United Kingdom Employment Appeal Tribunal

BAILII case number: [2009] UKEAT 0538_08_2910

Appeal No. UKEAT/0538/08

EMPLOYMENT APPEAL TRIBUNAL
58 VICTORIA EMBANKMENT, LONDON EC4Y 0DS

At the Tribunal

On 7 May 2009

Judgment delivered on 29 October 2009

Before

HIS HONOUR JUDGE PETER CLARK

MR P GAMMON MBE

MR R LYONS

CABLE REALISATIONS LTD	APPELLANT
GMB NORTHERN	RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MR OLIVER HYAMS (of Counsel) Instructed by: Messrs Browne Jacobson Solicitors 44 Castle Gate Nottingham NG1 7BJ
For the Respondent	MR SIMON GOLDBERG (of Counsel) Instructed by: Messrs Thompsons Solicitors The St Nicholas Building St Nicholas Street Newcastle upon Tyne NE1 1TH

SUMMARY

TRANSFER OF UNDERTAKINGS: Consultation and other information

Duty to consult under Reg. 13(2) TUPE 2006. Consideration of dictum in IPCS (1987) IRLR 373. Quantum of award for failure to consult. Appeal and cross-appeal dismissed.

HIS HONOUR JUDGE PETER CLARK

1. This matter has been proceeding in the Newcastle Upon Tyne Employment Tribunal. The parties are GMB Northern (the Union) Claimant and (1) AEI Cables Limited (AEI) and (2) Cable Realisations Limited (Cable) Respondents. This is an appeal by Cable against the reserved Judgment of an Employment Tribunal chaired by Employment Judge Green and promulgated with reasons on 21 September 2008 upholding the Union's claim that Cable was in breach of reg. 13(2) of the **Transfer of Undertakings (Protection of Employment) Regulations 2006** ("TUPE") and awarding 3 weeks wages in respect of each of the Union's affected members. The Union cross-appeals against the quantum of the Employment Tribunal's award.

Background

2. On 3 September 2007 a relevant transfer of Cable's business located at Birtley to AEI took place. This case is concerned with the timing of the transferor, Cable's consultation with the Union, which was a recognized trade union for the purposes of TUPE, prior to the transfer date.

3. The transferor had been making a loss since late 2006 and in May 2007 a formal decision was taken to discontinue its cable business during 2007 either by sale or closure. Sales brochures were distributed and on 31 May Paramount, an Indian-based company, issued a non-binding letter of offer to buy out the transferor's interest.

4. On 18 June Mr Mansfield, Managing Director of the transferor, requested the Personnel Manager, Mr Scott, to prepare 90 day notices of redundancy on the basis of a potential site closure.

5. On 28 June a meeting of the board of the transferor's holding company, TT Electronics plc, led to a decision to actively pursue the sale of the business. Mr Scott was asked by Mr Mansfield not to proceed with the 90 day notices.

6. On 29 June notices were posted at the Birtley site informing the workforce that negotiations were underway to sell the entire business to a major cable manufacturing company.

7. The first meeting between the transferor and union representatives took place on 3 July. Those representatives then complained that consultation had not taken place in good time; the identity of the prospective buyer had not been released; the minute of the meeting continued:

> **"Changes to working conditions. Pension. Employer's duty to inform transfer date. Legal economic and social effects. Measures required. Don't think that has been done before attempt to sell. Employer must supply information long enough before transfer."**

8. Mr Scott responded that there was no obligation at that stage to consult under TUPE. The Union registered a Failure to Agree. On 6 July Jackie Woodall, the Union's senior organizer, wrote to Mr Mansfield complaining of lack of consultation.

9. On 11-12 July Heads of Agreement for a share sale from transferor to transferee was signed containing a confidentiality clause.

10. On 13 July a notice was posted informing the workforce at Birtley that the due diligence process would be starting on 16 July and a further notice on 18 July stated that if there was to be a business transfer then the company would comply fully with its obligations.

11. On 25 July a meeting took place attended by Mr Mansfield, Mr Scott, the Manufacturing Director, and union representatives and Ms Woodhall, together with Mr Haruray of the potential purchasers. Mr Haruray maintained the potential purchaser's secrecy as to its identity and Mr Mansfield put the time scale for any possible purchase in terms of weeks. Questions about the annual payment round were said by Mr Haruray to be dependent on the company's commercial viability. A later meeting that day in the absence of Mr Haruray focussed on pay and pensions.

12. On 26 July an exchange of e-mails between solicitors acting for the transferor and transferee anticipated exchange of contracts for sale of the business on 3 August.

13. On 15 August the transferee provided the transferor with the information required by reg. 13(2) TUPE (the 'measures' letter), concluding;

> **"There are no measures envisaged in relation to the transferring of employees in connection with the transfer."**

14. On the same day the Union was provided with the information required under reg. 13(5) and a meeting took place with the Union representatives and Ms Woodhall. A further similar meeting took place on 17 August at which the Union's questions and transferor's answers were recorded.

15. The factory closed early on 17 August for the annual shutdown which took place between 20 and 31 August. During that period about 99 per cent of the Union employees were on holiday and some 85 per cent away from home. Ms Woodhall was not then on holiday. Meetings took place on 29 and 30 August with employee representatives who had been elected on 8 August, but not GMB site representatives.

16. The transfer, originally placed for 24 August, was finally completed on 3 September. On that day a meeting took place between the transferee, Ms Woodhall and the Union representatives.

17. The Employment Tribunal found (paragraph 25) that the transferee wanted the transfer to take place

at the end of September. It was the transferor who insisted on the earlier date.

TUPE 2006

18. The original TUPE Regulations 1981 were passed, not wholly successfully, to implement EC Directive 77/8187 (the Acquired Rights Directive). The 2006 Regulations were passed to implement Directive 2001/23/EC.

19. The material provisions for present purposes are to be found in reg. 13 of the 2006 Regulations. Regulation 13 is headed 'Duty to inform and consult representatives'. A complaint to an Employment Tribunal that an employer has failed to comply with a requirement of reg. 13 is, in the case of failure relating to representatives of a trade union, made by the trade union (reg.15(1)(c)).

20. The distinction between the duty to inform and to consult the trade union is to be found in the provisions of reg. 13(2) and 13(6).

21. Reg. 13(2), concerned with the former duty, provides:

> 13. —(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.
>
> (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.

22. Reg. 13(6) provides:

> (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.

23. At para. 12 of their reasons the Employment Tribunal set out paras. 11-13 of the judgment of Millett J in **IPCS v Secretary of State for Defence** [1987] IRLR 373 (ChD), stating that Counsel for all (three) parties had referred to that case. At para. 20 they add:

> **"We agreed with Millett J on the relationship between informing and consulting when he said (IPCS, para. 13)**
>
> *'The consultations referred to in the opening words of subsection (6) are voluntary consultations, which the unions may seek on any topic once they have the requisite information,, but which the transferring employer is not compelled to grant if he chooses not to do so.' "*

24. IPCS was decided under the provisions of the **Dockyard Services Act 1986** (the 1986 Act), which allowed the Secretary of State to make arrangements for private sector companies to take over the management of the Royal Dockyards at Rosyth and Devonport. The 1986 Act applied the **1981 TUPE Regulations** to the transfer of the dockyards. Although not necessary for the determination of the action brought by trade unions for a declaration that the Secretary of State had failed in his duty under the 1986 Act to give information to those unions representing affected employees, Millett J, at paras. (11-13) of his judgment, expressed his opinion as to whether, under s1(6) of the Act (reflecting the predecessor of reg. 13(2) of the 2006 Regs, beginning:

> **"Long enough before the transfer to enable consultation to take place between the Secretary of State and the representatives of the independent trade unions recognised by him in respect of the employees, the Secretary of State shall … inform those representatives of … "**

There then followed provisions (precisely reflected in sub-paragraphs (a)-(d) of reg. 13(2)) that obligation to provide information arose notwithstanding that there was no obligation on the Secretary of State to consult with the unions under s.1(8) of the 1986 Act (now to be found in reg. 13(6) of the 2006 Regulations). His Lordship answered that question in the affirmative, as the Employment Tribunal noted and adopted in the present case at para 20 of their reasons.

The Employment Tribunal Decision

25. Based on their application of the law to the facts as found the Employment Tribunal resolved the issues between the parties as follows:

> (1) The Transferor, Cable, failed to inform the union long enough before the transfer (3 September) to allow consultation with the appropriate representatives to take place, contrary to reg. 13(2). They found that the necessary information was given on 15 August which, on the face of it was sufficient time before the 3 September. However (para 23) the information was given only two days before the factory shutdowns when 99 per cent of the union members were on holiday (85 per cent being away from home). Although the full-time official, Ms Woodhall, was not on holiday, the union site representatives and members were. There was very little time for meaningful, albeit voluntary consultation (no compulsory obligation to consult under reg. 13(6) arose) to take place. The transferor could have provided the information by 13 August; further, the transfer date could have been deferred until soon after the workforce's return to work on 3 September to allow for a short period of consultation.

(2) Having found a breach of reg. 13(2), but not reg. 13(6), the Employment Tribunal made the appropriate declaration and awarded 3 weeks wages in respect of each of the union members who were affected employees. Their reasoning in arriving at that award was as follows. They noted that the maximum compensation per affected employee was 13 weeks pay (reg. 16(3)). The considered the Court of Appeal guidance in **Susie Radin v GMB and Others** [2004] ICR 893 and directed themselves that since, in their view, the remedy available is for both failure to inform and consult the maximum available for a failure to inform is 3 weeks pay. They notionally reduced that perceived maximum because Cable had given 2 days notice (15-17 August) but then increased it by the same amount because Cable was (a) in a position to inform the union on 13 August and (b) could have deferred the transfer date, finally awarding 3 weeks pay.

Cable's Appeal on Liability

26. Mr Hyams who, like Mr Goldberg, appeared below (the first Respondent below, AEI, has ceased to be a party in the EAT pursuant to the order of Underhill P seal-dated 26 January 2009) wishes to take a point not raised below, namely that the observation of Millett J in the IPCS case at para 13 is wrong as a matter of law. He now submits before us, but did not below, that the obligation to inform under Regulation 13(2) only arises with a view to compulsory consultation provided for in Regulation 13(6), not voluntary consultation. Since there was no obligation on Cable to consult under Regulation 13(6), as the Employment Tribunal found, there can be no breach of the duty under Regulation 13(2).

27. Mr Goldberg objects to Mr Hyams being permitted to take this new point for the first time on appeal. He relies on the 'Kumchyk principle' (see **Kumchyk v Derby CC** [1978] ICR 1116), endorsed by the Court of Appeal in **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719 (informed, in part, by the earlier CA decision in **Jones v Governing Body of Burdett Coutts School** [1998] IRLR 521).

28. It is clear from the judgments in Glennie that a new point will only be entertained on appeal in exceptional circumstances. Before deciding whether such circumstances exist we shall first consider whether Mr Hyams' point (the IPCS point) is a good one, requiring no further evidence below; if not, then the **Kumchyk** question need not arise. Even if it is a good point that still may not be enough (see **Jones**).

The IPCS Point

29. The question posed by Mr Hyams is whether 'consult' in Regulation 13(2) of the 2006 Regulations means consult as required by Regulation 13(6), no such requirement arising in the present case or can it refer equally to voluntary consultation, as Millett J though in IPCS?

30. In support of the former construction Mr Hyams submits that since Regulation 13(6) only requires consultation concerning measures which the employer envisages he will take in relation to the affected employees (provided for in Regulation 13(2)(d)) the requirement to provide information under Regulation 13(2) is not dependent on the purpose of consultation. That is expressly provided for in respect of the information required under Regulation 13(2)(d) by Regulation 13(6).

31. Whilst we see the logic of that submission as a matter of pure construction we think and here this Tribunal enjoys the benefit of the vast practical experience of its industrial members, that it overlooks the industrial relations rationale behind TUPE and in turn the Directive. Mr Hyams contends that the purpose behind the requirement to provide information under Regulation 13(2) is to put at rest the minds of affected employees as far as possible at a time of impending changes. We

think that it goes further than that; it is designed to allow the representatives of those employees to engage in a consultation process with the employer on an informed basis. Whether the employer is obliged to engage in such a consultation exercise is dependent on Regulation 13(6).

32. However, as the facts of the present case show, a responsible employer will not necessarily limit consultation to the measures being taken. Here, as Mr Goldberg points out, the transferor (and transferee) answered questions raised by representatives of the workforce on 15 and 16 August notwithstanding that no measures were envisaged under Regulation 13(2)(d).

33. Mr Hyams has referred us to Article 7 of the 2001 Directive (formerly Article 6 of the 1977 Directive) and submits that it provides no support for the interpretation placed on the relevant domestic provision by Millett J in **IPCS**. We do not believe that the Directive advances the argument one way or another. We are satisfied that Article 7 is properly transposed into domestic law by Regulation 13(2).

34. Finally, we agree with Mr Goldberg that we should be slow to interfere with what has become settled law (see Harvey on Industrial Relations, V2, F 270-275).

35. In these circumstances we have concluded that Mr Hyams' late challenge to the observations of Millett J in IPCS is not well-founded. Consequently, even had we permitted him to take the new point now it would not have succeeded. In our judgment the Employment Tribunal, at para 20 of their reasons, correctly directed themselves as to the construction of Regulation 13(2).

Relevance of the shutdown

36. Mr Hyams further submits that even if the purpose of providing information is to assist voluntary as well as compulsory consultation with the affected employees' representatives the fact that during 10 of the working days between 15 August and 3 September the site was shutdown and the affected employees (and their site representatives) were on holiday is irrelevant to the question posed by Regulation 13(2); was the relevant information given long enough before the relevant transfer?

37. We disagree. Having accepted that the purpose of providing the information was to assist the union to engage in voluntary consultation with the transferor prior to the transfer date Mr Goldberg has referred us to the classic test formulated by Hodgson J in **R v Gwent County Council ex.p Bryant** (1988) Crown Office Digest 19 and approved by Glidewell LJ in **R v British Coal Corporation ex.p Price** (1994) IRLR 72, para 24l fair consultation means

> **"(a) Consultation when the proposals are still at a formative stage.**
>
> **(b) Adequate information on which to respond.**
>
> **(c) Adequate time in which to respond.**
>
> **(d) Conscientious consideration by an authority of the response to consultation."**

38. That formulation requires some adaptation in the present case. Here, the obligation to provide information arose, on the Employment Tribunal's findings, on 13 August. Thereafter, in order to engage fully in a meaningful consultation exercise it was essential that the union site representatives were available to speak with management and that those representatives could communicate with the members whom they represented. That was not practicable during the shutdown as the transferor must have known. In these circumstances we agree with Mr Goldberg that the Employment Tribunal was entitled to take into account the effect of the shutdown in

answering the 'long enough' question posed by Regulation 13(2).

Perversity

39. Having failed to persuade us on his first two submissions, Mr Hyams finally falls back on the well-worn perversity argument. He makes a number of points on the facts which he contends inevitably lead to the conclusion that the relevant information was provided long enough before the transfer date. We have considered the points made by Mr Hyams and the detailed response made by Mr Goldberg. We do not propose to set out the rival contentions in this judgment. Put shortly, we are wholly unpersuaded that Mr Hyams makes good this submission, bearing in mind the high hurdle facing appellants on this ground of appeal. See **Yeboah v Crofton** (2002) IRLR 634.

The Remedy Appeals

40. Both parties now before us challenge the Employment Tribunal's award of 3 weeks pay.

41. First, it is common ground between Counsel and we agree that the Employment Tribunal misunderstood the statutory maximum award under Regulation 16(3) as applying to cases of a failure to both inform and consult. We are satisfied that the maximum applies to any breach of Regulation 13. However, what we think the Employment Tribunal had in mind was that the maximum award is appropriate where there has been a complete failure both to inform and consult, as was the case in **Susie Radin**. That case was concerned with the consultation provisions of ss 188 and 189 of the **Trade Union and Labour Relations (Consolidation) Act 1992**. However, s188(4) of that Act requires the employer contemplating redundancies to provide certain information to the employee representatives for the purpose of consultation. On its facts, there had been a total failure on the part of the employer to inform and consult the representatives and a maximum protective award made by the Employment Tribunal was upheld in the Employment Appeal Tribunal and Court of Appeal.

42. It seems to us that the approach laid down by Peter Gibson LJ in **Susie Radin**, para 45, resonates in the present case. Although the maximum award is 13 weeks, this is far from being a case in which no information was provided; it was provided on 15 August and there was no failure to engage in mandatory consultation.

43. Thus, whilst the Employment Tribunal's reasoning is infelicitously worded we are satisfied that they properly took into account their findings of fact in arriving at an award which reflected the justice of the case. It was neither too high, as Mr Hyams submits, not too low, as Mr Goldberg argues. Like baby bear's porridge, it was just right. Accordingly, we shall dismiss both the appeal and cross-appeal on remedy.

Disposal

44. It follows that both the appeal and cross-appeal fail and are dismissed. For the reasons which we have endeavoured to give the Employment Tribunal's judgment is affirmed.
