SUMMARY

2011/35 Resignation notice did not prevent transfer (UK)

<p>An employee (Mr Marcroft) who had given his termination notice shortly before the business employing him transferred under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (‘TUPE’), and who did not need to attend the office during the notice period, was nonetheless assigned to the undertaking. Accordingly, he could not assert that his employment had not transferred, thereby preventing the new owners of the business from enforcing a restrictive covenant in his contract.</p>

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Facts

Marcroft had been employed in the insurance industry for over 30 years. From July 2008, he had been employed by PMI Health Group Ltd ('PMI') predominantly in the commercial insurance department of its business. His contract contained a post-termination restrictive covenant prohibiting him from approaching clients of PMI whose accounts he had managed or about whom he had acquired knowledge whilst with PMI.

On 15 September 2009, Marcroft submitted notice of his resignation. The notice period would expire on 26 October 2009. On 25 September 2009, he was informed by the directors of PMI that the commercial insurance business would be sold to Heartland (Midlands) Ltd ('Heartland'). However, there was no consultation with Marcroft in relation to the transfer, nor did he receive anything in writing about the transfer. It was agreed that Marcroft need not attend the office during the notice period, but that he would be on call at home. He did not do significant work, but took calls and finalised accounts. Marcroft took no action to object to the transfer, which was completed on 2 October 2009.

After his employment terminated, Marcroft started working for a rival insurance company. PMI's solicitors wrote to him, alleging he had breached his restrictive covenant. Marcroft's solicitors denied this, saying that TUPE had applied to transfer his employment (and the benefit of any restrictions) to Heartland. Heartland then brought proceedings against Marcroft for breach of contract, claiming that his employment had been transferred to it and that it was entitled to sue for breach of the restrictive covenant.

Despite having originally admitted to PMI that TUPE applied and that his contract had been transferred to Heartland, Marcroft now denied this. He asserted that, at the time of transfer, he was not "assigned" to the commercial insurance department, relying on regulation 2(1) of TUPE. This defines "assigned" as meaning "assigned other than on a temporary basis". Marcroft contended that, by handing in notice of resignation on 15 September 2009, he had become assigned to the commercial insurance department 'on a temporary basis', so his contract of employment had not transferred. Furthermore, as he spent some time dealing with private health business and other things, Marcroft argued that he was not assigned to the commercial department in any case at the relevant time.

Marcroft also claimed that the transfer of his employment contract to Heartland was inoperative in any event because PMI had not provided him with information which would have enabled him to exercise his right to object to the transfer under TUPE. Marcroft relied on the duty under regulation 13 of TUPE to provide the representatives of the affected workers with certain information and alleged that there had been a conspiracy between PMI and Heartland to avoid the operation of, or to breach, the protective regime of TUPE.

The County Court's Decision

The County Court judge held that Marcroft was assigned to the business of the commercial insurance department at PMI, which had transferred to Heartland. Marcroft himself had agreed that he spent 80% to 85% of his time on commercial insurance business and had no expertise in other areas of insurance with which PMI dealt. The judge found as a fact that,

certainly until he handed in his notice on 15 September 2009 and 'probably certainly' until 25 September 2009, Marcroft was assigned to PMI's commercial insurance business.

The judge then rejected the contention that, as from the above dates, Marcroft was not assigned to the undertaking transferred on the basis that he had become 'effectively an employee without any portfolio' as there was little or no work for him to do. The judge found that PMI were still entitled to rely on him and was satisfied that Marcroft had remained at all times assigned to that department and the part of business which was transferred to Heartland on 2 October 2009.

In relation to the allegation of conspiracy between PMI and Heartland, the judge found that there had been no intentional or deliberate scheme between PMI and Heartland to avoid the operation of TUPE or breach its provisions. The judge further held that it was not a condition for employment to be transferred that the employee had been given notice of the proposed transfer. If it were, unscrupulous employers might fail to give notice in order to frustrate the intention of TUPE, which could not be right. Finally, the judge commented that TUPE provided a specific remedy (of up to 13 weeks' pay) for failure to inform and, in any event, the obligation had been on PMI rather than Heartland.

The Court of Appeal's Decision

Marcroft appealed to the Court of Appeal, submitting that the judge had failed to give proper consideration to the notion of a 'temporary' assignment in regulation 2(1) of TUPE. He contended that once he had handed in his notice, his position became temporary without any requirement or expectation that he undertook duties during the currency of his garden leave.

The Court of Appeal stated: '...it cannot be right, in principle, that an employee is automatically assigned on a temporary basis, thereby losing the protection of TUPE, simply as a result of handing in his notice'. The Court further held that the fact that the sale of the undertaking was officially confirmed to Marcroft on 25 September 2009 and that it was agreed that he could stay at home on call did not change his position as someone assigned to the commercial department.

In relation to the failure to inform and the alleged denial of the right to object as grounds for rendering ineffective Marcroft's transfer to Heartland, the Court upheld the first-instance judgment. In particular, it held that there was a duty under regulation 13 of TUPE to provide the representatives of the affected workers, not the individual himself, with certain information. (If there is no existing recognised trade union or other appropriate representatives, the employer is under an obligation to arrange elections for representatives.)

There was no basis in fact or law for implying a term in the contract of employment that would render the transfer ineffective unless the employee had been provided with information by the employer about the transfer. Marcroft's appeal was accordingly dismissed.

Commentary

This case is unusual in that it concerned an employee seeking to avoid being transferred under TUPE Ð the key point being, of course, that he was attempting to escape liability for the breach of his restrictive covenant.

The most significant issue raised by the case in legal terms was whether an employee may become assigned to the undertaking merely 'temporarily' - thus avoiding transfer under TUPE - either by handing in notice of resignation or by virtue of the garden leave arrangements which followed. The Court of Appeal rejected the argument that an employee's position may change as a result of handing in notice or as a result being on garden leave. As the Court made clear, it cannot be right for employees to lose the protection of TUPE simply on the basis of such factors. Moreover, it would clearly be wrong for employees to lose protection because employers do not inform them about the transfer, either deliberately or otherwise.

Deciding otherwise in this case would have left Heartland, the transferee, with no remedy for Marcroft's breach of restrictive covenant. As the judge at first instance commented, once an employee qualifies for protection under TUPE, this must not only safeguard his rights but also 'carry with it any burdens that he has under the contract'. The Court of Appeal's judgment therefore provides some reassurance for purchasers of businesses seeking to guard against unfair competitive practices by former employees of the undertaking.

Comments from other jurisdictions

Germany (Martin Reufels): Even if an employee is released from his or her duties during the notice period, he or she is still assigned to the employer and to the establishment. If a transfer of the business takes place during the release period (and during the notice period), this still has the effect that the employment relationship is transferred to the new owner of the business. A German court would have decided this issue in the same way.

A significant issue in this case is the fact that Mr Marcroft is bound by a post-termination restrictive covenant. The transfer of the business in which he previously worked can result in his former employer not being adequately protected. Take the following example. An employee with a post-termination restrictive covenant resigns. Shortly afterwards the part of the business in which he used to work is transferred to a new owner. Unless the covenant is worded in such a manner as to take account of a transfer of undertaking, the employee is free

to compete against that new owner. This is because, although the employee is bound by the covenant, this legal biding is vis-a-vis his former employer, not vis-a-vis the new owner of the business.

The Netherlands (Peter Vas Nunes): In 2005 the Dutch Supreme Court decided a case concerning a cleaning lady, Ms Memedovic, in the employment of a cleaning company, Asito. Her job was to work in a police station, along with other cleaners also employed by Asito. Following an incident, she was suspended and told that she would never work in the same police station again. While she was suspended, Asito lost the cleaning contract for the police station in question. The issue was whether she transferred into the employment of the cleaning company that won the contract. The Supreme Court held that she did not, because the tie connecting Ms Memedovic to the transferred part of Asito's business, within the meaning of Botzen – v – RDM, had been permanently severed. The facts in the case reported above strike me as comparable. At the time PMI's business transferred to Heartland, Mr Marcroft had resigned and was no longer actively employed. Thus, the Court of Appeal appears to take different position from that of the Dutch Supreme Court.

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