Appeal No. UKEAT/0155/20/LA (V)

EMPLOYMENT APPEAL TRIBUNAL

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

Heard remotely
10 December 2020
Judgment handed down on
4 March 2021
.

Before

HIS HONOUR JUDGE SHANKS

(SITTING ALONE)

MR G LEWIS APPELLANT

DOW SILICONES UK LIMITED RESPONDENT

JUDGMENT

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APPEARANCES

For the Appellant	MR OWEN PRYS LEWIS (of Counsel)
For the Respondent	MR CHRISTOPHER HOWELLS (of Counsel) Instructed by: Capital Law LLP Capital Building Tyndall Street Cardiff CF10 4AZ

SUMMARY

TRANSFER OF UNDERTAKINGS

The Claimant resigned after a TUPE transfer and claimed unfair dismissal relying on alleged fundamental breaches of contract by his employer and/or on regulation 4(9) of TUPE arising from the introduction of new standby/call out arrangements and the extension of his duties in relation to safety. The ET rejected his claim that he was to be treated as dismissed on either basis, finding (a) that under his existing contract the employer was entitled to introduce the changes and (b) that the changes were not "substantial change(s) in working conditions to [his] material detriment".

On his appeal the EAT held:

(a) that the ET's finding that under the claimant's existing contractual terms the employer was entitled to introduce the changes was open to it; but

(b) that that finding was irrelevant to the issue under regulation 4(9); and the finding that the changes were not substantial and to the claimant's material detriment were perverse on a proper application of regulation 4(9), as explained in **Tapere v South London and Maudsley NHS Trust** [2009] IRLR 972.

Accordingly the appeal was allowed and the issue of unfair dismissal remitted to the ET.

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HIS HONOUR JUDGE SHANKS

Introduction

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1. Mr Lewis, the Appellant, worked at the Combined Heat and Power Plant in Barry in South Wales as one of ten operations technicians. He started in June 1999. Initially he was employed by Npower. The Respondent, Dow Silicones UK Ltd, bought the plant in 2013 but the staff were outsourced to Engie Renewals Ltd, who became Mr Lewis's employer. In 2017 Dow decided to "insource" the staff; this involved them transferring from Engie to Dow under the Transfer of Undertakings (Protection of Employment) **Regulations 2006** (TUPE) on 1 March 2018.

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2. It was Dow's intention to make changes to the working arrangements at the plant. Mr Lewis was not happy with these changes and he resigned on 5 March 2018 claiming unfair dismissal. His case was that Dow were acting in fundamental breach of his contract of employment and that his resignation gave rise to a constructive dismissal and/or that he could rely on regulation 4(9) of TUPE which provides:

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> **"… where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of a person whose contract of employment is or would be transferred under paragraph (1), such an employee may treat the contract of employment as having been terminated, and the employee shall be treated for any purpose as having been dismissed by the employer."**

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3. The Employment Tribunal in Cardiff (EJ Harfield, Mrs Palmer and Mr Charles) decided in a judgment issued on 24 December 2019 that there had been no dismissal on either basis and that his claim therefore failed. He appeals on the grounds that that decision was perverse.

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Relevant Facts

4. There was no individual written contract of employment relating to Mr Lewis before the Tribunal but it was common ground that the Npower collective agreement for graded staff dated May 2012 was incorporated into his contract. This stated that the normal working week was 37 hours (cl 4.1) and that management would determine "work patterns by reference to operational requirements" (cl 4.2). There was provision at cl. 4.4 for payment of a shift and unsocial hours allowance, which was apparently £10,345 in Mr Lewis's case. Mr Lewis was entitled to 31 days annual holidays in addition to eight days of bank holidays (cl.6.7). Clause 5.2 of the collective agreement provided that employees would be " … expected to undertake duties and responsibilities commensurate with their grade and competency." Under the Npower "Contribution Statement" for site operations technicians it was provided that one of the key accountabilities was the "application of safe systems of work … which may include taking on the duties of Safety Controller/Safety Co-ordinator as required by the location manager".

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5. Under the system operated at the plant by Engie, two operations technicians worked on each shift and they were each rostered to work 168 hours across a five week shift pattern. This amounted to 1747 hours per year which was less than 37 hours per week, which equates to 1924 hours per year. A practice had arisen whereby the spare 177 hours did not have to be worked but were somehow "drawn down" against holiday entitlement. All overtime worked was voluntary and was paid at overtime rates even where there were spare hours remaining. If cover was required in respect of any shift, someone would ring around and see if cover could be provided on a voluntary basis as a matter of goodwill. Mr Lewis did substantial amounts of overtime under this system, working 400 hours overtime in 2017.

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6. There was no dispute that Dow was going to introduce changes in the way the operations technicians worked at the Barry plant. The main change was to the standby/call-out arrangements. In future, the rota would identify an employee for each shift who could be called on to provide primary cover if required. Each employee would be paid an £9,000 premium for providing 150 hours of such cover; this was to be paid regardless of how many hours he was actually required to work by way of cover. Although the Tribunal found that employees were not forced to provide the cover if circumstances prevented this because of, for example, sickness or childcare difficulties, the system was subject to monitoring and failure to provide cover when required could result in disciplinary action or affect performance related pay.

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7. Further, Dow wished to change the operations technicians' responsibilities in relation to safety. Under the Engie system, engineers, and not operations technicians, were responsible for issuing work control documents to confirm that it would be safe for work to be carried out on a piece of equipment which had failed. Dow wished to introduce a system where operations technicians would issue "Safe Work Permits" to deal with the issue. This was to involve training over a period of six months; it plainly involved important new responsibilities.

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8. There was also no dispute that Dow wished the operations technicians to sign Dow's standard form contract of employment, but the Tribunal rejected Mr Lewis's case that he was threatened with dismissal if he refused to sign the new contract. The Dow contract had no provision for payment of a shift and unsocial hours allowance and only provided for 25 days holiday.

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The appeal

9. Mr Lewis says that a properly directed Tribunal was bound to have found that there was a fundamental breach of contract by Dow and that the transfer would involve substantial changes to his material detriment for the purposes of regulation 4(9) having regard to the proposed changes in relation to (a) standby/call out duties and associated changes to in relation to hours of work and overtime, (b) holiday entitlement, (c) the elimination (or reduction to £9,000) of the £10,345 shift and unsocial hours allowance and (d) the introduction of the new responsibilities in relation to safety.

10. In relation to the changes to holiday entitlement and the shift and unsocial hours allowance, I accept Mr Howells' submission that the Tribunal found that in fact Dow intended to honour Mr Lewis's existing entitlements once they had been established to their satisfaction and that any indication to the contrary resulted from misunderstandings and confusion about his contractual terms before the transfer (see paras 87 and 94 of the judgment in particular). I shall therefore concentrate only on the proposed changes in relation to standby/call out duties and safety responsibilities.

Fundamental breach of contract

11. The Tribunal found that these changes were ones that could properly be made by Mr Lewis's employer within the express terms of his existing contract as found in the Npower collective agreement. In relation to the new standby/call out duties the Tribunal noted that Mr Lewis was contracted to work 37 hours per week and that the proposed 150 hours per year cover was well within this number of hours and that the management had the right to determine work patterns by reference to operational requirements. In relation to the safety responsibilities the Tribunal found (at para 81) that the new duties were "commensurate with Mr Lewis's grade and

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competency" and were within the key accountabilities mentioned in the relevant "Contribution Statement".

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12. It seems to me that these findings were open to the Tribunal on the evidence and I therefore reject the appeal based on fundamental breach of contract and constructive dismissal. I turn therefore to regulation 4(9).

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Regulation 4(9)

13. Regulation 4(9) was considered by the Employment Appeal Tribunal in the case of **Tapere v South London and Maudsley NHS Trust** [2009] IRLR 972; the following propositions from that case are not contentious:

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(1) The regulation can apply even where there is no breach of the employee's contract of employment;

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(2) Whether there is a change in working conditions and whether it is substantial are questions of fact;

(3) The nature as well as the degree of any change needs to be considered in deciding whether it is substantial; and the nature (or "character") of the change is likely to be the most important aspect in determining this;

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(4) The question whether a change in working conditions is to the "material detriment" of an employee involves two questions: (a) whether the employee subjectively regarded the change as detrimental and, if so, (b) whether that was a reasonable position for the employee to adopt.

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14. The Tribunal dealt with the new standby/call-out arrangements at paragraphs 69 to 76 of the judgment. In short, they found that they did not involve a substantial change to Mr Lewis's

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working conditions to his material detriment because (a) Dow had a contractual right to introduce the new system and Mr Lewis "owed" the hours and (b) Mr Lewis already worked additional hours for Engie by way of cover. It does not seem to me that either of these points support the

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Tribunal's finding. The fact that an employer is contractually entitled to introduce a change in working conditions does not mean it is not a change. And the fact that Mr Lewis may have provided many hours of cover by way of wholly voluntary overtime when asked under the previous arrangements cannot mean that effectively having to provide cover when rostered and

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called upon does not represent a change which is of its nature substantial (even ignoring any financial consequences which Mr Howells for Dow said were not raised as such below). Plainly Mr Lewis considered the change detrimental to him and I cannot see any basis for saying that his

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position is not reasonable; as he pointed out to the Tribunal, the new system, involving compulsory standby arrangements, clearly had the potential to impact on his domestic plans and arrangements.

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15. I am therefore of the view that the Tribunal's finding was based on false reasoning and I consider that there was really only one finding open to them in all the circumstances, namely that this was a substantial change to Mr Lewis's material detriment. Their finding to the contrary

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on this point was accordingly perverse.

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16. I have reached a similar conclusion in relation to the new Safe Work Permit arrangements which the Tribunal dealt with at paras 77 to 82 of the judgment. In this case the Tribunal found against Mr Lewis because: (a) under his employment contract it was open to Dow to extend his responsibilities to cover the Safe Work Permit; (b) that it was not a substantial

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extension because he could do it with appropriate training which had already been put in place. As before (a) is irrelevant. As to (b), it seems to me that the fact that a change is within the

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capabilities of the employee after a course of training cannot be determinative and, given the nature of the new responsibilities and the training involved it must have amounted to "a substantial change". Again, it was plainly one that Mr Lewis regarded as detrimental and, again, given the nature of change and the need to undergo training, I do not see how that position can be regarded as unreasonable.

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Conclusion and disposal

17. For those reasons I allow the appeal to the extent that I consider that the Tribunal's findings in relation to regulation 4(9) were perverse. I therefore substitute a decision that by reason of the changes to his working conditions in relation to standby/call-out duties and safety Mr Lewis was entitled to treat his contract of employment as terminated and is to be treated as having been dismissed by Dow. His complaint of unfair dismissal based on regulation 4(9) is accordingly remitted to the Tribunal to determine. Given that this decision is based on findings of perversity, I think the matter should be remitted to a fresh Tribunal but the parties may make representations on the point in writing within 14 days of this decision being promulgated if they disagree with this view.

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