**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4105198/2016 & others as per multiple ref 7959**

**Held in Glasgow on 13 January 2020**

**Employment Judge L Doherty**

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| **Mr B Aitken** | **Claimant**<br>**Represented by:**<br>**Mr Cunningham - Counsel** |
| **K7X Ltd** | **Respondent**<br>**Represented by**<br>**Ms Greg-**<br>**Solicltor** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The Judgement of the Employment Tribunal is that the application under Rule 39 (1) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 (the Rules) is refused.

**REASONS**

1. This case has a very long and complex procedural history which it is unnecessary to rehearse here in detail. In summary, the claimants presented a claim on 7 September 201 6 of automatically unfair dismissal and failure to consult in compliance with the TUPE Regulations. The claim was initially presented against K7X Ltd t/Pro Soccer. The response was lodged in the name of Pro Fives Ltd, who were accepted as being the respondents. Pro Fives Ltd subsequently went into liquidation, and in July 2018 the K7XLtd were sisted as respondents.

2. To date there have a number of applications for strike out of the claims failing which a Deposit Order. Two were made by made by the Pro Fives Ltd which were refused in June and September 2017. The respondents then made and application for strike our failing which a deposit order, which was considered by Employment Judge MacPherson at a hearing in December 201 8. The application to strike it was refused, but a deposit was ordered. The claimants subsequently made an application for reconsideration of that decision, which was granted, and the order was revoked. The respondent's made a further application for the order of a deposit on 3 December 2019, which application has resulted in this Preliminary Hearing being fixed.

3. The purpose of this Preliminary Hearing (P H) therefore is to consider the respondent's application for the order of a deposit against each of the three claimants, under Rule 39 (1) of the Rules. The allegation respect of which the order is sought is:

*"that the claimants were automatically unfairly dismissed when their employment was terminated following a TUPE transfer, and that there was a failure to consult under TUPE, in respect of an asserted TUPE transfer of their employment in Aitken Multi-Purpose Arena Limited to the Respondent K7X on or about one fourth April 2016, whether directly or by a series of transactions. "*

4. The claimants were represented by Mr Cunningham, advocate, and the respondent by Ms Greg, solicitor.

5. For the purposes of enquiry into the claimants means under Rule 39 (2) the claimants each produced a statement of means and resources.

6. An order had been issued by Employment Judge MacPherson that this means and resources statement should be produced by 19 December. There was a failure comply with that order, and the statements were produced on the morning of the PH.

7. Ms Greg accepted that she was in a position to cross examine the claimant's, notwithstanding the failure to comply with the order, and she sought an

adjournment of 20 minutes in which to consider the information contained in the statements. Further to that adjournment, Ms Greg confirmed there was no challenge to the information produced by Courtney Aitken. Brian Aitken, and Elizabeth Aitken both give evidence as to their means and resources and where cross-examined.

8. The respondents had in attendance at the PH a Mr O'Hara, an accountant Ms Greg accepted that the purpose of Mr O'Hara's evidence was to speak to a report produced by the respondent, and included in the bundle of documents before the Tribunal at this PH. She accepted that the respondents would be able to rely upon the terms of that report in making their submissions, without Mr O'Hara giving evidence as to its content.

9. Consideration of an application under Rule 39 is intended to be dealt with by a Tribunal in a summary manner rather than as 'mini proof. The Tribunal was not persuaded that it was necessary for it to hear Mr O'Hara's evidence in order to be directed by the respondents to the content of the report which he had produced, or to relevantly take the document into account in the conduct of the exercise which is required of it in considering and application under Rule 39. Accordingly, the Tribunal proceeded only on the basis of the parties' submissions, other than the evidence given by the claimants referred to above.

**Respondent's submissions**

10. Ms Greg helpfully produced a written outline submission which she supplemented with oral submissions.

11. Ms Greg to the Tribunal to the relevant law and drew its attention to the tests which the Tribunal has to apply in considering an application under Rule 39 (1).

12. Ms Greg submitted that there was a factual dispute between the parties as to whether an economic entity transferred from Aitken Multi-Purpose Arena Ltd (AMPA), to Pro Fives Ltd on or around April 2016. She submitted the claimants provided no specification as to the manner in which any such

economic activity subsequently transferred to K7X, the current respondents. She submitted there was no specification as to any *'series of two or more transactions'* which may have resulted in liability transferring from Pro Fives to K7X. She submitted there was no specification as to the dates of such transactions. Without such specification the claimants could not lead evidence. Without such evidence, there was little reasonable prospect of success of the allegation which is the subject of this application succeeding.

13. Ms Greg submitted this was particularly so given the terms of Mr O'Hara's report, which clearly confirmed that the respondents and Pro Fives Ltd were entirely separate legal entities, trading from different locations, and that K7X Ltd had no involvement with the operations at East Kilbride, where AMPA was based and therefore there was no transfer of any economic entity from Pro Fives to K7X Ltd. Ms Greg submitted that Mr O'Hara was the group accountant for the group of companies of which Pro Fives Ltd and the respondents are part, and was therefore well placed to provide this report, as he was privy to the relevant information which enabled him to do so.

14. Ms Greg referred to the change of employer test relevant to TUPE and submitted there was no relevant specification, and nor was there any relevant specification of an intragroup transfer having taken place. Nor had the claimants provided any specification of a case to the effect that there was a transfer from Pro Fives to K7 X Ltd had occurred by means of the integration of a subsidiary into the parent company. In support of her position on this, Ms Greg referred to the cases of *Millman v Print Factory (London) 1991 Ltd (2007) WWCA Civ 322, (2007) IRLR 526; Jackson Lloyd Ltd and Mears Group pic v Smith UKEAT /0127/13 (4 April 2 014 - unreported); and ICAP Management Services Ltd v Berry EWHC 1321 (QB) (201 7) IRLR 811.*

15. Ms Greg accepted that Pro Fives Ltd was a subsidiary of the respondents but submitted that effectively nothing turned on this. The respondents were not sisted as a party to the proceedings until after Pro Fives had gone into liquidation.

16. Pro Fives Ltd was set up for good commercial reasons as was confirmed in Mr O'Hara's report and she took the Tribunal to parts of that report, including, his conclusion which made the position clear. If the claimants were claiming that there was TLIPE avoidance they would need to give notice of this.

17. Ms Greg submitted that a deposit order should be made, as its purpose was to give fair notice to a party of a perceived deficiency in that case, to identify what that issue is, and how it affects the prospects of success, so they can reach an informed decision to take the risk to proceed with the claim *(Hemdan v Ishmail (2007) IRLR 228.*

18. Further Ms Greg submitted that when determining whether to make a deposit order I Tribunal is not restricted to a consideration of purely legal issues but is entitled to have regard to the likelihood of the party be able to establish the facts essential to his case, and in doing so reach a provisional view is the credibility of the assertions being put forward *(Jansen van Rensberg v Royal London Borough of Kingston- upon- James UKEAT/0095/07 All ER (D) 187 (Nov).* The tribunal must have a proper basis for doubting the likelihood of the party be able to establish the facts essential to the claim or response (para 27).

19. In relation to the amount of the deposit order, Ms Greg submitted that the evidence from Mrs Aitken was unsatisfactory, however she left that as a matter for the tribunal.

**Claimants submissions**

20. Mr Cunningham also helpfully produced outline submissions in writing which he supplemented orally.

21. He submitted that consideration of Rule 39, involved a two-stage test, and that once the Tribunal had passed the threshold of concluding that the claimant had little reasonable prospect of success it had to go on to consider, having regard to all the circumstances of the particular case, whether it should make an order, and in what amount *(Hemden* supra).

22. Mr Cunningham submitted that the purpose of the rule is to identify a weakness in a claim at an early stage. He submitted that the early-stage point had passed in this case. The claims were presented on 7 September 2016, and the respondent at that point had been identified as K7X. The first application for a deposit order was refused on 1 June 2017. The second application was also refused after an oral hearing on 8 September 2017.

23. The third application was granted on 15 January 2019 after hearing on 3 December 2018, but was revoked on 4 October 2019. Mr Cunningham submitted the respondents had produced no new grounds for the third application, other than Mr O'Hara's report. He submitted that making the application so late goes against the guidance in *Hemden.*

24. Mr Cunningham submitted it was relevant that the respondents accept there is a factual dispute between the parties. He submitted the Tribunal should not make a deposit order which could have the effect of limiting access to justice, and he referred to the public policy considerations of TUPE protection.

25. Mr Cunningham also submitted that the deposit order is not appropriate where the true point raised by a party is a lack of specification of a claim *(Tree v South East Coastal Ambulance NHS Foundation Trust EAT 0043/17).*

26. He also referred to the case of *Sharma v New College Nottingham EAT 02871 77* in support of the proposition that reliance on documents which may on face value then some support to respondent's position to justify a deposit order is unsafe.

27. Mr Cunningham submitted that whether or not there was a relevant transfer is a matter of fact for the tribunal, and he referred to the guidance in the case of *Cheeseman v Brewer EAT/909/Eat/959/98 (2001) IBLR 144* and *Spikers v Gebroeders Abbattoir ECR (1986) 1119.* He submitted that the Tribunal must look at all circumstances in the round, and the fact that the business or undertaking is integrated into the organisational structure of the transferee does not preclude a finding that the transfer has taken place *(Klarenberg v Ferrotron Technologies GmbH (EC J)(2009) ICRE 1263).*

28. Mr Cunningham submitted that where there is a real factual dispute between the parties that would suggest that the test in Rule 39 (1) has not been met *(Hemdan).*

29. Mr Cunningham submitted that the ET1 Set out clearly and concisely the essential facts and circumstances that give rise to the claim that there was a relevant transfer to the Respondent. He accepted however that the claimants could provide specification of how it is said there was TUPE transfer of the the current respondents.

30. Mr Cunningham also submitted that this is a case where there was good evidence of a TUPE avoidance strategy, and as such evidence can create a strong influence of relevant transfer (AD/ *Ltd v Firm Security Group Limited (2001) 3 CMLR 8139).* He referred the tribunal to a series of emails in the documents in support of this position.

*31.* Mr Cunningham submitted that even if the Tribunal were to find that Pro Fives Ltd has a role in the operation of the transferred undertaking, that would not of itself preclude a finding against the respondent, and he referred to the *Print Factory* supra in support of this. He also referred, to the *ICAP case supra* at paragraph 41, and to the *Jackson Lloyd Ltd* case, supra at paragraph 49. Mr Cunningham submitted that a transfer could take place between more than one transferee; *Hyde Housing Association Limited v Layton (2016) ICR para 49.*

32. Mr Cunningham submitted that Respondent's application did not pass the threshold test in section 39 (1) and should be refused.

**Consideration**

33. Rule 38 of the Rules states:

> *(1) Where at a Preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party ('the paying party) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.*

*(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.*

*(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.*

*(4) If the paying party fails to pay the deposit by the date specified, the specific allegation or argument to which the deposit order relates shall be struck out. Where a response struck out, the consequence shall be as if no response had been presented, as set out in rule 21.*

*(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order-*

*fa) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and*

*(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),*

*otherwise the deposit shall be refunded.*

*(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.*

34. The allegation which is the subject of this application is:

*That the claimants were automatically unfairly dismissed when their employment was terminated following a TUPE transfer, and that there was a failure to consult under TUPE, in respect of an asserted TUPE transfer of their employment in Aitken Multi-Purpose Arena Limited to the Respondent K7X Ltd on or about 14 April 2016, whether directly or by a series of transactions.*

35. The test for ordering a deposit under Rule 38 is that a party has little reasonable prospect of success, as opposed to the test for striking out the claim under Rule 37 (1) (a).

36. In considering the application, the Tribunal took into account the guidance given as the approach it should adopt, set out in *Hemden v Ishmail (2007) IRLR 228,* referred to by both parties, and the judgement of Mrs Justice Simler at paragraph 12;

*The test for ordering payment of a deposit order by a party is that the party has little reasonable prospect of success in relation to a specific allegation, argument or response, in contrast to the test for strike out which require tribunal to be satisfied that there is no reasonable prospect of success. The test, therefore is less rigorous in that sense, but nevertheless there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim or defence. The fact that a tribunal is required to give reasons for reaching such a conclusion served to emphasise the fact there must be such a proper basis.*

*The assessment of the likelihood of a party be able to establish facts essential to his or her case is a summary assessment intended to avoid cost and delay. Having regard to the purpose of a deposit order, namely to avoid the opposing party incurring cost, time and anxiety in dealing with the point on its merits that has little reasonable prospect of success, a mini trial of the facts is to be avoided, just as it is to be avoided on a strikeout application, because it defeats the object of the exercise…. If there is a core factual conflict it should properly be resolved at full merits where evidence is heard and tested.*

37. The approach which the Tribunal should adopt to considering an application for a deposit, as opposed to strikeout, is also set out in the case of *Jansen van Rensberg v Royal London Borough of Kingston- upon- James UKEAT /0096/07,* where it is said that tribunals have more leeway in considering a deposit order.

38. The Tribunal also takes into account that that the potential risk of a Deposit Order resulting in the summary disposal of a claim should be mitigated by the

express requirement of Rule 39 (2) that the Tribunal shall make reasonable enquiry into the paying party's ability to pay.

39. In considering this application at the Tribunal take into account not merely that there might be a factual dispute between the parties, but that the exercise of considering whether to grant the deposit order involves the Tribunal in assessing the likelihood of the party against whom the order sought being able to establish the facts upon which they rely.

40. The factual allegations which underpin the claimant's claim are set out in the paper part to the ET 1. Those include that it was a condition of the sale of the AM PA business that it would be transferred as a going concern, and that after 14 April 2016, when AMPA ceased trading , the business continued to trade as a going concern, on the same basis as it had previously traded. The claimants allege that following transfer that signage which had previously been used remained in situ until June 2016, that the equipment which have been used continued to be used, as did furniture fixtures and fittings in the Premises.

41. This, on the face of it, sets out the basis of a claim under TUPE on the basis that there was a transfer of an economic entity, albeit the respondents may not accept all or any of the factual allegations made.

42. The respondents deny there was any transfer under TUPE not only to them, but also to Pro Fives Ltd, who it is accepted was a subsidiary of the respondents, but an entirely separate legal entity, which has now gone into liquidation.

43. There appeared to the Tribunal clearly to be a core factual dispute between the parties as to whether there was a relevant TUPE transfer. It could not be said that this allegation has little reasonable prospects of success at this stage. The question of whether or not there was a relevant transfer for the purposes of the TUPE Regulations, where there are factual disputes as to what occurred, are properly determined by a Tribunal having heard the evidence of the parties, and there was nothing to suggest that the Tribunal had a proper basis for doubting the likelihood of the claimants being able to

establish the facts essential to that position. The Tribunal recognises however that the respondent's argument is that even if there was a TUPE transfer the claimants cannot prove it was to them.

44. Ms Greg's position however is that there is no specification in the claim which would allow the claimant to lead evidence to demonstrate a TUPE transfer from Pro Fives Ltd to the current respondents or a TUPE transfer to them by any other means. Without being able to lead such evidence there is no reasonable prospect of the claim succeeding.

45. That, it appeared to the Tribunal amounted to a complaint about the lack of specification in the claim. Here, the Tribunal obtained helpful guidance from the judgement of Her Honour Judge Eady in the case of *Tree v South East Coastal Ambulance Service NHS Foundation Trust UKEAT /0043/17/LA,* referred to by Mr Cunningham. At paragraph 39 of that judgement it was stated:

*Even if there was a problem identifying the claim in the pleadings, I do not consider that a Deposit Order process is to be used as a shortcut substitute for case management Orders were appropriate in such circumstances (such as ordering of further Particulars, or requiring a party to formally amend the claim, using Unless Orders if need be).*

46. The Tribunal considered it not unlikely that matters have been complicated in this case in that when the claim was originally lodged it was directed against the current respondents, K7X Ltd, trading as Pro Soccer, butthat it proceeded against Pro Fives Ltd after the ET3 response was lodged in their name; the current respondents were sisted after Pro Fives Ltd went into liquidation. The claimants have however identified the legal basis of the claim (automatically unfair dismissal, and failure to consult under TUPE) and have set out factual averments in support of the position that there was a relevant transfer of an economic entity.

47. Mr Cunningham took the Tribunal to correspondence produced in the bundle, which he submitted supported the conclusion that there was a relevant transfer to the current respondents. He accepted that the claimants could

provide additional specification of the basis on which they say there was a relevant transfer to the current respondents.

48. It appeared to the Tribunal that the principal thrust of the respondent's submission was that there was no specification in the claimant's claim that there was a relevant TUPE transfer to the current respondents, and therefore they would be unable to lead evidence to support this, and thus there was little prospect of the allegation succeeding.

49. That deficiency is however is potentially cured by the claimants providing specification, and against the background of the claimants setting out relevant factual averments (albeit these are in dispute ) to support the contention that there was a relevant transfer under TUPE, the Tribunal was not satisfied that it could conclude that it had a proper basis for doubting the likelihood of the claimants being able to establish the allegation which was the subject of the application for the Rule 39 Order.

50. Accordingly, the application is refused.

51. As the Tribunal did not make any order for a deposit it was unnecessary to make findings in fact as to the claimants' means and resources.

52. Mr Cunningham's accepted that the claimants could provide specification of the basis upon which they say there was a relevant TUPE transfer to the respondents this should now be done . The claimants should specify the basis on which they say there was a relevant TUPE transfer to the respondents. This specification should be provided within 14 days of the date of issue of this judgment. The respondents will have 14 days thereafter to respond if required.

53. In order to make meaningful progress the case will be relisted for a final hearing by way of Date Listing Stencil.

54. Consideration of the claimant's application for wasted costs is deferred in the meantime.

Employment Judge: Laura Doherty
Date of Judgment: 16 January 2020
Entered in register: 20 January 2020
and copied to parties