



EMPLOYMENT TRIBUNALS

Claimant: Mr J Williams and 10 others (see attached schedule)

Respondent: Mectec Engineering Ltd (In Administration) (1)
Mectec Engineering (NW) Ltd (2)

Heard at: Wales (via CVP) **On:** 20 November 2023

Before: Employment Judge Leith
Mr P Collier
Mr B Roberts

Representation

Claimant: Mr Pollitt (Counsel)
First Respondent: No appearance or representation
Second respondent: Mrs Singh (Litigation Consultant)

JUDGMENT having been sent to the parties on 21 November 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The claimants claim failure to inform and consult under TUPE.
2. We discussed the issues with the parties at the start of the hearing. It was common ground that a relevant transfer took place, and that the first respondent did not arrange for the election of employee representatives or inform or consult with the affected employees prior to the transfer.
3. It was agreed that the issues in dispute were therefore as follows:
 - 3.1. Were there special circumstances which rendered it not reasonably practicable for the first respondent to comply with its duty to do inform and consult?

- 3.2. Did first respondent take all steps towards performance as were reasonably practicable in the circumstances?
- 3.3. Was the failure of the first respondent because the second respondent failed to provide measures information?
- 3.4. If either (or both) respondents were in breach of the obligation to inform and consult, what remedy should be awarded?

The non-attendance of the first respondent

4. The first respondent wrote to the Tribunal on 13 Nov 2023 indicating that they would not be attending the hearing. That notification was not copied to the other parties.

Adjournment application

5. At the start of the final hearing, the second respondent applied for the hearing to be adjourned on the basis that they had not been informed that the first respondent would not be attending the hearing, and they had not had the opportunity to call evidence. There were no witness statements before us from either respondent.
6. Having had regard in particular to rules 2 and 30A of the Employment Tribunal Rules of Procedure, we rejected that application for the following reasons:
 - 6.1. All parties had had adequate notice of the final hearing before us. Importantly, it was clear from the notice of hearing that the hearing before us was listed as a final hearing to determine the claim.
 - 6.2. The hearing before us followed a Preliminary Hearing, at which all parties (including the second respondent) were represented. Indeed, the second respondent was represented by an advocate from the same consultancy as represented them before us. The Case Management Orders from that Preliminary Hearing did not explicitly deal with witness statements and disclosure of documents. But if the second respondent was concerned that they would have been inhibited in preparing for the final hearing without having such orders in place, they could simply have asked the Tribunal to make orders (either at the Preliminary Hearing or after it).
 - 6.3. There was correspondence before us which suggested that the claimant had sought to agree a date for disclosure, agree the contents of the bundle, and agree a date for exchange of witness evidence. The second respondent's representatives did not respond to those overtures.
 - 6.4. In our judgment, the reference to the first respondent not attending the hearing was a red herring. That did not affect the second respondent's ability to call evidence or to conduct the proceedings. Indeed the owner of the second respondent had been a director of the first respondent.

- 6.5. The second respondent had been professionally represented throughout.
- 6.6. Stepping back, looking at the impact of delay and the unfairness to the claimant's if the matter was delayed further, the proportionality and cost of postponing for both the parties and other users of the ET, set against the position of a represented respondent who had every opportunity to call evidence at the final hearing, we considered that it was not in the interests of justice for the hearing to be adjourned.

Procedure, documents and evidence heard

7. We had before us a bundle of 229 pages. We also had witness statements from each of the claimants, although only one, Mr Ross, was tendered to give live evidence. In the event, Mrs Singh confirmed that she had no cross-examination for Mr Ross, so we accepted his statement as his unchallenged evidence.
8. We heard submissions from Mr Pollitt and Mrs Singh.

Fact findings

9. We make the following findings on balance of probabilities. The factual material before us was rather limited, but we have done the best that we could with the evidence available.
10. The first respondent was an engineering company specialising in water treatments and hygienic flooring for trade factories. The first respondent did not recognise a Trade Union.
11. It is common ground that each of the claimants was employed by first respondent at the relevant time.
12. The first respondent suffered financial difficulties. Mr Ross's evidence was that from 20 March 2022 there was a noticeable drop off in work, and that on a few occasions on or around 1 April 2022 he saw people walking around first respondent's premises in suits. When he asked, he was told that it was for insurance purposes.
13. On Friday 13 May 2022, each of the claimants received a text message asking them to attend a meeting on the following Monday.
14. At the meeting on Monday 16 May 2022, Robert Carr, the Engineering Director, told the assembled staff that the first respondent had gone out of business and that he had bought the business. He told the staff that they had "TUPE'd over". It is common ground that that was the first time that any of the claimants were told about the potential of a sale of the first respondent's business or of the potential for a TUPE transfer. It is common

ground also that the first respondent made no attempt to arrange for the election representatives from within the transferring staff in relation to the transfer.

15. The first respondent's case is that it was in severe financial difficulty, and that on (Friday) 6 May 2022 the proposed administrators received a financial offer from the second respondent to buy the business. That offer was accepted on 9 May 2022 (the following Monday). The first respondent's case is that the transfer then took place on 13 May 2022. It is the first respondent's case is that there were special circumstances rendering it not reasonably practicable for it to comply with its obligations under TUPE, namely the immediacy and demands of selling the business as a going concern. The first respondent's pleaded case is also that the second respondent failed to provide measures information.
16. The second respondent's case is that the offer to purchase the first respondent was made on 29 April 2022, and that they were informed on 12 May 2022 that it had been accepted and that the deal would be finalised on 13 May 2022. The second respondent's case is that the transfer then took place on 16 May 2022. The second respondent denies that it failed to provide any measures information, and also rely on the special circumstances defense.
17. Of course, we have heard no witness evidence on behalf of either of the respondents.

Law

18. Regulation 13 of TUPE provides as follows:

13.— Duty to inform and consult representatives

(1) In this regulation and regulations 13A 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.

(2) Long enough before a relevant transfer to enable the employer of any affected employees to consult the appropriate representatives of any affected employees, the employer shall inform those representatives of—

- (a) the fact that the transfer is to take place, the date or proposed date of the transfer and the reasons for it;
- (b) the legal, economic and social implications of the transfer for any affected employees;

(c) the measures which he envisages he will, in connection with the transfer, take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and

(d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

(2A) Where information is to be supplied under paragraph (2) by an employer—

(a) this must include suitable information relating to the use of agency workers (if any) by that employer; and

(b) “suitable information relating to the use of agency workers” means—

(i) the number of agency workers working temporarily for and under the supervision and direction of the employer;

(ii) the parts of the employer's undertaking in which those agency workers are working; and

(iii) the type of work those agency workers are carrying out.

(3) For the purposes of this regulation the appropriate representatives of any affected employees are—

(a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or

(b) in any other case, whichever of the following employee representatives the employer chooses—

(i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;

(ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

(4) The transferee shall give the transferor such information at such a time as will enable the transferor to perform the duty imposed on him by virtue of paragraph (2)(d).

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to

them, or sent by post to an address notified by them to the employer, or (in the case of representatives of a trade union) sent by post to the trade union at the address of its head or main office.

(6) An employer of an affected employee who envisages that he will take measures in relation to an affected employee, in connection with the relevant transfer, shall consult the appropriate representatives of that employee with a view to seeking their agreement to the intended measures.

(7) In the course of those consultations the employer shall—
(a) consider any representations made by the appropriate representatives; and
(b) reply to those representations and, if he rejects any of those representations, state his reasons.

(8) The employer shall allow the appropriate representatives access to any affected employees and shall afford to those representatives such accommodation and other facilities as may be appropriate.

(9) If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs (2) to (7), he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.

(10) Where—
(a) the employer has invited any of the affected employee to elect employee representatives; and
(b) the invitation was issued long enough before the time when the employer is required to give information under paragraph (2) to allow them to elect representatives by that time,

the employer shall be treated as complying with the requirements of this regulation in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.

(11) If, after the employer has invited any affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to any affected employees the information set out in paragraph (2).

(12) The duties imposed on an employer by this regulation shall apply irrespective of whether the decision resulting in the relevant transfer is taken by the employer or a person controlling the employer.

19. Regulation 13A deals with the situation where a transferor may consult directly with the affected employees, where the transferor is a microbusiness employing fewer than 10 employees.

20. Regulation 14 deals with the election of employee representatives.

21. Regulation 15 deals with failure to inform and consult.

22. Regulation 15(1) sets out, in respect of various circumstances, who has the standing to bring a complaint of failure to inform and consult, as follows:

“(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground -

(a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

(b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;

(c) in the case of failure relating to representatives of a trade union, by the trade union; and

(d) in any other case, by any of his employees who are affected employees.”

23. The EAT in *Hickling (t/a Imperial Day Nursery) v Marshall* [2010] 7 WLUK 952 held that, in a situation where no attempt was made to either arrange for the election of representatives or to consult directly with affected employees, it was unnecessary to decide under which provision of reg 15(1) the claim fell.

24. Regulation 15(2) provides that the burden of proof in showing that there were special circumstances rendering it not reasonably practicable to consult, and that the employer took all reasonable steps, is on the employer.

25. Regulation 15(4) provides that, in a complaint where there has been a failure to elect representatives, it is for the employer to show that the requirements of regulation 14 were satisfied.

26. Regulation 15(8) provides that, where a Tribunal finds that a complaint against a transferor is well satisfied, it shall make a declaration to that effect. It may order the transferor to pay appropriate compensation. In that case, the transferee will be jointly and severally liable along with the transferor.

27. The ET cannot apportion compensation between the two respondents in that situation (*Country Weddings Ltd V Crossman and ors* [EAT] 0535/12).

28. Where the Tribunal finds that the failure was because the transferee did not provide measures information, the award will be against the transferee only.

29. Regulation 16 provides that “appropriate compensation” means such sum not exceeding 13 weeks pay per employee as the Tribunal considers just and equitable, having regard to the seriousness of the failure of the employer to comply with his duty.
30. Compensation is designed to punish the employer for default (*Sweetin v Coral Racing* [2006] IRLR 252).

Conclusions

31. It is common ground that there was a transfer on either 13 or 16 May 2022. It is not necessary for us to reach a conclusion on the transfer date, because either way the transfer had happened at the point that Mr Carr met with the employees.
32. It is of course common ground that the first respondent failed to arrange for the election of employee representatives, or to take any step to discuss the prospective transfer with the affected employees.
33. In light of the absence of evidence from either respondent, there was no evidence before us that there were special circumstances rendering it not reasonably practicable to consult. The second respondent’s case, at its highest, was that they needed to retain some confidentiality so as to maintain customer confidence and avoid losing any customers. There was however no evidence of that before us, and no evidence (even speculative evidence) about the effect on the business if the possibility of a TUPE transfer of staff to the second respondent had been known prior to 16 May 2022.
34. In any event, without more explanation we cannot see why that would have prevented the first respondent from arranging for the election of employee representatives, or consulting with the affected staff. If the concern was confidentiality, they could have asked the staff to keep the matter confidential or been judicious about the information they shared. There was also no evidence before us regarding why consultation could not have taken place in at least the week before the transfer, or why the transfer could not have been pushed back for a few days to allow for consultation.
35. Even if we had considered that it was not reasonably practicable for the first respondent to comply with the relevant obligations in full, we would in any event have concluded that the first respondent did not take all reasonably practicable steps (for the purposes of regulation 13(9)). Put shortly, the first respondent took no steps at all to comply with the obligation to inform and consult. The first time the employees became aware of the transfer was when they were informed by the second respondent that it had happened.
36. Although the first respondent took the point in their pleaded case that the second respondent failed to provide measures information, there was no

evidence that that prevented first respondent from consulting with the affected staff. Again, the first respondent simply took no steps to comply with regulations 13 and 14. On the (limited) evidence before us, that had nothing to do with whether measures information was provided. It was simply a wholesale failure by the first respondent.

37. It follows therefore that we conclude that the first respondent failed to comply with regulations 13 and 14 of the Transfer of Undertakings (Protection of Employment) Regulations 2006.

38. We then turn to consider whether to order the first respondent to pay compensation to the claimants, and if so in what sum.

39. In our judgment, the sum that is just and equitable is 13 weeks' pay per affected employee. We reach that conclusion because:

39.1. There was a complete failure by the first respondent to arrange for the election of employee representatives or inform and consult with the affected employees.

39.2. There was no evidence before us that sale could not have happened a few days later to allow for consultation.

39.3. There was no evidence before us from which we could conclude that the consultation couldn't have started before sale was agreed. On the first respondent's case the sale was being discussed from 29 April onwards.

39.4. The purpose of the award is to, in effect, punish the defaulting employer. The seriousness of the default must be taken into account in making an award. This is, in our judgment, the most serious sort of default, because it is nothing less than a wholesale failure to comply.

40. By virtue of regulation 15(9), the inevitable consequence of making an award against the first respondent is that the second respondent will be jointly and severally liable. We cannot apportion our award between the two respondents.

41. We therefore award 13 weeks' pay per claimant, jointly and severally against the first and second respondents.

Employment Judge **Leith**

Date 19 February 2024

REASONS SENT TO THE PARTIES ON 21 February 2024

FOR THE TRIBUNAL OFFICE Mr N Roche

Schedule of Claims

Case number	Claimant
1601032/2022	Mr John Williams
1601034/2022	Mr Paul Bartley
1601035/2022	Mr John Brooking
1601036/2022	Mr Peter Hughes
1601037/2022	Mr Colin Parry
1601038/2022	Mr Robert Stockton
1601039/2022	Mr Steven Williams
1601040/2022	Mr Phillip Mullen
1601041/2022	Mr Mark Ross
1601042/2022	Mr Adam Roberts
1601043/2022	Mr Danny Waters