Neutral Citation Number: [2009] EWCA Civ 1045

Case No: A2/2008/3100

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE EMPLOYMENT APPEAL TRIBUNAL
3 Judges, P Elias presiding
UKEAT0338/08

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2009

Before :

LORD JUSTICE WALLER
LORD JUSTICE HUGHES
and
LORD JUSTICE RIMER

- -

Between :

Royal Mail Group Ltd	**Respondent**
- and -	
Communication Workers Union	**Appellant**

- -
- -

Adrian Lynch QC and Judy Stone (instructed by **CMS Cameron McKenna LLP**) for the **Respondent**
David Reade QC, Mohinderpal Sethi and Sarah Watson (instructed by **Messrs Simpson Millar**) for the **Appellant**
Hearing date : 30th June 2009

- -

Approved Judgment

Lord Justice Waller :

Introduction

1. This is an appeal from a decision of the Employment Appeal Tribunal, ('EAT') Elias P, presiding, handed down on 3 December 2008. The EAT allowed an appeal of the Respondent employer Royal Mail Group Ltd (**'**RMG**'**) from the Judgment of an employment tribunal (**'**the ET**'**) dated 17 June 2008. The EAT remitted the matter to a fresh tribunal to consider the question of information and consultation again in the light of the EAT's decision.

2. Permission to appeal was granted to the appellant union (CWU) by Sullivan LJ on one ground. That ground raises an important issue relating to the scope and nature of the statutory obligation on employers to inform and consult appropriate representatives of any affected employees with regard to the effect of a proposed relevant transfer under regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations (**'**TUPE**'**) 2006, SI 2006/246. Regulation 13 in itself gives effect to Article 7 of the Council Directive of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings of businesses (2001/23/EC) **(**'the Directive'**).**

3. The issue arises in this way. RMG transferred certain Post Office businesses to W H Smith ('WHS'). Where an employer transfers a business to another, regulation 4 of TUPE provides for the circumstances in which employees' contracts are automatically transferred to the transferee. Before the transfer takes place regulation 13 obliges the employer to provide information to the appropriate representatives of the employees (or in certain circumstances, as we shall see, to the employees themselves). Amongst the information that must be provided is that required under regulation 13(2)(b), which obliges an employer to inform the appropriate representatives of *'the legal, economic and social implications of the transfer for any affected employees'*. RMG were of the view that their contractual arrangements with their employees meant that under regulation 4 no automatic transfer would take place. CWU (the appropriate representatives), having for many years in similar situations taken the same view, on this occasion took a different view. But it followed that RMG did not inform CWU that automatic transfers would take place.

4. The ET concluded that RMG had no genuine belief in their view that no automatic transfers would take place. The EAT on appeal concluded that although at least some automatic transfers would take place, there was no evidence on which the ET were entitled to conclude that RMG did not genuinely believe their view. The EAT also held, contrary to the submissions made on behalf of CWU, that the obligation under 13(2)(b) was fulfilled if the employer informed the representatives as to his genuine belief of the legal implications. The employer was not in breach simply because the law, and thus the legal implications, was ultimately declared to be different.

5. If CWU were right in their contention, it would follow that RMG were in breach of their obligation under regulation 13 and that could lead to a penalty being imposed under regulation 15.

Background

6. So little is in issue that I gratefully adopt much of what is set out in CWU/the appellant's skeleton.

7. RMG, through its subsidiary, Post Office Limited, operates the Crown Office network of Post Offices which in April 2007 comprised 450 branches. Since 1986, several individual branches were converted to franchise status to be run privately. RMG had a policy of giving employees employed in the converting branches the choice of redeployment to another branch (for which it relied upon a standard mobility clause within the employees' contracts of employment) or voluntary redundancy.

8. In June 2006 there was a trial conversion of six Crown Office branches to WHS. CWU raised with RMG its concern that the franchise exercise was being undertaken on the basis that TUPE did not apply. It had not always on previous occasions been CWU's position that TUPE applied, but on this occasion it was CWU's position that employees would transfer automatically unless they declined. RMG responded by asserting that, although the franchising was a transfer of an undertaking for the purposes of TUPE, it would not operate to transfer any employment contracts to the transferee because RMG either redeploys employees to another office under the mobility clause or they accept voluntary redundancy.

9. From around September 2006 to the beginning of April 2007 various discussions and facilitated meetings took place between CWU and RMG about the future of the Crown Office network, including discussion of a potential large-scale franchising to a commercial partner.

10. On 19 April 2007 RMG announced that a deal with WHS had been signed: 6 converting branches went into consultation immediately, 63 were to go into consultation between May and July 2007 and 15 branches were told their future was uncertain. Conversions were to start in August 2007 and were aimed to be finished by June 2008. CWU maintained and reiterated its position on the application of TUPE, as set out above. In response, RMG maintained and reiterated its position that employees would not transfer automatically because they were being offered redeployment or voluntary redundancy.

11. The bulk transfer of post offices has prompted litigation in England, Scotland and Northern Ireland. The ET sitting in London Central considered four transfers as test cases in relation to the processes generally, whilst claims in other jurisdictions were stayed.

12. RMG argued that:

    (1) there was no automatic transfer of employment by virtue of regulation 4 because no contracts were 'terminated' by the transfer, and

    (2) the only obligation was for RMG to inform and consult on what it believed the legal, economic and social implications of the transfer to be even if those beliefs were incorrect. RMG asserted that its belief that no contracts of employment transferred was based upon legal advice but did not disclose the content of any legal advice received.

13. CWU's central contention was that:

(1) the automatic transfer principle by virtue of regulation 4 applied in respect of some, if not all, of the employees assigned to the transferring branches, and

(2) RMG failed to inform and consult the union on the legal implication that affected employees who would automatically transfer into the employment of WHS and the associated economic and social implications of the transfer. The obligations in regulation 13 were mandatory and provided no exception based upon the employer's purported mistaken belief as to the implications.

The ET decision

14. The ET heard extensive evidence and submissions. Although the ET did not make this clear, it appeared to accept that the principle of automatic transfer under regulation 4 would apply at least in some cases. Unanimously it held that RMG had no genuine belief that there would be no automatic transfer and thus that it had failed properly to inform and consult CWU in breach of regulation 13 of TUPE.

The Appeal Tribunal decision

15. Considering first whether regulation 4 did in fact apply, the EAT decided that automatic transfer must occur in respect of at least some of the affected employees. (RMG have not cross-appealed this point. They say it does not arise but they should not be taken to be accepting the EAT's ruling on this aspect).

16. The EAT found that RMG was mistaken in its belief that TUPE did not apply. However, the EAT ruled this did not mean that RMG's belief was not genuine. The EAT held that the ET did not have evidence on which it could conclude that RMG's belief was not genuine. The question then was whether under regulation 13(2)(b) – was a genuine (albeit mistaken) belief as to the legal implications sufficient for compliance, or was the obligation to get the position in law right whatever the subjective view of the employer? The EAT thought that if the intention had been that the transferor had to warrant the legal accuracy of the information he was providing, the Regulations would have said so in terms.

17. CWU appeals against that ruling.

Community Law

18. It is common ground that regulation 13(2) must be construed in accordance with the provisions of Community Law which begat it. TUPE 2006 enacts the provisions of Council Directive 2001/23/EC. The previous incarnation of the regulations was the Transfer of Undertakings (Protection of Employment) Regulations 1981 (SI 1981/1794) (**'**the 1981 Regulations'), which gave domestic effect to the Acquired Rights Directive (initially enacted as Council Directive EEC/77/187, and amended by Directive 98/50). Council Directive 2001/23/EC did not materially change the concept and effect of a transfer. As the preamble to the Directive observes:

> "(8) Considerations of legal security and transparency required that the legal concept of transfer be clarified in the light of the case-law of the Court of Justice. Such clarification has not

> altered the scope of Directive 77/187/EEC as interpreted by the Court of Justice."

19. CWU submits that one can only gain a proper understanding of the obligation placed on employers to inform employees, or representatives of employees, in the context of the provisions relating to automatic transfer themselves. They stress that an analysis of the case law of the ECJ reveals the consistent principle that Article 3(1) of the Directive, which is given effect in domestic law by regulation 4(1) and (2) of TUPE 2006, provides for the automatic transfer of the rights, powers, duties and liabilities of the transferor under or in connection with any contract of employment to the transferee. Thus, the rights conferred on employees by the Directive may not be made subject to the consent either of the transferor or the transferee nor the consent of the employees' representatives or the employees themselves. Lord Hope summarised the European case law in *North Wales Training and Enterprise Council Limited (trading as CELTEC Ltd) v Astley and others* [2006] UKHL 29, [2006] ICR 992, HL, at [54], in the following manner.

> "From this jurisprudence I would draw these conclusions as to the extent of the reservation. The starting point is to be found in the general rule that the contracts of employment of workers assigned to the undertaking transferred are automatically transferred from the transferor to the transferee on the date of the transfer. Then there is the fact that it is not possible for this rule to be derogated from in a manner unfavourable to the employees. The rights conferred on them by the Directive may not be made subject to the consent either of the transferor or the transferee nor the consent of the employees' representatives or the employees themselves: Daddy's Dance Hall, paragraph 14; d'Urso, paragraph 11."

20. This principle is given effect to in domestic law by regulation 4(1) and (2) of TUPE which provide that:

> (1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.
>
> (2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—
>
> (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) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee.

21. It is a further principle of Community law that an employee has a right to choose his employer and is not obliged to work for an employer whom he has not freely chosen: *Katsikas v Konstantinidis* [1993] IRLR 179, ECJ, at [31] to [33]. Further, at [35] and [36], it was said that:

> It follows from that that the Directive does not oblige Member States to provide that the contract of employment or employment relationship be continued with the transferor in a case where an employee freely decides not to continue the contract of employment or the employment relationship with the transferee. In such cases, it is for the Member States to determine the fate of the contract of employment or of the employment relationship. The Member States may, in particular, provide that in this case, the contract of employment or the employment relationship may be considered as terminated either on the initiative of the employee or on the initiative of the employer. They may also provide that the contract of employment or the employment relationship be continued with the transferor.

22. Within domestic law this is, in part, given effect to by regulation 4(7) which provides that:

> (7) Paragraphs (1) and (2) shall not operate to transfer the contract of employment and the rights, powers, duties and liabilities under or in connection with it of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee.

23. The Community principles of automatic transfer and individual freedom are also evident in the Judgment of the ECJ in *Celtec Ltd v Astley* Case C-478/03 [2005] IRLR 647 at [37] and [38]. It is unnecessary to set out the citations.

24. CWU submit that the principle of automatic transfer and the freedom of an employee to choose their employer underlines the protective nature of the Directive, and point to the preamble to the Directive where it is said:

> "(3) It is necessary to provide for the protection of employees in the event of a change of employer, in particular, to ensure that their rights are safeguarded."

25. CWU stress that the principle of automatic transfer subject to the right of the individual employee to choose for whom they work, requires employees to have accurate information as to the consequences of a proposed transfer in order that they can make an informed decision as to whether they wish to transfer. CWU's

submission is that it is consistent with the protective nature of the Directive to place an absolute obligation to provide accurate information. The obligation to provide the information is contained in Article 7 of the Directive.

26. Article 7 of the Directive provides, amongst other matters:

> 1. The transferor and transferee shall be required to inform the representatives of their respective employees affected by the transfer of the following:
>
> - the date or proposed date of the transfer,
>
> - the reasons for the transfer,
>
> - the legal, economic and social implications of the transfer for the employees,
>
> - any measures envisaged in relation to the employees.
>
> The transferor must give such information to the representatives of his employees in good time, before the transfer is carried out.
>
> The transferee must give such information to the representatives of his employees in good time, and in any event before his employees are directly affected by the transfer as regards their conditions of work and employment.

27. The obligation under Article 7 was also to be found in the predecessor to the present Directive, Council Directive 75/129/EEC, which was brought into effect in the UK by the 1981 Regulations.

28. Under the 2006 Regulations Article 7 is given effect by regulation 13. Regulation 13 then provides as follows:

> (1) In this regulation and regulations 14 and 15 references to affected employees, in relation to a relevant transfer, are to any employees of the transferor or the transferee (whether or not assigned to the organised grouping of resources or employees that is the subject of a relevant transfer) who may be affected by the transfer or may be affected by measures taken in connection with it; and references to the employer shall be construed accordingly.
>
> (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 that no measures will be so taken, that fact; and
>
> (d) if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take in relation to any affected employees who will become employees of the transferee after the transfer by virtue of regulation 4 or, if he envisages that no measures will be so taken, that fact.

29. For the purposes of Regulation 13 the appropriate representatives whom the transferor must inform and consult are defined by Regulation 13(3) which provides:

> (3) For the purposes of this regulation the appropriate representatives of any affected employees are—
>
> (a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union; or
>
> (b) in any other case, whichever of the following employee representatives the employer chooses—
>
> (i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, which (having regard to the purposes for, and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about the transfer on their behalf;
>
> (ii) employee representatives elected by any affected employees, for the purposes of this regulation, in an election satisfying the requirements of regulation 14(1).

30. Thus, in the present case, the affected employees being of a description in respect of which an independent trade union was recognized, the obligation on RMG under Regulation 13(2) was to inform and consult the independent union, CWU.

31. The obligation to inform and consult extends to employees who are 'affected' by the transfer. Thus it is not limited to those whose employment will transfer by reason of the operation of the Regulations. Thus, it was and is not in issue that RMG had an obligation to provide the information set out at 13(2) to the representatives of the affected employees even if RMG's case was that none actually transferred.

32. CWU stress that although in this case there are appropriate representatives, if there was no recognised union, or pre-existing employee representatives, and RMG had held an election for employees to elect representatives for the purpose of performing the information and consultation obligations on RMG under regulation 13(2), the

obligation to provide the information to inform and consult with those representatives would be exactly the same. Indeed in circumstances in which an employer had been obliged to hold elections but no employees had stood for election, then under Regulation 13(11) the obligation to provide the information remains, but it has to be provided directly to the affected employees. Thus the interpretation of the meaning of the obligation under Regulation 13(2) cannot depend upon the identity of the representative.

33. CWU contrast the language of Regulation 13(2)(a) and (b) with that used in regulation 13(2)(c) and (d). Under the latter the information to be provided includes information as to any "measures" which the transferor envisages it will take in relation to any affected employees or, if he envisages that no measures will be so taken, that fact; and if the employer is the transferor, the measures, in connection with the transfer, which he envisages the transferee will take. In the case of 'measures' there is then a specific obligation on the employer to consult the representatives, of any of the three forms, with a view to be consulted by the employer with a view to seeking agreement as to the measures:-

> '(6) An employer of an affected employee who envisages that he will take measures in relation to an 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.
>
> (7) In the course of those consultations the employer shall—
>
> (a) consider any representations made by the appropriate representatives; and
>
> (b) reply to those representations and, if he rejects any of those representations, state his reasons.'

34. The precise meaning of measures is not important. It refers to such things as shift patterns. But it is relevant to the construction of 13(2)(b), submit CWU, that 13(2)(c) and (d) are couched in language which is not "absolute" – the obligation to inform relates to what an employer "envisages".

35. The scheme for enforcement of the Regulations is contained within Regulation 15. Regulation 15 sets out the basis upon which a complaint alleging a failure to comply with Regulation 13 may be presented to an employment tribunal.

> '(1) Where an employer has failed to comply with a requirement of regulation 13 or regulation 14, a complaint may be presented to an employment tribunal on that ground—
>
> (a) in the case of a failure relating to the election of employee representatives, by any of his employees who are affected employees;

> (b) in the case of any other failure relating to employee representatives, by any of the employee representatives to whom the failure related;
>
> (c) in the case of failure relating to representatives of a trade union, by the trade union; and
>
> (d) in any other case, by any of his employees who are affected employees.'

36. Where the Tribunal finds a complaint under Regulation 13 well-founded it shall make a declaration to that effect and may order the transferor to pay appropriate compensation to such classes of affected employees as may be specified in the award. Regulation 16 provides that 'appropriate compensation' is such sum not exceeding thirteen 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. Guidance was given by the Court of Appeal in *Sweeting v Coral Racing* [2006] IRLR 252 CA that the award, in common with the protective award in cases of a failure to inform and consult in cases of collective redundancy under Trade Union and Labour Relations (Consolidation) Act 1992 (**'**TULR(C)A 1992') (see *Susie Radin v GMB and others* [2004] ICR 893 CA), was intended to be penal in nature, rather than solely compensatory, albeit that the use of the words "just and equitable" would entitle a tribunal also to have regard to any actual loss that a claimant employee showed that they had in fact suffered as a result of the failure to consult.

37. CWU emphasise the fact that the "just and equitable" discretion on compensation enables a Tribunal to consider the culpability of an employer in failing to meet the objective obligation under regulation 13(2)(a) and (b).

38. Aside from the "just and equitable" nature of the penalty, the Regulations also provide a further set of circumstances where the employer is not subject to the strict nature of the obligation under Regulation 13(2). Regulation 13(9) provides:

> '(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.'

39. Thus, if the employer could show that there were special circumstances which rendered it not reasonably practicable to have complied with the obligation under Regulation 13(2), then the duty becomes a more limited one to take all such steps towards performing that duty as are reasonably practicable in the circumstances.

40. In the present case at paragraph 6.50 of the Tribunal Decision the ET found that there were no 'special circumstances' and RMG did not appeal that finding.

CWU's submissions

41. CWU, through Mr Reade QC, submitted that the EAT were wrong and that the correct interpretation of the obligation under regulation 13(2)(b) is that the employer has to provide accurate information and that the scope of the obligation is not defined by the subjective state of the employer's mind. He relied on a number of indicators.

42. His first indicator was something to which I have already made reference. In looking at the actual wording of regulation 13(2) (and equivalent provisions of Article 7), he submitted there is a marked difference in the clear language of paragraphs (a) and (b) which require affected employees to be informed of the fact of transfer, the date or proposed date, the reasons for it, and the implications of it on the one hand, and the clear language of paragraphs (c) and (d) which require affected employees to be informed of measures which the transferor and transferee 'envisages' they will take in connection with the transfer.

43. CWU accepts that the wording of regulation 13(2)(c) and (d) allows for a subjective test of what the transferor and transferee actually envisaged in determining whether or not the obligation to provide information on measures is satisfied. The issue is not what measures he ought to envisage, but what measures he does in fact envisage. However, CWU submitted that that is not the position with regard to the information in paragraph (b). In stark contrast to paragraphs (c) and (d), the obligation is not for the employer to provide information only as to what he 'envisages' the legal, economic and social implications of the transfer to be. The obligation as set out in both the Regulation and Article is a straightforward obligation to inform the appropriate representatives of the implications, meaning that the employer must inform the union as to what those implications actually are and not what he believes them to be.

44. Mr Reade in his skeleton also pointed to a comparison that can be made with the new obligation under the 2006 regulations for information to be provided by the transferor to the transferee under Regulation 11. Regulation 11 provides:

> '(1) The transferor shall notify to the transferee the employee liability information of any person employed by him who is assigned to the organised grouping of resources or employees that is the subject of a relevant transfer—
>
> (a) in writing; or
>
> (b) by making it available to him in a readily accessible form.
>
> (2) In this regulation and in regulation 12 'employee liability information' means—
>
> (a) the identity and age of the employee;
>
> (b) those particulars of employment that an employer is obliged to give to an employee pursuant to section 1 of the 1996 Act;
>
> (c) information of any—
>
> (i) disciplinary procedure taken against an employee;

> (ii) grievance procedure taken by an employee,
>
> within the previous two years, in circumstances where the Employment Act 2002 (Dispute Resolution) Regulations 2004 apply;
>
> (d) information of any court or tribunal case, claim or action—
>
> (i) brought by an employee against the transferor, within the previous two years;
>
> (ii) that the transferor has reasonable grounds to believe that an employee may bring against the transferee, arising out of the employee's employment with the transferor; and
>
> (e) information of any collective agreement which will have effect after the transfer, in its application in relation to the employee, pursuant to regulation 5(a).
>
> (3) Employee liability information shall contain information as at a specified date not more than fourteen days before the date on which the information is notified to the transferee.'

45. The provisions of regulation 11 were enacted pursuant to a discretion given to Member States under Article 3, paragraph 2 of the Directive. That provides that:

> '2. Member States may adopt appropriate measures to ensure that the transferor notifies the transferee of all the rights and obligations which will be transferred to the transferee under this Article, so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer. A failure by the transferor to notify the transferee of any such right or obligation shall not affect the transfer of that right or obligation and the rights of any employees against the transferee and/or transferor in respect of that right or obligation.'

46. Thus, in respect of this requirement, if adopted, the Directive expressly defined and limited the information which was to be provided by the use of the phrase *'so far as those rights and obligations are or ought to have been known to the transferor at the time of the transfer'*. Thus a purely objective statement of the actual information was not required, but equally the scope of the information to be provided was not defined by the purely subjective state of the transferor's mind.

47. Mr Reade submitted that it could not have been the intention that the obligation which was imposed on employers under Article 7 of the Directive, in respect of the provision of the legal, economic and social implications of the transfer for the employees, was an even more limited one to be shaped and defined by the subjective state of the employer's mind. Had that been the intention then the Directive would have expressly provided for the scope of the obligation to be limited. The construction

which the EAT applied to regulation 13(2)(b) impermissibly derogated from the obligation which Article 7 required Member States to impose on employers.

48. Further, applying the genuine belief test to Regulation 13(2)(b) would not only be contrary to the express and clear wording of the Directive and the Regulations, but it would also render the purpose which the process is designed to serve meaningless – namely to inform affected employees of the consequences of a relevant transfer and thereby safeguard or protect affected employees' rights in the event of transfers of undertakings. In considering the purpose of the provisions it must be remembered that the same provisions apply irrespective of whether the appropriate representatives are a large union with legal resources, employee representatives or individual employees affected by the transfer, who may have no guidance whatsoever on the implications of the transfer to them other than what they are told by their employer.

49. To apply a genuine belief test, especially one without any further requirements such as the belief being based upon reasonable grounds or after reasonable research, is contrary to the purpose of TUPE and the Directive:-

1. it denies employees their right to information through their representatives, or their representatives, relating to the automatic right to transfer with continuity of employment and preservation of terms and conditions;

2. it provides an incentive for transferors, who may contrive to either transfer or not transfer employees, and further wish to believe that they are entitled to do so, to not make any enquiries into the legal position on transfer and instead adopt a commercially convenient position of their choosing, thereby benefiting from the genuine belief test which allows blissful ignorance of the law to be a defence;

3. the assessment of the 'genuine belief' test also provides further difficulties where a transferor may seek to rely upon legal advice as the basis of its belief but be reluctant to disclose the legal advice received;

4. it provides an incentive for transferors to not make any enquiries into the factual economic and social implications on transfer and instead adopt a position of allowing ignorance of information which is only accessible to the transferor (and transferee);

5. the assessment of the 'genuine belief' of a corporate body, involving many individuals who may indeed hold different beliefs on the implications, is a test fraught with difficulty and at odds with the requirement of regulation 13(5) which requires in mandatory terms that the information be provided in writing in a prescribed way which allows for easy assessment of compliance on an objective basis;

6. the 'genuine belief' test proposed by the EAT is one without any guidance on what is needed to meet the threshold of holding a genuine belief. For example, would it require clear-cut legal advice that the legal implications were definitely that the automatic transfer principle would not apply, that it might apply or that there might be a technical argument not previously upheld that could support an argument that the transfer principle would not apply?; and

7. a 'genuine belief' test would result in perverse outcomes. For example, a transferor could genuinely (but incorrectly) believe employees do not transfer to the transferee. He nevertheless wishes to get rid of the employees and disingenuously informs them that the legal implications of the transfer are that their contracts of employment are transferred to the transferee. In such a case, on a 'genuine belief' test, the transferor would be in breach of regulation 13(2)(b) even though he had given the correct legal implications of the transfer.

50. The EAT 'strongly' suggested at paragraph [130] that it would not be a defence for an employer to say that he did not inform because he did not realise that there was a relevant transfer at all, or because he genuinely believed that there was not. The EAT also considered that the employer would be liable for failing to inform affected employees even although he had genuinely not thought that they were affected. In these contexts, the EAT considered that an objective interpretation of regulation 13(2), namely the triggering of the obligation to provide information, is probably required. However, Mr Reade submits that the EAT erred at paragraphs [131] to [132] in holding that whilst the scope of the duty may have to be objectively determined, a subjective test should be adopted with respect to the actual information that should be provided insofar as the information to be provided under regulation 13(2)(b) is concerned.

51. The purpose of regulation 13(2)(b) is in the first instance to alert affected employees to the legal, economic and social implications of the transfer. The purpose of regulation 13(2)(c) is for the transferor to inform the representatives of any measures it envisages it may or may not take, depending upon the consultation it is required to carry out relating to its proposed measures. The basic and straightforward implications of transfer are the backdrop against which any proposed measures are to be considered and consulted upon. The legal, economic and social implications are therefore objective by their nature and do not require and should not allow a subjective test to be applied in determining whether or not an employer has satisfied the provision. The EAT erred at paragraph [132] in considering that the purpose of regulation 13(2)(b) is *'to enable the union to understand, and if necessary take issue with, the employer's perception of the situation'*. The EAT has wrongly conflated and/or merged the very different purposes of paragraphs (b) and (c).

52. The fact that the appropriate representative was a trade union must be irrelevant to the proper construction of the obligation under regulation 13(2)(b).

53. In answer to RMG's argument that an objective construction on the obligation under regulation 13(2) opens an employer to penal sanction in circumstances where it may be perceived that this was unjust, CWU point out that the ET (although obliged to make the declaration that there has been a breach of the obligation), may address any perceived injustice in the exercise of the discretion in compensatory award which it makes.

54. The Appeal Tribunal failed to define the very meaning of 'legal, economic and social implications of the transfer' and what this meant on the facts of this case.

i. In relation to legal implications, it is submitted that RMG was obliged to inform representatives of any affected employees of the legal implications and in particular those affected employees who would be

caught by the automatic transfer principle that they would transfer on the same terms and conditions unless they exercised their statutory right to object, and to inform them about what form any such objection should take. Only then would this particular class of affected employee be able to make a freely informed choice.

ii. With regard to the economic implications, it is submitted that this relates to the financial consequences of the transfer for any affected employees. This would include, for example, communication of the uncontroversial (but no less important) fact that occupational pension rights do not transfer upon a relevant transfer and the pension entitlement or scheme that would be available to the employees at WHS as well as other non-contractual benefits such as healthcare or life insurance. Further, any differences in non-contractual policies, such as provisions on sick pay or maternity. A factual assessment is needed of the differences an employee would encounter in a change of employment from RMG to WHS.

iii. As for social implications, this would no doubt have some overlap with the information on financial implications and also include, for instance, the new work location for transferred employees so as to enable affected employees to consider the new commuting time, distance and mode of travel.

55. Parliament has directly implemented the wording of the Directive by using the phrase 'legal, economic and social implications of the transfer'. The Directive itself did not seek to further define or limit the scope of those words. The information which should be provided in any specific transfer will be a factual question for the Tribunal considering the Regulations. A certain element of common sense is clearly required in considering what information needs to be provided in any particular transfer.

RMG's submissions

56. RMG submitted that the obligation on an employer to provide information was to enable an effective consultation to take place. They submitted that Elias P was right in saying at [132 (page 194)], the purpose of regulation 13 was to:

> "enable the union to understand, and if necessary take issue with, the employer's perception of the situation and the steps which he is proposing to take with respect to the transfer."

57. They pointed to the words with which regulation 13(2) opens and the requirement to provide the information "long enough before a relevant transfer to enable the employer . . . to consult the appropriate representatives of any affected employees". Thus the legislative purpose of the provision of information is to facilitate proper and effective consultation: *Institution of Professional Civil Servants v Secretary of Defence* [1987] IRLR 373 ("IPCS") at [10] per Millett J. Further, Millet J did not take the view that regulation 13(2)(b) placed a duty on the transferor to be "correct" or

"right" in the information provided under that regulation, as noted by the EAT at paragraph 129 of its Judgment (page 194).

58. RMG then made a number of points on the opening paragraph of regulation 13(2). They stressed, since the paragraph recognises that the provision of the information identified in regulation 13(2) is for the purpose of future consultation, it shows that the observation of Elias P, quoted above, applies not only to Regulation 13(6), which concerns consultation about any measures "envisaged" by the transferor, but more generally to the provision of any information within Regulation 13(2). Indeed, the Regulations (and Directive) are clearly premised on the assumption (borne out in practice) that discussions and consultation over an impending transfer extend beyond the legally mandated consultation where the transferor "envisages measures" within Regulation 13(6).

59. Also, the opening paragraph of Regulation 13(2) recognises that the holding of consultations is dependent on the employer providing information and the employer's understanding of the legal, economic and social implications of the transfer.

60. RMG submit that it is impossible to divide or divorce regulation 13(2) and the provision of information as to the "implications" of the transfer within regulation 13(2)(b) from the duty to consult within Regulation 13(6) as to any measures envisaged by the employer. Whether the employer "envisages" the taking of any measure, and the nature of any such measure, will be defined by the employer's understanding of the legal, economic and social implications of the transfer. Thus, for example, if the transferor does not believe that any employees will transfer under Regulation 4 of TUPE to the transferee, that will impact on the employer's understanding of the "implications" within Regulation 13(2)(b) and, of course, on whether the transferor "envisages" taking any measures within regulation 13(2)(c). Exactly the same applies to whether the transferor "envisages" that the transferee will take any "measures" within Regulation 13(2)(d) in relation to any affected employees who will become employees of the transferee by virtue of Regulation 4.

61. RMG summarise their position by submitting:-

> (1) Regulation 13(2) recognises that the provision of the required information is indivisible from the holding of consultation.
>
> (2) In particular, the provision of the information within Regulation 13(2)(b) as to the "legal, economic and social implications" of the transfer is indivisible from whether the transferor does or does not "envisage" that he will take "measures" or "envisages" that the transferee will take measures, in connection with the transfer.
>
> (3) It is clear and common ground that the test of liability in connection with Regulations 13(2)(c) and (d) which concern what the transferor "envisages" is subjective i.e. what is genuinely in the mind of the transferor, and not what is "correct", or "right".

(4) There would be an internal incoherence, quite apart from the practical difficulties and injustice, if liability under regulation 13(2)(b) were strict i.e. the transferor has to be "correct" or "right" as to the "implications" of the transfer, whatever he genuinely believes, and yet liability in regard to what he envisages, and whether consultation is required under regulation 13(6), is subjective.

(5) The purpose of regulation 13 is the holding of consultation. In order to achieve this purpose and allow for effective consultation, what is required is that the appropriate representatives have a proper opportunity to understand the employer's position with respect to the transfer and the measures that he intends to take pursuant to it. This necessarily depends on what the employer believes the legal position as regards the employees to be.

6) There is no need to require the employer to warrant that the information provided is correct. Consultation whether within regulation 13(6) or more generally must be conducted with a view to seeking the agreement of the appropriate representatives; that is inherent in the concept of consultation, and is expressly required by regulation 13(6). If the appropriate representatives disagree with the employer's position, then they will have the opportunity to make representations to this effect during the subsequent consultation. Where such representations are made, the employer is duty bound not only to consider any representations but also, if he rejects those representations, to give reasons for so doing: Reg 13(7). In this way, the information given by the employer is only the commencement point for the consultation exercise.

7) CWU's construction would require employers to warrant the legal accuracy of the information provided and to be liable for breach even though the employer provided the employees' representatives with information which was true to the transferor's best knowledge and belief as to the implications of the transfer. Imposing strict liability would far stricter than the liability attaching to legal advisers in relation to the provision of legal advice.

8) It is by no means true that the "legal implications" of a transfer are either clear cut or even readily predictable.

9) If the CWU's construction were correct the employer would be liable under Regulation 13(2)(b) on the basis that that provision required an employer to be "correct" (no matter how difficult it may be to foresee what the law might be) but the same employer would not be in breach of regulation 13(2)(c) and 13(2)(d) as to what he "envisaged" because that is clearly based on the actual belief of the employer.

10) The degree of hardship that would result from imposing strict liability in regard to the "correctness" of information to be provided under regulation 13(2)(b) is highlighted by consideration of what that information is to concern. In particular, it includes the "social" and "economic" implications, both of which are necessarily of a vague kind and yet the CWU maintains that strict liability should attach to the obligation to provide information as to these. Much of the information will be a matter of appraisal and judgment (as noted by Millet J in IPCS) at [10]).

11)CWU's suggestion that any injustice could be taken into account in making only a small award in respect of default is by no means a satisfactory answer to the charge of injustice. It is, in effect, an admission that the construction produces harsh and unacceptable results.

12) The harshness of CWU's interpretation is all the more apparent when applied to small employers. It is by no means true that the majority of employers will be in a position to take specialist legal advice in what is undoubtedly the extremely complicated area of the application of the detailed provisions of TUPE. Furthermore, unlike in the context of section 188 of TULR(C)A 1992, for Regulation 13 to apply there is no minimum number of affected employees. For small and/or impecunious employers, it would indeed be unjust to impose strict liability as to the contents of legal implications of the transfer.

13)There are no significant difficulties in assessing what a corporation genuinely believes to be the legal implications of a transfer. CWU is willing to admit that the test for compliance with regulations 13(1)(c) and (d) relates to what measures an employer genuinely envisages he will take. There is no reason to consider that there would be any more difficulties with assessing what a corporation genuinely believes to be true as to the legal, economic and social implications of a transfer.

14) The EAT's construction would not encourage improper or lax practice or discourage employers from taking proper legal advice. In the litigious field of TUPE there are numerous sanctions for an employer for "getting it wrong". For example, there may be mass claims for unfair dismissal.

15) Where an employer has taken no legal advice whatsoever and has not properly applied its mind to the issue of, for example, whether its employees would transfer to the transferee, that would be highly material evidence before an ET as to whether the employer had a "genuine belief" that those employees did not transfer.

Discussion

62. It is a powerful argument that employees need to know where they are. It can be said with force that it is for the employers to know what the legal implications are so that the employees can be informed. But in my view it does not follow that the employer must, in effect, warrant the accuracy of the law. The arguments of RMG and their answers to the points made by CWU are, in my view, compelling.

63. In my view the language of Regulation 13(2) is not the language of strict liability or warranty. The opening paragraph shows the purpose – "Long enough before . . . to enable the employer . . . to consult the appropriate representatives . . . shall inform . . .". It seems to me a powerful point that it is not simply in relation to "measures" that consultation is contemplated.

64. If one then goes through each subparagraph and considers the question of strict liability the position is as follows. I take first (a). Would the fact that the transfer did not ever take place give rise to liability? Would the fact that the date was changed give rise to liability? It seems to me that warranty of the accuracy of the subjects of this subparagraph could not have been contemplated. (b) Leaving aside "legal" – "economic" or "social" implications are highly unsuitable aspects to be the subject of some warranty as to accuracy as opposed to matters on which the employer should express a genuine view; (c) and (d) it is common ground are matters for the genuine belief of employers. It seems to me an unlikely construction that only one aspect of one subparagraph should be the subject of a warranty. The fact that a concession has to be made in relation to the language "measures" in (c) and (d) ultimately points in a direction opposite to that contended for by CWU.

65. I also find persuasive the fact that the subparagraphs are so inter-related. Economic and social implications will depend on the legal implications, and measures will depend on all three. All are to be the subject of interrelated consultation. It would be strange if part of the debate could not relate to the question whether the employer's view as to the legal implications was right. If it is said "there can be debate", it would seem stranger still that, if there is genuine disagreement and the employees' argument ultimately turns out to be right, a penalty can be imposed on the employer, but there is no balancing system of penalty if the employer turns out to be right.

66. I am not in any way persuaded that to rule as the EAT did makes regulation 13(2)(b) meaningless, or will lead to employers abdicating their responsibility by shutting their eyes to problems. There must be an obligation on the employer to consider the legal implications. If he does not do so, then he will not be able to defend his view as being genuine. What representatives should be informed of is a considered view as to the legal implications and an employer will not be able simply to say without considering the point – "this is what I believed".

67. Legal implications can in any event be difficult to be certain about. That, it seems to me, is important for a number of reasons. As RMG have said, a lawyer would not warrant the accuracy of his advice in any area of uncertainty if at all and it would take clear language to impose such a warranty on a non-lawyer. In addition it would seem to me that where consultation and debate is important, it is likely that the directive and regulations would be encouraging openness and allowing for an employer to be able to say the legal implications are not clear, where they are unclear, so that there can be

a proper debate about it. An obligation to warrant the accuracy seems to make it impossible for an employer to say that the answer is not clear.

68. In my view the EAT were correct in their view that the language of Regulation 13(2)(b) obliges the employer to describe what he genuinely believes to be the legal social and economic implications.

69. There was some suggestion from Mr Reade that a question should be referred to the ECJ. Since I have formed a clear view I would not myself contemplate referring a question.

70. I would dismiss the appeal.

Lord Justice Hughes :

71. I agree.

Lord Justice Rimer :

72. I also agree.