Appeal No. UKEAT/0838/04/DA

EMPLOYMENT APPEAL TRIBUNAL

58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal
On 9 March 2005

Before

THE HONOURABLE MR JUSTICE BEAN

MR K EDMONDSON JP

MR I EZEKIEL

MR CLIFF WILLIAMS — APPELLANT

1) ADVANCE CLEANING SERVICES LIMITED
2) ENGINEERING AND RAILWAY SOLUTIONS LIMITED
(IN LIQUIDATION) — RESPONDENTS

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MS S JOLLY (Of Counsel) Instrucrted by: Messrs Webster Dixon Fourth Floor, Thavies Inn House 3-4 Holborn Circus London EC1N 2HA
For the 1st Respondent	MS H WINSTONE (Of Counsel) Instructed by: Messrs M J Legal Bank House 81 St Judes Road Englefield Green Egham Surrey TW20 ODF
For the 2nd Respondent	No Appearance/Representation

SUMMARY

TUPE – **Botzen** – whether employed in the part transferred – no issue of law.

THE HONOURABLE MR JUSTICE BEAN

1. The Appellant, Mr Clifford Williams was employed by Engineering and Railway Solutions Ltd beginning in October 1998. He was originally a project leader on a contract which primarily involved engineering design. It appears that he worked on a self-employed basis at first but certainly by early 2000 he was employed by E & R S, as we shall call them, based at their office at Havant.

3. In 2002 the engineering design contract finished. E & R S's Managing Director Mr Roger Thompson, asked the Applicant to take responsibility for what Mr Thompson described as the company's "Train Care Division". E & R S had three contracts within the Train Care Division. The London Terminals contract provided for cleaning services to South Central Trains operating out of London Bridge and Victoria. There was also an accommodation contract for cleaning the premises at the London terminals and a cleaning contract for the trains running along the South Coast eastwards from Hampshire.

4. Mr Thompson gave evidence to the Tribunal that the London Terminals contract in particular was proving difficult to administer. He felt that the Applicant's background in project and personnel management would give the skills which the company badly needed to improve performance. The London terminals contract appears to have been a particular problem in that respect.

5. From July 2002 Mr Williams spent a great deal of his time coming to grips with the London terminals contract but remained based at Havant. He spent most of his time in September and October 2002 in developing a computer programme in the London terminals contract. During this period he made frequent trips to London. In 2003 South Central Trains

decided to go through a process of re-tendering for the London terminals contract. E & R S submitted a tender but they were not successful. The contract was to go to Advance Cleaning Services Ltd with effect from midnight on 27 August.

6. Mr Williams was not offered employment with Advance Cleaning Services Ltd and unfortunately E & R S went into liquidation, apparently on a petition by the Revenue and the Customs and Excise, on 23 October 2003. Mr Williams' application to the Tribunal for unfair dismissal, brought against both E & R S and Advance Cleaning Services Ltd raised the important issue (which was heard as a preliminary issue) of whether he was employed in or assigned to that part of the undertaking of E & R S which was transferred to Advance Cleaning Services Ltd on 27 August. Since the London terminals contract was (and this was apparently common ground) a part of the undertaking which was transferred, the question was whether Mr Williams was employed in or assigned to that part of the undertaking.

7. The Tribunal set out their findings of fact beginning with the plainly significant issue of how much time from 2002 - 2003 (particularly towards the end of that period) Mr Williams spent on the London terminals contract. They record that at a meeting between Mr Williams and Mr King, a director of Advance Cleaning Services Ltd, on 26 August 2003 Mr Williams had given his own estimate of between 60 and 70% of his time being spent on the London terminals' contract. The Tribunal set out Mr Williams' evidence on this issue and the evidence of Mr Morgan, the train environment manager for South Central Trains, whose estimate was very much less than that of Mr Williams; and came to the conclusion that they were certainly satisfied that, looked at over the relatively short time frame of Mr Williams' involvement with the London terminals contract, namely just about a year, more than half of his time would have been spent on this project.

8. The Tribunal had before them a document numbered B36 in their bundle signed by Mr Williams and Mr Thompson and dated 1 August 2002, though we have been told and accept that the correctness of the date on the document was in issue before the Tribunal. It is headed with the E & R S logo and after the company name has the heading 'Job Description' and then 'Job Title: Operations Manager – London Terminals'. It goes on:

> **"Main Purpose of Job.**
>
> **To manage E&RS Traincare contracts and ensure all contractual requirements are met and the contacts are run efficiently and within the budge approved by the E & RS directors.**
>
> **To oversee, instruct and advise all managers, supervisors and Traincare cleaners employed by E & RS at all locations.**
>
> **Hours and Shifts**
>
> **The Operations Manager will work a basic 39 hour week based at the Company Head Office in Havant, with visits to all locations as required. On occasions, some weekend and night shift working will be expected to suit service requirements."**

There are then further details including a number of references to "The Train Care Contracts".

9. The Tribunal do not in their Decision make any finding as to the authenticity or the significance of this document. It would perhaps have been better if they had recorded whether they consider it to be significant; but we have come to the conclusion after examining the Tribunal's findings of fact and the document itself (and assuming that it is indeed authentic and correctly dated) that it is not of any great significance. This is because as the Tribunal record Mr Williams' own contemporaneous estimate of the time he spent on the London terminals contract was between 60 to 70%. The Tribunal's conclusion which they were plainly entitled to reach as a matter of fact was that he spent more than half his time on the London terminals contract; and the job description, which does as we have said repeatedly refer to the Train Care contracts, is not in any sense incompatible with those findings of fact. It seems to be fairly clear, and certain by the Tribunal found, that the London terminals contact was the largest element in the work done by Mr Williams in the months leading up to the loss of the contract

by E & R S. But it was by no means the only one. The South Coast contract and the London Accommodation contract were also included in his duties and possibly other elements as well.

10. The Tribunal continued in their findings of fact as follows:

> **"9. Although Mr Williams attended in London on a relatively frequent basis, Havant remained his prime and regular workplace. Whilst Mr Williams may have been primarily involved with London terminals for a limited period, he retained responsibility for the south coast contract and the cleaning contract. The management of the contract was carried out by Mr Carrington and Mr Whelan [two subordinates] on site at the London terminals. Mr Williams only had an overview of their activities."**

11. The Tribunal's conclusion was as follows:

> **"9. … It is clear to the Tribunal that the employment of Mr Williams had originally been in respect of the engineering design contract held by the Second Respondent. On the termination of that contract, Mr Thompson moved him to the Train Care Division so that he could bring his project management skills to the problems being experienced under those contracts. Mr Williams did exactly that and effectively the next step as for him to be involved in the tendering process for the new contract in 2003. The Tribunal draws the deduction that the London terminals contract was a project in just the same way that the engineering design contact had been a project for the Applicant. He had been put in to make the contract work. …**
>
> **The Tribunal is satisfied that, whilst Mr Williams spent a large part of his time and probably the majority of his time working on the London terminal contract, he continued to be a Project Manager in the employ of the Second Respondent [that is E & RS]. Historically he had moved from one project to another and had work been available, he would have been a natural progression for him to move on to the next project after the London terminals contract had been lost. …He never became an integral part of the London terminals contract but remained attached to E & RS Ltd and was available to undertake other work for them."**

They found accordingly that he was not a person employed by the transferor in the part of the undertaking transferred and therefore dismissed his claim.

12. The law on this subject derives from the notoriously opaque decision of the European Court of Justice in **Botzen v Rotterdamsche Droogdok Maatschappi BV** [1986] 2 CMLR 50. The reasoning of the Court of Justice is compressed into two paragraphs, 15 and 16 and even paragraph 16 is immaterial to a straightforward case such as the present. Paragraph 15, after a reference to the submissions of the Commission states:

> **"15. …An employment relationship is essentially characterised by the link existing between the employee and the part of the undertaking or business to which he is assigned to carry out his duties. In order to decide whether the rights and obligations under an employment relationship are transferred under Directive 77/187 by reason of a transfer within the meaning of Article 1(1) thereof, it is therefore sufficient to establish to which part of the undertaking or business the employee was assigned"."**

The expression "assigned to the part of the undertaking" has never been defined. In **Duncan Web Offset (Maidstone) Ltd v Cooper** [1995] IRLR 633, this Tribunal, Morison J (then President) presiding, said in paragraph 15 that the first (and we would add the most common) factual situation which arises is this:

> **"1. X has a business in which he employs a number of people. X transfers part of his business to Y. In order to determine which employees were employed by X in the part transferred it is necessary to ask: which of X's employees were assigned to the part transferred – see Botzen"**

Then after a reference to the case of **Gale v Northern General Hospital NHS Trust** [1994] IRLR 292 this Tribunal continued:

> **"The contracts of employment of those who were so assigned will, unless the employees object, pass over to the transferee, thus giving effect to the purpose of the Regulations and the Acquired Rights Directive, pursuant to which they were made, that an employee should not forfeit his job because of a change in the identity of his employer. There will often be difficult questions of fact for industrial tribunals to consider when deciding who was 'assigned' and who was not. We were invited to give guidance to industrial tribunals about such a decision, but decline to do so because the facts will vary so markedly from case to case. In the course of argument a number were suggested, such as the amount of time spent on one part of the business or the other, the amount of value given to each part by the employee; the terms of the contract of employment showing what the employee could be required to do; how the cost to the employer of the employee's services had been allocated between the different parts of the business. This is, plainly not an exhaustive list; we are quite prepared to accept that these or some of these matters may well fall for consideration by an industrial tribunal which is seeking to determine to which part of his employers' business the employee had been assigned."**

13. Like our predecessors in the **Duncan Web** case we decline to attempt to provide a formula for deciding whether an employee was assigned to the part transferred or not. The potential factors referred to in the **Duncan Web** case are, as this Tribunal was at pains to emphasise, neither an exhaustive list nor a mandatory one that a tribunal has to recite and consider item by item. The most the Appeal Tribunal in **Duncan Web** were prepared to say is that "these are some of these matters may well fall for consideration".

14. What is abundantly clear and has been said on a number of occasions is that in weighing up whether somebody is assigned to the part transferred within the meaning of the **Botzen** case the tribunal (as so often in questions under the TUPE Regulations) is essentially reaching a decision on a question of fact. Accordingly an Appellant before this Tribunal has the difficult

task (provided that the employment tribunal have applied the correct law) of showing that the Decision was perverse; and, as the Court of Appeal made clear in a different context in **Yeboah v Crofton** [2002] IRLR 634, perversity is a high hurdle to jump.

15. Ms Jolly in the course of her succinct and forceful submissions for the Appellant drew our attention to paragraph 8 of the Decision of the tribunal, the first sentence which reads as follows:

> **"8. The European Court of Justice (in Botzen) and Mummery L.J. (in the unreported case of Jones and Kingston v Dollars Estate Agency [1998] EWCA Civ 1157) draw the distinction between the employee who is effectively assigned to the part of the undertaking transferred as against the employee whose work is substantially involved in that part of the undertaking."**

She complains that the contrast between the employee assigned to the part transferred and the employee whose work is substantially involved in that part is misconceived. We agree that this sentence is not felicitously worded. It would be more accurate to say that it is not sufficient for an employee to show that he was substantially involved in the part transferred: he has to show that he was effectively assigned to the part transferred. But viewing this tribunal decision as a whole we do not think that they thought otherwise. The findings we have recited and the conclusions set out in paragraph 9 of the Decision do amount to saying that while Mr Williams spent probably the majority of his time working on the London terminal contract he never became an integral part of it and his job continued to be one of project manager in the employment of E & R S.

16. These are, we think, unappealable findings of fact by the Tribunal. Notwithstanding Ms Jolly's attractive arguments we find that there was no error of law in their decision and we therefore dismiss the appeal.