

Appeal No. UKEAT/0131/17/JOJ

**EMPLOYMENT APPEAL TRIBUNAL**  
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal  
On 17 October 2017

**Before**

**THE HONOURABLE MR JUSTICE CHOUDHURY**

**(SITTING ALONE)**

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HARE WINES LTD

APPELLANT

(1) MRS S KAUR  
(2) H & W WHOLESALE LTD (DISSOLVED)

RESPONDENTS

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Transcript of Proceedings

JUDGMENT

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## **APPEARANCES**

For the Appellant

MR JOHN CROSFILL  
(of Counsel)  
Instructed by:  
Rainer Hughes Solicitors  
Oak House  
46 Crossways  
Shenfield  
Essex  
CM15 8QY

For the First Respondent

MR ALEXANDER MACMILLAN  
(of Counsel)  
Instructed by:  
Meaby & Co Solicitors LLP  
3-4 Portland Mews  
Soho  
London  
W1F 8JF

For the Second Respondent

No appearance or representation by or  
on behalf of the Second Respondent

## **SUMMARY**

**TRANSFER OF UNDERTAKINGS - Transfer**

**TRANSFER OF UNDERTAKINGS - Dismissal/automatically unfair dismissal**

**TRANSFER OF UNDERTAKINGS - Objection to transfer**

The Tribunal did not err in finding that the reason for the Claimant's dismissal was the transfer notwithstanding the fact there were ongoing relationship difficulties between her and a colleague.

**A** THE HONOURABLE MR JUSTICE CHOUDHURY

**B** 1. The Claimant was employed as a cashier by H&W Wholesale Ltd, a wine and beer  
wholesale business (the First Respondent below). When that business got into financial  
difficulties in 2014, Hare Wines Ltd (the Second Respondent below) agreed to purchase stock  
and take on any employees on the basis that the **Transfer of Undertakings (Protection of  
Employment) Regulations 2006** (“TUPE”) applied to the transaction. Hare Wines Ltd  
**C** assumed responsibility for the contracts of employment of all existing employees with the  
exception of the Claimant, whose employment was terminated.

**D** 2. Mr Windsor, a Director of the First Respondent, agreed with Mr Hare that the Second  
Respondent would take on the business and employees of the First Respondent. Mr Windsor  
then met with six or seven employees of the First Respondent about their future employment.  
The Claimant was the last to meet Mr Windsor for these purposes, and, at the conclusion of this  
**E** meeting, the Claimant’s employment was terminated. Mr Windsor wrote to the Claimant on 9  
December 2014 to say as follows:

**F** “I am sorry to inform you that due to unforeseen circumstances concerning the business, we  
must inform you that our business will now cease to trade. As a result we will unfortunately  
have to terminate your employment as from today.”

**G** 3. The transfer of the business took place a couple of days later on 11 December 2014.

**H** 4. The Claimant brought proceedings initially claiming redundancy pay and notice. She  
later amended her claim to bring a claim of unfair dismissal. She claimed that the principal  
reason for her dismissal was the transfer of the business to Hare Wines Ltd and that she was  
thus automatically unfairly dismissed within the meaning of regulation 7 of **TUPE**.

A 5. The Second Respondent defended the proceedings on the basis that in the meeting that  
took place on 9 December 2014 the Claimant had objected to a transfer and therefore, by reason  
of regulation 4(7) of **TUPE**, the liability for any of the claims brought by the Claimant either  
B remains with the First Respondent or was extinguished altogether.

C 6. Thus, the principal issue identified by the Employment Tribunal for determination was  
whether the Claimant had objected to transfer at the meeting on 9 December. The Tribunal  
described the factual issue to be determined in the following terms:

D **“16. Both Counsel agree that at the heart of this case is a dispute as to what happened on 9  
December 2014. On the Claimant’s case, she was dismissed because of the impending transfer  
and her contract of employment transferred pursuant to regulation 4(1). On the  
Respondents’ case, the Claimant objected to transfer such that regulation 4(8) operated to  
prevent her contract from transferring and she should not be treated as having been  
dismissed.”**

E 7. The Tribunal then set out the two contrasting versions of what happened at the meeting  
and said:

**“19. It is therefore crucial for me to resolve on balance which version of events I prefer and I  
bear in mind that the burden of proof is on the Claimant in this case to establish the dismissal.  
It has not been an easy task. ...”**

F 8. The Tribunal then proceeded to set out a number of issues of fact which either supported  
or weakened each party’s version of events as to that meeting. One of the matters which the  
Tribunal found had been discussed was described by the Tribunal as *“a strained working  
relationship [that the Claimant had] with a colleague, Mr Chatha”* (paragraph 5). The  
G Claimant’s version of this discussion was that it was a long conversation about Mr Chatha; she  
thought that Mr Chatha did not want her and that the Second Respondent did not want Mr  
Chatha to manage her. The Second Respondent’s version, as given by Mr Windsor in his  
H written statement, was that he told the Claimant that the business was being transferred to the  
Second Respondent. The Claimant stated that she was not happy to be working for the Second

A Respondent and did not wish to transfer. Mr Windsor regarded this as an objection to the transfer and for that reason her employment was terminated.

B 9. In oral evidence Mr Windsor completely denied that there had been any mention of Mr  
C Chatha at all. The Judge rejected Mr Windsor’s evidence in that regard. She considered that the discrepancy between Mr Windsor’s written and oral evidence was so significant as to undermine seriously the credibility of his evidence. The Tribunal, on balance, preferred the Claimant’s evidence as to what was said in the meeting and, at paragraph 29 of the Reasons, they concluded as follows:

D “29. ... It is consistent with the Second Respondent anticipating that there would be ongoing difficulties in the working relationship between the Claimant and Mr Chatha and, therefore, deciding that it did not wish her contract of employment to transfer. It is for this reason that the Claimant was the only employee told that she was not wanted. The Claimant did not object to transfer. She would have been employed immediately before transfer but for the dismissal on 9 December 2014. The reason for the dismissal was the transfer. As such her contract of employment transferred and the Claimant was unfairly dismissed. ...”

E 10. The Respondent appeals against that finding that the reason for the dismissal was the transfer. Five grounds of appeal were pursued in all. However permission was only granted in respect of one of them and that ground was put as follows:

F “Having found that [the Claimant] was dismissed because of a difficult working relationship with Mr Chatha the Employment Tribunal erred in law in concluding that the [principal] reason for the dismissal was the transfer OR has erred in law in failing to give any or any adequate reasons for that decision.” (Ground 5)

### **The Regulations**

G 11. Regulation 4 of TUPE provides:

“(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.

H ...

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so

**A** employed 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.”

**B** 12. The other relevant regulation to consider is regulation 7 which provides:

“(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is the transfer.”

**C** Submissions

**D** 13. Mr Crosfill, who appears for the Second Respondent, submitted that the Employment Judge had clearly made a finding that the reason for the dismissal was the anticipation of ongoing difficulties in the working relationship. Furthermore, that by immediately moving to a conclusion that the reason for the dismissal was the transfer, the Employment Judge had erred in assuming, consciously or otherwise, that the proximity of the transfer meant that any dismissal would be by reason of that transfer. Alternatively, it is said that the Employment Judge erred in that, having rejected the First Respondent’s case on dismissal, namely that the Claimant had objected to transfer, the Tribunal Judge assumed that it automatically followed that she could find against the First Respondent as to the reason for dismissal and adopt the Claimant’s reason as to the dismissal.

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**G** 14. Mr Crosfill, in very helpful submissions, submitted that the primary case he was putting forward was that where the reasons for dismissal are, as he described them, “entirely personal to an individual”, it cannot be said that the reason for the dismissal is the transfer. His fall-back position, if I did not accept that proposition, was that if the existence of purely personal reasons did not render it mutually exclusive to a determination that transfer was the reason, then the Tribunal should fully explain precisely why the transfer is said to be the reason for the dismissal. He said the Tribunal failed to do that in this case.

**A** 15. Mr Macmillan submits that the Respondent’s primary case, if accepted, would result in  
unfairness and potentially undermine the protection afforded by the **Regulations**. It would, he  
said, open up the floodgates to employers to be able to raise other reasons which are described  
**B** as “purely personal” and claim that they were the reason for dismissal. Whereas, in fact, it was  
the existence of a transfer that was the real cause of the dismissal.

**C** 16. As to the challenge to the Tribunal’s reasoning, Mr Macmillan accepts that the  
reasoning could have been more extensively set out in paragraph 29, but he submits that one  
needs to consider the Judgment as a whole, taking particular account of the close proximity of  
the transfer to the decision to dismiss, and the fact the Respondent was found to have said that it  
**D** did not want the Claimant to transfer.

### **Discussion and Analysis**

**E** 17. It is right that there has been a change in the law in that it is no longer sufficient for  
there to be a mere connection with the transfer in order for dismissal to be automatically unfair.  
The transfer must in fact be the sole or principal reason for the dismissal and that is a matter to  
be determined by the Tribunal having regard to all the circumstances.

**F**

18. The Tribunal in this case found, at paragraph 29, that the reason for the dismissal was  
the transfer. In my judgment, it cannot be suggested that the Tribunal had in mind the wrong  
**G** test or a lesser test in determining the reason for the dismissal. The wording used by the  
Tribunal clearly showed that it was considering what was the reason, sole or principal, for the  
dismissal. There was no reference to there being a mere connection.

**H**



**A** 19. I do not accept Mr Crosfill’s argument that the existence of purely personal reasons precludes the transfer from being the reason for the dismissal. There are a number of reasons for coming to that conclusion. First, I bear in mind that these **Regulations** are designed to  
**B** protect workers’ rights and one needs to be very careful in expanding or introducing what might appear to be new categories of defence, and which may undermine the protection afforded to employees in these situations.

**C** 20. Second, it is clear from the judgment of the European Court of Justice in **P Bork International v Foreningen Af Arbejdsledere I Danmark** [1989] IRLR 41 that an important factor to take into account in determining the reason for the dismissal is the proximity to the  
**D** transfer. Paragraph 18 of the judgment of the ECJ said as follows:

“18. ... In order to determine whether the only reason for dismissal was the transfer itself, account must be taken of the objective circumstances in which the dismissal occurred and, in particular, in a case like the present one, the fact that it took place on a date close to that of the transfer and that the workers concerned were re-engaged by the transferee.”

**E** In the present case, as noted already, the dismissal was effective just two days before the date of the transfer.

**F** 21. Paragraph 29 of the Reasons does indeed refer to the ongoing difficulties in the working relationship between the Claimant and Mr Chatha. However, even if those ongoing difficulties can be described as “personal” to the Claimant, a significant factor is that the difficulties were  
**G** ongoing. That is to say, they did not arise just on the point of transfer and were not going to end just afterwards. They had been in existence, it would seem, before the transfer and were likely to continue thereafter. It seems to me that in a situation where an employer had not taken  
**H** action to resolve an ongoing relationship difficulty prior to the transfer, but does so only at the

**A** point of transfer by dismissing one of the parties in that difficult relationship, it is open to the Tribunal to conclude that the reason for the dismissal was transfer.

**B** 22. An issue affecting an employee's conduct or competence, if suddenly acted upon at the point of transfer, is unlikely to be the sole or principal reason for the dismissal. An employer taking the opportunity to dismiss in such circumstances could reasonably be said to be motivated by the transfer, thereby making the transfer the principal reason for the dismissal. It will all, of course, depend upon the facts of individual cases.

**C** 23. I accept that there is some force in Mr Macmillan's suggestion that introducing this sort of defence based on reasons personal to the employee as a new or expanded category could seriously undermine the nature of the protection afforded by the **Regulations**. Such questions are best left as questions of fact to be determined by the Tribunal.

**D** 24. In the course of argument, Mr Crosfill raised an interesting example in which he suggested that if there was not mutual exclusivity as between the "personal reasons" situation and transfer it could lead to chaos. He posited the situation where an employee has blown the whistle and could be dismissed by the employer for that reason. That would give rise to an automatic unfair dismissal. However, if that employee were dismissed at the same time as the transfer, that would also give rise to a claim of automatic unfair dismissal. The reason for the dismissal in that situation, however, if one were to exclude purely personal reasons - i.e. the whistleblowing - would be to deprive the employee of the wider remedies that may be available to him under the whistleblowing regime.

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A 25. That may be said to be a somewhat extreme example of the kind of concern that Mr  
Crosfill was expressing; but in any case if the employer had decided that he wanted to dismiss  
the employee for whistleblowing and had used the transfer as the occasion for the dismissal,  
B then the Claimant would, it seems to me, already have had a good case for automatic unfair  
dismissal by reason of the whistleblowing. That is a somewhat different situation from the one  
where the employer has an ongoing reason which he might have relied upon to dismiss an  
C employee but did not act upon prior to the transfer. In that scenario, if the transfer was used as  
an occasion to take action where hitherto none had been taken, there is a much stronger basis  
for saying that the employee was dismissed by reason of the transfer. In any case, it is not  
unusual for an employer to have to put his case on the basis of the best reason for dismissal,  
D where there may be more than one option available. Whilst the claim is put on a particular  
basis, however, it will be for the Employment Tribunal to determine what is the actual reason  
having regard to all the circumstances.

E 26. I was also referred to the case of Smith & Ors v Trustees of Brooklands College  
UKEAT/0128/11 where it was held that the “but for” test is not the appropriate test. That is not  
a controversial proposition; however, it does not really advance Mr Crosfill’s position, in my  
F judgment, because the Tribunal in this case did not take a “but for” approach.

G 27. This takes me to the second aspect of Mr Crosfill’s argument, which is that if the reason  
for dismissal is a question of fact then in this case the Tribunal’s determination was not  
properly explained. I accept that if one focuses only on paragraph 29 of the Reasons, then there  
is a paucity of reasoning to explain why the transfer was considered to be the reason for the  
dismissal. However if one looks at the Reasons in their entirety, it is clear in my judgment that  
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A the Tribunal had in mind a number of factors, indicating that the transfer was the reason for the dismissal.

B 28. One factor is already mentioned, that is the ongoing nature of the relationship  
difficulties. Another also mentioned, perhaps more important, is the very close proximity  
C between the dismissal and the transfer itself. Whilst that is not conclusive, it is, as expressed by  
the ECJ in **Bork**, a particular factor to be considered with care. A further factor is that in this  
case the Tribunal found that the transferee did not want this particular employee to transfer. It  
is also right to note the Tribunal made findings about the fact that Mr Chatha would be  
D assuming a management position. Further the Claimant had expressed concern that she thought  
Mr Chatha did not want her and the Second Respondent did not want Mr Chatha to manage her.  
That aspect of the Claimant's evidence was accepted.

E 29. Taking all of these factors together, and other aspects of the Reasons which I have not  
mentioned, it is quite clear to me that the conclusion that the transfer was the reason for the  
dismissal is readily explained and easy to understand. For those reasons, and despite the  
F elegant submissions of Mr Crosfill this morning, I find that the appeal fails.

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