Neutral Citation Number: [2024] EAT 1

Case No: EA-2022-000617-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29 January 2024

Before :

JUDGE STOUT

- -

Between :

Sean Pong Tyres Limited **Appellant**

- and –

Mr Barry Moore (debarred) **Respondent**

- -
- -

Mr McFarlane (instructed by Peninsula Business Services Ltd) for the **Appellant**
No appearance or representation for the **Respondent**

Hearing date: 20 December 2023

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JUDGMENT

SUMMARY

TRANSFER OF UNDERTAKINGS, PRACTICE AND PROCEDURE

The Employment Tribunal upheld the claimant's (C's) claims for unfair constructive dismissal under **the Employment Rights Act 1996 (ERA 1996)** and harassment under the **Equality Act 2010 (EA 2010)**. Both claims were brought against C's former employer (R) but were based factually on harassment by an individual (X), although X was not a respondent to the claim. At the start of the final hearing, R applied to amend its response to argue that, owing to what was said to be a subsequent transfer of the business under **The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE)**, the employment of X had transferred to a new company (Y) and that, by virtue of reg 4 of **TUPE**, R's liability for C's claims had transferred to Y. The Tribunal refused R's amendment application and went on to find in favour of C on both the **ERA 1996** and **EA 2010** claims.

HELD: - **Dismissing the appeal**,

(1) As C's employment had not transferred to Y, he not having been employed at the time of the putative transfer or having been unfairly dismissed prior to the transfer for reasons connected with it, R's liability under the **ERA 1996** could not have transferred to Y (**Humphreys v Oxford University** [2000] ICR 405 applied);

(2) Nor does R's primary liability to C under s 40 of the **EA 2010** transfer to Y in such circumstances, notwithstanding that establishment of that liability may depend in part on R being vicariously liable for the actions of X by virtue of s 109 of the **EA 2010**;

(3) Any error in the Tribunal's handling of the amendment application was not therefore a material error because it could not have made any difference to the outcome;

(4) In any event, the Tribunal was in the circumstances right to approach the amendment application in accordance with the usual **Selkent** principles; R's **TUPE** point was, at best, a potential defence that it should have raised earlier in the proceedings; the Tribunal was right to regard it as not being a 'jurisdictional' issue; the Tribunal had otherwise properly exercised

its case management discretion to refuse the amendment application.

JUDGE STOUT:

Introduction

1. The appellant, Sean Pong Tyres Limited, was the respondent before the Employment Tribunal and I will refer to it as such. The respondent appeals from the judgment of the Employment Tribunal (Employment Judge Fowell, sitting with Ms Jane Lee and Mr Michael Brewer) (the Tribunal) sent to the parties on 7 February 2022 following a hearing that took place over three days on 31 January to 2 February 2022. The Tribunal by that judgment refused the respondent's application to amend its response to plead that its liability for the claims made in the proceedings by Mr Moore (the claimant) had transferred under **The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE)**. The Tribunal went on to find in favour of the claimant that he had been unfairly constructively dismissed contrary to s 94 of the **Employment Rights Act 1996 (ERA 1996)** and directly discriminated against and harassed because of age and race contrary to the **Equality Act 2010 (EA 2010)**. The Tribunal awarded the claimant £7,486 by way of compensation for unfair dismissal and £14,541.21 by way of compensation under the **EA 2010**.

2. Permission to appeal was granted by HHJ Barklem on the papers by order of 13 December 2022 who observed:

> It is arguable that the ET erred in law in refusing the adjournment, and in treating the application as one akin to **Selkent** when in reality it affected the correct identity of the defendant against whom liability should be attributed.

3. The claimant did not file a response to the appeal, or otherwise communicate with the EAT, and so was debarred from further participation in the appeal by Order of the Registrar sealed on 20 June 2023. The claimant did not challenge that debarring order and did not seek to appear at the hearing. I therefore only heard submissions from Mr McFarlane from the respondent. In view of the novelty of the TUPE point raised in this appeal, I reserved judgment.

The Tribunal proceedings and decision

4. As already indicated, the Tribunal upheld the claimant's claims of unfair constructive dismissal, age- and race-related discrimination and harassment. The basis of the unfair constructive dismissal claim was the alleged unlawful discrimination and harassment which had (the Tribunal found) been perpetrated by Mr Owusu. The claimant resigned in response to that conduct on 19 April 2021. He filed a claim with the Employment Tribunal on 1 June 2021. The respondent, through its legal representative Mr Antwi-Boasiako of Peninsula Business Services, submitted a response on 1 July 2021. There was a preliminary hearing on 9 September 2021 before Employment Judge Lancaster at which the respondent was represented by Mr Antwi-Boasiako and the claimant represented himself. Employment Judge Lancaster made a minor amendment to the name of the respondent with the agreement of the parties and with the parties drew up a list of the legal issues in the case, identifying the three specific allegations of harassment/discrimination relied on by the claimant. The case was listed for a three-day final hearing commencing on 31 January 2022.

5. At the start of the final hearing, Mr Antwi-Boasiako raised a preliminary issue with the panel in relation to what he said was a **TUPE** transfer of the respondent's business, including Mr Owusu's employment, on 1 July 2021. He made an application to amend the respondent's response to argue that its liability for the claims had transferred to the transferee (Credential) and for Credential to be joined as a party. The Tribunal's reasons for refusing the respondent's amendment application were relatively short and it is appropriate to include them in full here as they set out all the further information that is required by way of background to the appeal:-

> 9. A preliminary point related to the identity of the employer. According to Mr Owusu's witness statement, his employment transferred to Credential shortly after Mr Moore left. This was supported by Mr Frimpong's statement. If so, a defence was available to the respondent on the basis that their liability for this claim had passed to Credential by virtue of **the Transfer of Employment (Protection of Employment) Regulations 2006 ("TUPE").**
>
> 10. Although this is not a question of the Tribunal's jurisdiction, we raised it with the parties. Mr Antwi-Boasiako had given some thought to it. He proposed to ask us, in the event of a finding against the respondent, simply to transfer liability to

Credential. We explained that that would not be acceptable as they would have had no chance to defend themselves. As an alternative, he applied to amend the company's response to add Credential as a party. That would, he accepted, involve abandoning this hearing, and returning matters to square one, or at least to the position they were in when the company submitted its response to the claim on 1 July 2021. Credential could then file its own response and a further preliminary hearing would be needed before re-listing a hearing.

11. Reviewing the position, not only was there was no mention of **TUPE** in the response form, it was not raised at the preliminary hearing on 9 September 2021. Mr Antwi-Boasiako drafted the grounds of resistance and appeared at that hearing. He was very frank in his application that this aspect had been overlooked but submitted that the interested of justice required that the correct respondent to be made liable, however late it was being raised.

12. We thought we should get some more information about the alleged transfer so we heard briefly from Mr Frimpong. He explained to us that all the work done at this site was for Credential. They would bring in the tyres for sorting, and his staff carried out the tyre-grading service. His company did not own or lease any property there. There was not even a written contract with Credential. It was, to say the least, a very informal arrangement. It came to an end in July 2021 when Credential told him that it was terminated with immediate effect. They offered to take on any staff. Mr Owusu agreed to work for them but the two Erics decided they did not want to, and just left. Despite the lack of any paperwork that sounds very much like a service provision change, as defined at Regulation 3 of **TUPE**, although of course Credential were not here to give their side of the story.

13. That was the factual background to this application to amend. The key test in such cases, applying the principles in the case of **Selkent Bus Company v Moore** 1996 ICR 836, is the balance of prejudice to the parties. Without setting out that guidance at any length, the main three considerations are:

a. The nature of the amendment, i.e. whether it is a minor amendment or the addition of factual details on the one hand, or on the other hand raises entirely new factual allegations;
b. The applicability of time limits to the new claim or cause of action; and
c. The timing and manner of the application to amend.

14. Taking these in turn, firstly this was not a minor amendment. It raised an entirely new issue, and to resolve that issue there would need to be evidence from the respondent and from Credential about whether there had indeed been a **TUPE** transfer in July 2021. (Credential would also be entitled to bring a claim against Sean Pong Tyres Limited for failure to supply information about this potential claim (Regulation 12), so involving them may not have been without cost for the respondent.)

15. The second point concerned time limits. That was not such an important consideration here. Although some time had passed, a party can be added at any stage of proceedings where it appears that there are issues between them and the existing parties which it is in the interests of justice to have determined (Rule 34).

16. The last aspect however - the timing and manner of the application – seemed to us more clear cut. It was made at the 11th hour. Indeed, it was raised after Mr Moore had given his evidence, and at our prompting. Rule 2 of the Employment Tribunal Rules of Procedure sets out the "overriding objective" of dealing with the case justly and fairly. That includes avoiding delay, but only "so far as compatible with proper consideration of the issues." Refusing the application meant avoiding

delay, but would that be compatible with a proper consideration of the issues?

17. By way of comparison, we considered the approach taken when a claim form is presented late. If the employee has a solicitor or skilled adviser who has given the wrong advice or got the date wrong, that is generally the end of the matter. The employee loses the right to bring a claim and their remedy is against the solicitor. In this case, refusing the application meant that the respondent would lose the chance to put forward a defence, i.e. to shift responsibility to Credential. But Credential were not made aware of the potential claim at the time of the transfer and apart from the involvement of Mr Turner in trying to sort it out, described below, had no real part in it. No money changed hands, so it is not a case in which this potential liability was factored into the purchase price. Most significantly perhaps, there was no real explanation for the failure to raise this earlier. Overall it was a very late application involving a fundamental change of position, the abandonment of this hearing and a major delay in proceedings. In those circumstances, we took the view that the balance of prejudice was in favour of Mr Moore and we refused the application.

The respondent's submissions

6. By way of a written skeleton argument and oral submissions, Mr McFarlane submits that the Tribunal erred in law because it wrongly thought at paragraph 10 of its reasons that the respondent's amendment application did not involve 'a jurisdictional issue'.

7. He argues that, if there was a **TUPE** transfer, the Tribunal did not have jurisdiction to make findings against the respondent as, by virtue of regulation 4(2) of **The Transfer of Undertakings (Protection of Employment) Regulations 2006 (SI 2006/246) (TUPE)** the respondent's liability transferred to Credential. He submits that under s 109 of the **EA 2010** the liability of an employer depends on the liability of its employee, in this case Mr Owusu. He submits that, as Mr Owusu's employment transferred to Credential, so too did both his liability to the claimant, and his employer's liability, as being a 'liability under or in connection with' Mr Owusu's employment contract for the purposes of regulation 4(2)(a) of **TUPE**.

8. Mr McFarlane draws support from an decision of His Honour Judge Robinson in the Sheffield County Court in **Doane v Wimbledon Football Club Ltd and ors** (Claim No. 6SE 05063) in which the judge held that Wimbledon Football Club's vicarious liability for an allegedly negligent tackle by one of its players (Mr Holloway) against Mr Doane (then playing for Sheffield United Football Club)

had transferred under what is now reg 4(2) of TUPE to Milton Keynes Dons Ltd (MK Dons) when there was a TUPE transfer from Wimbledon to MK Dons under which Mr Holloway's employment transferred. Mr McFarlane accepts that HHJ Robinson's judgment, the copy of which he has provided is not signed, sealed or dated, is not binding on me, but submits that it is of persuasive authority.

9. Mr McFarlane further argues that the Tribunal failed to have proper regard to the principle that time limits do not apply where what is being considered is an addition or change to the parties to the proceedings: **Drinkwater Sabey Ltd v Burnett** [1995] ICR 328 and/or that the Tribunal wrongly treated the amendment as being one within the third category identified by the EAT in **Safeway Stores v TGWU** (UKEAT/0092/07) (i.e. an amendment which adds or substitutes a wholly new claim or cause of action unconnected with the original claim) when it should have treated it as HHJ Peter Clarke held in **Enterprise Liverpool Ltd v Jonas** (UKEAT/0112/09/CEA) at [17] as an amendment merely designed to alter the basis of an existing claim by substituting the correct claimant without purporting to raise a new distinct head of complaint.

10. He also submits that the Tribunal failed properly to weigh the relative prejudice to the parties, given that (in his submission) the claimant would not have lost anything by the amendment being permitted as he could have been compensated by way of a preparation time order for any additional work (albeit not for any time spent at a hearing itself), whereas the respondent was irretrievably prejudiced by having a judgment against it for acts for which (he submits) it was not in law liable.

Relevant legislative provisions

11. Regulation 4 of **TUPE** provides (so far as relevant):

> **4.— Effect of relevant transfer on contracts of employment**
> (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.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

(a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and

(b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

(3) Any reference in paragraph (1) to a person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer, is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in regulation 7(1), including, where the transfer is effected by a series of two or more transactions, a person so employed and assigned or who would have been so employed and assigned immediately before any of those transactions.

(4) Subject to regulation 9, 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 Act2).

…

(6) Paragraph (2) shall not transfer or otherwise affect the liability of any person to be prosecuted for, convicted of and sentenced for any offence.

(7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

(8) Subject to paragraphs (9) and (11), where an employee so objects, the relevant transfer shall operate so as to terminate his contract of employment with the transferor but he shall not be treated, for any purpose, as having been dismissed by the transferor.

(9) Subject to regulation 9, 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.

(10) No damages shall be payable by an employer as a result of a dismissal falling within paragraph (9) in respect of any failure by the employer to pay wages to an employee in respect of a notice period which the employee has failed to work.

(11) Paragraphs (1), (7), (8) and (9) are without prejudice to any right of an employee arising

apart from these Regulations to terminate his contract of employment without notice in acceptance of a repudiatory breach of contract by his employer.

12. Regulation 7 provides, so far as relevant, as follows:-

7.— Dismissal of employee because of relevant transfer

(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee is to be treated for the purposes of Part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for the dismissal is the transfer.

(2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after a relevant transfer.

(3) Where paragraph (2) applies—

(a) paragraph (1) does not apply;

(b) without prejudice to the application of section 98(4)4 of the 1996 Act (test of fair dismissal), for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)—

(i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or

(ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(3A) In paragraph (2), 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).

(4) The provisions of this regulation apply irrespective of whether the employee in question is assigned to the organised grouping of resources or employees that is, or will be, transferred.

13. Sections 94, 111 and 230 of the **Employment Rights Act 1996 (ERA 1996)** provide, so far as relevant:

94.— The right.

(1) An employee has the right not to be unfairly dismissed by his employer.

111.— Complaints to employment tribunal.

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

230.— Employees, workers etc.

(1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.

(2) In this Act "contract of employment" means a contract of service or apprenticeship,

whether express or implied, and (if it is express) whether oral or in writing.

(3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—

(a) a contract of employment, or

(b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

(4) In this Act "employer", in relation to an employee or a worker, means the person by whom the employee or worker is (or, where the employment has ceased, was) employed.

(5) In this Act "employment"—

(a)in relation to an employee, means (except for the purposes of section 171) employment under a contract of employment, and

(b)in relation to a worker, means employment under his contract; and "employed" shall be construed accordingly.

14. Part 5 (work) of the **Equality Act 2010** (EA 2010) includes sections 39 and 40 which provide, so far as relevant:-

39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—
(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—
(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—
(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—
(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(5) A duty to make reasonable adjustments applies to an employer.

…

40 Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—
(a) who is an employee of A's;
(b) who has applied to A for employment.

15. It is also relevant to note that, as originally enacted (and prior to amendment by **the Enterprise and Regulatory Reform Act 2013**), section 40 also included further sub-sections as follows:-

(2) The circumstances in which A is to be treated as harassing B under subsection (1) include those where—
(a) a third party harasses B in the course of B's employment, and
(b) A failed to take such steps as would have been reasonably practicable to prevent the third party from doing so.

(3) Subsection (2) does not apply unless A knows that B has been harassed in the course of B's employment on at least two other occasions by a third party; and it does not matter whether the third party is the same or a different person on each occasion.

(4) A third party is a person other than—
(a) A, or
(b) an employee of A's.

16. Section 83 of the **EA 2010** provides, so far as relevant:

83 Interpretation and exceptions

(1) This section applies for the purposes of this Part.

(2) "Employment" means—
(a) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;

…

(4) A reference to an employer or an employee, or to employing or being employed, is (subject to section 212(11)) to be read with subsections (2) and (3); and a reference to an employer also includes a reference to a person who has no employees but is seeking to employ one or more other persons.

17. Sections 109 and 110 of the **EA 2010** provide:

109 Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or
(b) from doing anything of that description.

(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).

110 Liability of employees and agents

(1) A person (A) contravenes this section if—

(a) A is an employee or agent,
(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and
(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

(3) A does not contravene this section if—

(a) A relies on a statement by the employer or principal that doing that thing is not a contravention of this Act, and
(b) it is reasonable for A to do so.

(4) A person (B) commits an offence if B knowingly or recklessly makes a statement mentioned in subsection (3)(a) which is false or misleading in a material respect.

(5) A person guilty of an offence under subsection (4) is liable on summary conviction to a fine not exceeding level 5 on the standard scale.

18. Section 120 of the **EA 2010** provides, so far as relevant:

120 Jurisdiction

(1) An employment tribunal has, subject to section 121 [armed forces], jurisdiction to determine a complaint relating to—

(a) A contravention of Part 5 (work).

Discussion and conclusions

19. This case raises what is, so far as Mr McFarlane and I are aware, a novel point of law as to the application of **TUPE** where a claim is brought by a claimant employee under the **EA 2010** against his or her employer and there is, subsequent to the acts that are the subject of the claim, a **TUPE** transfer pursuant to which an alleged individual employee tortfeasor (potentially liable to the claimant under s 110(1) of the EA 2010) transfers to a new employer (the transferee), but the claimant's employment does not. I have given full consideration to this novel point in this judgment because I felt it was necessary to do so in order properly to address the other question that arises on this appeal, which is whether the Employment Tribunal erred in law in refusing the respondent's amendment application. However, as will be seen, ultimately I have also been able to determine the appeal on a basis that is not dependent on the final stages of my analysis of the **TUPE** point. I also add this further note of caution for future cases: as a result of the debarring of the claimant in this case, my discussion and conclusions have necessarily been produced without the benefit of adversarial argument.

Liability for unfair dismissal and TUPE

20. Mr McFarlane agreed with a number of propositions that I put to him in the course of oral argument, and which provide the starting point for the legal analysis in this case. He agreed that it is not in dispute that the claimant resigned in April 2021, well before the putative **TUPE** transfer in July 2021 and for reasons unconnected with the transfer. The claimant's employment therefore was at all times with the respondent and he has never been employed by the putative transferee employer, Credential. Mr McFarlane also agreed that, as liability for (ordinary) unfair dismissal lies only with a claimant's 'employer' under the **ERA 1996** and in no circumstances against anyone who is merely an employee or agent of the claimant's employer (i.e. in no circumstances against an employee whose employment might transfer under **TUPE**), liability for the claimant's unfair dismissal claim lies properly with the respondent, which is the correct respondent to that claim.

21. This agreed position as regards liability for unfair dismissal is clear from the terms of regulation 4 itself, in particular sub-paragraphs (1) and (7)-(11), the effect of which is that it is only employees employed immediately before the transfer (and those unfairly dismissed prior to the transfer by virtue if reg 7(1)) whose contracts transfer to the transferee, along with liability for unfair dismissal. Any employee who objects to the transfer under reg 4(7) does not transfer, and thus nor does liability for unfair dismissal of that employee. The position is further confirmed by the Court of Appeal's decision in **Humphreys v Oxford University** [2000] ICR 405, in particular at [39] *per* Potter LJ as follows (referring to the provisions of the previous 1981 **TUPE** Regulations):-

> "…it is clear that to the extent that the common law right of the employee to terminate and sue for constructive dismissal is preserved by paragraph (5), it is a right which exists and must be asserted against the transferor employer. The reason is twofold. First, it is the nature of the common law right and remedy that both exist in respect of the employer who wrongly terminates the employee's contract of employment and cannot be asserted against a proposed transferee. Second, it is because the introductory wording of paragraph (4A) excludes the statutory novation under paragraph (1) and the comprehensive transfer of rights and obligations under paragraph (2); thus the remedy against the transferor employer is not transferred."

Liability under the EA 2010 and TUPE

22. Given that ss 39 and 40 of the **EA 2010** place the prohibition on discriminating against, victimising, harassing, or failing to make reasonable adjustments for, an employee on that employee's employer, it might be thought to be obvious that an employer's liability to a claimant under that Act would work the same way as liability for unfair dismissal under the **ERA 1996** in circumstances such as the present where the claimant's employment has not transferred under **TUPE**.

23. However, Mr McFarlane for the respondent in this case contends otherwise. He does so because of the provisions of s 109(1) of the **EA 2010**, which makes statutory provision for employers to be vicariously liable for the acts of their employees done in the course of employment. That provision itself may be thought unnecessary or duplicative in terms of imposing liability on employers, as it was by the drafters of the unfair dismissal provisions in the **ERA 1996** (and its

predecessors), since even without s 109 of the **EA 2010**, it seems to me that ss 39 and 40 themselves impose liability on employers and, as a matter of ordinary common law principles of vicarious liability, employers would have been liable for the acts of their employees done in the course of employment without the provision of s 109. That s 39 itself creates and imposes 'primary liability' on employers was recognised by Underhill LJ in the Court of Appeal in **Reynolds v CLFIS (UK) Ltd** [2015] EWCA Civ 439, [2015] ICR 1010 at [14] (dealing with a materially identical predecessor provision to s 39 in the **Employment Equality (Age) Regulations 2006** (SI 2006/1031)).

24. However, in common with its predecessor legislation, the **EA 2010** does not stop at creating a statutory tort for which employers are liable, but also contains provision making individual employees and agents of employers liable too. The effect of ss 109 and 110, read together, is not only to make explicit that employers are liable for the acts of their agents and employees, but to render individual employees and agents jointly and severally liable with the employer where they contravene the **EA 2010** when acting (respectively) in the course of their employment or with the employer's authority. By s 110(2), such tortfeasor employees and agents remain personally liable even where the employer manages to establish the defence available under s 109(4) that it took 'reasonable steps' to prevent the contravention and thus relieves itself of liability altogether. It was these provisions that led the Court of Appeal in **Reynolds v CLFIS** (ibid) to hold that, when considering the liability of the employer under the **EA 2010**, it is necessary at least in claims of direct discrimination to establish that there is a particular individual employee or agent who has the necessary discriminatory mindset. The Court of Appeal held that it was not sufficient to 'add together' the mindset of one employee or agent with the acts of another in order to establish liability. Underhill LJ explained the point as follows at [36]:

> 36 In my view the composite approach is unacceptable in principle. I believe that it is fundamental to the scheme of the legislation that liability can only attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination. That means that the individual employee who did the act complained of must himself have been motivated by the protected characteristic. I see no basis on which his act can be said to be discriminatory

> on the basis of someone else's motivation. If it were otherwise very unfair consequences would follow. I can see the attraction, even if it is rather rough-and-ready, of putting X's act and Y's motivation together for the purpose of rendering E liable: after all, he is the employer of both. But the trouble is that, because of the way the 2006 Regulations work, rendering E liable would make X liable too: see the analysis at para 13 above. To spell it out: (a) E would be liable for X's act of dismissing C because X did the act in the course of his employment and, assuming we are applying the composite approach, that act was influenced by Y's discriminatorily-motivated report. (b) X would be an employee for whose discriminatory act E was liable under regulation 25 and would accordingly be deemed by regulation 26(2) to have aided the doing of that act and would be personally liable. It would be quite unjust for X to be liable to C where he personally was innocent of any discriminatory motivation.

25. It is in the light of this analysis (now so well established that Mr McFarlane did not actually refer to <u>**CLFIS**</u> in his submissions) that the respondent in this case submits that the liability of an employer to a claimant employee under the **EA 2010** is a 'transferor's liability … under or in connection with' the contract of the tortfeasor employee such that it transfers under reg 4(2)(a) of **TUPE** to the transferee employer if the tortfeasor employee transfers, even if the claimant employee does not transfer.

26. So far as I and Mr McFarlane are aware, there is no authority under the **EA 2010** dealing with this point. There is authority in the conjoined cases of <u>**Martin v Lancashire County Council**</u> and <u>**Bernadone v Pall Mall Services Groups Ltd and ors**</u> [2001] ICR 197, CA, that tortious liability as well as contractual liability may transfer under reg 4(2)(a), provided it is connected with the employment contract. In both those cases, the employee who was the claimant had transferred to the transferee employer and the Court of Appeal accepted, having thoroughly surveyed the authorities, that the employer's liability to the employee in negligence transferred to the transferee employer under **TUPE** as a liability 'connected with' the employee's contract of employment. In so holding, the Court of Appeal referred to the **Acquired Rights Directive** 77/187/EEC which the 1981 **TUPE** Regulations were intended to implement (since amended and then consolidated in Directive 2001/23) and considered its purpose. Both the 1977 Directive and 2001 Directive state in their preamble that, *"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". The Court of Appeal also referred (at [19]) to the speech of Lord Slynn in **Wilson v St Helens' Borough Council** [1998] ICR 1141 at 1159-60:

> "In my opinion, the overriding emphasis in the Court of Justice's judgments is that the existing rights of employees are to be safeguarded if there is a transfer. That means no more and no less than that the employee can look to the transferee to perform those obligations which the employee could have enforced against the transferor. The employer, be he transferor or transferee, cannot use the transfer as a justification for dismissal, but if he does dismiss it is a question for national law as to what those rights are. As I have already said, in English law there would as a general rule be no order for specific performance. The claim would be for damages for wrongful dismissal or for statutory rights . . . The object and purpose of the Directive is to ensure in all member states that on a transfer an employee has against the transferee the rights and remedies which he would have had against the original employer."

27. The Court of Appeal then went on to consider the more difficult question of whether the transferor employer's right to indemnity from its insurer under its employer's liability insurance also transferred to the transferee employer. The Court of Appeal held that it did on the basis that this was a right of the transferor employer that was 'connected with' the contract of employment of the claimant, albeit that it was a right that arose under the employer's third party contract with the insurer. Peter Gibson LJ (with whom the other members of the Court agreed) recognised the 'force' in the contrary argument advanced on behalf of the transferee employer and insurers in terms summarised as follows in [47]:

> 47 Mr Edelman submits that it is not, because, he says, rights and obligations of the transferor under contracts with third parties cannot fall within the intendment of the Directive or the Regulations. He urges us not to find what might be seen to be a legislative lacuna, when, he submits, the obvious solution to the problem lies in the hands of the United Kingdom in the form of the rights reserved by the second sentence of article 3(1) under which the United Kingdom could provide that there should be joint liability of the transferor and transferee. He argues that to construe article 3 of the Directive and regulation 5(2)(a) so widely as to allow or require rights and obligations under third party contracts to transfer would greatly widen the scope of those provisions and would go far beyond the purpose of the Directive and the Regulations, and he contends that such construction to achieve what may, in the context of the application of the Directive to English law, be a just result would be to allow domestic considerations to affect the interpretation of Community obligations. That he says is impermissible.

28. However, the Court of Appeal rejected Mr Edelman's argument and held that it was consistent

with the purpose of the Directive for the right to an indemnity from the insurers to transfer: see *per* Peter Gibson LJ at [48]-[49] (noting at [49] that any other construction would also allow the insurer to escape from a liability for which a premium had been paid) and *per* Clarke LJ at [64].

29. I should add that the Court of Appeal in **Martin** also referred to the earlier Court of Appeal decision in **Morris Angel Ltd v Hollande** [1993] ICR 71, where it was established that a transferee employer is entitled to enforce against a transferred employee a restrictive covenant in his employment contract, notwithstanding that it was entered into for the benefit of the transferor employer's business. It was argued in that case that so to hold ran counter to the Directive's purpose of protecting employees' rights. However, the Court of Appeal (Dillon LJ at 77F-78A) observed:

> There is no doubt that the protection of employees' rights was the primary objective but any contract of employment is a complex of rights and obligations on each side, and in **Litster v. Forth Dry Dock & Engineering Co. Ltd.** [1989] I.C.R. 341, 350B-C, Lord Templeman summed up the effect of the E.E.C. Directive as being that upon the transfer of a business from one employer to another the benefit and burden of a contract of employment between the transferor and a worker in the business should devolve on the transferee. In the same case Lord Oliver of Aylmerton stated, at p. 354D-E, that, if primary or subordinate legislation enacted to give effect to the United Kingdom's obligations under the E.E.C. Treaty can reasonably be construed so as to conform with those obligations, a purposive construction will be applied even though perhaps it may involve some departure from the strict and literal application of the words which the legislature has elected to use.
>
> The key words in regulation 5(1) are the words: "[the contract] shall have effect after the transfer as if originally made between the person so employed and the transferee." It does have in a sense retrospective effect. Turner J. considered that the service agreement was therefore to be read ab initio as if made between the plaintiffs rather than the company and Mr. Hollande.

30. There are a number of other authorities dealing with transfers of liability under **TUPE** to which I have been referred or have read in the course of preparing this judgment, but Mr McFarlane is in agreement with me that there is no authority that considers the question of whether a liability in respect of an employee who does **not** transfer under **TUPE** may transfer to a transferee employer other than the judgment of HHJ Robinson sitting in the County Court in the **Doane** case, which Mr

McFarlane has located and on which he relies in his submissions. As already noted, Mr McFarlane accepts that this decision is not binding on me, but it is a well-written and careful judgment that refers to the relevant authorities and I have given it significant weight accordingly.

31. The facts of **Doane** were that Mr Doane, playing for Sheffield United Football Club, was injured in a tackle with Mr Holloway, then playing for Wimbledon. Subsequent to the tackle, as HHJ Robinson found, Mr Holloway's employment transferred pursuant to **TUPE** to Milton Keynes Dons ("MK Dons"). Mr Doane brought a claim in negligence against (among others), Mr Holloway personally, and also Wimbledon and MK Dons as being either or both vicariously liable for the actions of Mr Holloway. The question of whether Wimbledon's liability to Mr Doane, by virtue of its vicarious liability for Mr Holloway, transferred to MK Dons was considered as a preliminary issue, and HHJ Robinson answered that question in the affirmative. The key steps in the judgment were as follows:-

a. At [49] HHJ Robinson held that:

> *"a liability arising vicariously out of or by virtue of a contract of employment is classically a 'liability ... in connection with such contract [of employment]…".*

b. At [57]:

> "A Claimant such as Mr Doane, seeking to establish that an employer of the primary tortfeasor is vicariously liable for the tort of his employee, must establish that the act or omission in question arose in the course of the employee's employment with the employer. Thus if called upon to do so, Mr Doane must prove that Mr Holloway was in a contractual relationship with Wimbledon at the material time. Unless he can do so he has no prospect of recovery against Wimbledon. Thus Wimbledon's potential liability to pay damages to Mr Doane is plainly 'connected with' its contract with Mr Holloway."

c. At [58] HHJ Robinson held that it was consistent with what is now reg 4(6) of **TUPE** (which excludes from the rights and obligations that transfer "the liability of any person to be prosecuted for, convicted of and sentenced for any offence") that vicarious liability should transfer because, *"If it had been intended to exclude liabilities to third parties 'in connection with' any relevant contract of employment, then Regulation 5(4) is the place where such further exceptions could, and, in my judgment, would have been so specified"*.

d. HHJ Robinson considered contrary arguments advanced by counsel as to third party liabilities of the transferor employer arising: (a) under a commercial contract with a third party; and (b) under **the Occupier's Liability Act 1957** towards a third party visitor. Counsel had submitted ([60]) that there was "no good reason for the third party visitor to be in [a] different position to the commercial third party, merely because the claim arises vicariously rather than directly against the transferor". At [61]-[62] HHJ Robinson distinguished the two situations as

follows:

> "61. In my judgment, the distinction is directly connected with the different nature of the two types of liability. The claim of the commercial third party is a direct claim against the transferor. The claim of the third party visitor is first and foremost a claim directed towards the employee responsible for the dangerous state of the premises. The same position would obtain if, instead of a claim under **the Occupier's Liability Act 1957**, there was a claim arising out of a road traffic accident caused by the negligence of an employee driver and which resulted in the injury of a fellow employee passenger and a third party driver of a car into which the employer's vehicle had negligently collided. The claim of the injured fellow employee and the third party driver of the other vehicle is first and foremost a claim directed towards the negligent employee driver. In both cases, the employer is vicariously liable and so each injured party as a secondary claim against the employer, in contrast to the commercial third party who has only one claim, which must be made directly against the transferor employer.
>
> 62. Furthermore, a little analysis demonstrates the truly absurd result that would obtain if Mr Lewis is correct in his submission. Assume that shortly after the road traffic accident there is a transfer of undertaking. The injured [fellow passenger] employee may sue the new employer in accordance with the judgment in **Bernadone**. Yet, if Mr Lewis is correct, the injured third party driver of the other vehicle must sue the original employer. And of course, the same result would obtain in **the Occupier's Liability Act** example cited by Mr Lewis in the event that, in addition to the injured third party visitor, an employee of the transferor was also injured by reason of the same defect in the premises."

e. At [63], HHJ Robinson went on:

> "In addition, if Mr Lewis is correct, there is very real risk of injustice to an employee against whom a third party might, in the first instance, direct any claim. This is particularly so if it is only a third party who has been injured in an accident caused by the negligence of an employee. If Mr Lewis is correct, and vicarious liability is not transferred, the third party must direct any claim against the employee and the transferor employer. But what if the transferor employer has now gone out of business, and has no assets or insurance? The employee, who might have expected to have the support of his employer, is left to fight his corner on his own. He loses the advantage of his employer referring the defence of the claim to experienced Defence Solicitors, and loses his right to be indemnified by his employer against such liability. This represents a very significant disadvantage to the employee. The purpose of the legislation is the protection of the employee."

f. At [64], HHJ Robinson concluded in these terms:

> "In my judgment the primary liability of a negligent employee gives rise to the secondary vicarious liability which, in my judgment, is a liability which arises from or in connection with the relevant contract of employment such that it is a liability that transfers under Regulation 5 of **TUPE** [1981]. In that way, the negligent employee has the very real benefit of his new employer taking care of all the matters pertaining to the defence of any claim arising out of negligence related to his employment. Those matters may well include his employer arranging legal representation, undertaking the defence of any claim, and indemnifying him against any liability, which would be the position if the employee's right to be indemnified transfers to the new employer. Those matters represent benefits of such importance to the employee that it seems to be inconceivable that Parliament intended to exclude transfer of the relevant

liability to a new employer."

32. It seems to me that the decision in **Doane** is highly persuasive in respect of the position for the vicarious liability of a transferor employer in tort for the negligent act of employee whose employment has transferred. However, I am not persuaded that the analysis in **Doane** is necessarily applicable to the position in respect of an employer's liability under the **EA 2010** for the following reasons:-

a. **Doane** was concerned with an employer's vicarious liability only, and not an employer's primary liability. Under the **EA 2010**, an employer incurs a primary liability to its employee if it discriminates or harasses contrary to s 39 or s 40. As was especially clear from s 40(2)-(4) as originally enacted (concerning liability of an employer for acts of third parties – see the legislative provision set out above), it seems to me that an employer's liability to its employee under ss 39 and 40 arises independently of the vicarious liability provision in s 109 of the **EA 2010**. When Underhill LJ in **CLFIS** at [36] (quoted above) stated that he believed it was (emphasis added) "fundamental to the scheme of the legislation that liability can **only** attach to an employer where an individual employee or agent for whose act he is responsible has done an act which satisfies the definition of discrimination", he was concerned only with direct discrimination under the Act (and not other forms of discrimination such as indirect discrimination or failure to make reasonable adjustments which do not depend on the 'mindset' of any particular individual) and he was not suggesting an employer's liability under the **EA 2010** only arises as a result of vicarious liability for the acts of an individual. His point, insofar as it is relevant to the issue with which I am concerned, is that, at least for direct discrimination, an employer will not incur primary liability under s 39 unless there is an individual employee who has committed an act of direct discrimination in circumstances caught by s 110 **EA 2010**. In other

words, the unlawful act of the individual employee or agent is a necessary building block to establishing the employer's primary liability at least for direct discrimination and harassment (which have a mental element), but Underhill LJ was not saying that the unlawful act of the employee or agent was the source of the employer's primary liability (and I observe that it may not even be a necessary building block in a claim where there is no mental element, such as indirect discrimination).

b. While it is correct that, in cases of direct discrimination or harassment, the employer's liability to a claimant will, in the light of **CLFIS**, necessarily have a 'but for'-type connection with the individual tortfeasor's contract of employment, it seems to me to be stretching the meaning of reg 4(2)(a) of **TUPE** to say that the employer's primary liability to a claimant employee under ss 39 and 40 of the **EA 2010** is a 'liability under or in connection with' the alleged tortfeasor's contract so as to transfer under **TUPE**. Under the **EA 2010**, the liability of both the employer and the tortfeasor employee are completely dependent on the employer's contractual relationship with the claimant employee; without that contractual relationship the **EA 2010** imposes no duties and a claim cannot even get off the ground. It should be noted in this respect that the liability of an individual agent or employee under s 110(1)(c) also depends on the act in question being one that constitutes a contravention of the Act by the employer against its employee. The Employment Tribunal's jurisdiction under Part 5 of the **EA 2010** depends on their being an employment relationship between employer and employee. It does not depend in all cases on there being an employment relationship between the employer and an individual tortfeasor. As noted, the employer may incur primary liability independently of any individual employee or agent, or vicarious liability in respect of agents and not just employees.

c. 'Connected with' is a term that can have a narrower or wider meaning depending on the context, and it seems to me that, in this context, the connection between the liability and the contract needs to be direct. In all the cases, save for the part of **Bernadone** that was concerned with the insurance indemnity, the connection between the liability and the contract has been direct: the right or liability has arisen under or in connection with the transferring employee's contract with his employer, in the sense of being a right or liability owed by one party to that contract against the other, albeit sometimes in tort rather than contract. The insurance indemnity in **Bernadone** was different, as it was a right and liability under a third party contract, but it is apparent from the Court of Appeal's judgment that strong policy arguments pushed the Court towards the conclusion that the insurance indemnity transferred. It also remains the case that the triggering event for the right/liability under the insurance indemnity was still the employment relationship between employer and claimant employee who had transferred, not an employee who had not transferred.

d. It is, however, clear that it is not sufficient for a liability to be 'connected with' an employee's contract for that employee merely to have had something to do with the liability incurred by the employer. Thus, in the example of the commercial contract liability to a third party discussed in the **Doane** case, the mere fact that an employee who transferred to the transferee employer did the act that led to the transferor employer incurring liability to the third party would not mean it was a liability 'connected with' the employee's contract so as to transfer to a transferee employer under **TUPE**. On the contrary, the liability both arose under, and was only relevantly connected with, the employer's contract with the commercial third party. The same, it seems to me, is true of an employer's primary liability under ss 39 and 40 of the **EA 2010**. Even if vicarious liability under s 109 of the **EA 2010** plays a part in constituting

that liability in a particular case, the primary liability is still one that the employer owes only to the claimant employee and thus it can be said that it only arises 'in connection with' the transferor employer's contract with the claimant employee.

e. In a claim under the **EA 2010** involving an alleged individual tortfeasor, the transferor employer never incurs any liability (or owes any obligation to) the tortfeasor employee. In this respect, the position under the **EA 2010** is quite different to the position in tort where, by dint of s 1 of the **Civil Liability (Contribution) Act 1978 (the 1978 Act)** the tortfeasor employee has an entitlement to claim a contribution from his employer. It was that right which HHJ Robinson must have had in mind in **Doane** when holding that it was consistent with, and necessary to the purpose of, TUPE for Mr Holloway's employer's (Wimbledon's) vicarious liability for his negligent acts to transfer with him to MK Dons. In contrast, under the **EA 2010**, as the law is generally understood to be at present, a tortfeasor employee has no entitlement to claim a contribution against his employer since it was held by the EAT (Underhill J) in **Sunderland City Council v Brennan** [2012] ICR 1183 that the 1978 Act does not apply to claims under the **EA 2010**. If a claimant chooses to bring a claim against an individual tortfeasor under s 110 of the **EA 2010** rather than against his or her employer, that individual tortfeasor must normally face the claim as an individual and has no right to join the employer to the proceedings or seek a contribution from the employer. Under the **EA 2010** there is thus no 'package of rights and liabilities' belonging to the tortfeasor employee that the tortfeasor employee has any interest in transferring to the transferee employer. It follows that, unlike the position with the insurance indemnity in **Bernadone**, there is no policy reason for seeking to strain the natural interpretation of **TUPE**; indeed, the policy arguments point the other way (as to which, see further below).

f. I acknowledge that there is a possibility that the law regarding the 1978 Act might change. The Law Commission in its April 2020 Report (Law Com No 390 at [1.32]) recommended that the 1978 Act be extended to cover liability arising under the EA 2010. It is also possible that the **Brennan** case may be held to have been wrongly decided, given that the decision rests in large part on the view that a tribunal is not a 'court' for the purposes of the 1978 Act – a view that may be questioned given the Court of Appeal's decision in **Irwell Insurance Co Ltd v (1) Neil Watson (2) Hemingway Design Ltd (in liquidation) (3) Darren Draycott** [2021] EWCA Civ 67, [2021] ICR 1034 that the Employment Tribunal is a 'court' within the meaning of **the Third Parties (Rights against Insurers) Act 2010**. However, even if the 1978 Act does apply so that a tortfeasor employee under the **EA 2010** comes to have a package of rights against his employer that ought, construing **TUPE** purposively as the authorities have done, to transfer to his new employer, that would only mean that the transferor employer's vicarious liability should transfer to the transferee employer. It does not follow that the transferor's primary liability should also transfer.

g. I appreciate that the above conclusion might mean that, in the event of a change in the law regarding the 1978 Act, there end up being three respondents to a claim under the **EA 2010**, all liable for the same damage: the transferor, the transferee and the individual tortfeasor (or even a fourth: the insurer), but it seems to me that there is nothing in principle wrong with that. The underlying purpose of **TUPE**, as discussed in the authorities above, is for the complex of rights and obligations connected with a transferring employee's contract to transfer with that employee to the transferee. If there are rights and liabilities genuinely and properly connected with the tortfeasor employee's contract, those should transfer as HHJ Robinson held in **Doane**. However,

it is no part of the purpose of **TUPE** for the complex of rights and obligations in connection with a non-transferring employee to transfer to the transferee. Quite the opposite, as is clear from the well-established position in relation to liability for unfair dismissal set out at the outset of this analysis.

h. Moreover, to construe **TUPE** as having the effect for which Mr McFarlane contends in this case of transferring entirely the transferor's liability to the claimant to the transferee would mean that the claimant in this case would have to bring a claim against a person (the transferee employer) against whom, on the face of the **EA 2010** he has no right to claim at all. The transferee employer has never been (and nor does **TUPE** require that it should ever have been) his employer and so is not a person against whom the claimant can bring a claim under ss 39 and 40 of the **EA 2010**.

i. The construction which I favour also has the merit of ensuring that reg 4(2)(a) of **TUPE** is construed consistently with reg 4(2)(b). By way of reminder, reg 4(2)(b) provides (emphasis added) that "any act or omission before the transfer is completed, of or in relation to the transferor **in respect of that contract or a person assigned to that organised grouping of resources or employees**, shall be deemed to have been an act or omission of or in relation to the transferee". Reg 4(2)(b) thus clearly only transfers to the transferee responsibility for acts or omissions of the transferor in relation to the transferring employee and not in relation to non-transferring employees. My construction ensures that reg 4(2)(a) has the same effect in relation to rights and liabilities under or in connection with the employee's contracts.

The Tribunal's approach to the amendment application

33. It follows from the above that in my judgment, even if there was a **TUPE** transfer from the

respondent to Criterion, and Mr Owusu's employment transferred, the respondent's (primary) liability to the claimant in this case both under the **ERA 1996** and under the **EA 2010** would not have transferred to Criterion. If I am right about that, any error that the Tribunal made in considering the respondent's amendment application would not be a material one and that would be the end of this appeal.

34. I add that, as Mr Owusu was not joined to the proceedings as an individual respondent and so has not himself incurred any liability and, on the current state of the law as regards the 1978 Act (see discussion above), will now never incur any personal liability, there could have been no question in this case of this respondent owing Mr Owusu any obligation that ought to transfer with him under **TUPE** to a new employer consistent with the purpose of **TUPE**.

35. However, as indicated at the start of the Discussion and conclusions section of this judgment, I am conscious that I have not in this case had the benefit of adversarial argument and I therefore go on to consider whether the Tribunal erred in law in its approach to the amendment application assuming that my conclusion above is wrong and that the respondent is right that the effect of **TUPE** (if there was a relevant transfer) was to transfer its liability for the claimant's **EA 2010** claims (but not his unfair dismissal claim) to Criterion.

36. The law applicable to amendment applications has been discussed extensively in the case law and I do not need to add to this already long judgment by reciting much of that here. The starting point remains the decision of Mummery J (as he then was) in **Selkent Bus Co Ltd v Moore** [1996] ICR 836, and the general principles that a Tribunal faced with an amendment application should take into account all the circumstances (including the nature of the amendment, the applicability of time limits and the timing and manner of the application) and balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. In **Vaughan v Modality Partnership** [2021] ICR 535, HHJ Tayler added a number of helpful observations to those general principles, including that there should, when considering the relative prejudice to both sides, be a focus on the

real practical consequences of allowing or refusing the amendment (see [21] of that judgment). HHJ Tayler at [4] also emphasised, correctly in my judgment:

> Determining applications to amend is a core component of case management. As with all case management decisions the employment judge has a broad discretion. The Employment Appeal Tribunal will not interfere with case management unless it is clear that the employment tribunal has made an error of law.

37. The numerous cases that followed **Selkent** led to an attempt by the authors of *Harvey on Industrial Relations and Employment Law* to categorise types of amendment into three groups, which was picked up on by Underhill J (as he then was) in **Safeway Stores v TGWU** (ibid) as follows:

> At paras. 311.03-312.06, the editors adopt a threefold categorisation of proposed amendments which "alter existing claims or add new claims" –
> "(i) amendments which are merely designed to alter the basis of an existing claim, but without purporting to raise a new distinct head of complaint;
> (ii) amendments which add or substitute a new cause of action but one which is linked to, or arises out of the same facts as, the original claim; and
> (iii) amendments which add or substitute a wholly new claim or cause of action which is not connected to the original claim at all".
>
> The discussion which follows points out that there is no difficulty about time limits as regards categories (i) and (ii), since (i) does not involve any new cause of action and (ii), while it may formally involve a new claim, is in truth no more than "putting a new 'label' on facts already pleaded" (see para. 312.01). Cases in category (iii) are discussed at para. 312.04, where the editors say:
>
> "In that situation, the tribunal must consider whether the new claim is in time and, if it is not, whether time should be extended to permit it to be made (**Selkent Bus Co Ltd v Moore** [1996] ICR 836 at 843H).

38. In **Safeway Stores** Underhill J went on to hold that **Harvey** was wrong that category (iii) amendments could not be granted unless the new claim or cause of action was in time, or time could be extended, deciding instead that time limits are not a jurisdictional issue in the context of amendment applications, but merely a relevant discretionary factor to take into account. Mr McFarlane has picked up on this element of the **Safeway Stores** decision in his submissions, and as such dips his toe unnecessarily (it seems to me) into stormy waters with which I need not concern myself on this appeal.

39. For present purposes, I need only note in this respect that there remains conflict in the case

law as to whether time limits act as a jurisdictional bar in the context of an application to amend or are merely a discretionary factor to take into account. In **Galilee v Comr of Police of the Metropolis** [2018] ICR 634, EAT Hand J conducted a thorough analysis of the question and determined that the doctrine of 'relation back' does not apply in the Employment Tribunal so that, where a new claim is presented as an amendment, time limits must be considered as a jurisdictional issue, with the new claim deemed received at the time at which permission is given to amend (or possibly the date on which the application to amend is made, but not earlier): see **Galilee** ibid at para 109(a). **Galilee** was accepted to be correct on this point by Soole J in **Reuters v Cole** (UKEAT/0258/17/BA) at [31]. However, other decisions of the EAT have reached the same conclusion as Underhill J in **Safeway Stores**, albeit (so far as I am aware) without any engagement with why Hand J's analysis in **Galilee** was wrong: see, eg, **Vaughan** (ibid) at [15]; **Chaudhry v Cerberus Service Security and Monitoring Services Limited** [2022] EAT 172 at [34]-[35]; **MacFarlane v Commissioner of the Police of the Metropolis** [2023] EAT 111 at [45], [48], [50] and [69].

40. I do not, though, need to resolve this conflicting case law for the purposes of this appeal. Mr MacFarlane refers to it, it seems to me, because he has misunderstood the Tribunal's reasoning in this case. In fact, it is clear from paragraph 15 of the Tribunal's decision that it understood that time limits have no relevance in this case and it correctly refers to the principle (for which **Drinkwater Sabey Ltd v Burnett**, ibid, is authority) that time limits do not apply where what is being considered is an addition to, or substitution of, the parties to proceedings. The Tribunal's further reference to case law on time limits at paragraph 17 does not, contrary to Mr MacFarlane's submission, indicate that the Tribunal has incorrectly reverted to considering this as a time limits case. Reading the Tribunal's decision as a whole, it is clear to me that its reference to case law on time limits in unfair dismissal cases (where normally an error by a legal representative will be attributable to the party and the party's remedy for the error will lie against the legal representative rather than being allowed to prejudice the other party to the proceedings) is because it was considering, quite properly as the **Selkent** principles

require, where the balance of prejudice lay in relation to the amendment application. It referred to the case law on time limits in unfair dismissal by way of analogy, noting (rightly) that the blame for the lateness of the application could properly be laid at the door of the respondent's representative and that the potential for the respondent to have a remedy against its representative offset to some extent the prejudice it would suffer from the amendment application being refused.

41. When the Tribunal's reasons are thus understood, it is also plain that the Tribunal has not committed the further error that Mr MacFarlane alleges it committed, in that it has plainly not treated the amendment as being one within the third category identified in **Harvey** and **Safeway Stores**, but has properly recognised it as being an amendment designed to alter the basis of an existing claim by substituting a new respondent for part of the claim.

42. I also do not consider that there is any merit in Mr MacFarlane's submission that the Tribunal failed properly to weigh the relative prejudice to the parties. His submission was that the claimant would not have lost anything by the amendment being permitted as he could have been compensated by way of a preparation time order for any additional work (albeit not for any time spent at a hearing itself), whereas the respondent was irretrievably prejudiced by having a judgment against it for acts for which (he submits) it was not in law liable.

43. However, as to the prejudice to the claimant: while the possibility that a party may be compensated for delay in proceedings by way of a costs or preparation time order is in principle a relevant factor for the Tribunal to take into account (see, eg, [27] of **Vaughan**, ibid), Mr MacFarlane does not suggest that this argument was raised by the respondent's representative at the hearing and the EAT will not generally consider an argument that was not advanced before the Tribunal (see paragraph 8.13.1 of the EAT Practice Direction). The Tribunal is not in any event required to list in its reasons all relevant factors, no matter how peripheral their relevance, and as a specialist Tribunal can be taken to be aware of the rules on costs and preparation time orders. In this case, I am satisfied that the possibility of the claimant potentially being partially compensated for the delay by way of a

preparation time order at the rate of £42 per hour of preparation, was not so obvious or significant a factor that it needed to be specifically mentioned by the Tribunal in its reasons. What the Tribunal considered to be the prejudice to the claimant was clearly identified in its judgment as being "a very late application involving a fundamental change of position, the abandonment of this hearing and a major delay in proceedings".

44. As to the prejudice to the respondent, Mr MacFarlane also has no legitimate cause for complaint about the Tribunal's approach to that. The Tribunal expressly acknowledged at [10] that the respondent's case was that the **TUPE** point provided it with a complete defence to the claim. Further, at [17] it is clear from the Tribunal's references to the potential for the respondent to seek a remedy against its solicitor, that it had well in mind that in refusing the respondent's amendment application it was potentially denying the respondent the opportunity of a valuable defence. However, as I have already observed, the Tribunal rightly identifies that the prejudice to the respondent will be significantly lessened because (if the respondent is right about the law) its remedy will lie against its representative for failing to identify the potential defence to the proceedings at an earlier stage. The balancing of the relative prejudices to the parties, which the Tribunal had in my judgment adequately identified, was a matter for the Tribunal.

45. Finally, I need to deal with the respondent's argument that at [10] the Tribunal erred in law in not treating this TUPE point as a jurisdictional issue which needed to be resolved in order for the claim to be determined, akin to the need identified by HHJ Peter Clarke in **Enterprise Liverpool Ltd v Jonas** to have the correct legal person as the claimant. This point is, it seems to me, in part answered by my analysis of the **TUPE** point above. In short, it seems to me that, even if my ultimate conclusion on that point is wrong and the respondent's liability to the claimant in this case could have transferred to Criterion under **TUPE**, it would not follow that the Tribunal had taken the wrong approach to the amendment application. That is for two reasons: first, Mr MacFarlane has not shown me any authority (and I am aware of none) that 'jurisdictional' amendment applications must be considered by

reference to different principles to other amendment applications. HHJ Peter Clarke in **Enterprise Liverpool Ltd v Jonas** proceeded by reference to the standard case law on amendments I have referred to above. Secondly, I am satisfied that the **TUPE** point that the respondent belatedly raised in this case was properly categorised by the Tribunal as a potential defence to the claim rather than a 'jurisdictional' point. As a matter of jurisdiction, what mattered was that this was a claim that fell within Part V of the **EA 2010** as a claim by an employee brought against his employer. That was the only potentially jurisdictional issue. The respondent's **TUPE** argument could never change the fact that the claimant had properly brought the claim against his employer. Rather, the respondent was, as the Tribunal correctly recognised, merely seeking to set up a **TUPE** argument as a potential defence to its liability.

46. As such, I am satisfied that the Tribunal properly directed itself in law on the amendment application and exercised its discretion to refuse the amendment application in a way that was properly open to it on the facts.

Conclusions

47. For all these reasons, I dismiss the appeal.

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