Neutral Citation Number: [2019] EWCA Civ 216

Case No: A2/2017/2990

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
MR JUSTICE CHOUDHURY
UKEAT/0131/17/JOJ

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2019

Before :

LORD JUSTICE UNDERHILL
(Vice- President, Civil Division, Court of Appeal)
and
LORD JUSTICE BEAN

- -

Between :

HARE WINES LTD	**Appellant**
- and -	
MRS SATWANT KAUR	**Respondent**
H&W WHOLESALE LTD (DISSOLVED)	

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John Crosfill (instructed by **Rainer Hughes**) for the **Appellant**
Alexander MacMillan (instructed by **Meaby & Co Solicitors LLP**) for the **First Respondent (Claimant)**
The Second Respondent did not appear and was not represented

Hearing date: 19 February 2019

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Approved Judgment

Lord Justice Bean :

The Facts

1. Satwant Kaur was employed from 2002 as a cashier in a wine wholesale business run, over the course of her employment by a number of different corporate entities. The common link between them was that Mr K Hare and Mr Alexander Windsor were directors and/or shareholders. By 2014 the Claimant was employed by H&W Wholesale Ltd ("H&W") whose directors were Mr Hare and Mr Windsor.

2. In April 2014 Hare Wines Ltd started trading. Until 2 January 2015, Mr Hare was its sole director and shareholder.

3. Mrs Kaur had a strained working relationship with a colleague, Mr Chatha, who was to become a director of Hare Wines Ltd. The employment tribunal in the present case found that the difficulties were on both sides with neither of them entirely to blame, but that nevertheless there was friction and difficulty in their working relationship.

4. In early December 2014 it was decided that H&W would cease trading for financial reasons. Following discussions between Mr Windsor and Mr Hare, it was agreed that Hare Wines Ltd would take on the business and employees of H&W. Mr Windsor held meetings with the six or seven employees of H&W, the last of whom was Mrs Kaur. Her meeting with Mr Windsor was on 9 December 2014. Later that day Mr Windsor wrote to her as follows:

> "I am sorry to inform you that due to unforeseen circumstances concerning the business, I must inform you that our business will now cease to trade. As a result we will unfortunately have to terminate your employment as from today."

5. It is common ground that on 9 December 2014 there was a TUPE transfer of the business of H&W to Hare Wines Ltd as a going concern

6. Following early conciliation proceedings which did not result in a settlement, Mrs Kaur submitted a claim to an ET in March 2015 for redundancy pay and notice pay against both companies. Each submitted a Response. H&W Wholesale Ltd relied on the decision to cease trading and the transfer of the business to Hare Wines Ltd. Hare Wines Ltd asserted that the Claimant has never been an employee, had not spoken to Mr Hare and that it had not issued any letter of termination. The response stated:-

> "Mrs S Kaur was employed by H&W Wholesale Ltd which ceased trading on 9/12/14. She was called by Mr Alex T Windsor, who was director, and they had a meeting and Mr Windsor explained to her the situation and the matter was resolved between them. Mr K S Hare was unaware how things were resolved and was under the impression that S (Mrs S Kaur) did not want to continue as she did not turn up to work like all other staff did come to work."

7. Later she was given permission to amend the claim to include an allegation of automatic unfair dismissal by reason of the TUPE transfer. A hearing took place at

which neither respondent company attended and a decision was given in the Claimant's favour. That was set aside by the ET on the grounds that Hare Wines Ltd had not been present (and apparently had not had notice of the hearing?) and the matter relisted before a different employment judge. That hearing took place before EJ Russell (sitting alone) on 8 September 2016. She heard evidence from the Claimant and Mr Windsor.

8. In her judgment EJ Russell wrote:-

> "16. Both Counsel agree that at the heart of this case is a dispute as to what happened on 9 December 2014. On the Claimant's case, she was dismissed because of the Impending transfer and her contract of employment transferred pursuant to regulation 4(1). On the Respondents' case, the Claimant objected to transfer such that regulation 4(8) operated to prevent her contract from transferring and she should not be treated as having been dismissed,
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> 17. The Claimant's evidence was that she was called into the meeting, that Mr Windsor opened it by saying that he did not know how to tell her this and proceeded to give her bad news in the form of an indication that she was dismissed as the Second Respondent did not want her. The Claimant estimated that meeting lasted 45 minutes to an hour. There was a long conversation about Mr Chatha, that he did not want her and that the Second Respondent did not want Mr Chatha to manage her.
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> 18, By contrast, in his written statement, Mr Windsor says that he called the meeting and told the Claimant that the business was being transferred to the Second Respondent. The Claimant stated that she was not happy to be working for the Second Respondent and did not want to transfer. He stated that the Claimant explained her reason was the difficulty she had getting on with Mr Chatha and another male employee, whose name Mr Windsor could not recall, Mr Windsor stated that the Claimant also expressed concern that he would not be involved in the new company as she and he had got on well together. As the Claimant objected to transfer, her employment ended. He stated that the meeting lasted only 15 to 20 minutes.
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> 19. It is therefore crucial for me to resolve on balance which version of events I prefer and I bear in mind that the burden of proof is on the Claimant in this case to establish the dismissal. It has not been an easy task. There is a remarkable lack of contemporaneous documentation clearly seeing out the position which the parties now adopt. I considered the credibility and reliability of each version of the meeting in turn.
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> …

22. There are equally a number of matters which count against both Respondents' version of events. The letter of dismissal on 9 December 2014, on a clear and unequivocal reading, makes clear that it is the First Respondent who was terminating the Claimant's employment. if the Claimant had indeed objected, the First Respondent could be expected to write to formalise the end of the employment relationship however I consider that it is significant that Mr Windsor chose to use words of termination by an employer and omitted any reference to the transfer of the business or the Claimant's supposed objection or reluctance to transfer with it. This is particularly so where the First Respondent paid the Claimant £1,474 despite its parlous financial situation.

…

24. I took into account the discrepancies between the contents of Mr Windsor's written witness statement and his oral evidence in cross-examination. The significance of the discrepancies was increased given that the written statement was only produced on the morning of the hearing. As such, any discrepancies cannot be explained by passage of time. Whilst his written statement referred to discussion about the Claimant's difficulties with Mr Chatha, in cross-examination he was adamant that only the Second Respondent was referred to and that Mr Chatha was not even discussed. In response to the Tribunal's questions, Mr Windsor was categoric that there was no discussion in the meeting of any problems between the Claimant and Mr Chatha. This discrepancy between the written and oral evidence was so significant as to undermine seriously the credibility of his evidence.

…

27. The omission of reference in both Responses to an alleged objection to transfer is not consistent with the case as now put. Mr Hare's evidence at paragraph 12 of his witness statement was that when the Claimant did not attend work on 11 December 2014, he spoke to Mr Windsor who told him that the Claimant had refused to transfer. This is not pleaded; rather what is asserted in the Response is that Mr Hare was unaware of how things had been resolved and was under the impression that she did not wish to work for them as she did not attend work. I am satisfied that if Mr Hare had been told in December 2014 that the Claimant had refused to transfer, he would have said so in the Response.

28. Nor was I impressed by the evidence of Mr Hare with regard to the chronology of Mr Chatha's appointment as a director. Whilst not decisive, or even the most weighty factor in my analysis of the credibility of the evidence, I did consider it

> relevant in considering the context in which the meeting on 9 December 2014 took place The transfer took place on 11 December 2014. Mr Hare's evidence was that there was no suggestion that Mr Chatha may be appointed a director until after Christmas, whereupon discussions took place and the appointment was registered on 2 January 2015. I find that inherently unlikely given the importance of such a decision, the short timescale and intervening holiday period. On balance, I infer that the decision that Mr Chatha would assume management of the Second Respondent following transfer was taken prior to the meeting with the Claimant.
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> 29. On the balance of probabilities, I prefer the Claimant's evidence as to what was said in the meeting on 9 December 2014 to that of Mr Windsor. It is inconsistent with the Second Respondent anticipating that there would be ongoing difficulties in the relationship between the Claimant and Mr Chatha and therefore, deciding that it did not wish her contract of employment to transfer. It is for this reason that the Claimant was the only employee told that she was not wanted. The Claimant did not object to transfer. She would have been employed immediately before transfer but for the dismissal on 9 December 2014. The reason for the dismissal was the transfer. As such her contract of employment transferred and the Claimant was unfairly dismissed. The Claimant was entitled to 12 weeks' notice by virtue of her length of service; and that she was in fact only paid for one week and three days. As such, the Respondent breached her contract of employment."

9. At the conclusion of the hearing on 8 September 2016 EJ Russell announced orally and subsequently confirmed in her written reasoned judgment that the claim succeeded. She found that:-

   i) The claimant did not object to transfer: her contract of employment transferred from H&W to Hare Wines Ltd pursuant to regulation 4(1) of TUPE 2006;

   ii) the dismissal was automatically unfair;

   iii) Hare Wines Ltd breached the contract of employment in respect of notice.

10. A remedy hearing took place on 3 October 2016. The judge made awards totalling £16,401.38.

11. Hare Wines Ltd gave notice of appeal to the EAT against the judge's finding that the contract of employment transferred to them and that the dismissal was automatically unfair because the reason or principal reason for it was the transfer. The notice of appeal to the EAT put it in five different ways but permission was given only in respect of one, namely that:-

> "Having found that [the Claimant] was dismissed because of a difficult working relationship with Mr Chatha the employment

> tribunal erred in law in concluding that the principal reason for the dismissal was the transfer OR has erred in law in failing to give any or all adequate reasons for that decision."

12. By a reserved judgment dated 8 February 2018 Choudhury J dismissed the appeal. Hare Wines Ltd appealed to this court pursuant to leave granted on the papers by Lewison LJ. Lewison LJ also made an order under CPR 52.19, following an application made in Ms Kaur's Respondent's Notice, providing that no costs would be recoverable by either party in this court.

The law

13. Regulation 4 of TUPE provides:-

> "(1) Except where objection is made under paragraph (7) a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised group of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if made originally between the person so employed and the transferee.
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> …
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> (3) Any reference in para (1) to a person employed by he transferor and assigned to the organised grouping of resources or employees that is subject to a relevant transfer is a reference to a person so employed immediately before the transfer, or who would have been so employed if he had not been dismissed in the circumstances described in Regulation 7(1)."

14. Regulation 7, as amended in 2014, provides:-

> "(1) Where either before or after a relevant transfer, any employee of the transferor or transferee is dismissed, that employee shall be treated for the purposes of part 10 of the 1996 Act (unfair dismissal) as unfairly dismissed if the sole or principal reason for his dismissal is the transfer.
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> (2) This paragraph applies where the sole or principal reason for the dismissal is an economic, technical or organisational reason entailing changes in the workforce of either the transferor or the transferee before or after the relevant transfer.
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> (3) Where para 2(2) applies,
>
> a) paragraph (1) does not apply;
>
> b) without prejudice to the application of section 98(4) of the 1996 Act (test of fair dismissal) for the purposes of sections 98(1) and 135 of that Act (reason for dismissal)--

> i) the dismissal is regarded as having been for redundancy where section 98(2)(c) of that Act applies; or
>
> ii) in any other case, the dismissal is regarded as having been for a substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held."

The Appellant's submissions

15. For the Appellant company Mr Crosfill submits:

> "At paragraph 29 the Employment Judge initially finds that the reason for the dismissal is the anticipation of ongoing difficulties in the working relationship. She then immediately moves to a conclusion that the reason for the dismissal was the transfer. The employment judge appears to have assumed, consciously or otherwise, that because of the proximity of the transfer it would follow that any dismissal would be by reason of that transfer. An alternative explanation is that she assumed that having rejected the Second Respondent's case on dismissal it followed that she should find against it on the reason for the dismissal. If either of these is the case it amounts to an error of law. If there were some other reason(s) for the judge's decision, they are not ascertainable from the written reasons and the decision is not "*Meek* compliant".
>
> It is not disputed that in the present case the fact that the transfer took place provided the occasion upon which the Claimant was dismissed. However, given that all of the other employees were not and that they transferred to the Appellant's employment, and that the reasons were found to be a difficult working relationship, it is impossible to discern from the reasons why it could be said that the reason for the dismissal was "the transfer" rather than the transfer providing the occasion for the dismissal.
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> The Appellant's primary position is that, once a finding had been made that the reasons for the dismissal were personal to the Claimant (and existed independently of the transfer) it was not open to the Employment Judge on her own findings to conclude that the reason or principal reason for the dismissal was the transfer. If that is wrong, then the fall-back position is that there is insufficient reasoning to show why that is the case.
>
> The test of causation is not a "but for" question but must involve a finding as to the reason that caused the employer to dismiss……On any fair reading of the reasons, the findings of EJ Russell are that the reason that the Claimant was treated

> differently to the other employees was the existence of a difficult working relationship with Mr Chatha….. There is no examination of why, if a dismissal was proposed because of those difficulties, it would follow that the reason, or principal reason was the transfer. On its face it would appear that the true reason for the dismissal was animosity. Such animosity predated the transfer, would have existed had there been no transfer and, if the Claimant had remained employed. would have continued to exist.
>
> A conclusion that the reason for the dismissal was for a reason entirely personal to [the Claimant] precludes the possibility that the principal reason for the dismissal was the transfer. As a matter of logic there can only be one "principal reason" for any action. The dismissal might or might not have been unfair but the responsibility of that dismissal would not transfer to the Appellant, There is a real danger in finding that a purely personal reason can co-exist with the reason or principal reason being the transfer. If the tribunal has concluded that, having rejected the [transferor]'s case that there was an objection or resignation, it was bound to conclude that the reason for the dismissal was the transfer then it has fallen into error see paragraph 59 of *Kuzel v Roche*. That is one reading of the tribunal's reasons where a sole "central issue" is identified [paragraph 7) .
>
> It may be contended that there was some evidenced that the practical effect of the transfer was or might have led to greater proximity or management giving rise to a risk of further difficulties between the First Respondent and Mr Chatha. That appears to be the position taken in her Answer in the EAT. if that is the case, then the reasons are silent other than the fact that it was anticipated that Mr Chatha was to become a Director of the Appellant. In any event, that is to approach the issue of the reason for the dismissal on a "but for" basis which is wrong: see *Smith and others v Trustees of Brooklands College.* In any event, it is an insufficient basis for concluding that the principal reason for the dismissal was the transfer.
>
> The very fact that it is necessary to speculate as to why the Employment Judge moved from a finding that there was a dismissal to a finding that the reason for the dismissal was the transfer illustrates that, whether or not there was some other error, the employment Judge has failed to give adequate reasons for her decision. Appellant will rely upon the authorities of *Meek v City of Birmingham District Council* [1987] IRLR 250, CA and *Greenwood v NWF Retail* [2011] ICR 896, EAT in support of a submission that this element of the decision is vitiated by an absence of reasons."

Discussion

16. There were, as it seems to me, a number of serious obstacles in Mr Crosfill's path in seeking to reverse the findings of the employment tribunal. The first is that the reason given by the transferor employers at the time Ms Kaur's employment ended was a false one. Their case was that she had objected to being transferred; but having heard evidence from both the Claimant and Mr Windsor the employment judge believed the claimant and disbelieved Mr Windsor, and there cannot be any appeal from those findings.

17. It is true that the fact of an employer, for example, putting the wrong legal label (such as "redundancy") on a set of facts may not be fatal to its case: see *Abernethy v Mott, Hay and Anderson* [1974] ICR 323; but this is not a case about legal labels. Also, as Mummery LJ observed in *Kuzel v Roche Products Ltd* [2008] ICR 799 at paragraph 59: "it is not correct to say, either as a matter of law or logic, that the ET *must* find that, if the reason was not that asserted by the employer then it must have been for the reason asserted by the employee. That may often be the outcome in practice but it is not necessarily so." However, one should also bear in mind these other observations of Mummery LJ in the same case:-

> "The reason for dismissal consists of a set of facts which operated on the mind of the employer when dismissing the employee. They are within the employer's knowledge. … the employer knows better than anyone else in the world why he dismissed the complainant. … an employer who dismisses an employee has a reason for doing so. He knows what it is. He must prove what it was."

18. The next difficulty is that Ms Kaur was dismissed on the day of the transfer. As the leading case in the CJEU of *Bork* [1989] IRLR 41 makes clear, proximity to the transfer is not conclusive, but it is often strong evidence in the employee's favour.

19. The third difficulty is that the poor relationship between Mr Chatha and Mrs Kaur had apparently endured for some time without H&W seeking to terminate her employment. They only did so at the request of the transferee immediately before the transfer. The inference that the transfer (rather than the poor relationship in isolation from the transfer) was the reason or principal reason for dismissal was therefore very strong indeed.

20. Many dismissals occurring before or after a relevant transfer of an undertaking are held to be fair because the sole or principal reason for the dismissal is an economic, technical, or organisational ("ETO") reason entailing changes in the workforce of either the transferor or the transferee. This is not a case where it is suggested that Ms Kaur was dismissed for an ETO reason. The reasons were, as Mr Crosfill rightly says, personal to the Claimant. But that does not defeat her case. Mr Crosfill uses the phrase "purely personal reasons", but I agree with the submission of Mr MacMillan in his skeleton argument that the law of unfair dismissal or of transfer of undertakings does not recognise such a category, and I am not sure what the phrase means anyway. Mr Crosfill drew a distinction between a transferee who refuses to take on any of the existing workforce, which he said *would* be dismissal by reason of the transfer, and one who picks out one or two individuals to be dismissed but takes the rest, which he said would be dismissal for purely personal reasons and thus not by reason of the transfer. With respect, the distinction is unsustainable.

21. In his skeleton argument Mr Crosfill relied on the unreported decision of Judge McMullen QC in the EAT in *Smith v Trustees of Brooklands College* (UKEAT/0128/11/ZT 5 September 2011). In that case the four claimants had worked between 2005 and 2007 at Spelthorne College. In August 2007 Spelthorne was transferred to Brooklands. In due course Ms Hopkins, the HR director of the merged colleges, looked at the claimants' rates of pay and came to the conclusion that they had been overpaid in error: there had been no reduction in their pay to take into account the fact that they worked not the conventional 36 full time hours but 25. She negotiated with the claimants an agreement that as from 1 January 2010 their rates of pay should be reduced in a phased introduction. The claimants reluctantly agreed. They then brought proceedings alleging that the variations were for a reason connected with the TUPE transfer and therefore void. The employment judge accepted the evidence of Ms Hopkins and "found in clear terms that Ms Hopkins' decision was unconnected with the transfer". The real reason for the variation was her belief that the four claimants had been paid the higher rate by mistake and that the agreed variations on 1st January 2010 were not made void by being connected with the TUPE transfer more than two years earlier in 2007.

22. It is against that factual background that in the EAT Judge McMullen recorded at paragraph 28 of his judgment that it was common ground between counsel on both sides that TUPE is not a "but for" jurisdiction. He said that it was obvious that "but for" the four employees coming within the bailiwick of Ms Hopkins at Brooklands she would not have sought to reduce their pay; "but that was not the test; the question was, what was the reason? What caused her to do it?" I do not think that these dicta, quite apart from the fact that they reflected a consensus between counsel, lay down a test of general application in TUPE cases. The decision in *Smith* is unreported for a good reason, namely that it did no more than uphold a clear finding of fact by the first instance tribunal.

23. Once it was found that Ms Kaur had not objected to the transfer the central question became whether (a) she was dismissed because she got on badly with Mr Chatha (who was about to become a director of the business) and the proximity of the transfer was coincidental, or (b) she was dismissed because the transferee did not want her on the books, the reason for that being that she got on badly with Mr Chatha. Which of these two was the sole or principal reason was a question of fact and the employment judge was entitled to prefer the latter to the former. Although the crucial paragraph 29 of the judgment expresses her conclusions briefly they are in my view *Meek* compliant. The judge found that the transferee company anticipated that there would be ongoing difficulties in the working relationship between the Claimant and Mr Chatha. It therefore decided that it did not wish her contract of employment to transfer and communicated that wish to the transferor. That was why she was told that she was not wanted. The reason for the dismissal was the transfer.

24. These are my reasons for having concurred in the decision, which Underhill LJ announced after we had heard the submissions of Mr Crosfill, that the appeal would be dismissed. Although we did not find it necessary to call on Mr MacMillan, I wish to record our particular gratitude to him for submitting a skeleton argument and appearing in this court *pro bono.*

Lord Justice Underhill:

25. I agree. Mr Crosfill's essential submission was that on the Employment Judge's own findings of primary fact the reason for Ms Kaur's dismissal was, and was only, her poor relationship with Mr Chatha, because it was that which had led Mr Windsor to dismiss her; the transfer was no more than the occasion for the dismissal. He referred to the well-known exposition of what constitutes the "reason" for a dismissal in the judgments of Lord Denning MR and Cairns LJ in *Abernethy*, to which Bean LJ has already referred. But I do not think that that is a correct characterisation of what the Judge found (in Lord Denning's phrase) "operated on [Mr Windsor's] mind". The problems between Ms Kaur and Mr Chatha had been going on for some time, but there was no evidence that until the transfer they were regarded as cause for dismissal. Once the Judge rejected Mr Windsor's evidence as to the reason for the dismissal the only possible inference from her other findings was that he believed (in practice, no doubt, having ascertained Mr Hare's views) that Ms Kaur's problems with Mr Chatha, which had been tolerable pre-transfer, would not be tolerable post-transfer. In my view that means that the transfer was not simply the occasion for her dismissal but was, if not the sole reason, at least the principal reason for it: it was the transfer that made the difference between the problems being treated as a cause for dismissal and not. It does not ultimately matter what it was about the transfer that made that difference, and the Judge makes no explicit finding. I infer that she had in mind the fact, mentioned in para. 28 of her Reasons, immediately before the dispositive para. 29, that as a consequence of the transfer Mr Chatha would become Ms Kaur's manager; but it could in principle have been simply that Mr Hare, the new sole owner, had a lower tolerance of staff conflict than the previous regime. Either way, it was the transfer which was, within the meaning of the regulation, at least the principal reason for Ms Kaur being dismissed.