



EMPLOYMENT TRIBUNALS

Claimant: Mr S Orr

Respondent: Olsen Doors and Windows Limited

Heard at: Nottingham **On:** Wednesday 3 October 2018

Before: Employment Judge P Britton (sitting alone)

Representatives

Claimant: In Person

Respondent: Ms R Basra, Solicitor

JUDGMENT

1. The current Respondent Olsen Doors and Windows Limited (formerly Echelon International Limited) is dismissed from the proceedings.
2. Joined to the proceedings is ODW Realisations Limited (formerly Olsen Doors and Windows Limited).
3. The proceedings and a copy of this judgment will now be served upon the administrators: Andrew J Cordon and Richard A B Saville at Church House, 13-15 Regent Street, Nottingham NG1 5BS.
4. The current hearing of this matter scheduled for 8 October 2018 is postponed.
5. All current directions are stayed.
6. Otherwise directions are hereinafter set out.

REASONS

1. The issue that have to determine is essentially whether the Claimant is suing the correct Respondent, and if he isn't that the existing Respondent should therefore be dismissed from the proceedings. He is by his claim (ET1) claiming constructive unfair dismissal; or a redundancy payment¹; and breach of contract relying upon non payment of a "Golden handcuffs bonus". He resigned from his job on 30 January 2018 effective 23rd February.

¹ On the scenario as pleaded this is not a redundancy scenario.

2. The core issue before me today is whether or not there was a transfer to the Respondent (the transferee) within the definitions to be found at Regulation 3 of the TUPE Regulations 2006 (TUPE), and even if there was as to whether the Claimant can bring himself within the protection for continuation of accrued rights and indeed the carrying over of contingent liabilities pursuant to Regulation 4(1)(2) and (3).

3. The contention of the current Respondent as put forward before me by Ms Basra and as made clear in the Response (ET3), is that the provision cannot engage because he had long since ceased to be an employee of the Respondent. By long ceased I mean he was self-evidently not employed by it either at or immediately before the TUPE if indeed there was one. And "immediately before" is to be construed narrowly as was made plain by the Court of Appeal in **Secretary of State for Employment v Spence and Others** [1986] ICR 651CA.

The factual scenario

4. The first thing to do is to set down some agreed facts. As at 16 January 2018 the Claimant was employed as a Project Estimator for Olsen Doors and Windows Limited. I shall now refer to this particular business as Olsen (1). At that stage he secured an offer of alternative employment which gave him better potential to increase his career, and so he gave in his resignation, which is before me in the bundle prepared by the Respondent, on 17 January 2018. Over the next few days overtures were made to him by in particular the Managing Director, Colin Gaskin, to reconsider his position. This crystallised into what the Claimant would say was an unequivocal offer that if he remained with the business he would be promoted to Operations Manager on a significantly increased salary and enhanced other terms and conditions. As a result of that offer he therefore decided to withdraw his resignation. What then happened is that following Mr Gaskin coming back from a business trip to Poland, the Claimant was brought into a meeting at which present was Mr Gaskin and the HR Manager Julia Sheppard and informed that the deal was off. The Claimant thought about his position over the weekend and resigned for a second time on 30 January 2018. What he then did having gone through the ACAS conciliation process was to bring a claim to the Tribunal on 24 April 2018. It is self-evidently a claim primarily for constructive unfair dismissal based upon what had happened constituting a repudiation of the contract by inter alia Mr Gaskin. He was able to get the job that he had originally rejected following the offer to stay.

3. So he brought a claim (ET1) against Olsen 1 which was thus duly served out by the tribunal. A response was received on 16 July 2018. The delay was because when it was initially sent by the Tribunal to the address that the Claimant had given, it was sent back with a letter to the effect that that business has ceased trading. A company search was then undertaken by the tribunal and the claim re-served on the registered office at 25 British Fields, Ollerton Road, Tuxford, Nottinghamshire. However by its response what I will now describe initially as Olsen 2 made plain that it could not be liable as it had purchased assets in the context of an administration of Olsen number 1 and that accordingly there had been no transfer. Just dealing with that point from the documentation that I now have before me, Olsen 1 went into administration on 21 May 2018. It was renamed for the purposes of the administration as ODW Realisations Limited (ODW). The administrators appointed were Andrew Cordon and Richard Saville. On the same day they sold assets of what was now ODW to a business known as Echelon International Limited (Echelon). It had been formed as a

limited company in the usual way by what is known as an off the shelf formation on 17 October 2017, but it had not traded. Having acquired assets from ODW via the administrators on the 21 May it changed its name to Olsen Doors and Windows Limited (Olsen 2) on 26 May. I can understand the Claimant's cynicism about it all but I am of course bound by the law.

4. Thus as a matter of fact the Claimant was not an employee of Olsen 1 now ODW immediately before the transfer to Olsen 2, if that is what it was, on 21 May 2018. He had long ceased to be an employee of Olsen 1 as at 23 February 2018.

5. It may well be that he had a potential claim against Olsen 1, but it self-evidently wasn't was at that stage a liability because there was no judgment; and it is not one of those cases, as to which there are many on this topic (see the IDS Transfer of Undertakings Employment Law Handbook December 2015 edition), where there was a contingent liability for instance for lump sums that might be due on say a redundancy which had accrued via such as a collective agreement with the transferor before its transfer but which then came into dispute at a date after the transfer in terms of whether the relevant employees were entitled to rely upon that as a liability. That is not the case here.

6. Furthermore liability only transfers where the employee has transferred or was dismissed immediately before the transfer and because of it. Thus Regulation 4(1):-

"Except where objection is made under paragraph 7² 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..."

7. Well of course that can't apply because the employment of the Claimant had ended at latest on 23 February 2018 and if this was a transfer it was taking place almost 3 months later. That brings me back to Regulation 4(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.

*(3) Any reference in Paragraph 1 to a person employed by the transferor and assigned to the organised grouping of resources of employees that is subject to a relevant transfer, is a reference to a person so **employed immediately before**³ or would have been so employed if he had not been dismissed in the circumstances described in Regulation 7(1)*

² Not engaged in this scenario.

³ My emphasis.

including where the transfer is affected by a series of 2 or more transactions, a person so employed and assigned who would have been so employed and assigned immediately before any of these transactions.”

8. Thus it follows that the Claimant hasn't got a claim against Olsen 2, which is of course the current Respondent. What he does have is a potential claim against ODW Realisations Limited (formerly Olsen 1) and still subject to administration. But clear from the statement affairs before me is that it has very substantial net liabilities. Therefore it is self-evident that if the Claimant does decide to go ahead the cupboard will be bare; but of course if he was to succeed in the unfair dismissal claim before the Tribunal and it awarded him a basic award, he could at least apply for payment of that from the Secretary of State via the Insolvency Fund pursuant to the provisions at 182 of the Employment Rights Act 1996.

9. But in order for him to proceed against the business, that is ODW, he needs either the consent of the administrators or leave of the High Court of Justice: the administration number is 3469/2018.

Conclusion

10. So what I am going to do is as follows:-

10.1 Dismiss the current Respondent Olsen Doors and Windows Limited from these proceedings.

10.2 Join as Respondent ODW Realisations Limited (formerly Olsen Doors and Windows Limited) (in administration).

10.3 I am going to direct that a copy of this judgment is sent to the administrators by the tribunal secretariat with obviously a copy of the current pleadings so as to circumvent matters. In a covering letter the administrators are to be asked if they consent to the proceedings and if so whether they intend to defend them. They are to be asked to reply within 14 days.

10.4 If the administrators reply to the effect that they do not consent to these proceedings, then the matter will have to be stayed whilst the Claimant seeks approval from the High Court.

Employment Judge Britton

Date: 28 November 2018

JUDGMENT SENT TO THE PARTIES ON

.....

.....
FOR THE TRIBUNAL OFFICE