EELA EUROPEAN EMPLOYMENT LAWYERS ASSOCIATION

SUMMARY

2014/2 Dismissals shortly before a transfer were for an ETO reason even though the ultimate objective was the sale of the business (UK)

<p>The administrator of a business in financial difficulties found a potential purchaser of its assets and in May 2010 the parties reached agreement on the sale of the assets subject to a certain condition being met. Three months later, in August 2010, the condition was satisfied and the business was sold. In the meantime, the business was experiencing such severe cash flow difficulties that in late May 2010, the administrator dismissed nearly all administrative staff. Claims were later brought by three of those employees that their dismissals were unfair under TUPE. Was there an economic, technical or organisational (‘ETO’) reason for the dismissals? The Court of Appeal, overturning the decision of the Employment Appeal Tribunal (‘EAT’), distinguished between the immediate reason for the dismissals (cash flow difficulties) and the administrator’s ultimate objective (sale of the business) and found that there was an ETO reason. This case highlights that even in the context of insolvency procedures, where decision-makers will often be focused on the sale of the business, an ETO reason for related dismissals can exist. However, a careful and detailed examination of the facts of each case will be essential.</p>

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Facts

In 2009, London-based Crystal Palace Football club got into severe financial difficulties. In January 2010 the company which owed the club, Crystal Palace FC (2000) Limited (the 'Club'), went into administration and Mr Brendan Guilfoyle was appointed as the administrator. Administration is a procedure under the Insolvency Act 1986 used by companies facing financial difficulties.

An insolvency practitioner is appointed as a company's administrator with the purpose of rescuing the company or reorganising or realising the assets of the company under the protection of a statutory moratorium which prevents creditors from enforcing claims against the company.

Often, an administrator sells the assets of the company as a going concern, which in most cases will amount to a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('TUPE').

There was only one credible bidder for the assets of the Club being a consortium led by Mr Steve Parish. Negotiations with Mr Parish were complicated as the consortium wished to purchase not only the assets of the Club but the club stadium, which was owned by a different company, Selhurst Park Ltd.

In May 2010 the terms of a sale and purchase agreement in relation to the assets of the Club were reached with Mr Parish. The agreement was held in escrow and did not have legal effect because it was being held back pending the sale of the stadium.

By the end of May 2010 the Club was facing severe cash flow difficulties. As the football season was now over and there was no sale imminent, Mr Guilfoyle decided to sell the Club's most valuable players and dismiss all administrative staff other than those necessary to permit the core operations of the Club during the closed season. These dismissals took effect at the end of May 2010. News of the dismissals was picked up by the media which had the result of putting pressure on Selhurst Park Ltd's bank to facilitate the sale of the stadium to the consortium.

As a result, in August 2010 the consortium purchased the Club's assets and the stadium and they were transferred to the consortium's company, CPFC Limited. Mrs Kavanagh and three other administrative employees who were dismissed by the Club brought claims that their dismissals were unfair.

TUPE protects employees' rights when businesses are transferred and is the transposition into domestic law of the requirements of the Acquired Rights Directive (2001/23) (the 'Directive'). Regulation 7 of TUPE makes a dismissal because of, or for a reason connected with the transfer, unfair unless there is an ETO reason.[i]

If a pre-transfer dismissal is unfair then liability for the dismissal automatically transfers to the purchaser.

In the case of *Spaceright Europe Limited v Baillavoine [2012] ICR 520*, the Court of Appeal held that the dismissal of a chief executive on the first day that his employer, *Spaceright*, went into administration had been in connection with a later transfer of *Spaceright* and that there was no ETO reason for the dismissal.

The court held that the reason for the dismissal was to make the business more desirable to prospective purchasers. This did not relate to the conduct of the business as a going concern and could not be an ETO reason.

Judgment

At first instance, the tribunal concluded that as the sale of the Club was a possibility at the time that the dismissals took place, they were for a reason connected with the eventual transfer. When considering whether there was an ETO reason for the dismissals, the tribunal made a distinction between the administrator's reason for the dismissals and his ultimate

objective.

In its view, dismissals made to reduce the wage bill in order to continue a business would be an ETO reason which could be viewed separately from a longer term objective of selling the business in due course.

By contrast, reducing the workforce to make a business more attractive to a prospective purchaser (whether or not it has yet been identified), would not be an ETO reason.

Applying this to the facts, the tribunal found that although Mr Guilfoyle intended to continue the Club with a skeleton staff in the hope that it might be sold in the future, the reason he made the dismissals was because the Club had run out of money and would have to be liquidated unless staff costs were immediately reduced. Further, the particular circumstances of the Club meant that there were even stronger reasons than usual for averting liquidation. In particular, it was a seasonal business and its most valuable assets were its players, which meant that in liquidation it would have very few assets to realise. Consequently the tribunal concluded that there was an ETO reason for the dismissals.

The Claimants appealed. The EAT overturned the decision of the tribunal. In its view and relying on the decision in *Spaceright*, the only possible conclusion was that the dismissals were not for an ETO reason because they were not for the purpose of continuing the conduct of the business but were with a view to sale or liquidation. The Respondents appealed in their turn.

The Court of Appeal reinstated the tribunal's decision. Maurice Kay LJ, giving the leading judgment, found that the tribunal was justified in distinguishing between Mr Guilfoyle's reason for implementing the dismissals and his ultimate objective of selling the business as a going concern. He noted the tension between TUPE, which protects employees in the context of business transfers, and the statutory provisions relating to insolvency, which seek to ensure the best results for creditors and therefore often involve the dismissal of staff.

The "legal fulcrum" is regulation 7 of TUPE which regulates when those dismissals are fair. Assessing the application of regulation 7 is "an intensely fact-sensitive process". The courts have to be careful to avoid allowing an administrator to artificially contrive an ETO reason but at the same time care has to be taken before characterising an arrangement by an administrator as an illegitimate manipulation of TUPE.

In this context, *Spaceright* could be distinguished. There could not be an ETO reason in the *Spaceright* scenario because *Spaceright* was always going to need a chief executive (it was just desirable not to have one when selling the business); no change in the workforce was required. Therefore there could be no ETO reason.

Lord Justice Briggs, concurring, noted that if TUPE were to apply so as to transfer the liability for dismissals to the purchaser, purchasers would seek to reduce the purchase price accordingly, thus reducing the amount available to the administrator to distribute to creditors.

The result would be that those dismissed employees' claims would achieve a priority in the insolvent distribution not envisaged by the insolvency laws (as they would be able to claim in full against the purchaser).

In *Whitehouse v C. A. Blatchford Ltd [2000] ICR 542* the Court of Appeal made clear that the purpose of the Directive is to safeguard the rights of employees but not to place them in a better position by virtue of the transfer. In Briggs LJ's view, whilst this does not mean a dismissal by an administrator can never be a breach of TUPE, it is a further reminder of why a "subjective fact-intensive analysis of the sole or principal reason" for the dismissal is required.

Commentary

The EAT's decision, had in effect, made it impossible for administrators to dismiss employees without being in breach of regulation 7 of TUPE. This seems an overly wide interpretation of TUPE and it was therefore not surprising that it was overturned by the Court of Appeal.

It is now clear that in the context of administrations, having the sale of the business as the ultimate objective is not, of itself, sufficient to make related dismissals unfair. However, it is clear that courts will take an extensive and detailed review of the particular facts of each case to ensure there is genuinely an economic, technical or organisational reason for any dismissals and, furthermore, that they entail changes in the workforce.

As such, administrators will still need to take care when dismissing employees to avoid falling foul of TUPE.

Comments from other jurisdictions

Cyprus (Anna Praxitelous): The Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses Law of 2000, as amended (the "Law"), provides that a transfer shall not in itself constitute grounds for the dismissal of an employee by either the transferor or the transferee. The right to dismiss due to economic, technical or organizational reasons (ETO reasons) which require changes to the workforce, do however exist. Essentially, lawful dismissals may arise in cases where the transfer of undertaking results in redundancies, as provided in section 18 of the Termination of Employment Laws of 1967, as amended.

If the employment contract or employment relationship is terminated by reason that the transfer involves a substantial change to the terms of employment which are to the detriment of the employee, the employer shall be deemed responsible for the termination of the contract of employment, or employment relationship.

The 2012 case of *Giorgos Economides & Others - v - Exe-Lens Ltd and Redundancy Fund* concerned an unfair dismissal claim. The matters to be examined were whether (i) a transfer of undertaking took place within the meaning of the Law and Directive 2001/23 and (ii) whether there was a genuine reason for redundancy. According to the facts of the case, two companies, the Employer Company and Interoptic Ltd, merged and transferred their activities and assets to a new company, Interlens Ltd, registered by the shareholders of the two companies. All the employees of the Employer Company, with the exception of the applicants, continued their employment with Interlens Ltd. The Employer Company made the applicants redundant due to the closing of the departments where they were employed. The Court, taking guidance from ECJ case law, ruled that a transfer of undertaking had taken place as a result of the merger. Further, the Court noted that particular attention is required in cases where dismissals due to ETO reasons have occurred at the same time as a transfer of undertaking. In relation to the reason of the applicant's dismissals, the Court ruled that, based on the facts of the case, it appeared that the Employer Company's decision to close the departments where the applicants were employed, was taken prior to the decision to transfer and concerned the viability of the business. The fact that the realisation of that decision happened at the same time as the transfer could not prevent the Employer Company from taking such decision. It was ruled that the redundancy was genuine as per the provisions of the Termination of Employment Law of 1967 as amended, due to the closing of the departments where the applicants were employed.

The Netherlands (Zef Even): Case law in the Netherlands on ETO reasons is scarce. The Dutch UWV, a governmental agency in charge of assessing requests to terminate an employment agreement by notice, has published a dismissal policy. In this policy it explains when it will grant and when it will refuse a dismissal permit. This policy also explains when this is the case if the dismissal is planned around a transfer of undertaking. Not surprisingly, the UWV clearly states that employees may not be fired by reason of the transfer itself. Dismissal permits may, however, be granted even where a possible transfer of undertaking is about to take place, should a reorganisation involving redundancies be based on an economic necessity, *regardless* of that transfer. In such a case, the company must be restored to health based on ETO reasons. Dismissal permits will be refused if the redundancies are aimed at making it easier to sell the business. The reorganisation should strictly be based on economic, technical and/or organisational circumstances, which themselves justify the dismissals, irrespective of

the transfer. The outcome of the current UK judgment would therefore probably also be permitted in the Netherlands. There was after all an ETO reason for dismissal, which had the side effect that the company was easier to sell. In the *Spaceright* case, no change in the workforce was required, and therefore there could not have been an ETO reason. The same would, in my view, apply in the Netherlands.

Subject: Transfer of undertakings - ETO reasons

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Internet publication: unavailable

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