

Nationwide Building Society v Benn and ors EAT IDS 910

Under Reg 7 (2) of TUPE 2006, a dismissal for a reason connected with a transfer will be automatically unfair unless the employer can show that it was for an economic, technical or organisational (ETO) reason entailing changes in the workforce. In *Delabole Slate Ltd v Berriman* [1985] IRLR 305, the Court of Appeal (CA) held that for the defence to be available, the ETO reason must entail changes in the workforce and “the workforce” means the whole body of employees as an entity: it corresponds to the 'strength' or the 'establishment'. Furthermore, the term ‘changes in the workforce’ can only relate to the numbers of people employed or changes in the functions employees perform, but not to their terms and conditions of employment, such as pay and benefits.

The Portman Building Society (PBS) was taken over by the Nationwide Building Society (NBS). It was decided that there should be no redundancies below the level of branch manager. All roles below this level would be moved across to the merged organisation under a ‘job mapping’ process. Some months after the takeover, Mr Benn and a number of his colleagues resigned and presented claims of constructive dismissal arguing that: (i) their roles had changed significantly to their detriment following the transfer; and (ii) that new bonus arrangements had resulted in a significant decrease in their pay. A tribunal found the claimants had been constructively dismissed, but the dismissals were not automatically unfair under Reg 7 (2).

While the dismissals were 'connected with the transfer', there was an ETO reason entailing changes in the workforce, i.e. NBS did not have the same product range as PBS, which would have enabled the transferred employees to continue to function at the level that they had previously. The claimants appealed. They argued that in accordance with the principles established by the CA in the *Berriman* case, Reg 7(2) requires that an ETO reason must entail changes to the workforce as a whole and since the changes at issue affected only the transferring employees, Reg 7(2) was not satisfied.

The EAT rejected the appeal. There clearly was an ETO reason and according to the EAT Reg 7(2) does not state that the organisational reason must entail changes in the whole workforce. It can just relate to the body of transferring employees. Therefore the tribunal did not err in concluding that the dismissals were not automatically unfair.

As IDS rightly point out, this judgment is controversial. Firstly it weakens the protection afforded under TUPE to transferring employees being merged into the transferee’s business, as it suggests that changes can just be applied to the transferring workforce. Secondly, the judgment in *Berriman* also makes it clear that an ETO reason cannot apply to a change of terms and conditions and in this case, the transferee changed the terms of the contractual bonus scheme to the disadvantage of the transferring employees.

Keeping You One Step Ahead



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Willoughby v CF Capital plc EAT IDS 910

Miss Willoughby (W) was told by her manager, Mr Keeley (K), that CFC plc was experiencing financial difficulties and one way to avoid redundancies was for staff to become self-employed. W expressed an interest in this option and requested written details to help her make a decision. After repeatedly asking for these details, she received a letter containing an agency agreement for her to sign that would move her to self-employed status. The letter also stated that this was by mutual agreement and that her existing employment contract would terminate on 31 December.

Having taken legal advice, W phoned the company to say that she did not accept the agency agreement and was treating herself as dismissed. K then rang her on two occasions to explain that there had been a misunderstanding and reassure her that, if she did not wish to move to self-employment, she could continue to be employed, which K also confirmed in writing. W maintained that she had been dismissed and lodged a tribunal claim for unfair and wrongful dismissal. The tribunal held that 'without more', the letter from CFC plc terminating W's employment would amount to a dismissal, but there were 'special circumstances' meaning the dismissal had not taken effect.

A reasonable person in W's position, when receiving the letter on 23 December, would have realised that something was seriously wrong and that the notification of dismissal was an error. Furthermore, CFC plc withdrew the dismissal as soon as practicable after W alerted it to the mistake. The tribunal therefore decided that W had not been dismissed, but had resigned.

The EAT overturned the tribunal's decision and held that the dismissal had been effective. As a general rule, an employer who uses unambiguous words of dismissal will dismiss the employee and exceptions to this rule are limited. The wider interests of justice would not be served unless employers and employees are usually taken to mean exactly what they say. The fact that the employer had made a mistake in sending an employee a letter of dismissal did not prevent the clear, unambiguous words of dismissal from taking effect. While 'special circumstances' may deprive clear words of dismissal of effect, such circumstances do not arise where the person to whom the words are addressed is entitled to assume that they proceed from a conscious, rational decision – i.e. to take the dismissal at face value. Accordingly, W could continue with her claims of unfair and wrongful dismissal.

Todd v Strain and ors EAT IDS 911

Marchmont House care home was sold to Care Concern (GB) Ltd (CC Ltd). The sale gave rise to a relevant transfer under TUPE 2006. The owner of Marchmont, Mrs Todd, (T) held a meeting with staff informing them of the sale and confirming that everyone's job was safe. The majority of staff could not attend the meeting as they worked different shifts. Apart from some communications of a very minor nature, no further information was provided prior to the meeting.

Ms Strain and a number of her colleagues brought a tribunal claim against both T and CC Ltd, complaining that T had failed to inform and consult under Reg 13 or to arrange for the election of appropriate employee representatives. In particular, there had been a failure to consult about administrative pay arrangements concerning outstanding wages at the point of transfer, payment for untaken holiday prior to the transfer and the treatment of tax rebates to be reclaimed by CC Ltd in the month following the transfer.

The EAT agreed with the tribunal that the changes to pay arrangements related to the transfer were 'measures' in connection with the transfer, and the transferor's failure to inform and consult the workforce about them was a breach of TUPE 2006. Although the changes were administrative, they were not an inevitable consequence of the transfer. Furthermore, the EAT held that under TUPE 2006 there was no requirement that any measure's effect must actually be disadvantageous to employees in order to trigger the requirement to consult.

The EAT, however, disagreed with the employment tribunal's decision that an award of 13 weeks' pay was appropriate for each claimant. This was wrong in principle where some (though inadequate) information had been given and the measures requiring consultation were of very limited significance. An award of 7 weeks' pay was substituted, with T being jointly and severally liable with CC Ltd to pay the award.