Appeal No. UKEAT/0410/08/DA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 27 May 2009
Judgment handed down on 19 August 2009

Before

HIS HONOUR JUDGE HAND QC

MR D J JENKINS OBE

MR T MOTTURE

MS C TAPERE — APPELLANT

SOUTH LONDON AND MAUDSLEY NHS TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

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For the Respondent

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SUMMARY

CONTRACT OF EMPLOYMENT

Construction of term

The Employment Tribunal erred in construing the terms and conditions of employment as permitting the employer to transfer the employee to another location, providing it was reasonable to do so.

TRANSFER OF UNDERTAKINGS

Transfer

Where the location of the employee's place of work is restricted to the geographical area of the employing hospital trust, a transfer of the undertaking or part of the undertaking cannot enlarge the area and the concept of "substantial equivalence" does not apply.

Objection to transfer

Whether or not a "substantial change" is to the "material detriment" of the employee (regulation 4(9) of TUPE 2006) does not fall to be "objectively determined" in the sense of balancing the competing contentions of employee and employer and deciding which position is the most reasonable; the right approach is that suggested by Lord Scott in **Shamoon v Royal Ulster Constabulary** [2003] IRLR 285 at paragraphs 104 and 105, namely to consider the employee's position and ask whether it is reasonable in the circumstances for him or her to adopt that position.

HIS HONOUR JUDGE HAND QC

Introduction

1. This is an appeal from the judgment of an Employment Tribunal, comprising an employment judge and two lay members, sitting at London South on 25 and 26 June 2008, the written judgment having been sent to the parties on 2 July 2008. The judgment dismissed the Appellant's claims of unfair dismissal and entitlement to a redundancy payment.

The Factual Background

2. The background to the case is that of a "TUPE transfer" on 1 April 2007. Until then, the Appellant, who was the Claimant below, worked for Lewisham Primary Care Trust ("PCT"). She was part of the procurement team working from offices in Burgess Park, Camberwell. The Appellant and two other employees were transferred to the Respondent, South London and Maudsley NHS Trust. It was common ground at the Employment Tribunal that the transfer was a "relevant transfer" under the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE 2006"). During the course of the consultation process, which preceded the transfer, there had been discussions as to the Appellant's terms and conditions of employment. Her pay and grading were to be unchanged; similarly her working hours. But it was envisaged that "as soon as possible after the transfer" (see paragraph 10 of the judgment of the Employment Tribunal at page 3 of the bundle) the Appellant's place of work would move to the Respondent's premises at Bethlem Hospital, Beckenham.

3. In fact, it seems that this move was postponed due to a lack of room for the Appellant and her two colleagues at Bethlem Hospital. So she carried on working at Burgess Park. The PCT invoiced the Respondent for the continued use of the Burgess Park offices (see paragraph 14 of the judgment at page 4 of the bundle).

4. The Appellant was unhappy about the proposed change to her place of work. On 11 April 2007 the Appellant had a meeting with two employees of the Respondent at Bethlem Hospital to discuss the proposed move. The meeting is dealt with at paragraph 14. The Appellant's point of view is dealt with at paragraph 12 of the judgment in the following terms:-

> **"The Claimant lives in Grays, Essex. She was reluctant to move to work at the Bethlem in Beckenham as she believed that it would increase the journey time. She is a single mother and has to collect her child from school and be available till 8 a.m. when her child would be collected for school by taxi. She gave evidence that if she travelled via her old route of the A13 the journey time to Beckenham would be significantly longer - an additional 10 miles."**

We take it that the above represents the evidence she gave at the Employment Tribunal. Whether she said more or less the same at the meeting on 11 April is not clear from paragraph 14. It is clear, however, that the travel times were discussed. It seems likely that the travel experience of Mr Levoir, one of the Respondent's employees attending the meeting, was referred to in the terms set out in paragraph 14; the Employment Tribunal say this of him at paragraph 14:

> **"Mr Levoir lives in Essex, a little distance beyond Grays. He left at 7.45 a.m. and would get in for 9a.m. most days though he accepted that there were occasionally problems and then he would make up the time by reducing his lunch break or staying later."**

Certainly at some stage there was a discussion based on the AA route planner (see paragraph 13 of the judgment set out below). Subsequent to the meeting, the Appellant wrote to the Respondent asking for either shorter hours or payment of additional childcare costs. In May there was a further meeting at which the Appellant expressed concerns about using the M25 route and about "being late for her daughter"; the Respondent agreed that she could start 15 minutes later and suggested she try the M25 route and if that proved problematic, then the matter could be looked at again and another arrangement made (see paragraph 15 of the judgment). Save that on 22 June 2007 the Appellant lodged a grievance, nothing else seems to have happened until September.

5. In late August 2007 the Appellant took two weeks holiday. On 5 September 2007, whilst the Appellant was away on holiday, the Respondent wrote to her informing her that her place of work would change from Burgess Park to Bethlem Hospital on 10 September 2007. It appears that the Appellant returned from holiday on or about 9 September 2007. She had not received the letter by then. The next day she went to work at Burgess Park only to find that her workplace and colleagues were no longer there. She was very upset; although she went to Bethlem Hospital in the afternoon she did not stay. She was unwell the following day; she said that the move had caused her to be ill. This is all dealt with by the Employment Tribunal at paragraph 18 of the judgment. The Tribunal did not accept that the Appellant had been treated aggressively in the course of a telephone conversation with a member of staff, although it was accepted the conversation had not been a sympathetic one.

6. It seems that the Appellant then visited a doctor and was certified as unfit for work; she forwarded the certificate to the Respondent. An appointment with the Occupational Health Department was arranged for 1 October 2007 but before that could take place the Appellant wrote a letter of resignation on 17 September 2007. In the letter she complained of "recent telephone harassment" and "a fundamental breach of contract by moving my place of work, reducing my responsibilities and other problems associated with the transfer". She lodged a further grievance and wrote again on 10 October 2007 complaining of constructive dismissal.

7. The Respondent did not accept the resignation, suggested that it should be withdrawn, indicated a willingness to be flexible about the hours worked and suggested further discussions "if the journey turned out to be difficult for the Claimant" (see paragraph 21 of the judgment at page 5 of the bundle). The Appellant did not rescind the resignation and on 11 January 2008

the Respondent accepted it as having terminated the Appellant's contract of employment with effect from 22 November 2007.

8. The Appellant's contract of employment is at pages 50 to 51 of the bundle. It is dated 6 June 2000. Her employer was then called Community Health South London NHS Trust. At some later date presumably there was either a transfer of an undertaking from Community Health South London NHS trust to the PCT or the former changed its name to the latter. In any event, the place of work was designated as Unit 4, Burgess Park Industrial Park, Parkhouse Street, London SE5 7TJ. Later in the document the following appears:-

> **"Location There may be occasions when you are required to perform your duties either temporarily or permanently at other locations within the Trust."**

At paragraph 11 of the judgment, the Employment Tribunal refer to this as a "mobility clause".

9. Finally, so far as the facts are concerned, The Employment Tribunal made the following finding at paragraph 13 of its judgment:-

> **"In strict geographical terms the Bethlem is only 2½ miles further from the Claimant's home than Burgess Park. The shortest route from Grays to Beckenham would be via the M25. The Claimant's evidence was that the journey time to Burgess Park in Camberwell from her home in Grays took her on average 1½ hours. From Grays to Bethlem the best route would be via the M25. The AA route planner printed off the web, and given to the Claimant during her discussions with the Respondent, gives an average journey time from Grays to Bethlem of 50 minutes - though no doubt at peak times, such as 8 in the morning the journey time would be longer."**

The Judgment

10. On those factual findings, the Employment Tribunal identified three issues. Firstly, as a matter of construction, what did the "mobility clause" mean? Secondly, on the premise that either a term as to reasonableness was to be implied into the express mobility clause or that there was an implied mobility clause subject to reasonableness, whether it had been reasonable

to require the Appellant to move her place of work from Burgess Park to the Bethlem Hospital? Thirdly, whether regulation 4 (9) of TUPE operated so as to deem her to have been dismissed?

11. The Employment Tribunal reached its conclusions on those issues at paragraphs 28 to 33 of the judgment. Firstly, at paragraph 28 of the judgment, the Employment Tribunal decided that the mobility clause meant the Claimant could be transferred to locations operated by the transferee. This conclusion was reached by regarding the words "within the Trust" as otiose; the Employment Tribunal say at paragraph 28:

> **"The words "within the Trust" do not add anything to the mobility clause in the sense that an employer with a mobility clause would only transfer an employee to other locations which it itself owned or operated. We find that following the transfer Claimant's (sic) contract and the benefit of the mobility clause transferred to the Respondent and to the locations which it owned."**

Secondly, paragraphs 29 to 32 reach the same outcome but by a different and alternative route. The Employment Tribunal addressed the situation as if there was an express mobility clause, subject to an implied term as to reasonable user or no express mobility clause but an implied term as to mobility, again subject to reasonable user. Paragraph 29 reads as follows:

> **"In any event. (sic) even in the absence of a mobility clause we do not accept that the requirement that the Claimant work in a location which was not significantly further away from the Claimant's home than her primary place of work and which did not increase her travelling time could be said to amount to a fundamental breach of contract."**

12. The Employment Tribunal thought that the length of time it would take for the Appellant to travel from home to the Bethlem Hospital was "clearly at the heart of the case" (see paragraph 29 of the judgment). The Employment Tribunal went on to find, at paragraph 31, that "in normal circumstances" the Appellant's journey time from Grays to the Bethlem Hospital would not "exceed an hour and a half which is what the Claimant told us was the average journey time of her journey to Burgess Park." This led the Tribunal to conclude at

paragraph 32 that the "Respondent could reasonably require the Claimant to work from Bethlem".

13. The first sentence of paragraph 32, which reads:

> **"We are satisfied that there was no fundamental breach of contract (*implied* or express) when the Claimant's place of work was moved."** (emphasis added)

must proceed on the alternative basis that there was an express mobility clause or the existence of an implied mobility clause to the effect that the employer had the right to request the employee to change her place of work, provided that the request was reasonable.

14. The rest of paragraph 32 deals with what might be described as the procedural aspects. The Employment Tribunal decided that, although the Claimant had not received the letter informing her that the move would take place on 10 September she had known for some time that such a move was imminent. Also, although the employee dealing with her case had not been sympathetic during the telephone conversation of 11 September, there had been no harassment and thereafter genuine efforts had been made to persuade the Appellant to give the new arrangements a try.

15. Finally, at paragraph 33 of the judgment, the Employment Tribunal dealt with regulation 4 (9) of TUPE 2006. The Employment Tribunal had set out the provision at paragraph 4 of the judgment; it reads:

> **"Subject to regulation 9, where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of the 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 should be treated for any purpose as having been dismissed by the employer."**

At paragraph 33 of the judgment, the Employment Tribunal concluded that there had been no breach of the provision in the following terms:-

> **"Even if the change of location was not a breach of contract, was the change of location was (sic) a substantial change to the Claimant's detriment such that the Claimant could, by virtue of regulation 4(9) of TUPE treat her contract as terminated? A change of location might well fall (sic) amount to a "substantial change in working conditions to [the Claimant's] material detriment" but in this case the journey time to work was not materially longer and on this basis there was, viewed objectively, no material change to the Claimant's detriment."**

The Appellant's submissions

16. In relation to the construction point, Mr Medhurst submitted that the Employment Tribunal had erred in considering that the words "*within the trust"* added nothing. On the contrary, they were words of definition; they defined the geographical ambit of the mobility clause. Nor can the geographical ambit be changed by the transfer. "Trust" must refer to the geographical boundaries of the employer at the time the contract was entered into and not to the new geographical boundaries of the transferee trust. The transfer cannot alter the meaning of the term in the contract, which is being transferred. Benefits and burdens are transferred in the form in which they existed immediately before the transfer; they are to be preserved and that means they are neither diminished nor enlarged.

17. Given that construction of the clause, Mr Medhurst submits that requiring the Appellant to move location was a fundamental breach of her terms and conditions of employment. Where there is an express clause, there is no room for consideration as to how reasonable an alteration in terms of location might be. If the clause provides for an employee to work at a particular location or within a particular geographical area, then employment at a different location or outside that area amounts to a fundamental breach of the term. Consequently the Employment Tribunal fell into error by concluding that if this was an express term there was no fundamental breach of it.

18. Alternatively, if there was an express clause, which, by implication, was limited to reasonable notice, then here there was a lack of notice. Mr Medhurst relied on the authority of **United Bank v Akhtar** [1989] IRLR 507 as illustrating that an express mobility clause can be subject to an implied restriction as to reasonable notice.

19. In any event, he submitted that the Employment Tribunal had misdirected itself as to the proper interpretation of regulation 4(9) of TUPE 2006 at paragraph 33 of the judgment. The Employment Tribunal had failed to distinguish between "a substantial change in working conditions", on the one hand, and whether that change was "to the material detriment" of the Appellant, on the other. In particular, the Tribunal had misdirected itself by applying an objective test to the issues; that must be so because of the language used in the last sentence of paragraph 33, namely "the journey time to work was not materially longer and on this basis there was, *viewed objectively*, no material change to the Claimant's detriment" (emphasis added). Mr Medhurst relied on the Department of Business and Enterprise and Regulatory Reform Guide to TUPE 2006 ("the Guide"); in particular, he referred to the question and answer, which appears at page 18 of the Guide and indicates that what constitutes a "substantial change in working conditions" will be for "the courts and tribunal's to determine in the light of the circumstances of each case".

20. So far as "*material detriment*" was concerned, Mr Medhurst submitted that the same approach to "detriment" as that adopted in discrimination cases should be applied in this context. He referred to the speech of Lord Hope in **Shamoon v Royal Ulster Constabulary** [2003] IRLR 285. At paragraphs 35 to 37 on page 293 Lord Hope said:-

> **"… the only limitation that can be read into the word is that indicated by Lord Brightman. As he put it in *Ministry of Defence v Jeremiah* [1979] IRLR 436, 440, one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind**

that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment": *Barclays Bank plc v Kapur and others (No 2)* [1995] IRLR 87. But, contrary to the view that was expressed in *Lord Chancellor v Coker and Osamor* [2001] IRLR 116, on which the Court of Appeal relied, it is not necessary to demonstrate some physical or economic consequence. As Lord Hoffmann pointed out in *Khan's* case at p.835, paragraph 52, the employment tribunal has jurisdiction to award compensation for any injury to feelings whether or not compensation is to be awarded under any other head: Race Relations Act 1976 s.57 (4); 1976 Order, Article 66 (4). Compensation for injury to feelings was the relief which the appellant was seeking in this case when she lodged her claim with the tribunal. Her complaint was that her role and position had been substantially undermined and that it was becoming increasingly marginalised.

36 The question, then, is whether there was a basis in the evidence which was before the tribunal for a finding that the treatment of which the appellant complained was to her detriment or, to put it more accurately, as the tribunal did not make any finding on this point, whether a finding that they appellant had been subjected to a detriment could reasonably have been withheld.

37 The treatment of which the appellant complains was in the field of her employment. The practice by which she did the appraisals of constables as part of her job in the Urban Traffic Branch had been terminated. As for the question whether a reasonable person in her position might regard this as a detriment, the background is provided by the fact that not only was it the practice for the appraisals to be done by the chief inspectors but this was, as the tribunal put it, endemic in the force. There was evidence that the appellant had carried out as many as 35 appraisals since she was promoted to the rank of chief inspector. Once it was known, as it was bound to be, that she had had this part of the normal duties taken away from her following a complaint to the Police Federation, the effect was likely to reduce her standing among her colleagues. Reasonable employees in her position might well feel that she was being demeaned in the eyes of those over whom she was in a position of authority. The tribunal did not make an express finding to that effect, but there was materially on the evidence from which this conclusion could reasonably be drawn. The respondent did not lead any evidence to the contrary, so he is in no position to resist the drawing of these inferences from the evidence. In my opinion, the appellant was entitled to a finding that she was subjected to a detriment within the meaning of Article 8(2) (b)."

21. Mr Medhurst pointed out Lord Hutton, at paragraph 91 at page 301, and Lord Rodgers, at paragraph 123 at page 304, simply agreed with Lord Hope, as did Lord Scott but with the reservation at paragraphs 104 and 105 on page 302. There he said:

104 The Court of Appeal, however, came to the conclusion that Superintendent Laird's decision had not subjected the appellant to any detriment. They adopted a construction of 'detriment' that required there to be 'some physical or economic consequences as a result of discrimination'. I am unable to agree with the Court of Appeal and am in general agreement with the views expressed by Lord Hope in paragraphs 31 to 37 of his opinion.

105 My only reservation is that the test of detriment as expressed by Brightman LJ in *Ministry of Defence v Jeremiah* [1979] IRLR 436, 440, cited by Lord Hoffmann in *Chief Constable of the West Yorkshire Police v Khan* [2001] IRLR 830 at 835 - 836 (see paragraph 33 and 35 of Lord Hope's opinion), namely that 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment', must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice. In *Khan* the complainant, desiring to apply for a new job, wanted a reference to be given by his employers. His employers refused to give one. It was clear that if they had given one it would have been an unfavourable one. It might be said that a reasonable worker would not want an unfavourable reference. But the complainant wanted to be treated like all other employees and to be given a reference. The House concluded that this was a reasonable attitude for him to adopt and that the refusal to give him a reference, constituted 'detriment'. He was being deprived of

something that he reasonably wanted to have. And while an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute 'detriment', a justified and reasonable sense of grievance about the decision may well do so. On the facts of the present case I agree with Lord Hope that the appellant was entitled to a finding that she was subjected to a detriment within the meaning of article 8 (2)(b) of the 1976 Order."

22. Mr Medhurst submitted that if, by analogy, the Employment Tribunal had adopted the above approach to detriment, particularly the approach of Lord Scott, then it would have reached the opposite conclusion to that found at paragraph 33 of the judgment.

23. As to disposal, he submitted that on the issues as to whether there had been a fundamental breach, this tribunal was in as good a position as the Employment Tribunal and, therefore, should be able to reach the conclusion that the move from Burgess Park to Bethlem Hospital amounted to a fundamental breach of contract. Accordingly this tribunal should substitute a finding of fundamental breach. By the same token, he submitted that a finding of substantial change and material detriment should be substituted by this tribunal so that the Appellant must succeed under regulation 4 (9). This would have the same result in both instances, namely that this tribunal must find that the Appellant had been dismissed. In consequence, this tribunal must award her a redundancy payment and the only matter that need be remitted to the Employment Tribunal was whether the dismissal was fair or unfair.

The Respondent's submissions

24. Mr Scott supported the Employment Tribunal's construction of the location/mobility clause. He acknowledged that the purpose of TUPE 2006 was the protection of employees in transfer situations; here, this was achieved by the words "*within the Trust*". The Employment Tribunal's decision, he submitted, had adopted his alternative formulation as set out in his closing submissions to the Tribunal at paragraph 11 of his skeleton argument (see page 45 of the bundle). This is why the Tribunal puts the matter in the alternative at paragraph 32 of the judgment.

25. What the Tribunal have done is to construe the words "*within the Trust*" in a practical way, having regard to the circumstances of the case. Although they do not mention either authority, the approach is consistent with that of the Court of Appeal in **Morris Angel & Son Ltd v Hollande** [1993] IRLR 169, as modified by applying the doctrine of "substantial equivalence" suggested by an Employment Appeal Tribunal presided over by Maurice Kay J, as he then was, in the case of **Mitie Managed Services Ltd v French and others** [2002] IRLR 512. The "substantial equivalence" here is to substitute one geographical Trust area for another. If one does that it is clear that there was no breach.

26. Alternatively, and in any event, he submitted that the Employment Tribunal had been quite right to find that there was no fundamental breach. They had, in effect, found as facts that the distance was not greater and the journey time not longer. On a fair reading of paragraphs 12 and 13 of the judgment, the Tribunal rejected the argument that there was a 10 miles difference; the difference was really 2½miles and the evidence was that via the M25 it did not take substantially longer. This is the sum total of paragraphs 29 to 32 of the judgment.

27. Because of the way that Mr Scott deployed his submissions at first instance, the Employment Tribunal had also addressed the implied term argument. This too is disposed of by paragraphs 29 to 32 of the judgment. Moreover, the Tribunal had addressed the implied term suggested in **United Bank v Akhtar** [1989] IRLR 507. Paragraph 10 of the judgment must be taken to be a finding that there had been reasonable notice. The Tribunal had quite rightly not been prepared to confine that issue to events in September. Paragraph 10 of the judgment looked at the whole history; it had been plain that there would be a move and there had been discussion about it. Therefore, there had been reasonable notice.

28. Mr Scott's first position on regulation 4(9) was that statutory interpretation by reference to the Guide was impermissible. The Guide had not been referred to below and this was a new point. Secondly, and in any event, there was nothing in the Employment Tribunal's approach as set out at paragraph 33, which was inconsistent either with the Guide or the statutory language. The approach of the Tribunal at paragraph 33 was consistent with Lord Hope's speech in **Shamoon** and, for that matter, also with Lord Scott.

29. Finally, even if this tribunal rejected his submissions, Mr Scott argued that the case must be remitted for consideration of both redundancy and unfair dismissal. Facts would need to be found and that was the function of the employment tribunal.

Conclusions

30. The contract of employment (see pages 50 to 51 of the bundle) contained an express term as to the Appellant's place of work. She was "based at" Burgess Park. The contract also provided for alterations to that workplace in the terms of the location clause set out in paragraph 8 above. The Employment Tribunal recognised this at paragraph 11 of the judgment. In those circumstances the primary task of the Employment Tribunal was to construe the contract of employment.

31. This is what the Employment Tribunal did at paragraph 28 of the judgment. The conclusion reached by the Employment Tribunal in paragraph 28 was that the contract "*should properly be interpreted so as to allow a transfer to locations which were operated by the transferee*". Because the transferee could only deploy staff at locations "*which it itself owned or operated*" the words "*within the Trust*" must be treated as otiose. The result was that on transfer "*the benefit of the mobility clause transferred to the respondent and to the locations which it owned*".

32. We accept Mr Medhurst's submission that the words "*within the Trust*" cannot be regarded as surplus or meaningless. In our judgment they are plainly words of definition, which restrict the geographical area. Moreover, it seems to us that the contract falls to be construed at the time that it was entered into. After all, the parties are making an agreement at a point in time and while circumstances may need to be considered when construing the words of an agreement in order to ascertain the intention of the parties, plainly it must be the circumstances pertaining immediately before and at the time of the agreement and not later circumstances. This we take to be an elementary premise in relation to the construction of contracts.

33. Accordingly, we have concluded that the Employment Tribunal fell into error in regarding the words "*within the Trust*" as not adding anything. On the contrary, they were vital words, defining the scope of the mobility clause.

34. Mr Scott supports the conclusion at paragraph 28 of the judgment - "*the benefit of the mobility clause transferred to the respondent and to the locations which it owned*" -by reference to "substantial equivalence". We do not accept that submission. In our judgment the Court of Appeal decision in **Morris Angel and Son Ltd v Hollande** owes nothing to the concept of "substantial equivalence" derived from **Mitie Managed Services Ltd v French and others**.

35. **Morris Angel and Son Ltd v Hollande** was concerned with the scope of a restrictive covenant in a contract of employment after a relevant transfer. The clause was a non-dealing clause preventing dealing with "any person, firm or company who has at any time during the one-year immediately preceding ... done business with the group". The issue was how "group" was to be construed; did it mean the original group or did it mean the transferee group and how

had that construction been affected by the application of what was then regulation 5(1) of TUPE 1981 (now regulation 4(1) of TUPE 2006)? The High Court gave it the latter meaning; the Court of Appeal reversed that by construing the relevant clause as relating to customers of the original group. The main judgment was given by Dillon LJ, who, having referred at paragraphs 20 and 21 of his judgment to regulation 5(1), which had "*the protection of employees' rights* …[as] …*the primary objective*", goes on to say at paragraphs 21 to 23:

> **" … 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] IRLR 161 at pp. 164 -165 Lord Templeman summed up the effect of the EEC directive as being that upon the transfer of the 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 stated at p. 165, 21 that if primary or subordinate legislation enacted to give effect to the U.K.'s obligations under the EEC 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 literal application of the words which the legislature has elected to use.**
>
> **22 The keywords in regulation 5(1) are the words: "... the transfer shall have effect after the transfer as if originally made between the persons employed and the transferee". It does have in a sense retrospective effect. Mr Justice Turner 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. Clause 15 (1) was therefore to be read as an agreement by Mr Hollande not in the relevant year to solicit or undertake business for persons who in the previous year - on the facts of this case the year to 27 April 1992 - had done business with the plaintiffs, not the persons who in that year had done business with a company or its subsidiaries - the group. It followed that, as Mr Hollande was not seeking to do business with persons who in the previous year had done business with the plaintiffs, but only with the persons who had done business with the company, there was no covenant available to the plaintiffs under which injunctive relief could be granted ...**
>
> **23 The difficulty about that approach to my mind is that it turns the obligation on the employees under clause 15 (1) into a quite different and possibly much wider obligation than the obligation which bound him before the transfer, that is to say an obligation not to do business etc with the persons who had done business in the relevant year with the plaintiffs not the company. Such an obligation was not remotely in contemplation when the service agreement was entered into and I can see no reason why the regulation should have sought to change the burden on the employees. As Lord Templeman pointed out, the object was that the benefit and burden should devolve on the new employer. That would mean in the present context that the transferee should be able to enforce the same restriction."**

36. Here, the Employment Tribunal have, by the construction advanced in the judgment, produced a widening of obligation; the geographical area has been extended. Mr Scott justifies

this by recourse to the analogy with the doctrine of substantial equivalence, which he derives from **Mitie Managed Services Ltd v French and others**. That case concerned a profit sharing scheme, which the employment tribunal decided had transferred to the transferee as a result of the operation of regulation 5 (2) (a) of TUPE 1981 (now regulation 4(2)(a) of TUPE 2006). The employment tribunal had been undeterred by the fact that the profit sharing scheme related to the profits of the transferor, Sainsbury's, which had transferred its interest to Pitney Bowes Management Services Ltd, which had then transferred it to the Appellant, Mitie Managed Services Ltd. The practical difficulty was that whilst the Sainsbury's scheme resulted in either a cash bonus or the grant of shares, Pitney Bowes Management Services Ltd, whilst it did have a bonus scheme, had no power to issue Sainsbury's shares. Mitie was under a similar difficulty. Yet the tribunal's decision was that Mitie must honour the Sainsbury's bonus scheme. The Employment Appeal Tribunal reversed that decision, holding that the result of the transfer was not that the transferee must secure continued participation in the Sainsbury's scheme but had to provide a substantially equivalent scheme.

37. **Morris Angel and Son Ltd v Hollande** was cited in **Mitie Managed Services Ltd v French and others**, as it had been in the earlier case of **Unicorn Consultancy Services v Westbrook** [2000] IRLR 80, which was relied on in **Mitie**. The Employment Appeal Tribunal is bound, of course, by decisions of the Court of Appeal but doubts as to the correctness of the decision in **Morris Angel** were not even hinted at in either Employment Appeal Tribunal case. This is not surprising. Where there is a contractual term, which can be continued without practical difficulty, the benefits and obligations remain the same; this is what **Morris Angel** establishes. In such cases there is no need to consider "substantial equivalence". Where, however, there are practical impediments, as was the case in **Mitie**, and the clause cannot be implemented with precisely the same benefits and obligations, then equivalent benefits and obligations can be substituted, so long as neither benefit nor burden is increased or enlarged.

38. What the Employment Tribunal did here was to increase the scope of the geographical area in which the employee could be required to work. This altered the terms of her contract to her disadvantage and resulted in her employment being less protected after the transfer than it was before. Such an interpretation is the antithesis of the purpose of the Directive 2001/23/EC and, thus, of TUPE 2006, which is the domestic implementation of it. There was no difficulty about either construing the clause or as to its practical implementation. That there was a practical difficulty caused by the nature of the transaction cannot alter the meaning of the clause. The Appellant was based at Burgess Park. Her contract only empowered her employer to require her to move to other locations within the area of the Community Health South London NHS Trust. It was an inherent part of the transaction that the geographical location of the undertaking must move from Burgess Park to Bethlem Hospital and no doubt that created a practical difficulty but such a difficulty cannot invoke the concept of "substantial equivalence". If it could, then the whole purpose of the Directive and TUPE, which is achieved by preserving terms and conditions of employment, would be undermined.

39. Therefore, the Employment Tribunal misconstrued the contract of employment at paragraph 28 of the judgment. The Appellant could not be required to move to Bethlem Hospital and the Trust breached her contact when it purported to do so. Moreover, in so far as the Employment Tribunal considered the nature and scope of an implied term as to relocation, it fell into further error. No question of an implied term arose unless and until it was established that there was no express term or that the express terms, on its proper construction, gave rise to an implied qualification as to reasonableness. The contract clearly provides an express term and there is nothing on the face of the contract to suggest any such implied qualification. That being so, it is difficult to understand why the Employment Tribunal felt it necessary to consider reasonableness in paragraphs 30 to 32 of the judgment.

40. The pretext for doing so is set by paragraph 29 of the judgment of the Employment Tribunal (quoted above at paragraph 11 of this judgment). This appears to proceed on the alternative premise that the Employment Tribunal's construction of the contract at paragraph 28 is wrong so that there was a breach of contract but, even so that breach was not "fundamental" and, presumably (although the Employment Tribunal does not articulate this), therefore, not repudiatory.

41. This analysis is somewhat complicated by the use of the word "implied" at paragraph 32 of the judgment. As a result it seems likely that the discussion as to "reasonableness" is in the context of an implied term, which would not be broken by reasonable conduct on the part of the employer, as well as in the context of the nature and degree of the breach of any express term as to location.

42. In our judgment, in so far as the discussion relates to any implied term it was an erroneous discussion as we explain at paragraph 39 above. In so far as it relates to the nature of the breach of the express term, we also take the view that it was misconceived. What is at issue is not the reasonableness of the conduct of the party in breach or the unreasonableness of the other party but whether the party in breach is guilty of repudiatory breach or, as Lord Denning MR put it in **Western Excavating v Sharpe** [1978] 1 ICR 221 at 226:

> **"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance."**

So the issue is not whether a move of a few miles is not very much of a move but whether any move at all is a breach and, if it is, whether insistence on the move amounts to an intention no longer to be bound. To introduce the reasonableness of the employer as a measure of the

character of breach seems to us the wrong approach and we have concluded that the Employment Tribunal also fell into error in respect of this part of the judgment.

43. The Employment Tribunal appear to have appreciated that its finding as to breach of contract did not axiomatically dispose of any issues arising in relation to regulation 4(9) of TUPE 2006. Paragraph 33 of the judgment (set out above at paragraph 15 of this judgment) recognises that the regulation will apply even when there is no breach of contract. But it seems to us from paragraph 33 that the Employment Tribunal not only failed to distinguish the elements of the statutory provision but in saying " … *the journey time to work was not materially longer and on this basis there was, viewed objectively, no material change to the Claimant's detriment …"* rather combined them as one and the same. Moreover, the use of the word "objectively" suggests the application of an objective test throughout.

44. The two components to regulation 4(9), which matter for present purposes, are firstly a "*substantial change in working conditions*" and secondly "*to the material detriment of a person whose contract of employment is … transferred*". The first component requires consideration of two concepts. Firstly, what does Parliament mean by "*working conditions*"? It seems to us that the Employment Tribunal did not interpret that phrase narrowly so as to confine it literally to the conditions under which an employee works. In our judgment Parliament did not intend "*working conditions*" in regulation 4(9) to be confined to a physical state of affairs as might be the case if the matter were being looked at from the point of view of health and safety or environmental considerations. It seems to us obvious that the regulation implements the decision of the European Court of Justice in **Merckx and Neuhuys v Ford Motors Belgium SA** [1996] IRLR 467, where salesmen were transferred to a new dealership at a different workplace without any guarantee as to client base or sales figures, so that there was potential for an adverse impact on commission. All these components were regarded by the European

Court of Justice as "working conditions" and it follows that the phrase applies to contractual terms and conditions as well as physical conditions. The employment tribunal approached the change of workplace here as a change to "*working conditions*" and were right to do so.

45. Whether or not there is a change in working conditions will be a simple question of fact. Whether or not it is a change of substance will also be a question of fact and the Employment Tribunal will need to consider the nature as well as the degree of the change in order to decide whether it is substantial. In the sense that the employee will not be the arbitrator of whether the change is substantial, it might be said that the approach is objective but, as the case of **Merckx and Neuhuys v Ford Motors Belgium SA** illustrates, the character of the change is likely to be the most important aspect of determining whether the change is substantial. There, the European Court of Justice regarded the change as substantial because it was a change in remuneration. No doubt, in such cases there will be endless scope for argument as to the degree of change; the employer will assert that the money will be the same in the end result; the employee will protest that cannot be so; but the focus, in our judgment must be on the nature of the change.

46. Consider cases where the amount of remuneration is unchanged but there is a change in the method of payment. Moving from cash payment to bank transfer may now be a thing of the past; probably so is moving from weekly to monthly payment but each illustrates that it is the character of the change that matters. Each would be a change of substance, although the amount of remuneration was not altered. A more modern example (although we accept it might be unlawful in terms of the detail of Schedule E regulations) might be a change in the system of pay slip receipt from postal to e-mail attachment. There would be no change to the amount of the remuneration. So each of the examples we give would be a change and, in the context of deciding whether that change was "*substantial*", it is not necessary to consider whether the

perspective should be objective or subjective. In our judgment all of this applies just as much to change of workplace as it does to remuneration.

47. On our reading of paragraph 33, the Employment Tribunal adopted the above approach to the question as to whether the change was "*substantial*". But paragraph 33 of the judgment is not entirely clear and it might be read as the Employment Tribunal deciding that the issue of "substantial change" had to be "objectively determined". If so, for the reasons explained in paragraphs 45 and 46 above, the Employment Tribunal fell into error.

48. But the paragraph must be read as also requiring the question of "*material detriment*" to be objectively determined. Is that approach invoked by the word "*material*"?

49. The phrase "*material detriment*" has a long provenance in terms of parliamentary draftsmanship. Its origins can be traced to the context of the compulsory purchase of land in the middle of the nineteenth century, where it was introduced to allow for the purchase of part only of a piece of land providing that the division was not to the "*material detriment*" of the land not purchased. The concept remains in the modern law of compulsory purchase and is also to be found in town and country planning and in the regulation of pensions.

50. We think, however, an examination of that legislative provenance would be misconceived when interpreting a statute, which is the domestic implementation of the legislation of the European Union. **Merckx and Neuhuys v Ford Motors Belgium** was concerned with **Article 4(2)** of the **Council Directive 77/187/EEC** of 14 February 1977.

51. That has been replaced by **Article 4(2)** of **Council Directive 2001/23/EC** of 12 March 2001 but the wording is the same:

> **"2. If the contract of employment or the employment relationship is terminated because the transfer involves a substantial change in working conditions to the detriment of the employee, the employer shall be regarded as having been responsible for termination of the contract of employment or of the employment relationship."**

52. It will be noticed immediately that "detriment" is not qualified by any adjective. How then are employment tribunals to approach the phrase "*material detriment*" in regulation 4(9)? It seems to us probable that Parliament's addition of the adjective "material" was a recognition of Lord Hope's analysis at paragraph 35 of **Shamoon v Royal Ulster Constabulary** (see paragraph 20 above) that the use of the word "detriment", even without adjectival qualification, in Article 8(2)(b) of the **Sex Discrimination (Northern Ireland) Order 1976** involved the issue of materiality. We recognise, of course, that the context in **Shamoon v Royal Ulster Constabulary** was one of discrimination but the applicable field in which that alleged discrimination had to be considered was that of employment and we accept the submission of Mr Medhurst that we should consider the approach in **Shamoon v Royal Ulster Constabulary** when interpreting the phrase in regulation 4(9). Moreover, although "*material*" is added to the rubric of the Directive, we do not think that the addition is at all at odds with the meaning of the Directive, so long as the purpose of the adjective is regarded as an emphasis that the trivial or fanciful cannot be accepted as "*detriment*".

53. But where we part company with the Employment Tribunal's approach is as to the phrase importing an objective test into the regulation. In our judgment it was an error for the Employment Tribunal to regard this issue as one that must be "*objectively determined*". It seems to us the Employment Tribunal understood that to mean here was the competing arguments of the employee and the employer should be contrasted, weighed and arbitrated upon by the employment tribunal. In our judgment that was not the approach of the European Court of Justice in **Merckx and Neuhuys v Ford Motors Belgium** and it would not be consistent with what Lord Scott said in his speech in **Shamoon v Royal Ulster Constabulary** at

paragraphs 104 and 105 (see paragraph 21 above), which we regard as the correct approach. There was no weighing of the competing contentions in relation to the changes to the remuneration structure in **Merckx and Neuhuys v Ford Motors Belgium** and Lord Scott's suggested approach in **Shamoon v Royal Ulster Constabulary** was not that of looking at the employee's position by comparing it with that of the employer and deciding which of the two was more reasonable.

54. What has to be considered is the impact of the proposed change from the employee's point of view. Here the change of location meant potential disruption to child care arrangements and a longer journey or an altered journey involving travelling on the M25, which the Appellant did not find attractive. The questions that ought to have been asked were whether the employee regarded those factors as detrimental and, if so, whether that was a reasonable position for the employee to adopt? In determining the matter by weighing the employee's position against that of the employer and deciding that the employer's position was reasonable, the Employment Tribunal looked at the matter from the wrong standpoint and thus misdirected itself as to the correct approach to regulation 4(9).

Disposal

55. On the issue of breach of contract, we have found that the Employment Tribunal erred in law and should have concluded that the Respondent was in breach of contract. The Appellant resigned on account of it and, accordingly, a finding of dismissal is inevitable. No further facts need be found and it is not necessary to remit that aspect of the matter. Equally, our finding as to error in relation to regulation 4(9) of TUPE 2006 leads to the inevitable conclusion that the Appellant must be deemed to have been dismissed and that is a decision that we can make without the need for remission.

56. Mr Medhurst submitted that we could go on from there to find the dismissal was by reason of redundancy and that the Appellant was entitled to a redundancy payment. Whilst there might be little to argue about as to whether the facts fit the provisions of section 139(1)(a)(ii) of the **Employment Rights Act 1996** (i.e. that there was a redundancy situation), entitlement to a redundancy payment depends on other matters, principally whether there has been an offer of renewal of the contract or of re-engagement or an offer of suitable new employment unreasonably refused (see section 141(1) and (2) of the **Employment Rights Act 1996**). These are matters that require further factual investigation and require remission. The same applies to the issue of unfair dismissal.

57. Accordingly we will substitute a finding of dismissal and remit the issues of entitlement to a redundancy payment and unfair dismissal. The parties will be at liberty to call evidence relative to those issues.

58. Finally, we have considered whether the matter should be remitted to the same employment tribunal or to a differently constituted one? In **Sinclair Roche and Temperley and others v Heard and Fellows** [2004] UKEAT 0738_03_2207, [2004] IRLR 763 a division of this tribunal presided over by Burton J gave guidance as to remission in terms of 6 factors.

59. We have considered those. On the one hand, this is a case where an employment tribunal has come to a very clear but, as we have found, erroneous decision, not only on construction but also on the approach to regulation 4(9). In doing so the employment tribunal formed a firm view as to the reasonableness of the respective positions of the parties. It seems to us that will also be an issue on the question of entitlement to a redundancy payment and, as well as this being a flawed decision, there is a sense in which this will be "a second bite of the cherry" case. On the other hand, this is a decision of a professional tribunal, which has made

factual findings and it would be more convenient and economic for that tribunal to decide the outstanding issues.

60. In the end we think that the Employment Tribunal has expressed such firm views that the issues of redundancy payment and unfair dismissal should be remitted to a differently constituted employment tribunal on the basis that the Appellant was constructively dismissed and/or is deemed to have been dismissed pursuant to Regulation 4(9) in order for that employment tribunal to determine the issues of entitlement to a redundancy payment and whether or not the dismissal was unfair, with the parties being at liberty to call whatever evidence they wish, relative to those issues.