



# EMPLOYMENT TRIBUNALS

**Claimant:** Mrs Sarah Davies

**Respondent:** Hotter Shoes Limited

**Heard at:** Manchester

**On:** 4-7 March 2025 (6 March deliberations without parties)

**Before:** Employment Judge Cookson

## REPRESENTATION:

**Claimant:** Miss Bunton (counsel)

**Respondent:** Miss Jabir (counsel)

JUDGMENT having been given orally on 5 March 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

1. The claimant in this case had brought a complaint of a failure to inform and consult under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). Proceedings were brought against the transferee but not against the transferor.
2. At the outset of the hearing I raised with the parties that I was concerned that on the face of Regulation 15, the tribunal would not be able to uphold a complaint made only against the respondent, although I could not recall any authority on the matter. I raised this because it appeared to be a potential issue which might go to my ability to consider the complaint at all.
3. I noted that the following had been recorded in the summary case management hearing on 13 June 2024 before Employment Judge Rhodes at which both parties had been legally represented, although not by those who now appeared before me: *“Neither party wished to pursue an application to join the TUPE transferor Beaconsfield Footwear Limited [referred to as BFL below] to this claim on the basis that it is in administration and the respondent is jointly and*

*severally liable under TUPE Regulation 15(9) for any failure on the part of the transferor in any event.”*

4. The relevant statutory provisions in regulations 15 are as follows

*Failure to inform or consult*

*15.—(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.*

*(2) If on a complaint under paragraph (1) a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it, it shall be for him to show—*

*(a) that there were special circumstances which rendered it not reasonably practicable for him to perform the duty; and*

*(b) that he took all such steps towards its performance as were reasonably practicable in those circumstances.....*

*(7) Where the tribunal finds a complaint against a transferee under paragraph (1) well-founded it shall make a declaration to that effect and may order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.*

*(8) Where the tribunal finds a complaint against a transferor under paragraph (1) well-founded it shall make a declaration to that effect and may—*

*(a) order the transferor, subject to paragraph (9), to pay appropriate compensation to such descriptions of affected employees as may be specified in the award; or*

*(b) if the complaint is that the transferor did not perform the duty mentioned in paragraph (5) and the transferor (after giving due notice) shows the facts so*

*mentioned, order the transferee to pay appropriate compensation to such descriptions of affected employees as may be specified in the award.*

*(9) The transferee shall be jointly and severally liable with the transferor in respect of compensation payable under sub-paragraph (8)(a) or paragraph (11).*

5. I explained that that it seemed to me that Regulation 15(9) cannot be considered in isolation and does not provide for free standing joint and several liability. The actual wording means the issue of joint and several liability only appears to apply if compensation is payable under 15(8) and that requires that a tribunal finds a complaint against a transferor under paragraph 15(1) is well founded. However I wanted to give the parties time to make representations to me about this.
6. Neither of the representatives' barristers had anticipated this issue arising and were not in position to address me. To allow them to research the matter I decided that it would be in accordance with the overriding objective for me to hear evidence from the witnesses in attendance at the tribunal because the claimant had also brought another complaint which clearly had properly been brought against the respondent. Before we came to final submissions the parties addressed me on the preliminary point. Helpfully both counsel provided me with written and oral submissions.
7. Ms Jabir for the respondent helpfully draw my attention to the case of *Allen & Ors v Morrisons Facilities Services Ltd* UKEAT/0298/13/DM.
8. This is a case concerning a claim brought against a transferee under Regulation 13(4) of TUPE. A number of individual claimants had brought complaints against the respondent transferee for failure by the transferee to comply with their obligation under Regulation 13(4) to provide information to the transferor to enable them to comply with their obligations under Regulation 13(2)(d). The Tribunal held that the claims failed because transferring former employees of the transferor could not pursue claims against the transferee for breach of TUPE Regulation 13(4).
9. The Employment Appeal Tribunal dismissed the claimants' appeal. They found that Regulation 13(4) does not impose an obligation on a transferee to provide information to employees of the transferor. A complaint to an Employment Tribunal under Regulation 15(1)(d) can only be brought by an employee against his employer. The claimants' employer at the time of the alleged breach of Regulation 13(4) was the transferor not the transferee respondent.
10. In brief summary of her submissions, Ms Jabir argued that these principles must also apply in this case where the complaints were for an alleged breach of Regulation 13(2). The claimant's case for a breach of that Regulation is also

brought under Regulation 15(1)(d) and she argued the same reasoning must apply as in the *Morrison Facilities* case.

11. Ms Bunton argued that I could find that there was a well-founded complaint against the transferor on an evidential basis and it was not necessary for the claimant to have joined the transferor as a party. She argued that I am not bound by the reasoning in the *Morrison Facilities* case because this concerned a different sort of case. That case had been about regulation 13(4) concerning the transferee's obligations to provide information to the transferor. This case was simply about the breach of the transferor's obligations under regulation 13(2) which is a liability capable of transferring to the transferee under regulation 4. She reminded me of the position as determined before the 2006 Regulations and she pointed out that the issue I had raised had not been raised at the case management hearing in response to the joint position put forward by both parties,
12. If I did not accept her submissions on these points, Ms Bunton applied for the transferor to be joined as party to this case under Rule 35 on the basis that it was clear both parties had understood at the case management hearing that the claim could proceed only against transferee on the basis of joint and several liability under regulation 15(8) and the balance of prejudice would clearly fall in the favour of the claimant. The claimant had a strong case given that it appears to be common ground that there was no information and consultation process before the TUPE transfer which had occurred very shortly after the insolvency of BFL which had led to a "pre-pack" administration sale of the business to the respondent by the appointed administrators.
13. Ms Jabir objected to such an amendment application being allowed at this stage and argued that the prejudice to the respondent in the circumstances was inevitable.

### My Decision

14. I am persuaded that the analysis in the *Morrison Facilities* case properly applies in this case. The summary provided at the start of the EAT judgment says this A complaint to an Employment Tribunal under Regulation 15(1)(d) can only be brought by an employee against his employer [my emphasis]. *The Claimants' employer at the time of the alleged breach of Regulation 13(4) was the transferor not the transferee Respondent. The only route for employees of the transferor to obtain compensation from the transferee for breach of their obligations to a transferor under Regulation 13(4) is to pursue a claim against the transferor for breach of Regulation 13(2)(d) and for the transferor to give notice to and join the transferee as a party to the proceedings under Regulation 15(5). An Order against the transferee can only be made if the Tribunal find the transferor to be in breach of Regulation 13(2)(d) and to have established that it was not reasonably practicable to have performed that duty because the*

*transferee had been in breach of their obligation to give the transferor information under Regulation 13(4)*

15. The claimant in this case, Mrs Davies, has brought a complaint under Regulation 15(1)(d). In my view the decision in the *Morrison Facilities* case confirms my reading of Regulation 15 that the 15(1)(d) complaint could only be brought against BFL and so the claim against the respondent is misconceived. Even if it is right that the *Morrison Facilities* decision is only binding where the claim concerns a breach of regulation 13(4), I conclude that the principles in the decision still inform how I should interpret regulation 15(1)(d) in the context of complaint about a breach of regulation 13(2).
16. As explained by HHJ Slade, Regulation 15 confers no additional rights which can found a tribunal complaint. The regulation provides a means by which complaints may be made about breach of provisions of Regulations 13 and 14 and the remedies for any established complaint. Regulation 15(1)(d) for not give claimants a cause of action which is not conferred by Regulation 13 and 14.
17. The standing of an employee to bring a claim for breach of an obligation under Regulation 13 is determined at the date of the breach of the obligation not at the date the claim is lodged.
18. Applying those principles, the claimant's complaint in this case is about the failure of BFL and the insolvency practitioners to comply with the information and consultation obligations which applied when she was still employed by BFL.
19. I agree with Ms Jabir that the mechanism for the respondent being joint and severally liable under Regulation 15(9) contains preconditions. Regulation 15(9) is only engaged if compensation is payable under 15(8). 15(8) sets requirements for compensation – that a complaint under 15(1) has been found to be well-founded in which case a declaration must be made to that effect. Regulation 15(1) requires that a complaint has been presented to a Tribunal in relation to a breach of an employer of Regulation 13 or 14 by any of his employees who are affected employees. This is not simply a question of evidence about the transferor's conduct.
20. Having reached that conclusion, I determined whether I should allow the claimant to amend her claim to add BFL as a party. BFL is in administration. Legal proceedings against it are subject to the statutory stay. If the administrators do not consent to the claim against BFL proceeding the claimant would have to apply to court for leave to pursue her claim. The Tribunal does not have the power to grant that leave. If leave was granted or consent given, at that stage BFL would have to be given the opportunity to respond to the claim. Although that may not be what usually happens in administrations, it is possible. The delay arising from granting the application was therefore inevitable. This was a final hearing listed almost a year ago in relation to a claim lodged in November 2023. This hearing was the trial window granted for the

resolution of this dispute and delaying the resolution of the case in that trial window, except in exceptional circumstances, is not in accordance with the overriding objective.

21. I acknowledge that there is updated guidance published by the Department for Business Innovation & Skills from January 2014 on the TUPE Regulations which says this on page 44

*“Awards made by an employment tribunal”*

*“c) Information and consultation awards under TUPE*

*The defendants in consultation cases may be either the transferor or new employer, or both of them – the choice is for the complainant to make.....”*

22. The authors of the IDS Handbook on these provisions appear to have a similar view. However, these texts do not explain how that conclusion has been reached based on the statutory language, the IDS Handbook does not refer to the *Morrison Facilities* case and the BIS guidance predates it and does not appear to have been updated since. It is unfortunate if these texts are not correct, but the claimant was legally advised at the case management hearing and despite what these texts say I do not consider that statutory language in TUPE is ambiguous.

23. I could not ignore that the claimant, with the benefit of legal representation by counsel at the case management hearing, had made a conscious decision stage not to seek to join BFL. The case management summary does not tell me if there was a discussion with the judge but in any event it is not a judge's role to stop a legally represented party from making a poor decision. Ms Bunton had not sought to press an argument that the respondent had made a binding concession, but to be clear in any event I do not see how the respondent could concede a point which in effect would give me a power to grant a remedy under TUPE which Parliament had not given me the power to award. The claimant took professional advice and a decision was made on the basis of that advice. I do not consider it to be in accordance with overriding objective to allow a legally presented party to amend their claim at this very late stage in those circumstances, given the inevitable wasted time and cost for the respondent and delay in the resolution of the claim. That tipped the prejudice in the favour of the respondent, and the application to add BFL as a party was refused.

24. To be clear I would have reached the same conclusion if the application to add BFL had been made at the outset of the hearing.

25. In conclusion, the claimant had no right to bring a complaint under Regulation 15(9). Her complaint about a failure to inform and consult under Regulation 13(2) of the Transfer of Undertakings (Protection of Employment) Regulations

2006 had to be brought under Regulation 15(1)(d). That complaint had to be brought against BFL as the transferor who was the claimant's employer at the time of the alleged breach of Regulation 13(2) and could not be brought against the respondent who was the transferee. If there was no claim against BFL, the respondent could not be liable under regulation 15(9) and the claimant's complaint against the respondent cannot succeed as a matter of law. In those circumstances this complaint could have no prospect of success and was dismissed.

Approved by:

**Employment Judge Cookson**

**21 March 2025**

Judgment sent to the parties on:

9 April 2025

For the Tribunal:

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## **Notes**

Reasons for the judgment were given orally at the hearing. Written reasons have been requested and will be provided as soon as possible and will be placed online.

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If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found at [www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/](http://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/)