EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Miss S Shayesteh	**v** The Whittington Hospital NHS Trust

PRELIMINARY HEARING

Heard at: **London Central Employment Tribunal** **On: 30 January 2018**

Before: **Employment Judge Wade**

Appearances
For the Claimant: In person
For the Respondent: Mr W Young (Counsel)

JUDGMENT

1. The judgment of the Tribunal is that it does not have jurisdiction to hear the claims under:
   a. Regulation 15 of the Transfer of Undertaking (Protection of Employment) Regulations 2006 ("TUPE")(failure to inform and consult);
   b. Section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA")(failure to consult on redundancies) and
   c. The ETs Extension of Jurisdiction Order 1994 (breach of contract).

2. These claims are accordingly struck out.

REASONS

1. The claimant is a dental nurse and the practice she worked for transferred to the respondent under the TUPE regulations. The claimant was therefore an "affected employee" for the purposes of the statutory obligation for the employer to consult its workforce.

2. Unfortunately the claimant was given misinformation by the respondent's HR as to who her representative was at this time. She was told that she was represented by the RCN and then, when that proved wrong, by the British Dental Association. This was also wrong information and the respondent eventually said that the union

representing her interests was Unison, which she found hard to understand as she is not a member of any union. The respondent has apologised for this misinformation but as its witness Ms Gordon, Deputy Director of Workforce, points out, the claimant was not left out in the cold as she was told about the changes, offered one-to-one meetings et cetera.

3. It is understandable that the claimant felt she had not been properly consulted, but she claims under legislation which is very specific and only allows individuals to make claims in certain circumstances. The respondent's legal point is that even though the claimant was not a member of Unison, it, and only it, had the right to complain to the Tribunal about failure to consult under Regulation 15(1) of TUPE. If the duty to consult was with the union, there will be no infringement about which an individual claimant can complain.

4. Regulation 13(3)(a) of the TUPE regulations and says that:

> "For the purposes of this regulation the appropriate representatives of any affected employee in employees are:
> (a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of that trade union…."

5. Other options are provided if that is not the case. Although it took the employer some months to get to the point of identifying Unison as being the correct consultee, that is what is now said. Note that the Regulation does not require the affected employee to be a member of the union.

6. Was Unison "recognised"? Under section 178(3) of TULR(C)A, on the subject of collective agreements and collective bargaining, recognition is defined as:

> "the recognition of the union by an employer ….to any extent for the purpose of collective-bargaining".

The effect of recognition is that the union is authorized to bargain on behalf of the whole workforce, not just its members.

7. In this case there is no written recognition agreement; it may have been written down but it is lost and not available, so there is nothing in writing saying at that Unison is a recognised trade union.

8. However, that is not the only way to establish that there is recognition. As Lord Denning said in the Court of Appeal way back in 1979 in *National Union of Gold, Silver and Allied Trades v Albury*:

> "Sometimes there is an implied agreement of recognition. But at all events there must be something sufficiently clear and distinct by conduct or otherwise so that one can say "they have mutually recognised one another, the trade union and the employers, for the purposes of collective bargaining"".

His colleague at Lord Justice Eveleigh agreed and said that question was whether the parties had reached the point where one can use the expression "it goes without saying".

9. In this case I am satisfied that Unison's position as a representative of affected employees goes without saying and this is precisely why a written agreement has not been found; it was made so long ago that its origin is lost in the mists of time but subsequent conduct it testament to its existence.

10. As Ms Gordon, with 30 years' experience in the health service, said in her evidence, they have been the largest players on the staff side for so many years that it goes without saying that they are the group that the employer recognises and turns to for when negotiating with the workforce. They take responsibility for the interests of all staff, including those who are not members and even those who have other trade bodies at such as the Royal College of Nursing as well. It seems that the only exception are doctors who run their own show. This is what is known as collective bargaining.

11. I have seen evidence that both before and after this TUPE transfer, Unison was engaged in discussion and negotiation with management as would be expected of a union recognised for collective bargaining purposes. It is true that I have not seen direct evidence from Unison that they regard themselves as "recognised" but I have seen evidence of their officers negotiating over a range of policies and also in respect of this specific TUPE transfer. This is not merely liaison.

12. It would be impossible for the health service with hundreds of thousands of employees, and this respondent in particular with 4,000 staff, to negotiate effectively without recognition agreements in place enabling collective bargaining on behalf of the whole workforce. Agenda for Change was of course an enormous exercise which was only achievable in this way.

13. Also, in many of the employment statutes, which were negotiated by the politicians with the unions and the CBI, and certainly the two relevant to today, the primacy of unions is built in. It is no coincidence that the statutory expectation is that the employer will consult with the union, failing that with elected staff representatives, and only failing both, with individual employees for certain purposes.

14. It is also important to make the point, raised by the claimant, that there were a number of unions which might possibly have argued in her corner, the other obvious one being Unite; but that is not a reason to be concerned that this decision may not be correct. There is no closed shop and no obligation to join a union so on all issues there may be overlapping representation. As a result, the Trust set up a partnership group (which the respondent argued at the preliminary hearing was the regulation 13(3) union, later abandoning the argument) to make sure that all unions and management are working together. As set out in section 178(3), recognition exists if there is "recognition of the union to any extent for the purposes of purpose collective-bargaining". Exclusive recognition is not required.

15. In all the circumstances, I find that there was a recognition agreement with Unison in place which gave it the right to represent the whole workforce, excluding doctors and including the claimant.

16. Exactly the same arguments apply to the claim made under TULRCA, section 189, and so there is no jurisdiction under either piece of legislation because the duty to consult was with the union Unison.

17. The point being decided today is about the structure of the legislation. It is not about the rights and wrongs of the way the claimant was treated and I have already acknowledged that the claimant does have grounds for feeling aggrieved that she was confused by misinformation from the employer. I should also record, however, that Ms Gordon said that not only did she expect that Unison would look after the interests of all staff, but also that the claimant was offered the opportunity to meet both in a group and one-to-one to discuss the changes. I do not want to give the impression that I feel that the claimant was completely left out of the cold.

18. The claim of breach of contract also fails and must be struck out simply because the Extension of Jurisdiction Order is very limited in its scope. The tribunal can only hear a claim for breach of contract on termination of someone's employment and happily the claimant remains in the respondent's employment today.

19. The claimant's remaining claims of whistleblowing detriment will be decided at a full hearing.

CASE MANAGEMENT ORDERS

Made pursuant to the Employment Tribunal Rules 2013

The hearing

1. The final hearing is listed to take place over three days on **29, 30 and 31 May 2018**, starting at 10.am.

Leave to amend pleadings

2. Leave is given to amend the claim by adding the claimant's schedules of alleged protected disclosures and detriment of 3 December and the respondent's amended Grounds of Resistance of 18 December.

Schedule of Loss

3.1 The claimant has provided her Schedule of Loss but she is to send an updated schedule to the respondent **by 27 February**.

3.2 **By 13 March** the respondent is to serve a counter-schedule on the claimant.

Disclosure

4.1 Disclosure is to take place by list and copy **by 27 February.**

4.2 The parties are ordered to give disclosure of documents relevant to the issues. This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession,

custody or control, whether they assist the party who produces them, the other party or appear neutral.

4.3 The parties shall comply with the dates for disclosure but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

Bundle

5.1 **By 27 March** the respondent will provide one copy of the bundle to the claimant. This should be arranged with a contents page and shall contain a copy of each document, with each (double sided) page numbered, avoiding duplication and be so bound or otherwise held together so as to open flat.

5.2 The respondent shall bring five identical bundles of the copy documents to the Tribunal hearing.

Witness statements

6.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.

6.2 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.

6.3 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.

6.4 It is ordered that witness statements are exchanged so as to arrive on or before **1 May.**

6.5 Five copies of each witness statement should be provided at the hearing.

Employment Judge Wade on 31 January 2018