocate on his UK pay (terms and conditions) and Mrs Bone's rejection of that request. Those were the particular facts applicable to him which were in Mrs Bone's mind when she dismissed him."**

17. The second key conclusion was that there had been a variation of the contract within regulation 4(5) of **TUPE**. The reasoning here begins at paragraphs 63 to 64:

> **"63. Applying those regulations to these facts there was no dispute that the Claimant had agreed the relocation entailing a change of workplace from Wakefield to Manila a variation of contract permitted by TUPE.**
>
> **64. What was in dispute was whether the relocation to Manila was on the local terms and conditions (£3,000 to £6,000) which Mrs Bone believed he was entitled to or his UK terms and conditions (£26,000) which the Claimant believed he was entitled to because they were TUPE protected (Regulation 4). Was variation permitted by TUPE?"**

18. Dealing with arguments of Mr Cordrey, she said:

> **"66. Firstly, relocation was not 'demanded' by the Claimant, it was offered and he wanted to relocate. Secondly the Claimant had not 'demanded' a salary increase. His salary was £26,000. He was requesting the same salary not a lower salary or higher salary than the one he was contractually entitled to.**
>
> **…**
>
> **68. In my view all those points completely ignore the rights of the transferred employee in this off-shoring exercise who is prepared to relocate with the work and is entitled to TUPE protection because of the TUPE transfer. The Respondent cannot decrease the Claimant's salary and deny him the protection of TUPE even if that is fraught with the problems identified. Those problems do not trump the Claimant's TUPE right to his protected salary."**

The Legal Background

19. There has not been a great deal of litigation on the question whether and how **TUPE** applies where a business or part of a business is moved offshore. In **Holis Metal Industries Ltd v GMB** [2008] IRLR 187, the Employment Appeal Tribunal held that in principal **TUPE** might apply to a transfer from the UK to a non-EU entity; see paragraphs 40 to 44 and also at paragraph 8 where HHJ Ansell pointed out that in some cases the transfer may, on any view, take place within the UK. As HHJ Ansell also noted there may be difficult questions as to

whether that entity in question retained its identity when it moved from one country to another. He said:

> **"9. … The lack of cases in this area may suggest that companies proceed on the basis that the 2006 Regulations do not apply either because of extra-territoriality or because of the identity issue and they prefer to treat the UK-based workforce as redundant with the unions and employees preferring to concentrate efforts on securing the best financial deal for their future."**

20. The lapse of a further 10 years since **Holis** suggests that HHJ Ansell was correct in this surmise. I am, however, not concerned with the question of whether **TUPE** applies and whether there was a transfer. The parties both accept the law as set out in **Holis** and accept that there was, on the facts of this case, a transfer of an undertaking.

21. If there is a relevant transfer, regulation 4 of **TUPE** sets out the effect of the transfer on a contract of employment. As far as relevant to this appeal, it provides as follows:

> **"(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.**
>
> **(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.**
>
> **…**
>
> **(4) Subject to regulation 9, any purported variation of a contract of employment that is, or will be, transferred by paragraph (1), is void if the sole or principal reason for the variation is the transfer.**
>
> **(5) Paragraph (4) does not prevent a variation of the contract if -**
>
> > **(a) the sole or principal reason for the variation is an economic, technical, or organisational reason entailing changes in the workforce, provided that the employer and employee agree that variation; or**
> >
> > **(b) the terms of that contract permit the employer to make such a variation.**
>
> **(5A) In paragraph (5), the expression "changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer**

or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act).

…

(5C) Paragraphs (5) and (5B) do not affect any rule of law as to whether a contract of employment is effectively varied.

…

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee."

22. The right not to be unfairly dismissed is generally governed by Part 10 of the **Employment Rights Act 1996** ("ERA"). Section 98(1) provides that it is for the employer to establish the principal reason for dismissal and that it is of a kind specified in section 98(2) or some other substantial reason. Section 98(2) specifies redundancy as such as a reason. Section 98(4) provides that where the employer has fulfilled the requirements of section 98(1), depends on whether the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee, a matter to be determined taking into account all the circumstances, including the size and administrative resources of the employer's undertaking, equity and the substantial merits of the case.

23. The definition of redundancy is to be found in section 139. As far as material, this provides:

"(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to -

…

(b) the fact that the requirements of that business -

(i) for employees to carry out work of a particular kind, or

(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,

have ceased or diminished or are expected to cease or diminish."

24. However, there is also a provision within **TUPE** which applies to unfair dismissal. As far as is relevant, it provides as follows:

> ***"7. Dismissal of employee because of relevant transfer***
>
> **(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.**
>
> **(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.**
>
> **(3) Where paragraph (2) applies -**
>
> > **(a) paragraph (1) does not apply;**
> >
> > **(b) without prejudice to the application of section 98(4) of the 1996 Act (test of unfair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal) -**
> >
> > > **(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or**
> > >
> > > **(ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.**
>
> **(3A) In paragraph (2), the expression "changes in the workforce" includes a change to the place where employees are employed by the employer to carry on the business of the employer or to carry out work of a particular kind for the employer (and the reference to such a place has the same meaning as in section 139 of the 1996 Act)."**

Variation of the Contract

25. Mr Cordrey's first two grounds of appeal relate to the finding by the Employment Judge that there was a variation of the contract of employment. He argues that on the Employment Judge's own findings, there was no variation for the purposes of regulation 4 of **TUPE**. At all material times, the term as to location was Wakefield. The Claimant had no unilateral right to change the term as to location to Manila. The Claimant made it plain that he was seeking a change in this respect only if he retained his UK terms and conditions, including salary. The Respondent, at no time, accepted those terms.

26. Mr Rafiq submits, in answer, that this argument seeks to overturn a finding of fact made by the Employment Judge after cross-examination of the parties; that her conclusion is

consistent with the protection which **TUPE** is intended to give to employees. What, he asks, is the point of holding that **TUPE** may apply to transfers of undertakings offshore if the employee is not protected as **TUPE** envisages? He argues that given the willingness of the Claimant to transfer and the pay protection afforded by **TUPE**, the Employment Judge was entitled to find that there was a variation of the contract.

27. In my judgment, Mr Cordrey's submission is correct. On the findings of the Employment Judge, there was no variation of the contract for the purposes of regulation 4 of **TUPE**, or at all.

28. Regulation 4 of **TUPE** provides that following a transfer a contract of employment will have effect as if originally made between the person employed and the transferee (see regulation 4(1)). In this way, the rights and duties of an employee are preserved after the transfer as they were before the transfer. These rights and duties will include rights and duties about pay and about location of work. Following the transfer, the Respondent was required, as before the transfer, to employ the Claimant at Wakefield and to pay his salary. It was not required to employ him in Manila at the same salary in the absence of a variation of the contract.

29. As Mummery LJ said, in **Jackson v Computershare Investor Services plc** [2008] IRLR 70, at paragraph 30:

> **"30. The TUPE and Acquired Rights provisions aim at preventing the employee in an undertaking from being prejudiced as a result of the transfer of the undertaking … It is not, however, their objective to confer additional rights on the employee or to improve the situation of the employee …"**

30. In this case, on the Employment Judge's own findings, the Claimant proposed a change to the location where he was required to work but only on terms that he was entitled to the salary he would be entitled to earn in the UK. The Respondent did not accept that proposal. It was prepared to agree a change to the place where he worked only if he agreed to accept local terms and conditions. There was never any meeting of minds about the proposal. On ordinary contractual principles, such a meeting of minds is essential. There can be no variation of the contract without it.

31. These ordinary contractual principles relating to variation apply in the context of **TUPE**. Variation of the contract is permitted by **TUPE** only to the extent that it is advantageous to the employee or complies with regulation 4. Regulation 4 permits variation in certain circumstances but such variations must be, as they would be under the common law, agreed by both employer and employee. Ordinary contractual rules apply (see regulation 4(5C)).

32. If I read her Reasons correctly, the Employment Judge appears to have thought that the Claimant could achieve a variation of the contract as regards location while retaining his original salary because **TUPE** protected that salary; but the Claimant had no unilateral contractual rights to change his place of work and the Respondent never offered to change the location of his work while paying him his old salary. We have seen, when it addressed this matter in a question and answer document, it specifically stated that if individuals were interested in relocating to Manila, employment would be offered on the local terms and conditions applicable. It is plain from the Employment Judge's Reasons that the Respondent did not deviate from this stance at any point. In my judgment, the provisions of **TUPE** did not entitle the Claimant to vary his contract unilaterally so as to change his location of work.

Reason for Dismissal

33. Mr Cordrey's third ground of appeal relates to the reason for dismissal. He argues that the Employment Judge applied the wrong test. She concentrated on the reason why the Respondent refused to employee the Claimant in Manila. She should have applied the statutory test in section 139(1)(b). If she had done so, she would have been bound to conclude that the reason for dismissal was that the requirements of the business for employees to carry out work of a particular kind in the place where the Claimant was employed had ceased. Mr Rafiq submits, in answer, that the Employment Judge specifically applied her mind to the test in section 139(1)(b) and did not err in law in any way. She was entitled to place weight on the fact that the Financial Accounting Team function continued to exist and there was a job available for the Claimant in Manila. Given that the Claimant was prepared to transfer to Manila, any redundancy situation, he submitted, ceased to exist.

34. Once again, in my judgment, the submission of Mr Cordrey is correct subject to a point which I will make about regulation 7 of **TUPE**. Section 139(1)(b) required two questions to be asked and answered in order to determine whether the reason for dismissal was redundancy. The first question was whether, as a matter of fact, the requirements of the Respondent's business for employees to carry out work of a particular kind in the place where the employee was employed by the employer, had ceased. The Employment Judge did not specifically address this question in her conclusions, but her findings of fact are only consistent with an answer that those requirements had ceased. Transfer was effected so that the Respondent would take the entire function offshore to Manila, leaving no Finance function in Wakefield and all other members of the Finance Team either left or had their employment terminated. The second question was whether this cessation of requirement was the principal reason for dismissal. The Employment Judge said that the reason for dismissal was that Mrs Bone did not

believe the Claimant was entitled to transfer to Manila on his UK salary, but this was an issue at all only because the Respondent's requirements for his services in the place where he had been employed had ceased.

35. The Employment Judge was required by section 98 and section 139 to focus on the reason for the termination of the employment, not the reason why the Respondent did not agree to employee the Claimant elsewhere. Whether the Respondent ought to have found alternative employment for a person who has been made redundant is an important issue for the purpose of section 98(4), but it is also important not to elide it with the question whether the employee was redundant in the first place.

36. It may be implicit in the Employment Judge's reasoning at this point that the Claimant had a right to be employed at his current salary in Manila, a finding she was actually to make later in her Reasons. If so, for the reasons I have already given, she was incorrect. I am satisfied that the Employment Judge has not asked or answered the correct question for the purpose of section 139 and section 98 and that her conclusions about the reasons for dismissal cannot stand.

37. I turn to the point I wish to make about regulation 7 of **TUPE**. The Employment Judge did not address regulation 7 in her Reasons. In a sense, this is understandable for Mr Cordrey had not relied on regulation 7 directly - taking the position that the Claimant had not relied on it and Mr Rafiq himself did not address argument about regulation 7 - but I do not think regulation 7 can or should be ignored by an ET which is considering unfair dismissal in the context of **TUPE**, as in this case. It is a core part of unfair dismissal law in such a case.

38. In a case of this kind, therefore, the ET ought to consider whether the sole or principal reason for the dismissal was the transfer (regulation 7(1)). Generally, however, a genuine cessation or diminution of business or another form of genuine business reorganisation if it entails changes to the workforce before or after transfer will fall within regulation 7(2). If the sole or principal reason does fall within regulation 7(2), then the reason for dismissal will either be redundancy or some other substantial reason and the ET will go straight on to apply the section 98(4) test.

39. This leaves the question whether I should substitute a finding that the reason for dismissal for the purposes of section 98 was redundancy. The Employment Appeal Tribunal can substitute its own finding only if, once the ET's error of law is corrected, only one result was possible. See **Jafri v Lincoln College** [2014] ICR 920 at paragraph 21, which makes it clear that the Employment Appeal Tribunal must not engage in any factual assessment of its own. While I consider that the Respondent has a strong case for saying that the dismissal was for an economic or organisational reason entailing changes in the workforce and that it amounted to redundancy for the purposes of section 98, I think that conclusion does involve some degree of factual assessment on my part. The matter must, therefore, be remitted.

Willingness to Relocate to Manila

40. Mr Cordrey's next ground of appeal relates to the willingness of the Claimant to transfer to Manila. He says this was always in dispute before the ET, that he wished to cross-examine the Claimant about it, that he made this clear before the Claimant was called and that the Employment Judge impermissibly proceeded on the basis that the Claimant was willing to transfer. In answer to this submission, Mr Rafiq points out that the Employment Judge was only deciding the question whether the dismissal was fair or unfair. This depends on the

reasoning of the Respondent, particularly Mrs Bone. It was no part of the Employment Judge's task at the liability stage to decide whether the Claimant would actually have gone to Manila. Mrs Bone did not refuse his proposal to go to Manila because she disbelieved him but because she was unwilling to pay the UK salary in Manila.

41. On this part of the case, I prefer the submissions of Mr Rafiq. One question for the purposes of section 98(4) was whether the Respondent acted reasonably in dismissing the Claimant when he expressed willingness to relocate to Manila on UK terms and conditions. The Employment Judge made a finding as to Mrs Bone's attitude to this. She refused the request because she was not prepared to pay the UK salary for the job in Manila. The starting point for the Employment Judge was the reasoning of the Respondent. The Employment Judge was not, in any direct way, concerned, for the purposes of section 98(4), in making her own finding as to whether the Claimant would or would not really transfer to Manila. The Employment Judge said that any arguments about when or if the Claimant would have moved to Manila were relevant to remedy. She was evidently prepared to consider both those questions at the remedy stage. I do not think she was required to, or did, reach a finding about whether the Claimant would have relocated for the purposes of unfair dismissal liability and I see no error of law in her dealing with this matter as she did.

Territorial Jurisdiction

42. By amendment, Mr Cordrey raised an argument concerning territorial jurisdiction. He said the Respondent had submitted to territorial jurisdiction only on the basis of the Claimant's pleaded case that he had a contractual work location in Wakefield. He submitted that once the Employment Judge decided that his contractual work location was Manila then, on ordinary principles, the ET would not have jurisdiction to hear the unfair dismissal claim.

43. Since I have decided that the Employment Judge erred in law and that there was no contractual variation in the location of the Claimant's work prior to his dismissal, there was plainly territorial jurisdiction to determine this case. I decline to engage in further debate as to what the position might have been if there had been such a variation. That might raise quite difficult questions of UK or even European law.

Disposal

44. It follows, from what I have said, that the appeal must be allowed. There will have to be remitted to the ET the question as to what the reason for dismissal was and then the operation of section 98(4). The Employment Judge should decide those questions having regard to the statutory provisions which I have identified, including regulation 7.

45. The question arises whether the remission should be to the same Employment Judge or to a different Employment Judge. That is a question which the EAT decides in accordance with considerations laid down in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763. I have no hesitation in concluding that, in this case, remission should be to a different Employment Judge. This Employment Judge expressed her views strongly. It is highly desirable that they should be considered afresh by a newly constituted Tribunal.

46. Whether, when the matter is remitted, the ET should decide the issue of **Polkey** and compensation, alongside other issues, is a matter which the parties and the ET should consider before this matter is listed. As presently advised, it seems to me very sensible that any **Polkey** issue should be decided at the same time as liability issues. It may be relatively straightforward for the Claimant to provide a schedule of loss and for compensation issues to be decided at the same time, but I am less clear about that matter and I invite the parties to consider it; not here

but by means of discussion before the ET, in correspondence or, if an Employment Judge so orders, at a closed Preliminary Hearing.

The Employment Appeal Tribunal also had to decide an application made for costs of an earlier hearing on 10 July 2017. After further argument the following decision and reasons were given.

Costs

47. I have before me an application for the costs of and occasioned by an application for an extension of time for lodging an Answer, a process which led to a hearing in front of me on 10 July 2017. If anybody is ever sufficiently interested in the result of this case, to want to know what was decided at that hearing, there will have to be a transcript of it; given the time this evening, I do not propose to rehearse again the findings that I made.

48. I found that the failure to lodge an Answer, while one for which there was no good excuse, was not the worse kind of failure there could be. To some extent I found that the Claimant's failure to lodge an Answer when he should have done and to respond to correspondence was excusable, because, to some extent, I found that he had not received correspondence. There was nothing contumelious about the failure: it resulted rather from carelessness. The failure to read the Orders and accompanying correspondence which *were* received was such as to amount to carelessness and I think it was, within the terms of Rule 34A, unreasonable conduct, in the conducting of the proceedings, by the paying party. The door is open, in the sense that the threshold of Rule 34A is crossed. I must also, however, take into account the overall circumstances of the case when I exercise my discretion and I must in particular have regard to the paying party's ability to pay.

A

49. So far as the ability to pay is concerned, I have heard evidence from the Claimant. He earns approximately £290 net per week. He has monthly outgoings, which very largely equate to that amount, and only limited part-time income from his wife to assist. So his ability to pay is very limited.

B

50. Exercising an overall discretion, it seems to me right there should be some Order for costs, but that the Order for costs should only be enforced if the Claimant in due course is successful in obtaining some compensation in the Employment Tribunal, and it should then be capable of being offset against that award. I have discussed this with Mr Cordrey. I can see no reason why there should not be an Order of that kind, although it is disadvantageous to the Respondent, in the sense that it will only be enforceable if the Claimant is in due course successful.

C

D

51. I then have to consider the amount. To some extent there is overlap in the amount claimed because there would have had to be some consideration of the Claimant's Answer in any case. I bear in mind the importance that the amount that I order should be proportionate and reasonable. On the whole I think that a proportionate and reasonable amount to order is £1,250.

E

F

G

H