Appeal No. UKEAT/0347/16/DA

EMPLOYMENT APPEAL TRIBUNAL

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

At the Tribunal
On 6 November 2017

Before

HER HONOUR JUDGE EADY QC

(SITTING ALONE)

MR S EYRES — APPELLANT

AIR VANE COMPRESSORS LIMITED — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR PARAS GORASIA (of Counsel) Instructed by: AB Corporate LLP Atria Spa Road Bolton BL1 4AG
For the Respondent	MR PAUL SMITH (of Counsel) Instructed by: Chadwick Lawrence Solicitors Paragon Point Paragon Business Village Wakefield WF1 2DF

SUMMARY

TRANSFER OF UNDERTAKINGS - Continuity of employment

CONTRACT OF EMPLOYMENT - Implied term/variation/construction of term

PRACTICE AND PROCEDURE - Appellate jurisdiction/reasons/Burns-Barke

*Transfer of undertaking - **TUPE 2006** - continuity of employment / correct identity of Respondent - variation of agreement -adequacy of the Employment Tribunal's reasons*

There had been a relevant transfer for the purposes of **TUPE 2006** on 1 July 2015, by which employees of Excel transferred to the Respondent, although at the time neither party appreciated that this applied to the Claimant's employment. There were separate discussions between the Claimant and the Respondent's Managing Director as to the terms that would apply to the Claimant's employment by the Respondent but those broke down and the Respondent contended it was then agreed that the Claimant would revert to employment by Excel. After the Claimant subsequently sought to pursue claims against the Respondent, a Preliminary Hearing took place to determine the identity of his employer. The ET found that, although (contrary to the parties' understanding at the time) the Claimant's employment had transferred to the Respondent on 1 July 2015, there had subsequently been an agreement, reached between the Claimant and the Managing Director of the Respondent on 31 July 2015, by which his contract of employment with the Respondent terminated and he returned to Excel's employment. The Claimant appealed against this finding on two bases: (1) his evidence as to the meeting of 31 July 2015 had not been challenged and there was no proper evidential basis for the ET to find an agreement had been reached that day; (2) the ET had also failed to address the Claimant's argument under the non-oral variation clause of his service agreement. Although accepting that the ET had erred in both these respects, the Respondent contended this made no material difference to its conclusion.

Held: allowing the appeal.

The ET's finding as to the events of 31 July 2015 was not supported by the evidence and was apparently based on a misunderstanding of the Respondent's case below. Although that did not mean that there had not been an agreement between the parties in the terms found by the ET, the erroneous finding that it had been entered into at a specific meeting meant that the ET's finding in this regard was open to question. In addition, while the non-oral variation clause of the Claimant's service agreement did not mean that the parties could not have orally agreed to vary or terminate the contract (**Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd** [2016] EWCA Civ 396 (20 April 2016, unreported) and **MWB Business Exchange Ltd v Rock Advertising Ltd** [2016] 3 WLR 1519 CA applied), it was a relevant evidential consideration and the ET's failure to engage with this issue, taken together with its misunderstanding as to the events of 31 July 2015, rendered the conclusion reached unsafe.

HER HONOUR JUDGE EADY QC

1. The appeal in this matter arises out of a relevant transfer for the purposes of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") and what then followed. More particularly, it raises issues arising from the parties' misunderstanding of the implications of the transfer, and then from the Employment Tribunal's apparent misunderstanding of the Respondent's case.

2. In giving my Judgment, I refer to the parties as the Claimant and the Respondent, as below. This is the Full Hearing of the Claimant's appeal from a Reserved Judgment of the Manchester Employment Tribunal (Employment Judge Howard, sitting alone on 19 September 2016; "the ET"), sent out to the parties on 14 October 2016. Representation below was as it has been on this appeal. By its Judgment, the ET held that, as at 29 February 2016, the Claimant was not employed by the Respondent but had been an employee of Excel Compressor Engineering Ltd ("Excel"). It therefore dismissed the Claimant's claims against the Respondent. The Claimant appeals.

The Relevant Background and the ET's Decision and Reasoning

3. From about 1997, when he set up the company, the Claimant was the owner and Director of Excel. That position continued until 1 August 2014, when Advance Compressors Engineering Ltd ("ACE Group") acquired shares in that company. ACE Group is the parent company of the Respondent; its Managing Director is Mr Mark Peacock.

4. At around that time the Claimant's employment status was formally recorded in a written service agreement with Excel.

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5. By February 2015, ACE Group was the controlling shareholder of Excel, holding 67% of the shares, albeit the Claimant continued as Managing Director of Excel throughout.

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6. On 22 June 2015, pursuant to a proposed restructuring, Excel employees were notified of a proposed **TUPE** transfer to the Respondent. The other employees were invited to meetings on 24 June 2015, but the Claimant was not included, it being explained to him by Mr Peacock that **TUPE** did not apply to him as he was a Director with a service agreement. There is no

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suggestion that there was anything untoward in Mr Peacock's statement of that belief; it was wrong but that was what he genuinely understood to be the case. In any event, it seems that thereafter the Claimant proceeded on the assumption that his employment would not

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automatically transfer to the Respondent; whether or not he would become an employee of the Respondent would (he believed) be a matter for negotiation and agreement. Regardless of the views of Mr Peacock or the Claimant, on 1 July 2015 by operation of law under **TUPE**, the

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Claimant and all the other Excel employees transferred to the Respondent.

7. Thereafter, there were, in any event, discussions between the Claimant and Mr Peacock regarding a proposed service agreement with the Respondent, but they were unable to achieve a

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consensus. At a meeting between them on 31 July 2015, given the inability to reach mutually acceptable terms, the ET found that Mr Peacock agreed that the Claimant's employment contract with Excel would be reinstated, and his previous rate of salary would be paid, in line

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with his earlier terms of employment with Excel.

8. Going into August 2015, the Claimant received back pay from Excel to make good the previous shortfall in his salary when paid by the Respondent. Between September and

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November 2015, he received payslips from Excel.

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9. There was a further meeting on 16 September 2015, at which the ET found it was agreed that the Claimant would continue working for Excel as Managing Director; that company was to retain its own client list, carrying out work for the Respondent and invoicing it for work done.

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10. As from November 2015 the Claimant ceased to be paid. On 5 February 2016, his then solicitors sent a letter before action to the Respondent, referring to his employment with Excel, and complaining how his position in that regard was being made untenable.

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11. By letter of 29 February 2016, however, the Claimant's new solicitors wrote to the Respondent stating that they were acting on the Claimant's behalf as "*shareholder and director of Excel*" and as an employee of the Respondent, asserting that the Claimant had transferred to the Respondent's employment in July 2015 and contending that the failure to pay his salary amounted to "*an ongoing repudiatory breach*" of his service agreement with the Respondent, which the Claimant had accepted by resigning as Director of Excel.

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12. On 17 May 2016 the Claimant issued ET proceedings against the Respondent, complaining of unfair dismissal and unauthorised deduction of wages from November 2015 to February 2016. He specifically excluded any contractual notice claim, reserving his right to pursue such a claim in the civil courts.

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13. The matter was set down for Preliminary Hearing for the ET to determine the identity of the Claimant's employer. At the outset of its Judgment the ET recorded what it understood to be the area of dispute it had to resolve in this regard:

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> **"3. At the outset of the hearing the respondent conceded that the claimant's employment had transferred to the respondent on 1 July 2015, by virtue of the TUPE Regulations 2006, but asserted that, as at 31 July 2015 and by consent of both parties, the claimant's employment**

with the respondent had ceased and that he had reverted to his previous employment with the transferor, Excel Compressor Engineering Limited."

14. On the facts as found, which I have summarised above, the ET concluded that at the end of July 2015 it had been agreed that the Claimant would be employed by Excel on the terms of the service agreement he had previously had with that company. Payments of back pay were consistent with that agreement and the ET was satisfied that, from 1 August 2015 until the termination of his employment on 29 February 2016, the Claimant had been an employee of Excel and not the Respondent.

15. Specifically, the ET concluded:

> **"15. It was entirely apparent to the Employment Judge that, whilst the claimant had not appreciated his rights under the TUPE provisions, by August 2015 and thereafter the claimant's intention and understanding was to be an employee of Excel; that this had been agreed between him and Mr Peacock, acting on behalf of the respondent, on 31 July 2015; that, consequently, the claimant had been back paid so that his rate of pay reverted to the level to which he was entitled under the terms of his service agreement with Excel; and that his employment thereafter was governed by the terms and conditions of his service agreement with Excel."**

16. In those circumstances, the ET concluded the Claimant's claim had been brought against the wrong employer and it was duly dismissed.

The Appeal

17. The Claimant takes issue with the ET's finding that he was not an employee of the Respondent on two grounds: (1) that the ET erred in finding that there was an agreement between the Claimant and Mr Peacock at the meeting on 31 July 2015; (2) that the ET further erred in failing to engage with the Claimant's case on the variation clause in his 2014 service agreement - specifically, at paragraph 26, where it provides "*No variation or agreed termination of this agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives)*".

18. The Respondent accepts that the ET erred in its finding as to the events of 31 July 2015 - that was not the way the Respondent's case had been put below - but contends that made no material difference: the ET had plainly found, more broadly, that there had been an agreement between the parties that the Claimant would be re-engaged by Excel (as was evidenced by the Claimant's conduct and communications thereafter). The Respondent also accepts that the ET failed to engage with the Claimant's case on paragraph 26 of his service agreement, but again says that is immaterial to the conclusion reached.

Submissions

The Claimant's Case

19. For the Claimant, it was argued that the ET had found that the crucial agreement - that the Claimant's employment with the Respondent would be brought to an end and he would be re-engaged by Excel - had been entered into between the Claimant and Mr Peacock at the meeting on 31 July 2015. That was contrary to the Claimant's case: he had made clear in his witness statement what he contended had taken place at that meeting and he did not accept there had been such an agreement. It was, however, also contrary to any positive case put forward by the Respondent: although the Respondent had asserted that such an agreement had been reached, Mr Peacock had not referred to this as being at the meeting on 31 July, and the Claimant had never been challenged in cross-examination when he gave evidence as to what had happened on that day. The ET's finding as to the agreement reached on 31 July thus could not stand. Moreover, that was not just an issue that went to the date of any agreement. The Respondent bore the burden of showing that an agreement had been reached; it was necessarily part of its positive case, and it had failed to discharge that burden given that the ET had found the agreement was reached at a meeting, in respect of which the Respondent had not challenged the Claimant's case.

20. On the second issue, it was part of the Claimant's case that his 2014 service agreement provided, at paragraph 26, that it could only be varied, or the subject of mutual termination, if agreed in writing, signed by both parties and there was nothing to suggest that had occurred. While the authorities demonstrated there could still be oral agreement or variation by conduct, as a matter of evidence the ET had needed to engage with paragraph 26 and to demonstrate in its reasoning that it had found there had been an agreement, notwithstanding that clause.

21. In the circumstances the ET's Judgment could not stand and the appropriate course was to remit this matter to a differently constituted ET for consideration afresh.

The Respondent's Case

22. While the Respondent accepted that the ET had made a finding in respect of the meeting of 31 July 2015 absent a proper evidential foundation, that made no difference: there was nothing significant about the particular date of the agreement, it was enough that the ET had found that *an* agreement had been reached, whereby the Claimant's employment with the Respondent was terminated and he was re-engaged by Excel; it was for the Claimant to demonstrate why the specific date of the agreement made a difference.

23. The ET's finding had been broadly consistent with the Respondent's case. Neither the Claimant nor Mr Peacock had appreciated the implications of **TUPE** at the time, and the Respondent had understood that the Claimant had become its employee after a series of discussions in June and July 2015, but the apparent agreement in that respect had collapsed after having been the subject of a fundamental misunderstanding. At the Claimant's insistence, it was agreed - by mid-September at the latest - that his employment would revert to Excel, that being confirmed at the meeting of 16 September 2015 (the minutes of that meeting not being in

dispute). Specifically, the ET had accepted the Respondent's evidence as to the conclusion of the meeting on 16 September 2015 "*that the claimant would continue working for Excel as Managing Director, that Excel would retain its own client list and would carry out work on behalf of Air Vane by invoicing them for work done*" (paragraph 13 of the ET's Decision). The Respondent's case had not been based on an agreement having been reached on 31 July 2015, but that would in any event be immaterial. The key finding related to the fact of the agreement - that the Claimant would be employed by Excel - not its date.

24. In any event, what was clear was that, by the effective date of termination of 29 February 2016, some six months later, the Claimant was plainly no longer employed by the Respondent but was an employee of Excel, as was apparent from his own communications. In the alternative, the point could not be determined by the EAT, but would have to be remitted to the ET, but that should be the same Tribunal.

25. On the second ground, although it was correct that the ET had not expressly engaged with the Claimant's point on the service agreement (albeit the point had only been taken on the morning of the hearing), that was not fatal. The ET's findings were sufficiently clear to the effect that there had been an agreement. Moreover the omission led to no error of law: authority made clear that the parties' freedom to contract meant that any clause in a contract was capable of later variation by agreement, even if oral or by conduct, notwithstanding an anti-oral variation clause such as that contained within the Claimant's service agreement; see **Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd** [2016] EWCA Civ 396 (20 April 2016, unreported) and **MWB Business Exchange Ltd v Rock Advertising Ltd** [2016] 3 WLR 1519 CA. Although Underhill LJ in **Globe Motors** had allowed that such a clause might be of evidential value, in the present case the Claimant had never sought to rely on that clause; indeed

his argument below had been that he had never considered himself to have been an employee of the Respondent, and that he had wanted to return to Excel.

The Relevant Legal Principles

26. The obligation upon an ET in terms of the Reasons it provides for its Judgment is set out in Rule 62, Schedule 1 **Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013** ("the "ET Rules"), which relevantly provides:

> **"62. *Reasons***
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> **(1) The Tribunal shall give reasons for its decision on any disputed issue, whether substantive or procedural …**
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> **…**
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> **(4) The reasons given for any decision should be proportionate to the significance of the issue and for decisions other than judgments may be very short.**
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> **(5) In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how that law has been applied to those findings in order to decide the issues. …"**

27. It is common ground that the Rule provides a structure, not a straightjacket; see **Greenwood v NWF Retail Ltd** [2011] ICR 896 EAT; the Reasons provided should demonstrate substantial compliance with the requirements of Rule 62, such that the parties can understand why they have won or lost; see **Meek v City of Birmingham District Council** [1987] IRLR 250 CA.

28. It is equally not in dispute that, where a point is in issue between the parties, it should properly be put to the relevant witness for the other side; see the guidance provided in **Deepak Fertilizers & Petrochemical Ltd v Davy McKee (UK) London Ltd** [2002] EWCA Civ 1396. The areas of dispute should, further, be apparent from the pleadings in the case, a party being entitled to know the case it has to meet; see **Chandhok & Anor v Tirkey** [2015] IRLR 195 EAT.

29. Where an ET fails to specifically make a finding of fact on a particular issue of dispute, however, that need not be such as to undermine the ultimate decision; the question will be whether the failure has led to a consequential error of law or incorrect finding of fact; see paragraph 48, **Chief Constable of the Thames Valley Police v Kellaway** [2000] IRLR 170 EAT. The obligation on the ET is to identify and record those matters which were critical to its decision; see paragraphs 19 to 21, **English v Emery Reimbold & Strick Ltd** [2002] EWCA Civ 605.

30. Turning to the specific issue arising in this appeal in respect of the variation clause in the Claimant's service agreement, similar provisions have been considered at higher appellate level, in which it has been held that, as a matter of general principle, parties have freedom to agree whatever terms they choose and can do so in document form, by word of mouth, or by conduct. Thus, as a matter of principle, the fact that a contract includes an anti-oral variation clause (such as that contained within the Claimant's service agreement) does not prevent the parties from later reaching a new agreement, varying the original contract by oral agreement or by conduct; see per Beatson LJ in **Globe Motors Inc** (see above). And the underlying principle of party autonomy in this respect was further emphasised by the Court of Appeal in **MWB Business Exchange Ltd** (see above and per Kitchin LJ at paragraph 34). That said, in **Globe Motors**, Underhill LJ allowed that such clauses might still have value:

> **"117. … In many cases parties intending to rely on informal communications and/or a course of conduct to modify their obligations under a formally agreed contract will encounter difficulties in showing that both parties intended that what was said or done should alter their legal relations; and there may also be problems about authority. Those difficulties may be significantly greater if they have agreed to a provision requiring formal variation."**

Discussion and Conclusion

31. As was observed when this matter was permitted to proceed to a Full Hearing, both parties are agreed that there are errors in the ET's reasoning; the issue is whether this matters.

32. On the first point, the ET was concerned with the question whether there had been an agreement to terminate the Claimant's employment with the Respondent (as had been brought about by operation of law under **TUPE**) and for him to be re-engaged with Excel. It is apparent the ET found there had been such an agreement on the basis that it had been reached during the meeting between Mr Peacock and the Claimant on 31 July 2015. It is equally apparent that conclusion cannot stand. That was not the Respondent's case: it did not, and does not, suggest that such an agreement was reached at that meeting. It was equally not the Claimant's case and there was no evidential basis for the finding.

33. The Respondent says that does not matter. The important finding was as to the fact of the agreement rather than the date. There is some force in that argument but the difficulty is that the Claimant was saying there was no such agreement and the ET resolved the dispute on this point by making a finding as to when the agreement had been reached that is rendered unsafe by its misunderstanding of Mr Peacock's evidence and, it seems, of the Respondent's case. The Respondent says it can still be taken that there must have been such an agreement at some point prior to the effective date of termination of the Claimant's employment on 29 February 2016; that, it says, is consistent with the ET's finding as to what had been agreed at the meeting on 16 September 2015. Further, the Claimant was receiving pay and pay slips from Excel and was himself identifying Excel as his employer. Again, there may be force in these points, but equally it appears that for much, if not all of this time, the Claimant had failed to appreciate the implications of **TUPE** for his position; he might simply have been wrong to identify Excel as his employer and I do not consider the ET's findings as to what was said at the meeting on 16 September 2015 are such as can be read as necessarily meaning that the Claimant was no longer employed by the Respondent as a result.

34. It is helpful at this point to bring in the second issue - that arising from the Claimant's reliance on the anti-oral variation clause of his August 2014 service agreement. Again there is common ground, to the extent that the Respondent accepts that the ET failed to engage with the Claimant's case on this issue. Again however, it contends that does not matter: the ET addressed the substantive issues and did not need to deal with this point. Notwithstanding the force of Mr Smith's advocacy, I am, however, not persuaded. This was an issue before the ET and it went to the Claimant's case that he had never agreed to the ending of his contract and, thus, the termination of his employment with the Respondent. The Respondent says that also does not matter, as the clause the Claimant relies on would not have been determinative of the point: the parties could have reached an oral agreement for variation or mutually agreed termination in any event; see **Globe Motors** and **MWB**. Again I see the force of the argument, but am not persuaded that it provides a complete answer. The Claimant was saying that, given the operation of **TUPE**, he was (although he was not in agreement with this at the time, because he did not understand how **TUPE** worked) employed by the Respondent pursuant to the service agreement to which he had worked at Excel; he never agreed to enter into a new service agreement and he should not have been taken to have agreed a variation or mutual termination given the formalities required under the agreement he was seeking to uphold. Allowing that gives rise to an evidential question (there being no binding requirement of compliance with the anti-oral variation clause), it was not irrelevant to the ET's determination: given the expectation recorded in the service agreement, could the Claimant be taken to have agreed to a variation or termination of that agreement?

35. The Respondent says that in any event, by the effective date of termination of 29 February 2016, it was apparent that the Claimant was employed by Excel. On its face, that looks like a strong argument, but it is still an argument for the ET to assess and it needs to do

so, facing head on the complication that neither of the main protagonists understood what was happening to the Claimant's employment in terms of the application of **TUPE**, and addressing the potential implications of the Claimant's 2014 service agreement in evidential terms. Notwithstanding the parties' apparent confusion, the ET itself has to be clear what that meant and then make findings as to what happened, having regard to all the evidence, which will include paragraph 26 of the service agreement.

Disposal

36. Given my conclusion on these two issues, I am satisfied the appeal must be allowed and the matter remitted to the ET, the assessment required being a matter for the first instance Tribunal and not for the Employment Appeal Tribunal. The question is whether this should return to the same ET. The Respondent says it should, given this ET has already made findings not challenged as part of the appeal. The Claimant says it should be remitted to a differently constituted ET, there being no real saving in terms of time or cost.

37. I bear in mind the guidance laid down in **Sinclair Roche & Temperley v Heard & Anor** [2004] IRLR 763 EAT. There was obviously an unfortunate misunderstanding in this matter that is reflected in the ET's Judgment. There was further, a failure to engage with the Claimant's case on the variation clause in his service agreement. While I have no reason to doubt the professionalism of this Employment Judge, I can see that it would be difficult for the Claimant to have confidence in the same ET approaching this matter afresh, given the earlier findings, premised on the misunderstanding I have indicated. Given also the fact that, in either event, this is a fairly straightforward, one day matter, there is nothing to be lost in terms of proportionality, either in terms of time or cost. In those circumstances I consider the appropriate course is to remit this matter to a differently constituted ET, which should hear this

A preliminary issue afresh and form its own conclusions as to what was, or was not, agreed between these parties.

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