Appeal No. UKEAT/0224/12/RN

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8JX

At the Tribunal
On 24 January 2013
Judgment handed down on 25 April 2013

Before

THE HONOURABLE MR JUSTICE UNDERHILL

MRS R CHAPMAN

MS G MILLS CBE

I LAB FACILITIES LTD — APPELLANT

(1) MS L A METCALFE & OTHERS
(2) RKT POST PRODUCTIONS LTD
(3) I LAB (UK) LTD (IN LIQUIDATION)
(4) TICKETLAMP LTD — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR SIMON CHEETHAM (of Counsel) Instructed by: Hamlins LLP Roxburghe House 273-287 Regent Street London W1B 2AD
For the First Respondent	MR JAMES GOLDMAN (Solicitor) Hendons LLP 2 Mary's Crescent London NW4 4LH
For the Second & Third Respondents	DEBARRED
For the Fourth Respondent	NOT PARTICIPATING

SUMMARY

TRANSFER OF UNDERTAKINGS – Consultation and other information

Employer facing insolvency contemplates transfer of both parts of his undertaking but eventually the liquidator transfers only one part, the other being closed down – Claimants, who are employed in the part which is closed down, are dismissed and bring proceedings for, *inter alia*, breach of the information and consultation obligations under regulation 13 of **TUPE**. Claim is against the transferee as well as the employer by reason of the joint liability provision under reg. 15 (9) - Claim upheld on the basis that the Claimants were "affected employees" by reason of having been excluded from the eventual transfer notwithstanding the original intention that they would be included.

HELD, allowing the appeal, that the Claimants were not "affected employees" because:

(1) As regards the transfer as it eventually proceeded, i.e. of the part of the business in which the Claimants were not employed, such indirect impact as that may have had on the part in which they were employed did not make them "affected employees".

(2) As regards the earlier intended transfer of both parts of the business, no claim could be brought in respect of a transfer which had not in fact proceeded.

THE HONOURABLE MR JUSTICE UNDERHILL

INTRODUCTION

1. This is an appeal against the decision of an Employment Tribunal sitting at London Central, chaired by Employment Judge Grewal, on a claim for a breach of the information and consultation obligations under regulation 13 of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE"). The case was heard on 20 and 21 September 2011, and a Judgment, with written Reasons, was sent to the parties on 14 December. We should say at this stage that the Reasons are clearly and carefully drafted. The hearing was in fact a rehearing, an earlier decision having been overturned by this Tribunal (UKEAT/0441/10), but it is unnecessary to refer to that decision for the purpose of this appeal.

2. The ten Claimants were employed by a company called I Lab (UK) Ltd ("ILUK"). ILUK was based in Soho and provided services to the film and television industry. Up to early 2009 it specialised in "rushes" work. Rushes are the first version of a piece of filming, produced on a rough-and-ready basis, typically overnight, for immediate consideration by the client. In April 2009 ILUK "merged" with a company called RKT Post Production Ltd, which specialised in post-production work. Post-production is also concerned with work on shot footage, but the work is more sophisticated and less immediate: one consequence is that it is typically done during normal working hours in the day. The effect of the merger was that RKT's workforce became employees of ILUK: we will refer to them as "the post-production employees". The merger reflected the fact that there was a degree of overlap between the two businesses, and some scope for pooling of resources and access to each others' clients. Nevertheless, the core activities of the two previous businesses remained distinct, with the original rushes staff and the

post-production staff working – subject to one or two exceptions – in different premises and doing different kinds of work at different hours.

3. Soon after the merger ILUK got into financial difficulties. There was some uncertainty for a time about what would happen – we return to this below – but on 30 July 2011 it went into liquidation; and on 11 August 2011 the original business – i.e. the rushes business – was sold for a very small sum to a company called I Lab Facilities Ltd ("ILF"), which was in the same ownership. The post-production business formerly carried out by RKT was closed down by the liquidator. The Claimants, with one exception (a Mr Patel), were all employed in the ex-RKT business and were given a month's notice on 11 June 2009.

4. The Claimants brought proceedings in the Employment Tribunal against ILF, RKT, ILUK and a further company called Ticketlamp Ltd whose involvement we need not trouble to set out. Their primary case was that they were assigned to the undertaking, or part of the undertaking, which was transferred to ILF and accordingly were, by virtue of regulations 4 and 7 of TUPE, entitled to claim for unfair dismissal, and for various liquidated sums, against it as the transferee. It was evidently preferable to have a claim against ILF rather than against ILUK since ILUK was insolvent. However, the Tribunal held that, although the rushes part of ILUK's undertaking had indeed transferred to ILF, the Claimants (except for Mr Patel) were all assigned to a part of ILUK's undertaking that had not transferred and that their claim was accordingly against ILUK only. That part of the Tribunal's decision is not challenged and we need give no further details.

5. However, the Claimants also alleged that ILUK was in breach of the obligations to inform and consult under regulation 13 of TUPE and accordingly that they were entitled to compensation under regulation 15: we set out the material provisions below. That part of their

claim was upheld, and in each case a protective award was made in the maximum amount available, i.e. for thirteen weeks' pay. The sum varied from case to case, the highest award being £11,750 and the lowest £4,500. The total is £81,375. Regulation 15 (9) provides that where a breach of the consultation obligations by the transferor occurs the transferee is jointly and severally liable with the transferor. The Tribunal made an order to that effect, as it was obliged to do. The effect in practice is that the Claimants will enforce their claim entirely against ILF, being the only solvent party. The Tribunal was asked to "apportion" the amount of the liability between ILF and ILUK, but it declined: it had in fact no power to do so in any event (see **Todd v Strain** [2011] IRLR 11, at paragraph 35, and **London Borough of Hackney v Sivanandan** [2013] EWCA Civ 22).

THE RELEVANT LAW

6. No point arises on the appeal about the basic operation of TUPE. The only point that it is necessary to make is that a "relevant transfer", as defined in regulation 3, comprises not only the transfer of the whole of an "undertaking" but of any sufficiently self-contained part. It is common ground in the present case that the rushes business was a part of ILab's undertaking within the meaning of regulation 3. By regulation 4 all employees "assigned" to the transferred undertaking become at the moment of transfer employees of the transferee.

7. The obligations of which the Tribunal held that a breach had occurred arise under paragraphs (2) and (6) of regulation 13 of TUPE. These read:

> **"(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.

…

(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."

8. "Affected employees" is defined in regulation 13 (1) as follows:

"(1) In this regulation and regulations 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."

In **Unison v Somerset County Council** [2010] ICR 498 this Tribunal, Bean J presiding, held, at paragraph 21 (p. 504):

"We conclude that the "affected employees" are those who will be or may be transferred or whose jobs are in jeopardy by reason of the proposed transfer, or who have job applications within the organisation pending at the time of transfer. We do not think that the definition extends to the whole of the workforce, nor to everyone in the workforce who might apply for a vacancy in the part transferred in some point in the future."

9. We are not concerned on this appeal with the mechanics of the information and consultation required by the Regulations. The only point to note by way of background is that where, as we understand to have been the case here, there was no recognised trade union the employers must either inform or consult representatives, if there are any, who are recognised

for some other purpose (e.g. safety representatives) or organise the election of employee representatives: see regulation 14.

10. Regulation 15 (1) provides for a complaint to be made to the employment tribunal of a failure by an employer to comply with a requirement of regulation 13. Paragraphs (8) and (9) read, so far as material:

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

THE FACTS

11. We have set out most of the essential facts in the introduction above. The only aspect which it is necessary to add is that it had initially been hoped that the successor company – what became ILF – would take on some, though not all, of the post-production work and thus that some of the post-production employees would be engaged by it. The Tribunal found that on 12 June 2009 the post-production employees were told that they would be dismissed but that seven of them would be hired on new contracts. However, the situation changed at some point before 5 July, and the eventual decision, as we have said, was for only the rushes business to be transferred.

12. No attempt was made by ILUK to arrange for representatives to be appointed under regulation 14, and there was accordingly no compliance with the provisions of regulation 13.

13. The essential issue before the Tribunal was whether ILUK was under any obligation under regulation 13 to inform or consult with representatives of its post-production employees. ILF's position, in summary, was that there was no such obligation because the part of the undertaking in which they were employed was never transferred.

THE TRIBUNAL'S REASONS

14. The Tribunal's reasons for finding that there was an obligation to inform and consult in relation to the Claimants are stated at paragraphs 58 and 59 of the Reasons, as follows:

> **"58. We considered firstly whether a duty to inform under regulation 13 (2) of the TUPE Regulations arose in this case. Were the Claimants "affected employees" in relation to the "relevant transfer" that we have found, namely the transfer of the part of I Lab (UK) Ltd that did the rushes work? With the exception of Mr Patel, none of the Claimants were assigned to the part of the undertaking that was the subject of a relevant transfer. We asked ourselves whether the other nine Claimants, who did post production work, were employees who "may be affected by the transfer or may be affected by measures taken in connection with it". It was clear from the evidence that in about the middle of June it was envisaged that I Lab Facilities Ltd would do some post production work and that some of them would transfer to it (i.e. they would be dismissed by I Lab (UK) Ltd and re-hired by I Lab Facilities Ltd.). They were all told that. However, some time after that the decision was made that the only work that would be continued by I Lab Facilities Ltd would be the rushes work and, therefore, they would not be re-hired. The post production employees were not told that there had been a change of plan or the reasons for it. They were clearly affected by the relevant transfer by being effectively excluded from it, having been informed that they would be a part of it. If they were not going to be re-hired, because of a change in the economic entity that was being transferred, then their jobs were in jeopardy as a result of the proposed transfer. We find in the circumstances of this case they were employees who might be affected by the relevant transfer and that I Lab (UK) Ltd had a duty to provide the information set out at regulation 13 to their representatives.**
>
> **59. We then considered whether there was a duty to consult in their case. Did I Lab (UK) Ltd envisage that it would take any measures in relation to the Claimants (other than Mr Patel) in connection with the transfer of the part of the business that did the rushes work? It envisaged that their**

employment would effectively be terminated because the post production work would not transfer to I Lab Facilities Ltd. We considered that in those circumstances there was a duty to consult with their representatives."

THE APPEAL

15. Mr Simon Cheetham on behalf of ILF challenged the Tribunal's reasoning as set out above. His basic position was straightforward. The only transfer which occurred in the present case was the transfer of the rushes part of ILUK's undertaking. The Claimants were not affected by that transfer: they would not transfer under it. Nor were their jobs placed in jeopardy by it: the reason why those jobs were at risk, and were in due course lost, was the closure of the other – that is, the post-production – part of the undertaking. Accordingly, they were not "affected employees" and there had never been any obligation to inform and consult as regards them. Mr Cheetham focused on the statement in paragraph 58 of the Reasons that the Claimants "were … affected by the relevant transfer by being excluded from it". He submitted that that was self-evidently wrong.

16. If the Tribunal's reasoning was indeed as Mr Cheetham represents it, we agree that it was wrong. Taking it in stages:

(1) If one starts with a straightforward case where a single employer has two wholly self-contained plants or businesses, A and B, the sale of A evidently will not as such "affect" employees in B.

(2) We cannot see that it makes a difference, other things being equal, if, at the same time that the employer sells A, he closes B. If the buyer might realistically have considered purchasing B as well as A, and in particular if he had in fact considered doing so but had

decided against it, you could perhaps say that B was "excluded" from the sale; but that would not alter the basic fact that what has "affected" the employees in B is not the sale of A but the closure of B. (This does not necessarily mean that they have no rights to be consulted. Any proposal to dismiss them will of course, if they number more than twenty, attract the collective consultation obligations under Ch. II of Part IV of the **Trade Union and Labour Relations (Consolidation) Act 1992**.)

(3) The position may seem less clear-cut where the closure of B can be said to be, in whole or in part, the result of the sale of A – for example if B had been loss-making and had only been kept afloat by being subsidised out of the profits of A. But it is nevertheless clear to us that B's employees are not in such a case "affected" *by the transfer* within the meaning of regulation 13 (1). We do not believe that that phrase is apt to cover this kind of indirect effect, where the transfer as such has no impact on the employees. In such a case the effect on them will be the result of the closure of B.

(4) We have for the sake of clarity been considering the case of two wholly distinct businesses; but the position can be no different in principle in the case of two parts of the same undertaking.

(5) For the avoidance of doubt, we are not to be taken as saying that there can never be an obligation to inform and consult in relation to any employee of the transferor who is not transferred. A proposed transfer may well affect such employees if they do some work in or for the undertaking (or part) whose transfer is proposed (albeit not "assigned" to that part): the loss of part of their work may well affect them. But that is different from saying that they are affected simply because the transfer has left the remaining part of the undertaking less viable.

17. Mr James Goldman, on behalf of the Claimants, did not dispute that analysis, but he submitted that the Tribunal's reasoning, properly understood, was not based simply on their "exclusion" from the transfer. Earlier in paragraph 58 the Tribunal refers to its finding that it had at an earlier stage been "envisaged that [IFL] would do some post production work and that some of [the Claimants] would transfer to it", albeit purportedly by the mechanism of dismissal and "re-hire" by IFL and that "they [sc. the Claimants] were all told that". He pointed out that the Tribunal did not say simply that the Claimants were affected by the relevant transfer "by being excluded from it": the whole phrase was "by being excluded from it *having been informed that they would be part of it* [our emphasis]". In truth, he submitted, what generated the obligation to inform and consult was not the transfer in its final form but the plan in its earlier form, which included the transfer of much of the post-production work; it is true that a transfer of that kind did not in the event proceed, but that is immaterial if the obligation had already arisen. He accepted that the Tribunal's language was not very clear, but he submitted that on a fair reading of paragraph 58 as a whole the reasoning for which he contended could be discerned.

18. It is difficult to be sure that the Tribunal reached its conclusion by the route contended for by Mr Goldman. It clearly, as he says, attached some importance to the earlier but aborted plan; but on his approach it would not be accurate to say, as the Tribunal did, that the post production employees were affected because they were excluded from "the transfer" – rather, they were affected because they were intended to be included in it (or in an earlier version of it). Also, paragraph 59 would on his analysis would be wrongly expressed: at the time that the consultation obligation arose the termination of the contracts of those employees would *not* "effectively be terminated". Mr Cheetham submitted that this mismatch was a reflection of the fact that Mr Goldman had not advanced the "aborted transfer" submission in the Tribunal in the

way that he did before us. Mr Goldman candidly said that he could not be sure precisely how he had put it, although he had certainly placed weight on the existence of the earlier plan. We do not, however, believe that the outcome of this appeal should depend on precisely how the case was analysed before the Tribunal or on precisely how the Tribunal expressed itself. Cases of this kind are notoriously difficult and it would not be surprising if either the advocates or even a careful and experienced Employment Judge did not get the reasoning quite right. If, as we believe is the case, the essential factual findings were made we can perform (hopefully) the correct analysis ourselves.

19. What, therefore, is the position where an employer "envisages" a transfer but it does not in the event proceed ? At first blush, it might seem obvious that that should make no difference to whether the obligation to inform and consult has arisen in the meantime: what matters is that the transfer was *proposed.* Where the transfer is aborted the day before it is intended to occur because of some unexpected supervening event plainly the employer would have had to start his consultation weeks previously, and if he has not done so surely he should be regarded as in breach even though the deal has fallen through at the last minute.

20. However it is not as simple as that. It is necessary to appreciate that the time at which an employer must comply with the obligations under regulation 13 (2) and (6) is not defined by reference to when he first "envisages" that he will take the relevant "measures". Rather, the obligation is to take the necessary steps "long enough before" the transfer to allow consultation to take place. That being so, it can never be said definitively that the employer is in breach of that obligation until the transfer has occurred. Test it this way. Suppose the day before the proposed transfer the transferor wakes up to the fact that he has failed to inform or consult under regulation 13 and decides to postpone the transfer for (say) a month and to consult in the meantime – and does so. How in such a case could it be said that he had, in the terms of

regulation 15 (1), "failed to comply with a requirement of regulation 13" ? In our view the scheme of regulations 13-15 means that there can be no complaint of a breach of the obligations under them unless there has indeed been a relevant transfer. That is not an unacceptable result in policy terms. No doubt an intending transferor who takes no steps to inform or consult the employees potentially affected by the transfer is not behaving well and will be in breach if the transfer proceeds; but if in the end there is no transfer, and no employees are "affected", it does not seem to us axiomatic that any sanction is called for.

21. It follows that even if the Tribunal is to be regarded as having based its decision not on a failure to inform and consult the post-production employees about the transfer which actually occurred but on a failure with regard to the earlier form of the proposal, which did not proceed, the decision cannot be upheld on that basis.

22. We must accordingly allow the appeal and dismiss the claim under regulation 15.