Case Numbers: 2103451/07
And others

EMPLOYMENT TRIBUNALS

Claimants: **Mr S Royden**
And others
(see attached annex)

Respondent: **Barnetts Solicitors**

Heard at: **Liverpool** **On:** **2 and 3 February 2009**
4 February (in chambers)

Before: **Employment Judge: D Reed** **Members:** **Mr R G Raynor**
Mr P C Northam

Representation
Claimant: Mr G Turner, solicitor
Respondent: Ms K Nowell, counsel

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that:-

i) the respondents unfairly dismissed the claimants Mr Royden and Ms Ross.

ii) the respondents did not unfairly dismiss the claimants Mr Wainwright, Miss Collins and Mr White.

2. The majority judgment of the Tribunal is that

i) the respondents did not unfairly dismiss the claimant Miss Thomson;

ii) the respondent failed to comply with their duty to consult affected employees in connection with a transfer of an undertaking.

REASONS

1. In this case six claimants made claims of unfair dismissal, breach of contract and a failure in "collective" consultation against Barnetts, a firm of solicitors in Southport.

2. All six claimants were employees of Lees Lloyd Whitley ("LLW"), a firm of solicitors based in Birkenhead. They all claimed that there had been a transfer of an undertaking from LLW to Barnetts on 1 June 2007 upon which date they automatically became employees of Barnetts. However, all had then resigned their employment because, they said, Barnetts had repudiated their contracts. They had therefore been unfairly "constructively" dismissed and furthermore were entitled to notice pay. They also alleged that in connection with that transfer there had been a failure to carry out appropriate collective consultation, entitling them to further awards.

3. Barnetts claimed that no transfer of an undertaking had taken place (or if it had, that none of the claimants was assigned to the undertaking that was transferred); that in any event the claimants had objected to transfer such that any liability remained with LLW; that if there was a transfer there had been no repudiation; that if there had been a repudiation, accepted by the claimants, then their (constructive) dismissals had been by reason of an economic, technical or organisational reason such that they were in any event fair. Since the claimants were never employed by Barnetts, it was contended that no notice was due from Barnetts; if they had been so employed, since there had not been a repudiatory breach they were not entitled to damages for breach of contract (which would represent notice pay). Finally, it was denied that any right to collective consultation arose, alternatively that any such obligation had been properly discharged by then.

4. We heard evidence from three of the claimants, namely Mr Royden, Miss Thomson and Ms Ross. For the respondents we heard from two of their partners, Mr Swift and Mr Bright. Our attention was also directed to a number of documents. We reached the following findings.

5. The claimants were employed in various capacities within the conveyancing department of LLW. To a greater or lesser degree they all carried out work associated with Britannia Building Society ("BBS"). Where BBS agreed to lend money to a customer, it would ask if that customer had a solicitor. If he or she did, then the assumption would be that that solicitor would act on behalf of both the customer and BBS in connection with the property transaction i.e. that the solicitor would deal both with the purchase (and usually sale) of property itself and also the steps necessary to secure BBS's interest on the purchased property. If, on the other hand, the customer did not have a solicitor, BBS would refer them to LLW. For LLW there were no specific figures provided but in the light of events after 1 June 2007 it seemed reasonable to assume that in roughly

a quarter of the cases where mortgages were taken out with BBS, LLW would undertake the legal work.

6. LLW would pay a referral fee to BBS for each customer referred to it. The customer would pay the entire legal fees of LLW, including those referable to the work actually undertaken on behalf of BBS (in practice, a large element of the work would be for the benefit of both BBS and the customer).

7. BBS could not direct a customer to engage LLW and nor, so far as we could tell, was there any legally binding obligation on BBS to refer any customers to LLW.

8. However, there clearly were advantages for BBS in making such referrals. Not only would they receive a fee from LLW, they would then be dealing with people and systems with which they were familiar. Furthermore there were agreed standards of performance LLW were obliged to provide.

9. In 2006 BBS decided to seek tenders for the work. By that date Barnetts had established an informal collaborative arrangement with another firm of solicitors, Hammond Direct ("HD") and it was decided that there would be a joint bid from them, which was forwarded to BBS on 3 January 2007. In February 2007 Barnetts were informed that the bid had succeeded. It was agreed that Barnetts would handle cases referred by BBS branches and HD would deal with those referred from their call centre. It was anticipated that this would bring about a roughly 50/50 split between Barnetts and HD although in practice a substantially higher proportion of referrals were from branches and went to Barnetts.

10. Over the ensuing months there was considerable correspondence between Mr Royden and the representative of the claimants, Mr Turner, on the one hand and Barnetts on the other with a view to establishing what would happen to employees of LLW who had been involved in BBS work. All those employees worked at LLW's Birkenhead office. They were offered work in any office of Barnetts or HD. HD had offices in Bradford and Manchester and Barnetts in Southport. There was no question of the claimants being permitted to remain in Birkenhead: if they wished to "transfer" with the BBS work, they would have to work at one of those three locations (or possibly undertake home-working for HD, although that was not a possibility that appeared to have been seriously pursued by any of the parties).

11. Realistically, Southport was the only location the claimants were inclined to consider but it is clear that they were reluctant to work there. Eventually, there was simply an impasse.

12. Barnetts and HD became responsible for the BBS work on 1 June 2007. LLW continued to deal with those matters that had been referred to them before that date.

13. The claimants contended that on 1 June there had been a transfer of the undertaking in which they worked to Barnetts. They further considered that the

direction that they should work from Southport (at the nearest) was a repudiation of their contracts (on either common law principles or within Regulation 4 of the Transfer Regulations). On 4 June they submitted their resignations.

14. Regulation 3 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 provides that:-

(1) The Regulations apply to

(a) a transfer of an undertaking, business or part of an undertaking or business ...to another person where there is a transfer of an economic entity which retains its identity;

(b) a service provision change, that is a situation in which ...

(ii) activities cease to be carried out by a contractor on a client's behalf ... and are carried out instead by another person on the client's behalf.

(2) In this regulation "economic entity" means an organized grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.

(3) The conditions referred to in paragraph (1)(b) are that immediately before the service provision change.

(i) There is an organized grouping of employees ... which has as its principal purpose the carrying out of the activities concerned on behalf of the client;

(ii) The client intends that the activities will, following the service provision change, be carried out by the transferee ....

15. Regulation 4 provides that 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 organized grouping of resources or employees that is subject to the relevant transfer but that any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

16. Paragraph (7) of regulation 4 provides that paragraph (1) shall not operate to transfer the contract of employment of an employee who informs the transferor or the transferee that he objects to becoming employed by the transferee. Paragraph (9) provides that where a relevant transfer involves or would involve a substantial change in working conditions to the material detriment of the person whose contract of employment is or would be transferred, such an employee may treat the contract of employment as having been terminated and the employee shall be treated for any purpose as having been dismissed by the employer.

17. Regulation 7 provides that where either before or after a transfer any employee is dismissed, that employee shall be treated as unfairly dismissed if the sole or principal reason for dismissal is the transfer itself or a reason connected

with the transfer that is not an economic, technical or organisational reason entailing changes in the workforce.

18. Regulation 13(6) provides that 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 intended measures. Under paragraph (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.

19. At a case management discussion on 9 September 2009 a number of specific issues were identified for the Tribunal to address and indeed we do address them in the course of the following paragraphs. However, we have somewhat re-arranged the order and presentation of those issues. Furthermore, we consider that they do not exhaust the matters we are called upon to deal with.

Transfer of an undertaking

20. There are two ways in which a transfer of an undertaking can be established, namely an "old style" transfer under Regulation 3(1)(a) or a service provision change under Regulation 3(b).

21. The existence of an old style transfer depends upon the existence of an economic entity which retains its identity after the transfer. We did not consider that was apt to describe the situation here. There had been, at LLW, no distinction between branch and head office referrals. Indeed, those carrying out the work were not aware into which category any particular case fell. After 1 June, Barnetts dealt only with the branch referrals. If there was an economic entity which retained its identity in the hands of Barnetts, then that was it. Since clearly there was not a distinct economic entity of that sort within LLW, it follows, in our view, that the existence of a transfer under Regulation 3(1)(a) was not made out.

22. We then turned to the question of whether this amounted to a service provision change.

23. Clearly, activities ceased to be carried out by LLW on behalf of BBS. It was argued at one stage that BBS was not the "client", since no payment was made to BBS (in fact quite the reverse) and the actual person giving instructions to LLW was the customer. However, it was conceded by Mr Bright and was clearly the case that it was appropriate to regard BBS as the client of LLW and then Barnetts.

24. It was also pointed out that there was no exclusive right to work on behalf of Barnetts (both in the sense that HD obtained some of the work but more importantly that BBS were not in a position to insist that a customer give instructions to Barnetts) and there was no guarantee of work; there was, on the face of it, no obligation even to refer customers to Barnetts.

25. We did not consider these points were fatal to the claimants' claims. Regardless of the existence of any contractually enforceable obligation, it was clearly the expectation of all parties that work would come through this particular channel and that expectation was fulfilled.

26. A rather more difficult point arises as to what precisely were the "activities" to be carried out on behalf of BBS, as opposed to the customer. There would certainly be aspects of the work undertaken by LLW (and then by Barnetts) that were principally for the benefit of the customer. For example, the likelihood is that the customer would be selling a property in order to finance, together with the loan from BBS, the purchase of his new property. The processing of that sale was not something in which BBS had a direct interest. They were not paying for that work and it did not directly impact on the work that was being carried out for them i.e. the processing of the mortgage.

27. It would be open to us to consider that the activities in question for the purposes of the transfer were simply those directly benefiting BBS. We were not inclined to take that view. The successful completion of the entire transaction was clearly of interest to BBS. Unless the sale went through the likelihood is that the mortgage would not be required and BBS would lose out as a consequence. Accordingly, we concluded that the appropriate activities (i.e. those carried out by LLW on behalf of BBS) comprised the entirety of the work carried out on the relevant files by LLW.

28. The question then arises as to which were the "relevant files" (and therefore what precisely were the "activities" in question).

29. On the face of, those activities must be the ones which it is intended by BBS will be carried out by another party following the alleged transfer. Insofar as the transferee was Barnetts, then they were the branch referrals. Although those referrals were not dealt with distinctly by LLW, there is no requirement that they should have been in order to satisfy the definition of a service provision change, provided it can sensibly say that the "principal purpose" of the organized grouping of employees was the carrying out of those activities.

30. The statistics on the split between branch and head office referrals during the time LLW carried out the work was not very satisfactory. However, according to Mr Swift, between June 2007 and April 2008 HD carried out 119 completions whereas Barnetts carried out 963. In other words, the overwhelming majority of the work was that which eventually became the responsibility of Barnetts.

31. We were told that some 23 employees within the conveyancing department of 55 at LLW were considered to be allocated to the BBS contract. It appeared quite likely that in relation to none of them was <u>all</u> of their time spent on the BBS work. Looking at the matter in the round, however, and taking into account the evidence to which we refer below in connection with assignment, it appeared to us that there was indeed an organized grouping of employees which had as its principal purpose the carrying out of the activities (processing head office referrals), which BBS intended would be carried out by Barnetts. There was, in

other words, a service provision change.

Assignment to the relevant service

32. All the claimants alleged they were assigned to the work that Barnetts had inherited. We were told that all the claimants fell within the group of 23 employees who were categorized as part of the BBS team, but that was not sufficient for our purposes. It was clear that all were carrying out "non-BBS" and non-breach referral work for some part of the working day.

33. An indication was given in the case of Duncan Webb Offset v Cooper of the sort of issues that might be relevant in determining the question of assignment, such as the value given to each part of the business by the employee, the terms of the contract of employment, how the cost to the employer had been allocated etc. In fact, it was difficult to get any real picture on matters such as these (particularly in relation to the three claimants who did not even give oral evidence). We were left to make what judgments we could on the basis of the evidence we heard.

34. Mr Wainwright and Miss Collins worked in the call-handling team. This dealt with calls for the entire department, not just the BBS work. We remind ourselves that fewer than half of the employees within the department carried out BBS work and even those did not do it exclusively. When we "factored in" a reduction for head office referrals, and in the absence of any evidence on behalf of those claimants to the contrary, we were bound to conclude that considerably less than half of their work related to the relevant BBS work. We were not satisfied that they were assigned to that work.

35. Mr White and Miss Thomson were in the post-completion team. There were six associate solicitors within the conveyancing department, of whom three carried out BBS work. However, the three non-BBS teams undertook their own post-completion work (other than closing down files) and it follows that the bulk of Miss Thomson's "hands on" work was on the BBS teams.

36. However, one of those teams (BBS3) only spent some 20 per cent of its time on BBS work. Furthermore, Miss Thomson was actually in a managerial position in relation to the post-completion team which involved her in supervisory responsibilities that on the face of it further reduced her BBS-related work.

37. Of course, a further discount must be applied to reflect head office as opposed to branch referrals. In the light of above considerations, the majority view was that Miss Thomson was not assigned to the relevant work.

38. Mr White did not give evidence to us but had produced, pursuant to an order of the Tribunal, an assessment of his work. Unfortunately, all he tells us is that he spent "around 90 per cent" of his time at LLW on BBS cases, that he cannot say what the split is between head office or branch referrals and that 80 per cent was sale and purchase and the rest re-mortgage. Given the nature of the post-completion team and its obligations, we really would have required something a good deal clearer and more certain before concluding that he was

assigned to the relevant activities. We therefore conclude that he was not.

39. Mr Royden was a fee-earner and we heard various estimates of the time he would have spent on the relevant work. We accepted, however, that non-BBS work was a relatively peripheral element of his duties. Accordingly, even making allowance for head office referrals, we were prepared to accept that he was indeed assigned to the relevant activities.

40. We also heard evidence from Ms Ross and accepted that her workload in broad terms mirrored that of Mr Royden. It followed that we also concluded that she was assigned to the relevant activities.

Objection to transfer

41. It was contended that by their actions the claimants indicated that they objected to transferring to Barnetts and that accordingly their contracts were not transferred to Barnetts.

42. In fact, the claimants were also at pains to make it clear that they were not objecting to the transfer. Rather, they required their concerns (principally concerning location) to be satisfactorily resolved. To put the matter another way, they wished to seek reassurance that Barnetts would comply with their (Barnetts') obligations under the Regulations both in terms of preserving existing terms and conditions and not imposing a substantial change in working conditions to their material detriment. We did not accept they had objected to transferring.

Repudiation

43. The claimants contended there had been a fundamental breach of contract on the part of Barnetts in that they had insisted that the claimants work in Southport. Alternatively, they contended that the transfer would involve a substantial change in working conditions to their material detriment such that they were entitled to treat the contract as having been terminated.

44. The contracts of the claimants provided that their normal place of work was LLW's office at Birkenhead. In addition, the contracts of the claimants other than Mr Royden and Ms Ross provided that they would be required to work in any department of the firm as directed from time to time including any other office of the firm.

45. For Barnetts it was contended that the reference in the latter category of contract to "the firm" must, if there was a transfer, be taken to be Barnetts after 1 June. Accordingly, it was a term of the contract that the claimants could lawfully be directed to work at Southport. We did not accept that submission. The reference can only be to the offices of LLW.

46. We did not accept that the statement as to place of work amounted to a contractual right to work there. That, however, is not the end of the matter. There was no express mobility clause in the contracts of the claimants but it was reasonable to imply such a term. Reference will be made to this further, below.

47. Leaving the question of actual breach to one side, we turn to Regulation 4(9). Given the location of the homes of the relevant claimants, it was, in our view, clearly a substantial change to their working conditions that they should be required to work at Southport and furthermore that would occasion them a material detriment.

48. It follows from all this that in respect of Mr Royden and Ms Ross we conclude that they were dismissed by their employer, which in this case was Barnetts.

"Economic, technical or organisational" reason

49. The circumstances in which regulation 7 prevents a dismissal being unfair if it is by reason of a transfer clearly envisages an actual (as opposed to constructive) dismissal. It follows that the question for us is not the reason for the dismissal but the reason for the "repudiation" i.e. the reason for the direction that the claimants would work in Southport. In order for Regulation 7(1) to operate so as to avoid the finding of unfair dismissal, we would have to be satisfied that the reason for the direction that the claimants work in Southport was an economic, technical or organisational reason entailing changes in the workforce.

50. Clearly, there were economic and organisational reasons for the direction to work in Southport but they did not, in our view, entail changes in the workforce i.e. a change in the headcount or the duties of the relevant employees. To put the matter another way, the reason that direction was given was not to bring about a reduction in manpower. On the contrary, Barnetts were actively looking to recruit at the time and wished to take on all of the "displaced" employees if they could. We were told that, as it turned out, they only required some five employees to undertake the relevant work as opposed to the 23 within LLW. Quite apart from the fact, however, that they would be unaware of that fact until the work began coming through to them, it was not with an eye to that reduction in manpower that location was decided. It follows that we conclude that, since the dismissals were in connection with the transfer, the dismissals of the relevant claimants were unfair.

Breach of contract

51. This was not a subject expressly addressed in the issues the Tribunal was called upon to deal with. It would appear that no payments were made to the claimants after 1 June 2007, presumably on the basis that neither LLW nor Barnetts regarded them as their employees at the time. The claimants claim "notice". What we take this to mean is that they allege there were breaches of contract by Barnetts, resulting in their resignations. Accordingly, they have suffered damages, namely their wages going forward. However, as contract breakers Barnetts are entitled to assume performance most beneficial to themselves, which would be termination upon giving notice.

52. That presents something of a difficulty in this case in the light of the findings we have made. Although we are satisfied that the claimants who were assigned

to the activities transferred can avail themselves of the benefit of Regulation 4 (9), it is not clear whether there is, of necessity, a breach of contract. It seems to us that, for the reasons we have mentioned, consideration would have to be given to the implied mobility clause. This was addressed neither in evidence nor submissions by the parties.

53. This may be an entirely academic issue – on the face of it any compensatory award for unfair dismissal would encompass any such damages - but the parties will be invited to make further representations on this matter when the question of remedy is addressed.

Duty to inform/consult

54. The sole claim of the claimants in this regard was a failure to consult in the course of the discussions, correspondence and meetings that took place immediately before the transfer.

55. The majority view (the Employment Judge dissenting) was that there had been such a failure. In early April the claimants had returned to Barnetts a completed questionnaire. They had all indicated in that document that they were not sure what they wanted to do (in terms of where they wished to work) and would have liked to discuss any options with Barnetts.

56. In addition, each of the claimants provided to Barnetts a detailed analysis of his or her position (financial and otherwise) as it would be affected by a move to Southport. At no stage did Barnetts enter into detailed discussion with the individual claimants to address those specific points. In other words (and referring to Regulation 13), Barnetts had not replied to the relevant representations. It followed that there had been a failure to comply with the duty within Regulation 13 to consult.

57. The minority view was simply that, whilst indeed the claimants had indicated uncertainty about their positions, Barnetts had specifically asked them to state whether they were prepared to consider a move to Southport or not. Clearly, there was not purpose in discussing possible terms if the answer was a simple "no". Despite repeated requests, neither the claimants individually nor their representatives were prepared to answer that question. In those circumstances the minority view was simply that Barnetts had fulfilled their responsibilities.

58. This matter will now be re-listed for the consideration of remedy.

MR D REED
Employment Judge 12.3.09

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

13th MARCH 2009

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS
[JC]