CARC3153

25 February 2000

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN

BERNADETTE CLARKE

(Applicant) Appellant

and

MEDIGUARD SERVICES LIMITED

(Respondent) Respondent

CARSWELL LCJ

Introduction

This is an appeal by way of case stated against the decision of an industrial tribunal dated 9 August 1999, whereby it dismissed the appellant's claim against the respondent for compensation for sex discrimination and/or victimisation. The net issue in the appeal is whether an employee who has brought a complaint of such treatment against her employer is entitled to pursue it against him when she has come to a settlement with the transferee employer who has succeeded to his liabilities in consequence of a transfer to which the Transfer of Undertakings (Protection of Employment) Regulations 1981 apply.

The Course of the Proceedings

The appellant commenced full-time employment in March 1995 with the respondent company Mediguard Services Limited (Mediguard), a company which supplies services to hospitals. In early February 1996 she informed her manager that she was pregnant, with her expected date of confinement 3 October 1996. Thereafter she claims that she was the subject of a number of acts of discrimination and victimisation committed by senior staff of the respondent. On 30 May 1996 she

issued an originating application to an industrial tribunal complaining about that treatment. We have not been concerned in this appeal with the merits of her claim and have proceeded on the assumption that it would have been established.

At the end of June 1996 Mediguard lost its major contract to another similar supplier ISS Mediclean Limited (Mediclean) and the latter company took over its business in circumstances which amounted to a transfer of its undertaking within the meaning of the TUPE Regulations. On 29 October 1996 Mediclean was joined as a respondent to the appellant's application, pursuant to a request from Mediguard. Mediclean did not dispute that it had succeeded by reason of the TUPE Regulations to liability for the appellant's claim and so confirmed in a letter of 15 January 1997 to the tribunal. In that letter it asked that Mediguard should be dismissed from the case, but the appellant by letter dated 17 January 1997 objected to this course being taken. The Vice-President declined at a directions hearing held on 31 January to dismiss Mediguard from the proceedings, as neither Mediguard nor Mediclean had appeared to "give further cause", and directed that the issue be decided by the tribunal at the full hearing.

When the substantive hearing commenced on 14 April counsel for the respondents requested the tribunal to decide as a preliminary issue whether Mediguard was a proper party to the proceedings. The tribunal decided, after hearing initial argument, that the point required more detailed consideration and directed that the substantive hearing should proceed and that it would receive argument on the issue at the end of the case. We might observe that where there is a substantial preliminary issue it is generally better for the parties to request a separate hearing and for the tribunal to decide the issue before embarking on the substantive hearing, though in the present case it does not appear to have been such a pressing necessity. During the course of the hearing the appellant and Mediclean came to terms and agreed a settlement, in consequence of which Mediclean was by consent dismissed from the proceedings. The appellant wished to go ahead against the respondent Mediguard and the tribunal heard argument on 6 May 1999 on the issue whether

Mediguard was a proper party. By a written decision dated 30 June 1999 the tribunal held that the appellant did not have a remedy against the respondent and dismissed the application. By a requisition dated 9 August 1999 the appellant's solicitors requested the tribunal to state a case for the opinion of this court on three questions of law. The tribunal stated and signed a case dated 19 October 1999, in which it posed the following questions:

> "1. Whether the tribunal erred in law in finding that the appellant was not entitled to [a] remedy against the first respondent?
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> 2. Whether the tribunal erred in law in failing to make a finding that Article 6 of the Equal Treatment Directive required that the appellant should be able to pursue a remedy against the first respondent.
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> 3. Whether the tribunal erred in law in failing to apply a purposive interpretation to the Sex Discrimination (Northern Ireland) Order 1976 so as to allow the appellant to pursue a remedy against the first respondent in addition to her right to a remedy against the second respondent."

Counsel for the appellant was unwilling to disclose the terms of the settlement reached between the appellant and Mediclean, but agreed that for the purposes of the appeal the court should approach the matter on the basis that the appellant obtained or could have obtained full monetary compensation from Mediclean in the settlement. What she sought from Mediguard was not monetary compensation but something more than that, of a non-monetary nature. What form that should take was not precisely spelled out, but from the reference in argument to Article 65 of the Sex Discrimination (Northern Ireland) Order 1976 we take it that she wished to ask the tribunal to make an order declaring her rights and possibly a recommendation under Article 65(1)(*c*).

The Statutory Provisions

The Sex Discrimination (Northern Ireland) Order 1976 and the equivalent legislation in England and Wales were enacted in order to comply with the requirements of the Council Directive 76/207/EEC, commonly known as the Equal Treatment Directive. Articles 2 to 5 provided that the principle of equal treatment means that there should be no discrimination whatever on grounds of sex in a number of specified spheres, including access to employment, vocational training and working conditions. Article 6 then provided:

> "**Article 6**
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> Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged by failure to apply to them the principle of equal treatment within the meaning of Articles 3, 4 and 5 to pursue their claims by judicial process after possible recourse to other competent authorities."

The 1976 Order contains a comprehensive set of provisions designed to secure the prohibition of discrimination on the grounds of sex and to provide appropriate remedies to those who suffered discrimination. Article 3 defined sex discrimination against women and Article 6 discrimination by way of victimisation. Article 8 makes it unlawful to discriminate against a woman in relation to employment. For present purposes the material provision is that contained in Article 8(2):

> " (2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her -
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> (*a*) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or
>
> (*b*) by dismissing her, or subjecting her to any other detriment."

The TUPE Regulations were passed in 1981, again to comply with a European directive, 77/187/EEC, commonly known as the Acquired Rights Directive. The object of the Directive, as stated in the preamble, was "to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded." The material provision is Article 3(1), which before its amendment in 1998 read:

> " 1. The transferor's rights and obligations arising from a contract of employment or from an employment relationship existing on the date of a transfer within the meaning of Article 1(1) shall, by reason of such transfer, be transferred to the transferee.
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> Member States may provide that, after the date of transfer within the meaning of Article 1(1) and in addition to the transferee, the transferor shall continue to be liable in respect of obligations which arose from a contract of employment or an employment relationship."

In accordance with the requirement in Article 8, the United Kingdom enacted the TUPE Regulations to make the prescribed provisions part of domestic law. It was not in dispute that a relevant transfer took place within the definition contained in the Regulations. The material provisions are contained in Regulation 5(1) and (2) (as amended):

> " (1) Except where objection is made under paragraph (4A) below, a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee.
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> (2) Without prejudice to paragraph (1) above, but subject to paragraph (4A) below, on the completion of a relevant transfer -
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> (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this Regulation to the transferee; and

(b) anything done before the transfer is completed by or in relation to the transferor in respect of that contract or a person employed in that undertaking or part shall be deemed to have been done by or in relation to the transferee."

Paragraph (4A) is not material to the present case. The United Kingdom has not passed any legislation making the provision permitted by the second limb of Article 3(1) of the Directive.

The Transfer of Liabilities

The natural meaning of "transfer" is to hand something over from one person to another, one of the primary meanings in the *Oxford English Dictionary*. As Morison J said in *Ibex Trading Co Ltd v Walton* [1994] ICR 907 at 916, the word in its natural and ordinary meaning suggests a taking from one and a handing over to another. The Court of Session held in *Allan v Stirling District Council* [1995] ICR 1082 that under Regulation 5(2)(*a*) of the TUPE Regulations all the transferor's liabilities passed to the transferee and the transferor was no longer subject to those liabilities. We entirely agree with the view expressed by Lord Morison at pages 1086-7:

> "The word `transferred' necessarily denotes that all the transferor's liabilities, whether accrued or continuing, pass to the transferee and the transferor is no longer subject to any of them. We agree with what was said by Morison J. in *Ibex Trading Co. Ltd. v. Walton* [1994] I.C.R. 907, 916c, that `use of the word `transfer' in its natural and ordinary meaning suggests a taking away from one and a handing over to another.' Indeed we would go further and hold that the word cannot bear any other meaning in any circumstances. In the context of the subsequent provision in regulation 5(2)(*b*) that:
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> > `anything done before the transfer is completed by or in relation to the transferor in respect of that contract' - i.e. a contract of employment - `or a person employed in [the] undertaking or part shall be deemed to have been done by or in relation to the transferee,'
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> it is in any event a natural consequence that the liability of the transferor for performance of the acts which constitute an unfair

> dismissal should be discharged. It was submitted that the ordinary responsibility of an employer for dismissal of an employee should not be excluded in the absence of express provision to that effect. The appeal tribunal held [1994] I.C.R. 434, 443, that it would `not be right' to do so. We agree that an employer's liability should not be excluded in the absence of express provision or necessary implication, but in our view the provisions contained in sub-paragraphs (*a*) and (*b*) of regulation 5(2) unambiguously and clearly express that exclusion. This is confirmed by the provision made in regulation 5(4) whereby criminal liability is excepted from the effect of paragraph (2)."

Lord Morison went on to examine the terms of the Acquired Rights Directive and concluded that not only was the construction adopted by the court in accordance with the provisions of the Directive, but the terms of the Directive confirmed that view. We respectfully agree with the reasoning of the Court of Session, set out in detail in pages 1087-9, and with the conclusion which the court reached.

The Employment Appeal Tribunal in *DJM International Ltd v Nicholson* [1996] ICR 214 expressed agreement with the view that the proper interpretation of the words "anything done" in Regulation 5(2)(*b*) is very wide and that they can relate to anything done by the transferor in relation in respect of the contract of employment with his employees. The issue with which we are concerned in the present appeal, however, did not arise in that case. Likewise, *Angus Jowett & Co Ltd v National Union of Tailors and Garment Workers* [1985] ICR 646 and *Secretary of State for Employment v Spence* [1986] ICR 651, to which reference was made in the course of the argument before us, turned on other issues and do not provide direct assistance.

Somewhat more material are two decisions on the transfer of claims in tort made against transferors. In the first, *Martin v Lancashire County Council* (1999, unreported) Judge Fawcus, sitting as a deputy High Court judge, held that the plaintiff's claim in tort for pre-transfer injury did not pass to the transferee so as to relieve the transferor of liability. In this he followed an earlier decision by Judge Neligan in Bristol County Court in *Cramer v Watts Blake Bearne & Co Plc* (1997, unreported). In *Bernadone v Pall Mall Services Group* [1999] IRLR 6 (in which *Martin v Lancashire CC,* although

decided earlier, was not referred to) Blofeld J came to the contrary conclusion, that the transferee was the party liable to the plaintiff for an injury sustained by her before the transfer. He also held that the transferor's right of indemnity against its insurers passed to the transferee. We are not called on to make a direct choice between these decisions. Judge Fawcus was concerned about the possibility that the respective insurers of the transferor and transferee might not cover the liability in consequence of the transfer, but if Blofeld J's decision is correct that concern is removed. Judge Fawcus also took the view that the obligation to adopt a purposive construction of the Regulations in order to achieve the purpose of the Directive impelled him to his conclusion. We share the view expressed by Lord Morison in *Allan v Stirling District Council*, however, that the intention of the Directive is itself clear and that to adopt the construction proposed would distort the plain meaning of a statutory provision. We would therefore incline to favour the reasoning and conclusion in *Bernadone v Pall Mall Services Ltd.*

Sex Discrimination Cases

We are accordingly of the opinion that on the true construction of TUPE Regulation 5(2) liabilities incurred by a transferor will in general pass to the transferee and will fall upon him to the exclusion of the transferor, with the consequence that after the transfer the employee will not be able to hold the transferor liable. It was submitted on behalf of the appellant, however, that there was an implied exception to this construction when Regulation 5(2) falls to be applied to sex discrimination cases, because otherwise the provisions of that paragraph would fail to give an effective remedy to a victim of discrimination, and therefore on a purposive construction the court should reach the opposite conclusion in such cases. Her counsel relied upon the statement of the Court of Justice in *von Colson v Land Nordrhein-Westfalen* [1984] ECR 1891 at paragraph 23 of the Decision:

> "Although … full implementation of the directive does not require any specific form of sanction for unlawful discrimination, it does entail that that sanction be such as to guarantee real and effective judicial protection. Moreover, it must have a real deterrent effect on the employer."

The Court held accordingly that compensation for breach of the prohibition against discrimination must be adequate in relation to the damage sustained. This requirement was underlined by the Court in *Draempaehl v Urania Immobilienservice OHG* [1997] ECR I-2195, where it held that a ceiling on compensation in discrimination cases left the complainant without an adequate remedy. The Court repeated at paragraph 24 of its Decision the principle that the measures adopted by a Member State must be sufficiently effective to achieve the aim of the Directive and went on to say at paragraph 39 that the sanction chosen must have "real dissuasive effect" upon the employer. Counsel argued that a remedy directed only to economic consequences, which did not include social consequences, was inadequate. He therefore sought a remedy for the appellant which would mark the unlawfulness of the discriminatory behaviour of the transferor employer, the respondent Mediguard, and exert a sufficient deterrent effect on it. In order to achieve this object it was in his submission necessary to retain the respondent as a party and allow the appellant to continue the proceedings against it in order to obtain such a remedy.

The respondent's riposte to this proposition was straightforward: to impose concurrent liability on a transferor and keep him in the litigation would not confer any benefit of consequence on the complainant nor would it provide any significantly greater amount of deterrence against discrimination on the part of employers. The appellant, it was submitted, was in a position to obtain full monetary compensation from the transferee Mediclean. If individuals on Mediguard's staff should be held personally accountable, it had been open to the appellant to join them in the proceedings. If the decision on liability had gone to a decision by the tribunal with Mediclean as the sole respondent, it would have set out its findings about any discrimination proved with just the same amount of detail as if the proceedings had also included Mediguard. Those responsible for the

discrimination would, in the current phrase, be named and shamed just as effectively. The inclusion of Mediguard as a party would confer no advantage of substance upon the appellant, and its exclusion would not operate as a significant deterrent against discrimination.

In our opinion the respondent's contention is correct. The natural and ordinary meaning of Regulation 5(2) is that liability, in being transferred from the transferor to the transferee, is thereupon imposed upon the latter to the exclusion of the transferor. We regard this meaning as so plain that even if there were anything in the Directive which tended in the other direction, a different construction of a purposive nature would distort that plain meaning. We do not, however, consider that there is any such thing in the Directive; rather, its provisions tend to support our conclusions about the intention behind Regulation 5(2). Nor do we see any reason to imply an exception for sex discrimination cases, were it possible to do so, for the remedies given to the appellant by the Regulations are quite adequate. We therefore reject this ground of appeal.

The Transferor as Agent or Aider and Abettor

The alternative ground on which the appellant's counsel relied was the contention that the transferor was acting as agent for the transferee or was aiding and abetting the latter. They relied upon Articles 42 and 43 of the Sex Discrimination (Northern Ireland) Order 1976, which provide:

> " **42.**-(1) Anything done by a person in the course of his employment shall be treated for the purposes of this Order as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval.
>
> (2) Anything done by a person as agent for another person with the authority (whether express or implied, and whether precedent or subsequent) of that other person shall be treated for the purposes of this Order as done by that other person as well as by him.
>
> (3) In proceedings brought under this Order against any person in respect of an act alleged to have been done by an employee of his it shall be a defence for that person to prove that he took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing in the course of his employment acts of that description.

Aiding unlawful acts

43.-(1) A person who knowingly aids another person to do an act made unlawful by this Order shall be treated for the purposes of this Order as himself doing an unlawful act of the like description.

(2) For the purposes of paragraph (1) an employee or agent for whose act the employer or principal is liable under Article 42 (or would be so liable but for Article 42(3)) shall be deemed to aid the doing of the act by the employer or principal.

(3) A person does not under this Article knowingly aid another to do an unlawful act if -

(*a*) he acts in reliance on a statement made to him by that other person that, by reason of any provision of this Order, the act which he aids would not be unlawful, and

(*b*) it is reasonable for him to rely on the statement.

(4) A person who knowingly or recklessly makes a statement such as is referred to in paragraph (3)(*a*) which in a material respect is false or misleading commits an offence, and shall be liable on summary conviction to a fine not exceeding £400."

The basis adopted by counsel for the first limb of this argument was that when the transferee takes over and succeeds to liability for discriminatory acts, he is to be regarded as ratifying the acts of the transferor. This argument appears to involve three propositions:

(a) When the transfer takes place the transferor is by implication of law constituted the agent of the transferee in respect of acts committed before the transfer.

(b) Such acts are to be regarded as having been committed on behalf of the transferee.

(c) The acts are automatically ratified by the transferee, whatever they were and irrespective of the extent of his knowledge of them.

The concept of ratification postulates the existence of an agent who has done something for which he did not then have authority but which his principal subsequently authorises: see, eg, *Bowstead & Reynolds on Agency,* 16th ed, para 2-046. It could not sensibly be said that when discriminatory acts are committed by an employer he is then acting as agent for a possible future transferee, of whose existence nobody may at that time have had the slightest idea. The suggestion

is put forward that when the transferee arrives upon the scene and succeeds to liability for the transferor's acts the latter is retrospectively constituted the former's agent by implication of law. It then has to be supposed that all the discriminatory acts are ratified by the transferee, although he may have no knowledge of the material circumstances in which the acts were done, ordinarily an essential prerequisite for ratification: *Bowstead & Reynolds, op cit,* para 2-065. These propositions cannot in our opinion be sustained. They are inconsistent to such an extent with the accepted basic principles of the law of principal and agent that we cannot suppose that they should be implied from the terms or framework of the TUPE Regulations.

We find it even more difficult to accept the other proposition put forward on behalf of the appellant, that the transferor can be regarded as having aided the transferee to do the acts which constitute unlawful discrimination. The transferee cannot be said in any possible sense to have done the acts himself. He is merely made liable by operation of law for the acts done by the transferor. The suggestion then has to be that the transferor, who actually did the acts himself, aided the transferee (who did not physically do anything) to do those acts. The proposition only needs to be stated for its weakness to be apparent, and we shall content ourselves with saying that we find the suggestion misplaced.

Reference to European Court of Justice

Mr Lavery asked us to consider referring to the Court of Justice a question whether an adequate remedy must contain a sufficient deterrent to deter employers from committing discriminatory acts. We do not consider that there is any matter of European law which requires to be referred, for all the propositions which were cited to us from the case-law appear to us quite clear and not in need of interpretation. Any issues in the appeal concerned with principles of European law which were the subject of dispute were matters of application of the relevant principles, not of their interpretation.

We accordingly hold that the tribunal was not in error in its decision and answer the first question in the negative. The second and third questions really relate to steps in the reasoning towards the conclusion of the issue posed by the first question. We do not need to answer them and shall not do so. The appeal will be dismissed.

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