

Neutral Citation Number: [2023] EAT 143

Case No: EA-2022-001143-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building,
Fetter Lane, London, EC4A 1NL

Date: 2 November 2023

Before :

HIS HONOUR JUDGE SHANKS

Between :

MS GINA GANNON

Appellant

- and -

MS TEUTA BICAKU (1)

**MS SOFIA TOMBAZIDOU-CRAWFORD (2)
T/A IVORY DENTAL CLINIC**

Respondents

**Mr Sapandeep Singh Maini-Thompson, Counsel (Advocate) for the Appellant
MS Sofia Tombazidou-Crawford, the Second Respondent for the Respondents**

Hearing date: 2 November 2023

JUDGMENT

HIS HONOUR JUDGE SHANKS:

1. This is an appeal by Gina Gannon against the decision of the Employment Tribunal sitting in Watford (EJ Bedeau, Mrs G Bhatt, MBE and Mr Wharton) which was sent out on 12 October 2022 following a hearing without lawyers on 8 July 2022. The appeal was allowed to proceed by Michael Ford KC on the sift in relation to questions arising from the obligations lying on employers under Regulations 13 and 13A of the TUPE Regulations.
2. Ms Gannon was employed as practice manager by the Ivory Dental Clinic from 26 February 2018. The Ivory Dental Clinic had two partners who were dentists, Ms Teuta Bicaku and Ms Sofia Tombazidou-Crawford. From August 2020 there had been discussions with another dental practice called Dental Beauty with a view to Dental Beauty buying the practice but it seems that at that stage neither principal whose names I have just mentioned was keen to sell. However, Ms Tombazidou-Crawford was prevented from practising as a dentist by the GDC with effect from 21 January 2021, which obviously made the likelihood of a sale greater.
3. At the end of February 2021 after the conduct hearing before the GDC which led to her being prevented from practising it was mooted that Ms Bicaku would take over the whole practice but she did not at that stage feel confident enough to run it on her own. Meanwhile discussions had continued with Dental Beauty and they carried out some due diligence apparently, although no date for a sale had been agreed.
4. On Friday 5 March 2021 there were discussions involving both the principals of Ivory Dental and over the weekend following Ms Bicaku decided finally that she would not be able to take over the practice and she so informed her partner at about 14:00 on

Monday 8 March 2021. It seems that in consequence of that almost immediately there was an oral agreement that a deal with Dental Beauty would go through.

5. On Tuesday 9 March 2021 Ms Bicaku called the Claimant, Ms Gannon, to a meeting with the other staff to take place later that morning. The only relevant findings about that meeting and subsequent events are contained in paragraphs 17 and 18 of the ET’s Judgment. Paragraph 17 says this:

The evidence that the meeting took place on 9 March 2021 is consistent with the Respondent’s account as it was a day that is etched in Ms Tombazidou-Crawford’s memory. She explained the reason for the sale being that she could no longer run the practice as a dentist in light of the GDC’s ruling and that Ms Bicaku was unable to take it over. She informed them of the identity of the new owner and the date of the transfer and stated that they should stay with the new owner. She told the Tribunal, and we accept her evidence, she said goodbye for the last time to her staff and to the business she’d founded in 2003. We also accepted the evidence that the meeting was on 9 March ...

At paragraph 18 there is a reference to someone called Sharron being content to work for the new company, Dental Beauty, but it then says:

The Claimant denied that that was the case.

Whether the Tribunal made an error by saying “Sharron” in the first part of that paragraph is not clear but in any event that is the full extent of the factual findings of the Tribunal that seem to me relevant to the appeal.

6. Completion of the sale apparently then took place at about 17:30 on 9 March 2021.

7. Ms Gannon in due course brought proceedings in the ET against the Ivory Dental Clinic's two principals alleging breach of the obligations to inform and consult which are to be found in Regulations 13 and 13A of TUPE. It seems to me helpful if I quote the relevant parts of the TUPE regulations at this stage before turning to consider the Judgment and whether the appeal should be allowed.

8. Regulation 13 provides as follows:

(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 no measures will be so taken that fact; and

(d) [not relevant]

...

(5) The information which is to be given to the appropriate representatives shall be given to each of them by being delivered to them or sent by post to an address notified by them to the employer or, in the case of representatives of a trade union, sent by post to the trade union at the address of its lead or main office.

(I say in parenthesis that I take from that that the normal way of informing and complying with the obligation under regulation13(2) is to provide a document to the representatives.)

- (6) **An employer of an affected employee who envisages that he will take measures in relation to the 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.**

...

- (9) **If in any case there are special circumstances which render it not reasonably practicable for an employer to perform a duty imposed on him by any of paragraphs 2 to 7 he shall take all such steps towards performing that duty as are reasonably practicable in the circumstances.**

Regulation 13A relates to micro-businesses, which is what we are dealing with here, and says as follows:

- (1) **This regulation applies if at the time an employer is required to give the information under Regulation 13.2 the employer employees fewer than 10 employees, there are no appropriate representatives and the employer has not invited any of the affected employees to elect employee representatives.”**
- (2) **The employer may comply with Regulation 13 by performing any duty which relates to appropriate representatives as if the affected employees were an appropriate representative.**

So in the case of a micro-business the obligations are direct to the employees.

Then Regulation 15 says this:

- (1) **Where an employer has failed to comply with a requirement of Regulation 13 a complaint may be presented to an ET on that ground:**

...

- (d) **in any other case by any of his employees who are affected employees.**

- (2) **If on a complaint under paragraph 1 a question arises whether or not it was reasonably practicable for an employer to perform a particular duty or as to what steps he took towards performing it it shall be for him to show:**
 - (a) **that there were special circumstances which rendered it not reasonably practicable for him to perform the duty, and:**
 - (b) **that he took all such steps towards his performance as were reasonably practicable in those circumstances.**

...
- (8) **Where the Tribunal finds a complaint against a transferor under paragraph (1) well founded it shall make a declaration to that effect and may**
 - (a) **order the transferor ... to pay appropriate compensation to such description of affected employees as may be specified in the award ...**

Finally regulation 16(3) provides that:

Appropriate compensation in Regulation 15 means such sum not exceeding 13 weeks' pay for the employee in question as the Tribunal considers just and equitable having regard to the seriousness of the failure of the employer to comply with his duty.

9. Those were the potentially relevant provisions. Unfortunately, the ET in their Judgment refer to only Regulations 13(2) and 13A. The essence of the decision rejecting Ms Gannon's claim is at paragraphs 30 to 32 which say:

30. The only time at which the Respondents had a definitive date was on 9 March for the sale. By then staff had been informed in the morning of a substantial sale of the business late in the afternoon. There was no earlier time at which staff could have been told. The decision up until 8 March was to delay the sale or to avoid a sale. On 8 March the

Respondents had decided they would go ahead with the sale and sign the purchase agreement.

31. We are satisfied the Claimant and her colleagues were informed, given the proximity of the sale, about the reasons for the sale and the date of the transfer on 9 March 2021, that the sale was going ahead later that day and that they should consider working for Dental Beauty. They were told the identity of the purchaser and that that company would be their new employer. It was the Respondents' understanding that they all agreed to work for the new company.

32. The Tribunal has concluded that the Respondents have complied with Regulation 13A TUPE. The Claimant's Claim against the Respondent is not well founded and is dismissed.

10. It seems to me that the Tribunal may in making their findings at paragraph 30 of the decision have been reaching a conclusion under Regulation 13(9) but they have not said so, they have not quoted that paragraph and they have not analysed matters by reference to it.
11. On appeal Ms Gannon, who was ably represented by Mr Maini-Thompson, said in effect that the ET had failed to grapple with a number of relevant issues or, indeed, to make all relevant findings of fact. It seems to me that counsel must be right in that and that Ms Gannon's appeal must succeed. The ET did not consider the effect not only of Regulation 13(9) to which I have referred but also 13(2)(b), (c) and (d), 13(5) and (6) and Regulation 15(2), all of which, it seems to me, ought to have been considered, analysed, and applied.
12. Further, it is plain from submissions made by Ms Tombazidou-Crawford in particular that the ET failed to make a number of relevant findings of fact, in particular about the

visit that she says took place by the buyers in the afternoon of 9 March 2021 and, as she says, Ms Gannon's involvement in that meeting and on whether Ms Gannon did or did not indicate that she agreed to the transfer and her employment going over to the buyers with effect from the following day. None of those things is really dealt with by the ET.

13. Given that state of affairs, it seems to me the only possible outcome today is that the appeal must be allowed and the entire matter must be remitted to a fresh tribunal to decide the outcome having heard, I am afraid, all the evidence again.

14. This is a most unfortunate outcome given the delay, inconvenience and expense which has already been incurred and which may be involved hereafter. As I have already said, I would strongly encourage the parties to negotiate some kind of settlement of this claim bearing in mind that the maximum compensation is 13 weeks' pay and that a week's pay is capped at a specified amount and given that it may be tricky to present this case properly without the assistance of lawyers and that any fees that they would be charging would be very likely to substantially exceed the maximum compensation at stake.
