Appeal No. UKEAT/0139/19/JOJ

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal
On 25 and 26 February 2020
Judgment handed down
On 15 May 2020

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

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1) DUNCAN FERGUSON
2) JOHN KEVILL
3) ANDREW LAX
4) BYRON PULL

APPELLANTS

ASTREA ASSET MANAGEMENT LTD

RESPONDENTS

JUDGMENT

APPEARANCES

For the Appellants	MR DAVID READE (One of Her Majesty's Counsel) MS CHARLENE ASHIRU (Of Counsel) Instructed by Reed Smith LLP The Broadgate Tower 20 PRIMROSE Street EC2A 2RS
For the Respondents	MR SIMON DEVONSHIRE (One of Her Majesty's Counsel) DANIEL ISENBERG (Of Counsel) Instructed by Linklaters LLP One Silk Street London EC2Y8HQ

A **SUMMARY**

TRANSFER OF UNDERTAKINGS

The Claimants were directors of Lancer and beneficial owners of Lancer's holding company; Messrs Ferguson and Kevill were also employees of Lancer and Messrs Lax and Pull were employed by companies which they controlled which contracted their services to Lancer; there were seven other Lancer employees. Lancer's sole business was managing the Berkeley Square Estate on behalf of the owners under a management agreement.

The owners gave 12 months' notice to terminate the agreement and appointed a new company to manager the Estate, Astrea. There was no dispute that this involved a TUPE transfer from Lancer to Astrea.

Shortly before the transfer, the Claimants arranged for their employment contracts to be substantially improved to provide for guaranteed bonus payments and generous new termination payments. The EJ found that these changes were made "by reason of" the anticipated transfer and had no legitimate commercial purpose for Lancer but were designed to compensate the Claimants for loss of Lancer's business, dishonestly taking undue advantage of TUPE by awarding themselves remuneration knowing it would be paid at the expense of Astrea. Astrea dismissed Messrs Ferguson and Kevill on or shortly after transfer and did not accept that Messrs Lee and Pull transferred under TUPE or alternatively also dismissed them.

The Claimants brought claims against Astrea based on TUPE for unfair dismissal and contractual termination payments and for "compensation payments" for breach of reg 13(4) of TUPE under which Astrea was required to provide "measures" information to Lancer. Following a five-day hearing the EJ found inter alia:

(1) that the new contractual terms were void "considering reg 4(4) TUPE in the light of the [EU] abuse of law principle";

(2) that Messrs Lax and Pull did not transfer to Astrea under reg 4(1) because they were not assigned to the organised grouping of employees engaged in the management of the Estate;

(3) that Mr Kevill was unfairly dismissed by virtue of reg 7(1) but that his compensatory award should be reduced by 100% under s 123(6) of ERA and, under the Polkey principle, that he would have been (fairly) dismissed by Astrea within three weeks of the transfer in any event;

(4) that Astrea had breached reg 13(4) of TUPE by failing to provide "measures" information in good time and that "appropriate compensation" should be awarded to all four Claimants for that breach amounting to three weeks' pay for each of them.

On appeal by the Claimants against these findings, the EAT decided that:

(1) (a) reg 4(4) of TUPE, properly interpreted in a "broad purposive" way consistently with EU law, rendered void all contractual variations made because of a transfer and not just those adverse to the employee as contended by the Claimants;

(b) if that interpretation was wrong, on the facts Astrea could rely on the EU abuse of law principle to prevent Claimants relying on the new contractual terms since (i) the purpose of the EU rules (safeguarding employee rights) had not been achieved, but rather some other purpose (ie substantially improving the rights of the Claimants) and (ii) their intention was to obtain an improper advantage by artificially obtaining variations to their contracts of employment with Lancer in contemplation of the transfer;

(2) the EJ had erred in her approach to the issue whether Messrs Lax and Pull were "assigned" to the organised grouping of employees managing the Estate so as to be transferred under

TUPE, in particular by concentrating on how much work they were doing rather than on whether they were "organisationally" assigned to the relevant grouping;

(3) (a) the EJ failed to consider properly whether, and to what extent, Mr Kevill's conduct had "caused or contributed to" his dismissal for the purposes of s123(6) of ERA; but

(b) the EJ had been entitled to make the Polkey finding which she did notwithstanding that the "reason" for the putative dismissal would have been conduct before the transfer and may not have amounted to any legal wrong;

(4) (a) on a proper interpretation of reg 16(3) of TUPE on the facts of the case the EJ was entitled to find that "appropriate compensation" for Astrea's breach of reg 13(4) amounted to three weeks' pay;

(b) on a proper interpretation of reg 15(7) it would not have been open to the EJ to award compensation to the other transferring employees who might have, but did not, bring claims under reg 15(1)(d).

The appeal was therefore dismissed save in relation to the issues at (2) and (3)(a) which were remitted to the EJ to reconsider.

HIS HONOUR JUDGE SHANKS

Introduction

1. This is an appeal against certain findings in a judgment of Employment Judge Goodman sitting in London Central dated 13 December 2018 which followed a five-day hearing in October 2018. The appeal raises several issues on the interpretation of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). It has been fought with skill and tenacity by counsel on both sides.

Facts

2. The Berkeley Square Estate comprises around 140 properties in Mayfair and Knightsbridge worth some £5 billion. It is ultimately owned by the Abu Dhabi royal family. From 2004 the Estate was managed by Lancer Property Asset Management Ltd ("Lancer") under a formal agreement dated 18 November 2005 which was terminable on 12 months' notice. Lancer's was a "single client" business and it was solely engaged in managing the Estate. From 2012 the content of the Estate had remained static with no new acquisitions.

3. Lancer was owned by Lancer Property Holdings Ltd ("Holdings"). The four Appellant/Claimants were the beneficial owners of Holdings and were the directors of both Lancer and Holdings. Mr Kevill was Lancer's CEO and an employee under a service agreement dated 1 May 2009. Mr Ferguson was Lancer's Head of Asset Management; he was also an employee of Lancer under a service agreement dated November 2007. Messrs Lax and Pull were employed by their own service companies (Abbotstone and IMS respectively) which had contracted with Lancer to provide their services. Mr Lax was Lancer's Chairman and Mr Pull was Finance Director. There were seven other staff employed by Lancer.

4. Holdings owned a number of other property companies, through which the Claimants traded property in London and the South East on their own account. According to the last set of statutory accounts before the EJ, Holdings had an annual turnover of £13.6 million and profits after tax of £4.2 million.

5. On 20 September 2016 the Estate owners served a year's notice of termination under the management agreement. Astrea Asset Management Ltd ("Astrea") was formed in late 2016 to take over the management of the Estate. In April 2017 Giles Easter was appointed its CEO. On 6 July 2017 it entered into a formal management agreement to take effect from 29 September 2017.

6. Initially the Claimants, led by Mr Kevill, had hoped that they could persuade the Estate owners to extend the 2005 agreement or to buy out the business; part of their campaign to achieve this involved a lack of co-operation in providing information to the owners and making veiled threats that vital staff would be leaving. As the year went on relationships became strained.

7. In around June 2017 the Claimants decided to update the Lancer staff contracts and undertake a review of their own terms. At some point Mr Kevill and Mr Ferguson signed new employment contracts with Lancer which were dated 26 July 2017; among other things these contracts contained (a) new rights to *guaranteed* bonuses amounting to 50% of salary (£576,000 and £402,000 respectively) and (b) new contractual termination payments amounting to a month's salary for every year served as a director of Lancer (said later to amount to £768,000 and £380,000 respectively as at September 2017). There were similar changes in relation to Mr Lax's contract with Abbotstone and Mr Pull's with IMS and the contractual notice period in those contracts was increased from 12 to 24 months. The new contracts were supplied to Astrea on 1

September 2017 after the provision of "employee liability information" on 30 August 2017. On 30 August 2017 Mr Kevill had proposed by email to his fellow directors that if any of them did not transfer to Astrea (or, as he put it, if any of them were "... stuffed by the Arabs") the contracts of those who did not transfer would revert to their previous terms, a proposal to which they all agreed the same day (note, incidentally, that it seems that the EJ overlooked the email exchanges I was shown when she said in para 168 that it is not clear whether this was agreed: there is no doubt it was agreed). Mr Kevill had also copied their solicitor into his email in the apparent expectation that this would make it privileged from disclosure.

8. The EJ found at paras 158 and 159 that the new terms about bonus and termination were not agreed for any legitimate commercial purpose of Lancer but were designed to compensate the Claimants as owners of the company for the loss of its business contract and (to an extent and possibly only by Mr Kevill) to punish the owners " ... for using TUPE to acquire the management of the Estate, rather than a purchase of the business" (as the EJ puts it at para 164 of the judgment). At para 165 she found that these changes were made "by reason of the transfer." And at para 166 she found that the "essential aim" of the exercise was to obtain an "undue advantage" and that the Claimants were acting dishonestly in effectively "... awarding ... themselves [a guaranteed 50% rise in salary], knowing it would be paid at the expense of Astrea".

9. On 25 September 2017 Astrea wrote various letters stating that following the transfer Mr Kevill's employment would terminate immediately for gross misconduct (particularly relating to the new contracts) and that it was not accepted that Mr Lax and Mr Pull would transfer but that if they did they too were dismissed for gross misconduct. Mr Ferguson did formally transfer on 29 September 2017 but following a meeting with Mr Easter on 2 October 2017 he was told he

too was dismissed for gross misconduct in relation to the new contracts, as confirmed in a letter dated 5 October 2017.

The ET's decision and the issues on the appeal

10. The Claimants brought proceedings in the ET against Astrea claiming *inter alia* unfair dismissal, contractual termination payments on the basis of the new contracts, and 13 weeks' pay as a "compensation payment" for breach of regulation 13(4) of TUPE. They made clear that any money claim was based on section 13 of Employment Rights Act (ERA) (unauthorised deductions) and that they reserved the right to bring claims for damages in the civil courts. There was no dispute that there had been a relevant TUPE transfer on 29 September 2017 by virtue of regulation 3(1)(b), which applies to a "service provision change", with Lancer as the transferee and Astrea as transferor; but it was not accepted that Messrs Lax and Pull's contracts of employment with the service companies transferred. The EJ found that:

(1) Mr Ferguson was unfairly dismissed and that his award was increased by 25% for failure to follow the ACAS Code;

(2) Mr Kevill was unfairly dismissed by virtue of regulation 7(1) of TUPE since the reason for the dismissal was the transfer. In his case any award was "reduced by 100% for conduct". She also found at para 178 of the judgment, applying the well-known **Polkey** decision (**Polkey v A E Dayton Services Ltd** [1988] ICR 122), that if there had been a proper process carried out "... he would have been dismissed in any event within three weeks [of the transfer]";

(3) Messrs Lax and Pull had no claim against Astrea arising from the termination of their employment because they were not assigned to the relevant grouping of employees and so did not transfer under regulation 4(1) of TUPE.

(4) "Considering regulation 4(4) [of TUPE] in the light of the abuse principle", the terms of the new contracts relating to bonus, termination payment and notice were in any event void because they were varied "... by reason of the transfer" (see: para 167);

(5) Astrea was to pay each of the Claimants three weeks' pay for breach of regulation 13(4) of TUPE.

11. On appeal the Claimants say that:

(1) the EJ was wrong to find that the new contractual terms on bonus, termination and notice were void;

(2) she should have found that Messrs Lax and Pull were assigned to the relevant grouping of employees;

(3) she was wrong to find that Mr Kevill had caused or contributed to his dismissal for the purposes of section 123(6) of ERA and to make the **Polkey** finding;

(4) she should have awarded the maximum 13 weeks' pay by way of compensation for the breach of regulation 13(4) and should have awarded such compensation in favour of all the Lancer employees, not just the Claimants.

I will take the issues in that order.

Were the new contractual terms as to bonus, termination payment and notice void?

12. At para 167 the EJ concluded that these terms were void, considering "regulation 4(4) in the light of the abuse principle …" The parties agreed with me that the "abuse principle" could not properly be relevant to the interpretation of regulation 4(4) and that the issue of interpretation and the abuse principle needed to be considered separately, but it was not disputed that it was open to Astrea to maintain on the appeal that the EJ was correct to find the terms were void on either basis. I consider the proper interpretation of regulation 4(4) first.

Proper interpretation of regulation 4(4)

13. The relevant provisions of TUPE are regulations 4(1) and 4(4) to 4(5B):

> **"(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.**
>
> **...**
>
> **(4) Subject to regulation 9 [which relates to variations where transferors are subject to insolvency proceedings], 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 of employment 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).**
>
> **(5B) Paragraph (4) does not apply in respect of a variation of the contract of employment in so far as it varies a term or condition incorporated from a collective agreement, provided that—**
>
> **(a)the variation of the contract takes effect on a date more than one year after the date of the transfer; and**
>
> **(b)following that variation, the rights and obligations in the employee's contract, when considered together, are no less favourable to the employee than those which applied immediately before the variation."**

14. Regulation 4(4) was introduced with the 2006 version of TUPE and there had been nothing like it in the earlier 1981 version of the Regulations; it was amended in 2014, along with the introduction of new provisions at regulations 4(5) to 4(5B) set out above. There is no doubt that, given the EJ's finding at para 165 that the (sole) reason for the changes to the Claimants' contractual terms was the anticipated transfer, regulation 4(4) would render those new contract terms void if it was interpreted literally. However, it is common ground that TUPE is to be interpreted so as to give effect to the European Acquired Rights Directive from which it derives

(Directive 2001/23/EC and its predecessor Directive 77/187/EEC), which is itself to be interpreted in accordance with any relevant decision of the European Court and applying the "broad purposive" approach adopted to the interpretation of EU legislation, as exemplified by the Supreme Court in **Shanning International v Lloyds TSB Bank plc** [2001] UKHL 31. The Claimants say that, properly interpreted in this way, the "purported variations" referred to in regulation 4(4) must be read as referring only to variations which are "adverse" to an employee, which would not therefore include those we are concerned with. There is no direct authority on the issue.

15. Turning first to the Acquired Rights Directive itself, the most relevant parts provide as follows:

> **"COUNCIL DIRECTIVE ... on the approximation of the laws of Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings ...**
>
> **Whereas:**
>
> **...**
>
> **It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded.**
>
> **...**
>
> **Article 3**
>
> **The transferor's rights and obligations arising from the contract of employment or from the employment relationship existing on the date of a transfer shall, by reason of such transfer, be transferred to the transferee.**
>
> **..."**

The clear purpose of the Directive, based on the wording of the title and the recital quoted, is that of "*safeguarding* employee's rights in the event of transfers of undertakings …"; I observe immediately that, generally speaking, "safeguarding" involves the prevention of something negative or undesirable, as distinct from improving something or making it better. It is also noteworthy that if Art 3.1 were itself interpreted literally it would mean that contractual changes made between the transferor and the employee before the transfer, even if clearly adverse to the employee and made because of the anticipated transfer, would apply as between the transferee

and the employee after the transfer. But no-one has suggested that such an outcome is required by the Directive and it seems plain that a purposive interpretation would allow for and indeed require that adverse changes made by the transferor employer because of the transfer should be considered void. The issue is whether a provision which also voids other (possibly advantageous) changes made because of the transfer is compatible with the Directive.

16. Turning to the European case law, Mr Reade referred me first to the decision of the European Court of Justice in the well-known **Daddy's Dance Hall** case (**Foreningen AF Arbejdsledere Danmark v Daddy's Dance Hall A/S** [1988] IRLR 315). The facts were that immediately after a transfer the employee freely entered into a new contract of employment with the new (transferee) employer which differed from his old contract in several respects including that it contained a provision for 14 days' notice of termination. When the new employer dismissed him with 14 days' notice, proceedings were brought in the Danish courts about the length of notice to which he was entitled, which led to a referral to the European Court of Justice. The Court ruled on the first question referred that on the facts of the case there was a transfer for the purposes of the Directive and, in relation to the second question (ie whether an employee could waive rights under the Directive by entering a new contract if he obtained advantages thereby which did not place him overall in a less favourable position) they went on to say this:

> **"[14] ... [The] Directive ... aims at ensuring for workers affected by a transfer of an undertaking the safeguarding of their rights arising from the employment contract or relationship. As this protection is a matter of public policy and, as such, outside the control of the parties to the employment contract, the provisions of the Directive, in particular those relating to the protection of workers against dismissal because of transfer, must be considered as mandatory, meaning that it is not permissible to derogate from them in a manner detrimental to the workers.**
>
> **[15] It follows that the workers concerned do not have the option to waive the rights conferred on them by the Directive and that it is not permissible to diminish these rights, even with their consent. This interpretation is notwithstanding the fact that, as in the instant case, the worker, to offset disadvantages arising for him from a change in his employment relationship, obtains new advantages so that he is not, overall, left in a worse position than he was before."**

The Court added at [18]:

> **"... As the [transferee] has in fact been substituted for the [transferor] pursuant to ... the Directive in respect of rights and obligations arising from the employment relationship, this relationship may be altered with regard to the [transferee] within the same limits as for the [transferor], on the understanding that in no case the transfer of the undertaking itself can constitute the reason for this alteration."**

The Court therefore decided that it is not possible where the Directive applied for workers to diminish their rights, even voluntarily by agreement. But the Court did not address the issue which arises here, which is whether it is compatible with the Directive to deem an agreed variation made by reason of the transfer void if it was considered advantageous to the employee, in particular such a variation made by the transferor employer rather than the transferee. It is significant that the Court states in para [18] that in no case can the transfer constitute the reason for an alteration, without reference to the nature of the alteration.

17. In a subsequent reference from Denmark (**Landsorganisationen I Danmark v Ny Molle Kro** [1989] ICR 330) the Court of Justice stated at para [25], having referred to the **Daddy's Dance Hall** case, that "... the purpose of the Directive is to ensure, as far as possible, that the contract of employment or employment relationship continues unchanged with the transferee, in order to prevent the workers concerned being placed in a *less favourable position solely as a result of the transfer*" (my emphasis). Mr Devonshire also drew my attention to observations of the CJEU in two cases which relate to the purpose and proper interpretation of the Acquired Rights Directive. In **Alemo-Herron v Parkwood Leisure Ltd** [2013] ICR 1116 the Court stated at para [25] that the Directive "… does not aim solely to safeguard the interests of employees in the event of transfer of an undertaking, but seeks to ensure a fair balance between the interests of those employees, on the one hand, and those of the transferee, on the other". And in **Scattolon v Ministero dell'Instruzione, dell'Universita e della Ricerca** [2012] CMLR 17 the Court stated at para [77] that the Directive "… cannot usefully be invoked in order to obtain an improvement of remuneration or other working conditions on the occasion of a transfer of an undertaking … Directive 77/187 itself is aimed merely at avoiding workers being placed, solely by reason of a

transfer to another employer, in an unfavourable position compared with that which they previously enjoyed."

18. The second case relied on by Mr Reade was a decision of the Court of Appeal, **Credit Suisse First Boston (Europe) Ltd v Lister** [1999] ICR 79. Following a transfer, Mr Lister entered into a new contract with the transferee which contained a covenant preventing him working for a competitor; his previous contract of employment had contained no such provision but the new contract contained many provisions that were more favourable to him than the old one. When the transferee sought an injunction based on the new covenant the judge held that it was unenforceable under TUPE interpreted in the light of the **Daddy's Dance Hall** case notwithstanding that the new contract also gave him compensating benefits. The Court of Appeal upheld this decision on the basis that it was directly covered by the decision of the European Court in **Daddy's Dance Hall**. But the Court expressly declined to address the question of the enforceability of other (possibly advantageous) aspects of the new contract, which the Court said was a question which had not been addressed by the European Court and which gave rise to questions which were "not easy to answer" (see discussion at p 807B-F).

19. The main plank of Mr Reade's argument is the third case he referred me to, the decision of the Court of Appeal in **Power v Regent Security Services Ltd** [2008] ICR 442. In that case, Mr Power's retirement age under his pre-transfer contract of employment was 60. Shortly after the transfer he signed the new (transferee) employer's terms and conditions which said that his retirement age was 65. He was dismissed when he reached 60 and claimed unfair dismissal. The employer (Regent) sought to rely on the then existing provision in ERA which meant he could not claim unfair dismissal after he had reached his normal retirement age, which for these purposes was equivalent to his contractual retirement age. Although Regent had itself agreed

A that his retirement age was 65, they sought to rely on regulation 5(2) of the (then current) 1981 version of TUPE (which reflected art 3(1) of the Directive (see above)) and on regulation 12 of TUPE 1981, which said that any " ... provision of any agreement (whether a contract of employment or not) shall be void in so far as it purports to exclude or limit the operation of regulation 5 ...", to maintain that he could not rely on the agreement that his retirement age was now 65 and that his contractual retirement age remained 60, as agreed with his old employers. The essence of the Court of Appeal's decision was at para [29] and following in the judgment of Mummery LJ:

> **"[29] The safeguarding of an employee's acquired rights on transfer of an undertaking means that a transferred employee, who wishes to take the benefit of the original retiring age of 60 agreed with the transferor, is entitled to do so as against the transferee. If the retiring age is then varied by agreement with the transferee, the employee must be treated as obtaining an additional right not as waiving an acquired right. His acquired right to retire at the original retiring age of 60 is transferred by the 1981 [TUPE] Regulations. The acquired right cannot be removed by his agreement on the transfer of the undertaking or by reason of it. There is, however, nothing in the EC or domestic legislation to prevent the employee from obtaining an additional right. Neither the public policy reflected in the Directive and the Regulations nor the reasoning in the authorities cited by Regent prevent an employee from reaching an agreement with the transferee employer under which he obtains an additional right by reason of the transfer. The transferred employee can then choose between enforcing the transferred acquired right or the newly obtained right.**
>
> **...**
>
> **[32] Regulation 12 does not support Regent's case. Mr Power's reliance on the retiring age of 65 agreed with the transferee, even for a reason connected with the transfer of the undertaking, is not contrary to the prohibition on employees contracting out of the protection and safeguards of the 1981 Regulations. As already explained the agreed variation of his retiring age to 65 could not deprive him of the transferred acquired right to retire at age 60.**
>
> **[33] Regulation 12 is unavailable to Regent. Mr Power has not contracted out of his acquired right as to his retiring age ie the right to retire at 60. Rather than contracting out of, excluding or limiting his transferred acquired right, he has contracted into and obtained a right which he did not previously have, ie he has obtained from Regent the right to continue working, if he so wishes, after the age of 60 and up to the age of 65. There simply is no contracting out of or exclusion or limitation of Mr Power's right to retire at 60, which can be rendered void by the regulation, or disentitle him from relying on the varied retiring age, let alone release Regent from the variation offered by and agreed to by it."**

It is important to recognise that in Mr Power's case (a) the contractual term which the transferee/employer was seeking to avoid (namely that Mr Power's retirement age was 65) was one which *it* had put forward *after* the transfer; (b) there was no provision like regulation 4(4) applying at the relevant time (although by the time the case was decided TUPE 2006 had come

into force); and (c) the transferee employer was seeking to rely, as against the employee, on the anti-avoidance provision found in regulation 12 of TUPE 1981. I do not consider that the case stands as authority for the proposition that regulation 4(4) should be interpreted as applying only to changes which are adverse to the employee for two reasons: first, on the narrow basis that the wording and context of regulation 12 of TUPE 1981 are quite different to those of regulation 4(4) of TUPE 2006; and, second, because what the Court of Appeal says is that the "public policy reflected in the Directive" does not "*prevent* an employee from reaching an agreement with the transferee employer under which he obtains an *additional* right by reason of the transfer"; the Court does not say that the Directive positively *requires* that variations to the employee's terms agreed with either transferor or transferee employer by reason of the transfer which the employee considers advantageous cannot be deemed void consistently with the purposes of the Directive. Further, it is notable that, although the decision is understandable on the merits, the Court of Appeal do not really address the issue of what Mr Power's contractual retirement age was after he had signed the new terms and it highlights the difficulty inherent in deciding what is an "adverse" and what is an advantageous or positive term. Although the solution of saying that it was open to employee to choose which of the two terms to rely on worked in the context of Mr Power's case, this would not always be satisfactory, and it would leave open the prospect that contractual rights would be dependent on the subjective view of the individual employee, who might change his mind from time to time.

20. Mr Reade also drew my attention to the Guidance issued by the Department for Business Enterprise and Regulatory Reform in relation to the amendments made to TUPE 2006 in 2014 which relevantly states as follows:

> **"However, the employer may vary terms and conditions in any of the following circumstances:**
>
> **A. When the reason for the variation is unrelated to the transfer. In this case the sole or principal reason for the variation will not be the transfer and therefore the restriction in the TUPE Regulations does not apply.**

> ...
>
> **E. When changes are entirely positive from the employee's perspective. The underlying a purpose of the Regulations is to ensure that employees are not penalised when a transfer takes place. Changes to terms and conditions which are entirely positive are not prevented by the Regulations."**

With respect to those at the Department responsible for the Guidance, the statement at letter E on which Mr Reade relies can only be of limited persuasive value. In so far as there is authority for it, it would appear to be based on the **Power** case, which I have considered above.

21. At para 20 of his skeleton argument Mr Reade states:

> **"The reason that beneficial changes are not prohibited is immediately apparent: in the context of employee protective legislation voiding entirely beneficial changes could be exploited by employers and leave employees at risk. There are many reasons why an employer may wish to improve terms and conditions or provide a guaranteed bonus ("golden handcuffs") pre-transfer, for example, to secure that employees do not leave, or object to the transfer. If the transferee could then snap its fingers and void those terms, the employees will have been cheated and the aim of the Directive will not have been met. Thus, varied terms that are beneficial to the employee have to be preserved and protected through the transfer."**

It is of course possible to envisage circumstances like those outlined by Mr Reade where an employee may suffer an apparent injustice as a consequence of the voiding provision in regulation 4(4) if it applies to all variations to his contract of employment, including those which he regards as positive. However, it is important to recognise that the provision only applies where *the sole or principal reason* for the variation is the transfer itself; it does not apply if the reason is properly categorised in some other way; since the purpose of the Directive is to *safeguard* (and not to improve) the rights of employees which may otherwise be damaged by reason of a transfer, it seems reasonable to exclude positive as well as negative consequences of the transfer. Further, regulation 4(4) does not apply to a variation where the reason for it is also " .... an economic, technical or organisational [one] entailing changes to the workforce ...". (I note incidentally that it is not difficult to envisage that such a variation (eg to change a place of work) could be regarded by an employee as a positive one). Further, as discussed at great length during the hearing, it may be that an employee in the position of Mr Power, for example, would be able to rely on an

estoppel of some sort in answer to an inequitable reliance by the transferee employer on regulation 4(4). That may be more problematic in the case of a variation agreed with the transferor but such a case may well involve injustice to the transferee employer, as starkly illustrated in this very case, and it is significant in this context that the European Court observed in the **Alemo-Herron** case to which I refer above that the Directive seeks to ensure a fair balance between the interests of transferring employees, on the one hand, and those of the transferee, on the other.

22. Finally Mr Reade referred me to regulation 4(5B)(b) of TUPE 2006 which he said was consistent with the interpretation of regulation 4(4) for which he contended in that it makes specific provision for balancing of terms which are adverse and terms which are advantageous to the employee in certain narrowly defined circumstances. On analysis, it seems to me, for what it is worth, that regulation 4(5B) actually points against the Claimants' interpretation: it refers to a single *variation* which would have been avoided by virtue of regulation 4(4) but which leaves the employee no worse off: that suggests that the "variation" is likely involve both positive and negative provisions which could be balanced off; whereas, if a relevant (ie prohibited) "variation" could only involve negative provisions, there would be nothing to balance against them. I have also had regard to regulation 4(5) and regulation 9 in this context; in general they seem to me to point to the conclusion that regulation 4(4) covers all contractual changes, not just those adverse to the employee.

23. Taking account of these considerations I have come to the view, applying the European "broad purposive" approach to its interpretation, that the words "any purported variation" in regulation 4(4) should be interpreted to cover all types of variation and not just those which are adverse to the employee, as suggested by the Claimants. In summary my reasons are as follows:

(1) This interpretation is consistent with the main purpose of the underlying Directive, as derived from the Directive itself and the EU case-law, which is to *safeguard* employee's rights, not to improve them;

(2) It is not contrary to any European or English authority when properly analysed;

(3) It avoids difficult questions which otherwise potentially arise as to whether a (purported) variation is or is not "adverse" to the employee and reduces the possibility of confusion as to what the terms of an employee's contract are from time to time and the matter being subject to the whim of the employee;

(4) In so far as it might otherwise cause a deserving employee any kind of injustice there are other answers which are likely to cover the situation; and it would tend to reduce the possibility of injustice to a transferee employer in circumstances like those that have arisen in this case;

(5) It appears to be consistent with other provisions within TUPE;

(6) Finally, it is entirely consistent with the literal words used by the legislator.

That conclusion disposes of the appeal in relation to the Claimants' new contractual terms but, in case I am wrong on the question of interpretation, I have gone on to consider the EU "abuse of law" principle and its applicability in this case.

EU abuse of law principle

24. Astrea say that, even if they were otherwise valid, the Claimants were precluded from relying on the new contractual terms because of the EU "abuse of law" principle, which says that EU law cannot be relied on for abusive or fraudulent ends. It was not disputed that this principle was capable of applying to a claim in the employment tribunal based on TUPE and that, if it applied, it would in effect render the new contractual terms void as against Astrea; but the Claimants say that on the facts the principle had no application in this case.

25. I was referred to numerous authorities from the European and English courts where the principle has been described, ending with **Skatteministeriet v T and Y** [2019] 2 CMLR 31, a decision of the Grand Chamber, where the European Court was specifically asked what the constituent elements of an "abuse of rights" are and how they can be established. The Court stated:

> **"[97] As is clear from the Court's case law, proof of an abusive practice requires first, a combination of objective circumstances in which, despite formal observance of the conditions laid down by the EU rules, the purpose of those rules has not been achieved and, secondly, a subjective element consisting in the intention to obtain an advantage from the [EU] rules by artificially creating the conditions laid down for obtaining it …**
>
> **[98] Examination of a set of facts is therefore needed to establish whether the constituent elements of an abusive practice are present, and in particular whether economic operators have carried out purely formal or artificial transactions devoid of any economic and commercial justification, with the essential aim or benefitting from an improper advantage ..."**

26. The Claimants say at paras 25 to 27 of their skeleton argument that on the facts of the case neither the first nor second requirement was satisfied: in relation to the first, the variation of the contractual terms *furthered* the purpose of the EU rules, which was to safeguard employees' rights in the event of a transfer, rather than not achieving that purpose; and on the second, the tribunal was not concerned here with an artificial transaction at all: these were (*ex hypothesi*) valid contracts of employment. Further it was said that the advantage, that is the enhancement of contractual rights, was obtained without any reliance on TUPE.

27. As to the first requirement, as discussed above in relation the proper interpretation of regulation 4(4), the purpose of the Acquired Rights Directive is to *safeguard* the rights of *employees* in the event of a transfer, not to improve them. Absent the application of the abuse of law principle, the effect of the transactions we are concerned with would have been to vastly *improve* the rights of the Claimants when the transfer took place rather than to safeguard their rights as employees; it seems to me that in those circumstances it can properly be said that the

purpose of the EU rules (safeguarding employee rights) has not been achieved, but rather some other purpose (ie substantially improving the rights of the Claimants).

28. As to the second requirement, namely the intention to obtain an improper advantage by carrying out a purely formal or artificial transaction, there was ample material to support the conclusion that this was the Claimants' intention. The fact that the new contracts of employment were valid on the face of it does not assist the Claimants: the very reason that the abuse principle is relevant at all is that there has been formal observance of the rules, such that on the face of it the Claimants would be entitled to what they claim by virtue of TUPE. It was clearly open to the EJ to find that there was no legitimate commercial purpose in Lancer agreeing the new terms and that the Claimants were acting dishonestly in awarding themselves the enhanced contractual terms knowing that it would be paid at the expense of Astrea; those facts, combined with the agreement between the Claimants that the new terms would not apply in relation to any of them who did not transfer to Astrea (see reference to Mr Kevill's email dated 30 August 2017 at para 7 above) lead inevitably in my view to a finding that the Claimants had the requisite intention.

29. I do not really understand the final point Mr Reade seeks to make. The whole basis of the Claimants' claim against Astrea in so far as it related to the new contractual terms was reliance on TUPE; otherwise there was no claim at all.

30. It therefore seems to me that the requirements of the EU abuse of law principle were satisfied and that, although not ideally expressed at paras 166 and 167, the EJ's implicit conclusion that the Claimants' case in relation to the new contractual terms involved an abuse of EU law was one she was fully entitled to reach on the evidence. The Claimants were therefore precluded from relying on the new contractual terms as against Astrea following the TUPE transfer on this ground as an alternative to the regulation 4(4) ground.

Conclusion on issue (1)

31. In view of my conclusions on both the proper interpretation of regulation 4(4) and the EU abuse of law principle, the EJ was right to find that the new contractual terms relied on by the Claimants were void and I reject the appeal in relation to issue (1). I do not consider it necessary to go on to consider other interesting points which have been raised in connection with this issue (relating to the "common law abuse principle", alleged breaches by the Claimants of their fiduciary obligations towards Lancer as directors and the effect thereof in relation to Astrea, and the entitlement of Messrs Kevill and Ferguson to the termination payments on the facts), but these are all points that would potentially remain live should there be a further appeal.

Were Messrs Lax and/or Pull assigned to the group of employees subject to the transfer?

32. To repeat the terms of Regulation 4(1) of TUPE:

> **"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."**

It was common ground that the relevant transfer was a transfer from Lancer to Astrea of the organised grouping of employees which carried out the activity of managing the Berkeley Square Estate on behalf of the owners. The EJ found that Messrs Lax and Pull were genuine employees of their respective service companies and it was accepted that, as employees of a sub-contractor of Lancer, they could in principle transfer to Astrea under regulation 4(1). The issue raised on the appeal is whether the EJ made an error of law in deciding that they were not "... assigned to the relevant group of employees."

33. The relevant legal principles are as follows:

(1) The question whether a particular employee is "assigned" to an organised grouping of resources or employees is ultimately one of fact to be assessed by the employment tribunal on the particular circumstances of the case by reference to all the relevant evidence.

(2) Conceptually the question is distinct from the question whether an employee is part of a relevant grouping of employees.

(3) The test is "organisational" (see: **Botzen v Rotterdamsche Droogdok Maatschappij BV** [1986] 2 CMLR 50 at [14] and [15]); it is not simply a question of looking at the amount of time in fact dedicated by the employee in question to the activities carried out by the relevant grouping.

(4) It is clear that for the purposes of regulation 4(1) an employee is either assigned or not assigned to the relevant grouping: he cannot be "partly" assigned.

(5) In deciding to which part of a business an employee is assigned, it may be relevant to consider " ... the amount of time spent on one part of the business or the other; the amount of value given to each part by the employee; the terms of the contract of employment showing what the employee could be required to do; how the cost of the employee's had been allocated between different parts of the business [but] this is, plainly, not an exhaustive list." (see: quotation from Mummery J in **Buchanan-Smith v Schleicher & Co International Ltd** UKEAT/1105/94 at para [19] of **Edinburgh Home** case referred to below)

(6) In the case of a "single client" business it is very likely that all the employees of the transferor will be assigned to the grouping carrying out activities for the client, but that is not necessarily the case: for example, a particular employee may be assigned to the business of another company in a group of companies (see: **Duncan Webb Offset (Maidstone) Ltd v Cooper** [1995] IRLR 633 at [17]) or his role may be "… strategic and … principally directed to the survival and maintenance of the transferor as an entity ..."

(see: **Edinburgh Home Link Partnership v The City of Edinburgh Council** (UKEATS/0061/11, 10.7.12, at [19]).

34. The EJ set out the legal principles at para 107 of the judgment and considered the evidence she thought relevant at paras 108 to 113. Her conclusions on the issue are contained in para 114. She said: "Making an assessment in the light of this evidence and the relevant law, the Tribunal concludes that for some years neither [Mr Lax nor Mr Pull] was assigned *more than in small part* to the activities of the Estate." Later in para 114 she said: "Both seem in reality to have been *working part-time*, whether through age or poor health, while drawing dividends that reflected their historic role." (Emphasis in both quotations is mine).

35. The Claimants do not really quibble with the EJ's account of the law in para 107 but they say that it is clear she did not apply the legal principles properly, in particular because she took into account how much work was actually being done by Messrs Lax and Pull in relation to the Estate, not for the permissible purpose of comparing it with how much time they spent on other parts of the business to which they may have been "assigned" as part of an overall assessment, but to reach the conclusion that in fact they were not contributing much or any time to the relevant activities and to jump from there to the conclusion that they were not "assigned" to the grouping of employees carrying out those activities without further analysis. Mr Reade relied in his reply submissions in particular on the two statements from para 114 of the judgment referred to above. These statements certainly tend to indicate the EJ was not adopting the right approach and there are other statements relating to the evidence which confirm this impression, for example the statement at para 108 that it "... was hard to see how [Mr Lax] was *engaged in* the management of the Estate as an asset at all, save for agreeing with decisions made by others."

36. Mr Devonshire reminds me that it is not the task of the EAT to go through the judgment with a "fine-tooth comb" and that there were numerous facts and circumstances referred to in paras 108-114 which together went to the EJ's overall assessment. In the case of Mr Pull in particular, he says that his own evidence was that he worked on the business of other group companies and spent only 25% of his time on Lancer.

37. Even bearing these points in mind, I have come to the view that the EJ's reasoning indicates that she has approached the issue wrongly, without having properly in mind the fundamental nature of the question she was asking herself (ie whether Messrs Lax and Pull were "assigned" in an organisational sense to the relevant grouping). Nor are her findings of fact sufficiently clear for me to say confidently that she reached the right answer regardless of a few errors of expression; but equally I do not think on the material I have that it would be right for me to conclude the matter in favour of the Claimants myself. In those circumstances I must allow this part of the appeal and remit the issue to the employment tribunal to consider afresh in the light of the evidence already received, along with any consequential matters which arise if there is a finding that Messrs Lax and Pull did transfer to Astrea under TUPE.

38. The Claimants also relied in the notice of appeal on this part of the case on the submission that the EJ's finding was "... against the weight of the evidence." (see para 3.2). That would not normally provide an arguable basis for an appeal but given the conclusion I have already reached that the issue needs to be remitted to the employment tribunal I need not consider it further.

Mr Kevill: contribution and Polkey

39. Having concluded that Mr Kevill had been unfairly dismissed by virtue of regulation 7(1) of TUPE because the sole or principal reason for the dismissal was the transfer, the EJ went on to consider contribution and **Polkey** deductions. At paras 176 and 177 she found that Mr Kevill had behaved in a way that was blameworthy (a) in devising and leading "the inflation of the contract terms" (b) by being deliberately obstructive in the face of the owner's requests for information "for months" before the transfer and (c) by being contemptuous of the owners on racial grounds behind their backs (in things he said to Mr Easter). She went on to find at para 179 that this conduct was such that any award to Mr Kevill should be reduced by 100% under sections 122(2) (basic award) and 123(6) (compensatory award) of ERA. She also found at para 178 that if a proper process had been carried out he would have been dismissed (by implication fairly) by Astrea within three weeks of the transfer. Mr Kevill appeals against the section 123(6) finding and the **Polkey** finding.

40. In order for a reduction to be made under section 123(6) a tribunal must find that the relevant dismissal was "to any extent caused or contributed to by any action of [the Claimant]". The notice of appeal at para 4.2 says that because the reason or principal reason for Mr Kevill's dismissal was found to be the transfer his conduct *cannot* have been caused or contributed to it. That is clearly wrong: it is quite possible for there to be more than one relevant cause for these purposes.

41. It is right to say, however, that there is no express finding in the judgment as to whether (and, if so, to what extent) Mr Kevill's conduct caused or contributed to his dismissal. Mr Reade drew my attention to paras 47, 48, 119 and 120 of the judgment where the EJ made express findings that Mr Easter had made a firm decision by May 2017 that he did not want to take on

Mr Kevill when the transfer took place (and, it followed, that he was dismissed because of the transfer); in those circumstances, he says, since the decision had already been made in May, it would not have been open to the EJ to find that Mr Kevill's conduct thereafter caused or contributed to his dismissal to any extent. Mr Devonshire responded by suggesting that Mr Kevill's conduct after May 2017 and immediately before the transfer may have "re-inforced" a decision already made and thus *contributed to* the dismissal, but the EJ does not expressly consider such a case. It is also fair to say that part of the blameworthy conduct (that is the obstruction in the face of requests for information from the owners) took place before May 2017 (a matter considered rather inconclusively by the EJ at para 119).

42. It seems to me that, in the absence of any express findings by the EJ on causation and given the uncertainties on the point, the 100% reduction in the compensatory award cannot stand but that the right course will be to allow the appeal in relation to section 123(6) and remit the question of a deduction under that provision to the employment tribunal.

43. So far as the **Polkey** finding is concerned, it is said in the notice of appeal that all the conduct relied on arose in the period when Mr Kevill was an employee and director of Lancer and owed no duties to Astrea and/or that in any event it did not involve any breach of duty (in either capacity) towards Lancer. Without analysing this point in any detail, it seems to me plain that it is misconceived. The relevant question was whether Mr Kevill's dismissal by Astrea after the transfer date would have been fair if they had gone through a proper process, ie, adopting the words of section 98(4) of ERA, whether it would have been reasonable for Astrea to have treated the conduct relied on as a sufficient reason for dismissing him. In my view it is clear that Astrea would have acted perfectly reasonably in regarding Mr Kevill's conduct as sufficient reason to dismiss him. There is no requirement in section 98 that such conduct should involve a breach of

any contract of employment or that it should amount to gross or other "misconduct" in the technical sense or be "aimed" at either the transferor or transferee employer and, in any event, even if it was not properly categorised as a reason which " ... relate[d] to the conduct of the employee", it could properly have been categorised as "some other substantial reason".

44. At para 93 of the Claimants' skeleton argument there is a separate point which is not raised in the notice of appeal. It is said that, if Mr Kevill had in practice transferred to Astrea, he would have remained in Astrea's employment and not been dismissed quickly for his "pre-transfer conduct" and that the parties would have "smoothed things over". That seems to me a rather unrealistic factual scenario but, in any event, the EJ made a clear finding of fact at para 178 for which there was a good evidential basis that " ... he would have been dismissed ... within three weeks." It is not open to Mr Kevill to attack that finding of fact on an appeal to the EAT.

45. I therefore have no hesitation in rejecting the appeal in relation to **Polkey**. On the basis of the EJ's finding at para 178 Mr Kevill's compensatory award will be limited on any view to loss sustained as a consequence of being dismissed three weeks earlier than he would have been if he had been allowed to transfer to Astrea.

Compensation for breach of regulation 13(4) of TUPE

Legal and factual context

46. Under regulation 11 of TUPE there is an obligation on the transferor in a contemplated TUPE transfer to provide the transferee with "employee liability information" relating to employees assigned to the relevant grouping not less than 28 days before the transfer; "employee liability information" includes the particulars of employment required under section 1 of ERA 1996 (see: regulation 11(2)(b)). The remedy for a failure to provide such information is an award of compensation to be paid by the transferor to the transferee (see: regulation 12).

47. There is also a duty on the transferor to provide certain information to representatives of its affected employees "... long enough before a relevant transfer ..." to enable consultation to take place (regulation 13(2)); that information should include any "measures" which the transferor envisages will be taken by the transferee in relation to affected employees who will transfer (regulation 13(2)(d)); there is a concomitant obligation on the transferee to give the transferor information which will allow it to comply with regulation 13(2)(d) (see: regulation 13(4)).

48. Regulation 15(1) enables employee representatives, union representatives and employees to complain in certain circumstances if employers have failed to comply with regulation 13 (or regulation 14 which relates to organising the election of employee representatives). Regulation 15(7) provides:

> **"Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award."**

"Appropriate compensation" is defined in regulation 16(3) in this way:

> **"Appropriate compensation" in regulation 15 means such sum not exceeding thirteen weeks' pay for the employee in question as the tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty."**

49. The EJ found that Astrea were in breach of their obligation in regulation 13(4) in relation to the Claimants because it was not until 21 September 2017 that Mr Ferguson was told in response to his question in a meeting that he was to report for work on 29 September 2017 and it was not until 25 September 2017 in the "measures letter" that Messrs Kevill, Lax and Pull were informed that they would not transfer and were dismissed. For this she awarded three weeks' pay in favour of each of the Claimants; in Mr Kevill's case, this amounted to £33,230 (there being

no statutory cap on a week's pay for the purposes of these provisions as there is in the context of a redundancy payment, for example.)

50. The Claimants appeal against this decision because they say that (a) the EJ took into account irrelevant factors when assessing the "appropriate compensation" and should have awarded the maximum 13 weeks' pay and (b) on a proper reading of regulation 15(7) there should have been compensation awarded to *all* the Lancer employees and not just the four Claimants.

Quantum

51. I was referred to **Todd v Strain** [2011] IRLR 11, a decision of the EAT (Underhill P and members) relating to the proper approach to assessing "appropriate compensation" from which I derive the following propositions (which are based in part on the decision of the Court of Appeal in **Susie Radin Ltd v GMB** [2004] IRLR 400 which relates to "protective awards" under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)):

(1) The purpose of "appropriate compensation" is, notwithstanding its name, to provide a sanction for breaching the terms of regulations 13 and 14, not to compensate employees for loss they have suffered as a consequence of the breach;

(2) ETs have a wide discretion to do what is just and equitable in all the circumstances, but the focus should be on the seriousness of the employer's breach, which may vary from a technical breach to a complete failure to comply with its obligations;

(3) An assessment of the "seriousness" of a breach involves considering not only of the employer's "culpability" (which would include a consideration of how deliberate any breach was) but also its consequences in practice, which might include the emotional impact on relevant employees (see para [30] of **Todd**).

However, it does not seem to me that the concept of taking the maximum award as the starting point and reducing the award only if there are mitigating circumstances, which is referred to in the **Susie Radin** case at para 45(5) in the judgment of Peter Gibson LJ, is likely to be a helpful one in the context of breaches of regulations 13 and 14 of TUPE: not only are the factual circumstances always going to differ but "appropriate compensation" (with the same maximum of 13 weeks pay) is designed to cater for different types of breach of regulations 13 and 14 by different types of employer: thus, we are concerned here with a transferee employer in breach of regulation 13(4) while the **Todd** case was concerned with a transferor employer in breach of regulations 13(2) (provision of information), 13(6) (an obligation to consult about measures) and 14 (the obligation to organise election of employee representatives).

52. Having set out the relevant background at paras 131 to 139 the EJ in this case held at para 140 that the appropriate compensation was three weeks' pay in the case of each of the Claimants. She then said that the reasons for this were (to paraphrase) that the breach was serious but it would not be just and equitable to award more than three weeks in the very particular circumstances of this case where the Claimants were the people making the decisions about providing "employee liability information" and that information could have been supplied earlier than the statutory time limit (1 September 2017) but was not because the contracts were not ready because they were being revised in contemplation of the transfer and there was tactical play on both sides in relation to providing information.

53. The Claimants say that these reasons were irrelevant to the decision the EJ was making and that the compensation awarded cannot therefore stand. I accept that para 140 could have been better expressed and could have focussed more clearly on the "seriousness" of Astrea's default. Nevertheless, it seems to me that, read with the preceding paragraphs, the reasoning and

conclusion of the EJ were supportable. It was in my view relevant to Astrea's culpability that the "measures" in relation to the Claimants which needed to be decided on and then communicated were delayed to an extent because of the content of the new employment contracts which were only revealed to Astrea 28 days before the transfer date and that the delay was part of a "game" in which both sides were being tactical; and it was relevant in considering the effect of the default on the Claimants that they personally "knew the score" (and there are a number of places in the preceding paragraphs where the EJ observed that they must have suspected what was coming) and that they were not in practice employees who were going to need to be "consulted" about what was going to happen.

54. In the light of what the EJ says at para 140 and her findings as a whole, I agree with her conclusion that an award of more than three weeks' pay in respect of any of the Claimants would not have been "just and equitable" having regard to the seriousness of Astrea's breach in this case properly assessed. This was very far from the paradigm "really serious" case where, for example, a transferor employer had wholly failed to inform or consult its employees and the first they had heard about a transfer was on the very day it was to take effect, causing serious alarm and distress. I reject this part of the appeal.

Other employees

55. The relevant parts of regulation 15 are as follows:

> **"Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—**
>
> **(a)in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;**
>
> **(b)in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;**
>
> **(c)in the case of failure relating to representatives of a trade union, by the trade union; and**
>
> **(d)in any other case, by any of his employees who are affected employees.**

> **...**
>
> **Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.**
>
> **...**
>
> **(10) An employee may present a complaint to an employment tribunal on the ground that he is an employee of a description to which an order under paragraph (7) ... relates and that—**
>
> **in respect of an order under paragraph (7), the transferee has failed, wholly or in part, to pay him compensation in pursuance of the order;**
>
> **...**
>
> **(11) Where the tribunal finds a complaint under paragraph (10) well-founded it shall order the transferor or transferee as applicable to pay the complainant the amount of compensation which it finds is due to him."**

In this case there was no union or employee representative so the complaint about Astrea's failure to provide "measures" information was presented by the Claimants under regulation 15(1)(d). It is the Claimants' position on appeal that, having found the complaint against Astrea well-founded, the EJ ought to have ordered Astrea to pay appropriate compensation not only to them but also to the other seven Lancer employees.

56. It is right to say that on a completely literal reading of regulation 15(7) it would appear to be open to the ET to order compensation to be paid to "affected employees" who are neither parties to the proceedings nor represented before it by a union or an employee representative. That, however, would be a very surprising result on general principles and it would run counter to the decision of the EAT in **Independent Insurance Company Ltd v Aspinall** [2011] IRLR 716 relating to the analogous provisions in sections 188-189 of the TULRCA 1992. As the EAT said in that case such a provision would be "wholly unprecedented" and represent "an amazing sea change" and it would undoubtedly produce very unsatisfactory procedural and evidential anomalies. The Claimants say that regulation 15(10) would be redundant if an individual claimant can only obtain an order in his own favour; I do not understand that submission: regulation 15(10)

provides an enforcement mechanism which can be used by individual affected employees on whose behalf appropriate compensation has been ordered at the behest of a trade union or employee representative. They also say that the anomalies can be dealt with in the context of the individual complaint under regulations 15(10) and (11); it does not seem to me, however, that it would be a remotely satisfactory process for the ET to make an order for the payment of a certain amount of compensation, for the employer to ignore that order, for the relevant employee to seek to enforce it and then for the employer to be able to raise issues as against the specific employee for the first time, and it does not seem to me that the wording of the provisions is close to suggesting that such a process was envisaged by the legislation. It seems to me clear by necessary implication that on a complaint under regulations 15(1)(d) (or indeed 15(1)(a)) the ET can only order "appropriate compensation" to be paid to an individual employee who brings a complaint.

57. In any event, even if it was open to an ET in principle to order compensation in favour of an employee who was neither a claimant in his own right nor represented by a union or employee representative, it is clear that under regulation 15(7) such an order would be discretionary. I find it hard to imagine any case where it would be appropriate to make an order in favour of such an employee and, even if there was such a case, I am quite satisfied that it is not this one.

58. I reject this part of the appeal without hesitation.

Conclusion and disposal

59. For those reasons I allow the appeal in relation to the issues (a) whether Messrs Lax and Pull were assigned to the grouping of employees which transferred to Astrea and (b) whether Mr Kevill's compensatory award should be reduced under section 123(6) of ERA and, if so, by what proportion; but I dismiss all the other grounds of appeal raised by the Claimants.

60. The Claimants' position in the notice of appeal was that the EAT should itself determine that Messrs Lax and Pull transferred to Astrea and were automatically unfairly dismissed and that the reduction in Mr Kevill's compensation should simply be set aside. For reasons already indicated I consider that these matters should be remitted to the employment tribunal. Mr Reade submitted at the conclusion of the hearing that any remitted questions should go to a different judge because EJ Goodman has reached certain views and may find it difficult to look at matters afresh while there are comprehensive findings of fact and full transcripts of evidence from which a new judge could work. It seems to me that it would be much preferable if the case went back to EJ Goodman who heard all the evidence and will be in a much better position than anyone else to make the judgments required on a remission. Given in particular the limited nature of the remission I see no reason for concern about her not being able to bring an independent mind to the case hereafter.

61. I therefore direct as follows:

(1) The appeal is allowed only in relation to the findings that:

(a) Mr Lax and Mr Pull were not assigned to the relevant grouping of employees;

(b) Mr Kevill's compensatory award was reduced by 100% under section 123(6) of the ERA 1996.

(2) Those two matters are to be remitted to EJ Goodman (unless that is impracticable in which case the Regional Employment Judge is to assign another judge) who is to reconsider them in the light of this judgment and further submissions of the parties and then to adjudicate on any consequential issues arising from such reconsideration;

(3) No further evidence is to be taken relating to the two matters remitted and any purely factual findings already made by EJ Goodman are to stand;

(4) The remainder of the appeal is dismissed.