Appeal No. UKEAT/0203/19/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING,7 ROLLS BUILDINGS FETTER LANE LONDON EC4A 1NL

At the Tribunal
On 17 December
Judgement handed down on
29 March 2021

Before

HIS HONOUR JUDGE MARTYN BARKLEM

(SITTING ALONE)

MS NOBLE APPELLANT

EMMA BOX AND OTHERS RESPONDENTS

Transcript of Proceedings

JUDGMENT

FULL HEARING

 Revised

APPEARANCES

For the Appellant	MR MACKENZIE Representative
For the Respondents	No Appearance or Representation made

SUMMARY

Transfer of Undertakings

The appeal is one in which no party other than the Appellant was represented. That representative, although experienced in the employment law field, is not a qualified lawyer. No authority was cited to the EAT, and the decision is one which should be treated with care. However the EAT held that the ET erred in law in holding that, when an agreement for the transfer of a law firm became void by operation of s284 Insolvency Act 1986, there had nonetheless been a valid transfer within the meaning of the Transfer of Undertakings (Employment Protection) **Regulations 2006 ("TUPE").** The ET had not explained the legal basis for the distinction.

The ET also erred in dismissing a separate claim which was not before it and on which the Appellant had not been heard.

HIS HONOUR JUDGE MARTYN BARKLEM

1. This is the restored hearing of an appeal from a decision of the ET sitting at Hull, EJ Lancaster sitting alone, following a hearing which took place on 19th March 2018. Written reasons were sent to the parties on 27th March 2018. The original hearing of the appeal, on 16th September 2020, was adjourned by me, for reasons which appear below.

2. The only person who was present at the hearing of the appeal was Mr Mackenzie, on behalf of the Appellant, the Respondent below. I have not received submissions as to the law from any qualified lawyer, and thus this decision should be treated with great care in term of the issues which it decides. I mean no disrespect to Mr Mackenzie by this comment – he was of great assistance to me during the hearing.

3. The finding of the ET was that employment contracts of a number of employees who had worked for a law firm named Ingrams had transferred to Kellie Noble on 8th December 2018 by operation of the Transfer of Undertakings (Employment Protection) Regulations 2006 ("TUPE"). This followed the execution of a sale agreement ("the December 8th Agreement") on that date between Mr Stott, who had until then been the sole proprietor of the firm, and Ms Noble who had hitherto been a salaried partner.

4. A secondary finding, in a separate claim brought by Ms Noble against Mr Stott, was that Ms Noble was not an employee of Mr Stott. This finding is appealed on the basis that the point was not argued at the hearing, and thus Ms Noble was not heard on it.

5. In July 2016, as found by the ET, a bankruptcy petition had been presented against Mr Stott, who was adjudged bankrupt on 25th April 2017. By section 284 of the Insolvency Act 1986 is provided:

> ***(1) Where a person is made bankrupt, any disposition of property made by that person in the period to which this section applies is void except to the extent that it is or was made with the consent of the court, or is or was subsequently ratified by the court.***

6. As Kerr J pointed out, when sifting this case direct to a full hearing, the ET in its reasons cited an earlier version of the section, but the change is of no effect. The ET accepted that the December 8th Agreement was caught by this provision.

7. As stated above, the Appellant is represented by Mr Mackenzie, as she was below. He is an experienced representative in the employment law field but is not legally qualified. The Secretary of State does not appear. By an email 9th September 2019 it was said that that he does not seek to oppose the appeal, and by a further email of 27th September 2019, that he will not be taking any part in the proceedings.

8. None of the Respondents to the appeal (that is, the Claimants below) appear or are represented. Each has emailed the EAT saying broadly the same thing: they have no representations to make on what they regard as a purely legal question.

9. Mr Mackenzie said in his original skeleton argument that he had found no authorities which would be likely to assist me. However, he had not addressed the point made by the Employment Judge (albeit citing no authority) that there can be a transfer of an economic entity

without a formal contract. In this case this would be by the staff continuing to operate the firm's business under the Appellant's supervision until it ceased to trade. He told me at the 16th September hearing that due to Covid he had been unable to access libraries to carry out research. I stressed to him that the EAT cannot give legal advice but I mentioned some authorities to which he might wish to refer.

10. I considered whether the appropriate course would be to invite a written submission after the hearing. However, when taken with the second issue, I decided that this was not appropriate.

11. The second reason for the adjournment stemmed from the fact that, just two days before the original hearing of the appeal, 14th September 2020, one of the Claimants below, Ms Densley, contacted the EAT saying that she had just learned that Ms Noble had been adjudged bankrupt on 14th August 2019 , being discharged on 14th August 2020. She said that she had been advised that, for that reason neither Ms Noble nor Mr Mackenzie had locus standi to prosecute the appeal.

12. Between the date of the adjourned hearing and the resumed hearing the Trustees have given written approval for Ms Noble to proceed with the appeal so that potential difficulty has been removed.

13. I have been told by Mr Mackenzie that the Claimants have each received the sums held by the ET to have been due to them from Ms Noble from the Redundancy Fund. Moreover, her bankruptcy would have extinguished Ms Noble's obligation to pay the Claimants any such sums in any event. This appeal is, therefore, on the face of it, moot. This was accepted

by Mr Mackenzie, who told me that he was conducting the appeal on a pro bono basis, out of interest in concluding the matter, the point not having been purely academic when the appeal started.

14. As recorded in the ET's decision, Mr Stott, the sole owner of a firm of solicitors named Ingrams was struck off the roll of solicitors on 28th October 2016 following findings of dishonesty. The SRA granted an emergency authorisation for Ms Noble, described as a "salaried partner" to run the practice. The ET rejected submissions that, as someone designated a "partner" Ms Noble thereupon became liable for the 30 or so employees of the firm.

15. The ET accepted Ms Noble's evidence that the SRA began to lose patience with the slow process of the negotiations being conducted by Mr Stott to sell the practice, and that he received an ultimatum requiring him to divest himself of his interest in the firm by 4 pm on the 8th of December 2016 with an implied or explicit threat of intervention if he did not.

16. So it was that on 8 December 2016, just before the deadline set by the SRA, Miss Noble entered into an agreement with Mr Stott to buy the business. The employees of the business sought to argue that this resulted in a TUPE transfer of the firm to Ms Noble.

17. The reasons record (para 16) that from 8th December Ms Noble assumed control of Ingrams. The purchase price payable the December 8th Agreement was not paid out of Ms Nobles pocket, but came from the practice's bank account, from which she continued to draw a salary. I was told by Mr Mackenzie at the resumed hearing of the appeal that the evidence before the ET was that Ms Noble continued to draw the same salary after 8th December as

A before, and that all revenue generated by way of fees went into the practice's bank account, which was in fact an account under Mr Stott's control.

B 18. Eventually Ms Noble decided to close the business and issued notices of redundancy to the staff.

C 19. On 25th April 2017 Mr Stott was adjudged bankrupt. As the petition had been presented in July 2016 section 284 of the Insolvency Act 1986 was engaged and, as was accepted by the ET, that applied to the December 8th Agreement entered into between Mr Stott and Ms Noble. Accordingly, as the agreement had not been made with the consent of the court or ratified by it, it was void.

D

E 20. Mr Mackenzies' argument before the ET as before the EAT is simple. The transfer of the economic entity was effected by the December 8th Agreement and nothing else. As that transfer was void, nothing transferred, and Ms Noble could not, as a matter of law, have had any undertaking transferred to her under TUPE.

F 21. The ET recorded that Mr Stott's trustee in bankruptcy had "without any order, taken possession of Ingrams assets-such as they were, and I understand the majority of the property was subject to charges – following the closure of the business". It seems to me that that arises from the straightforward application of s284(1), and I am not sure what "order" was in the ET's contemplation.

G

H 22. At paragraphs 20 and 21 of the Reasons the ET concluded as follows:

> **20. I therefore conclude that the Sale Agreement in so far as it related to the "disposition of property" was a perfectly legal transaction at the time, although it was potentially voidable in the event of Mr Stott being declared bankrupt and there then being no successful application for validation. The employees were not, however, Mr Stott's property to dispose of to Miss Noble. I find therefore that the contracts of employment which the Claimants had, either with Mr Stott before 28th October 2016 or with Miss Noble after that date are not and cannot be the subject matter of the contract between the two of them. In any event the transfer of undertaking is not solely dependent upon the written contract between the transferor and the transferee. It is a question of fact whether there was or was not a transfer of an economic entity which retained its identity and the terms of any contract will not necessarily be determinative of that issue. The TUPE transfer as at 8th December 2016 is therefore unaffected. As I have already indicated that transfer of the workforce as an economic entity is not dependent upon there also being any transfer of property. I do not therefore accept Miss Noble's argument that this is an entire agreement which cannot be severed and which is automatically void so that therefore the complete transaction is of no effect. I do not recognise the concept of a vanishing transfer whereby employees who have, applying TUPE, continued in new employment for 4 1⁄2 months before the bankruptcy and for a further 3 months beyond that are then to be deemed not to have transferred at all. The employment contracts are separate from and are not in any way tainted by the voidability of the property elements of the Sale Agreement. Both Miss Nobel and the individual employees had full legal capacity to enter into contracts of employment, and that is what they did.**
>
> **21. Nor do I accept any suggestion that Miss Noble, having agreed a mutual termination of her employment, is then somehow to be held to have continued in Mr Stott's employ throughout by reason of a void commercial transaction between them. There was no intention to create any continuing legal relationship after 8th December except in respect of enforcing the finalised Sale Agreement. Mr Stott, of course, exercised no control whatsoever over Miss Noble: she was free to and did run the business entirely as she saw fit. In no sense did Miss Noble continue to provide her services as a solicitor to Mr Stott in return for any remuneration from him. There was no mutuality of obligations consistent with a contract of employment. It is meaningless to suggest that Miss Noble was still an employee of Mr Stott throughout this period.**

23. The ET did not seek support its conclusions at paragraph 20 by reference to authority. I assume that it was referred to none such. As I have already explained, no authority has been cited to me by Mr Mackenzie which bears on the issue one way or another, he having concluded that the cases to which I had referred him were not on point. It is therefore necessary to approach the issue by reference to first principles.

24. In my judgment the ET rather minimises the effect of the section 284 which was, unequivocally, to make the agreement void. No relevant proviso applied. So everything which the December 8th Agreement purported to transfer was, as a matter of law, regarded as a nullity. The employees continued to work, being paid from the same bank account which was never transferred to Ms Noble, and which, on the ET's finding, was reclaimed by Mr Stott's trustee. The fees received from the practice continued to be paid into that account.

25. Mr Mackenzie has taken me to s436(1) of the Insolvency Act which defines "property" as including "things in action". He says, without citing authority, that an employment contract is a "thing in action".

26. I do not have to decide that point and would in any event be unwilling to do so given the lack of legal assistance.

27. I find it impossible to understand from the ET's reasons the proper legal basis on which it held that the employment contracts are severable from the other assets of Ingrams, such that Ms Noble was saddled with all of the legal liabilities which TUPE prescribes but with none of the benefits. It seems a strange result that the contracts of employment transferred permanently to her, even though the funds from which the salaries were paid were regarded as having been the property of Mr Stott, and the work which the employees did, and the revenues that they generated, also reverted to Mr Stott (or, rather, to his trustee in bankruptcy).

28. Of course, people cannot be regarded as "property", but a law firm derives revenue by selling the services of its employees. It seems to me to stand logic on its head to argue that, as a void contract, the sale of the undertaking – the law firm - must be regarded, as a matter of law, as though it have never taken place, but that the transfer of all contracts of employment between the firm and its employees are capable of subsisting independently as an economic entity.

29. In the circumstances, and in the absence of any proper explanation of the legal basis of a decision which is, in my judgment, at odds with the effect of s284(1) of the Insolvency Act

1986 I find that the ET erred in law in finding as it did and allow the appeal in the case of E Box and others v Kelly Noble and Paul Stott. In case I am wrong in that conclusion I find that the ET did not give adequate reasons as to the legal basis for its conclusions.

30. I turn to the second ground of appeal, which concerns the finding of the ET set out above, at paragraph 21 of the reasons.

31. At my request Mr Mackenzie provided me with an Order made at a Preliminary Hearing ("PH") on 15th January 2018, which resulted in the hearing on 19th March 2018. The PH was concerned only with the claim *against* Ms Noble and Mr Stott, and not the claim which was brought by Ms Noble against Mr Stott. Indeed, as appears from the bundle, the ET in the second case was received by the ET only on 27th January 2018, more than a month after the PH in the other case. Mr Mackenzie says, and I have no reason to doubt him, that there had never been a PH in the Noble v Stott claim, far less joinder of that claim to the other. He tells me that he was unaware that this point was to be considered or decided at the hearing on 19th March 2018 and was not invited to make submissions on it.

32. I note that, when the ET set out the scope of the hearing, at para 3, it described "the issue for determination at the hearing" as being, in effect, whether either or both of Mr Stott or Ms Noble was the employer at the material time. There is no mention of the other claim, neither is there any indication to be found in the Reasons as to how that claim came before the ET for determination of the issue.

33. In circumstances where the matter was not before the ET, and where Ms Noble, through Mr Mackenzie, was given no opportunity to be heard on the point, that finding cannot stand. I make no comment as to the actual findings made.

34. The appeal is therefore allowed in full. I would be surprised if it is in the interests of any of the parties to resurrect the matter, but should they choose to do so it will be a matter for the Regional Employment Judge as to how the matter proceeds. Any hearing on the issues under appeal should be before a differently constituted ET.