



EMPLOYMENT TRIBUNALS

Claimant: Mr S McCall

Respondent: J & J Ormerod PLC

Heard at: Manchester

On: 26 and 27 October 2023

Before: Employment Judge Cookson

REPRESENTATION:

Claimant: In person

Respondent: Mr Halpin (Solicitor)

PRELIMINARY HEARING IN PUBLIC

RESERVED JUDGMENT

The judgment of the Tribunal is that the claimant was not assigned to the part of the undertaking transferred to the respondent in accordance with Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). In consequence the claimant was not an employee of the respondent, and the claim of unfair dismissal is therefore dismissed because the Tribunal does not have jurisdiction to determine it.

REASONS

Introduction

1. This was a reserved judgment on the issue of whether the claimant was assigned to the part of the undertaking which Employment Judge Cookson determined had been transferred to the respondent. Judgment in relation to that issue was given

orally at the hearing on 27 October 2023 with the judgment sent to the parties on 6 November 2023.

2. Employment Judge Cookson apologises to the parties that due to judicial workload and absence there has been a delay in the provision of this judgment.

3. Employment Judge Ainscough required the following preliminary matter to be determined:

- (1) Whether there had been a relevant transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006; and in particular,
- (2) Whether there was an economic entity that meant there was an organised group of resources with the objective of pursuing an economic activity;
- (3) Had there been a transfer of the economic entity which retained its identity?
- (4) Was the claimant assigned to the economic entity?

The Judgment on 27 October 2023

4. Having considered evidence from the claimant and Mr Greenhalgh for the respondent and contained in the documents contained in a joint bundle of documents, and heard submissions from both parties, EJ Cookson determined as follows:

- a. there was a transfer of part of an undertaking in accordance with regulation 3(1) (a) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE") from Interior Contracts (Kitchens) Ltd to the respondent.
 - b. The part of the undertaking transferred was that part undertaking the design and installation of kitchens for the new homes market but excluding the part of the undertaking concerned with manufacturing of kitchens.
5. There was insufficient time to determine whether the claimant was assigned to the transferred undertaking, but the claimant was given the opportunity to give further evidence and both parties made additional submissions before the Tribunal about this was reserved.

The Law

6. Regulation 4(1) TUPE preserves the contract of any employee who, on the occurrence of a relevant transfer, is '*employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer*'. There is however no statutory test to explain how this issue should be decided.

7. In **Botzen and ors v Rotterdamsche Droogdok Maatschappij BV** 1986 2 CMLR 50, ECJ, the European Court of Justice (ECJ) considered the matter within the context of the Acquired Rights Directive (“The Directive”) which is the EU Directive from which TUPE derives.
8. The *Botzen* case involved a Dutch company that got into financial difficulties. A new company was set up to acquire that company’s activities. The old company’s marine, general engineering, heavy machinery and turbine departments were all sold to the new company but the general administrative, personnel, ship repair or offshore parts of its business were not. The question before the courts was whether the claimants, who were mainly employed in the non-transferred parts of the transferor’s business but who performed some duties for the transferred parts, were entitled to have their employment transferred to the new company in accordance with Article 3(1) of the Directive. The Dutch national court referred the matter to the ECJ for a preliminary ruling.
9. The ECJ ruled that: ‘An employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under Directive 77/187 by reason of a transfer within the meaning of Article 1(1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned.’
10. It is not necessary for the employee to be wholly (or very substantially) engaged in the business or part of the business transferred. Instead, the Tribunal must determine whether the claimant can properly be regarded as assigned to that part.
11. The problem of determining who is assigned to the undertaking being transferred tends to be particularly acute in the context of certain fairly common factual scenarios identified by Mr Justice Morison in **Duncan Web Offset (Maidstone) Ltd v Cooper and ors** 1995 IRLR 633, EAT, as follows:
 - a. X has a business in which it employs a number of persons. X transfers part of that business to Y
 - b. a person is employed by X to work in Y’s business and Y transfers that business to Z
 - c. X, which is part of a group of companies, employs a number of people on X’s sole business. The whole of X’s undertaking is transferred by X to Y. Some of X’s employees worked partly for X and partly for other parts of the group.
12. Morison J offered observations in respect of each scenario, but it is the first scenario which is relevant to this case.
13. **Scenario one:** Regarding the first (i.e. a ‘part-only transfer’), in order to determine which employees were employed in the part transferred it is necessary simply to ask which employees were assigned to the part transferred. Another way of putting the same question is to ask, as the Court of

Appeal did in **Gale v Northern General Hospital NHS Trust** 1994 ICR 426, CA, whether a particular employee was 'part of the ... human stock or resources' of the part transferred. Morison J in *Duncan Web Offset* acknowledged that difficult questions of fact often have to be determined by a tribunal to establish who was and was not 'assigned' to the part of the business that has been transferred; and, for this reason, declined to give general guidance on the matter. However, he accepted that some of the factors that may be relevant included:

- i. the amount of time spent on one part of the business or the other
- ii. the amount of value given to each part by the employees
- iii. the terms of the contract of employment showing what the employee could be required to do; and
- iv. how the cost to the transferor of the employee's services was allocated between different parts of the business.

14. The case law demonstrates that the issue of assignment cannot necessarily be determined simply by establishing the relative percentages of time spent by the employee on activities associated with the part of the undertaking that is transferred compared with any part that is not. However, in **Buchanan-Smith v Schleicher and Co International Ltd** EAT 1105/94 Mr Justice Mummery made the point that the discharge by an employee of duties involving the use of assets or the discharge of beneficial administrative duties for the part transferred are insufficient to constitute 'assignment' to the undertaking.

15. In **Edinburgh Home-Link Partnership and ors v City of Edinburgh Council and ors** EATS 0061/11 the EAT observed — with regard to a 'service provision change' under Reg 3(1)(b) — that it is not the case that every employee who can be linked in some way to the relevant client activity is to be regarded as assigned to the organised grouping of resources or employees responsible for undertaking that activity.

16. In that case the Council had entered into contracts for the provision of care services to homeless people with two organisations: HOP, an unincorporated voluntary association and a charity, and H-L, an incorporated body. C and M had been co-directors of H-L and C was also the sole director of HOP. C's job description for each organisation was almost identical: his days were not divided up between the two jobs and his role was described as 'strategic' for the purposes of delivering the contracted services in accordance with the Council's own service level agreements, with particular focus on an arduous retendering process. His employment contract with H-L came to an end prior to April 2008, after which he returned as H-L's director on a temporary basis. On 27 April 2009 the local authority decided to bring the services previously provided by H-L under the annual service level agreements back in-house.

17. It was accepted by an employment tribunal that this constituted a TUPE transfer, but the tribunal held that M and C had not been assigned to an organised grouping of employees immediately before the transfer. On appeal,

the EAT took the view that it had not been established that the strategic work carried out by M and C was directed towards the delivery of the particular activities for which the Council had contracted. The mainstay of M and C's jobs had not been frontline work concerning homeless care provision at all; rather, the substance of their jobs had required them to carry out other activities not contracted for. The employment tribunal had therefore been entitled to conclude that the claimants were not assigned to the particular undertaking transferred.

Findings of Fact

18. The company that the claimant worked for, Interior Contracts (Kitchens) Limited ("Interior Contracts"), was a specialist kitchen supply company. It supplied bespoke kitchens to property developers for new houses and apartments on a business-to-business basis.
19. The claimant describes the undertaking as the design, manufacture and installation of kitchens on a business-to-business basis for the new homes market. In the Tribunal's judgment on the question of whether there had been a transfer of all or part of the undertaking, that description was accepted although it was also found to be significant the manufacturing undertaken was bespoke.
20. Interior Contracts employed around 50 employees who undertook responsibilities over a factory and within a sales and design team, together with an installation team supported in part by people who were contract workers. Annual turnover had been as high as £7million, but it was hit hard by trading conditions and the covid pandemic. Its turnover dipped over the course of 2020 and 2021 which caused cashflow difficulties and there were unsuccessful attempts to sell the business.
21. The cashflow problems were serious and eventually the secured creditor required the involvement of specialist insolvency services. A buyer was sought, and attempts were made to secure alternative finance. At one stage there seems to have been a suggestion that perhaps a pre-pack administration could be achieved, but that proved not to be the case.
22. On 2 September 2022 the company was placed into administration and joint administrators were appointed. On the same day the employees of the company, including the claimant, were dismissed by reason of redundancy, and in due course redundancy payments were made to them by the Redundancy Payment Service.
23. The former managing director of Interior Contracts was engaged by the respondent company. The respondent is also a kitchen supply company, but its business is based around the provision of "off the peg" kitchen components to the building trade, with a small retail business. It does not manufacture bespoke kitchens.
24. Without referring in detail to the findings relevant to the issue of whether the transfer which are not relevant to the issue of assignment, Mr Greenhalgh who is the managing director of the respondent, saw an opportunity for the

respondent to purchase some assets from the administrators before the general auction of assets. The value was modest. The respondent purchased the existing WIP (work in progress). That was the kitchens which had been built already by Interior Contracts, but which had not yet been delivered. That purchase took place shortly after the company went into administration. In addition, what was called the “live order book” was purchased around a month later for £7,000.

25. On the question of the transfer or not of an undertaking, the Tribunal found that this was an industry where the skills and knowledge of employees was important, but it could not be described as being a wholly labour-intensive case, where the only material factor is what has happened the skills and activities of the employees.
26. The Tribunal accepted that the live order book had some value, and it increased the opportunity to secure future work had previously been undertaken by Interior Contracts, but the vast majority of the tangible assets were not transferred to the respondent. There are significant intangible assets, such as goodwill, within the Interior Contracts business, and which represented a significant value although the Tribunal could not place a value on that from the evidence available. The Tribunal accepted that a significant element of that intangible asset base was acquired by the respondent through its engagement of the former managing director. Indirectly in that way the respondent has been able to secure the business of a very significant proportion of Interior Contracts’ customers.
27. Balancing all the evidence the Tribunal found there was a transfer of the design and installation elements of Interior Contracts’ business, but there was not a transfer of the whole of the undertaking – there no acquisition of the site or the manufacturing facility and equipment, and the respondent did not take the bespoke manufacturing elements of the business.
28. The Tribunal was also satisfied that there had been an organised group of resources and there was clearly an economic activity which was being pursued which retained its identity after the transfer as a new Contracts Division within the respondent’s business.
29. Once that issue had been determined the Tribunal turned to the question of assignment of the claimant. He was the finance director of Interior Contracts and a statutory director for Companies House purposes.
30. There was little evidence about assignment in the claimant’s witness statement. He was invited to give further evidence about this issue but was able to give little detail. The claimant had no written service agreement or contract of employment. The claimant’s evidence was that he had a wide-ranging remit which involved not only the preparation of accounts and dealing with matters like credit control but would also involve him interacting with customers and suppliers – he was involved in pricing and supply issues, and answering queries and finding solutions for problems which arose – for example as the financial difficulties mounted he was involved in seeking to secure the continued supply of materials required to enable contracts to be fulfilled. He also had

responsibilities for other financial issues such as the payroll, which meant he was engaged with the workforce.

31. The claimant was also required to deal with the banks, and this took up significant amounts of time in the period before the collapse of Interior Contracts. He had been involved in attempts to secure alternative finance or find a buyer and this had taken up much of his time before the business collapsed.

Discussion and conclusions

32. The Tribunal accepted the claimant's evidence that he was significantly involved in many parts the business and that he had a role which perhaps went beyond that of traditional finance director. It is accepted that as the financial difficulties increased, the claimant engaged in keeping contracts on track as far as possible and that will have involved him to some degree across the business.
33. However, the Tribunal concluded that the claimant was not assigned to the part of the business that transferred to the respondent, which is the part of business undertaking the design and installation of kitchens for the new homes market. It is clear that the claimant's primary responsibilities were strategic. Dealing with the banks, supporting attempts to find a buyer for the business, preparing accounts, dealing with credit control and so on, were activities undertaken on the part of the company of which he was a director and, in many respects, related to the responsibilities of that legal entity. The part of the business the claimant was assigned to was the part which essentially disappeared or was taken over by the administrators when the company collapsed into administration.
34. The Tribunal accepted that what the claimant did benefited the part of the business and undertaking that the respondent acquired. The Tribunal also accepts that aspects of his work involved him working directly within the design and installation part of the business, but that does not mean he was assigned to it. This was not the primary focus of his job. To adopt the test from the **Gale case**, the claimant was not 'part of the ... human stock or resources' of the part of the undertaking which transferred. The respondent did not acquire Interior Contract's finance team. The Tribunal did not have a written contract of employment or job description for the claimant to consider of course, but there can be little doubt that if one had been available had there would not have been any reference to the claimant being responsible for and engaged in design and installation in any way.
35. In the circumstances the claimant was not assigned to the transferred part of the undertaking. In consequence his contract of employment did not transfer to the respondent and his claim against the respondent, which never employed him, cannot be well founded, and is dismissed.

Employment Judge Cookson

Date: 15 January 2024

JUDGMENT SENT TO THE PARTIES ON

18 January 2024

FOR THE TRIBUNAL OFFICE

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