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TUPE taken to the cleaners

Superclean Support Services plc v Lansana and Wetton Cleaning Services, EAT 20 May 1997, unreported

As feared, UK courts have seized on the European Court's decision in Suzen (LELR 10) with an unjustified fervour. The Court of Appeal in Betts (LELR 10) used the decision as a basis for overturning the finding that there had been a transfer of an undertaking and, in doing so, adopted an interpretation which was unduly harsh on employees. Now the EAT appears to take as read that there is no transfer where neither physical assets nor employees transfer.

Mr Lansana was employed as one of 14 cleaners on a contract operated by Wetton at a university hall of residence. The contract was put out to tender and Superclean was successful. Wetton said that because of the "uncertainties in the law relating to transfers of undertakings" it would not make redundancy payments to the 14 staff who were not offered jobs by Superclean.

The Industrial Tribunal decided this was a TUPE transfer. Such was the state of the law at that time (March 1996) that Superclean did not initially appeal against that part of the decision. The Suzen decision intervened and, surprisingly, the representative of Mr Lansana asked permission to challenge the decision that there was a transfer, and was supported (less surprisingly) by Superclean.

The Employment Appeal Tribunal concluded that TUPE did not apply because there was no transfer of "significant tangible or intangible assets or taking over by Superclean of any, let alone a major part, of Wetton's workforce".

The EAT felt that Suzen had a "dramatic impact" on the previous UK decisions. There can be no doubt that Suzen does affect the previous line of authority, but this does not remove the need for a careful analysis of the nature of the contract and what precisely has transferred. The EAT decision contains no analysis of the rights which would normally transfer with any cleaning contract - the monopoly right to provide cleaning services under the contract in return for payment, the use of premises and services, the organisation of the work.

The judgment must be treated with considerable caution. It is not based on a thorough application of the factors listed in Spijkers [1986] CMLR 1119 [ELJ] to the facts of this case and, significantly, both the successful contractor and the dismissed employee were arguing that TUPE did not apply. Tribunals should not lose sight of the arguments which formed the logical basis of Dines [1995 ICR 11] and subsequent decisions. Post-Suzen, TUPE cases require close analysis and there should not be a general presumption against TUPE applying whenever employees are not taken on by the new employer.

Where do I work?

High Table Ltd v Horst & Others [1997] IRLR 513

A simple question, but one which has absorbed much legal attention over the years as far as the entitlement to claim redundancy payments is concerned.

In Bass Leisure Ltd v Thomas [1994] IRLR 104 the EAT adopted a factual approach to the question about the place where the employee was employed (see LELR No 2).

The Court of Appeal has now approved the factual test. The Court of Appeal said that for the purposes of Section 81(2) Employment Protection Consolidation Act 1978 (now Section 139(1) Employment Rights Act 1996) the question of where the employee was employed for the purposes of the business is one to be answered primarily by a consideration of the factual circumstances prior to the dismissal.

In High Table Ltd v Horst the three Applicants were employed as silver service waitresses by the company who provided catering services for various companies in the City of London and elsewhere. All the Applicants worked for one client, Hill Samuel. Included in the employees terms of employment was a mobility clause. In 1993 there were cuts in Hill Samuel's catering budget and a reorganisation of the services provided by High Table Ltd which meant they needed fewer waitresses. The three women were dismissed as redundant. The employees complained of unfair dismissal and the Industrial Tribunal rejected the claims. Before the EAT it was argued that because the employees' contracts of employment included a mobility clause it was not sufficient that there was a redundancy situation at the place where the employees were actually working.

The EAT allowed the appeal and remitted their case for rehearing.

The Court of Appeal considered all the previous case law on the issue including Bass Leisure Ltd v Thomas. Lord Justice Peter Gibson said "if an employee has worked in only one location under his contract of employment for the purposes of the employer's business, it defies common sense to widen the extent of the place where he was so employed, merely because of the existence of a mobility clause". As the employees had only worked in one location they were redundant as the employer needed fewer employees to carry out the work in that location.

The Court of Appeal also said it would be unfortunate if the law was to encourage inclusion of mobility clauses and contracts of employment to defeat genuine redundancy claims.

Given the existence of mobility clauses in many contracts of employment today what is important when considering whether an employer has made out a genuine redundancy situation, is where the employees actually worked, not where they could be required to work.

Discipline and crime proceedings

R v Jacqueline White, Manchester Crown Court 28 APRIL 1997

In this case the Defendant, a Care Assistant employed by Trafford Council was charged on 3 counts of assault occasioning actual bodily harm. The charges arose following an incident at work involving one of the residents at the home where the Defendant was employed.

At the trial on the 28 April 1997 at Manchester Crown Court Defence Counsel made an application to the Trial Judge that the prosecution should be stayed because of an abuse of process. The grounds for the application were that the Defendants' employers had gone ahead with its own internal disciplinary hearing prior to the determination of the trial. This was despite a request by the Defendant's unions and solicitors that the hearing be postponed until after the Crown Court hearing.

Documents relating to the hearing were obtained by the Defendant's solicitors following an application to the Crown Court. It was clear to the trial judge from these documents that no accurate contemporaneous note of the evidence had been taken during the internal disciplinary hearing. The trial judge therefore accepted Defence Counsel's argument that the Defendant would therefore be unable to test the consistency of the evidence of the prosecution witnesses who gave evidence at the internal disciplinary tribunal. The trial judge was also unable to determine upon what basis the evidence had been given to the tribunal. Although the Defendant was exonerated at the disciplinary hearing the findings of the tribunal were unclear and ambiguous in its terms.

The trial judge was of the clear opinion that the employers ought to have postponed the internal disciplinary hearing until after the determination of the criminal proceedings, only because it is in the Crown Court that the Defendant's liberty is dealt with and therefore it is there that the primary decision of facts should be made. The trial judge went on to say that the employer's action may well be regarded as contempt of court.

The trial judge concluded that the Defendant could not have a fair trial and ordered a stay in the proceedings and that a not guilty verdict be entered on all 3 counts.

Representatives and Statutory Rights

Current legislation recognises that certain categories of employee need protection against victimisation at work and that there must also be protection of an employee's right to be represented on work-place issues. Three cases in this issue focus on different aspects of that protection: representation for employees facing a change in employer; and the job security of safety representatives and those employees who claim a statutory right. The outcome of these cases casts doubt on the effectiveness of the legislation.

Dismissals for asserting statutory rights

"The main problem for employees is likely to be evidential. An employee should be able to show that a right has been asserted – provided there is evidence of the issue being raised with the employer in a clear fashion, preferably in writing."

Mennell v Newell and Wright (Transport Contractors) Limited [1997] IRLR 519 (Court of Appeal)

Section 29 of the Employment Rights Act 1996 makes it automatically unfair to dismiss someone for asserting a statutory right. The statutory rights concerned include deductions from wages, minimum notice, union activities and time off.

In LELR 1 we reported the Employment Appeal Tribunal's decision in favour of Mr Mennell. The Court of Appeal has now overturned that decision.

Mr Mennell had been issued with a new contract which he refused to sign. He was dismissed as a result. One of the clauses in the new contract would have entitled his employers to deduct training costs from his final salary.

In his Tribunal claim he alleged that by refusing to sign the new contract he was asserting the statutory right not to suffer a deduction which would be contrary to the Wages Act (now section 13 of the Employment Rights Act 1996). He claimed that he was dismissed for asserting that statutory right and that consequently his dismissal was automatically unfair.

The Court of Appeal did not accept that argument. The appeal court said that Mr Mennell had not "asserted" any statutory right. An employee is only protected if she or he has alleged that the employer has breached a statutory right.

This does not mean that the employee needs to go as far as making a claim against the employer or starting Industrial Tribunal proceedings. It does mean that the employee must actually allege that a right has been infringed. It is enough that the employee communicates to the employer that she or he believes that a right has been infringed. The right does not need to be specified provided it is made reasonably clear to the employer what right is claimed to have been infringed.

Mr Mennell could not establish that he had made any such allegation, so his claim failed.

However, the other key aspect of the decision gives more cause for optimism. The Court of Appeal emphasised that the protection applies where an allegation of breach of statutory right has been made, even if no statutory right has been infringed. It is sufficient that the employee has made the allegation and that the allegation is the reason for dismissal.

Section 29 itself makes clear that it is immaterial whether the employee has the right concerned or whether it has been infringed. The allegation of breach of statutory right need not be correct, provided that the claim was made in good faith.

This has important practical implications for employees. The protection given by section 29 is particularly important for employees with less than two years' service, as it is a right which applies from day one of employment. In the past, new employees who, for example, were not issued with written contracts would be reluctant to press their entitlement in case they were branded "troublemakers" and sacked. Now, there is a positive advantage to raising such concerns. If the employee then faces dismissal she or he has the argument that the real reason for dismissal was the claim that a right had been infringed.

The main problem for employees is likely to be evidential. An employee should be able to show that a right has been asserted – provided there is evidence of the issue being raised with the employer in a clear fashion, preferably in writing. What will be more difficult is showing that claiming the right was the reason for dismissal when employers will generally point to other reasons justifying the dismissal. Although asserting a right which does not exist can form the basis of a claim, employers will no doubt retort "am I likely to dismiss someone for making a claim which I knew would not succeed". Part of the answer may lie in the manner in which the claim was made: an issue considered in our next case.

Protection for safety reps

"Tribunals will make the jump from concluding that safety concerns are not justified to deciding that they have not been raised in good faith, so the employee should be denied protection."

Shillito v Van Leer (UK) Limited [1997] IRLR 495 (EAT)

This case concerns the rights of safety representatives under section 44 of the Employment Rights Act 1996.

Mr Shillito was the senior TGWU shop steward at the factory. Employees working on a line in the factory complained of the odour emitted by a solvent and the line was closed down and the employees moved. The line safety representative raised the issue with Mr Shillito. The employers alleged that Mr Shillito failed to follow the agreed safety procedure, but instead saw the company first aider and insisted, allegedly belligerently, that the employees should be seen by the company doctor or sent to hospital. He was disciplined for his pains. The employers said his actions amounted to misconduct by failing to follow the agreed procedure and not acting as a responsible union representative.

Mr Shillito claimed that this amounted to victimisation because of his actions as a safety representative. The Industrial Tribunal and the Employment Appeal Tribunal rejected this claim. They did so on the grounds that he was not the safety representative for the line in question, nor was he acknowledged as a safety representative for acting outside the agreed procedure. These are narrow grounds, based essentially on the argument that if an employee is not a representative on safety for the employees concerned, he cannot be exercising safety representative functions by pursuing concerns on their behalf. This may be an unduly formalistic interpretation of the legislation, but the third ground for the decision is of even more cause for concern.

"Once Tribunals are permitted to explore the representative's motives in raising safety concerns, it is a short step to examining whether the concerns are justified. "

The EAT accepted that it is irrelevant whether the representative acted reasonably in raising the concerns, or in the manner in which they were raised. This is consistent with the decision in Bass Taverns Limited v Burgess [1995] IRLR 596 where the Court of Appeal upheld a complaint by a union representative who was disciplined for going "over the top" in criticising management.

The EAT accepted that Mr Shillito's employers could not legitimately discipline him for performing his *functions* in an unreasonable way, unacceptable to the employer, nor for intending to embarrass the company in front of external safety authorities. So far, so good, but the EAT accepted the Tribunal's finding that he acted "in bad faith" because his motive was solely to pursue a personal agenda to embarrass the company and not to perform health and safety functions.

This appears to leave a loophole for employers to exploit. Once Tribunals are permitted to explore the representative's motives in raising safety concerns, it is a short step to examining whether the concerns are justified. The approach taken in the Shillito case raises the worry that Tribunals will make the jump from concluding that safety concerns are not justified to deciding that they have not been raised in good faith, so the employee should be denied protection. This seems to bring in a test of reasonableness by the back door and undermine the absolute protection envisaged by the European Directive on which the legislation is based.

The rights to consultation when a business is sold

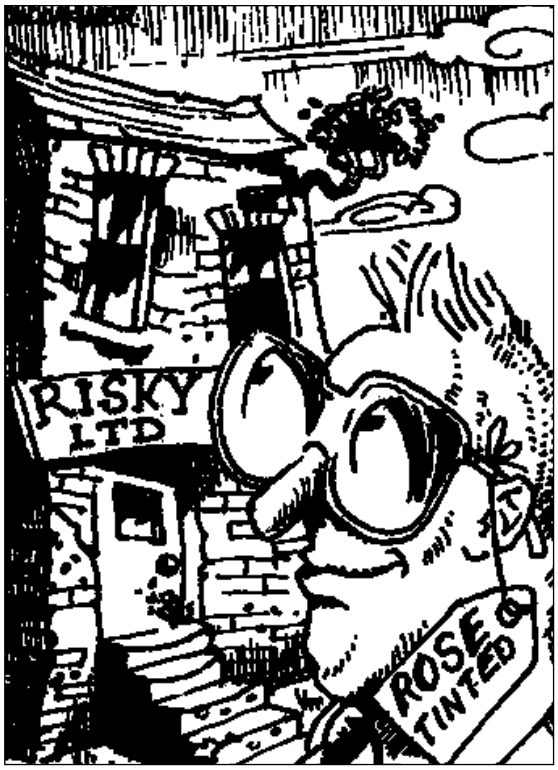
Keane & others v Clerical Medical Investment Group Ltd (Bristol Industrial Tribunal, 19/6/97) IDS Brief 595

The inadequacies of the Conservatives' legislation on consultation rights have been highlighted in previous issues (see LELR 1). Labour is committed to reviewing the legislation (see LELR 11). The court challenge brought by Unison, GMB and NASUWT has been placed on hold pending that review. Government proposals are imminent. The Keane case demonstrates the need for reform.

When a business was sold, the employer consulted only with the Executive Committee of the Staff Association, who were required to sign a confidentiality agreement which prevented them from discussing the proposed sale with the employees affected. The employees were not told of the sale until the day it took place.

The individual employees brought a claim that the consultation did not comply with the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE). The Staff Association, perhaps not surprisingly, did not bring such a claim.

The Tribunal said that once there are representatives, only those representatives can bring a claim for a failure to consult: the individual employees cannot do so.



The Tribunal refer to the decision in the judicial review proceedings brought by Unison, GMB and NASUWT, but do not appear to have taken fully on board the requirement deriving from that decision that representatives must be "appropriate" and that "appropriateness" must be judged objectively. This must involve looking at the function of the committee and purpose for which it was established. It is arguable that it should also address the composition of the committee, bearing in mind that none of the committee was employed in the part of the business transferred.

This decision highlights the fundamental flaw in the Regulations: there is no requirement that representatives be independent. There should be a requirement that representatives be free from domination or control by the employer. It is almost certain that such a requirement would mean that representatives who are prepared to sign a confidentiality agreement which prevents them from communicating with the employees they are supposed to represent would not be "independent" and the so-called consultation would not comply with the legal requirements.

A proper guarantee of independence must be a central part of the revised Regulations, plus proper sanctions where there has been a failure to consult.

Stub it out

Waltons & Morse v Dorrington [1997] IRLR 488 (EAT)

The introduction of smoking policies in the work place frequently becomes a major industrial relations issue. But the one about the cigar smoker, the pipe smoker and the cigarette smoker will have an impact beyond both its own work place and the rights of smokers and non-smokers. The Employment Appeal Tribunal has held that a contract of employment contains an implied term that an employer shall provide a working environment which is reasonably suitable for the performance of its employee's contractual duties, so far as is reasonably practicable. In reaching their conclusion the EAT have drawn on an employer's obligation set out in the Health and Safety at Work Act 1974 and the employer's duty to provide and maintain a reasonably safe working environment which has adequate facilities and arrangements for staff welfare and is without risk to health.

Mrs Dorrington had worked for a firm of solicitors for 11 years. From December 1992 she had complained about the heavy smoking of lawyers in her immediate vicinity. Nearly two years later a smoking policy was devised: solicitors were to be allowed to continue smoking in their own rooms and a room was designated as a smoking room. Mrs Dorrington was next to the designated smoking room as well as the rooms of the cigar smoking, the pipe smoking and the cigarette smoking lawyers. The firms inadequate ventilation system meant that the policy made no improvement to the problems as it was still just as smoky where Mrs Dorrington sat.

When the non-smokers raised the issue, nothing was done about it. So Mrs Dorrington looked elsewhere and when she was offered another job, she handed in her notice explaining that she was leaving because of the smoking problem.

The Employment Appeal Tribunal have upheld her claim of constructive and unfair dismissal. They have formulated an implied term that "The employer will provide and monitor for his employees, so far as is reasonably practicable, a working environment which is reasonably suitable for the performance by them [the employees] of their contractual duties". The EAT was satisfied that a suitable working environment could have been provided without difficulty. Given the inadequate ventilation, the firm should have banned smoking from the building. Equal weight cannot be given to smokers and non-smokers as the choice of an individual not to smoke has no adverse impact to those nearby, but the reverse is not true.

> An employee may be entitled to a smoke free environment and the failure to provide one can amount to a fundamental breach of contract.

The EAT also agreed with the Industrial Tribunal that Mrs Dorrington's delay in leaving while she found other work would not defeat her claim for constructive dismissal. She quickly found an alternative job, but as she needed to work because of her family commitments and given her 11 years service, she had not waived the employers breach while she continued at work as she looked for another job.

So an employee may be entitled to a smoke free environment and the failure to provide one can amount to a fundamental breach of contract entitling the employee to resign and claim constructive dismissal. By creating this implied term into contracts of employment, the EAT has given real effect to the protection of health and safety issues at work. It goes much further than the right of employees to leave work in cases of serious and imminent danger (Section 100(1)(d) of the Employment Rights Act 1996) so grudgingly introduced by the Conservative Government. It also gives contractual force to an employee's obligations in Section 2 of the Health and Safety at Work Act 1974.

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